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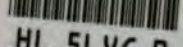
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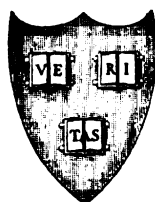
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OF

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SECOND SERIES

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# JUDICIAL AND STATUTORY DEFINITIONS

## OF

# WORDS AND PHRASES

## SECOND SERIES

## VOLUME 3

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### LAND

See Arable Land; Cemetery Land; Claim Against Land; Claim upon Land; Coal Lands; Common Lands; Contract Made Touching the Land; Crown Lands; Cultivated Lands; Drainage of Land; Earned Land; Granted Lands; Improved Land; Inclosed Land; Iron Land; Lots, Blocks, Tracts, and Parcels of Land; Mainland; Marsh Land; Mineral Land; Overflowed Lands; Public Land; Respecting Title to Land; School Land; Shore Land; Suit for Land; Sunk Land; Swamp and Overflowed Lands; Tide Land; Timber Land; Uninclosed Lands; Unplatted Lands; Vacant Land; Wild and Forest Lands.

Adjacent lands, see Adjacent.

All my lands, see All.

Contract for sale of land, see Contract of Sale.

Improvement of land, see Improvement.

Interest in land, see Interest (In Property).

My land, see My.

Other lands, see Other.

Raw prairie land, see Raw.

Right of way as land itself, see Right of Way.

See, also, Real Property.

"Land" is a term used to designate all real estate, just as money is used to designate the whole volume of the medium of exchange. *Montgomery County v. Cochran*, 121 Fed. 17, 21, 57 C. C. A. 261.

"The word 'land' \* \* \* comprehends ground, soil, or earth, pastures, woods, springs, wells, lakes, ponds, and all things that have become a fixed part of the soil." *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 488, 494, 225 Mo. 414, 20 Ann. Cas. 1072.

The primary meaning of the word "land," at common law, is "any ground, soil, or earth whatsoever; as meadows, pastures, woods, waters, marshes, furzes and heath." In a more limited sense the term denotes the quantity and character of the interest or estate which the tenant may own in the lands. *Kemp v. Goodnight*, 80 N. E. 160, 161, 168 Ind. 174.

"Land," in its legal signification, has an indefinite extent upwards, so that by a conveyance of land all buildings, growing timber, and water erected and being thereupon shall likewise pass. *Trustees of the Freeholders & Commonalty of Town of Brookhaven v. Smith*, 90 N. Y. Supp. 646, 650, 98 App. Div. 212.

It is elementary that the word "land" in its legal signification has an indefinite extent upwards as well as downwards, and therefore if it were possible for a man to live in a state of nature, unconnected with other individuals, the proprietor of land would own not only the face of the earth within the boundaries of his proprietorship, but also everything under it and over it. An imaginary person living in such a state of nature would be at liberty to use his land as he pleased to build on it to any height and to dig into it to any depth without restraint. But as man was formed for society and is incapable of living alone, organized society is essential to his well-being and happiness, and every person who enters society must give up a part of his so-called natural rights and liberty for the benefit of the community. *Cochran v. Preston*, 70 Atl. 113, 114, 108 Md. 220, 23 L. R. A. (N. S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048 (citing 1 Bl. Comm. p. 125).

Land in its broadest signification includes not only the surface of the earth but the mines, quarries, and everything under it;

and whoever has the fee in the surface presumptively owns everything of a permanent nature under or over it. Notwithstanding it is competent for the owner to convey the mines or quarries by a separate grant vesting in one person a freehold in the soil and in another a freehold in the mines or quarries and to sever the ownership of the surface from the ownership from that which is under it, there may exist a double ownership or two freeholds in the same parcel of land. *Louisville & N. R. Co. v. Boykin*, 76 Ala. 560, 563 (citing 2 Washb. Real Prop. 375).

The word "land" includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences. *Crawford Co. v. Hathaway*, 93 N. W. 781, 788, 67 Neb. 325, 60 L. R. A. 889, 108 Am. St. Rep. 647 (citing *McGee Irrigating Ditch Co. v. Hudson* [Tex.] 22 S. W. 967).

*Anderson's Law Dict.* says that the word "land" comprehends all things of a permanent and substantial nature, being a word of very comprehensive significance. Act Feb. 22, 1851, pp. 64, 65, is entitled "An act for the benefit of William Jewell College. Certain lands owned by William Jewell College exempted from tax." And section 1 provides that "all the land and improvements thereon now owned by the William Jewell College \* \* \* and all the lands that may hereafter be granted or devised to said college, or any other institution of learning in this state, for the benefit of education, be, and the same are hereby, exempted from all taxes \* \* \* so long as said lands may be owned by said college." Section 2 releases from delinquent taxes the "land" belonging to the college in the counties named, and section 3 makes it a misdemeanor to willfully injure or destroy timber, etc., from any of the lands belonging to the college. The entire endowment fund of the college was in lands when the act was passed, the colleges of that time being generally endowed in land alone, and the charters of a number of colleges perpetually relieved them from taxation on all kinds of property. Held, that the word "land" as used in the act will be construed to include personality, so that the college cannot be taxed on its endowment fund, consisting of personality. *State ex rel. Waller v. Trustees of William Jewell College*, 136 S. W. 397, 399, 401, 402, 234 Mo. 299.

The term "land" in statutes conferring power to condemn is to be taken in the legal sense, and includes both the soil and buildings and other structures on it and all interests therein. *White v. Cincinnati, R. & M. R. R.*, 71 N. E. 276, 278, 34 Ind. App. 287 (quoting and adopting definition in *Lewis, Em. Dom.* [2d Ed.] § 285).

"The term 'land,' in statutes conferring power to condemn, is to be taken in the legal

sense, and includes both the soil and buildings and other structures on it, and any and all interests therein." In assessment of damages in proceedings for condemnation of land, the appraisers should value the land taken with the buildings on it, and it will be presumed that the buildings were included in the award. *Stauffer v. Cincinnati, R. & M. R. R.*, 70 N. E. 543, 544, 33 Ind. App. 356 (quoting *Lewis, Em. Dom.* [2d Ed.] § 285; citing *Brockett v. Ohio & P. R. Co.*, 14 Pa. 241, 53 Am. Dec. 534; *State v. Reed*, 38 N. H. 59; *Mills, Em. Dom.* §§ 49, 223).

The word "land" comprehends ground, soil, or earth, pastures, woods, spring, wells, lakes, ponds, and all things which have become a fixed part of the soil. The word "tenement," in its ordinary meaning, means a "house," which is the subject of tenure, and includes, not only corporeal hereditaments, which are or may be held, but also all inheritances issuing out of any of these inheritances, or concerning or annexed to or exercised within the same, though they lie not in tenure. "Tenement" is a word of greater scope than "lands," and though, in its vulgar acceptance, is only applied to houses and other buildings, yet, in its original, proper, and legal sense, it signifies anything that may be holden, provided it be of a permanent nature, whether of a substantial and sensible, or of an unsubstantial, ideal, kind. The term "hereditaments" includes rights unconnected with land, but generally used as the widest expression for real property of all kinds, being divided into real hereditaments, which are lands and tenements, and personal hereditaments, which are rights concerning neither lands nor tenements. As so defined, neither the term "tenement" nor "hereditament" includes in law a lease of lands for years. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 494, 225 Mo. 414, 20 Ann. Cas. 1072.

In common speech the nonmineral portion of land, the portion which covers and envelopes the minerals, is called the "surface" of the land, and the proprietor of land who devests himself of title to the minerals which it contains is still spoken of as the owner of the fee or of the surface or of the land. *Kansas Natural Gas Co. v. Board of Com'rs of Neosho County*, 89 Pac. 750, 751, 75 Kan. 335.

The word "land," as a conveyance, carries every kind of property, right, and appurtenance which is legally embraced in that word, but what rights go to a patentee of land depend, not upon any supposed adjudication contained in the patent, but upon the general law of the state where the land is situated. *City of Los Angeles v. Los Angeles Farming & Milling Co.*, 98 Pac. 869, 871, 152 Cal. 645.

A will whereby testator devised farm lands to his daughters for life, remainder in fee simple to their children, and whereby he

provided that they might sell their respective lands, proceeds to be reinvested in "lands" to be held for the same use, and that purchaser must see that the reinvestment was made before acquiring title to land devised, did not require reinvestment in farm lands, but reinvestment could be made in city real estate; the word "lands" including every form of real estate. *Clay v. Bogle* (Ky.) 119 S. W. 737, 738.

#### Statutory definitions

"Gen. St. 1901, § 7342, defines the word 'land' in the phrases 'real estate' and 'real property' as including lands, tenements, and hereditaments and all rights thereto and interest therein, equitable as well as legal." *Clarke v. Lawrence*, 88 Pac. 735, 738, 75 Kan. 26.

The word "land" or "lands," as used in Code 1899, c. 13, § 17, cl. 16, relating to taxation, expressly includes lands, tenements, and hereditaments, and all rights thereto and interests therein, except chattel interests and chattels real. *Harvey Coal, etc., Co. v. Dillon*, 53 S. E. 928, 936, 59 W. Va. 605.

Under Ky. St. 1909, § 458, providing that the words "real estate" or "land" shall be construed to mean any interest other than a chattel interest, and section 470, providing that no action shall be brought upon a contract relating to real estate unless in writing, a parol contract to board and care for the owner of a life estate in land in consideration of the use of the land is void, though board was furnished in reliance on the contract. *Hampton v. Glass* (Ky.) 116 S. W. 243, 244.

Under the statutes declaring that the word "land," and the phrases "real estate," and "real property," shall include lands, tenements, hereditaments and all rights thereto and interests therein equitable as well as legal, and providing that lands not exempt by law shall be liable to be taken on execution, land held by an equitable title may be levied upon and sold by virtue of an execution. *Poole v. French*, 80 Pac. 997, 1000, 71 Kan. 391.

Laws 1903, p. 376, relating to street openings, requires by section 15 that each lot, piece, or parcel of land be designated upon a diagram as a basis for assessments. Section 17 requires the amount of assessment to be set opposite each lot, piece, or parcel of land which under section 20 is made a lien upon the property assessed. These sections and sections 23 and 26, use the terms "property," "lands," and "each lot, piece or parcel of land," interchangeably. Held that, in requiring the superintendent of streets to assess the benefits from street improvements on the property of any street railroad within the assessment district, the word "property" was used in a limited sense and as referring to that species of property designated as "land," which as defined by Civ. Code, § 659, is "the solid material of the earth," and hence there was no authority for an assessment against

the "ties, tracks, poles, rails and switches" as such or apart from the franchise. *Los Angeles Pac. Co. v. Hubbard*, 121 Pac. 306, 308, 17 Cal. App. 646.

The vendee's right to specific performance of a contract to convey land is "lands" and "real estate" within the statute definition (Rev. St. § 4971, subd. 9), as including "lands, tenements and hereditaments and all rights thereto and interests therein." The lands, on the vendee's death, descend at once, by operation of law to his children (Rev. St. § 2270, subd. 1). An administrator cannot sue to compel specific performance of a contract to convey land to his decedent, the price for which has been paid, where it does not appear that the administrator is in possession, or that the personal assets of the estate are insufficient to pay the debts. *Carpenter v. Fopper*, 68 N. W. 874, 94 Wis. 146.

#### As agricultural or grazing land

"Lands of the state," as used in the title of act to promote public health, etc., by draining such lands, included agricultural lands. *Slason v. Board of Sup'rs of Buena Vista County*, 104 N. W. 454, 458, 128 Iowa, 442, 70 L. R. A. 440.

In Rev. Civ. St. 1897, § 4218fff, prescribing the classified free school, asylum, and public lands subject to sale to actual settlers, the terms "land" and "other lands" are used in the popular sense "as not embracing town lots, but meaning agricultural or grazing lands." *Conn v. Terrell*, 80 S. W. 608, 609, 97 Tex. 578.

#### Building or other structure

According to Blackstone, "land" legally includes all castles, houses, and other buildings, for they consist of two things—land, which is the foundation, and the structure thereupon. Where defendant in trespass to try title disclaimed any title or interest in the land, but claimed title to a house standing thereon, the plea of the three-year statute of limitations was without application; the land legally including all houses. *Fidelity Cotton Oil & Fertilizer Co. v. Martin* (Tex.) 136 S. W. 533.

An assessment under Pub. St. 1901, c. 79, §§ 4, 8, authorizing an assessment on lands receiving special benefits from the construction of a sewer, for their just share for the cost of construction and maintenance, etc., recognizes the ownership of buildings on lands of another, and buildings so situate are real estate for the purposes of assessment, and are properly assessed to the owner thereof; such buildings being "lands." *Granite State Land Co. v. Town of Hampton*, 79 Atl. 25, 29, 76 N. H. 1.

"Under the general tax law, and by the general understanding, the term 'lands,' when used with reference to assessments for purposes of taxation, includes with the land above or under water all constructions which have been erected upon or affixed thereto."

In re City of New York, 76 N. E. 18, 19, 183 N. Y. 245.

Where one making an excavation in a lot negligently left it exposed to inclement weather for an unreasonable length of time without putting in foundation walls, thereby causing injury to a building on an adjoining lot by the caving in of the ground, he is liable to the adjoining owner for the injury to the building, though Rev. Civ. Code, § 291, providing that each coterminous owner is entitled to the lateral support which his land received from the adjoining land, subject to the right of the adjoining owner to make proper excavations on using ordinary care, and taking reasonable precautions to sustain the land, and giving previous reasonable notice to the other of his intention to make the excavations, and section 187, defining "land" as the solid material of the earth, whatever may be its ingredients, give only the right to damages for injuries to the land itself, and not to buildings placed thereon. *Hannicker v. Lepper*, 107 N. W. 202, 203, 20 S. D. 371, 6 L. R. A. (N. S.) 243, 129 Am. St. Rep. 938.

#### **Easements and incorporeal hereditaments**

The word "land," as used in Code 1904, § 1105f (3-6), authorizing the condemnation of lands or any interest or estate therein, includes easements, and other incorporeal hereditaments, and all rights thereto and interest therein, and is synonymous with the terms "real estate" and "real property." *Swann v. Washington Southern R. Co.*, 61 S. E. 750, 751, 108 Va. 282 (quoting 2 Bouv. Law Dict. 306).

In an eminent domain statute which authorizes certain classes of public service corporations to condemn land for their use, the word "land" is comprehensive, and includes any interest in land, and under it an easement or right of way may be condemned. *Pacific Postal-Telegraph-Cable Co. v. Oregon & C. R. Co.*, 163 Fed. 967, 969.

The term "lands," as used in the condemnation statute, embraces all rights and easements growing thereout. *South Bound R. R. v. Burton*, 46 S. E. 340, 342, 67 S. O. 515.

The word "land," as used in the Eminent Domain Act, is capable of including easements in its signification. *McEwan v. Pennsylvania, N. J. & N. Y. R. Co.*, 60 Atl. 1130, 1131, 72 N. J. Law, 419.

The word "lands" is not coextensive with the words "tenements and hereditaments," and does not comprehend incorporeal hereditaments. In re *Handley's Estate*, 57 Atl. 755, 757, 208 Pa. 388 (citing 2 Jarm. Wills, 382).

Under Laws 1896, p. 796, c. 908, § 2, as amended by Laws 1899, p. 1589, c. 712, providing that the term "land" shall include,

not only the land itself, but all buildings and other articles and structures and superstructures erected on or under the same, where a turnpike company did not own the fee in the land, but owned a continuing easement therein for the maintenance of the pike during the life of the company's franchise, such easement, together with the corporation's tangible property, consisting of bridges, culverts, ditches, prepared roadbeds, and structures on the soil, were taxable to it as land. In re *President, etc., of Albany & B. Turnpike Road*, 87 N. Y. Supp. 1104, 1105, 94 App. Div. 509.

#### **Franchise of corporation**

Under Tax Law, § 2, subd. 3, defining the terms "land," "real estate," and "real property" to include land, underground railroads, including the valuation of franchises to construct and operate the same, and defining a "special franchise" to include the value of the tangible property of a corporation situated in or under or above any street, a corporation owning special franchises to operate an underground railroad under city streets owns special franchises subject to taxation, though only so small a part of the railroad is constructed and in operation as is insufficient to meet operating expenses, taxes, and interest, and the franchises, if possessing a value, are taxable, though they are not used. *People ex rel. Hudson & M. R. Co. v. State Board of Tax Com'rs*, 127 N. Y. Supp. 918, 143 App. Div. 26.

Laws 1896, p. 796, c. 908, as amended by Laws 1899, p. 1589, c. 712, § 2, subd. 3, defines the terms "lands," "real property," and "real estate" as including, besides the tangible property enumerated, the value of all franchises, rights, authority or permission to construct, maintain, or operate in, under, above, upon, or through any streets, highways, or public places, mains, pipes, etc. The term "real property" for the purposes of taxation seems to be limited to such intangible rights or franchises as relate to public streets or highways and to exclude by interference such as relate to public waters. *People ex rel. Edison Electric Illuminating Co. v. Commissioners of Taxes & Assessments*, 110 N. Y. Supp. 833, 58 Misc. Rep. 249.

The tax law (Laws 1881, c. 293), defining the terms, "land," "real estate," and "real property" as including "all surface, underground or elevated railroads," and the value of all franchises to construct or operate railroads, in, under, above or through streets, is not limited to street surface railroads only, but includes long distance surface steam railroads, and hence a franchise granted by the state to a steam surface railroad for its road in, under, above, or through streets is property, and a special franchise, and taxable. *People ex rel. New York Cent. & H. R. R. Co. v. Woodbury*, 133 N. Y. Supp. 135, 139, 74 Misc. Rep. 130, 145.

### Growing grain

Growing crops of grain are fructus industriales, and Civ. Code, §§ 186-188, defining "land" as the solid material of the earth, whether soil, rock, or other substance, exclude growing grain, and only include such growing things as are annexed to the earth by roots, such as are deemed fructus naturales. *Bjornson v. Rostad* (S. D.) 137 N. W. 567, 570.

### Highway, street, or right of way

Rem. & Bal. Code, § 8739, authorizes any railroad corporation to enter upon any of the state school lands to locate its road. Section 8740 authorizes every railroad corporation to "appropriate" by condemnation any land or interest therein, and any rights of way for tunnels beneath the surface, including state school lands, tide lands, etc., necessary for the line of the road, provided that, if the bed of such railway is upon a state or county road, the corporation shall be responsible for the cost of relocating the road appropriated. Section 8738 permits any corporation to change the grade or location of its "road or canal" in order to avoid dangerous or deficient curves, etc. Section 5717, provides that "when it shall be necessary in the location of any road herein mentioned to appropriate any part of any public road, street or alley," etc., the county court may, except within the limits of a municipal corporation, agree with the corporation upon the conditions upon which it may be appropriated, and, if the parties cannot agree, the corporation may appropriate so much thereof as may be necessary in the location of the road. Section 5718 provides that whenever a private corporation is authorized to appropriate any public highway, etc., as mentioned in the last section, if it be within any town, incorporated or not, the corporation shall locate its road upon the particular street, etc., designated by the local authorities; but if they refuse to make such designation the corporation may make such appropriation without reference thereto. Section 5719 provides that when a public highway, etc., is taken by agreement, the corporation may place tollgates thereon with the consent of the local authorities, but shall not when the highway is appropriated without agreement. Section 8737 authorizes every railroad corporation to construct its railway across, along, or upon any stream, plank road, turnpike, etc., paying any damages caused thereby. Held, that a railway company could not acquire by eminent domain as against the public the exclusive right to use one-half of a street for a double-track railway; the term "land," as used in sections 8739 and 8740, not including land already devoted to a public use, such as a street. *State ex rel. B. Schade Brewing Co. v. Superior Court of Spokane County*, 113 Pac. 576, 578, 62 Wash. 96.

### Mine

The word "lands," as used in a statute governing descent and distribution, which provides that a surviving spouse shall be entitled to an estate for life in the lands of an intestate leaving issue, remainder to such issue, includes a mine open at the time of the vesting of the life estate, and such mine is, under the statute, inherited as lands by the life tenant. *Lone Acre Oil Co. v. Swayne* (Tex.) 78 S. W. 380, 383.

The term "land," as used in statutory enactments, means and includes mines and mining claims. *Bradford v. Morrison*, 29 Sup. Ct. 349, 351, 212 U. S. 389, 53 L. Ed. 564 (quoting and adopting definitions in Rev. St. Ariz. pars. 2708, 2948).

### Minerals

"Land" includes coal and minerals in place. *Huss v. Jacobs*, 50 Atl. 991, 994, 210 Pa. 145.

Under Code, c. 2, § 5, subsec. 10, providing that "land" includes lands, tenements, and hereditaments and all rights thereto and interest therein other than a chattel interest therein, where on a bill filed by a vendor for a specific performance, it was decreed that the land be sold, and the entire acreage was sold and conveyed without restriction or reservation, the conveyance carried title to the coal and minerals beneath the surface of the land. *Steinman v. Vicars*, 39 S. E. 227, 229, 99 Va. 595.

A bill may be maintained to quiet the title to coal and other minerals under and on a tract of land; the minerals being "land" within Code 1896, § 809, providing that when any person is in peaceable possession of lands, whether actual or constructive, claiming to own the same, and his title thereto or to any part thereof is denied or disputed, he may maintain a suit in equity to settle the title and to clear up all doubts and disputes concerning it. *Gulf Coal & Coke Co. v. Alabama Coal & Coke Co.*, 40 South. 397, 398, 145 Ala. 228.

Petroleum, oil, and natural gas are included in the comprehensive idea which the law attaches to the word "land" and are a part of the soil in which they are found. A lease of land for the purpose of mining coal or extracting oil or natural gas from the soil or rock is in effect a grant of the corpus of the land. *Haskell v. Sutton*, 44 S. E. 533, 536, 53 W. Va. 206.

"Oil," before its extraction, is a mineral, and is a part of the 'land.'" *Swayne v. Lone Acre Oil Co.*, 86 S. W. 740, 742, 98 Tex. 597, 69 L. R. A. 986, 8 Ann. Cas. 1117; *Isom v. Rex Crude Oil Co.*, 82 Pac. 317, 318, 147 Cal. 659.

### Pontoon

A pontoon floating upon the water of a navigable stream, between high and low water mark, though fastened to the shore by a



cable, is not "land," and an action for an injury to a person thereon by a moving vessel is within the admiralty jurisdiction. *The Mackinaw*, 165 Fed. 351, 352.

#### **Premises synonymous**

Premises as including land, see Premises.

The Liquor Tax Law (Laws 1897, p. 225, c. 312, § 24, subd. 1), prior to the amendment made by Laws 1905, p. 145, c. 104, made it unlawful to traffic in liquor within one-half mile of the building and "premises," of any state hospital, and the amendment added the words "or lands" after the word "premises." On a petition for the cancellation of a liquor tax certificate, it was stipulated that defendant, prior to the amendment, had been legally selling liquor at the place in question. Held, that "lands" was synonymous with "premises," and in view of the stipulation there could be no cancellation of the certificate, whether defendant was carrying on his business within one-half mile of lands owned and used by a state hospital and contiguous to it, or within one-half mile of the buildings, or not. The terms "premises" and "lands" are synonymous, and, if there is any distinction between the words, it is that the word "premises" is more inclusive. According to Bouv. Law Dict. and Worcester Dict. the word "premises" is defined as "lands and tenements." According to Cent. Dict., it is defined as "lands and houses or tenements." According to Stand. Dict., it is defined as "land or lands; land with its appurtenances." In *re Cullinan*, 99 N. Y. Supp. 374, 375, 113 App. Div. 485.

#### **As property**

See Private Property; Property.

#### **Proceeds of sale**

Act of Separation from Massachusetts (Rev. St. 1883, p. 1005) § 1, par. 7, exempting from taxation "lands" theretofore granted to any religious society, etc., while the same continue to be owned by such society, does not exempt a fund created from the proceeds of a sale of such lands. *Inhabitants of Gorham v. Trustees of Ministerial Fund in First Parish in Gorham in Cumberland County*, 82 Atl. 290, 292, 109 Me. 22.

#### **Real estate and real property synonymous**

The word "land," as used in Code 1904, § 1105 (3-6), authorizing the condemnation of lands or any in trust or estate therein, is synonymous with "real estate" and "real property." *Swan v. Washington Southern R. Co.*, 61 S. E. 750, 751, 108 Va. 282.

#### **As security**

See Security.

#### **Submerged land**

The word "lands" includes the beds of nonnavigable lakes and streams, and lands are none the less land for being covered with water. *State v. Jones*, 122 N. W. 241, 243, 143 Iowa, 398.

"Land" covered by water within the public domain of the United States is as much a part thereof as the dry land. *Kean v. Calumet Canal & Improvement Co.*, 23 Sup. Ct. 651, 659, 190 U. S. 452, 47 L. Ed. 1134.

The owner of the bank of a navigable stream owns to the center of the stream, unless the ownership of the bank and the bed of the stream has been separated, subject only to governmental and public rights; and the bed of a navigable stream is "land." *Green Bay & Mississippi Canal Co. v. Telulah Paper Co.*, 122 N. W. 1062, 1065, 140 Wis. 417.

#### **Timber**

The word "lands," in Const. 1890, § 211, prohibiting the sale of school lands, includes the soil only, and not timber growing thereon; and hence Code 1906, § 4702, is not unconstitutional because it authorizes a sale of such timber. *L. N. Dantzer Lumber Co. v. State*, 53 South. 1, 2, 97 Miss. 355.

#### **Town lots or blocks**

Where a party contracts for the purchase of a threshing outfit, unless he shall go to Oklahoma and buy land, the word "land" is broad enough to include a piece of real property described as a block in a town site. *J. I. Case Threshing Mach. Co. v. Mickley*, 83 Pac. 970, 72 Kan. 372.

#### **Trees**

At common law, "land" embraces, not only the soil, but its natural products, such as trees, growing upon and affixed to it. *L. N. Dantzer Lumber Co. v. State*, 53 South. 1, 2, 97 Miss. 355.

Trees standing on land are a part of the "land," the title to which can be passed by a statutory deed. *Morgan v. Pott*, 101 S. W. 717, 719, 124 Mo. App. 371.

#### **Water and water power**

"Land" includes the water upon it, and, when the fee to land is acquired by condemnation, everything which is comprehended in the term "land," including water, vests in the expropriator. *Philadelphia Trust, Safe Deposit & Ins. Co. v. Borough of Merchantville*, 69 Atl. 729, 730, 74 N. J. Eq. 330.

Under Gen. St. 1902, § 2321, which provides for the taxation of land owned or taken by a municipal corporation for the creation or furnishing of a supply of water, if the inhabitants of the town in which it is situated do not have the use and do actually use such water supply on the same terms as the inhabitants of the municipal corporation, in which case the property shall be exempt, a dam located on such land is not an item subject to taxation separate from the land, and should have been included in an item of the assessment denominated "land used in connection with reservoir." *City of Norwalk v. Town of New Canaan*, 81 Atl. 1027, 1029, 85 Conn. 119.

The Flowage Act (Laws 1868, c. 20, § 1; Pub. St. 1901, c. 142, § 12) provides that any corporation authorized by charter may erect and maintain on its land a water mill or dam to back the flowage of water for the development of power and section 13 provides that if land is overflowed or otherwise injured by the use of such dam, and such injury is not within 30 days after due notice satisfactorily adjusted, petition may be brought to the superior court to have the damage assessed. Held, upon petition to assess damages for the flowing out or taking of the head or falls of a stream located upon petitioner's land, which had been neither utilized nor developed, that the term "land" in the act was not used in a narrow or restricted sense to apply only to land as distinguished from water, but to land with all the incidents of full ownership; that the damage or "injury" intended by the act was such as resulted from depriving the landowner of the ability to use his land to the best advantage in view of its location and natural adaptability; and that a limitation of the use of undeveloped water power was an injury to land, for which compensation must be made. *Swain v. Pemigewasset Power Co.*, 85 Atl. 288, 289, 76 N. H. 498.

#### LAND ACTUALLY USED

See Actually Used.

#### LAND CERTIFICATE

As chattel, see Chattel.

As personal property, see Personal Property.

A "land certificate" is the obligation of the government entitling the owner to secure the designated quantity of land by following the requirements of the law. *Waterman v. Charlton*, 120 S. W. 171, 172, 102 Tex. 510.

#### LAND DAMAGES

Compensation for land taken under the power of eminent domain, and for the buildings on it, is technically "land damages." The building is technically not only a part of the land, but is technically land; and an action for compensation for land taken under the power of eminent domain, and buildings which are upon that land, is as matter of technical law and ordinary parlance, spoken of as an action for "land damages." In an award of special commissioners to assess damages for land taken to widen a street under a railroad's track directing that the town should pay the entire expense of land damage occasioned by the taking of land and property, the term "land damages" was not limited to the value of the land taken apart from the erection thereon, and hence, where the land taken supported one of the abutments of the railroad bridge, the railroad was entitled to damages for the taking of the abutment as well as the land. *New York, N. H. & H. R. Co. v. Blackstone*, 69 N. E. 315, 316, 184 Mass. 491.

#### LAND FOR HOLDING WATER

The words "land for holding such water," in St. 1888, p. 469, c. 177, creating a water company to supply the inhabitants of a town with water, and authorizing the company to take and hold water of designated streams and all lands "necessary for holding and preserving such water," mean land for a reservoir. *Dorr v. Inhabitants of Sharon*, 84 N. E. 446, 449, 198 Mass. 240.

#### LAND JOBBER

A man who occasionally buys and sells land cannot be said to be a land jobber or a dealer in lands; but, if a man makes a particular business of buying and selling land to obtain profit, he is properly designated as a "land jobber" or dealer in land. *Vanderbilt University v. Cheney*, 94 S. W. 90, 92, 116 Tenn. 259.

#### LAND SUITABLE FOR CULTIVATION

See Suitable for Cultivation.

#### LAND, TIMBER, AND TIMBER RIGHTS

The term "land, timber and timber rights," as used in a lease of a railroad, etc., specifying that plaintiff demised, let, etc., to defendant for 91 years, all land, timber, and timber rights, etc., included all the standing timber. *Atlantic & N. C. R. Co. v. Atlantic & N. C. R. Co.*, 61 S. E. 185, 190, 147 N. C. 368, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363.

#### LAND TITLED

Const. art. 14, § 2, provides that all general land certificates shall be located, surveyed, or patented only on vacant and unappropriated public domain, and not on any "land titled" or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county record or in the general land office, or when the appropriation is evidenced by the occupation of the owner or of some person holding for him. Held, that where it was not claimed that certificates by which land was surveyed under a railroad grant were improperly issued, and the descriptions in the patents in express terms covered the land described in a subsequent patent to K., it being necessary to resort to evidence aliunde to show that the railroad patents did not convey the state's title to the land in controversy, it was "land titled," within such constitutional provision. *McLennan v. Fisher* (Tex.) 130 S. W. 598, 599.

#### LAND TO LAND

Fishing for menhaden with purse or drag seines, in a bay on our coast not having an entrance over three nautical miles in width between headlands on the main, or between the mainland and an island, or between islands, is prohibited by chapter 261, Pub. Laws 1885, defining the width of such

entrance, or any part thereof, to such prohibited waters, measured from "land to land." *McClain v. Tillson*, 19 Atl. 457, 458, 82 Me. 281.

#### LAND VALUABLE FOR MINERALS

"Lands valuable for minerals" in the law means all lands chiefly valuable for any of the mineral deposits treated in the legislation relating to mining claims, rather than lands chiefly valuable for agricultural purposes. *Webb v. American Asphaltum Min. Co.*, 157 Fed. 203, 205, 84 C. C. A. 651.

Under Rev. St. U. S. §§ 2318, 2319, reserving from sale lands valuable for minerals, and opening for exploration and purchase all valuable mineral deposits in the lands of the United States, to render lands valuable for minerals there must be minerals in such quantities as to justify effort to extract them; but it is not necessary that minerals of sufficient amount to allow immediate profitable working be shown to exist, but it is enough if the vein or deposit has a present or prospective commercial value. *Madison v. Octave Oil Co.*, 99 Pac. 176, 178, 154 Cal. 768.

#### LANDED

Plaintiff, cotton company, delivered cotton to a compress company and subsequently delivered the warehouse receipts of that company to a railway company and received in exchange bills of lading. The cotton company shipped the cotton over the railway line to a purchaser under a contract requiring that the cotton should be delivered in good condition to the purchaser's mills "landed," and drafts for the purchase price with bills of lading attached were drawn by the cotton company on the purchaser and honored before the cotton was delivered at its destination. Held, that "landed" meant that the cotton company was responsible for the entire shipment of cotton and for damages to it until delivered at the point of destination, and therefore the right of recovery for damages to the cotton resulting from exposure to the weather while in the possession of the compress company was in the cotton company, although it had not been called on to repay any of the purchase price. *Southern Ry. Co. v. Jones Cotton Co.*, 52 South. 899, 900, 167 Ala. 575.

#### LANDED PROPERTY

In an act annexing certain territory to a city, providing that the rates of taxation on all "landed property" so annexed shall not exceed a certain rate, the phrase "landed property," as used in the act, meant rural, unimproved land, as distinguished from real estate compactly built on, as in a city. *Mayor, etc., of City of Baltimore v. Rosenthal*, 62 Atl. 579, 581, 102 Md. 298 (citing *Sindall v. City of Baltimore*, 49 Atl. 647, 93 Md. 533).

The term "landed property" is defined by Acts 1902, p. 199, c. 130, as "real estate, whether in fee simple or leasehold, and whether improved or unimproved." *Joesting v. Mayor, etc., of Baltimore*, 55 Atl. 456, 457, 97 Md. 589.

Annexation Act, § 19 (Acts 1888, p. 127, c. 98), declared that until 1900 the rate of taxation on all "landed property" in certain territory annexed to Baltimore should not exceed the rate for Baltimore county, and that after 1900 the county rate should not be increased for city purposes on "landed property" within the territory until avenues, streets, or alleys shall have been opened or constructed through the same, nor until there shall be on every block of ground so to be formed six dwellings or storehouses ready for occupation. Acts 1902, p. 199, c. 130, § 4a, defined "landed property" to mean real estate, whether improved or unimproved and until avenues, streets, or alleys shall have been opened, constructed, and improved, shall be construed to mean until avenues, streets, or alleys shall have been opened, graded, curbed, and otherwise improved to full width by some substantial material. Held, that property within the territory annexed to the city by the act of 1888 situated in a block bounded by improved streets, though not containing six dwellings or storehouses, was not "landed property" within such act. *Hiss v. City of Baltimore*, 64 Atl. 52, 103 Md. 620.

Acts 1888, p. 127, c. 98, § 19, relating to the annexation of a certain tract to Baltimore, provided that until 1900 the tax rate upon all "landed property" and taxable personal property in the tract should not exceed the rate of Baltimore county for 1887, and that after 1900 the rate should be the same as for the rest of the city of Baltimore, provided that the increased rate should not take effect until avenues, streets, or alleys should be opened through the property, and at least six dwellings or storehouses be ready for occupation upon each block of ground so to be formed. Acts 1902, p. 199, c. 130, provided that the term "landed property" in the act of 1888 should mean real estate whether in fee simple or leasehold; that the provision as to the opening of avenues, etc., should mean avenues, etc., opened, graded, curbed, and otherwise improved from curb to curb by pavement or other substantial material, and that the term "block of ground" should mean an area not exceeding 200,000 superficial square feet bounded on all sides by intersecting avenues, streets, or alleys, graded, curbed and otherwise improved from curb to curb, by pavement or other substantial material. A triangular block, being part of the tract annexed by the act of 1888, contained 1,000,000 superficial square feet, bounded on one side by 3034 feet of a road, part of which was curbed and macadamized, the rest cov-

ered with an inch of stone, but uncurbed. On another side was a common road not graded, curbed, or paved, and on the third side was a private toll road, curbed and paved in the middle. There were about 47 dwellings and storehouses on the block. Held, that a leasehold interest in the block was taxable under the county, and not the city, tax rate. *City of Baltimore v. Schafer*, 68 Atl. 138, 140, 107 Md. 38.

Acts 1888, p. 127, c. 98, § 19, provides after the year 1900 the Baltimore county rate of taxation at the time of the passage of the act shall not be increased for city purposes on any landed property within the annex until avenues, streets, or alleys shall have been opened or constructed through the same, nor until there shall be on every block of ground so to be formed at least six dwellings or warehouses ready for occupation. Acts 1902, p. 199, c. 120, defines "landed property" to mean real estate, whether in fee simple or leasehold, and whether improved or unimproved. Held, that a wholly unimproved lot bound by a street or alley on two of its four sides and contiguous to a 28-acre tract of land with no visible boundary separating it from such tract was "landed property" within the meaning of the acts, and hence not subject to the Baltimore city rate of taxation until it had reached the standard of development required by the act to make it urban property. *City of Baltimore v. Gail*, 68 Atl. 282, 285, 106 Md. 684.

#### LANDHOLDER

Acts 1903, p. 255, c. 145, relating to improvement of gravel and macadamized roads, contemplates as resident "landholders" of the county, whose lands abut upon the proposed improvements, who are entitled to sign a petition for the improvements, only the holders of a title in fee, and not mere life tenants. *Kemp v. Goodnight*, 80 N. E. 160, 162, 168 Ind. 174.

#### LANDING

See Public Landing.

According to the accepted meaning, the act of "landing" is setting on shore, or coming on shore. *Taylor v. United States*, 152 Fed. 1, 10, 81 C. C. A. 197 (dissenting opinion).

"Landing from such vessel" takes place and is complete the moment the vessel is left and the shore reached within Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1213, 1217, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing from such vessel of such alien at any time or place other than that designated by the immigration officers. *Taylor v. United States*, 28 Sup. Ct. 53, 54, 207 U. S. 120, 52 L. Ed. 130.

The transfer of a Chinese person from the vessel in which he was brought to the

United States to a detention shed maintained by the owners of the vessel on their dock, where he was detained under guard pending determination of his right to enter the United States, did not constitute a "landing" of such person within Act Cong. May 6, 1882, c. 126, § 2, 22 Stat. 59, as amended by Act July 5, 1884, c. 220, 23 Stat. 115, prohibiting the master of any vessel from knowingly landing or permitting to be landed any Chinese laborer, etc. *United States v. Seabury*, 133 Fed. 983, 985.

Act March 3, 1903, c. 1012, § 18, 32 Stat. 1217, declares that it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the "landing" of any such alien "from such vessel" at any time or place other than that designated by the immigration officers, and any such owner, etc., who shall land or permit to land any alien at any other place shall be guilty of a misdemeanor. Held, that the words "landing from vessel" as so used mean "to go ashore," the landing being complete the moment the vessel is left and the shore is reached. *Niven v. United States*, 169 Fed. 782, 785, 95 C. C. A. 248.

The word "landing" in Hurd's Rev. St. 1908, c. 93, § 28, par. "b," providing that there must be maintained at the "landing" at which miners take or leave the cage sufficient light to show the "landing" and surrounding objects, when considered in connection with section 16, par. "e," requiring the mine superintendent to see that sufficient lights are maintained at the top and bottom landings when the men are hoisted and lowered, and section 2, par. "b," providing that at the bottom of every shaft and at every caging place therein a sufficient passageway must be cut around the landing place, is broad enough to cover the place at the bottom or at the top of the shaft where miners enter or leave the cage and the mine operator must keep each of those places lighted. *Robertson v. Donk Bros. Coal & Coke Co.*, '87 N. E. 373, 374, 288 Ill. 344.

#### As wharf or place for loading and unloading

"A 'landing' is a space adjacent to a navigable water where vessels may approach and land to unload and receive passengers and freight, and where articles of freight may be left for loading on the vessel, or after they have been unloaded until they can be taken away." *Chicago, R. I. & P. Ry. Co. v. People ex rel. Dailey*, 78 N. E. 790, 793, 222 Ill. 427 (quoting and adopting definition in *Farnham, Water & Water Rights*, § 145a).

#### LANDING PLACE

Land abutting upon water, from which water shipments can be made, and leased for that purpose, with privileges of piling lumber, is a landing place, within Rev. St. c. 9,

§ 13, subsec. 1, authorizing taxation of personality employed in trade where the owner occupies a landing place. *Inhabitants of Georgetown v. William E. Hanscome & Co.*, 79 Atl. 379, 380, 108 Me. 131.

Rev. St. c. 9, § 12, provides that all personal property within or without the state shall be assessed to the owner in the town where he is an inhabitant on the 1st day of each April. Section 22 provides that partners in business whether residing in the same or different towns, may be jointly taxed under their partnership name in the town where their business is carried on for all personal property enumerated in section 13, par. 1, employed in such business, except that, if any portion of such property is placed or situated in a town other than where their place of business is under specified circumstances, they shall be taxed therefor in such other town. Section 13, par. 1, provides that all personal property employed in trade shall be taxed in the town where so employed on the 1st day of each April, provided that the owner, his servant, subcontractor, or agent so employing it occupies any "landing place," etc., therein for the purpose of such employment. Held that, to sustain an assessment of taxes on lumber belonging to a firm in a certain town, it must appear that the firm were at the time of the assessment carrying on business in the town, and that the property assessed was employed in that business, or if their place of business was in another town that the property so employed was placed or situated in the town where sought to be assessed and the property must be employed in trade, etc., and, if their place of business is in another town than that in which the property is deposited, it must appear that the firm or their servants or agents so employing the property occupied for purposes of the employment a "landing place," etc., in the town where the assessment is sought to be made, and where members of a firm resided in other towns and cut logs in other towns, which were hauled to a town where they were sought to be assessed for taxation, there sawed by a portable sawmill, and "stuck up" to season in a field within the town with the intent to leave it there until sold, when it was to be hauled to a railroad siding, half a mile distant also in the town, for shipment, and all the work done on the lot was done under contract of another person, the firm, however, supervising the work so far as to determine the size and shape of the manufactured product, the firm having no office anywhere, their books being kept in another town at a dwelling house from where the correspondence of the firm was carried on and prospective purchasers taken by the firm to the sticking grounds to examine the lumber, the business of the firm was being carried on in another town, and the lumber was

not subject to taxation in the town where deposited, since the field where the lumber was "stuck up" was not a "landing place" within the statute, the term "landing" first incorporated into the statute in Laws 1860, c. 53, then meaning a place on a river or other navigable water for landing and unloading goods, or for taking on or letting off passengers or a place where any kind of craft lands or for storing logs for winter. *McCann v. Inhabitants of Town of Minot*, 78 Atl. 465, 467, 107 Me. 393.

### LANDLORD

A man to be a "landlord" must sustain some relation to the land, such as owner, or quasi owner, and, while a landlord may assign the rent, the assignee is not a "landlord" within the meaning of the statute giving a landlord's lien. *State v. Elmore*, 46 S. E. 939, 941, 68 S. C. 140.

"A 'landlord' is a person whose lands are occupied." Hence, when a petitioner said he was a landlord, he, in effect, said he was the person whose lands were occupied. *Loft v. Kaziz*, 84 N. Y. Supp. 228, 230.

Under General Milwaukee Ordinance, c. 20, § 36, inhibiting all persons from leasing or letting either as landlord or agent, any room, house, or other premises to be used for the purpose of prostitution or lewdness, the term "landlord" is not restricted in its meaning to the owner of an estate in lands, but refers to lessees who let particular rooms. *City of Milwaukee v. Beatty*, 135 N. W. 873, 874, 149 Wis. 349.

Under a statute enacted in the reign of George II, a landlord was permitted to appear and defend in ejectment, and the word "landlord" was interpreted to include all persons claiming title consistent with the persons sued as tenants in possession. *Bower v. Cohen*, 54 S. E. 918, 919, 126 Ga. 35.

Premises were leased for one year, and before the expiration of that term the landlord leased to another the premises for a term to begin at the expiration of the first term. The first tenant held over, and the landlord brought summary proceedings to dispossess him. Section 2231, Code Civ. Proc. provides that a tenant holding over at the expiration of his lease may be removed and section 2235 provides that the application may be made by the "landlord or lessor." Held that the lessor of both tenants was the "landlord or lessor" within the statute, and could maintain an action to dispossess the first tenant, if there had been no election by the landlord to continue the lease. *Ellis v. Morse*, 127 N. Y. Supp. 438, 440, 142 App. Div. 592.

A petition in summary proceedings for the possession of land, alleging that the petitioner is the lessee and "landlord" thereof, is not a sufficient compliance with Code Civ.



Proc. § 2235, requiring the petition to state the interest of the petitioner in the premises. The statement that the petitioner was the "lessee" and "landlord" is the assertion merely of an interest and not a description of such interest. *Ferber v. Apfel*, 99 N. Y. Supp. 215, 216, 113 App. Div. 720 (citing *Kazis v. Loft*, 80 N. Y. Supp. 1015, 81 App. Div. 636; *Loft v. Kazis*, 84 N. Y. Supp. 228; *Engel-Heller Co. v. Henry Elias Brewing Co.*, 75 N. Y. Supp. 1080, 87 Misc. Rep. 480; *Potter v. New York Baptist Mission Soc.*, 52 N. Y. Supp. 294, 23 Misc. Rep. 671; *Ross v. Same*, 52 N. Y. Supp. 303, 23 Misc. Rep. 683; *Cram v. Dietrich*, 78 N. Y. Supp. 948, 38 Misc. Rep. 790).

#### Owner not equivalent

A description of the petitioner as the "landlord of the premises hereinafter described" is insufficient to confer jurisdiction of summary proceedings, for that does not state that he is the owner, but merely alleges the relation of the parties without stating petitioner's interest in the premises. *Underhill v. Cohen*, 114 N. Y. Supp. 115, 117, 61 Misc. Rep. 627.

#### LANDLORD AND CROPPER

A verbal contract between a cropper, who owed a large supply account for which his landlord was security and also owed his landlord for supplies, and his landlord, whereby it was agreed that, if the cropper should desire to work elsewhere the following year, he should settle up his supply account and notify the landlord before a time fixed, so that he might have time to get some one else, and that, if the cropper did not settle up and notify the landlord before the time fixed, then he was to be a cropper for the landlord for the following year, does not create the relation of landlord and cropper within Act Dec. 17, 1901 (Acts 1901, p. 63), as amended by Act Aug. 7, 1903 (Acts 1903, p. 91), providing that, where the relation of landlord and cropper has been created, it shall be unlawful for any person during the contract to employ the cropper or to disturb in any way such relation; that act contemplating a complete contract and not a contract whereby the relation will be created in the future on the happening or nonhappening of a given contingency, dependent on the will of one of the parties. *Polk v. Thomason*, 61 S. E. 123, 124, 130 Ga. 542.

#### LANDLORD AND TENANT

The relation of "landlord and tenant" is that which subsists by virtue of a contract for the possession of lands at will, for a definite period, or for life. *Foss v. Stanton*, 57 Atl. 942, 76 Vt. 365.

The relation of landlord and tenant arises under contract, express or implied, for possession of lands or tenements in consideration of certain rent to be paid therefor;

possession being an essential element. *Whiteside v. Oasis Club*, 142 S. W. 752, 753, 162 Mo. App. 502.

The words "landlord and tenant" signify not only the immediate parties to a lease, but also their respective successors in interest. Where a landlord assigns his lease with his right to the control, occupancy, and possession of the premises for more than four years beyond the expiration of the term, and the tenant holds over, the assignee may elect to treat the holding over as a tenancy for another year. *United Merchants' Realty & Improvement Co. v. Roth*, 103 N. Y. Supp. 1112, 1113, 53 Misc. Rep. 92.

Under the direct provisions of Code 1896, § 2711, where one party furnishes land for raising a crop and another furnishes the labor and the team to cultivate it, with a stipulation for a division of the crop between them, the relation of landlord and tenant exists between them; the status, fixed by the statute, being contractual. *Kennedy v. McDiarmid*, 47 South. 792, 793, 157 Ala. 496.

Where one enters into possession of land under a deed claiming it in good faith as owner, and does not recognize any interest in the grantor, the relation of "landlord and tenant" does not exist, and he cannot be summarily dispossessed as a tenant at sufferance. *Sharpe v. Mathews*, 51 S. E. 706, 707, 123 Ga. 794 (citing *Watson v. Toliver*, 29 S. E. 614, 103 Ga. 123).

The reservation of rent in some form and allegiance to the title are distinguishing characteristics of a contract by which the relation of landlord and tenant exists. *Andrews v. Erwin* (Ky.) 78 S. W. 902, 903.

Reservation of rent is not essential to the creation of the relation of "landlord and tenant." Plaintiffs conveyed to defendant by deed all the timber and trees on the tract of land described; the deed providing that the grantee should have all the rights of way and privileges over and upon the land usually extended to lumbermen, provided that the timber should be removed within three years, and that all refuse, timber, barns, houses, cabins, sheds, etc., remaining on the premises at that time should revert to and become the property of plaintiffs. Held, that such deed was not a mere license, but was sufficient to create the relation of "landlord and tenant." *Alexander v. Gardner*, 96 S. W. 818, 819, 123 Ky. 552, 124 Am. St. Rep. 378.

Plaintiff, who resided on a farm, contracted to allow defendant to occupy free of rent one of the houses on the farm and carry on the same for a term of years. Each party was to furnish certain things for the farm, and the crops were to be sold and proceeds divided. Held, that the relation of "landlord and tenant" did not exist between the parties as to the house, but that defendant's

occupancy was a mere incident of his carrying on the farm, and an action would not lie against him to recover possession of the house under V. S. 1560, providing that, when a lessee holds possession without right, the person entitled to possession may have a writ to restore him thereto. *Mead v. Owen*, 67 Atl. 722, 724, 80 Vt. 273, 13 Ann. Cas. 231.

## LANDOWNER

The county named in the preliminary report of the surveyor as a landowner affected by a proposed drainage is not a "landowner" within the provision of the drainage act requiring the dismissal of the petition upon remonstrance of two-thirds of the "landowners" affected. *Honnold v. Endicott*, 83 N. E. 502, 170 Ind. 16.

The word "landowner," in the statute giving a company power to condemn land, and providing that it shall be liable for all such damages as may be established by any landowner, embraces not only the owner of the fee, but a lessee for years and any other person who has an interest in the property affected by the condemnation. *Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co.*, 66 S. E. 194, 196, 84 S. C. 306.

## LANGUAGE

See Doubtful Language; Ordinary Language.

English language, see English.

Obscene language, see Obscene—Obscenity.

Profane language, see Profane—Profanity.

"Language" is the expression of thought by means of spoken or written words which are but signs of ideas. *United States v. One Car Load of Corno Horse and Mule Feed*, 188 Fed. 453, 462.

"Language" is a generic term, and includes any words or speech by which thought may be conveyed, and language may be obscene and vulgar when used in the presence of a female without the use of a single word which could be intrinsically classified as being obscene and vulgar. *Morris v. State*, 65 S. E. 58, 59, 6 Ga. App. 395.

"Language" is the offspring of the past, but its life is in and for the ever opening and progressive future. Its principal mission is to convey from one mind to another the new thoughts as they arise; for the old is continually dying, while the new is being born. If each word had a single fixed and unchanging meaning, and if there simply were certain established collocations of words, each with one signification, the powers of language would be very limited, and it could never express a new idea." *State v. Stuart*, 92 S. W. 878, 881, 194 Mo. 345, 112 Am. St.

Rep. 529, 5 Ann. Cas. 963 (quoting and adopting definition from Bishop).

## LAP

Where one grant conflicts in part with another, occasioning what is called a "lap" or "interlock," the elder patentee under his grant acquires at once constructive seisin in deed of all the land embraced within its boundaries, although he has taken no actual possession of any part thereof. The junior grantee under his grant acquires similar constructive seisin in deed of all the land embraced by his boundaries, except that portion within the interlock, the seisin of which had already vested in the senior grantee. *Green v. Pennington*, 54 S. E. 877, 878, 105 Va. 801 (citing *Koerner v. Rankin's Heirs* [Va.] 11 Grat. 427).

## LAP POSITION

In the railway automatic quick action brake system, the position known as the "lap position" was, where the engineer thought that the train pipe pressure had been sufficiently reduced by the resultant brake application, he moved the handle back a short distance so as to close all the ports and hold the brakes at the point at which they had been set. *Westinghouse Air Brake Co. v. New York Air Brake Co.*, 119 Fed. 874, 875, 56 C. C. A. 404.

## LAPPINGS

"Lappings" consist of a woven fabric composed of a flax warp and a wool filling and is dutiable under paragraph 346 of the Tariff Act of 1897. *United States v. E. De F. Wilkinson Co.*, 154 Fed. 751, 752.

## LAPSE

### LAPSE OF TIME

The phrase "lapse of time," as used in a constitutional provision giving the Legislature power to revive any remedy which may have been barred by "lapse of time" or "by any statute of limitations," means a period of time limiting the action, and relates alone either to an express statute of limitations or to a "lapse of time" dealt with either under the statute or the general law, as a limitation of time. *North British & Mercantile Ins. Co. of London & Edinburgh v. Edwards*, 37 South. 748, 85 Miss. 322.

## LARCENY

See Compound Larceny; Grand Larceny; Petit Larceny; Simple Larceny; Taking (In Larceny).

Hog stealing, see Hog.

Property subject of larceny, see Personal Property; Property.

Stealth as element, see Stealth.

See, also, Fraud; Fraudulent Taking; Horse Stealing; Theft.

"Larceny" is taking personal property by stealing; by theft. *Cox v. Territory*, 104 Pac. 378, 379, 2 Okl. Cr. 668.

"Larceny" is predicated on the wrongful taking of property with intent to convert it. *Axtell v. State*, 91 N. E. 354, 355, 173 Ind. 711.

"Larceny" is the felonious taking of the property of another. *State v. Wasson*, 101 N. W. 1125, 1126, 126 Iowa, 320.

"Larceny" is the taking of another's personal property without the owner's consent, accompanied by an intent to wholly deprive him of its value. *State v. Hinton*, 109 Pac. 24, 27, 56 Or. 428.

"Larceny" is the felonious taking and carrying away of the personal property of another, with the intent to convert it to the use of the taker without the consent of the owner. *State v. De Luca* (Del.) 77 Atl. 742, 743, 2 Boyce, 158; *State v. Stewart* (Del.) 67 Atl. 786, 788, 6 Pennewill, 435.

"Larceny" is the felonious taking and carrying away of the personal goods of another, with intent to deprive the owner of his property therein, and to appropriate the same to the use of the taker. *State v. Spencer* (Del.) 53 Atl. 337, 338, 4 Pennewill, 92.

"Larceny" is the felonious taking and carrying away of the personal property of another, with intent to convert it to the taker's use, and to deprive the owner of the same, without the owner's consent. *State v. Palmer* (Del.) 53 Atl. 359, 4 Pennewill, 126.

"Larceny" is the felonious taking and carrying away of the personal property of another, with intent to convert it to the taker's use and deprive the owner of its use without his consent. *State v. Dredden*, 73 Atl. 1042, 1043, 6 Pennewill, 446.

"Larceny" is the wrongful or fraudulent taking and carrying away by any person of the personal goods of another without the owner's consent, with a felonious intent to convert them to the taker's use. *State v. James*, 113 S. W. 232, 233, 133 Mo. App. 300.

"Larceny" is the wrongful or fraudulent taking and carrying away of the personal goods or property of another, with the felonious intent to convert it to his own use and make it his own property without the consent of the owner. *State v. Wolf* (Del.) 66 Atl. 739, 741, 6 Pennewill, 323.

At common law, as well as by statute, "larceny" is the wrongful taking and carrying away of the personal property of another, with a felonious intent to convert it to the taker's use without the owner's consent. *State v. Brewington* (Del.) 78 Atl. 402, 403, 2 Boyce, 71.

"Larceny" is defined as "the wrongful or fraudulent taking and carrying away of the personal property of another, from any place, with a felonious intent to convert the

same to the taker's use, and make it his own, without the consent of the owner." *State v. Weatherman*, 100 S. W. 482, 483, 202 Mo. 6 (quoting and adopting definition in *State v. Gray*, 37 Mo. 463).

"Larceny" is a felonious taking and carrying away of the personal goods or chattels of another with intent to deprive the owner of his property therein and to appropriate the same to the use of the taker. Asportation, nonconsent of the owner, and a felonious intent to thereby convert the stolen property to the defendant's own use are necessary elements of larceny. *Ladeaux v. State*, 103 N. W. 1048, 1049, 74 Neb. 19.

A "larceny" has been defined as a felonious taking of the property of another, without his consent and against his will, with intent to convert it to the use of the taker, or "the wrongful or fraudulent taking or carrying away by any person of the personal goods of another with a felonious intent to convert them to his (the taker's) own use and make them his own property without the consent of the owner." *Bassett v. Spofford*, 45 N. Y. 387, 391, 6 Am. Rep. 101 (citing 2 Russ. Crimes, 1; *Mowrey v. Walsh* [N. Y.] 8 Cow. 238).

The phrase "deemed guilty of larceny," as used in B. & C. Comp. § 1805, providing that, if any person shall embezzle or fraudulently convert any money belonging to another in his possession, he shall "be deemed guilty of larceny," and on conviction shall be punished accordingly, refers to statutory larceny and not larceny at common law. *State v. Browning*, 82 Pac. 955, 956, 47 Or. 470.

Where one collects money for another and neglects or refuses to turn it over but uses the money himself, he commits a "larceny." Specifically, it is embezzlement and is punishable as "larceny." *State v. Conklin*, 84 Pac. 482, 484, 47 Or. 509.

If the general bookkeeper of a bank, having no general or special custody or possession of the funds of the bank, secretly takes from the safe or drawer of the receiving or paying teller moneys of the bank, with the intent to appropriate the same to his own use, he commits an act of "larceny." *United States v. Breese*, 131 Fed. 915, 920.

In a prosecution for larceny, the state must prove that the property taken was personal property of some value belonging to the owner named in the indictment and that it was taken feloniously by the defendant with intent to convert it to his own use within two years prior to the finding of the indictment, and in the county in which the case was being prosecuted. *State v. De Luca* (Del.) 77 Atl. 742, 743, 2 Boyce, 158.

A bill of particulars, filed with an indictment for "larceny" of a receipt, which alleged that accused told prosecutor that he would

loan prosecutor money and take from him as collateral a negotiable receipt of a third person for certain bonds, that accused falsely represented to prosecutor that he intended either to keep the certificate in his possession or to place the same as collateral with a bank for a loan, that accused loaned to prosecutor money and received as collateral the receipt, that accused sold the receipt, that after the maturity of the debt prosecutor made demands on accused for the return of the receipt and tendered the amount of the debt, that accused declined to deliver the receipt or any receipt of the same amount, and that accused never intended to retain possession of the receipt, but at the time of making the representation and receiving the receipt he intended to dispose of the same, etc., permitted the commonwealth to prove common larceny, embezzlement, obtaining property by false pretenses, or larceny, defined by Rev. Laws, c. 208, § 26, making one who, with intent to defraud, obtains property by false pretense guilty of "larceny." Commonwealth v. Althause, 93 N. E. 202, 205, 207 Mass. 32, 31 L. R. A. (N. S.) 999.

In a trial for "larceny," the gist of the offense is the unlawful taking and appropriating by the accused of the property of another, the name of the owner being a matter of secondary importance or consideration. Where the name of the owner is not known, it is sufficient to allege that fact. State v. McDuffy, 60 South. 80, 81, 131 La. 695 (citing State v. Hanks, 1 South. 458, 39 La. Ann. 234; State v. Dominique, 1 South. 665, 39 La. Ann. 323; State v. Harris, 8 South. 530, 42 La. Ann. 980; State v. Southern, 19 South. 668, 48 La. Ann. 628).

#### Statutory definitions

"Larceny" is the felonious stealing or carrying away the personal property of another. People v. Devlin, 78 Pac. 900, 143 Cal. 128 (citing Pen. Code, § 484).

Pen. Code, § 441, defines "larceny" as the felonious stealing, taking, carrying, leading, or driving away of the personal property of another. Buffehr v. Territory, 89 Pac. 415, 11 Ariz. 165.

"Larceny" is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. State v. Davis, 76 Pac. 705, 706, 28 Utah, 10 (citing Rev. St. 1898, § 4355).

"Larceny" is to take, steal, and carry away. An instruction thus defining larceny in the words of the statute was sufficient, since the words employed are daily in common use and such as the jury were presumed to understand. State v. Carter, 121 N. W. 694, 695, 697, 144 Iowa, 280.

Ann. St. 1899, Ind. T. § 965, defines "larceny" as follows: "'Larceny' is the felonious stealing, taking, carrying, riding or driving away the personal property of another." It

was not error for the trial court to give the jury the following definition of "larceny," to wit: "'Larceny' is the felonious stealing, taking, carrying, riding or driving away the property of another." It is the felonious taking; that is, wrongful and corrupt taking. Hendrix v. United States, 101 Pac. 125, 128, 2 Okl. Cr. 240.

Hurd's Rev. St. 1905, c. 38, § 167, provides that larceny may be committed by feloniously taking and carrying away any bond, bill, receipt, or any instrument of writing of value to the owner. So an indictment charging the larceny of a bill of exchange must aver the value thereof. People v. Silbertrust, 86 N. E. 203, 204, 236 Ill. 144.

Hurd's Rev. St. 1909, c. 38, § 75, provides that if any agent embezzles or fraudulently converts to his own use, or takes with intent to do so, without the consent of the employer, any property of the employer which has come to his possession or to his office by virtue of such employment, is to be deemed guilty of "larceny." So an indictment, charging in the language of the statute that defendant was the agent of B., and as such agent collected and embezzled funds belonging to her in the amount of \$7,000, was sufficient. People v. O'Farrell, 93 N. E. 136, 139, 247 Ill. 44.

Pen. Code, § 484, defines "larceny" as the felonious stealing, taking, carrying away of the property of another. So an information charging that accused, from the immediate presence of prosecutor, by means of force and against prosecutor's will, did take, steal, and carry away certain property of the value of \$1,026 of the personal property of prosecutor, was sufficient. People v. Ho Sing, 93 Pac. 204, 205, 6 Cal. App. 752.

"A person who, with the intent to deprive or defraud the true owner of his property, or of the use or benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either: (1) Takes from the possession of the true owner, or of any other person, or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing, or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or (2), having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer or any person, association, or corporation or public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property

and is guilty of larceny." *People ex rel. Perkins v. Moss*, 100 N. Y. Supp. 427-429, 50 Misc. Rep. 198 (citing Pen. Code, § 528).

Pen. Code, § 528, makes it "larceny" for a servant to appropriate to his own use any money which he has in his possession as such servant, with intent to deprive the true owner of his property or the use thereof. Section 548 provides that it is a sufficient defense that the property was appropriated openly under a claim of title preferred in good faith, but that the section shall not excuse the retention of the property of another to pay demands held against him. An employe collected over \$900 for his employer, and deducted therefrom over \$400, which he claimed was for arrears of salary and expenses and a certain other item, and sent his check to the employer for the balance, with a statement showing how it was arrived at. Held, that where the employer owed less than \$100, and the claim of the employe was made with intent to avoid payment of certain sums due, the employe was guilty of larceny under the Code, for the appropriation was not under a claim of title, but under a claim of indebtedness, and was not made in good faith. *J. W. Matthews & Co. v. Employers' Liability Assur. Corp.*, 111 N. Y. Supp. 76, 77, 127 App. Div. 195.

Penal Code, § 528, declares that a person who, "with intent to deprive or defraud the true owner of his property," etc., appropriates the same to his own use or benefit, or that of any other person other than the true owner, is guilty of larceny, and section 548 declares that on an indictment for larceny it shall be a defense that the property was appropriated openly under a claim of title made in good faith, even though such claim is untenable. The president of a life insurance company, having promised to contribute up to \$50,000 to a political campaign, requested relator, a vice president, to make the payment personally, as that would make it easier to refuse the other demands, and that the president would see that the matter was taken care of later. Relator made the payment, after which the president brought the matter to the attention of the finance committee of the insurance company, and, it being of the opinion that relator should be reimbursed from the company's funds, the president, under his authority to pay out the company's money on executive order, caused such reimbursement to be made without further action on the part of the finance committee or trustees of the company. In proceedings for relator's arrest for the larceny of such fund, the proof showed that relator derived no personal advantage from the money, and that it was paid by him in the honest belief that he was benefiting the insurance company. Held, that the facts did not establish *prima facie* the commission of larceny; there being no evidence of an attempt to de-

fraud. *People ex rel. Perkins v. Moss*, 80 N. E. 383, 387, 187 N. Y. 410, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309.

Under the statutes of Oklahoma a person who takes personal property unlawfully, feloniously, and with intent to deprive another thereof, is guilty of larceny; and it is immaterial whether the property is taken from the owner or another. *State v. Clark*, 128 Pac. 161, 163, 8 Okl. Cr. 432.

"Larceny" is defined by Snyder's St. § 2591, as the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof. Section 2603 punishes any person who shall steal any stallion, mare, etc., creates a separate and distinct offense, and to support a conviction under it the state must prove a felonious intent on the part of accused to deprive the owner thereof, and to convert the same to his own use, which specific proof is not necessary to support a conviction under the general larceny statute. *Crowell v. State*, 117 Pac. 883, 884, 6 Okl. Cr. 148.

Pen. Code, § 528, defines "larceny" as follows: "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, \* \* \* having in his possession, custody or control, as a bailee, servant, attorney, agent, clerk, trustee or officer of any person, association or corporation, \* \* \* any money, property, evidence of debt or contract, article of value of any nature or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property is guilty of 'larceny.'" *People v. Burnham*, 104 N. Y. Supp. 725, 727, 119 App. Div. 302.

Section 880 et seq. of the Penal Code contains the definition of "larceny," which is, in substance, that every person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, takes property from the possession of another, or, having in his possession property of another, appropriates the same to his own use, or that of any other person other than the one entitled to it, is guilty of "larceny." When the property taken is of a value exceeding \$50, or when it is taken from the person of another, it is termed grand larceny; otherwise, petit larceny. Under this section what at common law constituted the offenses of larceny and embezzlement are merged in the one offense of larceny, and thereby the distinction formerly recognized between cases where the taking was unlawful and those where the possession had been lawfully obtained is abolished. Property must have an owner before it is the subject



of larceny, but this statute does not define the character of that ownership—whether it is general or special, joint or several, absolute or qualified, arises from title or from possession. The particular ownership of the property stolen does not fall within the definition, and is not of the essence of the crime. Neither the legal nor moral quality of the act is affected by the fact that the property stolen, instead of being owned by one, or by two or more jointly, is the several property of different owners. The gist of the offense is the felonious taking or appropriation. The grade of the offense is determined by the value of the property taken. *State v. Mjelde*, 73 Pac. 87, 29 Mont. 490.

Where a territorial statute defined larceny as a taking with a felonious intent to deprive the owner of the property taken, and with intent to appropriate the same to the use and benefit of the taker, an instruction authorizing a conviction if the property was taken by defendant with the felonious intent to deprive the owner thereof was erroneous. *Miller v. Territory of Oklahoma*, 149 Fed. 330, 339, 79 C. C. A. 268, 9 Ann. Cas. 389.

An indictment alleging that accused, doing business as the L. Company, misrepresented to a certain person the resources of such company, and induced such person, relying on the misrepresentations, to subscribe and pay for stock in an Arkansas corporation, thereby fraudulently obtaining of such person a certain amount of money, without showing that accused or the L. Company were in any manner connected with the Arkansas corporation, and without alleging that the L. Company was the Arkansas corporation, nor that accused owned any stock in the Arkansas corporation, nor was an officer or agent thereof, or authorized to represent it in the sale of its stock, did not charge an offense under Kirby's Dig. § 1689, making one guilty of "larceny" who with intent to defraud or cheat another shall designedly, by color of any false token or writing, etc., obtain from any person any money. *State v. Lester*, 128 S. W. 846, 847, 94 Ark. 242.

Rev. St. 1899, § 1903, enacted in 1835, provides that if a person alter the marks of any animal the subject of larceny, being the property of another, with intent to steal or convert it to his own use, he shall be guilty of larceny, and punished in the same manner as if he had feloniously stolen such animal. Prior to the revision of 1879, grand larceny was the felonious stealing, taking, and carrying away of goods worth \$10 or more or any horse, sheep, hog, etc., belonging to another and by the revision the act was amended by striking out the words "sheep" and "hog," and by increasing the value of the stolen property to \$30. Held, that section 1903 does not limit the offense to the felonious marking of any animal the subject of grand larceny, but merely the subject of larceny, which includes petit larceny, and the fact

that the amendment of the statute excluded hogs and sheep from the list of animals, the stealing of which constituted grand larceny, per se, did not operate to exclude such animals under the value of \$30 from the operation of section 1903. *State v. Zehnder*, 128 S. W. 960, 962, 228 Mo. 310.

An employé of a railroad company was required to make an independent check of the men employed by a construction company, which relied on the reports made by the employé in paying the men. The employé and the timekeeper of the construction company reported that a third person was entitled to receive compensation for work done, and they procured the presentation to the construction company of a check therefor, which it paid. They received the proceeds. The report was false. Held, that the employé was guilty of larceny under Pen. Code, § 528, punishing one who, with intent to defraud, obtains from another by aid of fraudulent representations any money, etc. *People v. Eaton*, 107 N. Y. Supp. 849, 853, 122 App. Div. 706.

#### **Animus furandi**

Intent is a necessary element of "larceny." *Sutherland v. St. Lawrence County*, 91 N. Y. Supp. 962, 968, 101 App. Div. 299.

To constitute "larceny" the taking must be done with a felonious intent. *Bailey v. State*, 122 S. W. 497, 498, 92 Ark. 216.

Criminal intent is the principal element of "larceny," whether of grand larceny which is a felony, or petit larceny which is a misdemeanor. *State v. Claybaugh*, 122 S. W. 319, 321, 138 Mo. App. 360.

It is insufficient to constitute "larceny" that the taking was without color of right or authority, but it must have been with a felonious intent. *State v. Peterson*, 92 Pac. 302, 303, 36 Mont. 109.

Where one has taken and converted animals to his own use, if at the time of the taking there was a felonious intent to deprive the true owner of the permanent use and benefit of his property, he is guilty of larceny. *Blackshare v. State*, 128 S. W. 549, 552, 94 Ark. 548, 140 Am. St. Rep. 144.

It is essential to a conviction of "larceny" that the property be taken "animus furandi," and where it clearly appears that the taking was perfectly consistent with honest conduct, although the party charged with the crime may have been mistaken he cannot be convicted of "larceny." *Bird v. State*, 37 South. 525, 527, 43 Fla. 8.

"Larceny" is the felonious taking and carrying away of the personal property of another, with intent to convert it to the taker's use and deprive the owner of its use without his consent. Felonious intent is a material element of the crime of larceny. *State v. Dredde (Del.)* 73 Atl. 1042, 1043, 6 Pennewill, 446.

Under Pen. Code, § 528, making guilty of larceny one who takes property with intent to deprive the owner of the same, or of the use and benefit thereof, a taking of property without an intent to so permanently appropriate the same as to deprive the owner of the property itself, or its use and benefit, is not "larceny." There must be something more than an intention to retain possession of property, without an intent to actually appropriate it. *People v. Kenny*, 119 N. Y. Supp. 854, 855, 135 App. Div. 380.

"Larceny" is the wrongful and fraudulent taking or carrying away of the personal goods of another with felonious intent to convert them to the taker's own use and make them his property without consent of the owner; but the felonious intent is not necessarily an intent to gain an advantage for the taker, it being sufficient that there be an intention to deprive the owner of his property; and, even in those jurisdictions where a *lucri causa* is required, it is not necessary that the benefit to the defendant be of a pecuniary nature. *Canton Nat. Bank v. American Bonding & Trust Co.*, 73 Atl. 684, 685, 111 Md. 41, 18 Ann. Cas. 820.

"Larceny" is the unlawful taking and carrying away the goods or property of another, secretly or furtively with the felonious intent to appropriate them to the use of the trespasser. \* \* \* From the foregoing authority we deduce the rule that, under the English common law, and consequently under our statute, which is merely declaratory thereof, one cannot commit the crime of 'larceny' or robbery without a felonious intent, or, in other words, he cannot commit them by inadvertence or through ignorance." Where accused took from the possession of the court's receiver certain cattle belonging to him and taken from him under process in an action against him, he was not guilty of robbery or "larceny," in the absence of evidence of felonious intent. *Triplett v. Com.*, 91 S. W. 281, 282, 283, 122 Ky. 35.

Both at common law and under Pen. Code, § 880, and section 883 as amended by Sess. Laws 1897, p. 247, defining larceny as a taking "with intent to deprive or defraud" the true owner, an indictment charging that defendant "feloniously and with the intent then and there to steal," etc., sufficiently charges a felonious intent, the phrase following the word "feloniously" taking nothing from the effect thereof. *State v. Allen*, 87 Pac. 177, 178, 34 Mont. 403 (citing *Wharton's Precedents*, 415; *State v. Rechnitz*, 52 Pac. 264, 20 Mont. 488).

In an action for slander by a daughter against her father, where it was doubtful whether the father meant to charge his daughter with the crime of larceny, the court should have charged that the crime of larceny is committed where one person takes the property of another with intent to convert it to his own use or that of another,

and that the crime is not committed where the taking is done by a person innocently and without any evil intent, and that unless the words were intended to charge the plaintiff with the crime of larceny, and would be naturally so understood by the person hearing them, they should find for defendant. *Beams v. Beams*, 129 S. W. 298, 299, 138 Ky. 818.

#### Same—At time of taking

"Larceny" at common-law was the felonious taking of the property of another against his will, with the intent to convert it to the use of the taker, or, as some authorities hold, the use of the taker or a third person. In "larceny" the felonious intent must have existed at the time of the taking of the property. *Williams v. United States Fidelity & Guaranty Co.*, 66 Atl. 495, 496, 105 Ind. 490.

"Larceny" consists of an intent to trespass on the personal property of another, coupled with an intent wholly to deprive the owner thereof, and the crime is not committed unless such intents concurrently and contemporaneously exist. *State v. Teller*, 78 Pac. 980, 45 Or. 571 (citing 1 Bish. Crim. Law [7th Ed.] §§ 207, 342; *Rapalje*, *Larceny*, § 20; *State v. Hull*, 54 Pac. 159, 33 Or. 56, 72 Am. St. Rep. 694; *State v. Meldrum*, 70 Pac. 526, 41 Or. 380; *Johnson v. People*, 113 Ill. 99).

A felonious intent at the time of the taking is essential to "larceny." To make the finder of a check guilty of larceny, he must have had an intent or fraudulent purpose to convert it to his own use at the time he took possession thereof, and that he knew or had reasonable means of knowing the owner is evidence of such intent, if he afterwards converts it to his own use. *State v. Hinton*, 109 Pac. 24, 27, 56 Or. 428.

In every "larceny" there must be a trespass in the original taking of the property; that is, in larceny the felonious intent must have existed at the time of the taking. *State v. Casey*, 105 S. W. 645, 647, 207 Mo. 1, 123 Am. St. Rep. 367, 13 Ann. Cas. 878 (citing *State v. Shermer*, 55 Mo. 83; *State v. Ware*, 62 Mo. loc. cit. 602).

Defendant took a bull from the range, believing it to be his own, and later, ascertaining that it belonged to another, converted it. There was no willful trespass in the taking. Held, that it was not "larceny," as the felonious intent at the time of taking was absent, and, there being no trespass, the doctrine that a person, taking property by trespass, who subsequently wrongfully converts it, is guilty of larceny, had no application here. *Wilson v. State*, 131 S. W. 336, 96 Ark. 148, 41 L. R. A. (N. S.) 549, Ann. Cas. 1912B, 339.

The crime of "larceny," under the statute defining "larceny" as the taking of personal property accomplished by fraud or stealth, with intent to deprive another there-

of, may be shown by proof that at the time of the taking of the property it was taken with the felonious intent to convert it to the taker's own use, and to deprive the owner thereof, regardless of the fact as to whether the taking was accomplished by fraud or stealth. To constitute larceny the criminal intent must exist at the time of the taking, and the taking may be by stealth with such criminal intent, or the taking may be with the owner's knowledge through fraudulent practice. *Flohr v. Territory*, 78 Pac. 565, 570, 14 Okl. 477.

#### Asportation

Any felonious taking or asportation of personal property may be "larceny"; therefore the omission of the word "away" from a charge as to "the felonious taking and carrying of the personal property of another" is not per se error. *Presley v. State*, 57 South. 605, 607, 63 Fla. 37.

In a trial under an indictment charging defendant with larceny of a suit case and its contents from a railroad depot the court, after defining larceny as the felonious stealing, taking and carrying away of the personal property of another, charged that if defendant actually took into his hands the property named in the indictment and lifted it from the place where the owner had put it, so as to entirely remove it from the place where it was put defendant was guilty of larceny, and that if the jury did not find that defendant took the property from the depot, but did find that he took and carried it away from a place outside of any building, the verdict should be guilty of larceny, fixing therein the value of the property stolen. Held that, in the absence of a request by defendant for instructions, the instructions were as specific as the case demanded. *State v. McDermet*, 115 N. W. 884, 885, 138 Iowa, 86.

#### Asportation to new jurisdiction as new offense

Where defendant induced R., who had previously been employed by a dray company authorized to receive goods for a consignee of certain shoes, and who was known to the servants of the carrier holding such goods for delivery, to go to the freight depot of the carrier in Illinois after his employment by the dray company had terminated, and procure a load of shoes from the carrier, and R. obtained such shoes, and delivered them to a person other than the consignee in Missouri, such act constituted "larceny," and not "false pretenses," and was therefore punishable under Rev. St. 1899, § 2362, providing that every person who shall steal the property of another in any other state and shall bring the same into Missouri may be convicted and punished for larceny as though the property was stolen in Missouri. *State v. Mintz*, 88 S. W. 12, 16, 189 Mo. 268.

Under section 285, Crimes Act (Gen. St. 1901, § 2286), providing that every person

who shall steal or obtain by robbery the property of another in any other state, territory, or country, and shall bring the same into this state, may be convicted and punished for larceny in the same manner as if such property had been feloniously stolen or taken within this state, and section 83, Crimes Act (Gen. St. 1901, § 2076), making the alteration of brands with intent to steal or convert the branded animal "larceny," one who in another state marks or brands, or alters the mark or brand of, any animal, the subject of larceny and the property of another, with intent to steal it or convert it to his own use, so that if the marking, branding, or alteration were done in this state he would be guilty of the larceny as defined by section 83, may be convicted and punished for larceny under section 285, whether or not the original taking may have been a crime against the laws of the state or country where it was committed. *State v. White*, 92 Pac. 829, 831, 76 Kan. 654, 14 L. R. A. (N. S.) 556.

#### Confidence game distinguished

See Confidence Game.

#### Consent of owner

As used in Cr. Code, § 114, making it criminal to steal money or other property, the word "steal" includes all the elements of larceny at common law. If the original taking of the property is with the consent of the owner, the crime of "larceny" is not committed. *Cohoe v. State*, 113 N. W. 532, 533, 79 Neb. 811.

Where the owner of personalty voluntarily parts with its possession for a particular purpose, and the person receiving possession for that purpose has at the time a fraudulent intent to make use of such possession as a means of converting the property to his own use, the crime is larceny. *Bivens v. State*, 120 Pac. 1033, 1036, 6 Okl. Cr. 521.

Where one by fraud, trick, or false pretense induced the owner to part merely with the possession of his property, there being no intent to pass title, and the party receiving takes it with intent fraudulent to convert it to his own use, the crime is "larceny." *State v. Loser*, 104 N. W. 337, 340, 132 Iowa, 419 (citing *State v. Edwards*, 41 S. E. 429, 51 W. Va. 220, 59 L. R. A. 465; *State v. Hall*, 40 N. W. 107, 76 Iowa, 85, 14 Am. St. Rep. 204; *People v. Morse*, 2 N. E. 45, 99 N. Y. 662; *State v. Anderson*, 47 Iowa, 142; *People v. Rae*, 6 Pac. 1, 66 Cal. 423, 56 Am. Rep. 102; *Loomis v. People*, 67 N. Y. 329, 23 Am. Rep. 123; 1 Whart. Cr. Law, § 1179).

Where it appeared that the whole scheme by which a person obtained money was a fraud from the beginning and that possession obtained by mere trickery with a present intent to convert it to his own use that he had no rightful possession, and that delivery was made to him without any intent to pass the title, but merely to enable

him to make a specific use of the money, his appropriation of it constituted "larceny" at common law. *Commonwealth v. King*, 88 N. E. 454, 460, 202 Mass. 379 (citing *Commonwealth v. Flynn*, 45 N. E. 924, 167 Mass. 460, 57 Am. St. Rep. 472; *Commonwealth v. Rubin*, 43 N. E. 200, 165 Mass. 453; *Commonwealth v. Lannan*, 26 N. E. 858, 153 Mass. 287, 289, 11 L. R. A. 450, 25 Am. St. Rep. 629; *Commonwealth v. Barry*, 124 Mass. 325).

#### Conversion

There was a "conversion," within B. & C. Comp. § 1807, declaring guilty of larceny one who receives money of the state and converts it, where money being deposited in a bank by the State Treasurer for safe-keeping was paid out to others than such Treasurer. *State v. Ross*, 104 Pac. 596, 599, 55 Or. 450, 42 L. R. A. (N. S.) 601.

#### Converting or claiming property found

Where accused, as agent of prosecutor, had an interest in certain rent collected by him, he could not be convicted of larceny by embezzlement of such rent, under Hurd's Rev. St. 1909, c. 38, § 75, providing that, if an agent fraudulently embezzles or converts property in his hands belonging to his employer, he shall be guilty of larceny. *People v. O'Farrell*, 93 N. E. 136, 139, 247 Ill. 44.

On an information drawn under Comp. Laws 1909, § 2591, defining larceny generally, a conviction may be had under section 2592 on proof that accused found lost property with means of inquiry as to the owner, and appropriated the same to his own use without a reasonable effort to discover the owner; the latter section only prescribing a rule of evidence. *Berry v. State*, 111 Pac. 676, 677, 4 Okl. Cr. 202, 31 L. R. A. (N. S.) 849.

When a delivery of goods is made for a specific purpose, the possession is still supposed to reside in the first proprietor, and, where any person has the bare charge of another's effects, legal possession remains in the owner, and therefore, where the finder of the purse told defendant's wife thereof, and she stated that the purse looked like her husband's and took the same telling the finder that, if it did not belong to her husband, she would return it, and afterwards possession was given to him on his claim of ownership, when in fact it belonged to another, the legal possession remained in the finder, and defendant's claim thereto constituted larceny. *Williams v. State*, 75 N. E. 875, 877, 165 Ind. 472, 2 L. R. A. (N. S.) 248 (citing *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474; *Bish. New Cr. Law*, § 824).

#### Different grades

"Larceny" is divided into two degrees, or otherwise varied in punishment, by the value of the thing stolen; and an indictment must allege the value of the article stolen, and the proof of value will be adequate if it simply shows to which of the classes meriting corresponding punishment the offense be-

longs. *Woodring v. Territory*, 78 Pac. 85, 86, 14 Okl. 250, 2 Ann. Cas. 855.

Under Rev. Pen. Code, §§ 605, 607, 608, as amended by Laws 1903, p. 175, c. 151, "larceny" is the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof. Larceny is divided into two degrees, the first of which is termed "grand larceny"; the second, "petit larceny." Grand larceny is larceny committed in either of the following cases: (1) When the property taken is of value exceeding \$20. (2) When such property, although not of value exceeding \$20, is taken from the person of another. (3) When such property, although not of value exceeding \$20, is a bull, steer, cow, heifer, or calf, or is a stallion, mare, gelding, horse, or colt. Larceny in other cases is petit larceny. Under Rev. Pen. Code, §§ 605, 607, 608, as amended by Laws 1903, p. 175, c. 151, making it grand larceny to take property exceeding \$20 in value, or when the property, though not of value exceeding \$20, is a stallion, mare, gelding, horse, or colt, there is no variance between an information alleging larceny of a horse and proof of the larceny of a gelding, especially in view of Rev. Code Cr. Proc. § 569, providing that neither a departure from the form or mode prescribed as to any pleading nor error therein renders it invalid, unless it has prejudiced defendant, and section 229, providing that an indictment is sufficient if the act charged is clearly set out in ordinary and concise language, so as to enable a person of common understanding to know what is intended. *State v. Matejousky*, 115 N. W. 96, 98, 22 S. D. 80.

To feloniously take from the person of another the goods of that other and carry the same away has always been a crime, punishable as either grand or petit "larceny," so that the Legislature in defining and making punishable the specific act of feloniously taking property from the person of another did not create a new offense, but recognized such act as a degree of larceny in which the grades of grand and petit larceny are included, so that a defendant charged with larceny from the person may properly be convicted of any of the lesser offenses proved. *State v. Clem*, 94 Pac. 1079, 1080, 49 Wash. 273.

#### Element of burglary

See Burglary.

Under Comp. Laws 1909, § 2554, making it burglary to break and enter any building, etc., with intent to steal therein, the word "steal" involves a felonious intent on the part of the taker to deprive the owner of property and to convert it to the taker's use; while any trespass involving the taking of personal property with intent to deprive another thereof is "larceny," within section 2557, making it burglary to enter any building, etc., with intent to commit any felony,

larceny, or malicious mischief. *Sullivan v. State*, 123 Pac. 569, 570, 7 Okl. Cr. 307.

Under Rev. St. 1898, § 4334, as amended by Sess. Laws 1905, p. 16, c. 19, making it burglary for any person to break and enter a building with intent to commit a "larceny" or any other felony, an information, charging the breaking and entering a building at night with intent to steal goods, without stating their value, sufficiently charges a burglary in the first degree, as "larceny" within such section includes both a misdemeanor and a felony, and the words "or any other felony" are equivalent to "or any felony other than that embraced within the larceny." *State v. Hows*, 87 Pac. 163, 31 Utah, 168.

#### Embezzlement distinguished

"Larceny" and "embezzlement" are distinguishable, in that in larceny possession of the property may be obtained by fraud, while it cannot be so obtained in embezzlement. *People v. Grider*, 110 Pac. 586, 588, 13 Cal. App. 703.

The distinction between "larceny" and "embezzlement" is one fully recognized in the criminal law. While the two offenses have much in common, for the purpose of prosecution they have uniformly been regarded as distinct. In every "larceny" there must be a trespass in the original taking of the property; that is, in larceny the felonious intent must have existed at the time of taking. Whereas "embezzlement" is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted, or into whose hands it has lawfully come. *State v. Casey*, 105 S. W. 645, 647, 207 Mo. 1, 123 Am. St. Rep. 367, 13 Ann. Cas. 878.

The crimes of "embezzlement" and "larceny" are so different in their character that they should be treated in an indictment as distinct and separate offenses. *State v. Finnegan*, 103 N. W. 155, 157, 127 Iowa, 286, 4 Ann. Cas. 628.

The term "embezzle," as used in the statute, is a broader term than "larceny," but not exclusive of it. *State v. Sullivan*, 21 South. 688, 689, 49 La. Ann. 200, 62 Am. St. Rep. 644; *State v. Pellerin*, 43 South. 159, 161, 118 La. 547.

To constitute "larceny" as distinguished from "embezzlement," there must be a trespass to the possession, but it is larceny where one gains possession of another's personal property so as to constitute only a bare custody, or procures it by subterfuge; the owner's property not being divested in such case; he still having constructive possession. *Boswell v. State*, 56 South. 21, 22, 1 Ala. App. 178.

At common law, possession was a necessary element of "larceny," and the distinction between "larceny" and "embezzlement" depends on the nature of the possession

and the manner of obtaining it, and it would seem that a mere credit is not the subject of "larceny" at common law. *Higbee v. State*, 104 N. W. 748, 749, 74 Neb. 331.

"Embezzlement" is defined as the fraudulent appropriation of property by a person to whom such property has been intrusted or into whose hands it has lawfully come. It differs from "larceny" in the fact that the original taking of the property was lawful or with the consent of the owner, while in "larceny" the felonious intent must have existed at the time of the taking. *United States v. Allen*, 150 Fed. 152, 153 (citing *Moore v. United States*, 16 Sup. Ct. 294, 295, 160 U. S. 268, 269, 40 L. Ed. 422).

"One who obtains money or goods by some fraudulent trick or artifice, and carries them away, is guilty of 'larceny.'" Thus where one marries a woman in pursuance of a scheme to procure money which she has on deposit in bank, and later procures a check for the money on representations that he will use the money in making an investment for her, he is guilty of "larceny" and not "embezzlement." *Hunt v. State*, 79 S. W. 769, 771, 72 Ark. 241, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33 (citing *Beasley v. State*, 38 N. E. 35, 138 Ind. 552, 46 Am. St. Rep. 418).

The crime of "embezzlement" differs in its essential ingredients from the crime of "larceny" in this: That in "larceny" the gravamen of the offense is the unlawful and felonious taking of personal property with the intent to convert and steal the same, while in "embezzlement" the taking is lawful, because of the trust reposed in the agent, servant, or trustee receiving it, and the gist of the offense consists of the conversion of the property so received with a felonious and fraudulent intent of converting the same to the use of the agent, servant, or trustee. *State v. Culver*, 97 N. W. 1015, 1016, 5 Neb. (Unof.) 288.

According to Pen. Code, § 528, "larceny" includes every act which was larceny at common law, and in addition such acts as formerly constituted "false pretenses" and "embezzlement." At common law, if a person honestly and in good faith received possession of personal property in trust, and thereafter converted the same to his own use, he was guilty of "embezzlement." If he obtained possession of the property by fraud, the owner intending nevertheless to part with the title as well as the possession, the offense was obtaining property under "false pretenses." If the possession was wrongfully or fraudulently obtained, without the owner's consent, and without color of title, and with a felonious intent of converting the property to the use of the taker or another, the offense was "larceny." *People ex rel. Perkins v. Moss*, 99 N. Y. Supp. 138, 144, 145, 113 App. Div. 329 (citing *People v. Mill-*

er, 62 N. E. 418, 169 N. Y. 350, 88 Am. St. Rep. 546).

"Larceny" was a crime at common law and consisted of a trespass, committed in the taking of the personal goods and chattels of another with intent to convert them to the taker's use, without the consent of the owner. "Embezzlement" cannot be committed unless the defendant is in the lawful possession of the property at the time of the conversion. As trespass is an injury to the possession only, it logically and legally follows that one in the lawful possession of goods cannot commit larceny of them, for it were idle and absurd to talk of one committing an injury to his own possession. "Embezzlement" consists in the breach of some trust relation by one in the lawful possession of the personal property of another who fraudulently converts it to his own use. In "larceny" there is no breach of any confidential relation as in embezzlement, while in the latter crime there is no trespass as in larceny. *State v. Browning*, 82 Pac. 955, 956, 47 Or. 470.

"Larceny" at common law was the felonious taking of the property of another against his will with intent to convert it to the use of the taker, or, as some authorities hold, the use of the taker or third person. "Embezzlement" consists in the fraudulent appropriation to one's own use of money or goods intrusted to him by another. In larceny the felonious intent must have existed at the time of taking, whereas in embezzlement the fraudulent act consists in the appropriation of the property to the use of the taker or third party, but the felonious or fraudulent intent is of the essence of the offense in each case. Where an insurance agent was entitled under his contract with the company to a credit of three months on his monthly balances due the company, the fact that at the end of the three months he was unable to pay, or simply failed to pay, with no proof of a fraudulent disposition of the money, would not have established embezzlement. The mere failure to pay a debt without compulsion even by one having the financial ability is neither larceny nor embezzlement. *Williams v. United States Fidelity & Guaranty Co.*, 66 Atl. 495, 496, 105 Md. 490.

The distinction between larceny by fraud and embezzlement is determined as to the time when a fraudulent intent to convert arose, and in larceny the criminal intent must exist at the time of the taking, and if the taker received the property as a bailment with intent to conform to the owner's wishes and thereafter fraudulently appropriates the property, the crime is embezzlement under *Snyder's Comp. Laws* 1900, §§ 2591 and 2609. *Bivens v. State*, 120 Pac. 1063, 1066, 6 Okl. Cr. 521.

"Where one honestly receives the possession of goods upon trust, and after re-

ceiving them fraudulently converts them to his own use, it is a case of 'embezzlement.' But where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts with the possession and not with the title, the offense is 'larceny.'" Where a person gave money to another as a stakeholder on a bet, such delivery having been brought about by fraud and artifice of the stakeholder, who intended to appropriate the money in any event, and who did so, the offense was "larceny." *State v. Ryan*, 82 Pac. 703, 706, 47 Or. 338, 1 L. R. A. (N. S.) 862 (quoting and adopting the statement in *People v. Tomlinson*, 36 Pac. 506, 507, 102 Cal. 19, 23).

Where a person honestly receives the possession of goods, chattels, or the money of another on any trust, express or implied, and after receiving them fraudulently converts them to his own use, he may be guilty of "embezzlement" but not of "larceny," except as "embezzlement" is by statute made "larceny." *State v. Buck*, 84 S. W. 951, 952, 186 Mo. 15, 2 Ann. Cas. 1007 (citing *Commonwealth v. Barry*, 124 Mass. 325).

#### False pretenses distinguished

The distinction between the crime of larceny and that of cheating by "false pretenses" is this: "If the false pretenses induce the owner to part with his property intending to transfer both title and possession, the crime is cheating by 'false pretenses.' If, on the other hand, one by fraud, trick, or false pretense induces the owner to part merely with the possession of his property, there being no intent to pass the title, and the party who receives it took it with intent fraudulently to convert it to his own use, the crime is 'larceny.'" *State v. Loser*, 104 N. W. 337, 339, 840, 182 Iowa, 419.

Prosecutor met defendant through a newspaper advertisement, and defendant offered to sell him a half interest in the rooming house department of a brokerage company for \$200, and represented that he (defendant) needed an assistant, and that the business netted profits of between \$200 and \$300 a month. Prosecutor desired a salary, but thereafter paid defendant \$50 to be kept by him for 30 days; defendant agreeing to return the same to prosecutor at the expiration of such time if he was dissatisfied, which defendant failed to do. Held that since the ownership of the money so deposited remained in prosecutor, and there was no intent on his part to deliver possession thereof to defendant, except temporarily, the latter's offense, if any committed, was "larceny," and not obtaining money by "false pretenses." *State v. Anderson*, 84 S. W. 946, 949, 186 Mo. 25 (citing *State v. Vickery*, 19 Tex. 326; 2 Arch. Cr. Pl. 372; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123; *People v. Morse*, 2 N. E. 45, 99 N. Y. 662).

"Larceny" and "false pretenses" are distinguishable, in that in larceny the owner does not intend to part with his property to accused, though he may intend to part with possession; while in false pretenses he does intend to part with his title. *People v. Grider*, 110 Pac. 586, 588, 13 Cal. App. 703.

The distinction between "false pretenses" and "larceny," is that in the former the owner parts with the possession and title of property by reason of false and fraudulent representations knowingly and designedly made, while in the latter the owner of the property stolen must not have intended to part with the title to it. *People v. Proctor*, 82 Pac. 551, 552, 1 Cal. App. 521.

"Where, by means of fraud, conspiracy, or artifice, possession of the property is obtained with felonious intent, and the title still remains in the owner, 'larceny' is established, while the crime is 'false pretenses' if the title, as well as possession, is absolutely parted with." *People v. Delbos*, 81 Pac. 131, 132, 146 Cal. 734 (quoting and adopting definition in *People v. Rae*, 6 Pac. 1, 66 Cal. 425, 56 Am. Rep. 102).

Where possession of personal property is obtained from the owner by fraud, trick, or device, and the owner intends to part with both possession and the title when he surrenders control of the property, the offense is obtaining property by "false pretenses"; but if the possession is fraudulently secured, and the owner does not intend to part with the title, the offense is "larceny." *Beckwith v. Galice Mines Co.*, 93 Pac. 453, 455, 50 Or. 542, 16 L. R. A. (N. S.) 723.

"If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up possession, the offense, if any, is obtaining money by 'false pretenses.' But where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts with the possession and not with the title, the offense is 'larceny.'" Where a person gave money to another as a stakeholder on a bet, such delivery having been brought about by fraud and artifice of the stakeholder, who intended to appropriate the money in any event, and who did so, the offense was "larceny." *State v. Ryan*, 82 Pac. 703, 706, 47 Or. 338, 1 L. R. A. (N. S.) 862 (quoting and adopting the statement in *People v. Tomlinson*, 36 Pac. 506, 507, 102 Cal. 19, 23).

If the owner of property part with not only the possession but with the right of property also, the offense of the party obtaining the property will not be larceny, but will be that of obtaining goods by "false pretenses." *Zink v. People*, 77 N. Y. 114, 128, 33 Am. Rep. 589 (adopting definition in

*Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474).

One who went to a wholesale cigar store, and, giving an assumed name, falsely represented that he had come to get cigars for a retail dealer, and thereby procured the cigars and converted them to his own use, was guilty of "larceny," since the wholesaler intended to deliver him merely the possession of the goods for the retailer, and not to sell them to him personally, and was not guilty of "obtaining property by impersonating another," within the meaning of Rev. St. 1899, § 1900. *State v. Kosky*, 90 S. W. 454, 457, 191 Mo. 1.

Where defendant induced R., who had previously been employed by a dray company authorized to receive goods for a consignee of certain shoes, and who was known to the servants of the carrier holding such goods for delivery, to go to the freight depot of the carrier in Illinois after his employment by the dray company had terminated, and procure a load of shoes from the carrier, and R. obtained such shoes, and delivered them to a person other than the consignee in Missouri, such act constituted "larceny," and not "false pretenses," and was therefore punishable under Rev. St. 1899, § 2362, providing that every person who shall steal the property of another in any other state and shall bring the same into Missouri may be convicted and punished for larceny as though the property was stolen in Missouri. *State v. Mintz*, 88 S. W. 12, 16, 189 Mo. 268.

According to Pen. Code, § 528, "larceny" includes every act which was larceny at common law, and in addition such acts as formerly constituted "false pretenses" and "embezzlement." At common law, if a person honestly and in good faith received possession of personal property in trust, and thereafter converted the same to his own use, he was guilty of "embezzlement." If he obtained possession of the property by fraud, the owner intending nevertheless to part with the title as well as the possession, the offense was obtaining property under "false pretenses." If the possession was wrongfully or fraudulently obtained, without the owner's consent, and without color of title, and with a felonious intent of converting the property to the use of the taker or another, the offense was "larceny." *People ex rel. Perkins v. Moss*, 99 N. Y. Supp. 138, 144, 145, 113 App. Div. 329 (citing *People v. Miller*, 62 N. E. 418, 169 N. Y. 350, 88 Am. St. Rep. 546).

Prosecutor applied to defendant for a position, who introduced him to A. to arrange the terms of his employment. A. required prosecutor to deposit \$50 as a guaranty of his honesty, to be returned on termination of his employment; but defendant on the next day told prosecutor that, as \$400 or \$500 would pass through prosecutor's



hands every day, he must deposit \$150 more, which he did. Defendant pretended to give him a receipt for this money, which, instead, was a bill of sale for a one-half interest in the rooming house business conducted by the concern. Prosecutor worked for \$15 per week for three or four weeks, during which time he drew \$15.75, and, becoming dissatisfied, demanded the return of his money, which defendant refused to pay him, and then prosecutor discovered that his receipt therefor was a bill of sale. Held that, prosecutor never having intended to part with the title to the money so deposited, defendant, having acquired the same by fraud, with the felonious intent to convert it to his own use, was guilty of "larceny," and not "false pretenses." *State v. Buck*, 84 S. W. 951, 952, 186 Mo. 15, 2 Ann. Cas. 1007 (citing *Commonwealth v. Barry*, 124 Mass. 325; *People v. Morse*, 2 N. E. 45, 99 N. Y. 662; *People v. Dunmar*, 18 N. E. 325, 106 N. Y. 502; *People v. Miller*, 62 N. E. 418, 169 N. Y. 339, 88 Am. St. Rep. 546; *People v. Gottschalk*, 20 N. Y. Supp. 777, 66 Hun, 64).

#### As felony

See Felony.

#### Force and arms

Though an indictment charged that accused "with force and arms" stole a horse, those words should have been omitted from the instructions, for, neither force nor arms being an element of the offense, their use in the indictment was unnecessary. *Walklate v. Commonwealth (Ky.)* 118 S. W. 314, 315.

#### Gambling distinguished

The obtaining of money under pretext of betting at cards and the best hand winning, but where in fact prosecuting witness had no chance to win, and was the only player who actually risked anything, is within *Comp. Laws* 1907, § 4355, defining "larceny" as the felonious taking of the property of another, and such a game cannot be held to constitute gambling merely. *State v. Donaldson*, 99 Pac. 447, 449, 35 Utah, 96, 20 L. R. A. (N. S.) 1164, 136 Am. St. Rep. 1041.

#### As infamous crime

See Infamous Crime.

#### As misdemeanor

See Misdemeanor.

#### Property of another

To constitute "larceny," the thing stolen must be the property of another; but either general or special ownership may be sufficient. *State v. Roswell*, 133 S. W. 99, 100, 153 Mo. App. 338.

"Larceny" consists in two essential elements: First, the misappropriation; and, second, the accompanying intent. Evidence of ownership is therefore admissible, even necessary, in proving the misappropriation, since one may not usually wrongfully appropriate his own property. But it is as

much a crime to steal one person's property as another's. The ownership of the property is not an essential ingredient of the crime, so long as it appears that the title to the same is not in the accused. The crime is complete when it appears that the property feloniously taken or appropriated was not the property of the accused. *People v. Mead*, 109 N. Y. Supp. 163, 164, 125 App. Div. 7.

"'Larceny' is the felonious stealing, taking, carrying, leading, or driving away the personal property of another," and an indictment charging defendant with willfully, etc., taking from the person and possession of prosecutors said money, was insufficient in not charging that the property was not that of defendant. *People v. Cleary*, 81 Pac. 753, 1 Cal. App. 50.

One who has taken an estray and is in possession thereof has such property interest therein that the taking of it from him may be "larceny"; so, also, one in possession of stolen property purchased from the thief; so, also, a thief, in possession of property he has stolen, as against another than the owner. *Maxwell v. Territory*, 85 Pac. 116, 10 Ariz. 1.

*Pen. Code. § 484*, defines "larceny" as the felonious stealing, etc., of personal property of another. Held, that the phrase "personal property of another," as so used, means property in the possession of another who is entitled, as bailee or otherwise to retain possession for some benefit or profit to himself to the exclusion of all others, and not absolute ownership as defined by *Civ. Code, § 679*, so that a taking of a helper by the general owner thereof from the possession of an agister entitled to hold the same under a lien for pasturage, with the intent to deprive the latter thereof, constituted "larceny." *People v. Cain*, 93 Pac. 1037, 1039, 7 Cal. App. 163.

#### Robbery as including

See Robbery.

#### Robbery distinguished

See Robbery.

#### Riot synonymous

See Riot.

#### Steal

See Steal.

#### Theft synonymous

See Theft.

#### Trespass

"Larceny" is the felonious stealing and carrying away, etc., of the personal property of another, every larceny including a trespass to the possession, which cannot exist unless the property was in the possession of the person from whom it is charged to have been stolen. *People v. Hoban*, 88 N. E. 806, 807, 240 Ill. 303, 22 L. R. A. (N. S.) 1132, 16 Ann. Cas. 226.

"To constitute 'larceny' there must be a trespass in the taking. \* \* \* It is not necessary that the taking be by force or stealth. If possession is obtained by fraud with intent to convert the property to the use of the taker, and it is so converted, 'larceny' may be charged." Where E. and defendants conspired to steal the funds of a labor union, and to that end procured the election of E. as recording secretary of the union, and pursuant to his duty as such recording secretary he drew money from a bank to be forwarded to the district and national organizations, and carried the money on his person until late in the evening, when pursuant to the conspiracy he pretended to have been held up and robbed, the crime was not "larceny" because of the absence of a felonious taking. *State v. Cothorn*, 115 N. W. 890, 891, 138 Iowa, 236.

"At common law and under the statute, in 'larceny' there must be a trespass. Where the ownership of property is not parted with and by a fraud or trick the possession of the property is obtained and is converted to the use of the taker without the consent of the owner, and at the time of resorting to the trick or fraud to obtain the possession it was intended to take the property and permanently deprive the owner of it, this would constitute 'larceny' at common law as well as under the statute." *State v. Copeman*, 84 S. W. 942, 945, 186 Mo. 108 (citing 1 Bish. New Cr. Law, § 585; *State v. Murphy*, 90 Mo. App. 548; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123; *State v. Vickery*, 19 Tex. 326).

#### LARCENY AFTER TRUST DELEGATED

If a person, fraudulently intending to get possession of the money of another and appropriate the same to his own use, by false representations induces the owner to deliver the money to him for the purpose of being applied for the owner's use or benefit, and then appropriates it in pursuance of the original intent, he is guilty of both "larceny" after trust delegated and simple larceny, and may be prosecuted for, and convicted of, either offense. *Martin v. State*, 51 S. E. 384, 123 Ga. 478.

#### LARCENY, BY BAILEE

See, also, Bailee.

The language of Mills' Ann. St. § 1256, defining "larceny" by a bailee converting money, etc., "he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, and on conviction shall be punished accordingly," makes the conversion by a bailee with intent to steal the exact equivalent of a felonious stealing, taking, and carrying away. *Quinn v. People*, 75 Pac. 396, 397, 32 Colo. 135.

#### LARCENY BY FALSE PRETENSES

See False Pretense.

#### LARCENY FROM THE HOUSE

House as element of, see House.

Under Pen. Code 1895, § 178, providing that "larceny from the house" is the breaking or entering any house with intent to steal, or after breaking or entering said house stealing therefrom anything of value, the offense can be committed in four different ways. It may consist in the breaking of a house with intent to steal, provided the offense is not burglary; entering any house with intent to steal; breaking a house and stealing therefrom, where it can be accomplished without entry or entering and stealing. Section 182 defines two classes of "larceny from the house" and distinguishes them. It provides that "any person breaking and entering any house or building (other than a dwelling house or its appurtenances) with intent to steal, but is detected and prevented from carrying such intent into effect or in stealing any of the articles therein contained." The section then provides that "any person breaking or entering any such house or building and stealing therefrom any money, goods, chattels, wares or merchandise or any other article of value shall be guilty of a misdemeanor." This second division of the section is subdivided into thefts where there is a breaking and entering in order to accomplish the theft, and where there is no breaking, but merely an entrance into the building and a theft is accomplished. But in both cases a theft must actually be committed. Under the first portion of section 182, as in the first clause of section 178, where a house other than a dwelling house and its appurtenances is broken and entered with intent to steal, and the offender is detected, he is guilty of "larceny from the house," though nothing be taken. *Glaze v. State*, 58 S. E. 1126, 1127, 2 Ga. App. 704.

#### LARCENY FROM THE PERSON

Included in robbery, see Robbery.

Robbery distinguished, see Robbery.

See, also, Theft from the Person.

The crime of "larceny from the person" (B. & C. Comp. § 1800) is a compound larceny consisting of simple larceny (section 1798) aggravated by the circumstance of taking the property from the person of another in which the value of the property is not an ingredient of the offense, as in case of simple larceny. *State v. Reyner*, 91 Pac. 301, 302, 50 Or. 224.

The act of pocket picking is the offense of "larceny of the person." *State v. Whitten*, 92 N. E. 79, 80, 82 Ohio St. 174.

The two elements peculiar to "larceny" from the person in the nighttime are that it must be "from the person" and "in the nighttime"; and, upon information for larceny from the person in the nighttime, a verdict of larceny from "a" person in the nighttime is insufficient. *State v. McGee*, 80 S. W. 899, 900, 181 Mo. 312.

**LARD**

Where "lard" compound was made of cotton seed oil and oleostearine, and was generally described as lard both in trade and among consumers, proof of the theft of such compound was sufficient to sustain a conviction under an indictment charging the theft of lard, though "lard" as defined by the dictionaries and the pure food law means a product of a hog. *Roman v. State*, 142 S. W. 912, 913, 64 Tex. Cr. R. 515.

**LARGE**

See *At Large*.

A complaint for injury to a pedestrian while passing along a sidewalk on a dark night by running into a stone, in alleging that the city had permitted a "large" stone, unguarded and unprotected, to remain along the sidewalk, at the edge thereof, for a long time prior to the accident, and that it was the city's duty to guard against the danger by erecting barriers, is insufficient; it not showing the size or location of the stone, or how long it had been there, so as to make it clear that it was the city's duty to maintain barriers. The word "large," as here used, like "along" and "edge," is a relative term. It does not indicate the size or character of the stone, except in a comparative sense. *City of Vincennes v. Spees*, 74 N. E. 277, 280, 35 Ind. App. 389.

**LARGE CONSUMER**

The term "large consumer," used in a contract between a city and a water company providing that the cost of furnishing water to manufacturers and large consumers was to be estimated according to the size of the establishment, does not mean persons taking water for ordinary family use, where such persons are fully covered by a schedule based on houses having a certain number of rooms and occupied by different numbers of families, but contemplates concerns like manufacturing, which differ more or less from instances specifically provided for. *Berends v. Bellevue Water & Fuel Gaslight Co.*, 82 S. W. 983, 984, 119 Ky. 8.

**LARRY**

A "larry" is a kind of car used to haul coal from a coal mine tippie to coke ovens, and from which larry ovens are charged with coal. *Hairston v. United States Coal and Coke Co.*, 66 S. E. 473, 66 W. Va. 324.

**LASCIVIOUS**

See, also, *Lewdness*.

Character usually cannot be characterized as lascivious, wanton, or lewd unless it was intentionally calculated to incite to lust. It is thus distinguished from indecency and impropriety, which may or may not indicate

lust, depending upon the purposes or feelings of the person who is guilty of such indecency or impropriety. Indecency of conduct may tend to prove lasciviousness, but when lasciviousness is proven an unchaste character is thereby established. *State v. Hummer*, 104 N. W. 722, 724, 128 Iowa, 505.

Rev. St. § 3893, declares every obscene, lewd, or lascivious book, pamphlet, print, or other publication of an indecent character, or notices giving information for obtaining such publications, to be nonmailable matter, and prescribes a punishment for the use of the mails to transmit or circulate the same. Held, that the words "obscene," "lewd," and "lascivious," as used in such section, signify that form of immorality which has relation to sexual impurity, having the same meaning as is given them at common law in prosecutions for obscene libel. *Hanson v. United States*, 157 Fed. 749, 750, 85 C. C. A. 325.

"Lasciviousness" is defined as wantonness or lewdness. *State v. Hummer*, 104 N. W. 722, 723, 128 Iowa, 505 (citing *Ex parte Doran*, 32 Fed. 76; *United States v. Clarke*, 38 Fed. 732; *United States v. Durant*, 46 Fed. 753; *State v. Lawrence*, 27 N. W. 126, 19 Neb. 307).

**LAST**

See *Same as Last*.

**LAST ADJUSTED VALUATION**

Under Act April 12, 1905 (P. L. 142), providing for the levy of a road tax on "the last adjusted valuation" for county purposes, there is no such valuation until the county commissioners have corrected the assessor's return, and the board of revision has given the taxpayers opportunity to object. *H. C. Frick Coke Co. v. Mt. Pleasant Tp.*, 71 Atl. 930, 931, 222 Pa. 451.

**LAST ASSESSMENT**

The "last county assessment," contemplated by Kirby's Dig. § 5683, providing that no single improvement shall be undertaken which exceeds in cost 20 per cent. of the value of the property in the improvement district as shown by the "last county assessment," includes the valuation added by the county board of equalization, and where the value is thus increased before the board of improvement of a city reports the estimated cost of an improvement, and before the passage of an ordinance levying the assessment to pay for the improvement, such increased value must be considered. *Board of Improvement Dist. No. 5 of Texarkana v. Offenhauser*, 105 S. W. 265, 268, 84 Ark. 257.

**LAST CLEAR CHANCE**

See, also, *Discovered Negligence; Discovered Peril; Humanitarian Doctrine*.

The doctrine of the "last clear chance," generally attributed to the case of *Davies v. Mann*, 10 Mees. & W. Rep. 546, in which the

owner of a donkey, who negligently turned it out on the highway with its feet hobbled, was allowed, notwithstanding his own negligence, to recover from a person driving along the highway who carelessly ran into and killed it, is that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of the injured party's own negligence. *Pilmer v. Boise Traction Co.*, 94 Pac. 437, 438, 14 Idaho, 327, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161.

"The last clear chance doctrine" arises where plaintiff has been negligent in placing himself in a position of danger, but that negligence has spent its force at the time he received an injury owing to the negligence of defendant. *Scholl v. Belcher*, 127 Pac. 968, 975, 63 Or. 310.

Under the "last clear chance doctrine," one is liable for injury negligently inflicted upon another, though the injured person by his own negligence put himself in the place of danger, if the person inflicting the injuries saw the peril in time to have avoided the accident by using ordinary care. *Cerrano v. Portland Ry., Light & Power Co.*, 126 Pac. 37, 40, 62 Or. 421.

The "last clear chance" to avoid injury is the last opportunity to avoid the danger, by one of the parties learning of it, and knowing that the safety of the other depends solely upon his conduct, and the rule does not apply where the act of the injured party and the defendant are substantially concurrent. *Indianapolis St. R. Co. v. Bolin*, 78 N. E. 210, 213, 215, 39 Ind. App. 169.

The "last clear chance" doctrine, which is the rule that, notwithstanding the injured person's original negligence, the defendant is liable if, by the exercise of ordinary care, he might have discovered plaintiff's peril in time to have avoided the injury, is in conflict with the contributory negligence rule. *Chicago, B. & Q. R. Co. v. Lilley*, 93 N. W. 1012, 1016, 4 Neb. (Unof.) 286.

"Last clear chance" is the doctrine that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet, if the defendant could, in the result, by the exercise of proper care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. *McClanahan v. Vicksburg, S. & P. R. Co.*, 35 South. 902, 906, 111 La. 781.

If the negligence of both parties cooperate there is usually no liability, except for the "humanitarian or 'last chance' doctrine," which means that, though the injured party may have been negligent in placing himself in a position of peril, yet if defendant, by ordinary care, did see, or could see, him in time to have averted injury,

defendant is liable. *Matz v. Missouri Pac. Ry. Co.*, 117 S. W. 584, 591, 217 Mo. 275.

The doctrine of "last clear chance" is not limited to cases where the peril of the person injured has been actually discovered by those causing the injury, but extending to cases where the peril could have been discovered by the exercise of reasonable care on their part. The duty to exercise due care to avoid the consequence of another's negligence arises when the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. *Nichols v. Chicago, B. & Q. R. Co.*, 98 Pac. 808, 814, 44 Colo. 501.

The "last clear chance" doctrine is somewhat of an exception to the general rule of law, by which an injury caused by the joint negligence of the wrongdoer and the person injured is not actionable. *Murphy v. Wabash R. Co. (Mo.)* 128 S. W. 481, 485.

The doctrine of the "last clear chance" does not involve the recognition of liability in case of concurrent negligence, and does not involve a case of comparative negligence, but requires one to use reasonable care not to injure another in the condition in which the latter has placed himself, though the latter is guilty of negligence in putting himself in a place of danger avoidable by reasonable precautions. *Welsh v. Tri-City Ry. Co.*, 128 N. W. 1118, 1119, 148 Iowa, 200.

The exception to the general rule making contributory negligence a defense, known as the "last chance doctrine," does not apply where there is no negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence is continuous and operative down to the moment of the injury, or where his negligence or position of danger is not discovered by the defendant in time to avoid the injury. *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 43, 90 C. C. A. 459.

The rule of "the last clear chance" implies that the one charged with negligence knew the person injured was in a place of danger and negligently failed to avoid injuring him; but his testimony that he did not have such knowledge is not conclusive. Such knowledge may be shown by proof that the person injured was in a situation of imminent danger, and so situated that the one injuring him, if he used his senses as human beings ordinarily do, must have known the danger. *Zitnik v. Union Pac. R. Co.*, 136 N. W. 995, 997, 91 Neb. 679.

The doctrine of "last clear chance" cannot be applied where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them. *Rowe v. Southern California Ry. Co.*, 87 Pac. 220, 221, 4 Cal. App. 1 (citing *Holmes v. South Pac. Coast Ry.*, 31 Pac. 834, 97 Cal. 169).

The "last clear chance doctrine" applies to the facts of the particular case, and the doctrine is applicable if it appears that plaintiff was negligent and the defendant was not negligent in bringing about the dangerous situation, but saw or might have seen plaintiff's peril in time to prevent the injury. *McGee v. Wabash R. Co.*, 114 S. W. 33, 35, 214 Mo. 530.

The doctrine of "last clear chance" is an exception to the general rule that contributory negligence of the person injured will bar recovery without reference to the degree of negligence, and under the doctrine, an injured person may recover from the injury resulting from the negligence of another though his own negligence exposed him to the danger of injury, if the injury was more immediately caused by want of care on the other's part to avoid the injury after discovering the peril of the person injured. *Clark v. St. Louis & S. F. R. Co.*, 108 Pac. 361, 363, 24 Okl. 764.

The doctrine of the "last clear chance" rests upon the principle that there is something in the plaintiff's condition or situation to admonish the defendant that he is not able to protect himself. It is the doctrine of prior and subsequent negligence, or remote and proximate cause, and presupposes the intervention of an appreciable interval of time between the prior negligence of the plaintiff and the subsequent negligence of the defendant. It applies notwithstanding the contributory negligence of the plaintiff when the defendant knows, or by the exercise of ordinary care ought to know, of plaintiff's danger, and fails to do something which it has power to do to avoid the injury, or when the plaintiff is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot and the defendant can prevent a resulting injury. *Roanoke Ry. & Electric Co. v. Carroll*, 72 S. E. 125, 127, 112 Va. 598.

"The party who has the last opportunity of avoiding an accident is not excused by the negligence of any one else. His negligence, and not that of the one first in fault, is the proximate cause of the injury." Again it has been stated in this way: "Where both parties are negligent, the one that has the last clear opportunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible for it; his negligence being deemed the direct and proximate cause of it." The rule is bottomed sometimes upon one proposition, and sometimes upon the other, and sometimes upon both. The first is that in such cases defendant's negligence, instead of being concurrent, is the sole and proximate cause of the injury, and the other is that plaintiff's negligence is no defense to wanton or willful negligence. When bottomed solely upon the last proposition, to wit,

wantonness or willfulness, it is apparent that something more than the want of ordinary care is necessary. The injury must either be willful, or, as said in some cases, be due to such gross negligence as that wantonness or willfulness may be inferred. When bottomed upon the former proposition—that is to say, upon the doctrine that defendant's negligence, being last in point of time, is the proximate, and plaintiff's precedent negligence the remote, cause—neither wantonness nor willfulness nor their equivalent need be shown. But it must appear in such cases that plaintiff's and defendant's negligence are not concurrent in point of time. If concurrent in this sense, then there can be no recovery save where the rule of comparative negligence obtains. *McCormick v. Ottumwa Ry. & Light Co.*, 124 N. W. 889, 892, 146 Iowa, 119.

Under the "last chance" doctrine, "though plaintiff negligently placed himself in a perilous position by driving near the track, the motorman operating the car owed the plaintiff the duty to avoid injuring him, and plaintiff's previous negligence did not bar a recovery if the injury resulted from the negligence of the motorman is not stopping or checking the car." *Deitring v. St. Louis Transit Co.*, 85 S. W. 140, 144, 109 Mo. App. 524 (quoting and adopting definition in *Sepetowski v. St. Louis Transit Co.*, 76 S. W. 693, 102 Mo. App. 119; *Morgan v. Wabash R. Co.*, 60 S. W. 195, 159 Mo. 262; *Hutchinson v. St. Louis & M. R. Co.*, 88 Mo. App. loc. cit. 383).

The theory of the last chance doctrine, which applies only where there is negligence of defendant subsequent to the negligence of plaintiff, so that defendant's negligence is the proximate cause of the injury notwithstanding plaintiff's prior negligence, is not submitted by instructions that plaintiff could recover if she, in attempting to cross a street, and while crossing it, was exercising ordinary care to avoid injury, and defendant's driver negligently failed to give warning of her danger, or negligently failed to stop the team after he could have seen by the exercise of ordinary care that plaintiff was in danger of collision with the team. *Vaughn v. Wm. J. Lemp Brewing Co. (Mo.)* 132 S. W. 293, 297.

What is termed as the "last chance doctrine" is the doctrine to the effect that in cases of contributory negligence he who has the last clear opportunity to avoid inflicting an injury is responsible if in the exercise of ordinary care he fails to do so. Where those in charge of a locomotive saw plaintiff's team slowly approaching a crossing 150 feet away, they were not chargeable with negligence in failing to check the train, but were entitled to presume plaintiff would stop. *Lambert v. Southern Pac. R. Co.*, 79 Pac. 873, 875, 146 Cal. 231.

An instruction that if the jury find from the evidence that plaintiff was negligent in attempting to cross the street, yet if they further find that defendant's agent or servant in charge of the car alleged to have inflicted the injury, either saw, or by the exercise of ordinary care could have seen, the danger of plaintiff's position in time to have avoided the collision, but failed to exercise care and negligently allowed the car to collide with plaintiff and injure her, then plaintiff is entitled to recover, presented what is known as the "humanitarian" or "last chance" doctrine. *Hough v. St. Louis Car Co.*, 123 S. W. 83, 86, 146 Mo. App. 58.

The doctrine of the "last chance," or "last clear chance," makes it necessary for the servants of a railway company, after they see the danger of a person who has negligently come upon the track, to avoid injuring him. To this end, the servants of the railway company are bound to keep a vigilant lookout in front of advancing engines or trains in order to discover persons exposed to danger on highway crossings, or at other places where they have a legal right to be, and the railway company will be liable for running over them if, by maintaining such a lookout and by using reasonable care and exertion to check or stop its train, it could avoid injury to them. The doctrine applies where the negligence of the person injured is remote and that of the railway company proximate, for if both be negligent, and the negligence of both be concurrent and directly contributing to produce the accident, then the case is one of contributory negligence pure and simple. If, however, the negligence of the person injured merely puts him in the place of danger and stops there and does not actively continue until the moment of the accident, and the railway company either knew of his danger, or by the exercise of such diligence as the law imposes would have known it, then, if the negligence of the person injured did not concurrently combine with that of the railway company to produce the injury, the company's negligence is the proximate cause, and that of the person injured is the remote cause. *Drown v. Northern Ohio Traction Co.*, 81 N. E. 328, 328, 76 Ohio St. 234, 10 L. R. A. (N. S.) 421, 118 Am. St. Rep. 844.

The "last clear chance" doctrine is thus defined in *Thompson on Negligence*, 449; "When it is said, in case where the plaintiff has been guilty of contributory negligence, that the company is liable if by the exercise of ordinary care it could have prevented the accident, it is understood that it will be so liable if by the exercise of reasonable care, after a discovery by defendant of the danger in which the party stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employes, when the exercise of ordinary care would have dis-

covered the danger and averted the calamity." This rule calls for "ordinary care" and not for extraordinary care, and the use of all possible precautions; and where plaintiff stepped onto the track in front of some cars moving towards him by gravity under control of the brakes alone, the mere fact that the crew of the switching engine standing close by, on a parallel track, did not sound either whistle or bell, but attempted to warn him by shouting to him, was not negligence on their part which would create a liability under the "last clear chance" doctrine, but at most an error of judgment in an emergency created by plaintiff's own act, especially where plaintiff heard but did not heed the shouts. *Jones v. Sibley, L. B. & S. R. Co.*, 46 South. 61, 64, 121 La. 39 (citing *Harlan v. St. Louis, K. C. & N. Ry. Co.*, 65 Mo. 22).

In an action for injuries to a person on the track of an electric street railway, an instruction that the motorman must use diligence to avoid danger to a person on the track, and that the car must be stopped, if there is time to stop it, where the person is in a dangerous position, and if there was time, in the exercise of ordinary care, for a motorman to have stopped the car after seeing, or after he was bound to see, with ordinary care, the dangerous position of the person on the track, and failed to check the speed of the car, then the defendant was guilty of negligence, is not objectionable in not properly stating the theory of "the last clear chance." *Indianapolis St. Ry. Co. v. Seerley*, 72 N. E. 169, 1034, 35 Ind. App. 467.

The rule that one's neglect to discover peril of another is to be held to be the sole proximate cause of resulting injury is not an arbitrary but a reasonable one. The test is: What wrongful conduct occasioning an injury was in operation at the very moment it occurred or became inevitable? If just before the climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power and each neglected to use it, then their negligence was concurrent, and neither can recover of the other. The doctrine of "last clear chance" will not be extended to cases where the plaintiff's own negligence extended up to and actually contributed to the injury. To warrant its application there must have been some new breach of duty upon the part of the defendant subsequent to the plaintiff's negligence. In an action for damages for the death of a railroad employe who was run over by an engine while at work on the track, where there was no evidence to show whether he looked and listened, an instruction that, if the employe in charge of the engine could by the exercise of reasonable diligence have seen deceased on the track in sufficient time to have stopped the engine and avoided the injury, plaintiff will be entitled to recover, notwithstanding

deceased was negligent in failing to see the approach of a train, was erroneous. *Missouri Pac. R. Co. v. Bentley*, 93 Pac. 150, 152, 78 Kan. 221 (quoting and adopting definition in *Dyerson v. Union Pac. R. Co.*, 87 Pac. 680, 74 Kan. 528, 7 L. R. A. [N. S.] 132, 11 Ann. Cas. 207).

The engineer of a train who has given the danger signal, commencing when a trackman was seen on the track 600 feet away, and, as soon as he discovers that the man is apparently unconscious of the approach of the train, adopts every possible means to avert the accident, by sounding bell and whistle and reversing the engine and putting on the air brakes, has done his full duty, as respects "the last clear chance." *Hoffard v. Illinois Cent. R. Co.*, 110 N. W. 446, 450, 138 Iowa, 543, 16 L. R. A. (N. S.) 797.

As applied to an action for injuries to a traveler in a collision with a street car, the doctrine of the "last clear chance" is that, even assuming the negligence of plaintiff contributed to the injury of which he complains, still if, after the occurrence of such contributory negligence, the employes of defendant saw the dangerous condition in which plaintiff was placed, and by the exercise of ordinary care could have stopped the car, and so have avoided injuring him, and failed to do so, the defendant is responsible. *Henderson v. Los Angeles Traction Co.*, 89 Pac. 976, 980, 150 Cal. 689.

The theory of the "last clear opportunity," in the case of injury to one on the track by being struck by the engine, is that the engineer saw the party injured and realized her perilous situation and had ample opportunity to have avoided the accident by the exercise of reasonable caution and care. *Zipperlen v. Southern Pac. Co.*, 93 Pac. 1049, 1053, 7 Cal. App. 206.

Under the doctrine of the "last clear chance," where negligence of defendant is the proximate cause of the injury for which suit is brought, and that of plaintiff a remote cause only, the plaintiff may recover. In the case of a person injured at a street railway crossing, if the motorman saw, or could have seen by the exercise of ordinary care, the situation of the person in time to have avoided injuring him, and fails to do so, the railroad company is liable for his injury, and, notwithstanding the negligence of the person in placing himself in a position of peril, under the doctrine of the "last clear chance," this operates as an exception to the general rule forbidding recovery by plaintiff guilty of contributory negligence. It is no departure from just principles, but a wholesome and humane doctrine, to hold that if after the defendant knew, or in the exercise of ordinary care ought to have known, of plaintiff's negligence, he could have avoided the accident, but failed to do so, the plaintiff can recover. *Grass v. Ft. Wayne & W. Val.*

*Traction Co.*, 81 N. E. 514, 517, 42 Ind. App. 395 (citing *Indianapolis Traction & Terminal Co. v. Kidd*, 79 N. E. 347, 350, 167 Ind. 402, 7 L. R. A. (N. S.) 143, 10 Ann. Cas. 942).

In an action for injuries to a person on the track of an electric street railway, an instruction that the motorman must use diligence to avoid danger to a person on the track, and that the car must be stopped, if there is time to stop it, where the person is in a dangerous position, and if there was time, in the exercise of ordinary care, for a motorman, to have stopped the car after seeing, or after he was bound to see, with ordinary care, the dangerous position of the person on the track, and failed to check the speed of the car, then the defendant was guilty of negligence, is not objectionable in not properly stating the theory of the "last clear chance." *Indianapolis St. Ry. Co. v. Seerley*, 72 N. E. 169, 170, 35 Ind. App. 467.

The doctrine of the "last clear chance" means that notwithstanding the previous negligence of plaintiff, if at the time of the injury it might have been avoided by the exercise of reasonable care on the part of defendant, defendant will be liable for the failure to exercise such care. Hence, where a passenger, a girl under 14 years of age, unaccustomed to riding on street cars, becomes frightened by the negligence of the defendant's servants in carrying such passenger past her known destination, and the conductor knows, or by the exercise of due care and diligence under the circumstances should know, of such passenger's frightened condition, and that she is about to leave the moving car, it is his duty to exercise the highest degree of care possible under the circumstances to prevent such passenger from alighting from the moving car. *Kruger v. Omaha & C. B. St. Ry. Co.*, 114 N. W. 571, 573, 80 Neb. 490, 17 L. R. A. (N. S.) 101, 127 Am. St. Rep. 786.

#### LAST DESCRIBED

A deed from a tax collector to the territory, which recites the assessment and levy of taxes for the year on property described as "Cabin and Lot 6 of Block 60 and Cabin and Lot 7 of Block 60" of a city and on personal property, and which states that the taxes were delinquent, and that the property was sold to the territory, and which conveys to the territory "all that lot \* \* \* of land \* \* \* above and last described in this deed," conveys only lot 7. *Abell v. Swain*, 100 Pac. 831, 832, 12 Ariz. 421.

The phrase "last herein described," in a finding that a bankrupt was the owner of a business, together with a leasehold interest of the premises and the furniture contained therein, and the good will of the business, and that he had sold the property "last herein described," confines the sale by the bankrupt to a sale of the good will of his business and the furniture used in connection there-

with, and not a sale of his leasehold interest. *Leist v. Dierssen*, 88 Pac. 812, 814, 4 Cal. App. 634.

The rule that the expression, "the real property last hereinbefore described," used in the granting part of a tax deed, includes only one tract of several described in the deed, applies only where the last description is of a single tract which is segregated from the others and described wholly apart from them for some independent purpose, and where no language intervenes between such description and the operative words of the grant which will extend the application of the word beyond that tract. *King v. Gibson*, 113 Pac. 429, 430, 84 Kan. 29.

#### **LAST GENERAL ELECTION**

See General Election.

#### **LAST KNOWN ADDRESS**

Under Pol. Code, § 3650, which requires an assessor to state in the assessment of property the name and post office address, if known, of the person to whom the property is assessed, the address shown on the last assessment constitutes the last known post office address so far as the tax records are concerned, and, in the absence of other information, the tax collector must take notice of the address so shown and mail the notice of resale to such address. *Campbell v. Moran*, 119 Pac. 89, 90, 161 Cal. 325.

#### **LAST PLACE OF ABODE**

A service of a writ of scire facias, in a suit commenced in Massachusetts, by the officer's leaving a copy therefor at the "last and usual place of abode" of a trustee in that state, according to the laws of the state, was sufficient, though prior to such service he had removed to a neighboring state. *Adams v. Rowe*, 11 Me. 89, 90, 25 Am. Dec. 266.

#### **LAST PORT OF DISCHARGE**

See Final Port of Discharge.

#### **LAST PRECEDING**

The term "last preceding," in a statute providing that when the common council in any city, having at the "last preceding" state census more than 50,000 inhabitants, shall consider it necessary to procure grounds for a public market, such council shall appoint a committee, refers to the state census which may immediately precede in point of time the action of the council, and the law is general. *State ex rel. Board of Education of City of Minneapolis v. Brown*, 106 N. W. 477, 480, 97 Minn. 402, 5 L. R. A. (N. S.) 327.

#### **LAST PUBLICATION**

In Comp. Laws N. M. 1897, §§ 2956, 2967, relating to a publication of a notice, and requiring the last publication at least two weeks before the return day, by "last publication" the last act of making the notice public—the last insertion in a newspaper pre-

scribed—was intended, not the last day of the period for which the publication was directed. *Harrison v. Wallis*, 90 N. Y. Supp. 44, 49, 44 Misc. Rep. 492.

#### **LAST SESSION**

In a statute providing that supervisors might, at their last session before regular election, etc., "last session" means the last regular session appointed by law. It has no reference to special sessions called for some specific purpose. The "session" includes the entire sittings of the board, from the meeting on the first day till the final adjournment. *Tuohy v. Chase*, 30 Cal. 524, 527.

#### **LAST SICKNESS**

See During Last Sickness.

The term "last sickness," as used in statutes of wills, means where the testator is in extremis, or overtaken by a sudden and violent sickness, and has not time nor opportunity to make a written will. A nuncupative will is made "at the time of the last sickness," as required by Ballinger's Ann. Codes & St. § 4605, though not made when testator is in extremis, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will, where made when the last sickness has so progressed that testator expects death, and is liable to die at any time, and in view of, and as preparatory to, such result, which followed, he made the verbal will, and this without regard to his opportunity then or afterwards to make a written will. In *re Miller's Estate*, 91 Pac. 967, 47 Wash. 253, 13 L. R. A. (N. S.) 1092, 125 Am. St. Rep. 904, 14 Ann. Cas. 1163 (quoting and adopting the definition in *Prince v. Hazelton* [N. Y.] 20 Johns. 502, 11 Am. Dec. 307).

Where a verbal will is made in the last sickness, of which the testator dies, when such sickness has progressed to such a point that he expects death at any time, and realizes that he is liable to die therefrom at any time, and in view of such expected death, and as preparatory thereto, makes a will near to the time of his death, such will is made in the "last sickness" of the testator, although a sufficient time may have intervened between the making of the oral will and the death of the testator to have permitted the making of a written will. *Godfrey v. Smith*, 103 N. W. 450, 455, 73 Neb. 756, 10 Ann. Cas. 1128.

"Last sickness," as the term is used in statutes allowing a verbal will to be made in the "last sickness" of the testator, does not mean that he must be in extremis or articulo mortis, nor is it necessary that he be prevented from making a written will by surprise of sudden death. The requirement is satisfied if the disease of which the testator dies has progressed to such a point that he expects death at any time and is liable to die therefrom at any time, and in view of such expected death and as preparatory



thereto such will is made, and that thereafter death from such sickness does occur. *Baird v. Baird*, 79 Pac. 163, 165, 70 Kan. 564, 68 L. R. A. 627, 3 Ann. Cas. 312.

## LATE

The word "late," as used in an officer's return of service of the summons by leaving at defendant's "late place of residence" means formerly, recently, existing not long ago. "Late" is defined as "existing not long ago; not long ago but not now." The term "late place of residence" evidently meant the place where the defendant had recently resided but did not then reside, and hence the return did not show compliance with the statute requiring service by leaving at defendant's usual place of residence. *Minnesota Thresher Mfg. Co. v. L'Heureux*, 118 N. W. 565, 566, 82 Neb. 692 (quoting and adopting definitions in 25 Cyc. p. 161; *Webst. Dict.*).

## LATELY PENDING

Where an exhibit in the record recited that certain chancery causes were "lately pending" in a certain circuit court, such recital did not show that such causes were still on docket. *Scott v. Thomas*, 51 S. E. 829, 831, 104 Va. 330.

An order-book entry of final judgment is essential to show in the record on appeal rendition thereof. Reference to the cause, in the clerk's certificate, as one "lately pending" in the court below, is not enough. *Chicago Horseshoe Co. of Indiana v. Gostlin*, 66 N. E. 514, 515, 30 Ind. App. 504.

## LATENT

"Latent" means not discernible by examination. *Anderson v. Van Riper*, 128 N. Y. Supp. 66, 67.

## LATENT AMBIGUITY

A "latent ambiguity" is one developed by extrinsic evidence, where the particular words, in themselves clear, apply equally well to two different meanings. *Wolff Truck Frame Co. v. American Steel Foundries*, 195 Fed. 940, 944, 115 C. C. A. 628 (citing definition in *Petrie v. Trustees of Hamilton College*, 53 N. E. 216, 158 N. Y. 458).

A "latent ambiguity," as defined by Lord Bacon, is "that which seems certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter, outside of the deed, that breedeth the ambiguity." If this double meaning is apparent on the face of the instrument, then the ambiguity is a patent one. If the language is apparently not of double meaning, but is shown to be so only by the aid of collateral or extrinsic facts, the ambiguity is "latent." *Oliver v. Henderson*, 49 S. E. 743, 121 Ga. 836, 104 Am. St. Rep. 185 (citing 1 *Jarm. Wills* [Am.

Notes] top p. 743; *Walker v. Wells*, 25 Ga. 141, 71 Am. Dec. 164).

"Latent ambiguity" arises from some collateral circumstance or extrinsic matter in a case where the language of the instrument is intelligible. *Barrett v. Kansas & Texas Coal Co.*, 79 Pac. 150, 151, 70 Kan. 649.

A "latent ambiguity" exists when, there being no defect in the description on the face of the instrument, it becomes necessary to fit the description to the thing—in other words, to identify it by parol evidence; and evidence of surrounding circumstances and inferences from such circumstances are admissible to show to which thing the ambiguous description applies. *Sherrod v. Battle*, 70 S. E. 834, 838, 154 N. C. 345.

"A 'latent ambiguity' in a will, which may be removed by extrinsic evidence, may arise (1) either when it names a person as the object of a gift, or a thing as subject to it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator." *Wheaton v. Pope*, 97 N. W. 1046, 1048, 91 Minn. 299 (quoting *Patch v. White*, 6 Sup. Ct. 617, 117 U. S. 210, 29 L. Ed. 860).

A "latent ambiguity" is one where the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts without altering or adding to the written language or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases used. *Teague v. Sowder*, 114 S. W. 484, 488, 121 Tenn. 132.

Where there is no defect on the face of a will, but there is an uncertainty in attempting to put it into effect, the ambiguity is "latent." *Jennings v. Telbert*, 58 S. E. 420-421, 77 S. C. 454.

## LATENT DEFECT

A "latent defect" is one which could not have been discovered by inspection. *L. McManus Co. v. Drexel Furniture Co.*, 68 S. E. 859, 860, 8 Ga. App. 158.

A defect in a roll of cloth sold, which consists of holes in the cloth, is not a latent defect, since it is easily discoverable. *Strauss v. Salzer*, 109 N. Y. Supp. 734, 735, 58 Misc. Rep. 573.

## LATERAL

In a statute providing that a petition to widen, deepen, and alter a ditch "shall be held to include any side 'lateral' spur or

branch ditch, drain or water course necessary to secure the object of the improvement, whether the same is mentioned therein or not," the word "lateral" does not qualify the words "branch ditch, drain or water course," and therefore, under a petition to improve a ditch extending in a southerly direction, it is proper to order the construction of a branch ditch commencing half a mile northeast of the starting point of the main ditch and intersecting the main ditch about a hundred feet from its starting point. *Omaha & N. P. R. Co. v. Sarpy County*, 117 N. W. 116, 117, 82 Neb. 140.

Sess. Laws 1905, c. 140, p. 254, § 1, requiring a "lateral passageway of at least 900 feet" between all fish traps, means that every trap must be so located that there shall be neither trap within a distance of 900 feet laterally therefrom; and a trap was not properly located where a parallelogram, formed by lines 900 feet long, projected at right angles to the ends of the trap and lines connecting the same drawn parallel to the course of the trap 900 feet on either side thereof, intersected traps previously located, though the trap in question did not intersect similar parallelograms of the prior traps. *Johansen v. Mulligan*, 83 Pac. 417, 418, 41 Wash. 379.

### LATERAL RAILROAD

"A 'lateral road' is one proceeding from some point on the main trunk between its termini." *Baltimore & O. R. Co. v. Waters*, 66 Atl. 685, 688, 105 Md. 396, 12 L. R. A. (N. S.) 326 (quoting and adopting definition in *Newhall v. Galena & C. U. R. Co.*, 14 Ill. 273).

Within the meaning of section 1 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, which provides that "any common carrier subject to the provisions of this act upon application of any lateral branch line of railroad . . . shall construct, maintain and operate upon reasonable terms, a switch connection with any such lateral branch line of railroad," etc., and further providing (as amended by Act June 18, 1910, c. 309, § 7, 36 Stat. 545) that, if it fails to make such connection on application, the Interstate Commerce Commission may, on complaint and after a hearing, order it done, whether a road is or is not a "lateral branch line of railroad," and entitled to invoke the powers of the commission, depends on the relation which it bears to the line with which switch connection is asked, and not upon its relation to the shippers or territory. It is such a lateral branch when it is tributary to and dependent on the other line for an outlet, or in other words is essentially a feeder, but not when it is in effect an independent and competing line, although it does not compete as to a portion of the territory involved, and

such dependent relation is not established by the fact that it seeks the connection at one of its terminals. *Baltimore & O. S. W. R. R. v. United States*, 195 Fed. 962, 965.

An interurban electric railway for passengers and some freight, running under a state charter between points in the state through the middle of a diamond-shaped area inclosed by two steam railways, and in its general course parallel to and more or less competing with the steam roads, and working on a different plan, is not a "lateral branch line of railroad," within the meaning of the act to regulate commerce of February 4, 1887, as amended by the act of June 18, 1910, requiring carriers subject to the act to establish switch connections with such lines on certain conditions, and permitting owners of such lines as well as shippers to make complaint to the Interstate Commerce Commission in case of the carrier's failure upon written application, and authorizing such commission to hear, investigate, and determine whether such conditions exist, and to make an order directing the carrier to comply with the act. *United States v. Baltimore & O. S. W. R. Co.*, 33 Sup. Ct. 5, 6, 226 U. S. 14, 57 L. Ed. 104.

Laws 1869, p. 2399, c. 917, §§ 3, 4, under which plaintiff railroad company was organized by the consolidation of the N. and H. Railroad Companies, provide that the consolidation shall not release the new corporation from any of the restrictions or duties of the several corporations. Laws 1846, p. 272, c. 216, creating the H. Company, authorized it to construct a single, double, or treble-track road between New York and Albany, and section 1 further authorized it to construct the branches for depot and station accommodations needed for its business. Plaintiff seeks to condemn land for 35 miles of track from its general depot in New York City for an "additional main track," and to afford a more expeditious means of handling traffic. Held, that the charter contemplated such tracks as would accommodate the depot conditions for a treble-track railroad, and the purposes of the desired track in question came within the spirit of the additional charter power to construct branches for station accommodation needed for railroad business, though it already had treble tracks over the same distance. So it is true that a "lateral or branch railroad" usually contemplates one running from some point on the main line, intended as a connecting line or feeder, to quote the *American & English Encyclopedia of Law* (volume 18, p. 561); but in the present case the statute itself defines the branch or branches to be constructed, and these are "for depot and station accommodations, as may be required for the business of said railroad." *New York Cent. & H. R. R. Co. v. Untermeyer*, 117 N. Y. Supp. 443, 446, 133 App. Div. 146.

A "lateral railroad" built under the lateral railroad law (Burns' Ann. St. 1908, §§ 5398-5404) is governed by the general railroad laws so far as applicable, and is subject to governmental regulation. A railroad, to be built by a stone company, is not deprived of its character as a lateral railroad within the lateral railroad law (Burns' Ann. St. 1908, §§ 5398-5404), because it is to connect with a lateral road already existing, where the two roads together do not exceed the length fixed by the statutes and will be used as one road. *Westport Stone Co. v. Thomas*, 94 N. E. 406, 409, 175 Ind. 319, 35 L. R. A. (N. S.) 646.

The right given to a railroad company chartered to construct a railroad from the city of Baltimore to the Ohio river, to construct "lateral railroads," in any direction whatever, 'in connection with such railroad, is not, in the absence of anything in the charter to that effect, limited to construction of branches which will be feeders for the port of Baltimore, but authorizes the construction of a branch from the main line to connect with another branch, so as to take around the city of Baltimore freight going in either direction, and not intended for that city. *Baltimore & O. R. Co. v. Waters*, 66 Atl. 685, 688, 105 Md. 396, 12 L. R. A. (N. S.) 328.

#### LATERAL SUPPORT

The right of "lateral support" extends no further than to avoid negligence as to land incumbered with buildings. *Sharpless v. Boldt*, 67 Atl. 652, 658, 218 Pa. 372.

#### LAUNCH

As rigging and apparel, see *Ships' Rigging and Apparel*.

#### LAUNDRY

See *Occupied as a Steam Laundry*.

#### LAUREL

See *Japanese Laurel*.

#### LAW

See *At Law and in Equity*, *Attorney at Law*; *Authorized by Law*; *Business Required by Law*; *By-Law*; *Color of Law*; *Commercial Law*; *Common Law*; *Conclusion of Law*; *Conflict with General Law*; *Contrary to Law*; *Court of Law*; *Criminal Law*; *Custody of the Law*; *Decision Against Law*; *Due Course of Law*; *Due Process of Law*; *Election Law*; *English Law*; *Equal Protection of Law*; *Error of Law*; *Existing Law*; *General Law*; *Ignorance of Law*; *Insurance Law*; *Intestate Laws*; *Issue at Law*; *Issue of Law*; *Knowledge of the Law*;

*Learned in the Law*; *Liability Created by Law*; *Limited by Law*; *Local Law*; *Matter of Law*; *Mistake of Law*; *Municipal Law*; *Operation of Law*; *Ordinary Course of Law*; *Organic Law*; *Penal Laws*; *Practice (In Law)*; *Practice of Law*; *Prescribed by Law or Ordinance*; *Presumption of Law*; *Previously Ascertained by Law*; *Provided by Law*; *Provisions of Law*; *Remedial Law*; *Retrospective Law*; *Returnable According to Law*; *Revenue Law*; *Seisin in Law*; *Session Laws*; *Special Law*; *Specially Prescribed by Law*; *Statute*; *Stock Law*; *Substantive Law*; *Surrender by Operation of Law*; *Trial at Law*; *Under the Laws*; *Uniform Operation of Laws*.

As regulation, see *Regulation*.

Ex post facto law, see *Ex Post Facto*.

Law of necessity, see *Police Power*.

Otherwise provided by law, see *Otherwise*.

Prohibited by law, or otherwise, see *Otherwise*.

Remedy at law, see *Remedy*.

Similar law, see *Similar*.

See, also, *Act (In Legislation)*.

"Law," according to an ancient maxim, "is good sense, and what is contrary to good sense is not good law." *Burke v. State*, 119 N. Y. Supp. 1089, 1099, 64 Misc. Rep. 558.

"Law" is a rule of civil conduct prescribed by the supreme power, says Blackstone. It can never properly be a law, unless notified to those who are to obey it. *Ingersoll v. Coal Creek Coal Co.*, 98 S. W. 178, 185, 117 Tenn. 263, 9 L. R. A. (N. S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829 (citing *Green Bag*, Oct. 1906).

"Law" might be defined as the aggregate of those rules and principles of conduct promulgated by legislative authority or established by local custom, and our laws are the resultant derived from a combination of the divine or moral laws, the laws of nature and human experience, as such resultant has been evolved by human intellect influenced by the virtues of the ages. *State v. Central Lumber Co.*, 123 N. W. 504, 508, 24 S. L. 136, 42 L. R. A. (N. S.) 804.

"Law" is defined to be a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong. The laws of a state are more usually understood to mean the rules and enactments promulgated by legislative authority or long-established local customs having the force of law. *Henry v. Cherry & Webb*, 73 Atl. 97, 105, 30 R. I. 13, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

"Legislative power," within Const. art. 4, § 1 (Ann. St. 1906, p. 175), providing that the legislative power shall be vested in the General Assembly, is the power to make laws;

a "law" is a rule of civil conduct prescribed by the supreme power of a state; a "rule" is distinguished from whim, caprice, compact, agreement, or discretion, and "prescribed" means that the rule shall be manifested and published, so as to be known as a rule of civil conduct. *Merchants' Exchange of St. Louis v. Knott*, 111 S. W. 565, 571, 212 Mo. 616.

"Law" is something more than mere will exerted as an act of power. In the language of Mr. Webster in his famous definition: "It is the general law, the law which hears before it condemns, which proceeds upon inquiry to render judgment after trial so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." It is not every act of legislation in form that is law. *Jamison v. Wimbish*, 130 Fed. 351, 358 (quoting *Hurtado v. People of California*, 4 Sup. Ct. 111, 110 U. S. 535, 28 L. Ed. 232).

The phrase, "which may by law be brought before him," used in a statute defining the offense of bribery, and making it a material element thereof that the offered bribe shall be on a question which may by law be brought before the person sought to be bribed in his official capacity, means a law in force at the time of the offered bribe. *State v. Butler*, 77 S. W. 560, 572, 178 Mo. 272.

It is not every act, legislative in form, that is "law." "Law" is something more than mere will asserted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains, and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. In re *McNaught*, 99 Pac. 241, 247, 1 Okl. Cr. 528 (quoting with approval from *Hurtado v. California*, 4 Sup. Ct. 111, 110 U. S. 516, 28 L. Ed. 232).

The rule that equity will not reform a deed on the ground of mistake where the mistake is one of law applies only where the word "law" is used in the sense of general law, or law of the country, and does not apply where it is used in the sense of a private

right, for in such case the mistake is really one of fact. *Marshall v. Lane*, 27 App. D. C. 276, 280.

To have the force of "law," a rule must possess the quality of uniformity and universality and must operate upon all improvements of the entire political community affected by it alike. "Laws" are not like garments which citizen and judge may put on and off at will. A law for a section of the state is not a law of the land, and modification of the common law to meet the conditions and wants of individuals in localities would not constitute modifications to meet the conditions and wants of the people. Nothing less than the welfare of the whole people can be considered, and the sovereignty of society at large must be behind the adoption and enforcement of any rule or it is not law. *Clark v. Allaman*, 80 Pac. 571, 580, 71 Kan. 206, 70 L. R. A. 971 (citing 1 Black. Com. 45).

Regulations prescribed by the Secretary of Agriculture for the inspection, disposition, etc., of cattle, sheep, etc., and the carcasses and meat food products of cattle sheep, etc., not inconsistent with Act Cong. June 30, 1906, c. 3913, 34 Stat. 674, authorizing such regulations, had the force of "law." *State v. Peet*, 68 Atl. 661, 663, 80 Vt. 449, 14 L. R. A. (N. S.) 677, 130 Am. St. Rep. 998.

"Law" is a statement of the circumstances, in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the lawmaker, except in extraordinary cases. It is true that domestic corporations remain always within the power of the domestic law." Acts done by domestic corporation outside of the United States, which largely depend for their efficacy upon the co-operation, in a conspiracy to drive a rival out of business, of soldiers and officials in Costa Rica, acting under governmental sanction, in territory over which that state exercises a de facto sovereignty, cannot be made the basis of the action to recover threefold damages authorized by the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209, 210, c. 647) § 7, on behalf of those injured in their business by reason of violations of that statute. *American Banana Co. v. United Fruit Co.*, 29 Sup. Ct. 511, 512, 213 U. S. 347, 356, 33 L. Ed. 828, 16 Ann. Cas. 1047.

Under Const. art. 6, § 23, making the county court a tribunal of limited jurisdiction, and after designating certain matters of which it shall have cognizance adds and

such court and criminal jurisdiction as may be conferred by "law," and section 28 of the same article, requiring that all laws relating to courts shall be general and of uniform operation throughout the state and the organization, jurisdiction, powers, proceedings, and practice of all the courts of the same class or grade so far as regulated by "law" shall be uniform. The word "law," as that word is used in section 23, obviously means law which is enacted by the legislative department of the state government which the Constitution has created, and "law" found in section 28 is of the same character. Const. art. 20, provides for the organization of the city and county of Denver. By section 4 of the article the people of the new organization are vested with the exclusive power to make their own municipal charter, and under this constitutional authority a charter was adopted. Section 182 of the charter provides that all cases of contested elections shall be tried by the county court, with certain exceptions. Const. art. 6, § 23, makes of the county court a tribunal of limited jurisdiction, not including matters of election contests. Section 28 provides that all laws relating to courts shall be of uniform operation throughout the state. Const. art. 7, § 11, provides that the General Assembly shall pass laws to secure the purity of the elections. Section 12 that the General Assembly shall by general law designate the courts by whom the election contests not therein provided for shall be tried. Held, that legislation relating to the jurisdiction and procedure of the state courts is exclusively within the purview of the General Assembly, and that section 182 of the charter is void. Hence the county courts did not have jurisdiction of a proceeding to contest an election on the proposition of granting certain franchises in the city streets. *Williams v. People*, 88 Pac. 463, 465, 38 Colo. 497.

Const. 1901, § 45, providing that no "law" shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be enacted and published at length, reaches only those cases where the act is strictly amendatory or revisory in its character; and if a law is in itself complete, intelligible, and original in form, it does not fall within the meaning of the Constitution. *Miller v. Griffith*, 54 South. 650, 651, 171 Ala. 337.

"There is no merit in the contention that section 222 of the Constitution prohibits the passage of a single law covering the issuance of bonds, and that it requires that more than one law should be passed to authorize a city or town to issue the bonds. The authority to the Legislature, given by this section, is to pass general laws authorizing counties, cities, towns, villages, districts, or other political subdivisions of counties, to issue bonds; and the plural word 'laws' was employed mani-

festly for the purpose of allowing the Legislature to pass a different act for cities, towns, and villages, and another act for counties and political subdivisions of counties. If the plural had not been used, and the Legislature had been simply authorized to pass a general law, then it would have been compelled to pass one general law, applying alike to cities and counties. *Blakey v. City Council of Montgomery*, 39 South. 745, 746, 144 Ala. 481.

#### As domestic laws

The statutes of a state have no extraterritorial force, and are not "law" in another state, in the ordinary sense of the term. *Mutual Life Ins. Co. of New York v. Prewitt*, 105 S. W. 463, 465, 127 Ky. 399.

#### By-laws of corporation

That a day fixed by the by-laws of a corporation for the regular monthly meeting of the directors fell on a holiday did not warrant a meeting the next day, where the by-laws made no such provision; Civ. Code, § 11, permitting an act appointed by "law or contract" to be performed on a particular day, which falls on a holiday, to be performed on the next business day, being inapplicable. *Cheney v. Canfield*, 111 Pac. 92, 93, 158 Cal. 342, 32 L. R. A. (N. S.) 16.

#### Constitutions and amendments

The word "law," in Const. 1867, art. 2, § 17, declaring that a bill shall, before it becomes a law, be presented to the Governor, etc., does not include a proposed constitutional amendment authorized by article 14, empowering the General Assembly to propose constitutional amendments, and a proposed constitutional amendment adopted by the General Assembly need not be submitted to the Governor for his approval. *Warfield v. Vandiver*, 60 Atl. 538, 540, 101 Md. 78, 4 Ann. Cas. 692.

The term "law," as used in Const. art. 5, § 31, providing that no law shall extend the term of any public officer after his election, does not refer to the Constitution and the will of the people expressed at the polls in the matter of proposed amendments to that instrument, but relates to statutes enacted by the Legislature. *State ex rel. Teague v. Board of Com'rs of Silver Bow County*, 87 Pac. 450, 451, 34 Mont. 426.

The state and federal Constitutions are "laws," within How. Ann. St. c. 164, § 4, giving mutual benefit associations power to make regulations for their own government not contrary to the laws of the United States or this state. *Kern v. Arbeiter Unterstuetzungs Verein*, 102 N. W. 746, 750, 139 Mich. 233.

#### Decisions

Where a statute or decisions of the courts authorizes a revision on the ground that the verdict is contrary to the "law," the "law" referred to means the "law" of that case as

given by the court, whether right or wrong. *Lynch v. Snead Architectural Iron Works*, 116 S. W. 693, 695, 696, 132 Ky. 241, 21 L. R. A. (N. S.) 852.

A judicial decision is not a "law." It is merely evidence of what the law is, and a change of decision is not the promulgation of a new law. Hence the constitutional provision as to laws impairing the obligations of contracts does not apply to judicial decisions. *Swanson v. City of Ottumwa*, 106 N. W. 9, 13, 131 Iowa, 540, 5 L. R. A. (N. S.) 860, 9 Ann. Cas. 1117.

#### **Municipal ordinance**

Ordinance distinguished, see Ordinance.

"Ordinances" are mere rules or by-laws of a municipal corporation. The word "law" does not ordinarily include a municipal ordinance. *Wright v. City of Macon*, 64 S. E. 807, 813, 5 Ga. App. 750.

A city ordinance may be considered a law of the state, within the constitutional provision prohibiting the state from passing laws impairing the obligation of contracts. *Cumberland Telephone & Telegraph Co. v. City of Memphis*, 198 Fed. 955, 956.

Though an ordinance of a county requiring one engaged in the business of raising cattle to pay a license fee does not denounce failure to obtain the license as a crime, one so failing is subject to prosecution by virtue of Pen. Code, § 435, declaring guilty of a misdemeanor every person who commences or carries on any business without procuring a license required by "any law of this state" for the carrying on of the same; an ordinance being a law within such code provision. *Ex parte Miller*, 110 Pac. 139, 13 Cal. App. 564.

In Ky. St. § 3096, as amended and reenacted by Acts 1910, c. 107, providing that when, in any city of the second class having a street railway, the railway company is required by law or its franchise, or by any contract with the city, to pave any part of a street or alley, the cost shall be assessed against the company, the term "required by law" applies where the general council passes an ordinance making the requirement and such a requirement by ordinance is authorized by the act. *City of Newport v. Silva*, 137 S. W. 546, 549, 144 Ky. 450.

A municipal ordinance providing what officer of a municipality shall sign the certificate of legality to be indorsed on municipal bonds issued under authority of Rev. St. 1899, §§ 1719-1724, is a provision of "law," within the constitutional requirement that such certificate shall be indorsed on the bond of any county, etc., to be signed by the county auditor or other officer "authorized by law." *Diefenderfer v. State*, 83 Pac. 591, 593, 14 Wyo. 302.

The clause "law of this state," as used in Pen. Code, § 435, providing that every

person who commences or carries on any business, etc., for the transaction or carrying on of which a license is required, by "any law of this state," without taking out a license prescribed by such law, is guilty of a misdemeanor, includes a "county ordinance." *Plumas County v. Wheeler*, 87 Pac. 909, 913, 149 Cal. 758 (citing *In re Lawrence*, 11 Pac. 217, 69 Cal. 608).

A complaint by a city filed in the recorder's court of the city which alleges that accused committed the prohibited act within the police jurisdiction, contrary to law and in violation of an ordinance of the city, charges a violation of the ordinance, for the word "law" may include an ordinance, and accused must know that he is prosecuted for a violation of an ordinance of the city. *Dowling v. City of Troy*, 56 South. 116, 117, 1 Ala. App. 508.

A complaint by a city by its attorney which alleges that accused did the prohibited act "contrary to law" falls to charge a violation of a municipal ordinance; the phrase "contrary to law" having been appropriated by Code 1907, § 7353, to the definition in indictments of violations of statutes, and the word "law," unless otherwise qualified in a penal proceeding, presumptively referring to the common law, in the absence of a statute giving it another meaning. *Rosenberg v. City of Selma*, 52 South. 742, 743, 168 Ala. 195.

#### **Order of court**

The term "by law," as used in Ky. St. 1903, § 4129, providing that the sheriff shall be collector of all taxes unless the payment thereof is "by law" directed to be made to some officer, means a statute and does not include an order of the fiscal court. *Commonwealth v. Wade's Adm'r*, 104 S. W. 965, 966, 126 Ky. 791.

#### **Special laws**

The word "laws," in a constitutional provision that all laws not repugnant to the Constitution shall be continued in force until they expire by limitation, etc., applies to all special as well as general laws. *Butler v. City of Lewiston*, 83 Pac. 234, 236, 11 Idaho, 393.

#### **Statutes and common law**

The expressions "required by law," "allowed by law," and "limited by law," and the like, employed in a statute, refer to statutory law. *People v. Knapp*, 132 N. Y. Supp. 747, 750, 147 App. Div. 436.

A plea averring that arbitrators were sworn according to the law is not subject to the objection that it omits to aver that the arbitrators were sworn in accordance with Civ. Code 1896, § 515, since the term "law," if unqualified, except in cases involving penal matters, embraces legislative enactments, as well as the common law. *Tennessee Coal,*

*Iron & R. Co. v. Roussell*, 46 South. 866, 870, 155 Ala. 435, 130 Am. St. Rep. 56.

The term "laws," in Const. art. 3, vesting the legislative power in the Senate and House of Representatives, constituting together the General Assembly, and declaring that the style of their "laws" shall be, etc., denotes action of the General Assembly in its legislative capacity, and their style must be that of enactment, and they are the outcome of a bill for an act which has been presented to the Governor for his approval. *McGovern v. Mitchell*, 63 Atl. 433, 441, 78 Conn. 536.

The word "laws," as used in the federal statute denouncing conspiracies to commit offenses against the laws of the United States, means statutory laws. *United States v. Thomas*, 145 Fed. 74, 79.

It is a general rule of construction that, where an act of the General Assembly refers to the "laws" of its own state, the expression will be held to refer to statute law, rather than to unwritten law, unless the context requires a different construction; and especially is this true of acts which are themselves in derogation of the common law. *Southern Bell Telephone & Telegraph Co. v. Beach*, 70 S. E. 137, 138, 8 Ga. App. 720 (citing 5 Words and Phrases, pp. 4021, 4022).

#### Unconstitutional act

"An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no offense. It is in legal contemplation as inoperative as though it had never been passed." *Wright v. Davis*, 48 S. E. 170, 172, 120 Ga. 670 (quoting *Norton v. Shelby County*, 6 Sup. Ct. 1121, 118 U. S. 425, 30 L. Ed. 178).

#### LAW DAY

"Foreclosure" and "law day" are synonymous in the sense that it is the time when the mortgagor declares a default and submits his case to a court of competent jurisdiction. The word "foreclosure," as used with reference to the rule under which a mortgage is discharged by a tender before foreclosure, must be taken in the meaning which is commonly and generally accepted by the laity, as well as by the bar; that is, the institution of a suit, or the "law day," as contradistinguished from the "law day" of the common law. *Murray v. O'Brien*, 105 Pac. 840, 844, 56 Wash. 361, 28 L. R. A. (N. S.) 998.

#### LAW MERCHANT

See, also, *Commercial Law*.

There is no presumption that the so-called "law merchant," taken as a vaguely defined portion of the common law or in its widest interpretation of the law of European countries having the Roman and the Frankish law for its parents, prevails in other countries. *Aslanian v. Dostumian*, 54 N. E. 845, 846, 174 Mass. 328, 47 L. R. A. 495, 75 Am. St.

Rep. 348 (citing and adopting *Savage v. O'Neil*, 44 N. Y. 298, 300, 301; *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *Flato v. Mulhall*, 72 Mo. 522; 2 Starkie, Ev. [4th Am. Ed.] 568; Whart. Ev. §§ 314, 315, 1292; *Smith, Merc. Law* [10th Ed.] Introduction).

#### LAW OF THE CASE

The opinion delivered on a former appeal is the "law of the case." *Hocker v. Louisville & N. R. Co. (Ky.)* 96 S. W. 526, 527.

"The doctrine of 'law of the case' extends only to the questions squarely presented and distinctly passed upon on the former appeal." *Hunter v. Porter*, 77 Pac. 434, 439, 10 Idaho, 86.

A decision of the Supreme Court on appeal, is the "law of the case" on a subsequent trial, whether right or wrong. *Neary v. Northern Pac. Ry. Co.*, 110 Pac. 226, 235, 41 Mont. 480.

A decision of the Supreme Court on appeal is the "law of the case" governing the trial court on a subsequent trial. *Berger v. Metropolitan Press Printing Co.*, 111 Pac. 872, 61 Wash. 35.

The phrase "law of the case," as applied to the effect of a decision of an appellate court in an earlier appeal in the same case, merely expresses, in the absence of statute, the practice of courts generally to refuse to reopen what has been decided, and not a limit to their power. *Messinger v. Anderson*, 32 Sup. Ct. 739, 740, 225 U. S. 436, 56 L. Ed. 1152.

The opinion of the Court of Appeals is the "law of the case" on the subsequent trial. *South Covington & C. St. Ry. Co. v. Schilling (Ky.)* 89 S. W. 220, 221.

The "law of the case" is a rule of expediency, which should not be lightly disregarded; but it should be restricted to such questions as have been presented to and decided on the former appeal, and those necessarily involved in such decision, and should not apply to a mere expression of opinion in regard to matters not actually involved in the decision, nor should it apply to questions referred to by intimation only, and not determined. *First Nat. Bank of Hastings v. Farmers' & Merchants' Bank of Platte Center*, 95 N. W. 1062, 1064, 2 Neb. (Unof.) 104.

The decision of certain questions by a District Court of Appeal, with a view to further proceedings in the case, only concurred in by two of the justices of such court, does not constitute "the law of the case" for further proceedings. *Turner v. Fidelity Loan Concern*, 83 Pac. 70, 2 Cal. App. 122.

The evidence on retrial being substantially the same as on the first trial, the decision on the questions presented on the former appeal is the "law of the case" on a subsequent appeal. *Teakle v. San Pedro, L. A. & S. L.*

R. Co., 102 Pac. 635, 637, 36 Utah, 29 (citing 5 Words and Phrases, p. 4024).

A decision on appeal that, upon the facts in the record, plaintiff cannot recover, becomes the "law of the case" on a subsequent appeal, wherein the record discloses a substantially unchanged set of facts. *Thuis v. City of Vincennes*, 73 N. E. 1098, 35 Ind. App. 350.

On the first appeal of a suit concerning the title to land, the question involved was: Did a decree in a former suit to correct a deed to the land by striking therefrom the words "her bodily heirs," inserted after the name of the grantee, finding that the deed should be so corrected and the master's deed made pursuant to that decree, to correct the former deed, divest the plaintiffs, T. and S., bodily heirs of the original grantee, of the fee-simple title thereof? And it was held that the decree was inoperative, and that the master's deed did not divest these plaintiffs of the fee-simple title, but that it still remained in them. On a second appeal the question presented was: Did the court properly decree upon the cross-bills filed after the case was reinstated, on the evidence submitted to it, that the deed should be corrected, and in correcting it and decreeing the fee-simple title to the land to be in defendants, the remote grantees of the original grantee? Held, that the decision of the court on the first appeal is not conclusive against the rights of the defendants on the second appeal, since the question presented for determination is not the same. *Teel v. Dunnihoo*, 82 N. E. 844, 847, 230 Ill. 476, 120 Am. St. Rep. 319.

A decision on a former appeal is the "law of the case" as to all questions then decided, so far as the facts remain the same; the court on a subsequent appeal being entitled to look to the report of the former appeal to determine to what extent the rule applies. *Gipe v. Pittsburgh, C. & St. L. Ry. Co.*, 82 N. E. 471, 472, 41 Ind. App. 156.

A holding on appeal that plaintiff's evidence entitled him to have the issues submitted to the jury is not conclusive that plaintiff is entitled to go to the jury on a retrial, but that question depends on the evidence introduced on retrial. *Hartley v. Chicago & A. B. Co.*, 73 N. E. 398, 399, 214 Ill. 78.

That principle of the "law of the case," when applicable to a subsequent appeal of the same case, is limited to decisions on a prior appeal on points necessary to a determination of the cause. *City of Rushville v. Rushville Natural Gas Co.*, 73 N. E. 87, 89, 164 Ind. 162, 3 Ann. Cas. 86.

Where, in an action at law tried to the court, the facts were in dispute, a submitted proposition as the "law of the case," which was a mixed proposition of law and fact,

was properly refused. *Illinois Cent. R. Co. v. Seitz*, 73 N. E. 585, 586, 214 Ill. 350, 105 Am. St. Rep. 108.

Where, in an action by a servant for injuries, the cause was reversed on appeal on the ground that plaintiff was guilty of contributory negligence, as shown by his testimony that he was not looking, at the time of the injury, at the piece of machinery which caused the injury, but on the next trial he testified that he was looking at it, the holding on the former appeal was not the "law of the case" on the next appeal. *Buehner Chair Co. v. Feulner*, 73 N. E. 816, 817, 164 Ind. 368.

Where the only question involved or decided on a former appeal was the sufficiency of an answer setting up the statute of limitations as a defense, and no question as to the sufficiency of the complaint was disclosed, but, after the case was remanded, plaintiff filed an amended complaint which was not shown to be substantially the same as the original, the ruling on the former appeal that the answer was insufficient was no bar to a subsequent objection to the sufficiency of such amended complaint. *Stafford v. St. John*, 73 N. E. 596, 600, 164 Ind. 277.

The decision of the Supreme Court on appeal on a will contest as to the insufficiency of the evidence to overthrow the will is the "law of the case" on those facts. *Westfall v. Wait*, 73 N. E. 1089, 1091, 165 Ind. 353, 6 Ann. Cas. 788.

The "law of the case" does not mean the application of the recognized rules of law to the proven facts but is a precise application of the law as laid down by the trial judge and if erroneous is ground for reversal, though given at the request of the complaining party. *Weeks v. Auburn & S. Electric Ry. Co.*, 113 N. Y. Supp. 636, 637, 60 Misc. Rep. 400.

Where the instructions of the court on the second trial of a cause conform to the opinion on appeal from the judgment on the first trial, it is not error to refuse requested instructions. Where, on the first trial of a cause, a peremptory instruction was not given or requested, and that question was not presented on appeal, the propriety of giving a peremptory instruction on the second trial must be determined by the evidence, without reference to the opinion of the appellate court. *Miller v. Metropolitan Life Ins. Co. (Ky.)* 89 S. W. 183, 184.

The rule of the "law of the case" has no application to questions of fact, so that nothing said on a former appeal as to the facts can bind the trial court or be conclusive on a second appeal. Where, in an action on a policy, the Supreme Court reversed a judgment in favor of plaintiff, and remanded the cause for new trial, holding that the policy was void for breach of a condition, and that



the facts proved did not establish a waiver thereof, such judgment was not *res judicata* of the issue of waiver on the retrial at which the evidence was materially different. *Hartford Fire Ins. Co. v. Enoch*, 96 S. W. 393, 394, 79 Ark. 475.

The decision of the appellate court will be followed on a subsequent appeal, where the record therein supports the conclusion reached on the prior appeal. *Malone's Committee v. Lebus* (Ky.) 96 S. W. 519, 521.

Under Acts 1903, p. 55, c. 39, making it the duty of the court to charge the law of the case, "the law of the case" means the substantial issues of the case. *Gibson & Cunningham v. Purifoy*, 120 S. W. 1047, 56 Tex. Civ. App. 379.

"According to the more rigid rule, an expression of opinion, however deliberate upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a dictum; but it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point." *Bouvier*. Where, in an action on a contractor's bond for the construction of a high school, the constitutionality of the Code provision providing for such bonds, and the validity of the bond in question given thereunder, were directly presented and decided by the court, to the effect that the bond was enforceable as a common-law bond voluntarily given, regardless of the validity of the statute, such decision was not obiter, but constituted the "law of the case" and was conclusive on the parties on a subsequent appeal. *People's Lumber Co. v. Gillard*, 90 Pac. 556, 557, 5 Cal. App. 435.

The doctrine of the "law of the case" presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal, but the ruling adhered to in the single case where it arises is not carried into other cases as a precedent. *Allen v. Bryant*, 100 Pac. 704, 705, 155 Cal. 256.

"The doctrine of the 'law of the case' is this: That where the Supreme Court, in deciding an appeal, states in its opinion a principle of law or rule necessary to the decision, that principle or rule becomes the 'law of the case,' and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, \* \* \* and this, although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular." *Westerfeld v. New York L. Ins. Co.*, 107 Pac. 699,

700, 157 Cal. 339 (quoting *Tally v. Ganahl*, 90 Pac. 1049, 1050, 151 Cal. 418, 421).

The rule of the "law of the case" is applicable only where the same matters determined in a previous appeal are involved in a subsequent appeal, and a judgment on appeal sustaining a demurrer to a complaint is not conclusive on a subsequent appeal, where the facts alleged are different and present different questions of law. *Flood v. Templeton*, 92 Pac. 78, 83, 152 Cal. 148, 13 L. R. A. (N. S.) 579.

## LAW OF CONTRACT

"The 'law of contract' may be described as the endeavor of the state, a more or less imperfect one, by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness." *Viles v. Barre & M. Traction & Power Co.*, 65 Atl. 104, 105, 79 Vt. 311 (quoting and adopting *Williston's Wald's Pol. Cont.* 1).

## LAWS OF THE COUNTRY

See Conformably with the Laws.

The treaty between the United States and the Argentine Republic of July 27, 1853 (article 9, 10 Stat. 1009), provides that if any citizen of either of the two contracting parties shall die without will in any of the territories of the other, the Consul General or consul of the nation to which decedent belonged, or the representative of such Consul General or consul, may intervene in the possession, administration, and judicial liquidation of decedent's estate, conformably with the laws of the country, for the benefit of the creditors and legal heirs. Held, that the phrase "laws of the country," so far as the United States is concerned, means the local laws of administration and procedure of the respective states, and qualifies the right and the method of intervention, as well as the procedure after intervention takes place, so that if a consul intervenes he must do so in the manner, to the extent, and for the purpose prescribed by the laws of the jurisdiction where the property is situated, and the Italian Consul General, under the treaty of May 8, 1878, between Italy and the United States (article 17, 20 Stat. 732), providing that the respective Consuls General, etc., shall enjoy in both countries all the rights which are or may hereafter be granted to the officers of the same grade of the most favored nation, would not have the right to be appointed administrator of the estate of a subject of Italy resident in California, leaving property there with his heirs resident in Italy, in view of the California law providing that the public administrator of the county shall officiate in such a case. *In re Ghio's Estate*, 108 Pac. 516, 518, 157 Cal. 552, 37 L. R. A. (N. S.) 549, 137 Am. St. Rep. 145.

**LAW OF HIS RESIDENCE**

Code Civ. Proc. § 390, provides that, where a cause of action not involving real estate within the state accrues against a non-resident, an action cannot be brought thereon in the state after the expiration of the time limited by the "law of his residence" for bringing a like action. Held, that the phrase "law of his residence" means the law of the debtor's residence at the time the cause of action accrued, and not the time when the action was commenced. *Utah Nat. Bank v. Jones*, 96 N. Y. Supp. 338, 339, 109 App. Div. 526.

**LAW OF THE LAND**

See Due Process of Law.

**LAW OF NECESSITY**

The "law of necessity," as applied to the power to punish for contempt, is the law of self-defense. *People ex rel. Attorney General v. News-Times Pub. Co.*, 84 Pac. 912, 967, 35 Colo. 253 (adopting definition in *Thomas*, *Constructive Contempt*).

**LAW OF THE ROAD**

The custom of the road, and the law founded on it, to go to the right of the center of the road in order to safely pass governs the case of vehicles passing on the same side of the roads and streets so wide that there is no necessity for them to turn to the right of the center line in order to pass safely. *Wright v. Fleischman*, 85 N. Y. Supp. 62, 41 Misc. Rep. 533.

**LAW OF THE STATE**

The "laws of a state" are such enactments as its Legislature promulgates, and as expounded by its courts, and a state statute has such meaning as the judicial department of the state construes it to have, though without such judicial construction the federal courts might from its language construe it differently. *Commonwealth v. International Harvester Co. of America*, 115 S. W. 703, 706, 131 Ky. 551, 133 Am. St. Rep. 256; *American Tobacco Co. v. Commonwealth (Ky.)* 115 S. W. 755, 756.

A provision in a note that the same shall be construed by the "laws of the state" of Kansas means the statute of the state with reference to negotiable instrument and the rights and liabilities of the parties thereto, and does not comprehend the decisions of local courts construing like contracts that had been or might thereafter be announced, nor can it be expended so as to make the decisions of the local courts the governing law with respect to the construction of the provisions of the mortgage given to secure such note. *Keene Five Cent Sav. Bank v. Reid*, 123 Fed. 221, 227, 59 C. C. A. 225.

Within the provision of Bankr. Act, § 64b(5), giving priority to debts owing to any person who by the laws of the state or the

United States is entitled to priority, insolvency laws are "laws of the states," although their operation is suspended by the bankruptcy act. In *re Bennett*, 153 Fed. 673, 687, 82 C. C. A. 531 (citing *In re Wright*, 95 Fed. 807).

The phrase "laws of the states," as used in Bankr. Act July 1, 1898, providing for the payment of debts owing to any person who, by the "laws of the states," or the United States, is entitled to priority, means that the priorities must be determined by the laws of the particular state where the proceeding is pending, and not by the laws of all the states together. In *re P. J. Potter's Sons*, 143 Fed. 407, 411.

A county ordinance regulating sheep grazing, and imposing a license tax thereon "is a law of this state" within Pen. Code, § 435, providing that every person commencing or carrying on any business for which a license is required by any "law of this state," without taking out or procuring the license prescribed, is guilty of a misdemeanor. *Plumas County v. Wheeler*, 87 Pac. 909, 913, 149 Cal. 758; *Sierra County v. Flanigan*, 87 Pac. 913, 149 Cal. 769 (citing *In re Lawrence*, 11 Pac. 217, 69 Cal. 608).

Municipal ordinances are "laws of the state," within the provisions of Pen. Code, § 435, making it a misdemeanor for a person to carry on any calling for the transaction of which a license is required by any law of the state, without taking out or procuring the prescribed license. *Ex parte Sweetman*, 90 Pac. 1069, 1070, 5 Cal. App. 577; *Ex parte Bagshaw*, 93 Pac. 864, 865, 152 Cal. 701.

**LAW STUDENT**

See Student.

**LAW OF THE UNITED STATES**

Congressional enactments having general application throughout the United States, and not the purely local laws of the District of Columbia, are what are meant by the provision of the Federal Judicial Code, § 250, for the appellate review in the Federal Supreme Court of judgments and decrees of the court of appeals of the District in cases in which the construction of "any law of the United States" is drawn in question by the defendant. *American Security & Trust Co. v. Commissioners of District of Columbia*, 32 Sup. Ct. 553, 554, 224 U. S. 491, 56 L. Ed. 856.

The phrase, "laws of the United States," as used in the removal acts, authorizing removal of a cause arising under the laws of the United States, means acts of Congress, and does not include executive rules and regulations, unless a recovery of damages is expressly authorized by statute for a disregard of such regulations. *Beck v. Johnson*, 169 Fed. 154, 162.

The laws enacted by a territorial Legislature, subject to disapproval by Congress, are not "laws of the United States," and a suit arising under them, as where a corporation organized under them is a party to the suit, does not arise under the laws of the United States, and a federal court has no jurisdiction on that ground. *Maxwell v. Federal Gold & Copper Co.*, 155 Fed. 110, 112, 83 C. C. A. 570.

### **LAWS, RULES, AND REGULATIONS GOVERNING THE SOCIETY**

A certificate in a mutual benefit association, requiring that members should comply with all "laws, rules, and regulations governing the society," or that might be thereafter enacted for its government, related to by-laws enacted to control the internal management of the association, and did not include a by-law by which the society attempted to limit its liability on all outstanding certificates to an amount not exceeding one-half of the amount the association had contracted to pay on the death of members in good standing. *Bornstein v. District Grand Lodge No. 4 Independent Order B'nai B'rith*, 84 Pac. 271-275, 2 Cal. App. 624.

### **LAWFUL**

See *Shall be Lawful*.

See, also, *Legal*.

Where plaintiffs alleged that, being the owners of certain capital stock in defendant company, they deposited it with the company, to be sold by defendant and the proceeds used in paying its debts, in consideration of an agreement that plaintiffs should hold certain offices of defendant until its business should be in successful operation, that defendant violated its agreement and ejected plaintiffs from the offices, and had sold and issued the stock to others, and refused and failed to deliver it to plaintiffs, or to pay plaintiffs the value thereof, though requested to do so, there could be no recovery as on a contract, as the alleged contract was illegal under Civ. Code, § 431, requiring directors of a corporation to be elected annually by the stockholders or members, and section 2240, declaring that which is contrary to an express provision of the law not "lawful." *Glass v. Basin & Bay State Min. Co.*, 77 Pac. 302, 304, 31 Mont. 21.

### **Legal, adequate, and reasonable synonyms**

In speaking of the provocation necessary to arouse the heat of passion, which would result in reducing the crime to manslaughter, "this court has held that 'lawful,' 'legal,' 'adequate,' and 'reasonable,' when used as adjectives qualifying 'provocation,' are synonyms; and, as a general rule, with very few exceptions, it takes an assault or personal violence to constitute this provocation." *State v. Heath*, 121 S. W. 149, 154, 221 Mo. 565; *State v. McKenzie*, 76 S. W.

1015, 1019, 177 Mo. 699 (quoting with approval from *State v. Bulling*, 15 S. W. 367, 16 S. W. 830, 105 Mo. 204).

### **LAWFUL ACT**

The words "lawful act," as used in Pen. Code 1895, § 684, providing that if any person in the performance of a lawful act shall by negligence and carelessness cause the death of another he is guilty of negligent homicide of the first degree, is defined by article 685 as an act not forbidden by the penal law, and which would give no just occasion for a civil action. *Gorden v. State (Tex.)* 90 S. W. 636, 637.

### **LAWFUL AUTHORITY**

See *Proper and Lawful Authority*.

Plaintiff's superintendent visited the land on which defendants were claimed to have committed a trespass in cutting timber, and on each of the visits stopped at defendants' camp. On his first visit the superintendent pointed out the section or lot lines to the foreman of defendant company and requested him to keep an accurate account of all timber he might cut. A like request was made of defendant S., who was president and general manager of defendant company. Held, sufficient to show that plaintiff acquiesced in the cutting and removing of the timber, subject to defendants' accounting for its actual value, and that it was not cut without "lawful authority," within Rem. & Bal. Code, § 939, authorizing a recovery of treble damages for the cutting of timber without lawful authority, etc. *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.*, 111 Pac. 774, 775, 60 Wash. 559.

### **LAWFUL BENEFICIARY**

The word "lawful," as used in a benefit certificate, providing that the beneficial association would pay to the beneficiary a certain sum of money, provided he was the "lawful" beneficiary of the member at the time of his death, means, according to the laws of the beneficial association, that plaintiff should be at the time of the member's death within the order of family relationship to the beneficiary mentioned in the charter. *Davin v. Davin*, 99 N. Y. Supp. 1012, 1014, 114 App. Div. 396.

### **LAWFUL BUSINESS**

In Business Corporations Law, § 2, authorizing the formation of stock corporations for any lawful business, "lawful business" means one lawful to all who engage in it and does not include the business of practicing law; the right to practice law being in the nature of a franchise from the state conferred only for merit. In re Co-operative Law Co., 92 N. E. 15, 16, 198 N. Y. 479, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

**LAWFUL CHASTISEMENT**

Where the punishment inflicted by a parent on a child is so excessive and cruel as to show that the parent was not acting in good faith for the benefit of the child, the parent is guilty of an unlawful assault, and cannot justify his act by claiming that the punishment inflicted was a "lawful chastisement"; but so long as a parent acts in good faith, honestly thinking that what he does is for the benefit of the child, he is within his prerogative, and the law will not interfere. *State v. Koonse*, 101 S. W. 139, 141, 123 Mo. App. 655.

**LAWFUL CHILD**

Where a will provided that the property given to one of the devisees should, if he died without lawful children, go to the heirs of another devisee, an adopted child of the devisee first mentioned was not a "lawful child," within the meaning of the will. *Cochran v. Cochran*, 95 S. W. 731, 732, 43 Tex. Civ. App. 259.

**LAWFUL CLAIM**

A good faith claim, appearing to be formidable and founded on grounds having the appearance, though false, of a paramount title, is not covered by a warranty against lawful claims, but such a warranty is intended to cover real claims and not claims only appearing real. An outstanding legal title is within a covenant of warranty against "lawful claims," and if asserted, is a "lawful claim," though an eviction may be avoided by showing a superior equity. *Mackenzie v. Clement*, 129 S. W. 730, 731, 144 Mo. App. 114.

**LAWFUL COURSE**

A bond recited that plaintiff lumber and oil company had a claim on certain timber in litigation which had been attached in a certain suit against the S. Lumber Company, and provided that in consideration of the release of the attachments, and that plaintiff would not litigate its rights in such suit, the obligors bound themselves to pay any interest which plaintiff might have in the timber to be determined by any lawful course. Held, that a lawful course for determining plaintiff's interest was by suit on the bond; plaintiff not being required to establish first its interest in the timber by suit against the S. Lumber Company. *Camp v. Capital Mining, Lumber & Oil Co. (Ky.)* 128 S. W. 323, 324.

**LAWFUL CURRENCY**

See *Lawful Money*.

An indictment charging theft from the person of "two dollars in money, lawful currency of the United States of America and of the value of two dollars," was sustained by proof of the theft of two dollars in silver; the term "currency," or "lawful currency,"

being sufficiently broad to include gold and silver, as well as paper money. *Brittain v. State*, 105 S. W. 817, 819, 820, 52 Tex. Cr. R. 169.

Under a statute providing that in an indictment for the larceny of money it is sufficient to allege the larceny of the same, without specifying the denomination or kind thereof, an indictment, charging accused with stealing money "lawful currency of the realm" (i. e., of the United States), to the amount and value of \$20 or more, sufficiently describes the money, to constitute larceny, within Ky. St. 1903, § 1194, punishing larceny of money of the value of \$20 or more. *Todd v. Com. (Ky.)* 93 S. W. 631, 632 (citing *Commonwealth v. Mann* [Ky.] 14 S. W. 685; *Jones v. Commonwealth*, 13 Bush [76 Ky.] 356; *Travis v. Commonwealth*, 27 S. W. 863, 96 Ky. 77).

Where a theft is charged, and the allegation is general that the money taken was lawful current money of the United States, the evidence must show that it was legal tender coin or legal tender currency of the United States, and the nickel is legal tender under the provisions of U. S. Comp. St. 1901, p. 2349. *Black v. State*, 79 S. W. 311, 46 Tex. Cr. R. 107.

**LAWFUL DEBT**

"A 'debt' is defined as 'that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to or to perform for another, that which one is obliged to do, or suffer.'" Plaintiff's husband gave his bond for the payment of money, secured by a mortgage on his farm, in which plaintiff joined. The husband died, devising the farm to plaintiff, who deeded it to her son, who assumed and agreed to pay the mortgage, but failed to do so. On the death of the son, without issue, his widow, having a dower in trust in the farm, executed a quitclaim deed of it to plaintiff and the other heirs, subject to decedent's "lawful debts," which plaintiff assumed and agreed to pay. Held that, since plaintiff did not sign the bond and was not personally liable for the mortgage debt, the covenant of her son to pay it was not enforceable against him, and hence the covenant in the deed from his widow to plaintiff did not obligate plaintiff to pay the debt; a claim not enforceable at law not being a "lawful debt." *Bonhoff v. Wiehorst*, 108 N. Y. Supp. 437, 441, 57 Misc. Rep. 456 (quoting and adopting definition in *Imp. Dict.*; citing *Latimer v. Veader*, 46 N. Y. Supp. 823, 20 App. Div. 426).

**LAWFUL DEFENSE**

By the words "lawful defense of the person" is meant what is sometimes termed self-defense. *Robinson v. Territory*, 85 Pac. 451, 455, 16 Okl. 241.

**LAWFUL DUTY**

In Rev. St. § 5451, which makes it a criminal offense to give or offer bribes, etc., to induce any officer of, or person acting for or on behalf of, the United States in any official function to do or omit to do any act in violation of his lawful duty, the phrase "lawful duty" is not restricted to a duty imposed by statute, but is broad enough to cover a duty imposed by a lawful superior; and an indictment charging a conspiracy to induce an assistant statistician in the Department of Agriculture to furnish to the accused advance news of crop conditions, and to cause to be published false reports as to such conditions in violation of the rules of the department, to aid defendants in market speculations, by promising such employé a percentage of the profits of such speculations, charges a conspiracy to commit an offense against the United States under Rev. St. § 5440. *United States v. Haas*, 168 Fed. 908, 910.

Regulations of the Agricultural Department having forbidden the giving out of any statement relating to the business of the department without the approval of the chief of the bureau, and secrecy having been imposed on all employés by the established usage and practice, indictments charging bribery of an associate statistician of the Bureau of Statistics of the Department of Agriculture to divulge the contents of the current cotton crop report in advance of its official publication stated an offense under Rev. St. § 5451, making it a crime to bribe any person acting for the United States in any official function to do or commit any act in violation of his lawful duty. *Haas v. Henkel*, 166 Fed. 621, 627.

**LAWFUL ENTRY**

The expression that the "entry must be lawful" means, not that it must have been effected under a formal right capable of enforcement by legal proceedings, but that it must not be through any unlawful or wrongful act, upon which the mortgagee would be estopped to found a right. *Stouffer v. Harlan*, 74 Pac. 610, 613, 68 Kan. 135, 64 L. R. A. 320, 104 Am. St. Rep. 396.

**LAWFUL EXCUSE**

That provision for alimony made by a Nevada court is not enforceable against the husband, a resident of California, because no jurisdiction of his person was acquired, does not constitute a lawful excuse within Pen. Code, § 270, which makes it an offense for a parent to willfully omit without lawful excuse to furnish necessary food, etc., for his child. *Ex parte McMullin*, 128 Pac. 368, 370, 19 Cal. App. 481.

**LAW EXPENSES**

Other lawful expenses, see *Other*.

**LAWFUL FENCE**

See, also, *Legal and Sufficient Fence*.

A fence, posts of which are rotted off, is not a lawful fence within Rev. St. 1899, § 3295, providing that in a county where swine are restrained from running at large a fence composed of three barbed wires, stretched on posts, firmly set in the ground, not more than 16 feet apart, shall be a lawful fence. *Smith v. Chicago & A. Ry. Co.*, 105 S. W. 10, 12, 127 Mo. App. 160.

Under Rev. St. 1899, § 1105, requiring a railroad company to construct and maintain fences sufficient to prevent stock getting on the track, an instruction, in an action under such section for injuries to stock, which defined a lawful fence as one sufficient "to resist horses, cattle, swine, and like stock," was not erroneous for using the phrase "to resist"; such phrase not being as strong as the phrase "to prevent" in the statute. *Hax v. Quincy, O. & K. C. R. Co.*, 100 S. W. 698, 695, 123 Mo. App. 172.

Rev. St. 1899, § 3295, providing for the construction of fences sufficient to prevent swine from running at large, composed of wire 4 feet high and posts 16 feet apart, referred to outside fences other than those required of railroads, so that a fence conforming to such specifications, constructed by an adjoining landowner along a railroad right of way, did not constitute a "lawful fence," for the building of which the landowner could recover from the railroad under Rev. St. 1899, § 1105 (*Ann. St. 1906*, p. 945). *Sharp v. Quincy, O. & K. C. Ry. Co.*, 123 S. W. 507, 508, 139 Mo. App. 525.

The petition in an action for damages to growing crops from trespassing stock alleged that the premises were situated in a subdivision where hogs, etc., were prohibited from running at large, and were inclosed by a lawful fence under the statute when the trespasses occurred, and described the stock law district by metes and bounds, and further alleged that, in the event that plaintiff's fence was not in strict compliance with the statute, nevertheless it was sufficient to keep out all stock sought to be excluded of an ordinary disposition, and not of a fence-breaking nature. Held, that the petition alleged a common-law liability based on the stock owner's negligence in knowingly permitting vicious animals to run at large, as well as the statutory liability based upon plaintiff's maintenance of a "lawful fence," within the statute. *Posey v. Coleman* (*Tex.*) 133 S. W. 937, 939.

*Sayles' Ann. Civ. St. 1897*, art. 2496, requires every farmer, etc., to make a sufficient fence at least five feet high, which shall be hog-tight, around his cleared land. Article 2497 permits one injured by the trespass of cattle or other stock to complain to a justice of the peace, who shall appoint two freeholders to ascertain the sufficiency of the

fence and the damages, and, if it appears that the fence was sufficient, the owner of the stock shall be liable for the damages. Article 2498 authorizes the impounding of trespassing stock for a second offense when the owner of the premises deems it necessary for his protection. Article 2499 exempts the stock owner from liability if the fence be insufficient. Sayles' Ann. Civ. St. 1897, art. 4998, as amended by Acts 1901, c. 123, provides that any fence in a locality which has statutory restrictions upon the running at large of stock which is sufficient to keep out ordinary stock permitted to run at large under the chapter shall be deemed a lawful fence, and requires all such fences to be four feet high. Held, that the statutes were enacted to give landowners complying with their requirements as to fences a special remedy for damages by trespassing stock, irrespective of negligence. *Possey v. Coleman* (Tex.) 133 S. W. 937, 939.

Under Code Civ. Proc. c. 44, providing that a corral fence exclusively for the purpose of inclosing stacks, if outside of any lawful inclosure, shall be sufficient and lawful if it is not less than 15 feet distant from the stacks, is substantially built with posts not more than 8 feet distant from each other and with not less than 5 strands of barbed fence wire and not less than 5 feet high, and that any other kind of fence which is as effective for the purpose of a fence as that above prescribed is lawful and sufficient, a fence the posts of which were 17 or 18 feet apart, which approached the stacks in places within 6 feet, consisted of but 4 strands of barbed wire, and was only 46 inches high, was not a "lawful fence." *Johnson v. Rickford*, 122 N. W. 386, 389, 18 N. D. 268.

Rev. St. 1899, § 1973, defining a lawful fence, and providing that unless the fence comes up to the requirements any person may have a right of action for damages resulting from injuries to his live stock from such illegal fence, refers to what is termed a "lawful inclosure," and does not create a liability on the railroad company for the killing of live stock in collision with a train, where such stock strayed onto the right of way because of a defect in the railroad's right of way fence. *Martin v. Chicago, B. & Q. Ry. Co.*, 89 Pac. 1025, 15 Wyo. 493.

#### LAWFUL HEIRS

See Personal and Lawful Heir.

Devise to lawful heirs as devise to class, see Class.

The word "lawful" before the word "heir" in a devise does not, in the absence of a contrary intent clearly indicated in the will, mean "legitimate," but means simply the person designated by law to take by descent. *Harrell v. Hagan*, 60 S. E. 909-911, 147 N. C. 111, 125 Am. St. Rep. 539.

"Children" are embraced within the term "lawful heirs," but the word is not per se

descriptive of the whole line of lawful heirs. *Reilly v. Bristow*, 66 Atl. 262, 264, 105 Md. 326.

The word "lawful," qualifying the word "heirs," is not sufficient per se to show an intention not to use the word "heirs" in its ordinary legal sense as a word of inheritance or of limitation. *Wool v. Fleetwood*, 48 S. E. 785, 789, 136 N. C. 460, 67 L. R. A. 444.

The words "lawful heirs," as used in a will whereby the testator bequeathed his residuary estate to his lawful heirs, without other or further designation as to who are intended as his beneficiaries, and directed that the same should be equally divided among his lawful heirs, share and share alike, described all the persons who, at the time of the death of the testator, answered the description of lawful heirs and were entitled to share in the residuary estate, regardless of the degree of their relationship to the testator, and resort must be had to the statute in order to determine who were the legal heirs of the testator. *Mooney v. Purpus*, 70 N. E. 894, 895, 70 Ohio St. 57.

In construing a will using the words "legal heirs" and "lawful heirs," the words "legal" and "lawful" do not modify or change the legal effect of the word "heirs." *Stisser v. Stisser*, 85 N. E. 240, 242, 235 Ill. 207.

In common parlance, the terms "heirs at law" and "lawful heirs" are used indiscriminately as synonymous and convertible terms, and, whenever either is used, they invariably refer to the heirs on whom descent is cast by law, and not to an heir by adoption. The relation of an heir by adoption is an exceptional and unusual one, and does not come within the ordinary and usual meaning of the words "lawful heirs," and those words ought not to be held *ex vi termini* to include an adopted heir. *Hockaday v. Lynn*, 98 S. W. 585, 589, 200 Mo. 456, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775 (citing *Reinders v. Koppelman*, 7 S. W. 288, 94 Mo. 338).

A devise to the testator's "lawful heirs" should be construed as referring to those who are such at the testator's death, unless a different intent is plainly manifested by the will. *Hill v. Hill*, 132 N. W. 738, 739, 90 Neb. 43, 38 L. R. A. (N. S.) 198.

A devise of land to testator's children, subject to the provision that the share of any child dying without issue of his body shall descend to the survivors of the children, or the lawful heirs surviving any of the children, gives to the children an estate in fee, defeasible as to each on his dying without leaving lawful issue, and on the death of a child, without issue surviving, his interest passes to the surviving children or grandchildren surviving any of the children; the words "lawful heirs" meaning surviving children and grandchildren of the devisees,

who take and hold as purchasers directly from testator. *Smith v. Ellington-Guy Timber Co.*, 71 S. E. 445, 446, 155 N. C. 389.

Under a will giving all the testator's land to his son for life with remainder to his "lawful heirs born of his wife," the son did not take a fee under the rule in *Shelley's Case* so as to give his widow a dower therein. The words "born of his wife," qualifying and explaining his "lawful heirs," confining the remainder to the children of his wife, and preventing the operation of the rule. The superadded words show that the deviser intended to make the words "lawful heirs" designatio personarum; that is, they show an intention on his part to limit the remainder over to a particular class of heirs. *Thompson v. Crump*, 50 S. E. 457, 138 N. C. 32, 107 Am. St. Rep. 514.

Testatrix adopted defendant in 1890, but, aside from recording of the deed, no public recognition of the relationship appears, testatrix having assumed no authority over defendant who continued to reside with her natural parents and other relatives until her marriage. In 1905 testatrix made a will giving defendant, who was designated "my young friend," \$100. After various other dispositions, the will provided that the residue of the estate should go to testatrix's "lawful heirs," excepting specified nephews. Held, that defendant is not entitled to share under the residuary clause. *Warden v. Overman*, 135 N. W. 649, 652, 155 Iowa, 1.

Where a testator devises a parcel of real estate to his son for life with remainder to his lawful heirs, and the son marries after the death of the testator, held, that upon the death of the son, the wife takes as heir, where there is nothing in the will tending to show that the testator used the words "lawful heirs" in a different sense from their strict technical import. *Miller v. Miller*, 29 Ohio Cir. Ct. R. 451, 454.

In a devise to the testator's grandson of a tract of land, and if he should die without "lawful heirs of his body" then to the testator's granddaughter, does not limit the estate of the grandson to a life estate where he had heirs of his body, but merely creates a conditional estate in the granddaughter by way of executory devise or shifting use. *Sessoms v. Sessoms*, 56 S. E. 687, 688, 144 N. C. 121 (citing *Smith v. Brisson*, 90 N. C. 284; *Morrisett v. Stevens*, 48 S. E. 661, 136 N. C. 160; *Jones v. Ragsdale*, 53 S. E. 842, 141 N. C. 200; *Whitfield v. Garris*, 42 S. E. 568, 131 N. C. 148, reaffirmed in 45 S. E. 904, 134 N. C. 24; criticizing *Bird v. Gilliam*, 28 S. E. 489, 121 N. C. 328; *Dawson v. Quinernerly*, 24 S. E. 483, 118 N. C. 188; *Thompson v. Crump*, 50 S. E. 457, 138 N. C. 32, 107 Am. St. Rep. 514).

A grantor executed a deed to his son, granting the property to him during his natural life, and at his death, then to his lawfully

constituted heirs. Held, that the term "lawfully constituted heirs" was merely a tautological way of referring to his lawful heirs at his death; and that the grantee took a life estate, with remainder to those who should comprise the class known as the grantee's heirs at his death. *Bradley v. Goff*, 147 S. W. 1012, 1014, 243 Mo. 95.

A testator gave his wife, for life, all of his estate, and provided that after her death it should go to his eldest daughter for life. He then declared that after the daughter's death such portion of his estate as might remain should be equally divided between his lawful heirs. Held, that the testator meant by the term "lawful heirs" those persons who at his death were entitled to inherit his intestate real estate. In re *Cowley's Will*, 97 N. W. 930, 931, 120 Wis. 263.

## LAWFUL ISSUE

See *Die Without Lawful Issue Surviving*.

The term "lawful issue" is not a technical term, and when used in a deed does not necessarily bring the deed under the rule in *Shelley's Case*, like the word "heirs," which is always a technical word, necessarily bringing the deed under the rule regardless of intention. *Hopkins v. Hopkins*, 114 S. W. 673, 676.

### As children born in wedlock

After death of testator and probate of his will, devising land in New York to B. for life, and on his death to his "lawful issue," *Acts Mich.* 1881, p. 48, No. 55, and *Laws N. Y.* 1895, p. 313, c. 531, declaring that the subsequent marriage of the parents shall legitimize their children previously born, were passed. Prior to either act, and while B. had a lawful wife, M., by whom he had children, he had children by another woman, S., and, after enactment of the Michigan act, he, in an action in that state in which jurisdiction was not acquired of M., a resident of New York, and on grounds not recognized by the laws of New York for divorce, obtained a decree of divorce; and thereafter in Michigan there was a marriage ceremony between him and S. Subsequently, in an action in New York by M. against B. for separation, there was a decree establishing the fact that M. was still the wife of B., notwithstanding the Michigan decree. Held, that B.'s children by S. were not entitled to take under the will. *Olmsted v. Olmsted*, 83 N. E. 569, 190 N. Y. 458, 128 Am. St. Rep. 585.

Under the rule that, where statutes can reasonably be construed to avoid conflict, that construction must be adopted. *Civ. Code Cal.* § 1388, providing that when an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate without lawful issue, his estate goes to his mother, or in case of her decease to her heirs

at law, and section 1387, providing that every illegitimate child is an heir to the person who, in writing signed in the presence of a competent witness, acknowledges himself to be the father of such child, and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock, will be held not to be in conflict in the case, where both the mother and child are illegitimate, on the ground that section 1387 makes the child the heir of his mother, while section 1388, taken alone, excludes him, but section 1387, which has to do solely with the right of illegitimates to inherit, will be construed as applicable only to inheritance by an illegitimate from a parent who is legitimate, or, for purposes of inheritance, the illegitimate child by reason of section 1387 is to be held to be within the terms "lawful issue," as that term is used in section 1388. In *re De Cigaran's Estate*, 89 Pac. 833, 835, 150 Cal. 682.

Where the father of defendants at the time of their birth was the lawful husband of another woman than their mother, but thereafter, in Michigan, obtained a divorce legal in that state, though not in the state of New York, and married their mother thereby establishing their legitimacy in that state, under Act Mich. March 28, 1881 (Pub. Acts 1881, p. 48, No. 55), they are entitled in New York to take under a devise to "the lawful issue" of their father. *Olmsted v. Olmsted*, 102 N. Y. Supp. 1019, 1020, 118 App. Div. 69.

A will, dated and which took effect in 1872, gave property in trust for the testator's son, with remainder to his "lawful issue." The son was then married and had children. After the death of his then wife, he married the mother of certain illegitimate children. Laws 1895, c. 531, providing that illegitimate children whose parents had theretofore intermarried or should thereafter intermarry should thereby become legitimized. Held, that the illegitimate children were not entitled to share in the remainder, since, while all children, whether legitimate or not, are the "issue" of their parents, that word, when qualified by the adjective "lawful," which is the antithesis of unlawful or illegitimate, is ordinarily understood to mean those only begotten and born in lawful wedlock, and it cannot be assumed that the testator considered the contingencies of the birth of illegitimate children, the enactment of a statute by which they might be legitimized, and the marriage of their parents. *Central Trust Co. of New York v. Skillin*, 138 N. Y. Supp. 884, 886, 154 App. Div. 227.

#### As descendants

The words "lawful issue, if any, of the body," mean lineal descendants, taking by right of representation per stirpes. *Union Safe Deposit & Trust Co. v. Dudley*, 72 Atl. 166, 169, 104 Me. 297.

The primary meaning of "lawful issue" is descendants, and, in the absence of the use of the words in a will in another sense, it will be so construed. Under a residuary bequest to testator's stepmother and half-sister, in equal portions, and, in the event of either dying without issue, the share of the one so dying to the survivor, the stepmother dying before testator, he does not die intestate as to the share given, but there is an implied bequest of it to her issue. In *re Disney's Will*, 103 N. Y. Supp. 391, 392, 118 App. Div. 378 (quoting and adopting definition in *New York Life Ins. & Trust Co. v. Viele*, 55 N. E. 311, 161 N. Y. 11, 76 Am. St. Rep. 238; *Chwatal v. Schreiner*, 43 N. E. 166, 148 N. Y. 683).

Under a will, establishing a trust fund for the benefit of a daughter of the testatrix during her life, and directing that on her death the principal be paid to her then "lawful living issue," the term "lawful living issue" does not include an adopted daughter. In *re Hopkins*, 89 N. Y. Supp. 467, 468, 43 Misc. Rep. 464 (citing *New York Life Insurance & Trust Co. v. Viele*, 55 N. E. 311, 161 N. Y. 11, 76 Am. St. Rep. 238).

Where testator by will devised his property in trust for his wife, on her death to be divided among his lawful issue, and gave the same to the persons entitled to the other half of his residuary estate, and by a clause disposing of such half testator provided that it should go to the lawful issue of his children or to his lawful issue per stirpes and not per capita, it was the intent of the testator to limit the phrase "lawful issue" in the first clause to the lawful issue of his children, or to his lawful issue. *Ingils v. McCook*, 59 Atl. 630, 633, 68 N. J. Eq. 27.

"The words 'lawful issue,' when used in a domestic will, primarily and generally mean descendants. Where there is nothing to the contrary to be found in the context of the instrument, or in extraneous facts proper to be considered, that is the sense in which they are presumed to be used. The real question \* \* \* is whether the testatrix used them in that sense or in some other sense. In giving construction to the words used by the testatrix in a domestic will, we cannot assume, without the clearest evidence, that she used the words 'lawful issue' in the sense they might possibly bear under the laws of a foreign country in which she died." In *re Tenney*, 93 N. Y. Supp. 811, 818, 104 App. Div. 290 (quoting and adopting definition in *New York Life Ins. & Trust Co. v. Viele*, 55 N. E. 311, 161 N. Y. 19, 20, 76 Am. St. Rep. 238).

Testator's will directed that his estate be divided into as many parts as he had children, the income of each part to go to a child for life, and upon the child's death the part to be divided among the "lawful issue"



of the child. At the time the will was executed several of the testator's children were married and had children. Held, that the daughters of a deceased daughter and a grandchild of such daughter took equally under the clause "lawful issue"; that phrase being equivalent to "descendants." *Phelps v. Cameron*, 96 N. Y. Supp. 1014, 1016, 109 App. Div. 798.

Testator gave one half of his residuary estate to trustees for the use of his wife for life, and on her death to divide the same among his lawful issue, or to trustees for their use as his wife should direct by will. In default of such will, he gave the same to persons then entitled to the other half of his residuary estate, to be distributed and held on the same trusts and in the same proportions as were mentioned in another clause of his will. Held, that the term "lawful issue" includes not only children but descendants. *Ingles v. McCook*, 59 Atl. 630, 635, 68 N. J. Eq. 27.

Where the phrase "lawful issue" is used in a will, if it clearly appears that it was used in a particular meaning, the phrase may be restricted to children then living, or to children then living and to the representatives of any deceased child. *Ingles v. McCook*, 59 Atl. 630, 635, 68 N. J. Eq. 27.

Testator gave property to trustees in trust, with directions to pay the net income to his three children for life; the trust to continue as long as any of the children lived. He provided that, if any of his children should die without lawful issue, the surviving children should have his share, and if any of the children should die, leaving lawful issue, the child so surviving should take the share of the income which the deceased parent would have taken, had he survived, and on the termination of the trust the property should vest in the surviving lawful issue of testator's children. Held, that words "lawful issue" meant children, and included only the lawful children of testator's children in being at the time of their death. *Brislin v. Huntington*, 103 N. W. 144, 147, 128 Iowa, 166, 5 Ann. Cas. 931.

#### As words of purchase

The words "lawful issue" in a deed are words of purchase and not of limitation. *Lacey v. Floyd*, 87 S. W. 665, 667, 99 Tex. 112.

Where a deed conveyed land to the grantee and his wife and to the legitimate heirs of the grantee, and in case of no "lawful issue" then over, the words "lawful issue" mean legitimate heirs and are words of purchase. *Lamb v. Medsker*, 74 N. E. 1012, 1013, 35 Ind. App. 662.

#### LAWFUL MERCHANDISE

Asphalt is "lawful merchandise" in a charter for West Indian trade, which provides that the vessel shall be employed in

carrying "lawful merchandise." *Dene Shipping Co. v. Tweedie Trading Co.*, 143 Fed. 854, 855, 74 C. C. A. 606.

#### LAWFUL MONEY

See Lawful Currency.

The term "lawful money," in an indictment charging "larceny" of certain money being "lawful money" of the United States, means money as commonly understood and includes bank notes. *State v. Finnegean*, 103 N. W. 155, 157, 127 Iowa, 286, 4 Ann. Cas. 628.

"Lawful money" means money which passes from hand to hand and from person to person and circulates through the community, and is synonymous with "current money." Lawful money is that which is usually used as a medium of exchange. *State v. Quackenbush*, 108 N. W. 953, 955, 98 Minn. 515.

#### LAWFUL OBSTRUCTIONS

Although the grass plats and shade trees along the sidewalk may be "obstructions," yet when ample width is left to answer the demands of travel they are obstructions that serve a useful purpose and are not inconsistent with the object for which streets are made and maintained. Like a fence, a hydrant, a hitching post, telephone or telegraph poles, they are "lawful obstructions," and a wire stretched around a grass and tree plat in a street for the protection of the plat is not such an obstruction as to render the city liable for injuries received by one who tripped and fell over such wire; the wire being in plain sight of pedestrians passing along the street. *Teague v. City of Bloomington*, 81 N. E. 103, 104, 40 Ind. App. 68 (citing *Lostutter v. City of Aurora*, 26 N. E. 184, 126 Ind. 436, 12 L. R. A. 259; *City of Vincennes v. Spees*, 74 N. E. 277, 35 Ind. App. 389; *Weinstein v. City of Terre Haute*, 46 N. E. 1004, 147 Ind. 556).

#### LAWFUL ORDER

Interstate Commerce Act, § 16, relating to the authority of a commerce commission, provides with respect to proceedings at law in a Circuit Court of the United States in case of the disregard of a "lawful order" of the commission, the finding of facts of the commission shall be prima facie evidence of the matters therein stated. The court says that the phrase "lawful order" implies more than the exercise of mere jurisdictional power or authority. "The words 'lawful order' mean an order the commission has jurisdiction to make. An order may be lawful and at the same time erroneous, so that if the commission made an order in a matter over which they had jurisdiction, which was merely an error of judgment as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful." *Western New York & P. R. Co.*

*v. Penn Refining Co., Limited, of Oil City, Pa.*, 137 Fed. 843, 352, 70 C. C. A. 22.

### LAWFUL POSSESSION

In St. 1907, p. 999, c. 538, § 2, providing that the owner or other person in the lawful possession of land may recover damages by trespassing animals from the owner or person chargeable with the care of such animals, the words "lawful possession" mean only peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious, but actually so. *Fisch v. Nice*, 106 Pac. 598, 599, 12 Cal. App. 60.

### LAWFUL PURPOSE

County Government Act 1897 (St. 1897, p. 460) § 25, subd. 35, authorizes county supervisors to grant franchises over the public roads and highways for all "lawful purposes" on such terms and conditions as, in their judgment, may be necessary and proper, and in such manner as to present the least possible obstruction and inconvenience to the traveling public. Held, that the words "lawful purposes," as so used, should be construed as limited to purposes in aid of the public's easement of travel, something which would promote the public comfort and convenience in the use of the highway; and hence such act did not authorize a county board of supervisors to grant a franchise to an electric power company to erect its power line along a highway, the title to the soil of which is not in the abutting property owners, for the primary purpose of furnishing light and power to private individuals, without rendering compensation to such abutting owners. *Gurnsey v. Northern California Power Co.*, 117 Pac. 906, 909, 160 Cal. 699, 36 L. R. A. (N. S.) 185.

The payment of a debt by a county which the Legislature has authorized is a "lawful purpose," for the issuing of bonds as authorized by County Law, § 12 (Laws 1892, p. 1748, c. 680), giving to boards of supervisors the power to borrow money on the credit of the county. *County of Ontario v. Shepard*, 91 N. Y. Supp. 611, 614, 100 App. Div. 200.

A "lawful purpose" which will excuse one for carrying a concealed weapon is "a lawful purpose that was specific, and, in a sense, temporary. For example, if a person should buy a deadly weapon at a store, and put it in his pocket for the purpose of taking it home; or if a person should find a deadly weapon, and place it in his pocket for the purpose of keeping it only till he could restore it to the owner, or make some other disposition of it—such person would not be carrying a deadly weapon concealed within the meaning of said act." *State v. Iannucci* (Del.) 55 Atl. 336, 337, 4 Pennewill, 193.

Under County Government Act Cal. 1897 (St. 1897, p. 458) § 25, subd. 35, authorizing a board of supervisors to grant franchises along and over the public roads and highways for all "lawful purposes," upon such terms and conditions as in their judgment may be necessary and proper, the authority of the board has relation to the purposes for which a highway is dedicated, and is limited by the uses, primary and incidental, to which under the law a highway is devoted; the "lawful purpose" must be consistent with the character and in furtherance of the design of the easement which the public has in and to the highways. The only right which the public has in and to the highways is to use it for the purpose of traveling over it without obstruction or interference; and the control which the board of supervisors can lawfully exercise must have in view the promotion of that use, and cannot extend beyond whatever is necessary to facilitate travel. A grant by a county board of supervisors of a franchise to erect poles and string electric wires thereon, along and over the public highway of a county for the purpose of lighting the highway, is an incident to the contemplated use of such highway, and is for a "lawful purpose," and it is immaterial that the lighting was in part used for private purposes. *Gurnsey v. Northern California Power Co.*, 94 Pac. 858, 860, 7 Cal. App. 534.

The words "lawful purposes," in the New York statute providing that no corporation shall issue either stock or bonds except for money, labor, or property actually received for the use and lawful purposes of such corporation, are general in character, but would seem to mean such property as would be germane to, or connected with, the business purposes of the corporation, as defined in its charter or articles of incorporation. Corporate bonds cannot be issued for the consideration of a note which is never collected. In *re Waterloo Organ Co.*, 134 Fed. 341, 343, 67 C. C. A. 255.

### LAWFUL REASONS

See Good and Lawful Reasons.

### LAWFUL RESTRAINT

Where a bank which paid money into the state treasury as taxes, supposing that it had the right to do so, in lieu of county and city taxes, delayed for more than two years to make application to the auditor to issue his warrant for the repayment of the money, relying upon a decision of the Court of Appeals to the effect that such payments by other banks similarly situated were proper, it lost the right to demand such a warrant, though that decision was overruled after the lapse of the two years, as the decision was not a "lawful restraint," within Ky. St. § 2544, providing that, in all cases where the doing of an act necessary to save any right

or benefit is restrained or superseded by injunction or other "lawful restraint," the time covered by the injunction or restraint shall not be estimated in the application of any statute of limitations. *Bank of Commerce of Louisville v. Stone*, 56 S. W. 683, 684, 108 Ky. 427.

### LAWFUL RESTRICTIONS

The "lawful restrictions" authorized by P. L. 1893, p. 302 (Gen. St. p. 3235), providing for the granting of a location for street railway tracks subject to restrictions, refer to restrictions that are to be made in the interest of the public and indicate a legislative act in granting a location. An ordinance granting a location may contain restrictions in the form of covenants requiring the street railway company to pave the streets in which the tracks are laid, and such restrictions are obligatory on any subsequent purchaser of the street railway tracks and franchises, even without an express assumption. *Borough of Rutherford v. Hudson River Traction Co.*, 63 Atl. 84, 88, 78 N. J. Law, 227.

### LAWFUL USE

An instruction, in an action for the death of an automobilist struck by a car, that the street railway company must use reasonable care to operate its cars on public streets with regard to "the lawful and customary use" of the streets by others, and that if, at the time decedent was killed, the company was not operating the car with regard to "the lawful and customary use" of the streets, but negligently operated the car, it was liable, is not erroneous as referring to the extent of travel, of which there was no evidence, but refers to the use of the street by the public; the word "lawful" meaning according to law as distinguished from an unlawful use and the word "customary" meaning according to usage and referring to the mode of using the streets. *Smiley v. East St. Louis & S. Ry. Co.*, 100 N. E. 157, 158, 256 Ill. 482.

### LAWFUL WEDLOCK

See Same as Lawful Wedlock.

### LAWFULLY AUTHORIZED

Under Civ. Code 1901, pars. 721, 725, 732, 2696, providing that no estate in land for a term of more than one year shall be conveyed, except by an instrument in writing subscribed by the party, "or by his agent thereunto authorized in writing," prohibiting actions on any lease for more than one year, unless in writing and signed by the party to be charged, "or by some person by him thereunto lawfully authorized," a lease for more than a year, signed by one of the parties and by a person verbally authorized by the other party, but not acknowledged by either, is not a valid lease, but is not within the prohibition in paragraph 2696, and is en-

forceable as a contract to lease; the words "lawfully authorized" in paragraph 2696 not meaning an authorization in writing. *Murphey v. Brown*, 100 Pac. 801, 804, 12 Ariz. 268.

### LAWFULLY BEGOTTEN

See Heirs Lawfully Begotten.

### LAWFULLY CLAIMING POSSESSION

Civ. Code, § 1927, provides that agreements of letting upon hire bind the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring against all persons lawfully claiming the same. Defendant on August 29, 1906, leased to plaintiff for 22 months, to commence January 21, 1907, certain land. P. A. was in possession of the land under lawful lease from the owners, and it was determined in litigation to oust him that he was entitled to possession until March 6, 1907. Plaintiff had been a tenant of P. A. but his lease expired in November, 1906, but he was permitted by P. A. to occupy a house but instructed by P. A. not to farm the land. He did farm the land and gave defendant his share of the crops as rental under the lease commencing January 1, 1907. During January and February, 1907, P. A.'s cattle got upon the land and did damage to the plaintiff's crop. Held, that plaintiff was entitled to damages from defendant as for breach of the implied covenant for quiet enjoyment, as P. A.'s act was the act of one lawfully claiming possession. *Agoure v. Lewis*, 113 Pac. 882, 884, 15 Cal. App. 71.

### LAWFULLY NATURALIZED

In Rev. St. § 1994, providing that any woman married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen, the clause "who might herself be lawfully naturalized" limits the section to a woman lawfully within the country, her own capacity independent of her marital status, being essential to citizenship; so that where an alien married woman was not entitled to enter the country under the immigration regulations, because of a contagious disease, the naturalization of her husband would not make her a citizen entitled to enter, under the statute. In *re Rustigian*, 165 Fed. 980, 982.

### LAWYER

As laborer, see Laborer.

As learned in the law, see Learned in the Law.

As member of learned profession, see Learned Profession.

A "lawyer" is one skilled in the law, while an "attorney" is an officer in a court of justice who is employed by a party in a cause to manage it for him. A law student fresh from his school and not a licensed of-

ficer of the court may well be termed a lawyer, but not an attorney. *Danforth v. Egan*, 119 N. W. 1021, 1024, 23 S. D. 43, 139 Am. St. Rep. 1030, 20 Ann. Cas. 413.

## LAY-LAID

### As construct

Where the city of Camden laid new pipes in place of old ones, which had been laid by a water company, the city's predecessor, such laying is within the meaning of Act March 9, 1871 (P. L. p. 415), authorizing the city to charge 75 cents per foot of frontage on land bordering on streets through which water pipes are laid. *Doughten v. City of Camden*, 59 Atl. 16, 17, 71 N. J. Law, 426.

### LAID DOWN

The word "laid down," in a contract of sale which requires the buyer to pay a specified price f. o. b. cars at his place of business in this country, or "laid down" at his place of business, or free at his place of business, duty unpaid, must be construed according to the universal understanding of merchants and importers throughout the United States and the foreign country, and the universal understanding is that the buyers should pay import duties; and the buyer must pay such duties without deduction from or credit on the price. *Steidtman v. Joseph Lay Co.*, 84 N. E. 640, 642, 234 Ill. 84.

### LAID UP

#### Ship

A yacht is "laid up for repairs," within a provision of the charter party, in such case allowing a rebate from the charter money, where it is at rest, having some damage made good, that in a material degree impairs its ability to pursue the voyage as a yacht, though the charterer may continue to eat and sleep and entertain friends on board. *Dahlgren v. Whitaker*, 124 Fed. 695, 696.

### LAY OFF-LAID OFF

The words "laid off," in *Pierce's Code* 1905, § 3560, providing that all streets, lanes, and alleys "laid off" and recorded in accordance with the statute shall be considered highways, must be given their usual and ordinary meaning, and a town site or addition is "laid off" when it is surveyed or measured and marked on the ground. *Meachem v. Seattle*, 88 Pac. 628, 630, 45 Wash. 380.

Though the words "lay off" were used in a notice terminating the service of an employé, it was a sufficient indication of action under Greater New York Charter (Laws 1901, p. 636, c. 466) § 1543, authorizing his suspension without pay for a year. *Shane v. City of New York*, 120 N. Y. Supp. 428, 430, 135 App. Div. 218.

### LAY OUT-LAID OUT

The words "lay out," in the will of Benjamin Franklin, creating a trust fund for the

town of Boston, do not mean merely the adoption of a plan for the use of the money in accordance with the will, but include the actual expenditure of it by the board of managers named in the will in the establishment of public works of the kind described. *City of Boston v. Doyle*, 68 N. E. 851, 854, 184 Mass. 373.

Under the deed of U., the owner of the east half of a block, of the southern half of his land, the northern boundary line of the land conveyed being described as binding on a 10-foot alley "here laid out," and the grant including the use of this alley in common, "together with the use of any alley 10 feet wide to be laid out by U., extending northerly parallel to P. street from the northwest corner of" the land conveyed "to H. street," while the words "laid out," in reference to the latter alley, are used in the sense of constructed or improved, and not in their ordinary meaning of the adoption of outlines or location, the alley being laid out in such sense by the deed, which clearly defines its location, the grantee's easement in the alley is not dependent on the grantor improving it, and is not lost by nonperformance of his personal covenant to do so. *Oberheim v. Reeside*, 81 Atl. 590, 592, 116 Md. 265 (citing 5 Words and Phrases, p. 4037).

The delineation of a street on a map made pursuant to Act March 21, 1871 (P. L. p. 638) § 23, in amendment of the charter of the village of Passaic, does not suffice to make an actual street within section 57 of the charter (Act April 2, 1873 [P. L. p. 507]), empowering the council to alter any street already or thereafter to be laid out. *Erie R. Co. v. City of Passaic*, 74 Atl. 338, 339, 70 N. J. Law, 19.

Laws N. H. 1903, p. 257, c. 255, § 3, relative to establishment of waterworks, provides that, "In case the town shall not be able to agree with the owner of any property or right taken for the purposes of this act, either party may apply to the superior court to have the same 'laid out' and damages determined." The court says the words "laid out" are undoubtedly derived from the procedure followed in laying out highways, "and the term itself and the direct reference indicate that the method of the divestiture of private title in road-laying proceedings was within legislative contemplation in this class of legislation. The decision of the selectmen laying a highway is a judgment, and includes both a finding upon the question of public good and a location upon the ground of the new way. The term 'laid out' is of familiar use in the taking of land for railroads. In such cases the corporation is authorized to locate its road, subject to petition by any landowner for a change of location, and to obtain title by deed to any lands which it deems necessary for the road. Pub. St. 1901, c. 158, § 8. If such deeds cannot

be obtained, application may be made for an assessment of damages. *Id.* § 9. The damages must be paid, or tendered, or deposited for the landowner, before entry is made upon the land to construct the road, except by the owner's consent. *Id.* §§ 18, 19. From all the evidence it is clear that by the permission given in certain cases to apply to have the desired right 'laid out' was meant an application to have the desired right, in the language before quoted (Laws 1901, p. 806, c. 290, § 2), 'taken, appropriated, and condemned.' The words 'laying out' and 'taking,' in a statute relating to eminent domain, were held to have the same meaning in *Charlestown Branch R. v. County Com'rs of Middlesex*, 7 Metc. [48 Mass.] 78, 84. The legislative intention seems clear, therefore, to authorize the plaintiffs to secure the necessary rights by purchase if they could; if not, by condemnation." *Town of Littleton v. Berlin Mills Co.*, 58 Atl. 877, 880, 73 N. H. 11.

#### As surveyed or platted

A town site or addition is "laid out" when it is surveyed or measured and marked upon the ground. *Meachem v. City of Seattle*, 88 Pac. 628, 630, 45 Wash. 380.

#### All necessary steps included

The city of Boston took part of lands for a short parkway, to be controlled by the park commissioners, and made a settlement with the owner, by which the city agreed to construct a roadway and walk, to which he should have perpetual access, and to assume any assessment for betterments for the construction of the park on the land not taken. Subsequently the city street commissioners laid out a street several miles long, which, where the owner's land lay, was superimposed on the parkway, and no physical change was made therein. Held not to preclude assessment for betterments on the owner's lands for the new street, which was a wholly new layout by the commissioners; to "lay out" meaning, in this connection, to fix the termini and prescribe the boundaries of a highway, and establish it as a public easement of travel, by official act of the proper authorities. *Leahy v. Charles*, 95 N. E. 834, 835, 209 Mass. 316.

The word "established," in Pol. Code, § 671, providing that, if a private way is "established" over the wild lands of a person who has no notice of the proceeding, he may within six months after receiving such notice, and not thereafter, proceed to have his damages assessed, has the same meaning as the words "laid out" in section 672; that is, the laying out of a way under the order of the ordinary. *Watkins v. Country Club*, 47 S. E. 538, 539, 120 Ga. 45.

Under *Burns' Rev. St. 1894*, § 6759, declaring that every public highway "laid out," or which may hereafter be "laid out," and which shall not be opened or used within six

years from the time of its being laid out, shall cease to be a highway for any purpose whatever, the words "laid out" doubtless mean established, surveyed, declared a road; a highway has been laid out—that is to say, it has been established and declared to be a highway by the judgment of the court. Where a highway was established by the judgment of the county commissioners, and within six years thereafter it was included within the corporate limits of a town, it did not become extinct, under such statute, though not opened or used as a highway. *Baltimore, O. & C. R. Co. v. Town of Whiting*, 65 N. E. 759, 761, 30 Ind. App. 182 (quoting and adopting definitions in *Decker v. Washburn*, 35 N. E. 1111, 8 Ind. App. 673).

#### As locate

A petition for a highway was not objectionable, because it prayed that the court "locate and establish" a road, instead of asking to have the road "laid out"; the term "laid out" being colloquial, meaning "to plan in detail," while "to locate" is to define the limits, to establish in a particular place, and, in a road proceeding, is as comprehensive as "lay out"—the term "lay out" expressing the work to be done by the viewers in establishing on the ground the lines and angles of the road. *Feagins v. Wallowa County*, 123 Pac. 902, 62 Or. 186.

#### LAYING OR RELAYING

*Buffalo City Charter*, § 288 (Laws 1891, p. 200, c. 105, as amended by Laws 1901, p. 661, c. 228, § 8), provides for the laying and relaying of sidewalks at the expense of abutting owners. Laws 1891, p. 221, c. 105, § 393, divides streets into carriage ways and sidewalks, and *Buffalo City Ordinance*, c. 4, pars. 8, 9, declares that the owner or occupant may be required to grade and level the sidewalk in front of his premises between the street and curbs, and, on his failure to grade and level the sidewalk for ten days after notice, the same may be done at his expense. Held, that the words "laying or relaying" of a sidewalk, within section 288, have the same meaning as "grading or regrading" in section 8, in each case referring to original work on the sidewalk or street, and not to repair after the sidewalk is once laid or relaid. *Konowski v. City of Buffalo*, 115 N. Y. Supp. 467, 470, 131 App. Div. 465.

#### LEAD

The zinc ores known as carbonate, silicate and sulphide of zinc are free of duty, the carbonate and silicate as "calamine," and the sulphide as "minerals, crude," under *Tariff Act July 24, 1897*, c. 11, § 2, *Free List* pars. 514, 614, 30 Stat. 196, 199, except that when they contain lead they are subject to the duty provided on "lead-bearing ore of all kinds," in section 1, *Schedule C*, par. 181, 30 Stat. 166. *United States v. Brewster*, 167 Fed. 122, 123, 92 C. C. A. 574.

## LEADING

### LEADING LIFE OF PROSTITUTION AND LEWDNESS

Resorting to a hotel for the commission of acts of lewdness during one night, constituting parts of a continuous transaction, does not amount to "leading the life of lewdness" within Code, § 4943. *State v. McDavitt*, 118 N. W. 370, 140 Iowa, 342, 132 Am. St. Rep. 275.

A woman who inhabits a house of ill fame or other place as a shelter or resort in which to engage in unlawful sexual commerce is "leading a life of prostitution and lewdness," within the meaning of Code, § 4943, which provides that if any person for the purpose of prostitution or lewdness resorts to, uses, occupies, or inhabits any house of ill fame or place kept for such purpose, or if any person be found leading a life of prostitution, such person shall be imprisoned, etc. The law means during every instant of her residence there, and not merely while in the flagrant act. True, as counsel say, "she must be found while in the act prohibited by the statute"; but the acts here prohibited is not the act of sexual intercourse, but the living of a life of prostitution and lewdness in the house or other resort in which she is found. *State v. Shaw*, 101 N. W. 109, 125 Iowa, 422.

### LEADING QUESTION

A "question is leading" when it suggests the desired answer to the witness. *El Paso & S. W. Ry. Co. v. Welter* (Tex.) 125 S. W. 45, 49.

"Leading questions" are such as suggest answers favorable to the interests of the party asking them. *Parsons v. Bridgham*, 34 Me. 240, 242 (citing 1 Starkie, Ev. [7th Ed.] 169).

A "leading question" is a question "embodying a material fact and admitting of an answer by a simple negative or affirmative." *Walker v. Baldwin & Frick*, 68 Atl. 25, 30, 106 Md. 619 (quoting and adopting definition in 1 Greenl. Ev. § 434; *Lee v. Tinges*, 7 Md. 234).

A "leading question" is one which suggests the desired answer; and a question susceptible to either an affirmative or negative answer, which does not suggest the desired answer, is not objectionable as leading. *Williams v. Smith*, 72 Atl. 1093, 1099, 29 R. I. 562.

"Any question by which the fact is made known to the witness, which the interrogator wishes to find asserted in and by his answer, is a 'leading question.' It is none the less leading because the alternative form of expression is used, as 'Did you, or did you not?'" *Parsons v. Huff*, 38 Me. 137, 141 (citing *People v. Mather* [N. Y.] 4 Wend. 247, 21 Am. Dec. 122; *Hopper v. Commonwealth*, 6 Grat. [47 Va.] 634).

"Leading questions" are defined to be those which ordinarily suggest to the witness the answer desired, or which, embodying a material fact, admit of a direct answer by a simple "yes" or "no," or which instruct a witness how to answer on material points. *Rosenkovitz v. United Railways & Electric Co.*, 70 Atl. 108, 110, 108 Md. 306.

A question is not necessarily "leading" because it admits of a direct negative or affirmative answer, but to make it objectionable when only a single fact is sought to be elicited it should suggest the answer. The use of the words "whether or not" in propounding a question to a witness does not in all cases relieve the question from the objection of being leading. *Bryan Press Co. v. Houston & T. C. Ry. Co.* (Tex.) 110 S. W. 99, 100, 101.

A question, containing the words "whether or not," so as in most instances to prevent the use of the words "yes" or "no" in answer, is said to be ordinarily not leading; whether it is or not depends on the nature of the question, the subject-matter, and the particular manner in which the other parts of it are framed. *State v. Taylor*, 50 S. E. 247, 254, 57 W. Va. 228.

A question is "leading" when it indicates the real or supposed fact which the examiner desires to have confirmed by the answer and the use of the words "whether or not" does not necessarily prevent a question from being leading if it still suggests the answer desired. *Peebles v. O'Gara Coal Co.*, 88 N. E. 166, 168, 239 Ill. 370.

A question propounded plaintiff, as to whether two items in an account previously rendered defendant, and offered in evidence by him, represented or was intended to represent the notes sued on, was rightfully rejected as being "leading." *Sayre v. Woodyard*, 66 S. E. 320, 322, 66 W. Va. 288.

The question, "Did you make any demand upon the defendant for the value of said damaged goods?" addressed to a witness, was not "leading." *International & G. N. R. Co. v. H. P. Drought & Co.* (Tex.) 100 S. W. 1011, 1012.

A witness was asked by the state in a burglary case, in order to identify a suit case as one which accused and another had in their possession: "Do you think that you would know that grip if you was to see it? A. I do not know; I think I would. Q. How does that compare with it? A. That kinder looks like the color of the grip they had. Q. Do you know whether it is or not? A. No, sir; I do not know exactly whether it is or not." Held, that the questions were not objectionable as leading; a "leading question" being one framed so as to indicate the answer desired. *Majors v. State*, 140 S. W. 1095, 63 Tex. Cr. R. 488.

The question asked by the defense, if it was possible, during the time the fight was

in progress, for any man to leave the crowd and go 40 feet and return with a bat without witness seeing him, which question was addressed to the evidence of the state that defendant had done just this thing, is not a "leading question"; a question not being leading because it can be answered "Yes" or "No," but being leading where it suggests the answer desired. *People v. Jones*, 117 Pac. 176, 180, 160 Cal. 358.

In an action by a mine employé for injuries resulting from the fall of rock or slate from the roof, a question on the direct examination of a witness called on behalf of plaintiff "whether in that mine that roof will sound all right in response to tapping and drumming with a pick and in a minute or two fall," is objectionable as leading. *Harper v. Black Diamond Coal Co.*, 142 Ill. App. 594, 597.

A "leading question" is one that may be answered "yes" or "no," and suggests the answer desired. Indeed, by a "leading" question is meant one which suggests to the witness the desired answer. Merely because it may be answered by "yes" or "no" does not render the question leading. Where a witness was asked by his counsel (1) "if his wife \* \* \* had ever had any cough or lung trouble" prior to a certain exposure; (2) "whether or not his wife had ever had any female trouble" prior to such exposure; (3) "if his wife \* \* \* ever suffered with rheumatism, lumbago, or anything of that kind" before such exposure—it was held not leading, though answerable "yes" or "no." *St. Louis Southwestern R. Co. v. Lowe* (Tex.) 97 S. W. 1087, 1088 (citing *Able v. Sparks*, 6 Tex. 350; *Mathis v. Buford*, 17 Tex. 155; *Trammel v. McDade*, 29 Tex. 361; *Lott v. King*, 15 S. W. 231, 79 Tex. 292; *Birgen v. Producers' Yard*, 11 S. W. 1027, 72 Tex. 55; *Cleveland v. Duggan*, 2 Willson, Civ. Cas. Ct. App. § 84).

## LEAF TOBACCO

Filler tobacco as leaf tobacco, see *Filler Tobacco*.

"Congress is, of course, presumed to be familiar with the fact that 'leaf tobacco' is divided into classes, or is subjected, before being placed in bales, to some kind of an assortment." *Erhardt v. Schroeder*, 15 Sup. Ct. 45, 48, 155 U. S. 124, 39 L. Ed. 94.

## LEAGUE

See *Major League*; *Square League*.

"League" and "legion" are of entirely different meanings; "league" being defined as an "alliance of persons," and "legion" as a "military body or organization." *People ex rel. Felter v. Rose*, 80 N. E. 293, 295, 225 Ill. 496.

## LEARNED

### LEARNED IN THE LAW

Where an attorney has been disbarred for violation of legal ethics, which is one of the branches required by Pol. Code, § 686, to be considered in passing upon the qualifications of one seeking admission to the bar, he is not "learned in the law" within the constitutional provision requiring that a state's attorney shall be learned in the law. *Danforth v. Egan*, 119 N. W. 1021, 1025, 23 S. D. 43, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.

### LEARNED PROFESSION

Allens imported under contract as expert accountants were not members of a recognized "learned profession," within Act Cong. March 3, 1903, c. 1012, 32 Stat. 1213, relating to the departure of aliens, and declaring in section 4 that the inhibition against the importation of aliens to perform labor or services of any kind, skilled or unskilled, shall not apply to persons belonging to any recognized learned profession. The definition of the word "profession" given in the *Century Dictionary* and approved in *United States v. Laws*, 16 Sup. Ct. 998, 163 U. S. 259, 41 L. Ed. 151, is a broad one, and it seems not unreasonable to assume that Congress qualified it with the adjective "learned" for the express purpose of restricting the scope of the exception. In *re Ellis*, 124 Fed. 637, 643.

Physicians, teachers, and lawyers belong to the "learned professions." *Flanders v. Daley*, 48 S. E. 327, 120 Ga. 885.

### LEARNING

See *Institution of Learning*.

## LEASE

See *Entire Lease*; *Further Lease*; *Grant- and Leased*; *Lessee*; *Mining Lease*; *Oral Lease*; *Sublease*.

*Expiration of lease*, see *Expire—Expiration*.

See, also, *Let*.

"The right 'to lease' by the ordinarily accepted meaning of the terms is unto the lessee. The owner, or first party, grants the lease, lets or demises the leased premises, and it is the second party who leases." Hence where plaintiff's predecessor in title as "party of the first part" executed a lease of certain premises to defendant "as party of the second part" for a term of two years, which contained a clause that at the expiration of the lease the party of the "first part" should have the privilege of leasing the premises for a further term of one year, etc., the words "party of the first part" used in such renewal clause were so plainly a clerical error, used in the place of party of the "second part" intended, as to put a purchaser of the property on inquiry as to the ten-

ant's right to renew. *Gray v. Maier & Zobelein Brewery*, 84 Pac. 280, 281, 2 Cal. App. 653.

A "lease" is a commutative contract. *Werlein v. Janssen*, 36 South. 216, 218, 112 La. 31.

"A 'lease' is nothing but a contract, and is governed by the same rules that other contracts are." *Feaster v. Fagan*, 113 N. W. 478, 479, 135 Iowa, 633.

The contract employed in the creation of the relation of landlord and tenant is called a "lease," and with reference to this the parties are designated as "lessor" and "lessee." *Foss v. Stanton*, 57 Atl. 942, 76 Vt. 365.

The indenture or writing is the evidence of the lease, though the term "lease" is sometimes used to designate the writing or instrument. *Mattlage v. McGuire*, 111 N. Y. Supp. 1083, 1085, 59 Misc. Rep. 28.

The word "lease" has a settled technical import. It imports a contract by which one person, either natural or artificial, divests himself, or itself of, and another person takes possession of, lands or chattels for a term. *Moorshead v. United States Rys. Co.*, 96 S. W. 261, 272, 203 Mo. 121.

A "lease" in writing constitutes a written contract, and the lessee cannot surrender it or be released from its terms without the consent of the lessor, and it is absolutely essential to the termination of the term that both the lessor and lessee agree to the surrender, and, when this is shown, the tenant is no longer liable. To constitute the surrender there must be a mutual agreement between the lessor and lessee. *Higgins v. Street*, 92 Pac. 153, 154, 19 Okl. 45, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086.

A "lease" is "a species of contract for the possession and profits of lands and tenements, either for life, or for a certain term of years, or during the pleasure of the parties." A writing by which defendants gave plaintiff the right to enter on and take possession of a strip of their land, and construct thereon a tramway, and occupy it for a stated time, in consideration of a certain amount per year, is a lease. *Asher v. Johnson*, 82 S. W. 300, 301, 118 Ky. 702 (quoting *Bouvier*).

An instrument reciting that it is agreed that a lease will be given on certain terms, and which was preceded by a letter in which different terms were proposed, and the parties subsequently agreed on still other terms, did not constitute a "lease," though it was accompanied by a payment of rent and the lessee took possession. *Ver Steeg v. Becker-Moore Paint Co.*, 80 S. W. 346, 351, 106 Mo. App. 257.

To constitute a "lease" the essentials of a contract must be present, and there must be an offer and an acceptance of the terms of the offer. *Israelson v. Wollenberg*, 116 N. Y. Supp. 626, 627, 63 Misc. Rep. 293.

A "lease" is a contract for the possession and profits of land and tenements on the one side and the recompense of rent or property on the other. *Ward v. American Health Food Co.*, 96 N. W. 388, 391, 119 Wis. 12.

A paper cannot be considered as a "lease," where it is not signed by the lessee, does not identify the premises, or state when the term is to begin or upon what dates the rent is payable. *Kuntz v. Mahrenholz*, 88 N. Y. Supp. 1002, 1003.

An agreement to give a lease is not a "lease," unless followed up by occupation, which is evidence of lessee's agreement to hire. *Goldberg v. Wood*, 80 N. Y. Supp. 427, 428, 45 Misc. Rep. 327.

No particular form of expression is necessary to constitute a lease, and whatever expressions explain the intentions of the parties to be that one shall divest himself of the possession of his property and that the other shall take it for a certain period of time are sufficient, and will amount to a "lease" for the specified time as effectually as if the most proper form of words had been used for that purpose. *Board of Sup'rs of Hancock County v. Imperial Naval Stores Co.*, 47 South. 177, 179, 93 Miss. 822, 17 L. R. A. (N. S.) 698.

The word "lease," as used in *Burns' Ann. St. Ind. 1901*, § 5524, providing that any telephone company authorized under the act shall have power to lease or attach to other telephone lines or exchanges by lease or purchase, does not include the power to sell all the property and franchises of a telephone company to another corporation, nor can the power to sell be necessarily implied from the grant of the expressed powers. *Cumberland Telephone & Telegraph Co. v. City of Evansville*, 127 Fed. 187, 193.

The word "lease," as used in a lease for a term of one year with the privilege of four years' additional "lease," was equivalent to "term." *Quinn v. Valquette*, 68 Atl. 515, 519, 80 Vt. 434, 14 L. R. A. (N. S.) 962 (citing *Harding v. Seeley*, 33 Atl. 1118, 148 Pa. 20).

A direction by one who had been occupying an apartment to the janitress, who was without authority to lease the same, not to let any one have the apartment during his absence, and a statement by him that when he came back he would sign the lease with the agent and that he wanted it for a year, did not constitute an "oral lease," and was no more than an agreement for a lease. *Columbia Bank v. Clarke*, 108 N. Y. Supp. 587, 588.

An instrument reciting receipt from defendants of \$10 for deposit on rent of two specified lofts, "rent to be \$65 per month and to run for two years," did not constitute a "lease" of the lofts for two years; it having been delivered to defendants by an agent of the owners not authorized to make leases, and it also being contemplated that a "lease"



should be subsequently executed by the owners. *Finkelstein v. Fabyik*, 107 N. Y. Supp. 67, 69.

An instrument described as a "lease," which fixed no length of time for it to run nor expressed any consideration therefor, and which recited that it was for "— months," and provided that "on leaving the order for said goods — dollars on the delivery of the same, — dollars, and every week thereafter the sum of — dollars," and which purported to be for the rent of household goods and jewelry, which were nowhere set forth or included in the covenants or agreements contained in the instrument, was not a "lease." *State v. Cordray*, 98 S. W. 1, 2, 200 Mo. 29, 9 Ann. Cas. 1110.

Since Rev. St. 1899, § 1187, expressly authorizes a street railway company to lease its property, and since section 4180, provides that when technical words having a peculiar meaning are used in a statute they shall be understood according to their technical import, a street railroad company leasing its property and franchises to another street railroad company is not liable for an injury to a passenger resulting from the negligence of the employees of the latter company; the word "lease" importing a contract by which one person divests himself and another person takes possession of property for a term. *Moorshead v. United Rys. Co. of St. Louis*, 100 S. W. 611, 613, 203 Mo. 121.

Where the owner of a sewing machine places it in possession of a prospective purchaser with an option to purchase at a fixed valuation, and with no agreement to rent, such transaction is not a lease within Comp. St. 1907, c. 32, § 26, providing that an agreement for lease must be in writing, and a copy filed with the county clerk. *Singer Sewing Mach. Co. v. Omaha Umbrella Mfg. Co.*, 119 N. W. 958, 959, 83 Neb. 619.

The word "lease," as used in Rev. St. 1899, § 1060, authorizing railroad leases, contemplates such an instrument as divests the lessor of possession and control and places the same in the lessee to the exclusion of the lessor, possessing all the qualities and incidents of a lease at common law between landlord and tenant. The rule that a landlord, in the absence of a covenant to do so, is under no obligation to make repairs, is applicable to leases of railroads; so that the lessor, in the absence of a covenant to repair, is not liable for injuries sustained by employees of the lessee company by the latter's negligence in failing to keep the track in proper repair. *Hahs v. Cape Girardeau & C. R. Co.*, 126 S. W. 524, 528, 147 Mo. App. 262.

Where an instrument granted to defendants the use of and the right to occupy certain lands described as a game preserve, and provided that it was understood that any failure on defendants' part to perform any of the agreements expressed should work "a for-

feiture of this lease," and plaintiff in its complaint alleged that it "entered into a certain indenture of lease," and that "at the time of the commission of said acts last aforesaid such defendants were tenants of said plaintiff under and by virtue of said lease, and for the purposes therein mentioned," the instrument would be regarded as a "lease," creating the relation of landlord and tenant. *Shafter Estate Co. v. Alvord*, 84 Pac. 279, 2 Cal. App. 602.

A "lease" is defined by Bouvier to be: "A species of contract for the possession and profits of lands and tenements either for life or for a term of years or during the pleasure of the parties. A conveyance by way of demise always for a less term than the party conveying has in the premises. Duration for a shorter period than the duration of the interests of the lessor in the land is one of its essential features, for if the lessor disposes of his entire interest it becomes an assignment, and is not a lease. In other words, the granting of a lease always supposes that the grantor reserves in himself a reversion." In 18 Am. & Eng. Enc. of Law (2d Ed.) 597, a lease is defined as: "A contract for the possession and profits of lands and tenements on the one side and the recompense or rents on the other, or in other words, a conveyance to a person for life, years or at will, in consideration of a rent, or other recompense." Within these definitions a sealed writing, witnessing that "the lessors do demise, let and lease for coal mining and coke manufacturing purposes for a period of thirty years" a tract of land, and which expressly agrees that "if at the expiration of the said period of thirty years, all the available merchantable coal which can be profitably mined has not been mined and removed, the lessees shall have the privilege of an extension of this lease on the same terms and conditions as those hereinbefore set forth, for a reasonable additional time until the whole of said coal can be so mined and removed," and which provides for a rent or royalty to the lessors of a certain amount per ton, created a "lease." *Harvey Coal & Coke Co. v. Dillon*, 53 S. E. 928, 930, 59 W. Va. 605, 6 L. R. A. (N. S.) 628.

Where a statute provides for the payment of a franchise tax by railroads, express companies, chair and dining car companies, etc., to the state, and also a local tax to the county, city, or taxing district, and another statute provides for the ascertainment of the franchise tax according to that proportion of the capital stock which the length of lines operated, owned, or leased in the state bears to the total mileage operated, owned, or leased, and the proportion of the tax to be paid in any locality is to be computed in the same way, a traffic arrangement by which one railroad obtains the right to use the tracks of another for a certain period of time at a certain rental, in order to

obtain ingress to a terminal city, is a "lease," within the meaning of the statute and for the mileage operated under which the railroad is liable to pay a franchise tax. *Jefferson County v. Board of Valuation & Assessment of Kentucky*, 78 S. W. 443, 445, 117 Ky. 531.

Where a will devised a farm to a son of testatrix, and provided that if the farm should be leased for the purpose of mining the proceeds of the lease should be divided among the children of testatrix, the word "lease" was not used in a technical sense, but indicated a method of converting the minerals into proceeds. *Hyde v. Rainey*, 82 Atl. 781, 784, 233 Pa. 540, Ann. Cas. 1913B, 726.

Under a covenant in an oil and gas lease that the lessor would, in and by any deed thereunder executed by him, prohibit any drilling for oil or gas on any land so conveyed, the word "deed" does not include a "lease," so as to prohibit the lessor from leasing the land for the purpose of drilling oil and gas wells thereon. *Test Oil Co. v. La Tourette*, 91 Pac. 1025, 1029, 19 Okl. 214.

The use in a writing of such words as "lease" and "rent," the fact that it is for a definite period and a recited consideration, that it provides for an abatement of rent in case of the obstruction of the wall by other buildings, also for necessary access through and upon the premises, and that the lessor warrants the title to said leasehold for the time herein mentioned, demonstrates that the writing was intended as a "lease." *Levy v. Louisville Gunning System*, 89 S. W. 528, 530, 121 Ky. 510, 1 L. R. A. (N. S.) 359.

The words "reserves" and "leases," in the title and body of chapter 244, p. 456, Laws 1897, providing for the assessment and taxing of mineral reserves, or leases, or separately owned mineral, or mineral rights, to the owner thereof, separately from the land, and providing penalties for its violation, mean at one time reserved or leased mineral, and at another written instruments evidencing mineral rights. *Kansas Natural Gas Co. v. Board of Com'rs of Neosho County*, 89 Pac. 750, 751, 75 Kan. 335.

Naphtha lamps and fire alarm lanterns owned and used by a lighting company in performance of its contract to light and maintain all naphtha lamps used by the city for lighting are not within Rev. Laws, c. 12, § 23, cl. 2, making personal property "leased" for profit liable to taxation where located, since the lamps are not held by the city as a "lessee." *Rising Sun St. Lighting Co. v. City of Boston*, 63 N. E. 408, 181 Mass. 211.

A "lease" granted premises, described on a blueprint attached, reserving from the said "leased premises" that portion lying between the tracks of the L. Railroad, as shown on such blueprint, and also reserving a strip of land 10 feet on either side of said railroad tracks. Another clause granted

the lessee an option to purchase the said "leased premises" at a certain price. Held, that the saving clause was not a reservation of an easement merely, but reserved from the operation of the lease the fee of the portion reserved, and, such reservation having been omitted from a deed executed on the exercise of the option, the grantor was entitled to have the mistake corrected. *Los Angeles & R. R. Co. v. New Liverpool Salt Co.*, 87 Pac. 1029, 1030, 150 Cal. 21.

A jury's negative answer to the special interrogatory, "Did you find that" the landlord's agent "had authority to waive the lease" of the landlord on any part of the crop covered by his lien, is not inconsistent with the verdict for the defendant, as authority to "waive the lease" is something different from authority to waive the lien. *Fishbaugh v. Spunaugle*, 92 N. W. 58, 60, 118 Iowa, 337.

#### As conveyance

Conveyance as including, see Conveyance.

A "lease" is defined to be "a conveyance of lands or tenements to a person for life, for a term of years, or at will, in consideration of a return of rent or some other recompense." *Hayes v. City of Atlanta*, 57 S. E. 1087, 1089, 1 Ga. App. 25 (quoting and adopting definition in Black, Law Dict.).

A "lease" is a conveyance of an estate or interest in real property for life, for years, at will, or for a term less than the grantor had in the real property. The term is not satisfied by a contract by which a landowner gives to another a right to convey water from a spring. *Clark v. Strong*, 93 N. Y. Supp. 514, 516, 105 App. Div. 179.

"A 'lease' may be in a sense a conveyance, but such is not the commonly accepted nor the accurate meaning of the term. When we say premises are 'leased,' we generally mean that the use of them is transferred." *Duff v. Keaton*, 124 Pac. 291, 294, 33 Okl. 92, 42 L. R. A. (N. S.) 472 (quoting definition in *Perkins v. Morse*, 2 Atl. 130, 78 Me. 17, 57 Am. Rep. 780).

A "lease" is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own, and it passes a present interest in the land for the period specified. *Chandler v. Hart*, 119 Pac. 516, 519, 161 Cal. 405, Ann. Cas. 1913B, 1094.

To "lease" is to transfer, for a term specified therein, from the lessor to the lessee, the property therein demised. *Moorshead v. United Rys. Co.*, 96 S. W. 261, 277, 203 Mo. 121.

The word "lease" is sometimes used to signify the interest and estate which is conveyed, but may properly apply to the instrument or means of conveyance. *Weander v. Claussen Brewing Ass'n*, 84 Pac. 735, 736, 42 Wash. 226, 114 Am. St. Rep. 110, 7 Ann. Cas. 536.

"A 'lease' is a contract for the possession of profits of land and tenements on the one side and the recompense or rents on the other, or, in other words, a conveyance to a person for life, years, or at will in consideration of a rent or other recompense." *Headley v. Hoopengartner*, 55 S. E. 744, 748, 60 W. Va. 626.

#### **Grant of easement**

Ky. St. 1903, § 2031, authorizes a guardian to lease any real estate of his ward until the latter shall arrive at full age provided no such lease is made for a longer term than seven years. Held that, where a guardian granted an easement for the laying of pipe line over his ward's land, a conveyance would be construed as a valid lease of the property for the purpose intended during the minority of the ward but not for a longer term than seven years. *Cumberland Pipe Line Co. v. Howard* (Ky.) 100 S. W. 270.

#### **As deed**

See Deed.

#### **As grant**

See Grant.

#### **As incumbrance**

See Incumbrance.

#### **License distinguished**

The difference between a license and a lease is that a lease gives to the tenant the right of possession against the world, while a license creates no interest in the land, but is simply the authority or power to use it in some specific way. *Joplin Supply Co. v. West*, 130 S. W. 156, 161, 149 Mo. App. 78.

A license in respect to real estate is an authority to do a particular act or series of acts on the land of another without possessing an estate therein. The test to determine whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive use of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, the question to be determined by a construction of the instrument. *Shaw v. Caldwell*, 115 Pac. 941, 943, 16 Cal. App. 1.

The test to determine whether an agreement for the use of real estate is a "lease" or a license is whether the contract gives exclusive possession of the premises against the world, including the owner, in which case it is a lease, or whether it merely confers a license to occupy under the owner. An instrument by which the owner of premises let to defendant "his ice business and privileges in \* \* \* with the use and benefit of his icehouses," for a term ending on a certain date, gave defendant the exclusive possession of, and the entire beneficial interest in, the icehouses and the land under them, so as to constitute a lease of the premises, in-

stead of a mere contract for their use as licensee under the owner. *Roberts v. Lynn Ice Co.*, 73 N. E. 523, 524, 187 Mass. 402.

A contract, whereby it was agreed that plaintiff should have the exclusive privilege of the public stenographer's office in a certain hotel, plaintiff agreeing to pay the rent promptly each month in advance for the exclusive privilege of the public stenographer's office, and to do private correspondence for the hotel management, and to furnish competent stenographers for this service, was not a "lease," but a mere agreement to allow plaintiff to carry on business in the hotel. *Hess v. Roberts*, 108 N. Y. Supp. 894, 895, 124 App. Div. 828.

An agreement whereby tenants of a store building, leased for a plumbing business, allowed a third person to occupy part of it in conducting an electrical supply business, was a "lease," though called a "license" by them. *Denecke v. Henry F. Miller & Son*, 119 N. W. 380, 384, 142 Iowa, 486, 19 Ann. Cas. 949.

An instrument by which defendant contracted to "let," and plaintiff to "take," the right to maintain, at a race park, three stands for sale of candies, said right being exclusive for said business within said park, also the storeroom under the tracks, and one of said stands, not to exceed a certain size, to be in the main pavilion, and providing the period of "letting," and the amount and times of payment of the "rent," instead of being a "license," is a "lease," affecting defendant in the exclusive use of the land, so that plaintiff, having paid the rent, can recover no part of it, though the park is destroyed by fire before the end of the period of letting. *Mehlman v. Atlantic Amusement Co.*, 119 N. Y. Supp. 222, 223, 65 Misc. Rep. 25.

A contract to let to plaintiffs the exclusive news, confectionery, view, and checking privileges on defendant's steamers for certain specified seasons, though denominated a "lease," was not a "lease," but a "license." *Nash v. Thousand Islands Steamboat Co.*, 108 N. Y. Supp. 336, 342, 123 App. Div. 148.

An instrument granting, demising, and leasing certain land for the purpose solely of mining and operating for oil, gas, and other minerals, laying pipe lines, building tanks, and structures to take care of the products is a lease conveying an interest in the land, and not merely a license to enter and operate for oil or gas. *Barnsdall v. Bradford Gas Co.*, 74 Atl. 207, 225 Pa. 338.

An instrument by which the owner of land therein described grants to another all the gas and oil under it, with the exclusive right to enter thereon at all times to drill and operate for oil or gas, etc., and provides for the time within which the various wells shall be completed, with a stipulated monthly rental for each well not finished on time,

and that each location shall consist of ten acres more or less, and that no well shall occupy more than one acre, is not a "lease," as leases are usually understood, but a mere grant of an exclusive right to enter and explore for oil and gas, and prosecute such business, occupying no more land than is needed for that purpose, not more than one acre to a well. *Stahl v. Illinois Oil Co.*, 90 N. E. 632, 633, 45 Ind. App. 211.

#### **Mining license**

A contract simply giving a right to take ore from a mine, no estate being granted, confers a mere "license," and licensee acquires no right to the ore until separated from the freehold; but an instrument devising lands for mining purposes, for a designated term of years, at a fixed rent, and giving the right to erect all necessary buildings, is a "lease," not merely a mining license. *Barnsdall v. Bradford Gas Co.*, 74 Atl. 207, 208, 225 Pa. 338, 26 L. R. A. (N. S.) 614.

#### **Implied covenant for quiet enjoyment**

The words "grant," "demise," or "lease," in a lease for years, creates a covenant in law for good title and quiet enjoyment of the lands demised during the term. *Headley v. Hoopengartner*, 55 S. E. 744, 747, 60 W. Va. 626.

#### **As perpetuity**

See Perpetuity.

#### **As property**

See Personal Property; Property.

#### **As privilege**

See Privilege.

#### **Sale and contract of sale distinguished**

A conveyance of standing timber for sawmill purposes is a sale of land and not a "lease" within Civ. Code 1895, § 3613, declaring that on a sale of land there is no implied warranty of title, and hence a vendee of standing timber cannot defend against a suit on purchase-money notes in any plea predicated on the breach of an implied covenant of quiet enjoyment. *McLendon Bros. v. Finch*, 58 S. E. 690, 692, 2 Ga. App. 421.

A contract binding the party of the first part to rent certain land to the party of the second part, providing for the payment of three installments of rent, and agreeing that if these are paid the party of the first part will convey the land to the party of the second part, was a "lease" and not a contract of sale. *Thomas v. Johnson*, 95 S. W. 468, 469, 78 Ark. 574 (citing *Quertermous v. Hatfield*, 14 S. W. 1096, 54 Ark. 16; *Ish v. Morgan*, 3 S. W. 440, 48 Ark. 413; *Watson v. Pugh*, 10 S. W. 493, 51 Ark. 218; *Cheney v. Libby*, 10 Sup. Ct. 498, 134 U. S. 68, 33 L. Ed. 818; *Blanchard v. Raines*, 20 Fla. 467; *Houston v. Smythe*, 5 South. 520, 66 Miss. 118).

A written instrument denominated a "lease," acknowledging the receipt of \$50, and providing for further payments of \$10

per month, with interest, until a certain sum was paid, after which the leased personalty was to become the property of the lessee, was a conditional sale. *Pringle v. Canfield*, 104 N. W. 223, 19 S. D. 506.

A contract provided that plaintiff leased from the owner of certain land a tract containing 250 acres and agreed to pay \$205 for the year 1905, with the privilege of rerenting the property on the same terms for seven successive years, and that in case of such renewals, on full payment of the rent, the owner on completion of the period would convey the property to plaintiff in consideration of \$1, and the amount, with legal interest, of taxes paid pending the contract. Held, that such contract operated as a "lease," and the annual payments as rent, so long as it was executory, and on completion of the payments it became a sale, at plaintiff's option, on his paying \$1, taxes, and interest pending the contract. *Heard v. Heard & Lee*, 41 South. 827, 828, 148 Ala. 673 (citing *Davis v. Robert*, 8 South. 114, 89 Ala. 404, 18 Am. St. Rep. 126; *Wilkinson v. Roper*, 74 Ala. 140).

The owner of land on which there were dumps of slag and smelter products entered into a contract denominated a "lease," by which he purported to lease the land for a stated term, with the right to remove the dumps on payment of a series of notes maturing at intervals through a portion of the term. The contract provided, in effect, that removal of the dumps should proceed only in proportion as payments were made, that when all the dumps were removed the lease should terminate, and that on payment of all the notes on or before maturity the lessee should be entitled to a bill of sale of the dumps, with the right to remove the same within a specified term. It further provided that: "It is mutually agreed that all work on the said above-described slag, slag dumps and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or keep any of the agreements herein, \* \* \* or any failure to pay immediately when due any one or more of said 100 promissory notes, \* \* \* shall work a forfeiture of all rights of the said party of the first part under this agreement, and the said party of the second part shall have the right \* \* \* to declare each and every one and all of the said 100 promissory notes, or whatever number of the said notes may remain unpaid, \* \* \* immediately due and payable, and \* \* \* to collect the same, \* \* \* and in case of forfeiture as aforesaid all work done and money expended by the said party of the first part shall inure to the party of the second part as liquidated damages, \* \* \* and the said party \* \* \* may thereupon \* \* \* enter upon said premises and dispossess all persons occupying the same." Held, that such transaction was not a lease,

but a conditional sale of the material in the dumps, which gave the owner alternative remedies for breach of the contract, and that, where he declared a forfeiture and took possession because of default in payment of notes, he could not also collect the notes maturing thereafter. *Manson v. Dayton*, 153 Fed. 258, 259, 265, 82 C. O. A. 588.

An agreement to sell a machine for a certain price, installments to be paid on acceptance of the proposition and shipment of the machine, with an option of returning it within a certain time in lieu of the last payment, and giving no claim on the part paid, is a "lease" for experimental purposes with the privilege of completing the purchase, and not a sale within Civ. Code, § 1770, providing that one who manufactures an article under an order for a particular purpose warrants it reasonably fit therefor. *Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co.*, 96 Pac. 369, 372, 153 Cal. 725.

A contract recited that S. desired to have the "use" of plaintiff's building and saloon fixtures, to become "the owner of said fixtures when fully paid for," and provided that S. could use the premises for a specified term; that he should make specified monthly payments to plaintiff, until the total payments, after deducting monthly ground rent, should equal the cost of the building, fixtures, etc., and 8 per cent. per annum interest thereon, when S. should be deemed the owner of the fixtures, thereafter paying plaintiff \$55 per month until the expiration of his ground lease, and that S.'s failure to make the monthly payments should evidence a relinquishment of his rights under the contract. Held, that the contract evidenced a conditional sale of the fixtures, etc., and not a "lease" thereof; S. becoming the owner thereof on reimbursing plaintiff his original investment, with interest, etc. *Coors v. Reagan*, 96 Pac. 966, 967, 44 Colo. 126.

A contract, after reciting that the vendors had "rented" certain furniture, provided that the title should remain in the vendors until the purchase money was paid in specified installments, and on default in any payment the vendors reserved the right to take possession without legal process. There was further provision that all payments should be placed to the credit of the vendee as payments on the "lease," or any other goods for which he might owe the vendors on open account on any other "lease," and that the vendee was to have no title to the "lease" until his account should be settled in full. Held, that the contract was one of conditional sale, entitling the vendors to the protection afforded by Code 1907, § 7342, making it a crime to remove or sell personal property to hinder or defraud any person who has a valid claim thereto, with knowledge of the existence of such claim. *Steele v. State*, 48 South. 673, 674, 159 Ala. 9.

A contract, though in the form of a lease and called a "lease," by which the vendor reserves title until final payment should be made, and the right of rescission in case the purchaser should fail to pay any installments of the so-called rent, is a conditional sale. *Unitype Co. v. Long*, 143 Fed. 315, 317, 74 C. O. A. 453.

A "lease" of property under an agreement that, on payment of a specified sum in installments, title shall pass to the lessee, amounts to a conditional sale, valid as to third parties as well as the parties to the transaction. *Kidder v. Wittler-Corbin Machinery Co.*, 80 Pac. 301, 302, 38 Wash. 179.

#### Sharing contract

An owner of a farm and milk route let it to one on condition that he furnish horses, etc., and divide the proceeds as follows: Eggs, daily; crops, when sold; milk, monthly. Held, that the contract did not create the relation of landlord and tenant and is not a "lease," and hence did not create the relation necessary to allow the application of the law relating to the right of distress for rent. *Olden v. Mather*, 67 Atl. 435, 73 N. J. Eq. 217 (citing *Gray v. Reynolds*, 50 Atl. 670, 67 N. J. Law, 169).

#### LEASE AT WILL

A lease of real property for more than three years, signed by an agent whose authority is not in writing, has against the principal no other force or effect, either in law or in equity, than a "lease at will," because of the first section of the statute of frauds. *Clement v. Young-McShea Amusement Co.*, 67 Atl. 82, 84, 70 N. J. Eq. 677, 118 Am. St. Rep. 747 (citing *Gen. St.* p. 1602).

#### LEASE FOR YEARS

A lease for any definite period is a "lease for years," and a lease for one year and a lease for 99 years create an estate of equal dignity. *Moss Point Lumber Co. v. Board of Sup'rs of Harrison County*, 42 South. 290, 298, 89 Miss. 448.

"A 'lease for years' is a contract between lessor and lessee for the possession and profits of lands and tenements on the one hand and a recompense by rent or other consideration on the other." *City of New York v. Interborough Rapid Transit Co.*, 104 N. Y. Supp. 157, 160, 53 Misc. Rep. 126 (quoting and adopting definition in *McAdam, Landl. & T.* 127).

#### LEASE FROM YEAR TO YEAR

A lease for one year to continue thereafter from year to year so long as mutually agreeable to the parties is a "lease from year to year" after the first year, and entitles the tenant to possession for at least two years and to sixty days' notice before the end of a year to terminate the lease. *McQuinn v. Logue*, 128 S. W. 516, 517, 143 Mo. App. 232.

**LEASE OF CONVICTS**

"The attempt is made to construe the expression 'leasing or hiring of convicts,' as used in the Constitution, as being synonymous with 'leasing of farms to be worked by the convicts.' How futile such an effort is will be apparent when we recall that at the adoption of the Constitution there was no system of leasing farms, and hence it was impossible that the constitutional convention could have dealt with a situation which had never arisen." *Henry v. State*, 39 South. 856, 876, 87 Miss. 1.

**LEASEHOLD**

A "leasehold" is defined to be "an estate in realty held under a lease." *Hayes v. City of Atlanta*, 57 S. E. 1087, 1089, 1 Ga. App. 25 (quoting and adopting definition in *Black, Law Dict.*).

"A 'leasehold interest' is not real estate, but merely a chattel real, which is personal property." *Townsend v. Boyd*, 66 Atl. 1099, 1101, 217 Pa. 386, 12 L. R. A. (N. S.) 1148.

A "leasehold" is an intangible chattel real; it is an entity per se, distinguished from the fee ownership out of which it issues. "Whether the distinction seems refined or not, it is real in legal thought, for a leasehold is not the wheat or corn produced under the right conferred by the lease. The lease is a thing apart from the commodities produced under the right conferred by it." A sealed writing demising and leasing for coal mining and coke manufacturing purposes for thirty years a tract of land, and granting unto the lessee the sole right of mining, shipping, and selling coal from the leased premises, with an extension to remove coal which can be profitably mined, providing for a rent or royalty to the lessor of ten cents a ton for all coal mined, containing a forfeiture clause for breach of covenant, created a leasehold or chattel real, taxable to the lessee under Acts 1905, p. 285, c. 35. *Harvey Coal, etc., Co. v. Dillon*, 53 S. E. 928, 936, 59 W. Va. 605.

A "leasehold" is the right to use property upon which a lease is held for the purposes of the lease. It is intangible property, which the law recognizes as having value, but which is incorporeal in its nature. It is not the property upon which the lease is held nor the property used in its exercise. In determining the taxable value of the leasehold, the pecuniary value of the property used in connection therewith or the use of which constitutes the leasehold estate may not be taken into consideration. The land which constitutes the subject of the leasehold is taxed, not as a leasehold, nor in the name of the lessee, but as land, in the name of the owner, and is not to be taxed over again in the name of the lessee, on the theory that it constitutes part of the leasehold. Nor are the improvements on the land,

whether they belong to the landowner or the lessee, to be taxed under the designation of "leasehold." If they belong to the owner of the land, they are charged to him, either as land or as personal property. Their value is not to be included in, or taken to make up, the value of the intangible thing, the leasehold. *State v. Bare*, 56 S. E. 390, 393, 60 W. Va. 483.

Under Burns' Ann. St. 1908, §§ 8395, 8396, giving a mechanic's lien on buildings and land to the extent of the title of the owner for whose immediate benefit the labor was done, or materials furnished, and where the owner has only a leasehold, the lien is not impaired by a forfeiture of the lease for rent, one furnishing materials under a contract with a purchaser in possession does not obtain a lien on the building as against the vendor after a surrender of the possession and rights of the purchaser; the term "leasehold" not including such purchaser. *Toner v. Whybrew*, 98 N. E. 450, 453, 50 Ind. App. 387.

**As chattel real**

See Chattel Real.

**As freehold**

See Freehold.

**As goods and chattels**

See Goods.

**As homestead**

See Homestead.

**As interest in land**

See Interest (In Property).

**As property**

See Personal Property; Property; Real Property.

**LEAST**

See At Least.

**LEAVE—LEAVING**

See Die Leaving Children; Die Leaving No Children; Die Leaving No Issue; Loss Through His Leaving; Should They Leave Issue.

Going away from a horse, beyond sight, hearing, and reasonably immediate reach, is "leaving" it, within a city ordinance declaring leaving any horse unhitched within a street a nuisance. *Monroe v. Hartford St. Ry. Co.*, 56 Atl. 498, 500, 76 Conn. 201.

The word "leaving," as used in an ordinance forbidding the leaving of a horse, etc., unattended in the street, means to desert, to abandon, to forsake; hence to give up, to relinquish. *Southern Hardware & Supply Co. v. Standard Equipment Co.*, 48 South. 357, 358, 158 Ala. 596.

The word "leave," in a letter written by testator to plaintiff, reciting "Delos, if there is not any change in my family, I shall leave

one-half of what I have for you, but have willed you \$1,000—now I want to say to you—you get me up a cane that will be good enough for you when I get through with, and I will 'leave' the cane and \$1,000 with it when I get through," means *prima facie* will. The testator accepted the cane furnished by plaintiff, and used it for many years, but did not leave \$1,000 to plaintiff, but substantially all of his property to an adopted daughter, who was amply provided for without the \$1,000. Plaintiff was entitled to specific performance of the contract created by the letter. *Bush v. Whitaker*, 91 N. Y. Supp. 616, 618, 45 Misc. Rep. 74.

Defendant's dray driver finished loading his dray from a car, drove away from the car from four to six feet and stopped the team, and was tying the load on the dray without having hold of the lines, when another team frightened his horses and they backed against the car, crushing plaintiff. Held, that the driver was not negligent as having left his team, within an ordinance making it unlawful to leave an animal attached to a dray upon a public street without locking the wheels of the vehicle; to "leave," within the ordinance, meaning to depart or abandon for the time, to go away from the immediate charge and supervision of the animals. While the driver of M.'s team had gotten down to fasten his load, B.'s team was negligently driven so as to frighten M.'s team, which backed up and crushed plaintiff's intestate. Held, that the fact that the accident would not have happened if the wheels of M.'s dray had been locked was no excuse for the negligent driving of B.'s team, where the act of M.'s driver in getting down did not amount to a leaving of his team within an ordinance requiring wheels to be locked in such cases, the condition and equipment of M.'s dray being immaterial on the question of B.'s liability, unless M.'s driver violated the ordinance and by the fact of so doing was negligent. *Sullivan v. Morton Draying & Warehouse Co.*, 108 Pac. 895, 896, 13 Cal. App. 35.

Laws N. C. 1890, p. 175, c. 54, § 62, authorizes service on certain insurance companies by "leaving" the summons in the office of the commissioner of insurance. Held that, where a return recited that service was made by reading the summons to the commissioner of insurance and "delivering" a copy thereof to him, it would be presumed that a copy of the summons was left with the commissioner; the court in which the action was brought being one of general jurisdiction. *Johnston v. Mutual Reserve Life Ins. Co.*, 93 N. Y. Supp. 1052, 1059, 104 App. Div. 550.

## LEAVENED

Edible wafers, raised in the making by the use of baking powder or bicarbonate of soda, are "leavened," although such agents

do not produce fermentation. *F. H. Leggett & Co. v. United States*, 131 Fed. 817, 818.

## LEAVES

See Ornamental Leaves.

Artificial leaves, see Artificial Flowers.

As to palm leaves which have been subjected to processes that restore their natural appearance and prevent decay, and some of which have been arranged in wreaths on wire frames, held that, as there had been no advance in manufacture that destroyed the original articles or made them useful for other purposes, or altered their trade designation, they still remained dutiable as "leaves," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191, rather than as "manufactures" of palm leaf, provided for in paragraph 450, 30 Stat. 193. *Kreshower v. United States*, 152 Fed. 485, 486.

## LEDGER

See Stock Ledger.

As book of original entries, see Book of Original Entries.

A ledger is a book of accounts in which are collected and arranged, each under its appropriate head, the various transactions scattered throughout the journal or daybook. *First Nat. Bldg. Co. v. Vandenberg*, 119 Pac. 224, 227, 29 Okl. 583.

## LEFT

See Whatsoever is Left.

"Left," in a devise of all the testatrix's estate to two grandchildren equally to be their estate, not subject to the debts or control of their husbands, and providing that on the death of either of them without descendants the survivor should have the share of the one so dying, and on the death of the survivor without descendants what was left should go to the others, shows that testatrix did not intend to devise to others the entire fund, but only so much of it as should vest at the death of the surviving issue. *Irvine v. Putnam (Ky.)* 89 S. W. 520, 521.

## LEFT SECURED ON MY REAL ESTATE

In a will giving testator's wife the interest on a sum of money so long as she lives and remains unmarried, to be "left secured on my real estate," the phrase quoted did not require the legacy to the wife to be secured by a mortgage on testator's real estate, but created a charge on such real estate without the aid of a mortgage. *Plum v. Smith*, 62 Atl. 763, 764, 70 N. J. Eq. 602.

## LEFT WITH

A person being in charge of an office must be understood to have been in charge of the whole of it, and a paper placed before

his eyes in a conspicuous place on the office desk therein is, in contemplation of Code Civ. Proc. § 1011, "left with a person having charge" of the office. *People v. Ferris Irr. Dist.*, 76 Pac. 381, 142 Cal. 601.

## LEG

See Breaking of a Leg.

A policy insuring against an accidental breaking of a "leg or arm" covers fractures of bones of the limbs whether in the hands or feet or in the upper or central divisions of the limbs, including a fracture of the heel bone (os calcis). *Rogers v. Modern Brotherhood of America*, 111 S. W. 518, 131 Mo. App. 353.

## LEGACY

See Beneficial Legacy; Contingent Legacy; Cumulative Legacy; Demonstrative Legacy; Entitled to Legacy; General Legacy; Modal Legacy; Specific Legacy; Vested Legacy.

Legacies are parcels of the distributable estate. Their amount may be expressed in precise figures, or they may be determinable upon an established basis of computation. *Blakeslee v. Pardee*, 56 Atl. 503, 505, 76 Conn. 263.

Testamentary trustees are entitled to pay the income from trust funds to the guardian of an infant beneficiary pending proceedings for settlement of their accounts without requiring a bond; such income being neither a "legacy" nor "distributive share," within Code Civ. Proc. § 2746. In re *Williams*, 123 N. Y. Supp. 383, 384, 66 Misc. Rep. 417.

Testator gave his sister a specified amount and also one-half of his residuary estate. By a codicil he gave to two nieces and a nephew "the legacy which I have left to my sister," share and share alike. Held, that the word "legacy" will be construed to include, not only the money legacy in the will, but the gift of half of the residuary estate. In re *Norris' Estate*, 66 Atl. 1000, 1001, 217 Pa. 560.

"No particular words are essential to create a 'legacy' or devise; the essential thing is that the intention of the testator to thereby make the gift from property of the estate is shown." A clause of a will providing that "the residue of my real estate, after my son H. has been paid what he has paid for me at various times, I will and bequeath," etc., creates a "legacy" to H. of the amounts paid by him for the testator. In re *Barclay's Estate*, 93 Pac. 1012, 1014, 152 Cal. 753.

The right given to a beneficiary by a will to receive a stated share of the net income from the entire residuary estate of the testator, left in trust until the time fixed

for its distribution, is not a "legacy" or "distributive share," within the meaning of such terms as used in War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464; and, under Act June 27, 1902, c. 1160, § 8, 32 Stat. 406, which provides that no tax shall be assessed under said section 29 in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to July 1, 1902, the only interest of the legatee in such income which was subject to taxation was the amount thereof actually received by him prior to said July 1, 1902, provided such amount was \$10,000 or more. *Lynch v. Union Trust Co. of San Francisco*, 164 Fed. 161, 163, 90 C. C. A. 147.

Shares of stock in a New Jersey corporation belonging to a testatrix, resident of Rhode Island, and passing under a bequest in her will, are subject to the inheritance tax imposed by P. L. 1906, p. 432, c. 228, entitled "An act to amend an act entitled 'An act to tax intestates' estates, legacies,' etc., which by section 1, subd. 2, imposes a tax when the transfer is by will of property within the state, and decedent was a non-resident of the state at death; the stock being embraced by the term "legacies" as used in the title. *Dixon v. Russell*, 73 Atl. 51, 52, 78 N. J. Law, 296.

### Gift causa mortis distinguished

See Gift Causa Mortis.

### Payment of debt

A legacy implies a bounty, and not a payment. In re *Dailey's Estate*, 89 N. Y. Supp. 538, 542, 43 Misc. Rep. 552.

The word "legacy," as used in the War Revenue Act June 13, 1898, imposing a tax on "legacies" in the hands of administrators, executors, or trustees, is a definite gift by will of personal property either general and pecuniary, or specific. It is of specific article of personal property or of ascertained and definite pecuniary amount which may be readily valued by the executor or trustee having it in charge. *Disston v. McClain*, 147 Fed. 114, 117, 77 C. C. A. 340.

### Personalty or realty

A "legacy" is a gift by will of personal property. *Harding's Adm'r v. Harding*, 116 S. W. 305, 307, 132 Ky. 133.

A "legacy" is defined as "a bequest or gift of personal property by last will and testament." *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587 (quoting Black, Law Dict.).

The terms "legacy" and "legatee" have different meanings in the French Code and Civil Law, from what they usually have under the English system; but even in the United States they may be used to refer to a devise of real property. *Lindsay v. Wil-*



son, 63 Atl. 566, 570, 103 Md. 252, 2 L. R. A. (N. S.) 408.

A "legacy" is a disposition of personal property by will. Under a will creating a trust, the beneficiary was empowered to dispose of the property by will and give the same to various charitable institutions and directed her executors after the payment of numerous bequests, to pay out of the residue any inheritance taxes due on any of the legacies whether to the state or federal authorities. Held, that the various dispositions of the trust estate constituted "legacies" and are entitled to have the transfer taxes paid out of the residuary estate. *Is-ham v. New York Ass'n for Improving the Condition of the Poor*, 69 N. E. 367, 369, 177 N. Y. 218.

Strictly speaking, the term "legacies" refers to personal property, but it may be, and often is, used in a more extended sense by persons unacquainted with the precise meaning of legal terms, and, when so used, may embrace real estate. *Russell v. Elden*, 15 Me. 193, 196.

Although the words "devise" and "devisee" properly and technically apply only to real estate, and the words "legacy," "legatee," "bequest," and "bequeath" only to personal property, they have been made interchangeable by Ky. St. 1903, § 467, which provides that "the words 'legatee' and 'devisee' shall each be held to convey the same idea; and the words 'bequeath' and 'devise' to mean the same thing; and the words 'bequest' and 'legacy' shall each be held to mean the same thing and to embrace and include either real or personal property, or both." *Roberts v. Chenoweth*, 112 S. W. 625, 627.

In common acceptance, "bequest" and "legacy" are synonymous terms, but "bequeath" is the term generally by which a gift of personalty is made in a will, and a legacy is the money or personal property bequeathed. The words "devise," "bequest," and "legacy" are not infrequently used in wills in a sense different from their strict legal meaning. It is stated, in a recent work on wills, that: "Of the verbs used to denote the act of making a will, 'devise' is properly used of realty, and 'bequeath' of personalty. Of the nouns used to name the various forms of gift, 'devise' is used of a gift of realty. 'Legacy' is used of a gift of personalty in general. None of these words have so fixed a legal meaning, however, that a gift will fail because testator does not use the words descriptive of the gift or the act of giving with technical accuracy. A devise is often mis-called a 'bequest,' or 'bequest' is often used to include both realty and personalty, or is used of a gift of money alone. So the verb 'devise' is often used to refer to personalty alone." In re

*Campbell's Estate*, 75 Pac. 851, 853, 27 Utah, 361 (citing Page, Wills, § 2).

"Legacy and devise" and "legatee and devisee" are often used as interchangeable phrases in wills and everyday conversation, and therefore courts would not feel fettered to any nice construction where the subject-matter or context shows the words were used interchangeably and as of the same import. But such popular and loose construction is hardly permissible in view of the statutory rule of hermeneutics. *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587.

While the word "devise" is the appropriate term to pass title to real estate, and "bequeath" the term applicable to gifts of personal property, a strict adherence to technical words is not necessary to give effect to a testator's intent, and the fact that the word "devise" is not used does not prevent the title to real estate passing by the use of the word "bequeath." *Mills v. Tompkins*, 97 N. Y. Supp. 9, 10, 110 App. Div. 212.

## LEGACY TAX

See Inheritance Tax.

A tax on an interest in personal property passing by will is a "legacy tax." In re *Macky's Estate*, 102 Pac. 1075, 1078, 46 Colo. 79, 23 L. R. A. (N. S.) 1207.

The inheritance tax is variously termed "succession tax," "legacy tax," and "probate duties"; but, whatever it may be termed, it is not a tax upon property, but upon the right of succession thereto. *State ex rel. Foot v. Bazille*, 106 N. W. 93, 96, 97 Minn. 11, 6 L. R. A. (N. S.) 732, 7 Ann. Cas. 1056.

A tax may be laid upon property immediately after it has devolved upon any person by will or inheritance so as to be not easily distinguishable from a form of taxation sometimes called "legacy tax." *Appeal of Hopkins*, 60 Atl. 657, 659, 77 Conn. 644.

The tax variously called an "inheritance tax," a "legacy tax," a "transfer tax," and a "succession tax," is a "burden imposed by government on all gifts, legacies, and successions, whether of real or personal property or both, or any interest therein, passing to certain persons (other than those specially excepted), by will, by intestate law, or by deed or assignment made inter vivos, intended to take effect at or after the death of the grantor." In re *Morris' Estate*, 50 S. E. 682, 138 N. C. 259 (quoting and adopting definition in *Dos Passos* [2d Ed.] § 2).

The words "an act to tax \* \* \* legacies," in the title of Act May 15, 1906 (P. L. p. 432) do not express that the object of the act, so far as it relates to legacies, is the imposition of a tax upon the transfer of property which is the subject of a bequest, and as Const. art. 4, § 7, par. 4, requires that the object of every law shall be expressed in the

title thereof, the statute is unconstitutional so far as it seeks to tax the transfer of property which is the subject of a bequest. *Dixon v. Russell*, 76 Atl. 982, 983, 79 N. J. Law, 490.

## LEGAL

See, also, *Lawful*.

The term "legal" means that which is according to law. *Vaughn v. National Council, Junior Order United American Mechanics*, 117 S. W. 115, 116, 138 Mo. App. 362.

"Legal" is defined as according to the principle of law; according to the method required by statute; by means of judicial proceedings. In *re Folwell's Estate*, 62 Atl. 414, 415, 68 N. J. Eq. 728, 2 L. R. A. (N. S.) 1193.

**Lawful, adequate, and reasonable, synonymous**

"Legal," "lawful," "adequate," and "reasonable," when used as adjectives qualifying "provocation," are synonymous, and, as a general rule, with few exceptions, it takes an assault or personal violence to constitute this provocation." *State v. McKenzie*, 76 S. W. 1015, 1019, 177 Mo. 699 (quoting with approval from *State v. Bulling*, 15 S. W. 367, 16 S. W. 830, 105 Mo. 204); *State v. Heath*, 121 S. W. 149, 154, 221 Mo. 565 (quoting and adopting definition in *State v. Bulling*, 15 S. W. 367, 16 S. W. 830, 105 Mo. 204).

## LEGAL ADVICE AND SERVICES

The services of an attorney for an administratrix, consisting of giving her advice, drawing leases and other legal instruments, ejecting nonpaying tenants, collecting doubtful demands due the estate, discovering assets, and in investigating and adjusting disputed claims, are such as the estate is liable for, under Rev. St. 1899, § 223, providing for allowances for "legal advice and services." *Hill v. Evans*, 91 S. W. 1022, 1024, 114 Mo. App. 715.

## LEGAL AND SUFFICIENT FENCE

The phrase "legal and sufficient fence," as used in Rev. St. 1883, c. 51, §§ 36, 37, requiring a railroad company to erect and maintain along the line of its road a legal and sufficient fence, means a fence sufficient to restrain and exclude any of the ordinary domestic animals from straying on that part of its track which passes through and is contiguous to the inclosure where such animals are pastured or kept; and a fence abutting a railroad, four feet in height and otherwise complying with the statute, and that will restrain horses, cows, and oxen, but will not restrain sheep, is not a legal and sufficient fence. *Cotton v. Wiscasset, W. & F. R. Co.*, 57 Atl. 785, 786, 98 Me. 511.

## LEGAL AVOIDANCE

See *Matter of Legal Avoidance*.

## LEGAL CAPACITY

See, also, *Legal Disability*.

The "capacity to sue" is the right to come into court, and differs from a "cause of action," which is the right to relief in court. *Howell v. Iola Portland Cement Co.*, 121 Pac. 346, 347, 86 Kan. 450.

"Incapacity to sue exists where there is some legal disability, such as infancy, or lunacy, or a want of title in the plaintiff to the character in which he sues." That plaintiff was appointed administrator as alleged, accepted the office, and qualified therefor, and letters of administration de bonis non are issued to him, and the validity of his appointment was not questioned, gives him "capacity to sue," though he may not be the real party in interest, and though the admitted facts may not authorize a recovery by him. *Homans v. New York Life Ins. Co.*, 106 N. Y. Supp. 929, 930, 55 Misc. Rep. 574 (quoting and adopting *Ward v. Petrie*, 51 N. E. 1002, 157 N. Y. 301, 68 Am. St. Rep. 790).

"Want of legal capacity," within the meaning of Rev. St. 1893, § 2649, specifying the grounds for demurrer to a complaint, refers to personal disability, such as infancy, idiocy, coverture, and the like, or to want of title to the character in which the plaintiff sues; a defect going to the cause of action itself as regards the plaintiff. One showing that in no event, under no circumstances, and in no capacity does plaintiff own or represent the cause of action sought to be enforced, does not fall within the statute. *McKenney v. Minahan*, 97 N. W. 489, 491, 119 Wis. 651.

Under the express provisions of Rev. St. 1899, § 3535, it is only when the plaintiff has no legal capacity to sue that a demurrer will lie on the ground that he has no capacity to sue; the words "legal capacity to sue" referring to infancy, want of authority, or any personal disability to maintain the action. *Littleton v. Burgess*, 91 Pac. 832, 836, 16 Wyo. 58, 16 L. R. A. (N. S.) 49.

A demurrer on the ground of want of "legal capacity to sue" must relate to some legal disability on the part of the plaintiff to prosecute and maintain his action. This disability must be "such as infancy, coverture, idiocy, and the like, and not the absence of facts sufficient to constitute a cause of action." *Pratt v. Northern Pac. Exp. Co.*, 90 Pac. 341, 342, 13 Idaho, 373, 10 L. R. A. (N. S.) 499, 121 Am. St. Rep. 268 (quoting and adopting definition in *Pomeroy Code Remedies* [4th Ed.] p. 180).

## LEGAL CAUSE

"Legal cause" is necessarily the deduction from some act, event, or circumstance. *McKenney v. Go & Co. v. McCarthy*, 90 Pac. 203, 117 Cal. App. 301 (citing *Marsh v. Superior Court*, 26 Pac. 962, 88 Cal. 596).

"Legal cause," as used in an instruction in an action for abuse of process author-

izing recovery if defendant issued an attachment against plaintiffs without legal cause, was not synonymous with "probable cause." *Sehon, Blake & Stevenson v. White* (Ky.) 92 S. W. 280, 281.

An entry, under statutes authorizing an entry on land under the directions of a railroad company solely for the purpose of making a preliminary survey of a proposed railway line subject to liability for all damages done to the land, constitutes a "legal cause and good excuse" within the statute providing that any person who without legal cause and good excuse enters the premises of another after warning shall be punished. *State v. Simons*, 40 South. 662, 145 Ala. 95.

### LEGAL CHARGE OF CRIME

A "legal charge of crime," as contemplated by extradition statutes, means one made in that state having jurisdiction to try the offense, and from which the fugitive fled. The word "charged," in 2 Ballinger's Ann. Codes & St. § 7017, declaring that, when any person shall be found within the state charged with an offense committed in another state, the court or magistrate may on complaint issue a warrant for his arrest, contemplates that the person arrested and delivered up committed the offense in another state and is in such state legally charged with crime. *State ex rel. Grass v. White*, 82 Pac. 907, 908, 909, 40 Wash. 560, 2 L. R. A. (N. S.) 563.

### LEGAL COUNTY ROAD

In Sess. Laws 1893, p. 380, making a county liable for injuries from defects in a "legal county road," it is apparent that the Legislature only intended to provide a remedy for injuries received by a traveler on a county road or highway. *Schroeder v. Multnomah County*, 76 Pac. 772, 773, 45 Or. 92.

### LEGAL DEPENDENT

A member of a fraternal insurance order, who dies leaving only brothers and sisters and nieces and nephews not living with him, dies without "legal dependents," within the certificate of membership, providing for payment to legal dependents, and his administrator is entitled to the fund for the payment of debts and distribution in due course of administration; the words "legal dependents" meaning those relying on the member for support. *Little v. Colwell*, 74 S. E. 10, 158 N. C. 351, 39 L. R. A. (N. S.) 450 (citing 2 Words and Phrases, pp. 1991, 1992).

There being no legal duty imposed by law on insured to support his mother, as in the case with his wife and minor children, she is not a "legal dependent" within the meaning of a policy payable to his "legal dependent." *Vaughn v. National Council, Junior Order United American Mechanics*, 117 S. W. 115, 116, 136 Mo. App. 362.

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### LEGAL DISABILITY

A petition by adult heirs and on behalf of minor heirs to open a decree of the county court approving the final report of the executor and distributing the estate, to correct an error resulting from an erroneous allowance to the executor and his attorney, which purports to be a petition of persons interested in the estate, and which sets forth facts showing that the allowance is erroneous as a matter of law, and which avers the fact of the minority of heirs and presentation of the petition on their behalf, is, as to such heirs, a sufficient petition within Prob. Code, § 287, authorizing persons laboring under any legal disability, to move to reopen the account of executor before final distribution; the term "legal disability" including minority, though the minors have a guardian. In re *Nelson's Estate*, 129 N. W. 113, 116, 26 S. D. 615.

Rev. St. 1898, § 3968, provides that no action can be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been discharged, excepting that if, at the time of such discharge, the person entitled to bring the action shall be under any "legal disability to sue," the action may be commenced at any time. Held, that the words "legal disability to sue," as used therein, referred to some characteristic of the person disqualifying him from acting freely for the protection of his rights, and not to an impediment to the suability of the particular cause of action, and so inability of the plaintiff to sue during the period of accounting and until the settlement of the guardian's account was not within the exception of persons "under [any] legal disability to sue." *Wescott v. Upham*, 107 N. W. 2, 3, 127 Wis. 590 (citing 5 Words and Phrases, p. 4060).

### LEGAL DUTY

See Lawful Duty.

### LEGAL ENTITY

See Entity.

### LEGAL ESTATE

Seised importing, see Seised.

Seisin importing, see Seisin.

### LEGAL ESTOPPEL

Equitable estoppel distinguished, see Estoppel in Pais.

Estoppel by deed, see Estoppel.

### LEGAL EVIDENCE

It was unnecessary to advise the jury of the meaning of "legal evidence" in an instruction that the law demanded conviction where there was sufficient legal evidence to show guilt beyond a reasonable doubt, as any man competent to serve as a juror would understand that it meant any evidence the jury

had a right to consider. *People v. Anderson*, 87 N. E. 917, 918, 923, 239 Ill. 168.

### LEGAL EXPENSES

See Proper and Legal Expenses.

### LEGAL FENCE

See Lawful Fence.

### LEGAL FRAUD

Promissory representation, looking to the future, as to what the vendee can do with the property, how much he can make on it, and how much he can save by the use of it, are on a par with false affirmations and opinions as to the value of property, and do not generally constitute "legal fraud." *National Cash Register Co. v. Townsend Grocery Store*, 50 S. E. 306, 307, 137 N. C. 652, 70 L. R. A. 349.

A bill of sale intended as an absolute transfer of title, but made with a secret agreement that the grantee, after selling enough goods to pay the grantor's indebtedness to him, should turn back to the grantor the remainder, or their proceeds, presents a case of "constructive fraud," sometimes called "legal fraud." *Walklin v. Horswill*, 123 N. W. 668, 672, 24 S. D. 191.

Misrepresentations of a material fact, made willfully to deceive, or recklessly without knowledge, or if made by mistake and innocently, and acted on by the opposite party, constitute legal "fraud," under Code 1907, § 4298, authorizing the rescission of a contract of sale of stock of a corporation. *Southern States Fire & Casualty Ins. Co. v. Wilmer Store Co. (Ala.)* 60 South. 98, 99.

"Misrepresentation of a material fact made willfully to deceive, or recklessly without knowledge, and acted upon by the opposite party, or if made by mistake and innocently and acted upon by the opposite party, constitutes 'legal fraud.'" *Camp v. Carithers*, 65 S. E. 583, 585, 6 Ga. App. 608 (quoting definition in Civ. Code, § 4026).

### LEGAL GROUND FOR NEW TRIAL AS MATTER OF LAW

The words "legal ground for granting a new trial as matter of law," in a request for a ruling that if plaintiff after testifying was arrested in court during the trial of the case, and the jury noticed some of the acts connected with her arrest, and were thereby made suspicious that plaintiff was arrested for perjury, there was a "legal ground for granting a new trial as a matter of law," mean that the conditions referred to called for a new trial as a matter of law, and as so construed the request is erroneous. *Kelley v. City of Boston*, 87 N. E. 493, 494, 201 Mass. 86.

### LEGAL HEIRS

See Lawful Heirs.

My legal heirs, see *My*.

The term "legal heirs," in its technical sense, as used in the common law, includes all persons born in lawful matrimony who succeed to the estate in real property of an ancestor. *Thomas v. Supreme Lodge Knights of Honor*, 105 N. W. 922, 923, 126 Wis. 593, 8 L. R. A. (N. S.) 904, 5 Ann. Cas. 456.

The term "legal heirs," in legal strictness signifies those entitled to inherit real estate; it is also used to indicate those who would take under the statute of distribution. *Dickerman v. Alling*, 76 Atl. 362, 363, 83 Conn. 342 (citing *Ruggles v. Randall*, 38 Atl. 885, 70 Conn. 44; *Tingler v. Chamberlin*, 42 Atl. 718, 71 Conn. 469).

In construing a will using the words "legal heirs" and "lawful heirs," the words "legal" and "lawful" do not modify or change the legal effect of the word "heirs." *Stisser v. Stisser*, 85 N. E. 240, 242, 235 Ill. 207.

As used in a will making a bequest to testator's wife and the legal heirs of his son, and, in case his son should die without wife or heirs, then to the heirs of another, the words "heirs" and "legal heirs" meant "children." *Knowles v. Knowles*, 65 S. E. 128, 130, 132 Ga. 806.

Where testator, by a codicil to his will, provided that the income derived from certain property should go to "my legal heirs," the term "legal heirs" means next of kin and legal heirs of testator, and does not include next of kin or legal heirs of his wife. *Miller v. Metcalf*, 58 Atl. 743, 744, 77 Conn. 176.

Under a limitation in a will to the "legal heirs" of a person, they were to be determined as of the date of his decease, and are the persons who under the laws then in force would have been entitled to inherit his real estate if he had died intestate. *Holmes v. Holmes*, 80 N. E. 614, 617, 194 Mass. 552.

The words "legal heirs," in a will which bequeathed a feather bed to testator's son and devised to his "wife and legal heirs of J. my youngest son" all the household furniture, meant "children." *Knowles v. Knowles*, 65 S. E. 128, 130, 132 Ga. 806.

Testator bequeathed certain personalty to "the legal heirs" of his housekeeper. Held, that her husband was excluded. In re *Schnitzler*, 114 N. Y. Supp. 934, 935, 61 Misc. Rep. 218.

Where a testator left to trustees an estate for his grandchild, the trust to continue three years during which the trustees were to possess and manage the property and its income and provide for and pay over to the grandchild at their discretion, and at the end of the three years the estate to pass to the possession of the grandchild, if then alive, and "if the grandchild die before the trust ceases her legal heirs to be substituted in place of deceased in every respect," the granddaughter's husband is not one of her "legal heirs" in the sense of the devise over

to her legal heirs. *Buck v. Paine*, 75 Me. 582, 589.

Testator gave half of his residuary estate of which his homestead formed a part to a niece for life, and provided, on her death without issue, the homestead should pass to the children of an uncle, and such children should participate equally with testator's "legal heirs" in whatever balance there might be over and above the homestead. Held, that his legal heirs were those who, in absence of a will, were entitled by law to inherit by descent ascertained at the time of testator's death, excluding the widow. *Perry v. Bulkley*, 72 Atl. 1014, 1019, 82 Conn. 158.

A deed of gift by parents to a son, which designates the son and his legal heirs as parties of the second part, and which conveys the property to the legal heirs, and which recites that the son shall have full control of it for life to maintain his family, and declares that he shall not sell, mortgage, or transfer his life interest, and that at his death his wife surviving shall, for life or until her remarriage, have equal shares with the heirs of the son, she not to sell or encumber her interest, gives the son no interest in the property except the power to control it for life, and in the absence of any showing that there is a surplus of income above what is necessary for the family, the son has no interest subject to execution, within Ky. St. § 1691, subjecting equitable interests to the payment of the debt of an execution creditor; the words "legal heirs" meaning children. *Mt. Sterling Nat. Bank v. Duff*, 140 S. W. 60, 61, 145 Ky. 67.

A testator bequeathed corporate stock to a trustee, to pay the income thereof to a grandson and granddaughter for life, and at their death the same to be distributed to their respective "legal heirs," except that, if the "legal heirs" of the grandson should be the granddaughter, the trusteeship should continue and the income be paid to the granddaughter for life. Held, that the words "legal heirs" were used in their primary sense. *Grant v. Stimpson*, 66 Atl. 166, 167, 79 Conn. 617.

The "legal heirs" intended by a will were those who answered the description at the time of testator's death, where no contrary intention was indicated. The term "legal heirs" meant those who answered that description under the laws of the state; and a provision for equally dividing each of four certain parts of the estate among the legal heirs of the persons named required such a division as is provided by the laws of the state for the distribution of the estate of a deceased person among his descendants. *Harris v. Ingalls*, 68 Atl. 34, 37, 74 N. H. 339.

Where testator devises land to his wife for life, and after her death to his daughter, and, if she shall not outlive her mother "and

leave no legal heirs," then to the son, the words "leave no legal heirs" are equivalent to "leave no lawful issue." *Church v. Baer*, 84 Atl. 1099, 1100, 236 Pa. 605.

### LEGAL HOLIDAYS

The words "legal holidays," as used in Comp. Laws 1897, § 5395, requiring saloons to be closed on all "legal holidays," not only includes legal holidays existing at the time of the adoption of the section, but includes holidays subsequently created by the Legislature, such as Labor Day, made a holiday by the act of 1893. *People v. Kriesel*, 98 N. W. 850, 851, 136 Mich. 80, 4 Ann. Cas. 5.

Code, § 2448, par. 9, provides that saloons shall not be open nor shall any sales be made on Sunday, or any election day, "or legal holiday." Section 3053, headed "Holidays," directs that certain days, including July 4th, shall be legal holidays for purposes relating to bills of exchange. Section 3541 provides that no person shall be held to answer in any court on the days enumerated in the preceding section. Section 4688, headed "Not on election days or holidays," declares that no party shall be required to take depositions on any days on which appearance cannot be required. Held, that the term "legal holiday," as used in section 2448, relates to the days designated in section 3053 as "holidays." *Brennan v. Roberts*, 101 N. W. 460, 462, 125 Iowa, 615.

The meaning of the phrase "days of public rest and legal holidays" is the opposite of "secular or business day," and excludes entirely and absolutely the idea of holding court. The words "legal holiday" and "dies non" are convertible terms. That they are so in the legislation of Louisiana "is demonstrated by the fact that they are so used in Act No. 110 of 1896, p. 158, making Decoration Day a legal holiday." *State v. Duncan*, 43 South. 283, 287, 118 La. 702, 10 L. R. A. (N. S.) 791, 11 Ann. Cas. 557.

Act March 4, 1905 (Acts 1905, p. 196, c. 118), is entitled "An act concerning legal holidays, the maturity of negotiable instruments, creating a Saturday half-holiday for banking institutions in certain cities, repealing all laws," etc. Section 1 designates certain days, including Labor Day, as "legal holidays," without restriction or limitation. Section 2 (page 197) declares that every Saturday after 12 o'clock noon in cities of more than 35,000 inhabitants shall, in addition to the legal holidays mentioned in section 1, be a legal holiday for banks, etc., and section 3 provides for the presentation, payment, etc., of negotiable instruments which mature on Sunday or a legal holiday. Held, that the holidays created by section 1 were legal holidays for all purposes, and hence the sale of liquor on Labor Day constituted a violation of Act March 10, 1905 (Laws 1905, p. 721, c. 169, § 579), prohibiting the sale of liquor on

certain specified days "or any legal holiday." *State v. Shelton*, 77 N. E. 1052-1054, 38 Ind. App. 80.

In view of Const. art. 6, § 5, providing that courts shall be always open, legal holidays excepted, and Code Civ. Proc. § 10, as amended by St. 1907, p. 561, c. 287, making every Saturday from 12 o'clock noon until 12 o'clock midnight a holiday, and sections 134, 135, as amended by St. 1907, pp. 681, 682, c. 358, authorizing courts to be open on holidays for specified purposes, trial courts ought to treat Saturday afternoon as a legal holiday. *People v. Heacock*, 102 Pac. 543, 546, 10 Cal. App. 450.

Under Rev. St. 1895, art. 2939, declaring February 22d a legal holiday, and article 1180, inhibiting the issuance of process on any legal holiday excepting in cases of injunction, distress proceedings, etc., a citation, in a divorce proceeding, whether original or an alias, issued on February 22, is invalid, and will not confer jurisdiction upon the court nor support a judgment. *Michael v. Michael* (Tex.) 100 S. W. 1018.

#### LEGAL INJURY

Whatever invades a person's rightful dominion over his property is a "legal injury," whether damage ensues or not. Such dominion is a right, for the violation of which the law imports damage, and courts of equity have always interposed, in a proper case, to protect the right without any reference to the question of actual damage, the motive which instigated the party to invoke its aid, or the benefits it derives from the act. *Allen v. Stowell*, 79 Pac. 371, 372, 145 Cal. 666, 68 L. R. A. 223, 104 Am. St. Rep. 80.

A contract or combination in restraint of interstate commerce, prohibited by Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 210, is not merely illegal in the sense that it is not enforceable, but is per se unlawful, and one who is harmed in his business or property by such a contract or combination has suffered a "legal injury," within the meaning of section 7 of the act, and is by such section given a right of action therefor. *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Ass'n*, 152 Fed. 864, 865, 871, 81 C. C. A. 658, 10 L. R. A. (N. S.) 972.

#### LEGAL INSANITY

"Legal insanity" excusing the commission of a criminal act is a disease of the brain, rendering a person incapable of distinguishing between right and wrong with respect to the offense charged. *State v. Privitt*, 75 S. W. 457, 459, 175 Mo. 207.

#### LEGAL INTENT

The words "legal intent," when applied to the intention of a testator, mean that where a testator has used in his will technical terms to which the courts of his domicile have attached a settled judicial meaning con-

stituting a rule of property in that state, then the courts of other states construing the will give to such words the same meaning. *Ball v. Phelan*, 49 South. 956, 968, 94 Miss. 293, 23 L. R. A. (N. S.) 895.

#### LEGAL INTEREST

See Direct Legal Interest.

As interest, see Interest (In Property); Interest (On Money).

Under Revision 1902, § 56, providing for a rebate of legal interest on the payment of that portion not yet due of a mortgage payable at a future date without interest, such "legal interest" is the rate used by the parties in fixing the amount of the mortgage payable in monthly installments without interest. *Greenville Building & Loan Ass'n v. Wholey*, 59 Atl. 341, 346, 68 N. J. Eq. 92.

#### LEGAL ISSUE

Legal heirs as including, see Legal Heirs.

The words "legal issue," when used in a will and unexplained by the context, have the meaning of descendants, and gift to the "legal issue" of testator's daughter, after a life estate to her, is a gift to her descendants, and is not limited to her children. Under a gift to the "legal issue" of testator's daughter, after a life estate to her, the trust fund held for her life will vest on her death absolutely in interest in all her descendants who are living in equal portions per capita. *Schmidt v. Jewett*, 88 N. E. 1110, 1111, 195 N. Y. 486, 133 Am. St. Rep. 815.

#### LEGAL KNOWLEDGE

See Presumption of Legal Knowledge.

#### LEGAL LIFE ESTATE

"Legal life estates" are those made by operation of law. *Disley v. Disley*, 75 Atl. 481, 483, 30 R. I. 366.

#### LEGAL MALICE

See Implied Malice; Malice.

#### LEGAL MEASURE OF DUTY

The rule of law now generally recognized is that the "legal measure of duty," except that made absolute by law, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," used interchangeably. *Raymond v. Portland R. Co.*, 62 Atl. 602, 604, 100 Me. 529, 3 L. R. A. (N. S.) 94.

#### LEGAL MEETING

In the statute providing that no alienation, or mortgage, of the real estate of any mining corporation shall have any force or effect, unless authorized at some meeting of stockholders, and that no meeting of stockholders shall be held to be "legal or valid," unless notice of the time, place, and object of holding the same be published, etc., the words "legal or valid" are not to be given a literal interpretation. The statute does not give strangers the right to raise questions as

to the regularity of a mortgage which the stockholders elect to waive. Thus where the notice for a stockholders' meeting of a corporation stated that the purpose of such meeting was to authorize the issue of bonds to the extent of \$100,000, to be secured by mortgage, etc., and the issue authorized was \$150,000, one not a stockholder, but a purchaser, at execution sale, of the corporation's equity of redemption in the property mortgaged, could not raise the question of the irregularity. *Beecher v. Marquette & Pacific Rolling Mill Co.*, 7 N. W. 695, 696, 697, 45 Mich. 103.

### LEGAL NAME

For the purpose of giving constructive notice to a defendant in a suit to foreclose a mortgage, where he has not sued on a written instrument signed by himself, his "legal name" includes his first Christian name and surname. Hence foreclosure of a mortgage did not divest the title of a non-resident defendant who was sued by the initial letters of his name, there being no personal service of summons upon him, or appearance in his behalf, and the record showing that he did not sign the mortgage or the note secured thereby. *Butler v. Smith*, 120 N. W. 1106, 1107, 84 Neb. 78, 28 L. R. A. (N. S.) 436.

### LEGAL NEGLIGENCE

"Legal negligence" is the omission of such care as persons of ordinary prudence exercise and deem adequate to the circumstances of the case. *Dooling v. City of New York*, 132 N. Y. Supp. 1012, 1014, 148 App. Div. 713.

### LEGAL NEWSPAPER

See Newspaper.

### LEGAL NOTICE

See Implied Notice.

"Legal" or "implied notice" is the same as "constructive notice," which, according to *Wilson's Rev. St. Ann.* 1903, c. 16, § 12, is notice imputed by the law to a person not having actual notice. Implied notice does not include either positive knowledge or information so direct as to necessarily carry conviction to the mind of the person notified, and neither does it belong to that class which depends on legal presumption, but it is substantial evidence from which the jury after estimating its value may infer notice. *Cooper v. Flesner*, 103 Pac. 1016, 1020, 1021, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29 (quoting *Wilson v. Brown*, 15 N. Y. 354; *Wade*, Law of Notice, §§ 3, 4, 5).

Rules of the Mississippi Railroad Commission provide that railroad companies shall give prompt notice by mail or otherwise to the consignee of the arrival of goods and that no storage or demurrage charges shall be allowed unless legal notice of the arrival of the goods has been given, and defines "le-

gal notice" in this connection as either actual or constructive notice, and provides that, where the consignee is personally served with notice, free time begins at 7 o'clock the following morning. *New Orleans & N. E. R. Co. v. A. H. George & Co.*, 35 South. 193, 195, 82 Miss. 710.

Notice of appointment of two executors, one residing within the state and the other without the state, which failed to include the name and address of the agent or attorney of the latter, was not a "legal notice" within the meaning of *Rev. St. c. 87, § 18*, providing that, when an executor or administrator does not give "legal notice" of his appointment, he cannot avail himself of the statute of limitations against claims against the estate, *Id. § 12*, providing that executors or administrators residing out of the state at the time of giving notice of their appointment shall appoint an agent or attorney in the state, and insert his name and address in such notice. *Dyer v. Walls*, 24 Atl. 801, 802, 84 Me. 143.

Where it appeared from the report of viewers for the laying out of a lot that they had given "legal notice" of the fact, presumably they had given the notice required by law. *Crescent Tp. v. Pittsburg & L. E. R. Co.*, 59 Atl. 1103, 1105, 210 Pa. 384.

Whatever is sufficient to put a subsequent purchaser on inquiry must be considered "legal notice" to him of the facts inquiry would have disclosed by the exercise of reasonable diligence. *Jennings v. Lentz*, 93 Pac. 327, 329, 50 Or. 483, 29 L. R. A. (N. S.) 584.

### LEGAL OBLIGATION

Debt as legal obligation, see Debt.

### LEGAL PERSONALITY

The Roman Catholic Church in the Philippine Islands is a legal personality, with capacity to hold property acquired by gift. *Santos v. Holy Roman Catholic and Apostolic Church*, 29 Sup. Ct. 338, 339, 212 U. S. 463, 53 L. Ed. 599.

### LEGAL PLAINTIFF

The "legal plaintiff" is the person in whom the legal title or right of action is vested, while the "equitable plaintiff" is the person who does not have the legal title to the right of action but is in equity entitled to the thing sued for. *Burrell v. United States*, 147 Fed. 44, 46, 77 C. C. A. 308.

### LEGAL POSSESSION

As possession, see Possession.

When a delivery of goods is made for a specific purpose, the possession is still supposed to reside in the first proprietor, and, where any person has the bare charge of another's effects, legal possession remains in the owner; and therefore where the finder of the purse told defendant's wife thereof,

and she stated that the purse looked like her husband's and took the same, telling the finder that if it did not belong to her husband she would return it, and afterwards possession was given to him on his claim of ownership, when in fact it belonged to another, the "legal possession" remained in the finder, and defendant's claim thereto constituted larceny. *Williams v. State*, 75 N. E. 875, 877, 165 Ind. 472, 2 L. R. A. (N. S.) 248 (citing *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474; *Bish. New Cr. Law*, § 824).

To be "legal," possession taken by a mortgagee must have been taken in good faith, free from fraud or wrong, and without violation of any contract relation with the mortgagor. *Jaggard v. Plunkett*, 106 Pac. 280, 281, 81 Kan. 565, 25 L. R. A. (N. S.) 935.

The term "legal possessor," as used in Civ. Code Cal. § 3052, providing that a person who makes, alters, or repairs any article of personal property at the request of the owner or legal possessor of the property has a lien upon the same for his reasonable charges, means one who has the right by virtue of his possession to originally contract with reference to the manufacture, alteration, or repair thereof, such as, for example, a lessee or pledgee of the property; some one having a possession coupled with a right of property so that he can contract with reference to it respecting any of the matters enumerated in the section. Where defendants engaged another to peel tanbark from trees on their land and deliver it at a certain place, and the latter hired plaintiffs to do the work, and no contractual relationship existed between defendants and plaintiffs, plaintiffs were not entitled to a lien for their wages on bark peeled by them remaining on defendants' land. *Quist v. Sandman*, 99 Pac. 204, 209, 154 Cal. 748.

### LEGAL PRESUMPTION

"The French Civil Code, calls all 'presumptions' consequences that the law or the judge draws from a known fact to an unknown fact, and a 'legal presumption' one that a special law applies to certain facts. *Cachard's Translation*, arts. 1349, 1350." In *re Cowdry's Will*, 60 Atl. 141, 142, 77 Vt. 359, 3 Ann. Cas. 70.

As said by Doe, J., in *Lisbon v. Lyman*, 49 N. H. 553, 563: "A 'legal presumption' is not evidence. In civil cases it is the finding of a fact or the decision of a point, when there is no testimony, and no inference of fact from the absence of testimony, on the subject or when the evidence is balanced. And often the fact is also found, or the decision made, by the rule of law which imposes the burden of proof on the party having the affirmative." In his *Treatise on Evidence*, Prof. Thayer says (page 314): "Presumptions are aids to reasoning and argumentation, which assume the truth of cer-

tain matters for the purpose of some given inquiry. They may be grounded on the general experience or probability of any kind, or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence." And on page 337 this language occurs: "While it is obvious, then, that a presumption—i. e., the assumption, intentment, taking for granted—which we call by that name, accomplishes, for the moment at any rate, the work of reasoning and evidence it should be remarked, as I have said before, that neither this result, nor the rule which requires it, constitutes in itself either evidence or reasoning. This might seem too plain to require mention if it were not for the loose phraseology in which courts sometimes charge the jury, leaving to it in a lump 'all the evidence and the presumptions' as if they were capable of being weighed together as one mass of probative matter." If there is a legal presumption that the ordinary man performs his duty and is not negligent, it is no more competent as evidence to prove the fact in a particular case, in the absence of other proof, than are other rules of law, including the presumption of innocence of criminal cases. *Wright v. Boston & M. R. Co.*, 65 Atl. 687, 691, 74 N. H. 128, 8 L. R. A. (N. S.) 832, 124 Am. St. Rep. 949.

A "legal presumption" is one which the law will recognize. Thus where testator retained custody of his will or had ready access to it, and it could not be found after his death, a "legal presumption" would be raised that the will and codicil were destroyed by him *animo revocandi*. *Hutson v. Hartley*, 74 N. E. 197, 199, 200, 72 Ohio St. 262.

In an action against a physician for malpractice, there is no presumption of the physician's negligence, and the burden of showing it is upon plaintiff. A true "legal presumption" is in the nature of evidence, and is to be weighed as such. The rules which impose the burden of proof upon certain parties, when designated as presumptions, are dry presumptions, having only a technical existence, and barren of all probative character when the case goes to the jury on conflicting evidence. *Sheldon v. Wright*, 67 Atl. 807, 814, 815, 80 Vt. 298.

### LEGAL PROCEEDINGS

Expenses of legal proceedings, see Expenses.

Attachment proceedings are "legal proceedings" within Bankruptcy Act July 1, 1898, c. 541, § 3a (3), 30 Stat. 546, which makes it an act of bankruptcy for an insolvent person to permit a creditor to obtain a preference through legal proceedings. In *re Putman*, 193 Fed. 464, 473.



A landlord within four months before the filing of a petition in bankruptcy may levy his distress and thereby acquire a lien which a subsequent bankruptcy adjudication would not render void or voidable, the lien thereby secured not being under the law of Maryland a lien secured "by legal proceedings" within Bankruptcy Act July 1, 1898, c. 541, § 67c, 30 Stat. 564. *In re Potee Brick Co. of Baltimore City*, 179 Fed. 525, 530.

All goods on demised premises, by the common law, or the statutory law of Pennsylvania, may be considered as under a quasi pledge to the landlord, which gives superiority to the specific lien acquired by a distraint. Such a lien is not one obtained through legal proceedings within Bankr. Act. July 1, 1898, c. 541, § 67f, 30 Stat. 565, and is not divested by the bankruptcy of the tenant within four months thereafter, and the same rule applies where the bankrupt was a subtenant, admitted to the premises by the lessee without the landlord's consent. *In re West Side Paper Co.*, 162 Fed. 110, 112, 89 C. C. A. 110, 15 Ann. Cas. 884.

The general lien of a landlord for rent, given by Code Ga. § 2795, to "date from the time of the levy of a distress warrant to enforce the same," is not created by judgment, nor obtained through legal proceedings, within the meaning of the bankrupt act of July 1, 1898 (30 Stat. 565, c. 541), § 67f, and is therefore not defeated by the provisions of that section, although the levy was made within four months of the filing of the petition in bankruptcy against the tenant. *Henderson v. Mayer*, 32 Sup. Ct. 699, 700, 225 U. S. 631, 56 L. Ed. 1233.

A lien on a bankrupt's assets secured by filing a creditor's bill within four months of the filing of a bankruptcy petition is one secured "by legal proceedings," which by Bankruptcy Act July 1, 1898, c. 541, § 67c, 30 Stat. 541, is avoided by the adjudication. *In re Potee Brick Co. of Baltimore City*, 179 Fed. 525, 530.

### LEGAL PROCESS

The term "legal process" means a process fair on its face, and one charged with resisting an officer in the levying of an execution issued by a justice of peace on a judgment rendered by him may show that the judgment was void and that the officer had knowledge thereof, though the state to make out a case need not show that the execution had behind it a legal judgment. *State v. Knapf*, 96 Pac. 1076, 50 Wash. 229, 21 L. R. A. (N. S.) 66.

The phrase "legal process" means valid legal process. Where a policy provided that, if any change take place in the possession of the property by legal process, it shall avoid the policy, an illegal assessment and a seizure and sale of the insured property thereunder were not a change in the possession by

"legal process." *Runkle v. Citizens' Ins. Co.*, 6 Fed. 143, 145.

### LEGAL RATE

See Contract Rate.

The expression "legal rate," used in Rev. St. 1899, § 1092, requiring railroads to furnish double-deck cars for the shipment of sheep, and declaring that it shall not be lawful for any railroad to charge for transportation of a double-deck car more than the legal rate of freight allowed for the shipment of stock, means that, as a maximum rate has been fixed for stock of all kinds, the charge for a double-deck car of sheep should not exceed that rate. *Wynn v. Wabash R. Co.*, 86 S. W. 562, 564, 111 Mo. App. 642.

### LEGAL RELATION

"Legal relation," as used in the rule that the measure of a succession tax under a will is the "legal relation" borne by the legatee to the testator, is the relation established by the law, and, while it usually follows the natural relation, it does not in all cases. *In re Cook's Estate*, 79 N. E. 991, 993, 187 N. Y. 253.

### LEGAL REMEDY

A "personal remedy" is where the injured party seeks redress of the party who inflicted the wrong and thus obtains a remedy for the wrong committed, while a "legal remedy" is where the injured party seeks his remedy by and through the intervention of the courts. *People ex rel. Stidger v. Horan*, 86 Pac. 263, 34 Colo. 336, 114 Am. St. Rep. 163.

### LEGAL REPRESENTATIVE

The phrase "legal representatives" usually means executors or administrators, but it cannot, of course, mean executors and administrators only, in whatever instrument it may appear, and with reference to all the different subject-matters treated of in the multitude of varying instruments, and no matter what the plain purpose of the maker of the instrument using the phrase may be in using it. It may, in various circumstances, mean executors, administrators, heirs, legatees, assignees, and devisees, even while legatees or devisees are strangers; in short, it may mean any person or corporation taking the beneficial interest in property, real or personal. *Allen v. Alliance Trust Co.*, 36 South. 285, 286, 84 Miss. 319.

The terms "legal representatives," "personal representatives," etc., are often used in statutes and instruments of writing so as to include all persons who stand in place or represent the interests of another, either by his act or by operation of law. *In re Harton's Estate*, 62 Atl. 1058, 1059, 213 Pa. 499, 4 L. R. A. (N. S.) 939.

Testator, after bequeathing one half of his estate to his wife, directed that the re-

maining half be distributed among his legal heirs and legal representatives according to the laws of distribution. Held, that the term "legal representatives" was without precise determinate meaning, and was used merely to indicate that testator intended that all who would take under the statute of distribution were entitled to share under the term "legal heirs," and hence did not include children of testator's first cousins who died before testator, they not being entitled to distribution in intestacy, as provided by Gen. St. 1902, § 398. *Dickerman v. Alling*, 76 Atl. 362, 363, 88 Conn. 342.

A certificate issued by a fraternal insurance association payable to the estate of a member is payable to his "legal representative" within the by-laws of the association authorizing certificates to be made payable to legal representatives of members. *Vaughan's Adm'r v. Modern Brotherhood of America*, 149 S. W. 937, 938, 149 Ky. 587.

#### As administrators or executors

The phrase "legal representatives" ordinarily means executors or administrators where not qualified by context. An act of Congress (Act April 28, 1904, c. 1759, 33 Stat. 436) provided a pension of \$1,000 which should be exempt from payment of debts of decedent, to be paid to the legal representatives of any railway clerk killed while on duty. Held, that the words, "legal representatives," were used in their ordinary sense; the intent being that the money should be paid to the administrator to be distributed according to the laws of the state of decedent's domicile, saving the payment of debts. *Wolfe v. Wolfe*, 134 S. W. 33, 34, 154 Mo. App. 218.

The phrase "legal representatives," in its ordinary acceptation, means executors and administrators, though it may mean next of kin or descendants. *Kelsay v. Eaton*, 76 Pac. 770, 772, 45 Or. 70, 106 Am. St. Rep. 662.

"The words 'legal representatives' or 'personal representatives' have also been used as designating executors or administrators, and not next of kin, in acts of Congress giving actions for wrongs or injuries causing death." *Briggs v. Walker*, 19 Sup. Ct. 1, 3, 171 U. S. 466, 43 L. Ed. 243.

The words "legal representatives" have a well-recognized meaning in law that are equivalent to executor or administrator, and are technical words, and when used in any legal instrument, and there is nothing in the context or otherwise to explain their meaning, they should be understood in their technical sense. *Page v. Metropolitan Life Ins. Co.*, 135 S. W. 911, 912, 98 Ark. 340.

It may be conceded that the words "legal representatives" frequently mean executors and administrators as used in a policy of insurance payable to insured's wife and children if living at the time of his death,

otherwise to the legal representatives or assigns of said member. *Hall v. Ayers' Guardian* (Ky.) 105 S. W. 911, 913, 914.

Where a will provided that any real property of testatrix that had not been disposed of by her husband at his death should be equally divided between her heirs and legal representatives and his legal representatives, one who was executrix of the husband's will and a devisee thereunder was a "legal representative," of the husband, within the will of testatrix. *Gruenewald v. Neu*, 74 N. E. 101-103, 215 Ill. 132.

The use of the expression, "heirs and legal representatives" instead of "heirs, executors, and administrators," may, under some circumstances, raise the presumption that those who are beneficially interested and succeed to the property and rights of the decedent are intended. *Marsh v. Marsh*, 137 N. W. 1122, 1124, 92 Neb. 189.

"The ordinary meaning of the words 'legal representatives' is 'executors and administrators,' and they are to be given that meaning unless there is something in the will properly construed to show that they should have some other meaning." *Alexander v. McPeck*, 75 N. E. 88, 91, 189 Mass. 34.

"Personal representatives" and "legal representatives" are sometimes used interchangeably, as signifying not only executors or administrators, but also those who legally stand in place of, or represent the interests of, another. *Lowry v. City of Duluth*, 101 N. W. 1059, 1060, 94 Minn. 95.

Under a life policy in which the insurer agreed with the "insured, his executors, administrators, and assigns," to pay the amount of the policy to insured's "legal representatives," the amount is payable to insured's executors or administrators, and not to his next of kin. *New York Life Ins. Co. v. Kansas City Nat. Bank*, 97 S. W. 195, 196, 121 Mo. App. 479.

The words "legal representative" are presumed to mean executors and administrators, and that meaning will be attributed to them in any instance, unless by the context or surrounding circumstances it be shown that the words were not so used, but denote some other and different idea. *Rockland-Rockport Lime Co. v. Leary*, 97 N. E. 43, 47, 203 N. Y. 469, Ann. Cas. 1913B, 62.

The term "legal representatives" of a deceased person will mean the executor or administrator if the subject-matter is personalty, and heirs or devisees if it is realty, within the rule that all the necessary parties to a judgment sought to be reviewed must be the parties to the bill of review, and, if they are dead, their "legal representatives" must be parties. *State Fair Ass'n v. Terry*, 85 S. W. 87, 89, 74 Ark. 149 (citing *Cochran v. Cochran*, 17 Atl. 981, 127 Pa. 486; *Ralston v. Sharon*, 51 Fed. 702; *Johnson v.*

Van Epps, 110 Ill. 557; *Turner v. Berry*, 8 Ill. 541).

In wills and other written instruments, the words "legal representatives" are frequently used to mean the persons who succeed beneficially to the property or interest of the deceased. Whether in any given case they are so used, or the executor or administrator is intended, must be determined from a consideration of all of the provisions of the will. *Marsh v. Marsh*, 187 N. W. 1122, 1124, 92 Neb. 189.

Within an order of a probate court that money be paid to a legatee of testatrix or his "legal representative," his executor or administrator, and not his heirs, is such representative, as that court could not properly undertake to distribute his estate as part of the settlement of testatrix's estate; the ascertainment of his legal heirs being, under Gen. St. 1902, § 394, for that court in the settlement of his estate. *Cooley v. Pigott*, 80 Atl. 92, 93, 84 Conn. 323.

The words "legal representatives," in a certificate issued by a foreign corporation authorized to issue benefit certificates, which recites that the amount thereof shall be paid to "legal representatives, related to the member as . . . ." do not include any of the persons specified in Rev. St. 1909, § 7109, providing that death benefits shall be paid to the families, heirs, blood relatives, affianced husband or wife of, or to persons dependent on, the member, but mean the executor or administrator of the member, and the liability of the corporation is that of a life insurance company, under section 6945, making the defense of suicide unavailable to life insurance companies. *Ordelheide v. Modern Brotherhood of America*, 189 S. W. 269, 270, 158 Mo. App. 677.

The words "representative" and "legal representative" of a person do not necessarily exclude the administrator or executor, but such words employed in a policy of a benefit association in view of the purposes of the association to benefit the family and heirs of deceased members were not intended to include the administrator of the member referred to in a policy. *Tucker v. Knights of Pythias of North and South America*, 68 S. E. 796, 797, 135 Ga. 56.

A claim against a city for the instantaneous death of plaintiff's intestate, through the city's negligence, stated that the claim was for damages sustained by his estate, legal representatives, and heirs, and that his estate, legal representatives, and heirs claimed a specified sum as damages. Held, that the words "legal representatives" were not used in their strictly technical sense as executors or administrators, nor was the word "heir" used in its primary and technical sense as one who, by reason of birth in lawful wedlock, inherits real property, but that the expression, "estate, legal representatives,

and heirs," was used with the idea of using words broad enough in their significance to include all persons having claims against the city on account of the death, and hence the claim was sufficient as a basis for an action for the benefit of the widow under the statute. *Moyer v. City of Oshkosh*, 139 N. W. 378, 380, 151 Wis. 586 (citing 4 Words and Phrases, pp. 3241-3264; 5 Words and Phrases, pp. 4070-4079).

Gen. St. 1906, § 3147, provides that, where the death of a minor child is caused by the wrongful act or negligence of a corporation or its agents, the father, as the legal representative of such minor child, may sue for the loss of services of the child and for the mental pain and suffering of the parent or parents. Held, that the damages authorized are personal to the parents, and an action therefor should be by the parent personally, and an administrator of the minor child has no interest in or right to such recovery; the term "legal representative" having reference to the parties benefited by the rights conferred, and not to the administrator or executor of a decedent. *Seaboard Air Line Ry. v. Moseley*, 53 South. 718, 719, 60 Fla. 186.

Testator devised the residue of his estate to trustees, and directed that, if his wife survived him, they should set apart a third thereof and pay the income to her for life, and at her death the fund should be divided into three parts, one of which should be paid to his son, if surviving testator's wife, otherwise to his issue living at the time of her death, and in default of issue to his legal representatives. He directed the trustees, if the son survived him, to set apart and invest a specified sum and pay the income thereof to the son for life, and at his death to pay the principal to his issue, and in default of issue to his legal representatives. Held, that the words "legal representatives" meant executors and administrators, so that the son took one-third of the trust fund created for the use of the widow if he survived her, and the right to have it administered as a part of his estate by his own executors or administrators, if he died before the widow without issue, and the trust fund created for his own use was also to be turned over to his executors or administrators, if he died without issue. *Alexander v. McPeck*, 75 N. E. 88, 91, 189 Mass. 84.

Where two beneficiary certificates were payable to testator's mother, who died before he did, and provided that in such case they should be payable to the "legal representatives" of the member, and the articles of incorporation declared the object of the association to be the equitable distribution of the fund among the "families or beneficiaries" of deceased members, and declared that each certificate entitled "the heirs or legal representatives or designated benefi-

aries" to \$2,000, and testator's will gave each of his two sisters such of his property as they might have in charge at his death, and all the "residue of which I may die seised, real, personal and mixed," absolutely to his affianced, it was held that, while the words "legal representatives" might sometimes be interpreted as "legal heirs," here they must be given their usual meaning and carried the certificates to the executor, and they went to the affianced by the residuary clause. *Walker v. Peters*, 124 S. W. 35, 36, 139 Mo. App. 681.

The word "heirs" properly means those on whom the law casts the real estate immediately on the death of the ancestor, and the words "legal representatives" mean executors and administrators. These words are to be construed unless from the context of a will it may be seen that testator intended to use them with another meaning. Where a share of an estate consisting of both real estate and personalty was to go to the "heirs or legal representatives" of a deceased legatee, the "heirs," according to the plain meaning of the term, would take the real estate. Where a share of an estate consisting of both real estate and personalty was to go to the "heirs" or "legal representatives" of a deceased legatee, the personalty would go to the next of kin, since to construe "legal representatives" in its primary meaning would make the personalty subject to the testamentary disposition and the debts of the deceased legatee, while the real estate was not. *Howell v. Gifford*, 53 Atl. 1074, 1077, 64 N. J. Eq. 180 (citing *Williams' Ex'rs*, 1013).

Testator bequeathed to his wife the balance due on a policy of insurance issued by a company which was neither a fraternal nor a mutual benefit association. The policy provided for payment to the beneficiary, his "legal representatives" or assigns. The application directed that the insurance should be paid "to whom I may direct in my will." Held, that the title vested in the widow, after the satisfaction of a debt to secure which it had been assigned, as executrix, and not as a beneficiary under the policy. *Leonard v. Harney*, 66 N. E. 2, 173 N. Y. 352.

A fraternal insurance association issued a certificate of membership to a man who named his wife as beneficiary. It provided that if his wife died before he did, he might name another beneficiary, but if he failed to do so, the insurance should be paid to his legal representative. The wife died; he died later; an administrator was appointed to whom the association paid the money. The insured left three children who sued the administrator to recover the money. Held, that the administrator was the legal representative of the deceased within the meaning of that term and was entitled to the money.

*Hunt v. Remsberg*, 112 Pac. 590, 591, 83 Kan. 665, 32 L. R. A. (N. S.) 246, 21 Ann. Cas. 1267.

#### Agent

A provision of an insurance policy that the term insured, as used therein, shall include his "legal representatives," does not include his agents. *Boston Marine Ins. Co. v. Scales*, 49 S. W. 743, 745, 101 Tenn. 628.

#### Assignees, purchasers, and grantees

The words "legal representative," as used in a statute relating to settlement on public lands, included not only heirs, executors, or administrators of a settler, but his legal assigns. *Lapish v. Wells*, 6 Greenl. (6 Me.) 175, 185.

An assignment of a patent to two persons named, "and to their legal representatives," to be held and enjoyed by them for their own use and behoof "and for the use and behoof of their legal representatives," is not a mere personal license to the persons named, but the words "legal representatives" mean "assigns" as well as "executors and administrators." *Hamilton v. Kingsburg*, 11 Fed. Cas. 346, 347, 15 Blatchf. 64.

On the death of a party to an action involving real estate, the heir of the deceased party must be brought in as successor, and hence a contention that the provisions of the Code of Public General Laws, providing that if a party to a suit in equity shall die before final decree, leaving heirs at law or representatives who should be made parties, it shall not be necessary to file an amended bill, do not contemplate that such proceedings should be revived by summoning in the heir, but that they mean, by using the term "legal representative," that the purchaser, and none other, in case of a sale of the land by the fraudulent vendee, should be brought in, is untenable. *Sinclair v. Auxiliary Realty Co.*, 57 Atl. 664, 668, 99 Md. 223.

The term "legal representative," as used in a land patent, embraced a representative by contract, a grantee, or assignee, as well as a representative by operation of law. The purchaser of a land claim sold by a Louisiana parish court in administration proceedings is a "legal representative" of the claimant, within the meaning of Act Cong. June 2, 1858, requiring the surveyor general of the district in which a land claimed is located, on satisfactory proof that such claim had been confirmed and is unsatisfied, to issue to the claimant or his "legal representative" a certificate of location of a quantity of land equal to that so confirmed and unsatisfied. *Bradley v. Dells Lumber Co.*, 81 N. W. 394, 396, 105 Wis. 245.

Code Civ. Proc. Cal. § 473, provides that an assignee or grantee is a "legal representative" of the assignor or grantor in regard to the things assigned or granted. *Abb. Law Dictionary* says that "to represent a person" is to stand in his place, to act his part, ex-

ercise his right, or take his share. *Brown v. Massey*, 76 Pac. 226, 228, 13 Okl. 670.

While in common parlance the expression "legal representatives" means administrators or executors, legally, it is not always so exclusive. Under a lease giving the lessor the right to cancel the lease and providing that the covenant and agreements contained therein were binding on the parties and their legal representatives, a grantee of the lessor had a right to cancel the lease. *Adler v. Lowenstein*, 102 N. Y. Supp. 492, 493, 52 Misc. Rep. 556 (citing *Mutual Life Ins. Co. v. Armstrong*, 6 Sup. Ct. 877, 879, 117 U. S. 591, 597, 29 L. Ed. 999; *Warnecke v. Lembca*, 71 Ill. 91, 93, 12 Am. Rep. 85).

#### As assigns

See Assigns.

#### Descendants

While the term "legal representatives" in its ordinary acceptation means executors and administrators, it may also mean descendants. *Kelsay v. Eaton*, 76 Pac. 770, 772, 45 Or. 70, 106 Am. St. Rep. 662.

Under a will giving legacies to relatives who shall be living or whose legal representatives shall be living at a certain time, the words "legal representatives" mean children or lineal descendants. *Miller v. Metcalf*, 58 Atl. 743, 745, 77 Conn. 176.

Testator created a testamentary trust, and provided that the income thereof should be applied to the use of daughters named and a son named, and declared that on the death of the daughters, respectively, the principal held in trust for the daughter dying should be transferred to the children of the deceased daughter, and, in default of children, the property should go to the other children named in the will and to their legal representatives. Held, that the words "legal representatives" meant lineal descendants, though the daughters were illegitimate children of testator. *Dwight v. Gibb*, 129 N. Y. Supp. 961, 964, 145 App. Div. 223.

#### Devisees and legatees

The words "legal representatives," as used in a contract for preferential rates between a railroad company and a shipper, which provided that the railroad agreed to transfer logs for such shipper and his assigns at a prescribed rate, and defined the word "assigns" as limited to the shipper's legal representatives in case of death, to his successors in the timber and lumber business in case of his retirement, and to any mill that he might build or purchase, does not include a legatee of the shipper's lumber business under his will. *Sullivan v. Louisville & N. R. Co.*, 35 South. 694, 697, 138 Ala. 650.

In *Rev. Civ. St. art. 2248*, providing that in actions against executors, etc., neither party shall be allowed to testify against the other as to any transaction with the testator,

etc., unless called by the opposite party, and providing that the provision shall extend to all actions by or against the heirs or "legal representatives" of a decedent arising out of transactions with the decedent, the reference to heirs and "legal representatives" does not include devisees and legatees, and in an action to cancel a deed given to one since deceased, where it appeared that by a settlement among the defendants certain churches were entitled to an interest in the estate as legatees and other defendants were entitled to an interest as heirs, plaintiff's testimony that the deed to the decedent had been given to secure a debt which had been released by decedent's will was admissible, as against the churches as legatees, but not as against the other defendants as heirs. *Emerson v. Scott*, 87 S. W. 369, 370, 39 Tex. Civ. App. 65.

The term "legal representatives" of a deceased person will mean the executor or administrator if the subject-matter is personality, and heirs or devisees if it is realty, within the rule that all the necessary parties to a judgment sought to be reviewed must be the parties to the bill of review, and, if they are dead, their "legal representatives" must be parties. *State Fair Ass'n v. Terry*, 85 S. W. 87, 89, 74 Ark. 149 (citing *Cochran v. Cochran*, 17 Atl. 981, 127 Pa. 486; *Ralston v. Sharon*, 51 Fed. 702; *Johnson v. Van Epps*, 110 Ill. 557; *Turner v. Berry*, 8 Ill. 541).

Under Laws 1885, p. 698, c. 405, § 6, providing for the delivery of a tax deed to the purchaser, his "legal representatives" or assigns, a deed is properly delivered to the sole devisee of the purchaser's estate, the quoted term not being necessarily confined to executors, administrators, etc. *Rosenblum v. Eisenberg*, 108 N. Y. Supp. 350, 353, 123 App. Div. 896 (citing *Griswold v. Sawyer*, 26 N. E. 464, 125 N. Y. 411; *Rice's Lessee v. White*, 8 Ohio, 216; 2 Blackw. Tax Titles, § 963, and note 1, citing cases; *Black, Tax Titles*, p. 312; *Morehouse v. Phelps*, 18 Ill. 472; *Mutual Life Ins. Co. v. Armstrong*, 6 Sup. Ct. 877, 117 U. S. 591, 29 L. Ed. 997; *Duncan's Lessee v. Walker* [Pa.] 1 Yeates, 213; *Commonwealth ex rel. Kreber v. Bryan* [Pa.] 6 Serg. & R. 81; *Wamsley v. Crook*, 3 Neb. 344; *Lee v. Dill* [N. Y.] 39 Barb. 521).

#### Heirs, next of kin, and distributees

Heirs as including, see Heirs.

Lineal heir as including, see Lineal Heirs.

While the term "legal representatives" ordinarily means executors or administrators, it may be shown to mean next of kin. *Wolfe v. Wolfe*, 134 S. W. 33, 34, 154 Mo. App. 218; *Kelsay v. Eaton*, 76 Pac. 770, 772, 45 Or. 70, 106 Am. St. Rep. 662.

P. L. 1898, p. 778, § 168, provides that the orphans' court shall make distribution "to the next of kindred to the intestate in equal degrees, or legally representing their stocks," and section 169 provides that, "in

case there be no child, then to the next of kindred of equal degree of or unto the intestate and their legal representatives as aforesaid." Held that the words "legal representatives," as used in section 169, mean legal representatives of their stocks, and, having found a common ancestor of the intestate and the living next of kin, the logical conclusion is that the nearest class of kinsman descending from that ancestor, together from the stock to which representation is limited. *Smith v. McDonald*, 61 Atl. 453, 454, 69 N. J. Eq. 765.

The term "legal representatives" of a deceased person will mean the executor or administrator if the subject-matter is personalty, and heirs or devisees if it is realty, within the rule that all the necessary parties to a judgment sought to be reviewed must be the parties to the bill of review, and, if they are dead, their "legal representatives" must be parties. *State Fair Ass'n v. Terry*, 85 S. W. 87, 89, 74 Ark. 149 (citing *Cochran v. Cochran*, 17 Atl. 981, 127 Pa. 486; *Ralston v. Sharon*, 51 Fed. 702; *Johnson v. Van Epps*, 110 Ill. 557; *Turner v. Berry*, 8 Ill. 541).

While it may be conceded that the words "legal representatives" mean executors and administrators, as used in Ky. St. 1904, § 655, providing that when a policy of insurance is effected on one's own life, in favor of some person other than himself, having an insurable interest therein, the lawful beneficiary, other than himself or his "legal representatives," shall be entitled to its proceeds as against creditors and representatives of insured, yet in an assessment insurance policy that the amount should go on his death to his wife (naming her) and his two daughters, if living, otherwise his "legal representatives" should be entitled to the insurance in equal parts, the words mean heirs and distributees. *Hall v. Ayer's Guardian* (Ky.) 105 S. W. 911, 913, 914.

That the heirs at law of a lessor, who dies intestate, were the only persons who could execute a good and sufficient deed to premises leased with an option to the lessee to purchase, will not make them the "legal representative" contemplated by the lease, to whom notice of a desire to exercise the option was to be given, where, by its terms, the legal representative provided for was not required to execute the deed, but only to deliver it or cause it to be delivered. *Rockland-Rockport Lime Co. v. Leary*, 97 N. E. 43, 47, 203 N. Y. 469, Ann. Cas. 1913B, 62.

"While technically the words 'legal representatives' mean administrators or executors, they may refer to heirs or next of kin. A 'representative' is one who stands in the place of an owner of real estate as heir, of personalty as next of kin. He is one, also, who takes by representation, and in wills and settlements the terms 'representatives' and 'legal representatives' are frequently held

to mean heirs and next of kin, and not executors and administrators." *Davidson v. Jones*, 98 N. Y. Supp. 265, 266, 112 App. Div. 254 (citing *Griswold v. Sawyer*, 26 N. E. 464, 125 N. Y. 411).

In *Davidson v. Jones*, 98 N. Y. Supp. 265, 112 App. Div. 255, it was held that though the words "legal representative" in a will devising property to the testator's wife and on her decease, to her children, or to their legal representative, refer technically to executors or administrators, yet they may also mean heirs at law or next of kin, and where used in reference to real estate, they mean heirs of testator's deceased children. In *re Allison*, 102 N. Y. Supp. 887, 895, 53 Misc. Rep. 222.

Where a testator makes a bequest to his sister, or, in case of her death before his own, to her heirs and legal representatives, the expression "legal representatives" is equivalent to "heirs," and may be regarded as mere surplusage. In *re Riesenbergs's Estate*, 90 S. W. 1170, 1171, 116 Mo. App. 308.

Where there was nothing in the contract of insurance nor in any statute or provision in the charter of the company to indicate that the words "legal representatives" were used in their broader sense to mean heirs at law, and the policy was an endowment payable to the insured if he was alive at the end of 15 years, and to his legal representative if he died before that time, his heirs had no vested interest in the policy by the use of such phrase, which would prevent the insured from assigning the policy. *Page v. Metropolitan Life Ins. Co.*, 135 S. W. 911, 912, 98 Ark. 340.

Gen. St. 1902, § 393, provides that ancestral real estate shall be distributed to the brothers and sisters, and those who legally represent them, of the blood of the ancestor from whom such estate came; that, if there are none such, then to the children of the ancestor, and those who legally represent them; that, if there be none such, then to the brothers and sisters of the ancestor, and those who legally represent them; and that, if there be none such, then it shall be divided in the same manner as other real estate. Held that "legal representatives" means those who inherit property per stirpes as the representatives of a deceased ancestor, in whose place, for the purpose of succession to such property, they stand, and so, where a son as the sole issue of his father died without issue, his mother surviving, ancestral estate which he had inherited from his father did not pass to her as the "legal representative" of the son's children, and hence on the death of the mother the nearest of kin to the son on his father's side were entitled to the property as against the nearest of kin on his mother's side. In *re Tuttle's Estate*, 59 Atl. 44, 45, 77 Conn. 310 (citing *Ketchum v. Corse*, 31 Atl. 486, 65 Conn. 89).

In Const. § 193, the phrase "legal or personal representatives," embraces not only the executor or administrator, but the heirs or next of kin, as the case may be, and action for death may be brought by the executor, administrator, heirs, or next of kin, and the widow, children, and administrator may join in an action. *Yazoo & M. V. R. Co. v. Washington*, 45 South. 614, 92 Miss. 129.

By "legal representatives" in a bequest in trust to pay the income to H., nephew of testatrix, and, at his death, the principal to such of his legal representatives "as are related to me by blood," is meant his heirs at law. *Hartford Trust Co. v. Wolcott*, 81 Atl. 1057, 85 Conn. 134.

A life policy stipulated that the insurer agreed with the "insured, his executors, administrators and assigns," to pay the amount of the policy to the insured's "legal representatives" within a specified time after proof of the death of the insured. The insured, at the time the policy was issued, was unmarried. Held, that the words "legal representatives" meant the insured's executors or administrators, and not his next of kin. *New York Life Ins. Co. v. Kansas City Nat. Bank*, 97 S. W. 195, 196, 121 Mo. App. 479.

#### Receiver

A provision in an insurance policy that, where the expression "insured" is used therein it shall include the "legal representatives" of the insured, does not entitle a receiver to take the place of the insured in answer to a demand by the company that the insured shall appear for examination under oath respecting a loss, as required by the policy, although the receiver was appointed for the express purpose of collecting the insurance; the insured having absconded and having been adjudged a bankrupt. *Sims v. Union Assur. Soc.*, 129 Fed. 804, 805, 808.

#### Sponse

The fact that the statute authorizes proof to be made by the heirs or "legal representatives" does not give the widow, claiming only a dower interest, any title in the land, since the quoted phrase, in its ordinary acceptance, means executor or administrator. *Braun v. Mathieson*, 116 N. W. 739, 791, 139 Iowa, 409.

#### Surviving partner

Under the statute prohibiting a party to testify against the opposite party in actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent, etc., a surviving partner, suing for the benefit of the firm, is not a "legal representative" of the deceased partner. *Shivel & Stewart v. Greer Bros.* (Tex.) 123 S. W. 207, 208.

#### Trustee in bankruptcy

"The terms 'legal representative' and 'personal representative,' in their commonly accepted sense, mean administrator or ex-

ecutor, though this is not their only definition. They may mean heirs, next of kin, or descendants, and sometimes assignees or grantees. The sense in which the term is to be understood depends somewhat on the intention of the party using it, and is to be gathered, not altogether from its use, but by the surrounding circumstances." Whether a trustee in bankruptcy is a "legal representative" within Act June 3, 1864, § 30, 13 Stat. 108, c. 106 (Rev. St. §§ 5197, 5198), providing that, where a greater rate of interest has been paid a bank than that allowed by that section, the person paying the same or his "legal representative" may recover back twice the amount of interest so paid, might admit of doubt. *Reed v. American-German Nat. Bank*, 155 Fed. 233, 236 (citing 6 Words and Phrases, p. 5358; *Griswold v. Sawyer*, 28 N. E. 464, 125 N. Y. 411).

#### LEGAL RESIDENCE

As residence, see Residence.

Inhabitant synonymous, see Inhabitantcy—Inhabitant.

Resident importing, see Resident.

The "legal residence" of a corporation, within a statute providing that actions shall be tried in the county in which defendant resides, etc., is the county designated in its articles of incorporation as the county in which its principal office shall be kept. *Woods Gold Min. Co. v. Royston*, 103 Pac. 291, 292, 293, 46 Colo. 191.

"There is a broad distinction between a legal and actual residence. A 'legal residence' (domicile) cannot, in the nature of things, coexist in the same person in two states or countries. He must have a legal residence somewhere. He cannot be a cosmopolitan. The succession to movable property, whether testamentary or in case of intestacy, except as regulated by statute, the jurisdiction of the probate of wills, the right to vote, the liability to poll tax, and to military duty, and other things, all depend upon the party's legal residence or domicile. For these purposes, he must have a legal residence. The law will, from facts and circumstances, fix a legal residence for him, unless he voluntarily fixes it himself. His legal residence consists of fact and intention. Both must concur. And when his legal residence is once fixed, it requires both fact and intention to change it. As contradistinguished from his legal residence, he may have an actual residence in another state or country. He may abide in the latter without surrendering his legal residence in the former, provided he so intends. His legal residence, for the purposes above indicated, may be merely ideal, but his actual residence must be substantive. He may not actually abide at his legal residence at all, but his actual residence must be his abiding place." *Pickering v. Winch*, 87 Pac. 763, 766, 48 Or. 500, 9 L. R. A. (N. S.) 1159 (quoting and

adopting definition in *Tipton v. Tipton*, 8 S. W. 440, 87 Ky. 245; *Michael v. Michael*, 79 S. W. 74, 75, 34 Tex. Civ. App. 630).

The actual residence is not always the "legal residence" or inhabitancy of a man. The foreign minister actually resides and is personally present at the court to which he is accredited, but his "legal residence" or inhabitancy or domicile are in his own country. Under Code Iowa, § 2906, which requires a chattel mortgage to be recorded in the county where the holder of the property resides, a mortgagor may be a resident of a county, within the meaning of the statute, although his legal domicile is elsewhere; and a mortgage given by a railroad contractor on property in his possession, in a county where he is at work, and in which he actually resides with his family, while engaged in performing his contract, is properly recorded in such county, although his residence there may be only temporary. In *re Brannock*, 131 Fed. 819, 822, 823.

### LEGAL RIGHT

See *Mutuality of Legal Right*.

A "legal right" is a claim recognizable and enforceable at law. In *re Folwell's Estate*, 62 Atl. 414, 415, 68 N. J. Eq. 728, 2 L. R. A. (N. S.) 1193.

By "legal rights" are meant rights which have been firmly established, and are undisputed or indisputable. *Tacoma R. & Power Co. v. Pacific Traction Co.*, 155 Fed. 259, 261.

The words "legal right," within the rule relating to uttering forged writings to the effect that the writing forged or counterfeited must be apparently such as will deprive a person of property, estate, or a "legal right," evidently mean a right that may be enforced in a civil action. *Commonwealth v. Tabor* (Ky.) 104 S. W. 261, 262.

A cause of action is inconceivable separately from the rights which it invades, and a legal right is inconceivable separately from possible infractions of that right. A "legal right" or title in this aspect is the privilege found in law against certain acts or omissions on the part of others. *Telulah Paper Co. v. Patten Paper Co.*, 112 N. W. 522, 524, 132 Wis. 364, 425.

The order of deportation of a Chinese person, who has plainly violated the exclusion act, made by a court of the United States, pursuant to the acts of Congress, is not made in an ordinary justiciable case, and does not deal with "legal rights," as that expression is generally understood. It merely involves the pretended claim to remain in this country of an individual who, against settled American policy and against the positive command of our statutes, has surreptitiously and fraudulently obtruded his unacceptable presence among our people. *United States v. Fah Chung*, 132 Fed. 109, 110.

### LEGAL SEPARATION

The provision of Code, § 966, that "legal separation from bed and board may be granted for drunkenness, cruelty, and desertion," read in connection with the other sections of the Code relating to divorce, and their index or head lines, which plainly contemplate and provide for the two kinds of divorce known to the law before the adoption of the Code, namely, divorce a vinculo and divorce a mensa et thoro, has no application to voluntary deeds of separation, nor does it apply to divorce a vinculo, but means that a divorce a mensa et thoro may be granted for the causes mentioned; the prefixing of the adjective "legal" to the words "separation from bed and board" being only an inartificial mode of expressing the meaning of what would have been better expressed by the use of the word "divorce," instead of the term "legal separation." *Maschaur v. Maschaur*, 23 App. D. C. 87, 89.

### LEGAL SERVICES

"Legal services" are "extraordinary services" within Rev. St. 1898, § 3929, providing that an allowance may be made to administrators for all extraordinary services. In *re Ryan's Estate*, 94 N. W. 342, 344, 117 Wis. 480.

### LEGAL SETTLEMENT

Rev. Pol. Code 1903, §§ 2810, 2812, charge the care of an insane person to a county where he has acquired a "legal settlement," without defining what shall constitute such a settlement. Held, that it must be deemed to have been used with the same meaning as in section 2764, relating to poor and indigent persons, and providing that they acquire a "legal settlement" charging a county with their support by a residence therein, for 90 days which they lose by acquiring a new one or by willful absence from the county for 90 days; it not appearing that a legal supplement was otherwise defined by any statute. In *re Bigelow*, 96 N. W. 698, 17 S. D. 331.

### LEGAL SHARE

The words "legal share," standing alone and unqualified by other expressions in a will whereby testator gave to his wife the legal share of his real estate and personal property, indicate an intention that she shall take one-half of the personal property absolutely and the income of one-half of the real estate for life, in the absence of any children of the parties, and a will whereby testator gave to his wife described property for use as long as she desired, after which the same should be sold by his executors and become a part of his estate, and whereby he declared that the legal share of his real estate and personal property should be paid to his wife as her share, and whereby he gave a legacy in money and the balance of his estate to enumerated relatives, and whereby he di-



rected his executors to dispose of all his estate within a specified time, used the term in such sense. *In re Dull's Estate*, 71 Atl. 9, 10, 222 Pa. 208, 128 Am. St. Rep. 796.

### LEGAL SUBDIVISION

"Legal subdivision," as used in Gen. St. 1901, § 6339, requiring each "legal subdivision of school land to be appraised separately prior to its being exposed to sale, refers to the smallest subdivision under the congressional system of surveying, namely (except where for special reasons lots are platted in more or less irregular shape as in the case of fractional sections), quarter-quarter sections, or 40-acre tracts. *Hopper v. Nation*, 96 Pac. 77, 78, 78 Kan. 198.

### LEGAL SURVEY

Act March 30, 1872 (St. 1871-72, p. 766, c. 531), for the survey of a line dividing particular counties, declaring that the line so surveyed should be conclusive until the Legislature should change it or order another survey, did not repeal Pol. Code, §§ 3969-3972, providing that any county lines not adequately marked should be run and marked by the Surveyor General; and hence a survey under the special act was a "legal survey." *Trinity County v. Mendocino County*, 90 Pac. 685, 686, 151 Cal. 279.

### LEGAL TENDER

As money, see Money.

To constitute a "legal tender" it is essential to prove an actual offer of the sum due, unless the actual production and offer of the money be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent act. *Greenwood v. Watson*, 171 Fed. 619, 621, 96 C. C. A. 421 (citing *Buchanan v. Horney*, 12 Ill. 336).

A decree requiring payment at a certain time is not complied with by a tender of the amount in "national bank notes." *Lawrence v. Staigg*, 10 R. I. 581, 598.

A bill of exchange is not "legal tender." *United States Health & Accident Ins. Co. v. Clark*, 83 N. E. 760, 762, 41 Ind. App. 345.

### LEGAL TITLE

See Inchoate Legal Title.

Seisin importing, see Seisin.

A purchaser's interest in land by virtue of a contract of sale is "legal title" within the one-year limitation (Code Supp. 1907, § 3447b), barring the claim of a spouse not joining in a conveyance by the holder of the legal title. *Hutchinson v. Olberding*, 130 N. W. 139, 140, 150 Iowa, 604.

The phrase "legal title" in Code Civ. Proc. § 368, providing that in an action to recover real property he who establishes a legal title to the premises is presumed to have been possessed thereof within the time required by law, is not necessarily a mere pa-

per title, but such a title as undisputed will sustain an action of ejectment. *Aubuchon v. New York, N. H. & H. R. Co.*, 122 N. Y. Supp. 581, 583, 187 App. Div. 834.

The Supreme Court of Appeals of West Virginia, referring to a statement in *Adams v. Alkire*, 20 W. Va. 480, in regard to adverse possession, that "it is entirely immaterial whether this color or claim of title be under a good or bad, a legal or equitable title," say that they "do not think the judge meant to say that an equitable title is color of title. In his statement he includes both color and claim, two distinct things. This is followed by the terms 'legal title' and 'equitable title.' We think that he meant that the terms 'legal' and 'equitable' should be used distributively; 'legal' referring to color of title and 'equitable' to claim." *Lewis v. Yates*, 59 S. E. 1073, 1075, 62 W. Va. 575.

### LEGAL VOTER

Nonregistered electors who may exercise the right to vote at an election by the production of the proof required by L. O. L. § 3463, prescribing the manner in which non-registered electors may establish their right to vote, are "legal voters" within Const. art. 11, § 2, and article 4, § 1a, granting to legal voters the right to amend their municipal charter, and such electors may sign an initiative petition proposing an amendment to the charter. *Woodward v. Barbur*, 116 Pac. 101, 104, 59 Or. 70.

A county court, in considering a petition for an election to determine whether the sale of liquors shall be prohibited, recited in their order that the matter came before them on the petition of "legal voters" of the county, and that, "it appearing to the court that said petition is signed by more than 10 per cent. of the qualified electors, \* \* \* and has been properly compared and certified to be genuine and is in all respects in due form of law, it is therefore considered and ordered by the court that the prayer of said petition be and the same is hereby granted." Held, that the terms "legal voters" and "qualified electors" as used in the order are not equivalent to "registered voters" as used in Laws 1905, p. 41, providing for the calling of an election to determine whether the sale of intoxicating liquors shall be prohibited on petition of 10 per cent. of the "registered voters." *Roesch v. Henry*, 103 Pac. 439-441, 54 Or. 230.

Laws 1905, p. 41, provides that whenever a petition therefor, signed by not less than 10 per cent. of the "registered voters" of any county, shall be filed with the county clerk, the county court shall order an election to determine whether the sale of liquors shall be prohibited, and that, in determining whether any such petition contains the requisite percentage of "legal voters," said percentage shall be based on the total vote in such county for Justice of the Supreme

Court at the last preceding general election, provided that in no event shall more than 500 petitioners who are legal voters be necessary upon any such petition, and "the county clerk shall, upon receipt of such petition, immediately file the same, and shall compare the signatures of the electors signing the same with their signatures on the registration books of the election then pending, or, if none pending, with the signatures on the registration books and blanks on file in his office for the preceding general election." Held, that the phrase "legal voters" is a synonym for "registered voters," and that no qualified elector is a competent petitioner for a local option election unless his signature appears on the registration books, the privilege of signing such a petition not being a right of franchise in which all the electors enumerated in Const. art. 2, § 2, may participate, but whether there is a sufficient number of signers is to be determined by comparing such number with the number who last voted for justice, and the number of registered voters in a district is only important for the purpose of comparing the signatures of the petitioners with the signatures on the registration books. *Roesch v. Henry*, 103 Pac. 439-441, 54 Or. 230.

A nonregistered voter may sign a petition for the nomination of a candidate for a public office, though the statute uses the words "voter" and "legally qualified voter or elector." In *re Herman*, 96 N. Y. Supp. 144, 145, 108 App. Div. 335.

The General Election Law (P. L. 1898, p. 319) defines the phrase "legal voters" as persons entitled to vote and who do vote at the time and in the manner prescribed in and by the statute on the question or proposition submitted. *Murphy v. City of Long Branch* (N. J.) 61 Atl. 593, 594.

Revision 1898, Act April 4, 1898, § 185 (P. L. p. 319), declares the meaning of the words "legal voters" to be persons entitled to vote and who do vote at the time and in the manner prescribed in and by the statute upon the question or proposition submitted. *Nugent v. City of Newark*, 72 Atl. 11, 12, 77 N. J. Law, 425.

A finding by the county court in an order calling the election that a petition for a local option election was signed by "legal" voters, when L. O. L. § 4920, requires such petition to be signed by "registered" voters, would not invalidate the election; "legal" voters being synonymous with "registered" voters as used in the statute. *State v. Billups*, 127 Pac. 686, 689, 63 Or. 277.

Article 4, §§ 2 and 3, of the state Constitution, provides that senators and members of assembly shall be elected by the legal voters. "Legal voters" are the male citizens who, by article 2, are given a vote for officers elected by the people. *Carpenter v. Cornish*, 85 Atl. 240, 243, 83 N. J. Law, 696.

## LEGAL WRONG

It is the general rule of law that "a 'legal wrong' is committed whenever a man is dispossessed of his property against his will." *De Vries v. Crofoot*, 111 N. W. 775-777, 148 Mich. 183.

## LEGALITY

Where plaintiffs recovered against a county for taxes paid on an alleged erroneous assessment of a section of land which by mistake of the taxing officers was assessed as containing more land than it in fact contained, the action did not involve the "legality of a tax or assessment," within provisions permitting an appeal to the Supreme Court in certain cases involving the legality of a tax or assessment. *Thomas v. Lincoln County*, 83 Pac. 18, 24, 41 Wash. 150.

## LEGALLY

The conclusion of the court in an action involving the dedication of a street, tried to the court without a jury, that the street was never "legally" dedicated to the public, was properly designated as a conclusion of law, and was reviewable on appeal; the word "legally" clearly indicating that the court referred to a statutory dedication. *Sweatman v. Bathrick*, 95 N. W. 422, 424, 17 S. D. 138.

## LEGALLY ASSESSED

Under Rev. Code Civ. Proc. § 54, making 10 years' possession under color of title, and payment of all taxes "legally assessed," ground for an adjudication of ownership, actual possession and payment of taxes under color of title, and in good faith, for the required period, entitles one to be deemed the legal owner, although the assessment of taxes for one or more of the years may be technically illegal; the term "legally assessed" meaning merely assessed under color of legal authority. *Murphy v. Nelson*, 102 N. W. 691, 694, 19 S. D. 197.

*Mills' Ann. St.* § 3807, requires the state board of equalization to make assessments upon railways, and include therein its rights of way, etc., and the revenue act (Laws 1902, c. 2) requires such board to assess all property used or controlled by railroad companies with certain exceptions. Held, that a railroad company in possession of and using land as its right of way was "legally assessed" thereon by the state board of equalization, within the meaning of Sess. Laws 1893, c. 118, § 6 (Rev. St. 1908, § 4089), making every person the legal owner of land who is in the actual possession thereof as stated, for seven successive years, and during such time pays all taxes legally assessed thereon. *Denver & R. G. R. Co. v. Doelz*, 111 Pac. 595, 596, 49 Colo. 48.

## LEGALLY AUTHORIZED

See Lawfully Authorized.

**LEGALLY CAUGHT**

See Fish Legally Caught.

**LEGALLY CHARGED**

Under policies issued to employers and railroad companies insuring them against damages with which they might be "legally charged" by reason of injuries to employees or to persons or property while being transported, the liability of the insurer arose on the happening of the injury, and not at the time judgment was recovered against the insured for such injury. *Ross v. American Employers' Liability Ins. Co.*, 38 Atl. 22, 23, 56 N. J. Eq. 41.

**LEGALLY COMPETENT**

The words "legally competent" mean that the person named as executor must be of legal age, of sound mind and memory, and untainted by conviction for a crime which renders the convicted person infamous. *Clark v. Patterson*, 114 Ill. App. 312, 316.

**LEGALLY CONSTITUTED COURT**

A de facto court is a "legally constituted court" within a habeas corpus statute. *State ex rel. Bales v. Bailey*, 118 N. W. 676, 678, 106 Minn. 138, 19 L. R. A. (N. S.) 775, 130 Am. St. Rep. 592, 16 Ann. Cas. 338.

**LEGALLY DISCHARGED**

The phrase "legally discharged," as used in Code Civ. Proc. § 2972, providing that every guardian of an incompetent person shall have the custody of the person of his ward and his estate until such guardian is "legally discharged," does not mean until he is discharged by an order of the court, but his authority is terminated under section 2973 ipso facto by an adjudication of restitution to capacity. In *re Scheuer's Estate*, 79 Pac. 244, 246, 31 Mont. 606.

**LEGALLY DUE**

Where a city tax was assessed against a bankrupt's property on May 1, 1899, prior to his being adjudged a bankrupt on August 8th, such taxes became "legally due and owing" on the day they were assessed, within Bankr. Act July 1, 1898, § 64, c. 541, 30 Stat. 563, making such taxes a preferred claim against the bankrupt's estate, though the taxes were not payable until after the adjudication. In *re Flynn*, 134 Fed. 145.

The franchise tax assessed under Gen. St. N. J. 1895, §§ 251, 252, 257, 258, 260, on the basis of the capital stock of a corporation, issued and outstanding on the 1st of January preceding the making of the return, is "legally due and owing" within the meaning of Bankr. Act July 1, 1898, § 64a, providing that taxes must be paid in advance of the payment of dividends to creditors, although such tax may not have been collectible until after the corporation was adjudged a bankrupt. *State of New Jersey v. Anderson*, 27 Sup. Ct. 137, 141, 203 U. S. 483, 51 L. Ed. 284.

**LEGALLY LIABLE**

Where a bill of lading contained a provision that neither the company nor any connecting carrier shall be liable for damages to or the destruction of the cotton by fire, and the consignor of the cotton gave up insurance thereon in his favor and took out a policy in favor of the carrier, fully protecting it from loss or destruction by fire, such insurance was a valid consideration for the promise not to insist on recovery of damage on account of the destruction by fire contained in the bill of lading, for it fully protected the carrier from loss or damage by fire for which it was "legally liable," and this included liability resulting from the negligence of its own employees, and for which it was unquestionably liable to the consignor, notwithstanding the exemption in the bill of lading. *Texas & P. R. Co. v. Cau*, 120 Fed. 15, 16, 57 O. C. A. 35.

**LEGALLY REQUIRED**

Code Civ. Proc. § 1989, provides that a witness is not obliged to attend as witness before any court out of the county in which he resides, unless the distance be less than 30 miles from his residence to the place of trial, and by Pol. Code, § 4300g, witnesses, when "legally required" to attend the superior court in civil cases, are entitled to mileage actually traveled. Witnesses for the plaintiff residing 200 miles from the place of trial, without subpoena, and on the request of the plaintiff, voluntarily went from their residence to the place of trial and testified. Held, that they were not "legally required" to attend, and hence were not entitled to the mileage allowed by section 4300g, and that an allowance for mileage could not be taxed in plaintiff's cost bill. *Naylor v. Adams*, 114 Pac. 997, 998, 15 Cal. App. 353.

A witness may waive the manner of service and accept service in some other form though not in strict compliance with the statute, and he will be required to obey a subpoena so served, so that such witnesses were "legally required to attend," within Comp. Laws 1907, § 994, so as to be entitled to mileage fees from their home to the place of trial. *Holt v. Nielson*, 109 Pac. 470, 475, 37 Utah, 566.

**LEGALLY SUFFICIENT**

Under L. O. L. § 3474, providing that the court, on a showing that any petition for a referendum is not legally sufficient, may enjoin the Secretary of State and all other officers from certifying or printing the title and number of the measure on the official ballot, the petition, to be "legally sufficient," must be a valid petition, signed by legal voters, and complying substantially with the requirements of the law; and, although a petition appears regular on its face, the court may inquire into its legal sufficiency. *State v. Olcott*, 125 Pac. 303, 304, 62 Or. 277.

## LEGATEE

See General Legatee; Residuary Legatee; Sole Legatee; Specific Legatee.

A "legatee" is a person to whom a legacy is given. *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587 (citing Black, Law Dict. tit. "Legatee").

Societies and corporations to whom legacies are given by a will are "legatees," within the meaning of a clause of the will providing that property of testatrix, not otherwise disposed of, shall be sold, and the money "paid to the legatees hereinbefore named." So, also, where the will provided that the property of testatrix otherwise undisposed of shall be sold, and proceeds paid to the "legatees hereinbefore named" in specified proportions, trustees previously named in the will and who are thereby given the legal title to the trust fund during the period of trust are "legatees," and as such take the legal title to whatever share of the property not otherwise disposed of the trust fund is entitled. *Crawford v. Mound Grove Cemetery Ass'n*, 75 N. E. 998, 1001, 218 Ill. 399.

Testator by olographic will, after having bequeathed to his wife the homestead with furniture, etc., together with a one-fourth interest in the residue after paying all bequests made, bequeathed the remaining three-fourths of the residue to his three other children, and provided that, if any of the "legatees" died before testator's death, then the legacy provided for him or her should be divided equally among the residuary legatees. Held, that the word "legatees" was used in an ordinary nontechnical sense to include bequests of both real and personal property, and that, under the rule that the testator's intention, as disclosed by the language used, must control, such term included the bequest to the wife, and that on her predeceasing the testator her share became a part of the residue within the substitutionary clause. In *re Henderson's Estate*, 119 Pac. 496, 498, 161 Cal. 353.

A will provided that upon the death of the life tenant the remainder should be divided pro rata among the legatees named in the will. If the word "legatees" was intended to indicate the five persons named as such in the will, the entire estate could not be disposed of, and, if testator had so intended, he could easily have called them by name. In another clause providing for abatement of legacies, a certain process of proportion was ordained necessarily applicable only to the beneficiaries who survived testator. Held, that "legatees" should be construed to mean only those who survived testator, and thus became legatees in the proper import of the term. In *re Hoffman*, 124 N. Y. Supp. 680, 681, 67 Misc. Rep. 334.

## Children

Where testator devises stock in trust for his daughter, one of the trustees being also an executor, and by another item directs that the executors shall hold it, together with other stock, the dividends of which are disposed of by the will, until a designated time, in the meantime paying the dividends and profits to each of said "legatees," and provides that, if any of the legatees die before such time without children, the dividends so bequeathed to each legatee, as well as the stock, shall be distributed among his surviving children, the words "legatees" and "children" are used interchangeably, and, as to that item of the will, synonymously, so that the dividends are payable directly to the beneficiary of the trust, and not to the executors as trustees. *Lamar v. Harris*, 48 S. E. 932, 933, 121 Ga. 285.

## As creditor

See Creditor.

## Devisee

Devisee as including, see Devisee.

The terms "legatee" and "devisee" are more strictly interpreted as referring the one to personalty and the other to realty, in the construction of statutes than in the construction of wills and deeds, and, where a deed describes the grantor as the only heir and legatee of a certain person, the word "legatee" may be regarded as meaning devisee of land as well as donee of personalty. *Weigel v. Green*, 75 N. E. 913, 918, 218 Ill. 227.

"Legacy and devise" and "legatee and devisee" are often used as interchangeable phrases in wills and everyday conversation, and therefore courts would not feel fettered to any nice construction, where subject-matter or context shows the words were used interchangeably and as of the same import. But such popular and loose construction is hardly permissible in view of the statutory rule of hermeneutics. *Desloge v. Tucker*, 94 S. W. 283, 286, 196 Mo. 587.

Although the words "devise" and "devisee" properly and technically apply only to real estate, and the words "legacy" and "legatee" only to personal property, they have been made interchangeable by Ky. St. 1903, § 467, which provides that "the words 'legatee' and 'devisee' shall each be held to convey the same idea." *Roberts v. Chenoweth* (Ky.) 112 S. W. 625, 627,

## As heir

See Heirs.

## As legal representative

See Legal Representative.

## LEGION

"League" and "legion" are of entirely different meanings; "league" being defined as "an alliance of persons," and "legion" as "a

military body or organization." *People ex rel. Felter v. Rose*, 80 N. E. 293, 295, 225 Ill. 496.

## LEGISLATION

See *Class Legislation*; *Exclusive Legislation*; *Expository Legislation*; *Municipal Legislation*; *Specially Named Legislation*.

See, also, *General Law*; *Special Law*.

The Legislature at a special session has all the power it has at a regular session, except so far as restrained by the Constitution, and the limitation by article 3, § 40, providing that at such sessions there shall be no "legislation" on subjects not designated by the Governor, does not preclude the appointment of an investigating committee to obtain information for future use, even on a subject not submitted by the Governor; the word "legislation" having a well-defined meaning, and including only the enactment, repeal, and amendment of laws. *Ex parte Wolters*, 144 S. W. 531, 538, 64 Tex. Cr. R. 238 (Davidson, P. J., dissenting).

The word "legislation," as used in Const. §§ 76, 246, providing, respectively, that at a special session of the Legislature there shall be no legislation upon subjects other than those designated in the call for the session except by vote of two-thirds of each House, and that no railroad shall have the benefit of any future legislation by general or special laws, refers to the enactment of statutes and is not descriptive of the processes by or through which laws are perfected by constituted authority, and hence such sections do not forbid the introduction of bills not within the subjects specially designated in the proclamation, unless the named proportion of the respective Houses sanction it. *State ex rel. Woodward v. Skeggs*, 46 South. 268, 271, 154 Ala. 249.

Const. art. 14, declares that the General Assembly may propose constitutional amendments, each amendment being embraced in a separate bill, by three-fifths of all members elected to each of the two houses, which bill shall be published by order of the Governor for a specified time before the election at which the amendment shall be submitted to the voters in a form to be prescribed by the General Assembly. Many provisions of the Constitution refer to the "General Assembly" in a manner indicating that the Governor is not included within the term. By the Constitutions of 1776, 1851, and 1864 the Governor was given no authority to veto a proposed constitutional amendment. Const. 1867, art. 2, § 17, declares that, to guard against hasty and partial legislation, every "bill" which shall have passed the House of Delegates and the Senate shall be presented to the Governor before it becomes a "law." Only a majority of both houses is required to adopt legislative measures. Held, that a pro-

posal to amend the Constitution is not "legislation," and the term "General Assembly" in article 14 does not include the Governor; and hence a bill proposing a constitutional amendment, and having appended to it no measures essentially legislative, need not be submitted to the Governor for his approval. *Warfield v. Vandiver*, 60 Atl. 538-543, 101 Md. 73, 4 Ann. Cas. 692.

When an incumbent of an office is removed by the action of the Legislature by abolishing the office or terminating his term, the officer is popularly said to be "legislated out of office." This colloquial term expresses with the precision of the logician the character of the removal. It is "legislation." *People ex rel. Devery v. Coler*, 65 N. E. 956, 959, 173 N. Y. 103.

## LEGISLATIVE

The word "legislative" is applied to the organ or organs of government which makes the law. *People v. Salisbury*, 96 N. W. 936, 938-941, 134 Mich. 537 (citing *Webst. Dict.*).

## LEGISLATIVE ACT

The filling of vacancies in a city council by the council is not a "legislative act," and therefore no aye and nay vote is necessary; *Burns' Ann. St. 1908*, § 8652, requiring the clerk of the common council to enter ayes and nays on the passage of every ordinance and resolution applying only to legislative acts. *Wagner v. State ex rel. Walker*, 91 N. E. 1, 2, 173 Ind. 603.

The creation of reclamation districts and the setting off of lands and the fixing of the boundaries of such districts are legislative acts, within the power of the Legislature, and the Legislature can neither be compelled to act or to refrain from acting, or controlled by any other power of government when it has acted within constitutional limitations. *Inglin v. Hoppin*, 105 Pac. 582, 583, 156 Cal. 483.

### Judicial act distinguished

An act is a "judicial" one where it undertakes to determine a question of right or obligation or of property as the foundation on which it proceeds. A "judicial act" determines what the law is and what the rights of parties are in reference to transactions already had; a "legislative act" determines what the law shall be in future cases. *Newell v. Franklin*, 74 Atl. 1009, 1011, 30 R. I. 258; *In re County Commissioners of Counties Comprising Seventh Judicial Dist.*, 98 Pac. 557, 560, 22 Okl. 435 (quoting and adopting definition in *Sinking Fund Cases*).

"A 'legislative act' is one which prescribes a general rule of conduct." A municipal ordinance providing for the paving of a street at the cost of the property benefited thereby to the extent of the benefit, being a judicial and not a legislative act, is invalid.

because passed without notice to the property owners affected thereby. *Sears v. Atlantic City*, 64 Atl. 1062, 1063, 73 N. J. Law, 710, 118 Am. St. Rep. 724.

The official action of a legal body which is the result of judgment and discretion is a "judicial act" rather than a "legislative act," and so too an act which determines the rights and duties of parties under existing law, with relations to existing facts, is said to be judicial rather than legislative. *Gulnac v. Board of Chosen Freeholders*, 64 Atl. 998, 1000, 74 N. J. Law, 548, 122 Am. St. Rep. 405.

State courts, in reviewing orders of the public service commission, act judicially and not "legislatively." *Delaware, L. & W. R. Co. v. Stevens*, 172 Fed. 595, 600.

When the public service commission, on complaint after hearing and the taking of evidence, entered an order requiring that complainants stop its interstate trains at a station, the commission's act was "legislative" and not judicial. *Delaware, L. & W. R. Co. v. Stevens*, 172 Fed. 595, 606.

The passage of a city ordinance granting a franchise to a public service corporation involves "legislative action" only, and such action cannot be reviewed by a writ of certiorari. *Tenny v. City of Columbia*, 92 Pac. 895, 896, 48 Wash. 150.

That which distinguishes a "judicial" from a "legislative" act is that the one is a determination of what the law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of future cases falling under its provisions. *Tyson v. Washington County*, 110 N. W. 634, 636, 78 Neb. 211, 12 L. R. A. (N. S.) 350 (citing and adopting definition in *Cooley. Const. Lim.*).

#### **Establishment of rates as legislative or judicial act**

The fixing of water rates by a city, when not a matter of contract, is a "legislative function" rather than a judicial function. *City of Pocatello v. Murray*, 173 Fed. 382, 385 (citing *Reagan v. Farmers' Loan & Trust Co.*, 14 Sup. Ct. 1047, 154 U. S. 397, 38 L. Ed. 1014; *Southern Pac. Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12).

The function of fixing railroad rates is a "legislative function." *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 957, 973, 974.

The establishment of railway passenger rates by the Virginia Corporation Commission is not *res judicata* in a suit which seeks injunctive relief on the ground that the rates are confiscatory, although such commission for some purposes is a court, and acted only after hearing and investigation, since proceedings to establish rates are legislative, and not judicial, in their nature. *Prentis v.*

*Atlantic Coast Line Co.*, 29 Sup. Ct. 67, 69, 211 U. S. 210, 53 L. Ed. 150.

Injunctive relief against railway passenger rates as fixed by the Virginia State Corporation Commission may be granted by a federal court if such rates are confiscatory, although, for some purposes, the commission is a court, since proceedings to establish rates are legislative, and therefore are not comprehended by the provision of Rev. St. § 720, forbidding federal courts from enjoining proceedings in state courts, which provision looks to the character of the proceedings, not the character of the body. *Prentis v. Atlantic Coast Line Co.*, 29 Sup. Ct. 67, 69, 211 U. S. 210, 53 L. Ed. 150.

#### **LEGISLATIVE AUTHORITY**

The words "legislative authority," as used in Const. art. 11, § 3, have no greater significance than such words as "common council or other legislative body" would have had. They were simply intended to designate the particular body, which it was recognized would exist under some name or other in every municipality, as the proper official agency to submit propositions for amendments to charters, and were not intended to define the powers of that body or place it in a position where it would be beyond restrictions by the organic act of the city. Hence the "initiative" provision of the charter of Los Angeles, giving power to the electors to adopt ordinances, is not shown to be unconstitutional because of the words "legislative authority" being used by the Constitution to designate the ordinary legislative body of a city, in providing for submission by legislative authority of the city of a proposed charter amendment to the voters of the city. *In re Pfahler*, 88 Pac. 270, 273, 150 Cal. 71, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911.

The term "legislative authority of a city," as used in Laws 1903, p. 364, c. 175, as amended by Laws 1907, p. 192, c. 99, providing that the legislative authority of a city having control of any public street shall have power to grant authority for the construction of street railways thereon of which the motive power is other than steam, and to prescribe the terms and conditions, and in Const. art. 11, § 10, providing that city charters may be amended by proposals therefor, submitted by legislative authority of the city to the electors thereof, etc., and in numerous statutes, means the mayor and council, and hence the mayor and council had the sole power to prescribe the terms on granting a street railway franchise; and an ordinance passed by the city council, and approved by the mayor, granting such a franchise is valid, notwithstanding an amendment to the city charter requiring the council to submit street railway franchises to the voters for their approval. *Benton v. Seattle Electric Co.*, 96 Pac. 1033, 1035, 50 Wash. 156.

**LEGISLATIVE BOARD**

Acts 1906, pt. 1, c. 1, empowering cities of the first class to construct a system sewerage, authorizing the mayor to appoint a commission who may appoint an engineer, secretary, and treasurer, and determine what system of sewerage is most expedient, and report the same to the council, etc., is not in conflict with Const. § 160, providing that the mayor, police judges, members of legislative boards, etc., shall be elected by qualified voters; the commission not being a "legislative board." *Miller v. City of Louisville (Ky.)* 99 S. W. 284, 285.

**LEGISLATIVE BODY**

A "legislative body" is any body of persons authorized to make laws or rules for the community represented by them. It is one capable of or pertaining to the enactment of laws. The common council of a city or town is the local legislature of that city or town. *Burke v. Wood*, 162 Fed. 533, 538.

Bouvier defines "legislative officers" as "those whose duties relate mainly to the enactment of laws." The board of aldermen of the city of New York is a "legislative body," within the Civil Service Law, providing that the unclassified service shall comprise officers and employes of a legislative body. As the services rendered by the appointees in the office of the city clerk and clerk of the board of aldermen are in the main legislative, such appointees are in the unclassified service, though such appointees are not directly appointed by the board of aldermen, but by the city clerk himself elected by the board. Such employes are in the unclassified service, though they may also aid the clerk in the discharge of other duties not legislative. *O'Grady v. Polk*, 116 N. Y. Supp. 290, 291, 132 App. Div. 47.

Under N. Y. Const. art. 3, § 26, providing that the powers and duties of a board of supervisors may be devolved upon the municipal assembly, etc., or other "legislative body," the words "or other legislative body" mean the legislative body of the city by whatever name it may be designated. *Wilcox v. McClennan*, 95 N. Y. Supp. 941, 942, 47 Misc. Rep. 465.

**LEGISLATIVE BUSINESS**

Under Const. art. 4, § 8, relating to extra sessions of the Legislature, and providing that it shall transact no "legislative business" other than that for which it is especially convened, or which is called to its attention by the Governor, except by a two-thirds vote of each house, the confirmation by the Senate of executive appointments to office cannot be regarded as "legislative business," since such confirmation is not essentially legislative in its nature, and does not require the co-operation of the House of Representatives. In re Advisory Opinion to the Governor, 59 South. 782, 786, 64 Fla. 16.

**LEGISLATIVE DEPARTMENT**

The "legislative department" within Const. art. 3, dividing the powers of government into the legislative, executive, and judicial departments, is composed of the body enacting laws for the state or, by delegation, for minor subdivisions and municipalities. *Witter v. Cook County Com'rs*, 100 N. E. 148, 149, 256 Ill. 618.

**LEGISLATIVE FUNCTION**

Const. art. 3, dividing the powers of government into the legislative, executive, and judicial departments, and prohibiting the exercise of any power belonging to any department by any person belonging to another department, does not mean that the legislative, executive, and judicial powers shall be kept so entirely separate and distinct as to have no connection with or dependence on each other, and it is a "legislative function" to provide places for holding courts and for the expenses of the judicial system and the compensation of judicial officers, and the Legislature may invest the board of county commissioners with the custody of property of the county, though the property is used in the exercise of judicial power by the judicial department; and, though a sheriff and clerk are essential to a court and to the exercise of judicial power, the former performs executive and the latter clerical duties only. *Witter v. Cook County Com'rs*, 100 N. E. 148, 149, 256 Ill. 618.

The function exercised by voters or a representative body upon whose approval the inception of a franchise grant by the Legislature is made conditional is not the exercise of a "legislative function." It is the exercise of the function of "referendum," which is not legislative. *Duffield v. Ashurst*, 100 Pac. 820, 825, 12 Ariz. 360.

**LEGISLATIVE OFFICER**

"Legislative officers" are those whose duties relate mainly to the enactment of laws. *State v. Kelly*, 77 S. W. 996, 997, 103 Mo. App. 711 (quoting Bouv. Law Dict.); *O'Grady v. Polk*, 116 N. Y. Supp. 290, 291, 132 App. Div. 47 (quoting Bouv. Law Dict.).

**LEGISLATIVE POWER**

See Full Legislative Powers.

See, also, Public Power.

The "legislative power" of government is that which makes the laws. In re Appointment of Revisor of Statutes, 124 N. W. 670, 671, 141 Wis. 592, 18 Ann. Cas. 1176.

"Legislative power" is the power to prescribe the rules of civil conduct. *Schaafe v. Dolley*, 118 Pac. 80, 82, 85 Kan. 598, 37 L. R. A. (N. S.) 877, Ann. Cas. 1913A, 254.

"Legislative power," within Const. art. 4, § 1, providing that the legislative power shall be vested in the General Assembly, is the power to make laws. *Merchants' Ex-*

change of *St. Louis v. Knott*, 111 S. W. 585, 571, 212 Mo. 616.

The words "legislative power," used in Const. § 29, providing that the legislative power shall be vested in a House of Representatives, etc., is a comprehensive phrase, meaning all powers that appertain to or are usually exercised by a legislative body. *Booth's Ex'r v. Commonwealth ex rel. Jefferson County Attorney*, 113 S. W. 61, 62, 130 Ky. 88, 33 L. R. A. (N. S.) 592.

The term "legislative power," as used in section 1 of article 4 of the Constitution, declaring that legislative power shall be vested in the General Assembly, elected by the people, means the power to enact laws, or to declare what the law shall be. It is the power to enact new rules for the regulation of future conduct, rights, and controversies. It does not mean that every act of officers created by the Legislature must be expressly prescribed by the lawmaking power. *People v. Roth*, 94 N. E. 953, 954, 249 Ill. 532, Ann. Cas. 1912A, 100.

Theoretically the "legislative power" is the authority to make, order, and repeal laws. *Richardson v. Young*, 125 S. W. 664, 668, 122 Tenn. 471.

The power to carry into effect Const. U. S. art. 4, § 4, providing that the United States shall guarantee to every state in the Union a republican form of government, is a "legislative power" and resides in Congress; and Congress may delegate to the President the power to determine whether the Constitution of a new state is republican in form. *Frantz v. Autry*, 91 Pac. 193, 214, 18 Okl. 561.

Whether or not a state has ceased to be republican in form within the meaning of the guaranty in Const. art. 4, § 4, because of its adoption of the initiative and referendum, is not a judicial question, but a political one, which is solely for Congress to determine. *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 32 Sup. Ct. 224, 228, 223 U. S. 118, 66 L. Ed. 377.

The words "legislative power," as used in Const. art. 4, § 1, conferring legislative power on the General Assembly, mean the power or authority, under the Constitution or form of government, to make, alter, and repeal laws and to pass any law within the ordinary functions of legislation not delegated to the federal government or prohibited by the state Constitution, not transferring, however, from the people fundamental legislative power. *Ellingham v. Dye*, 99 N. E. 1, 4, 178 Ind. 336.

The granting to a municipal corporation of power to pass all necessary ordinances for the protection of the safety of citizens is not an infringement of the maxim that "legislative power" may not be delegated.

*Sluder v. St. Louis Transit Co.*, 88 S. W. 648, 650, 189 Mo. 107, 5 L. R. A. (N. S.) 186.

By the provision in the federal Constitution that all "legislative powers" herein granted shall be vested in a Congress of the United States is meant that Congress keeping within the limits of its power and observing the restrictions imposed by the Constitution may in its discretion enact any statute appropriate to accomplish the objects for which the national government was established. The powers of the federal government were not exceeded by the enactment of Rev. St. § 1782, making it a misdemeanor for a United States senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested. *Burton v. United States*, 26 Sup. Ct. 688, 693, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 392.

The authority granted to a city council to grade and pave streets and sidewalks is "legislative" in character, so that the amount of the improvement, its kind and character, must first be ascertained by the city council and cannot be delegated to any other official or committee. *Harton v. Town of Avondale*, 41 South. 934, 939, 147 Ala. 458.

Act May 29, 1908 (Sess. Laws 1907-08, p. 453, c. 46, § 1), providing that upon the recommendation of the Supreme Court the Governor shall appoint an additional judge "for the time recommended by the court" for a district which has such an unusual number of cases awaiting trial that a thorough and effective administration of justice cannot be secured, is, at least as to the fixing of the term of office of such additional judge by the Supreme Court, a delegation of legislative power to the judicial branch of the government, in violation of Const. art. 4, § 1 (*Bunn's Ed.* § 50), dividing the powers of government into three separate departments, the legislative, executive, and judicial, and providing that neither shall exercise the powers properly belonging to either of the others. In re County Com'rs of Counties Comprising Seventh Judicial Dist., 98 Pac. 557, 559, 22 Okl. 435.

Acts 1905, p. 873, c. 410, providing that it shall be unlawful for any person, other than the authorized agent of a common carrier, to sell nontransferable tickets, issued and sold below the standard schedule rate, etc., and providing a penalty for its violation, is not unconstitutional as a delegation to the common carrier of legislative authority to create a penal offense or not, by the issuance or nonissuance of nontransferable tickets to the original purchaser below the standard schedule rate. There is a distinction between a "delegation of legislative power" involving discretion and conferring of authority or discretion as to the execution of the law to be exercised under and in pursuance



of the law. The former cannot be done, while to the latter no valid objection can be made. The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact, or state of things, upon which the law makes, or intends to make, its own action depend. *Samuelson v. State*, 95 S. W. 1012, 1016, 116 Tenn. 470, 115 Am. St. Rep. 805 (citing appeal of *Locke*, 72 Pa. 491, 13 Am. Rep. 716; *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 Ohio St. 88; *State v. Barringer*, 14 S. E. 781, 110 N. C. 525; *Commonwealth v. Abrahams*, 30 N. E. 79, 156 Mass. 57; *Commonwealth v. Davis*, 4 N. E. 577, 140 Mass. 485; *In re Nightingale*, 11 Pick. [28 Mass.] 168; *Commissioners of Easton v. Covey*, 22 Atl. 266, 74 Md. 262; *In re Flaherty*, 38 Pac. 981, 105 Cal. 558, 27 L. R. A. 529; *Debardelaben v. State*, 42 S. W. 684, 99 Tenn. 649).

"To declare what a law is or has been is a 'judicial power'; to declare what it shall be is 'legislative.'" Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), which limits the recovery in a suit against an administrator for the statutory penalty for failing to file an inventory does not invade the judicial province nor interfere with, dictate to or coerce the judicial department. *Atwood v. Buckingham*, 62 Atl. 616, 618, 78 Conn. 423 (citing *Dash v. Van Kleeck* [N. Y.] 7 Johns, 477, 498, 5 Am. Dec. 291).

A statute authorized a city to enlarge or contract its boundaries by ordinance defining the territory, and provided that any person interested might by certain procedure apply to the district court, which should determine the reasonableness of the alteration. Held, that the statute was not objectionable on the ground that it conferred "legislative power" on the court. "To legislate is to make or enact a law or laws." Webster's Dict. "Legislative power" is, therefore, the power to make laws, and incidentally to repeal them. But the power to determine, in a given case, presented by parties having property or other rights at stake, and independent of the exercise of any enacting power, whether a municipal corporation, professing to legislate under incidental or general authority, has exercised such authority in accordance with the condition of the grant, relates, not to the power of legislation, but to the manner of its exercise, and is itself judicial. *New Orleans & N. W. R. Co. v. Town of Vidalia*, 42 South. 139, 143, 117 La. 561 (citing *Callen v. City of Junction City*, 23 Pac. 652, 43 Kan. 627, 7 L. R. A. 736; *Forsythe v. Hammond*, 40 N. E. 267, 41 N. E. 950, 142 Ind. 505, 30 L. R. A. 576; *Territory ex rel. Kelly v. Stewart*, 23 Pac. 405, 1 Wash. 98, 8 L. R. A. 106; *In re Incorporation of Village of North Milwaukee*, 67 N. W. 1033, 93 Wis. 616, 33 L. R. A. 638; *Wahoo v. Dickinson*, 36 N. W. 813, 23 Neb. 426; *Forsythe v. City of Hammond*, 58 Fed. 774).

The board of supervisors of a county, in passing a resolution reviving the distinction between town and county poor, pursuant to Laws 1896, p. 176, c. 225, § 134, and apportioning among the town the taxes for the support of poor, pursuant to sections 9, 10 (page 139), discharges "legislative functions," so that its acts cannot be reviewed by certiorari. *People ex rel. Allen v. Board of Sup'rs of Westchester County*, 99 N. Y. Supp. 348, 349, 113 App. Div. 773 (citing *People v. Board of Sup'rs of Queens County*, 30 N. E. 488, 131 N. Y. 468; *People ex rel. O'Connor v. Board of Sup'rs of Queens County*, 47 N. E. 790, 153 N. Y. 370).

The power to determine what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the Legislature itself or delegated to a municipal corporation, is strictly a "legislative power." *Risley v. Utica*, 173 Fed. 502, 507 (citing *New Orleans Water-Works Co. v. Louisiana Sugar Refining Co.*, 8 Sup. Ct. 741, 125 U. S. 18, 31 L. Ed. 607; *United States ex rel. Ranger v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197).

The "legislative power" of the territory of Oklahoma extended to all rightful subjects or legislation pertaining to local self-government when not inconsistent with the Constitution and laws of the United States, and when the exercise of such power did not in any way interfere with the supreme right of Congress to control its governmental affairs. *Territory v. Long Bell Lumber Co.*, 99 Pac. 911, 914, 22 Okl. 890.

St. 1889, p. 358, c. 247, providing that new territory may be annexed to any town by the filing of a petition describing the territory desired to be annexed and a favorable vote at the election called pursuant to the petition, thus leaving the determination of the boundaries of the annexed territory to the inhabitants, is not for this reason invalid as a delegation of "legislative authority," since, under Const. art. 11, § 6, forbidding the Legislature to create or provide for the organization of municipal corporations by any other than general laws, fixing the boundaries of towns is not a legislative function. *People v. Town of Ontario*, 84 Pac. 205, 207, 148 Cal. 625.

While it is one of the settled maxims in constitutional law that the "power conferred upon the Legislature to make laws cannot be delegated" by that department to any other body or authority, this does not prevent legislative functions, which are merely ministerial or executive in their character, from being delegated by that branch of the government to other departments or to bodies created by it for that purpose. Laws 1905, p. 275, c. 163, creating a board for the purpose of procuring the erection of a capitol building

and authorizing such board to procure the erection of a building adopt plans and specifications, etc., is not unconstitutional as a delegation of "legislative power." *Davenport v. Elrod*, 107 N. W. 833, 835, 20 S. D. 567.

## LEGISLATURE

See House of Legislature.

Member of Legislature, see Member.

The word "Legislature," as used in Const. U. S. art. 1, § 4, providing that the time, place, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof, but that Congress may make or alter such regulations does not mean simply the members who compose the Legislature, but refers to the lawmaking body or power of the state, as established by the state Constitution, and which in this state, under the referendum Const. art. 3, § 1, includes the people, and hence Sess. Laws 1909, c. 223, dividing the state into congressional districts, is subject to the referendum vote of the people the same as any other law passed by the Legislature. *State ex rel. Schrader v. Polley*, 127 N. W. 848, 849, 26 S. D. 5.

A "legislator" is one who makes laws for a state or community. *Burke v. Wood*, 162 Fed. 533, 538.

## LEGITIMACY

### LEGITIMATE

"Legitimate" means lawful; lawfully begotten; born in wedlock; of lawful birth; a legitimate heir. *Lamb v. Medsker*, 74 N. E. 1012, 1013, 35 Ind. App. 662 (quoting and adopting definitions in *Webst. Dict.*; *Cent. Dict.*).

The term "legitimate," in Laws 1895, c. 570, providing for the incorporation of associations for the improvement of the breed of horses and for the establishment of a state racing commission, and authorizing the commission to issue licenses for running races and for the revocation of licenses, if for any reason the continuance thereof shall not be conducive to the interests of "legitimate" racing, is used in its broad and not technical sense, and means good or proper and not merely unlawful. *People ex rel. Empire City Trotting Club v. State Racing Commission*, 103 N. Y. Supp. 955, 961, 57 Misc. Rep. 331.

### LEGITIMATE CHILD

Child as including, see Child—Children (In Statutes).

"A legitimate child" is he that is born in lawful wedlock or within a competent time afterward." A child born 20 days after its mother was divorced from one husband, whose whereabouts were not shown, and 15 days after her marriage to another man, who recognized the child as his offspring, will be presumed to be his legitimate child. *Zach-*

*mann v. Zachmann*, 66 N. E. 256, 257, 201 Ill. 380, 94 Am. St. Rep. 180 (citing 5 Cyc. p. 626; *Coke*, Litt. 344a; *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644; quoting and adopting definition in 1 Bl. Comm. 446).

A child born after marriage, during wedlock, and within the usual period of gestation, after the husband has had opportunity to have begotten it, is conclusively presumed to be "legitimate." *Buckner's Adm'r v. Buckner*, 87 S. W. 776, 777, 120 Ky. 596.

### LEGITIMATE ISSUE

Under Act Cong. Feb. 28, 1891, c. 383, 26 Stat. 794, § 5, in amendment of Act Cong. Feb. 8, 1887, c. 119, 24 Stat. 388, providing that for the purpose of determining the descent of land to the heirs of any deceased Indian allottee of land, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom of Indian life, the issue of such cohabitation shall be, for the purpose aforesaid, taken to be the legitimate issue of the Indians so living together, and that every Indian child, otherwise illegitimate, shall for that purpose be taken to be the legitimate issue of the father, the illegitimate children of an allottee are entitled to inherit and share in the lands allotted to their father the same as though they were legitimate children, and the children of a deceased illegitimate child are entitled to the share of their deceased parent. In re *House's Heirs*, 112 N. W. 27, 29, 132 Wis. 212.

### LEGITIMATE PURPOSE

The term "legitimate purpose," as applied to the acts of a municipal corporation, means such a purpose as is authorized by the municipal charter: *Vaughn v. Village of Greencastle*, 78 S. W. 50, 51, 104 Mo. App. 206.

The creation of so-called treasury stock and disposition of it upon the representation that it was fully paid and nonassessable, and at a price inferentially below par, for the purpose of providing working capital for a corporation, is not a "legitimate corporate purpose," within the act concerning corporations (revision of 1896), granting power to corporations to purchase shares of their own capital stock, if such purchase is for a legitimate corporate purpose, but not otherwise. *Knickerbocker Importation Co. v. State Board of Assessors*, 65 Atl. 913, 914, 74 N. J. Law, 583, 7 L. R. A. (N. S.) 885.

### LEGITIMATE TITLE

In the provision of the protocol of the treaty of the Guadalupe Hidalgo that Mexican "grants" in the ceded territory shall preserve their legal value, and that the grantees may cause "their legitimate titles" to be acknowledged, the terms "grants" and "legitimate titles" are not restricted to absolute perfect grants made prior to the treaty, but include also equitable titles which, if there

had been no change of sovereignty, would have become perfect or could have been made perfect if the proper steps had been taken. The words "legitimate titles" mean titles that are comprehended in the term "grants," and since the term "grants," as employed in treaties, embraces all character of titles, equitable or legal, it reflects the sense and meaning in which the term "legitimate titles" was intended to be employed. *State v. Russell*, 85 S. W. 288, 293, 38 Tex. Civ. App. 13; *Haynes v. State (Tex.)* 85 S. W. 1029, 1039.

### LEGITIMATION

While "adoption," properly considered, refers to persons who are strangers in blood, "legitimation" refers to persons where the blood relation exists. The verb "adopts," in *Wilson's Rev. & Ann. St. 1903*, c. 59, art. 2, § 36, providing that the father of an illegitimate child, by acknowledging it as his own, etc., thereby "adopts" it as such, is used in the sense of "legitimizes." *Allison v. Bryan*, 97 Pac. 282, 283, 21 Okl. 557, 18 L. R. A. (N. S.) 931, 17 Ann. Cas. 468 (quoting *Blythe v. Ayres*, 31 Pac. 915, 96 Cal. 532, 19 L. R. A. 40, and citing *Bouvier*, *Black*, *Anderson*, and *Rapalje Law Dictionaries*).

### LEMON

As fruit, see *Fruit*.

As goods, wares, and merchandise, see *Goods*.

### LEND—LENT

See *Money Lent*; *Money Loaned* and *Invested*.

*Rev. St. c. 48*, § 64, providing that premiums for building association loans shall consist of a percentage charged on the amount lent in addition to interest, and section 65, providing that the monthly interest shall not be at a greater rate than 6 per cent. per annum, mean by the words "loan" and "lent" the whole sum contracted for, not the sum actually advanced. *Tibbetts v. Deering Loan & Building Ass'n*, 72 Atl. 162, 165, 104 Me. 404.

#### As give

Under *Revisal 1905*, § 1578, converting estates tail into estates in fee simple, a will whereby the testator "lends" land to his grandson and his lawful heirs of the body forever conveys an estate in fee simple. *Sessoms v. Sessoms*, 56 S. E. 687, 688, 144 N. C. 121 (citing *Cox v. Marks*, 27 N. C. 361; *Kling v. Utley*, 85 N. C. 59; *Edgerton v. Aycock*, 31 S. E. 382, 123 N. C. 134; *Hinson v. Pickett* [8. C.] 1 Hill Eq. 35).

A clause of a will bequeathed two separate parcels of land to the daughter of the testator, and, on her death, to her heirs and to her issue if living in fee simple, otherwise, "all the real estate loaned her to be divided between" certain persons. There was no

punctuation or anything to indicate that the testator intended to differentiate the two parcels of property in reference to the quantity of the estate. Held, that as "lend" may be construed as synonymous with give, devise, or bequeath, unless it is manifest that a different meaning was intended, the testator must be held to have referred to all the property devised his daughter in the residuary clause. *Faison v. Moore*, 75 S. E. 993, 160 N. C. 148.

### LENSE

It is necessary that "lenses" should be both ground and polished in order to be brought within the provision of the *Tariff Act* for "lenses \* \* \* ground and polished to a spherical, cylindrical or prismatic form"; and, where they have been brought to such form by molding, they are not within that provision. *United States v. Robinson*, 140 Fed. 968, 969.

### LESS

See *More or Less*; *Not Less Than*.

In an action under *Laws 1907*, p. 495, c. 254, defining the liabilities of railroads for injuries to employes, for the death of a brakeman, the use of the words "less or greater," instead of the statutory words "slighter or greater," in determining decedent's negligence as a contributing cause in comparison with that attributable to the railroad, was not erroneous, as the word "less" conveyed the idea conveyed by the word "slighter" as used in the statute. *Boucher v. Wisconsin Cent. Ry. Co.*, 123 N. W. 913, 914, 141 Wis. 160.

### LESS NOTE

Where a will gave a legacy, less a note held by the testator against the legatee, interest was properly charged on the note up to the time of the probate of the will, *Rev. Codes*, § 4770, requiring the language of a will to be given its ordinary meaning, and the words "less a note" would, in ordinary business transactions, refer to the debt as a whole, and not the sum mentioned as the principal only. In *re Beck's Estate*, 121 Pac. 784, 789, 44 Mont. 561.

### LESSENED CAPACITY

In a personal injury action, an instruction that the jury, in assessing damages, might consider the bodily and mental pain endured by the injured party, loss of time, and inability to work and earn money, and her diminished capacity for labor, etc., was not erroneous as permitting double damages for the same cause; "inability to work" meaning the total suspension of the power to work, and "diminished capacity to labor" meaning lessening, without totally destroying, the power to labor, and "inability" meaning without ability, and "lessened capacity" meaning that

partial ability remains. *Houston & T. C. R. Co. v. Maxwell* (Tex.) 128 S. W. 160, 166.

### LESSER OFFENSE

Under a count of a presentment for selling liquor without a license, in violation of Acts 1899, c. 161, § 1, to constitute which offense a single sale is sufficient, defendant cannot, there being no evidence of any specific sale, so as to authorize a conviction of the offense charged, be convicted of violation of Acts 1909, c. 479, § 16, making it an offense to exercise the privilege of retail liquor dealer without first paying the taxes prescribed for exercise thereof, though he has a United States revenue license to retail liquor, made by the act (page 1743) *prima facie* evidence that he is in the retail liquor business; the offense denounced by the act of 1909, though having a lighter punishment prescribed, not being a lesser offense than, and included in, the offense denounced by the act of 1899, within Shannon's Code, §§ 7085, 7195, permitting, on an indictment for an offense admitting, or consisting, of different degrees, a conviction of a lower degree of the offense than that charged, or of any offense necessarily included in that charged. *Brinkley v. State*, 145 S. W. 161, 162, 125 Tenn. 445.

### LESSEE

A petition in summary proceedings for the possession of land, alleging that the petitioner is the "lessee" and landlord thereof, is not a sufficient compliance with Code Civ. Proc. § 2235, requiring the petition to state the interest of the petitioner in the premises. The statement that the petitioner was the "lessee" and "landlord" is the assertion merely of an interest and not a description of such interest. *Ferber v. Apfel*, 99 N. Y. Supp. 215, 216, 113 App. Div. 720 (citing *Kazis v. Loft*, 80 N. Y. Supp. 1015, 81 App. Div. 636; *Loft v. Kazis*, 84 N. Y. Supp. 228; *Engle, Heller Co. v. Henry Elias Brewing Co.*, 75 N. Y. Supp. 1080, 37 Misc. Rep. 480; *Potter v. New York Baptist Mission Society*, 52 N. Y. Supp. 294, 23 Misc. Rep. 671; *Ross v. Same*, 52 N. Y. Supp. 303, 23 Misc. Rep. 683; *Cram v. Dietrich*, 78 N. Y. Supp. 948, 38 Misc. Rep. 790).

A covenant to pay to the lessees and their assigns, on the termination of the lease, a compensation for buildings and improvements put on the demised land during the term of the lease was not to be restricted to buildings put on the land by the lessees, but would include buildings put on it by subtenants or assigns of the lessees. If the opposite were the true construction of the word "lessees" in this covenant, the covenant in the earlier part of the lease that the said "lessees" shall have a right of way, and the covenant to "warrant and defend," would have to be restricted in the same way. *Hollywood v. First Parish in Brockton*, 78 N. E. 124, 125, 192 Mass. 269.

A "lessee" of a store building, who assumes entire control of a room connected therewith, is the "lessee and occupant" of such room within the law forbidding gaming. *Ford v. State*, 38 South. 229, 230, 86 Miss. 123.

#### As contractor

See Contractor.

#### As owner

See Owner.

#### As purchaser for valuable consideration

See Purchaser for Valuable Consideration.

### LESSOR

See Owner.

### LET

See Agree to Let.

The term "let" is usually applied to leases and conveyances of real estate and contains the idea of a grant, and when the parties have used it as the operative word applied to a transfer of timber rights and contracts passing such interest for 91 years and more, by fair interpretation and considering the nature of the interest, the parties could only have intended an assignment. *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, 61 S. E. 185, 190, 147 N. C. 368, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363.

#### As allow or permit

Where defendant, who had an option to purchase certain property, represented to plaintiff that they were to be "let in on the ground floor" with certain specified exceptions, it meant that they were to come into the purchase upon the same terms and conditions that he had made with the holder of the property, save as particularly specified. *Kroll v. Coach*, 78 Pac. 397, 399, 45 Or. 459.

#### As demise, grant, or lease

The term "let" contemplates the relation of landlord and tenant. It is defined as "to give leave to; to permit; to grant the use of realty for a compensation correlative to hire; to lease or hire out for compensation." Land, into possession of which one enters under a contract to purchase, is not "let" to him, within a statute making it forcible detainer to willfully hold over without force after the termination of the time for which the property was "let" after demand for possession. *Francis v. Holmes*, 118 S. W. 881, 883, 54 Tex. Civ. App. 608.

"The mere use of the words 'lease' and 'let,' in a contract of letting, does not necessarily create a lease as distinguished from a license;" but an instrument by which one contracted to let and another to take the ex-

clusive right to maintain stands for the sale of candies at a race park, also a storeroom under the tracks providing the period of "letting" and the amount and times of payment of rent, is a lease and not a license. *Mehlman v. Atlantic Amusement Co.*, 119 N. Y. Supp. 222, 223, 65 Misc. Rep. 25.

#### LET FOR HIRE

As used in an ordinance providing for the payment of a license by owners of vehicles used or let for hire, the term "letting for hire" was intended to apply to cases where persons, the hirers, took temporary possession of the wagon and team. *Swetman v. City of Covington (Ky.)* 82 S. W. 386.

#### LETTING

See Public Letting; Subletting.

#### LETTER

See Not to the Letter; Threatening Letter.

##### As memorandum

See Memorandum.

##### As public document

See Public Document.

##### As solicitation

See Solicit.

#### LETTERS OF ADMINISTRATION

See Ancillary Letters; Domiciliary Letters.

#### LETTERS OF CREDIT

A "letter of credit" is a letter containing a general or special request to pay the bearer or person named money, or sell him some commodity on credit, or give him something of value, and look to the writer of the letter for recompense, and which partakes of the nature of a negotiable instrument. *Liggett v. Levy*, 136 S. W. 299, 301, 233 Mo. 590, Ann. Cas. 1912C, 70.

#### LETTERS PATENT

"'Letters patent' are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them as such inventors, for the limited term therein mentioned, the exclusive right to make and use, and vend to others to be used, their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress." *Monaghan v. City of Indianapolis*, 76 N. E. 424, 425, 37 Ind. App. 280 (quoting and adopting

definition in *Seymour v. Osborne*, 11 Wall. [78 U. S.] 516, 20 L. Ed. 83).

A license to keep a dramshop is not a "letter patent," which can be tested or vacated by quo warranto. *Hargett v. Bell*, 46 S. E. 749, 750, 134 N. C. 394.

#### LETTERS TESTAMENTARY

See Entitled to Letters Testamentary.

"Letters testamentary" are of two kinds, "domiciliary letters" and "ancillary letters"; the first being issued at the place of the testator's domicile, and the latter at some place, other than domicile, where personalty of the testator is found. Such letters depend upon the situs of such personalty, and do not authorize the administrator or representative to perform any act or to reduce to possession personalty not within territorial authority of the court where issued. *Lockwood v. United States Steel Corporation*, 138 N. Y. Supp. 725, 727, 153 App. Div. 655.

#### LEVEE

"Levees" keep out the water. *Mound City Land & Stock Co. v. Miller*, 70 S. W. 721, 724, 170 Mo. 240, 60 L. R. A. 190, 94 Am. St. Rep. 727.

"A 'levee' is a space adjacent to a navigable water where vessels may approach and land to unload and receive passengers and freight, and where articles of freight may be left for loading on the vessels, or after they have been unloaded until they can be taken away." *Chicago, R. I. & P. Ry. Co. v. People ex rel. Dalley*, 78 N. E. 790, 793, 222 Ill. 427 (quoting and adopting definition in *Farnham, Water & Water Rights*, § 145a).

The word "levee," as used in the West and South, means a landing place for vessels for the delivery of merchandise, and, as incident thereto, for the temporary storage of the merchandise. In other words, a public landing. *Louisville & N. R. Co. v. City of Cincinnati*, 81 N. E. 983, 989, 76 Ohio St. 481.

That a tract of land bordering a river was designated as a steamboat landing on a plat and was dedicated to public use shows it to be a "levee." *Betcher v. Chicago, M. & St. P. Ry. Co.*, 124 N. W. 1096, 1097, 110 Minn. 228.

Where a strip of land lying along the margin of a navigable stream was included in the plat of a city and dedicated to the public by the use of the word "levee" written thereon, and several streets opened upon this tract, and many lots had no other means of ingress and egress, except over and along it, its dedication included its use as a street, as well as a landing place for boats. *McAlpine v. Chicago Great Western R. Co.*, 75 Pac. 73, 74, 68 Kan. 207, 64 L. R. A. 85, 1 Ann. Cas. 452.

A "levee" is a landing place for vessels, or a dyke or breakwater. *Sanborn v. Van Dune*, 96 N. W. 41, 44, 90 Minn. 215.

**As street**  
See Street.

#### LEEVE BOARD

As municipal corporation, see Municipal Corporation.

#### LEEVE DISTRICT

As citizen, see Citizen.  
As municipal corporation, see Municipal Corporation.

#### LEEVE DISTRICT DIRECTOR

As county officer, see County Officer.

#### LEEVE TAX

A tax levied by a sanitary district organized under Act July 1, 1907 (Laws 1907, p. 289), is not a "levee tax" within Act July 1, 1909 (Laws 1909, p. 323), providing for a reduction in taxes, excepting "levee taxes," etc. *People ex rel. Sanders v. Chicago & A. R. Co.*, 94 N. E. 14, 15, 248 Ill. 417; *Same v. Toledo, St. L. & W. R. Co.*, 94 N. E. 16, 249 Ill. 175.

#### LEVEL

There is a distinction between the words "aim," "point," and "level." "Aim" expresses more than the other two words inasmuch as it denotes a direction towards some minute point in an object, and the others imply direction towards the whole objects themselves. We aim at a bird; we point a cannon against a wall; we level a cannon at a wall. Pointing is of course used with most propriety with reference to instruments that have points. It is likewise a less decisive action than either aiming or leveling. A stick or finger may be pointed at a person merely out of derision; but a blow is "leveled" or aimed with an expressed intent of committing an act of violence. *Livingston v. State*, 65 S. E. 812, 6 Ga. App. 805 (quoting Crabbe's English Synonyms).

#### LEVEL RATE PREMIUM

A "level rate premium policy" is a policy on which the regular annual renewal premiums provided are to be kept down to a level, or are to be brought down to the level of the premiums charged for the first year's insurance by the application of the profits earned on the policy. *Ijams v. Providential Sav. Life Assur. Soc. of New York*, 84 S. W. 51, 60, 185 Mo. 466.

#### LEVER

See Cut-Off Lever.

#### LEVY

All levies, see All.

#### LEVY (Of Taxes)

"Levy" is defined as "the amount accruing from a tax or execution." *State ex rel. Ledwith v. Brian*, 120 N. W. 916, 917, 84 Neb. 30.

"Levy" is used variously, but, as applied to the determination of the amount or rate to be charged, it is a legislative function, to be exercised only by the state, or some inferior political division to which the power has been delegated. *School Dist. No. 127 of Reno County v. School Dist. No. 45 of Reno County*, 103 Pac. 126, 127, 80 Kan. 641.

The word "levy," as applied to taxation, is given a variety of meanings, among which are: "To impose or assess"; "to impose, assess and collect under authority of law"; "to raise or collect by assessment"; "to charge a sum of money already ascertained against a person or property subject to the charge"; "to determine by vote the amount of tax to be raised"; "to fix the rate at which property is to be taxed." *Gray v. Board of School Inspectors of Peoria*, 83 N. E. 95, 98, 231 Ill. 63.

The word "levy," as used in constitutional and statutory provisions that the county commissioners shall levy a tax in their respective counties for the support of public schools, and that county boards shall levy an annual tax on all the property in their respective counties, to be collected at the same time and by the same officers as other taxes, excludes from the act of levying any signification of creation. The duty to levy imposed on the board is therefore purely ministerial, and only imports that it should take such action as would result in the tax being placed on the auditor's books. The boards have no power to do anything more or less than require that the tax be entered. *Dickson v. Burckmyer*, 46 S. E. 343, 346, 67 S. C. 526.

"Levied," with reference to taxes, means the extension of a tax against taxable property, since a tax cannot be said to be levied until it has been so extended. *Pettibone v. West Chicago Park Com'rs*, 74 N. E. 887, 392, 215 Ill. 304.

A tax cannot be said to be "levied" when it is only estimated, and the time for levying it has not arrived. The limitation on the power of the county board to contract for bridge building to cost a sum not greater than the amount of money on hand in the county bridge fund derived from a levy of previous years and two-thirds of the levy of the current year gives no authority to the board to take into account the levy of the current calendar year prior to the making of such levy. Until this is made, there is no levy of the current year. *Clark v. Lancaster County*, 96 N. W. 593, 599, 69 Neb. 717.

"Three things are essential to a 'tax,' as that term is understood by our Constitu-

tion: First, the ascertainment of a sum certain, or that can be rendered certain, to be imposed on the collective body of taxpayers; second, a legal imposition of that sum as an obligation on the collective body of taxpayers; third, an apportionment of such sum among individual taxpayers so as to ascertain the part or share that each should bear. \* \* \* The first two acts above described, namely, the ascertainment of a sum to be imposed on the collective body of taxpayers and its imposition by a legislative declaration to that effect, are essentially legislative acts or acts proper directly to the lawmaking function of the government. \* \* \* The third act, namely, the apportionment of the whole sum imposed by way of tax on the collective body of taxpayers upon the separate individuals composing that body, is usually an administrative act performed under specific statutory directions, ascertaining the mode and time of its performance. \* \* \* The word 'levy' is indifferently employed, as commonly used, to express either one of these processes separately or both collectively. A tax is said to be levied when the amount or rate to be imposed is fixed by law, for what is wanting to complete such levy is supplied by the standing tax laws, and consists in a course of administrative action. When the levying of a tax is spoken of as a legislative act, it is commonly understood to describe such action on the part of the Legislature as would, with standing tax laws, complete the legislative authority requisite to enable the administrative department to distribute and collect the tax. \* \* \* In other words, the tax directed to be levied must be so far imposed, in order to comply with the letter and spirit of the Constitution, that no further legislation will be necessary to enable its collection." *Rice v. Shealy*, 50 S. E. 868, 870, 71 S. C. 161 (quoting and adopting definition in *Morton v. Comptroller General*, 4 S. C. 430, 453).

The power of the state tax commissioner conferred by Code Pub. Gen. Laws 1904, art. 81, § 150, requiring the commissioner to levy taxes on shares of corporate stock and to place a valuation on corporate stock for purposes of assessment, is not affected by Laws 1906, c. 404, amending article 81, § 22, and fixing a tax for each \$100 for a specified purpose, and directing the Comptroller to levy the taxes on corporate stock, since the function of the Comptroller, under the act of 1906, is a purely ministerial act fully performed when he enters on his books the number of shares of stock liable to taxation, the corporation the stock of which is taxed, the rate of taxation, and extends the amount of the tax, and since the word "levy" as applied to taxes means in some cases to raise and exact by authority of government the amount of a tax to be raised, and in other cases the word is used with reference to the mere ministerial act of entering the taxes on the tax

book and collecting them. *Union Trust Co. of Maryland v. State*, 81 Atl. 873, 874, 116 Md. 368.

By section 16 of P. L. 1903, p. 789, the commissioners are required each year to cause a tax to be "levied and assessed," etc., and to certify to the tax assessor, taxing board, or taxing officer the amount of tax required to be levied, assessed, and raised, and the said assessors, etc., shall assess said sums so directed to be assessed and certified upon all the persons and property liable, and the said tax shall be levied, assessed, and collected by the same officers, etc., and the tax so levied upon real estate shall be a lien thereon. Held, that throughout the section the word "levy" is used as referring to the administrative functions of taxation and not to the legislative function, the differences between which are pointed out in the case of *Township of Bernards v. Allen*, 61 N. J. Law, 228, at page 238, 39 Atl. 716, at page 719, also referred to in the dissenting opinion, 61 N. J. Law, 692, 41 Atl. 250; one of the judges using the phrase "levying taxes" as descriptive of the legislative function, while the other used it as referring to the administrative process of collecting the taxes. *Van Cleve v. Passaic Valley Sewerage Com'rs*, 58 Atl. 571, 586, 71 N. J. Law, 183.

Provisions in the body of an act conferring on parochial and municipal corporations power to levy license taxes was within the title of the act "to levy, enforce, and collect a license tax." *Mayor and Council of Alexandria v. White*, 15 South. 15, 16, 46 La. Ann. 449.

#### As all necessary proceedings

A city ordinance authorizing the issuance of bonds dated in 1910 and payable in 1930, which provides that "there is hereby levied" on the taxable property of the city a specified sum, of which a certain amount is to pay the principal of the bonds and the balance to pay interest, of which sum a specified amount shall be collected each year to and including 1930, the amount collected each year over that required for interest to constitute a sinking fund to the principal, complies with Laws 1907, c. 235, and Const. art. 11, § 3, requiring cities issuing bonds, to provide before, or at the time of doing so, for the collection of a direct annual tax sufficient to pay the interest as it falls due and to discharge the principal within 20 years, since "levy" in tax matters has various meanings dependent on the context, and in this instance includes everything necessary to the collection of the tax. *Borner v. City of Prescott*, 136 N. W. 552, 554, 150 Wis. 197.

#### Assess distinguished

Assessment as including, see *Assess*.

To "assess" a tax is to adjudge and determine what proportion of his property the taxpayer shall contribute to the public. To "levy" a tax is to make a record of this de-

termination, and to extend the assessment against the taxpayer's property. *Chicago, B. & Q. R. Co. v. Klein*, 71 N. W. 1069, 1071, 52 Neb. 258.

As used in Code Civ. Proc. § 325, requiring an adverse occupant to pay all the taxes which have been levied and assessed upon the land, the word "levied" refers to the act of the board of supervisors in making the "levy," and the word "assessed" refers to the act of the assessor in making the assessment. The statute does not require the payment of taxes assessed before the occupancy, and levied afterwards, but only such taxes as were both levied and assessed during the occupancy. *Allen v. McKay*, 52 Pac. 828, 829, 831, 120 Cal. 332.

#### As collection

In our revenue laws the word "levy" is sometimes used in the sense of "raising" or "imposing," and not in the sense of "collecting" a tax by execution. In different places in these laws the boards of county commissioners are authorized to "levy," or lay, taxes, while the word "collect" is used to define the power of the county treasurers to gather in or receive money for taxes theretofore assessed by county assessors and levied by the boards. *Parsons v. People*, 76 Pac. 666, 669, 32 Colo. 221.

The tonnage tax imposed on the use of foreign built yachts owned by citizens of the United States by Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112, being a tax upon the privilege of use, is assessable to and collectible from the personal user, and the provision of the statute that such tax shall be levied and collected by the "collector of customs of the district nearest the residence of the managing owner" requires that, where the owner resides in one district, the collector of that district shall levy and collect the tax, and the attempted action of the collector of another district to that end is not a "levy" and will not support an action to recover the tax. *United States v. Blair*, 190 Fed. 372, 375 (citing 5 Words and Phrases, pp. 4101-4104).

#### Special assessments

The "levy" of special assessments for street improvements is the exercise of a species of the taxing power of the state, and not of the right of eminent domain. *New York, C. & St. L. Ry. Co. v. City of Hammond*, 83 N. E. 244, 245, 170 Ind. 493.

#### LEVY (Of Writs)

See Equitable Levy.

As a sheriff's deed to land sold under execution need recite only the names of the parties to the execution, the date when issued, and of the judgment, and other particulars recited in the execution, which necessarily includes the fact that notice was given, and as a "levy," is under Rev. St. 1909, §

2195, defined as a "taking," which means to gain control or possession of, in any way, a sheriff's deed, need not recite that a levy was made, for the recital of notice and other formality shows that the land was taken, and hence a deed is prima facie correct although reciting an invalid levy, for that recital will be rejected as surplusage. *Butler v. Imhoff*, 142 S. W. 287, 288, 238 Mo. 584.

In a notice of sale, reciting that the land was levied under a judgment rendered before a judge named, and that the levy mentioned was made by virtue of an order of sale, the contention that the words "levy" and "judgment" indicate an execution sale is not tenable, as under the Code judgment is the apt word in proceedings of an equitable nature, as well as in those which are strictly legal. *Gray v. Eurich*, 96 N. W. 843, 2 Neb. (Unof.) 194.

#### Seizure under garnishment

The word "levied," as used in Civ. Code 1895, § 2913, providing that a "thing hired is not subject to sale under judgment obtained subsequent to the contract of hire against the owner, but may be levied on, and a bond for its forthcoming at the expiration of the time for which it is hired may be demanded of the person hiring," is to be given its technical meaning (that is, an actual seizure of the property by a levying officer under a process); and the latter part of the section in relation to a forthcoming bond would have no application to a case where the property is seized under a garnishment which is not a technical "levy," within the meaning of the statute, though for some purposes a garnishment is treated as in effect a levy upon the property. *Southern Flour & Grain Co. v. Northern Pacific R. Co.*, 56 S. E. 742, 743, 127 Ga. 626, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356, 9 Ann. Cas. 437.

#### Seizure under writ of replevin

"The strict meaning of the word 'levy' is usually a seizure of the defendant's property." By the word "levy," as used in Bankr. Act July 1, 1898, c. 541, § 677, 30 Stat. 565, making void all levies, judgments, attachments, or other liens obtained through legal proceedings within four months prior to the bankruptcy of an insolvent defendant, seems to include any seizure of property in the bankrupt's possession and which he claims to own, and seems to cover a seizure on a writ of replevin in a suit to recover property sold and delivered on credit under a contract which the plaintiff claims a right to rescind for fraud. In *re Weinger, Bergman & Co.*, 126 Fed. 875, 877.

#### Constructive seizure

As used in Rev. St. 1899, § 4043, providing that if a constable levy an execution, and a third party claim the property, he may take a bond of indemnity, the word "levy" means such levy, either actual or constructive, as the situation of the property permits.



If it is already in the custody of the law, because previously seized under a writ of attachment, a levy or seizure under a subsequent execution in a mode adjudged to be sufficient to give a lien on the property and enable the officer to sell it is also sufficient to bring into operation the statutory provisions in regard to a demand for indemnity by the officer if notice is given of outside ownership. *Smith ex rel. McElhaney v. Rogers*, 73 S. W. 243, 244, 99 Mo. App. 252.

#### Taking land

In Georgia, a levy on land is made by the official entry thereof on the execution, and not by seizure. *Keaton v. Farkas*, 70 S. E. 1110, 1111, 136 Ga. 188.

The object of a levy of execution is to bring the property within the custody of the law and prevent the judgment debtor from disposing of it to the prejudice of the creditor before sale can be made, and in case of real estate, on which the judgment is already a lien by docketing, the ordinary meaning of the word "levy" as used in section 6827 and elsewhere is inapplicable. *Britannia Min. Co. v. United States Fidelity & Guaranty Co.*, 115 Pac. 46, 48, 43 Mont. 93.

#### Seizure required

"A 'levy' under an execution upon personal property is made by the officer having the writ seizing the property and taking it into his possession." *People, to Use of Kenfield, v. Finch*, 76 Pac. 1120, 1123, 19 Colo. App. 512.

To constitute a levy there must be an actual or constructive seizure of property, and the property must be so far brought under the subjection of the officer that he can exercise control, and does assume to exercise control, by virtue of the writ; and the mere declaration of an intent to seize does not constitute a levy, but the officer must do some act for which he could be prosecuted as a trespasser, if it were not for the protection afforded by the writ. *Dean v. State*, 71 S. E. 597, 598, 9 Ga. App. 303.

## LEWD

See, also, Lascivious.

"'Lewd' is defined to mean given to the unlawful indulgence of lust; eager for sexual indulgence." *Jamison v. State*, 94 S. W. 675-678, 117 Tenn. 58 (quoting and adopting definition in *United States v. Bebout*, 28 Fed. 522).

As used in Rev. St. § 3893, declaring every obscene, lewd, or lascivious book, pamphlet, print, or other publication of an indecent character, or notices giving information for obtaining such publications, to be nonmailable matter, the words "obscene," "lewd," and "lascivious" signify that form of immorality which has relation to sexual impurity, having the same meaning as is given them at common law in prosecutions

for obscene libel. *Hanson v. United States*, 157 Fed. 749, 750, 85 C. C. A. 325.

The words "lewd and lascivious," as used in a statute providing that any person who shall unlawfully and feloniously commit any lewd and lascivious act, other than those constituting other crimes, on or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing the passions or sexual desires of such child, shall be guilty of a felony, do not limit the application of the section to an act attempted or committed between persons of opposite sexes. *People v. Zuell*, 82 Pac. 1128, 1129, 2 Cal. App. 59.

## LEWD HOUSE

The words "ill fame" are synonymous with the word "lewd," as used in the statute, making it an offense to keep a lewd house, and the reputation of a house being kept and maintained as a lewd house is admissible evidence on a trial of a person charged with the offense. *McConnell v. State*, 58 S. E. 546, 547, 2 Ga. App. 445.

A house may be a lewd house, within Pen. Code 1910, § 382, making it criminal for any person to maintain a lewd house or place for the practice of fornication and adultery, though the house may be devoted chiefly to the carrying on of some other vocation (such as boarding house or hotel), if lewd women are accustomed to frequent there and to carry on their practices. *Fitzgerald v. State*, 72 S. E. 541, 542, 10 Ga. App. 70.

There is no difference in meaning between the two expressions "house of ill fame" and "lewd house or place for the practice of fornication or adultery." *Cotton v. City of Atlanta*, 73 S. E. 683, 684, 10 Ga. App. 397.

## LEWDNESS

See Leading Life of Prostitution and Lewdness.

"Lewdness is lustfulness and lascivious behavior; a synonym of unchastity, sensuality, and debauchery." On a prosecution for keeping a house of ill fame, instructions that a house resorted to for the purpose of prostitution and lewdness was a house visited by persons of both sexes for the purpose of having sexual intercourse, or some other lewd purpose, and that lewdness was the unlawful indulgence of the animal desires, were correct. *State v. Wilson*, 99 N. W. 1060, 1061, 124 Iowa, 264.

The Century Dictionary makes "lewdness" synonymous with "impurity," "unchastity," "licentiousness," "sensuality." In *Commonwealth v. Wardell*, 128 Mass. 54, 35 Am. Rep. 357, it was held that "lewdness" is the irregular indulgence of lust, whether public or private. "Lewdness," as used in the age of consent law (Acts 1901, p. 29, c. 19), which, after prohibiting carnal knowledge of a female over 12 and under 18 years of age, de-

clares that nothing contained in the act shall authorize a conviction when the female is at the time or before the carnal knowledge a bawd, lewd, or kept female, includes private as well as public unchastity. *Jamison v. State*, 94 S. W. 675, 678, 117 Tenn. 58.

The term "lewdness," as used in Code, § 4939, prohibiting the keeping of a house of ill fame resorted to for the purpose of prostitution or lewdness, means lustfulness, lecherous, lascivious, or libidinous conduct. As used in section 4938, declaring that if any man or woman not being married to each other lewdly and lasciviously associate and cohabit together, or if any man or woman married or unmarried is guilty of open and gross lewdness, and designedly makes an open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be imprisoned, etc., the term "lewdness" means open and public indecency tending to corrupt public morals, and not mere unlawful indulgence of the animal desires, so that where accused was indicted for conspiracy to induce certain females to commit the crime of lewdness, and no act was shown indicating illicit intercourse or anything more than a conspiracy to procure the girls' willing assent to a single act of intercourse, an instruction defining "lewdness" as the unlawful indulgence of the animal desires was misleading and erroneous. *State v. Mitchell*, 128 N. W. 378, 379, 149 Iowa, 362.

A statute declaring that whoever commits an unnatural and lascivious act with another person shall be punished, etc., makes criminal any and all unnatural and lascivious acts with another person; and it is no defense that the act was not an act of copulation, since copulation is not within the statute. *Commonwealth v. Delano*, 83 N. E. 406, 197 Mass. 166.

Prostitution is the common "lewdness" of a woman for gain, or the offering of her person to indiscriminate intercourse with man, while "lewdness" is unlawful indulgence of the animal desire. *State v. Porter*, 107 N. W. 923, 924, 180 Iowa, 690.

To convict of the crime of "lewd and lascivious cohabitation," denounced by section 2596, Rev. St. 1892, there must be proved both lewd and lascivious intercourse, and a living or dwelling together as though the conjugal relation existed between the parties. Where the proofs show a residing together of the parties, but are silent as to any lewd and lascivious intercourse between them, there can be no conviction of the crime. *Whitehead v. State*, 37 South. 302, 48 Fla. 64.

"Lewd and lascivious association and cohabitation," as used in Code 1906, § 4358, means the living and cohabiting together of a man and a woman, not married to each other, in the same house, as husband and wife. *State v. White*, 66 S. E. 20, 66 W. Va. 45.

Under a statute providing that, if any man or woman "cohabit together as husband and wife without being married," each of them shall be guilty of a misdemeanor, proof of sexual intercourse between persons not married, though living in the same house, is insufficient to constitute the offense defined, without evidence that they cohabited and dwelled together and deported themselves toward each other as husband and wife. *McNeely v. State*, 106 S. W. 674, 84 Ark. 484.

## LEX LOCI CONTRACTUS

"The phrase 'lex loci contractus' is used, in a double sense, to mean, sometimes, the law of a place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing." *Pritchard v. Norton*, 1 Sup. Ct. 102, 111, 106 U. S. 124, 27 L. Ed. 104.

## LIABLE

See Party Liable; Primarily Liable; Secondly Liable; Usually Liable.

The word "liable" in a plea of contributory negligence, that plaintiff attempted to cross the road in front of the approaching automobile, when she knew that by so doing she was "liable" to be struck by the machine, does not mean "probably," but no more than "possibly." *Terrill v. Walker*, 59 South. 775, 776, 5 Ala. App. 535 (citing 5 Words and Phrases, p. 4110).

The words "probable," "likely," and "liable" are synonymous when applied to the effects of a personal injury, each dealing with reasonable probability, not with possibility, and what may probably, or is likely or liable to, be the future result of a personal injury, is competent evidence to prove what is reasonably certain in the matter. *Hallum v. Village of Omro*, 99 N. W. 1051, 1054, 122 Wis. 337.

In Webster's Dictionary, the word "liable" is said to refer to a possible or probable happening which may not actually occur, as horses are liable to slip; even the sagacious are liable to make mistakes. The word, as used in an insurance policy, does not signify a perfected or fixed legal liability, but rather a condition out of which a legal liability may arise. The word as most frequently used does not necessarily exclude the idea of a contingency. *State ex rel. Breeden v. Sheets*, 72 Pac. 334, 335, 26 Utah, 105 (quoting and adopting definition in *Home Ins. Co. of New York v. Peoria & P. U. R. Co.*, 52 N. E. 862, 178 Ill. 64).

"The word 'liable' denotes something external which may befall us; 'subject' refers to evils which arise chiefly from internal necessity, and are likely to do so. Hence the former applies more to what is accidental;

the latter to things from which we often or inevitably suffer." Webster. Therefore the provision of the general drain law that an application for the establishment of a drain shall be signed by not less than ten freeholders, five or more of whom shall be owners of land "liable" to assessment for benefits in the construction of such drain, means that at least five of the signers must be persons who may properly be assessed for benefits, and, as so construed, is not subject to the objection of being impossible of enforcement. *Albert v. Gibson*, 105 N. W. 19, 21, 141 Mich. 698 (citing 5 Words and Phrases, p. 4110).

"A party 'liable' is one who may be held responsible either directly or conditionally. Liability is predicable of a contingent obligation as well as one matured and fixed." Code Civ. Proc. § 1627, subd. 1, providing that any person who is liable to the plaintiff for the payment of a debt secured by a mortgage may be made a defendant in the foreclosure suit, applies to an assignor of a bond and mortgage who has guaranteed the collection thereof. *Robert v. Kidansky*, 97 N. Y. Supp. 918, 916, 111 App. Div. 475.

The qualifying phrase "and against the property liable for assessment for such improvement at the time of the making thereof," in section 129, c. 122, p. 207, Laws 1908, means the property which would have been liable for the special assessment had no infirmity existed therein or in the steps leading thereto, which infirmity this section was enacted to cure by the terms thereof. To construe the word "liable" to mean legally liable would take away the entire force of the curative act. *Shepherd v. Kansas City*, 105 Pac. 531, 533, 81 Kan. 369.

The word "liable," in an instruction, in an action for personal injuries, that if the jury find for plaintiff they can take into consideration as elements of damages plaintiff's physical and mental pain and suffering, and that which he is "liable" to endure in the future by reason of his injury signifies something that may happen without importing reasonable certainty that it will happen, and the charge indicates that the jury may enter into full conjecture as to the possible future suffering and injury, and the charge should be that the verdict may include not future damages which plaintiff is liable to suffer (that is, may suffer), but such damages as it is reasonably certain will of necessity result from the injury. *Green v. Catawba Power Co.*, 55 S. E. 125, 126, 75 S. C. 102 (citing *Ayers v. Delaware, L. & W. R. Co.*, 53 N. E. 22, 158 N. Y. 254; *Stutz v. Chicago & N. W. Ry. Co.*, 40 N. W. 653, 73 Wis. 147, 9 Am. St. Rep. 769; *Louisville S. R. Co. v. Minogue*, 14 S. W. 357, 90 Ky. 369, 29 Am. St. Rep. 378, and note; *Ford v. City of Des Moines*, 75 N. W. 630, 106 Iowa, 94; *McBride v. St. Paul*

*City Ry. Co.*, 75 N. W. 231, 72 Minn. 291; 13 Cyc. p. 138).

The word "liable," in an instruction, in an action for injuries to a pedestrian tripping over a brick thrown on the sidewalk from a pile of brick between the curb and the sidewalk, that the municipality was responsible if the brick was placed on the sidewalk so that it was "liable" to fall upon or be thrown thereupon, has the effect of imposing on the municipality the highest degree of possible care, and makes that which was possible negligence on the part of the municipality and is erroneous. *Sutter v. Kansas City*, 119 S. W. 1084, 1086, 138 Mo. App. 105.

As used, an instruction that it was the duty of a railroad company to exercise ordinary care to keep its right of way free from dry and combustible matter which would be "liable" to take fire and communicate it to a trestle, etc., had a meaning sufficiently wide to admit of a gloss rendering its meaning "within the range of possibility," which made the instruction erroneous as imposing too high a degree of care. *Root v. Kansas City Southern R. Co.*, 92 S. W. 624, 631, 195 Mo. 348, 6 L. R. A. (N. S.) 212.

The expression "liable to catch and hold vehicles" is indeterminate and of a wide meaning, and the fact that a street railway switch was so constructed that it was liable to "catch and hold vehicles" does not of itself show that the switch was such a structure as to render the railroad liable for injuries to a traveler in a buggy, the wheels of which were caught by the switch, and who was thereby thrown to the ground and injured. *Morie v. St. Louis Transit Co.*, 91 S. W. 962, 967, 116 Mo. App. 12.

#### LIABLE AS CARRIER

The phrase "liable as carrier," as used in Rev. St. § 4281, providing that if any shipper of certain designated merchandise shall lade it as freight or baggage on any vessel without then giving to its master or agent a written notice of the true character and value thereof, having the same entered on the bill of lading therefor, the master and owner shall not be "liable as carriers" thereof in any form or manner, means only the liability attached by law to the carrier's public employment, and does not attach to its liability as bailee. *La Bourgogne*, 144 Fed. 781, 786, 75 C. C. A. 647.

#### LIABLE TO FORFEITURE

Webster defines "liable" thus, "Obliged in law or equity, subject," and says it "denotes something external which may befall us." Rev. St. § 4189, declaring that for the commission of a certain act a vessel "shall be liable to forfeiture," does not effect a present absolute forfeiture, but only gives a right to have the vessel forfeited upon due process of law, and the property in the same

remains in the owner until seizure and condemnation, which relates back to the time of seizure and invalidates intermediate sales. *The Kate Heron*, 14 Fed. Cas. 139, 141, 6 Sawy. 106.

Where a certificate of a mutual benefit society provided that all the benefits accruing should be "liable to forfeiture" if the member did not comply with the association's constitution and by-laws one of which declared that, in case of omission to pay dues and assessments on the first of each month, the member should stand suspended, the phrase "liable to forfeiture," when construed in connection with the by-laws, part of the contract making the default itself operate as a forfeiture did not require affirmative action on the part of the association before a member's rights could be barred. *Brown v. Knights of the Protected Ark*, 96 Pac. 450, 453, 43 Colo. 289.

## LIABILITY

See Contingent Liability; Contract Liability; Existing Liability; Fixed Liability; Original Liability; Prima Facie Liability; Statutory Liability.

Any and all liability, see Any.

Any other liability, see Any Other.

Other liabilities, see Other.

"Liability" in its broadest and most comprehensive use includes any obligation one is bound in law or justice to perform, and is synonymous with "responsibility"; in a more restricted and perhaps in its popular sense, it means that which one is under obligation to pay to another. *State ex rel. City of Milwaukee v. Milwaukee Electric Ry. & Light Co.*, 129 N. W. 623, 630, 144 Wis. 386, 140 Am. St. Rep. 1025.

The words "debt" and "liability," as used in Const. art. 8, § 1, forbidding the Legislature to create any debt or liability, singly or in the aggregate, exceeding 1½ per cent. of the assessed value of taxable property in the state, are not employed in a technical sense, but have special reference to the basic legislative authority on which a state contract must rest, and in which alone a state debt must find its sanction. *Lewis v. Brady*, 104 Pac. 900, 901, 17 Idaho, 251, 28 L. R. A. (N. S.) 149.

A "liability" on an insurance policy as affecting deductions in assessing insurer's property for taxation is an obligation by insurer to pay the moneys which the policy calls for, on compliance by insured with binding conditions, regardless of whether the sum to be paid under the contract is a fixed amount or a stated sum plus profits. Supplement to the general tax act, approved May 11, 1906 (P. L. p. 418), provides for taxation of certain property of life insurance companies after deducting "liabilities," and requires "liabilities on policies" to be deter-

mined as of the date of taxation on a basis adopted by the insurance commissioner. Held, that an amount apportioned to deferred dividend policies as required by Laws 1907, p. 132, is not properly deducted from an assessment as constituting a "liability"; such amount being a "liability on the policies" comprehended in valuing the policies. *City of Newark v. State Board of Equalization of Taxes*, 79 Atl. 343, 345, 81 N. J. Law, 416; *Same v. Board of Equalization of Taxes of New Jersey*, 77 Atl. 795, 80 N. J. Law, 258.

The term "liability" is commonly used to denote the indebtedness or claim of a mutual insurance order against its members for dues or assessments, though it may not be a technical "liability" for the reason that the whole matter is optional with the member. The term is not used in the sense that an absolute personal obligation to pay exists, but rather in the sense that, if he would continue the liability of the insurer, the member himself is obligated to pay. The use of the term is not fatal to a pleading. *Logsdon v. Supreme Lodge of Fraternal Union of America*, 76 Pac. 292, 294, 34 Wash. 666.

The charter of a corporation, which declares that it shall have a first lien on all stock registered in the names of each member for his liabilities to the corporation, and that the lien shall extend to all dividends, embraces a demand for damages for breach of contract by a stockholder receiving the stock in consideration that the corporation may purchase at a fixed low price machines to be made by the stockholder; the word "liability" meaning responsibility, or the state of one who is bound in law and justice to do something which may be enforced by action. *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947, 960, 114 C. C. A. 583; *United States v. General Inspection & Loading Co.*, 192 Fed. 223 (quoting 5 Words and Phrases, pp. 4111, 4114, 4115).

As used in a policy of indemnity insurance providing that the policy should only cover losses sustained by, and liability for, any claims against the assured as a result of the risk specified in the attached contract or contracts, the word "liability" referred to a liability other than one strictly in the nature of indemnity, and included liability incurred in calling a physician in case of an emergency. *Kelly v. Maryland Casualty Co.*, 94 N. W. 889, 890, 89 Minn. 337.

Decedent executed a demand note to defendant, agreeing that the proceeds of certain policies of life insurance, which he had deposited with defendant as collateral to secure the note, should be applied to the payment thereof, and that, if he should come under any other liability or enter into any other agreement with defendant while it was

the holder of such obligation, then any excess of collaterals should be applied to such other note or claim, and, in case of any exchange of the collaterals, the provisions of the note should extend to the new collaterals. Decedent thereafter executed a new note to defendant's cashier for a debt owing to defendant, which note was, in fact, for defendant's benefit. When decedent died, he was also a member of a firm which was indebted to defendant for insurance premiums collected and unpaid. At this time all but \$181.50 of the original debt had been paid, for which amount a renewal note had been given which was due and unpaid. Held, that the words "liability," "agreement" and "claim," used in the collateral agreement, were sufficient to cover every conceivable obligation, and that the surplus due on the policies was therefore liable, not only for the balance of the original debt, but also for the note made payable to defendant's cashier, and for the firm's liability for the unpaid premiums. *Norfleet v. Pamlico Ins. & Banking Co.*, 75 S. E. 937, 939, 160 N. C. 327.

#### **Bond**

A bond is not a "liability" but is only the evidence or representation of an indebtedness. *City of Los Angeles v. Teed*, 44 Pac. 580, 582, 112 Cal. 319.

#### **Contingent future liability**

When we speak of "liabilities," we mean those obligations which are contingent, as well as those which are absolute. *Fidelity & Deposit Co. of Maryland v. Commonwealth Trust Co.*, 119 N. Y. Supp. 598, 599, 65 Misc. Rep. 88.

"There is a distinction made by the authorities between a contract of 'indemnity against liability for damages' and a simple contract of 'indemnity against damages.' In the former case it has very generally been held that an action may be brought and a recovery had as soon as the liability is legally imposed, while in the latter there is no cause of action until there is actual damage." Agreements, in an employer's liability policy, that if suit is brought against the assured he shall immediately forward the process to the insurer, which will defend or settle the claim, do not, when considered with a provision of the policy declaring its purpose to be indemnity to the assured "against loss from liability for damages," and another agreement that no action shall lie against the insurer in reference to any loss under the policy unless brought by the insured himself to reimburse him for payment by him in satisfaction of a judgment, render the policy one of "indemnity against liability," but it is a policy against loss or damage by reason of liability. *Finley v. United States Casualty Co.*, 83 S. W. 2, 3, 113 Tenn. 592, 3 Ann. Cas. 962 (quoting *Fenton v. Fidelity & Casualty Co.*, 56 Pac. 1096, 36 Or. 283, 48 L. R. A. 770, and citing *Jones v. Childs*, 8 Nev.

121; *Smith v. Chicago & N. W. R. Co.*, 18 Wis. 21; *Thompson v. Taylor*, 80 Wis. 73; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Trinity Church v. Higgins*, 48 N. Y. 532).

#### **Contract responsibility**

As used in the statute of limitations which provides that an action on a contract or "liability," express or implied, which is not in writing and does not arise out of any instrument, etc., the term "liability" was evidently intended to refer to a contractual liability. *Suter v. Wenatchee Water Power Co.*, 76 Pac. 298, 299, 35 Wash. 1, 102 Am. St. Rep. 881.

The word "liability," as used in *Ballinger's Ann. Codes & St. Wash.* § 4800, subd. 3, providing a limitation for an "action upon a contract or 'liability,' expressed or implied, which is not in writing and does not arise out of any written instrument," is applicable only to contracts. The personal "liability" of shareholders in a national bank, under Rev. St. U. S. § 5151, for the contracts, debts, and engagements of the bank, cannot be regarded as a contract "liability," for the purpose of making applicable the limitation prescribed by *Ballinger's Ann. Codes & St. Wash.* § 4800, subd. 3, for an "action upon a contract or 'liability,' expressed or implied, which is not in writing, and does not arise out of any written instrument." *McClaine v. Rankin*, 25 Sup. Ct. 410, 411, 197 U. S. 154, 49 L. Ed. 702, 3 Ann. Cas. 500.

The liability of a corporation for rent accruing from August 1, 1902, to June 11th following, under a lease executed in 1899, and fixing a monthly rental, is a liability within *Membership Corporation Law*, *Laws 1895*, p. 335, c. 559, § 11, making the directors of a membership corporation liable for any debt of the corporation contracted while they are directors and payable within one year or less from the date when contracted. *Thistle v. Jones*, 107 N. Y. Supp. 840, 841, 123 App. Div. 40.

#### **Costs**

As between the parties to a pending proceeding to establish a public drain, unadjudged costs do not constitute a liability within *Burns' Ann. St. 1908*, § 248, providing that repeal of a statute shall not extinguish any liability incurred under it; so that as between such parties repeal of the statute for the proceeding by Act March 6, 1905 (*Acts 1905*, p. 456, c. 157), and its consequent dismissal, did not affect any vested or contractual right. *Kunkalman v. Gibson*, 84 N. E. 985, 86 N. E. 850, 851, 171 Ind. 603.

#### **Covenant**

A covenant of warranty in a deed creates a liability as of the date of the deed and not as of the date of an eviction thereunder, and hence persons who have assumed the liabilities of a national bank on its voluntary liq-

validation cannot escape liability for breach of the bank's warranty in a deed because the warranty was not broken when the liabilities were assumed. *McLean v. Moore* (Tex.) 145 S. W. 1074, 1075 (citing 5 Words and Phrases, p. 4112).

### Debt

The word "liability" is much more comprehensive than the term "debt"; "liability" meaning the state or condition of one who is under obligation to do at once or at some future time something which may be enforced by action. *Hyatt v. Anderson's Trustee* (Ky.) 74 S. W. 1094, 1096 (citing *White v. Green*, 74 N. W. 929, 105 Iowa, 181).

The provisions of Pub. St. N. H. c. 140, relative to the execution and record of chattel mortgages, must be fully complied with to render them valid against any one except the parties thereto. Under section 6 requiring the parties to swear that the mortgage is made for the purpose of securing the debt specified in the condition and for no other purpose, and section 9 providing that if the mortgage is executed to secure the mortgagee for a liability other than a debt due from the mortgagor, the form of the oath shall be so varied as truly to describe the "liability"; if the mortgage is given to secure a debt, the condition and oath must describe it as a debt; if to secure a liability, it must be described as such, and a liability is not covered by the term "debt." *Sherman v. Estey Organ Co.*, 38 Atl. 70, 71, 69 Vt. 355.

### Franchise

The relation between a city and the owner of an existing telephone franchise being quasi contractual for the performance of a service, an ordinance modifying the terms of the franchise for the purpose of securing more effective service in competition with the owner of another franchise is not invalid as releasing an "indebtedness" or "liability" to the municipality in violation of Const. § 52. *Louisville Home Tel. Co. v. City of Louisville*, 113 S. W. 855, 856, 860, 130 Ky. 611.

### Judgment

The term "liability" generally includes every kind of legal obligation and is used in Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550, as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 798), providing that a discharge in bankruptcy releases a bankrupt from his debts, except such as are liabilities for obtaining property by false pretenses or representations as including every obligation to pay money whether evidenced by judgment or not, and every unsatisfied judgment is a liability. *Woehrlie v. Canciani*, 109 Pac. 888, 889, 153 Cal. 107; *In re United Button Co.*, 140 Fed. 495, 505.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act Feb. 5, 1903, c. 487, § 17, 32 Stat. 800, excepting certain "liabilities" from those released by a discharge

in bankruptcy, an excepted liability need not be reduced to judgment. *Bever v. Swecker*, 116 N. W. 704, 706, 138 Iowa, 721.

The character of the "liability," as that word is used in Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 550) § 17, subd. 2, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798, specifying certain debts of a bankrupt not affected by a discharge, is not changed by the fact that the liability has been reduced to judgment. *Peters v. United States*, 177 Fed. 885, 887, 101 C. C. A. 99.

The change made in Bankr. Act July 1, 1898, c. 541, § 17a (2), 30 Stat. 550, which as originally enacted provided that a discharge should release a bankrupt from all of his provable debts except such as "are judgments in actions \* \* \* for willful and malicious injuries to the person or property of another," and which was amended Feb. 5, 1903, c. 487, § 5, 32 Stat. 798, by substituting for the words "judgments in actions" the word "liabilities," did not have the effect of removing judgments for such causes from the excepted class, but of including such liability, whether judgment has been rendered upon it or not. *Thompson v. Judy*, 160 Fed. 553, 554, 95 C. C. A. 51.

### As obligation

See Obligation.

### As all obligations

An order of the federal court directing its receiver of a railroad to restore to the railroad its property in his hands on the agreement of the railroad to assume "all lawful liabilities and obligations of" the receiver existing on a designated date and save the receiver harmless against the payment of liabilities incurred by him, imposes on the railroad the payment of liabilities incidental to the receiver's operation of the road, including that for injuries to a passenger through the negligence of the receiver's servants; the word "obligations" meaning duties arising out of a contract or from an actionable tort, and the word "liabilities" including any form of legal obligation measured by money valuation, whether arising from contract, express or implied, from duty imposed by law or judgment of court, or in consequence of a tort. *Vandalia Ry. Co. v. Keys*, 91 N. E. 173, 175, 46 Ind. App. 353 (quoting 6 Words and Phrases, p. 4878).

### Ordinance

"Liability," within Milwaukee Charter, c. 4, §§ 2, 4, requiring the vote on ordinances creating "liability" against the city or any fund thereof to be taken by ayes and noes, means more than a naked undertaking involving no expense, covering a claim or obligation presented to the council for audit and allowance against some fund, and hence the section does not apply to an ordinance requiring street railway companies to sprinkle the part of streets occupied by their

tracks on the city furnishing the necessary water. State ex rel. City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 129 N. W. 623, 629, 144 Wis. 386, 140 Am. St. Rep. 1025.

#### Tax

The word "liability" is of large significance, but, as used in the statute limiting the time for bringing actions founded on contracts or liabilities, express or implied, it refers plainly to liabilities of a contractual nature, and not to taxes. Bradford v. Storey, 75 N. E. 256, 257, 189 Mass. 104.

#### Liability for tort

The word "liability," in the absence of anything limiting its scope, includes obligations arising out of torts as well as out of contracts. Thus where, on the dissolution of a firm engaged in the insurance and brokerage business, the continuing partner gave a bond to the outgoing partner, conditioned to pay all "liabilities" of the firm, it embraced a claim against the firm for damages caused by false representations made in a sale by the firm of certain securities. Price v. Parker, 83 N. E. 323, 197 Mass. 1, 125 Am. St. Rep. 326.

The limitation of a shipowner's liability for maritime torts not the result of his own fault, provided by Rev. St. §§ 4283-4285, was extended to nonmaritime torts by Act June 26, 1884, 23 Stat. 57, c. 121, § 18, limiting the individual liability of a shipowner for "any or all debts and liabilities" except wages and liabilities incurred prior to such enactment, to his share in the vessel, and the aggregate liabilities of all the owner of a vessel on account of the same to the value of the vessel and freight pending. Richardson v. Harmon, 32 Sup. Ct. 27, 29, 222 U. S. 96, 56 L. Ed. 110.

The exemption of lands, acquired under the homestead laws, from "liability" for any debt contracted by the parties does not exempt them from liabilities for torts. Brun v. Mann, 151 Fed. 145, 155, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

Const. art. 12, § 7, declares that "no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges." Held, that a corporation exercising the right to occupy and use the streets and public places for the operation of an electric light and power plant, and a street railway, under a franchise granted by the city, cannot convey such franchise so as to relieve the property used in the exercise thereof from liability for a judgment obtained for personal injuries to an employé in the operation of such property. Cooper v. Utah Light & R. Co., 102 Pac. 202, 206, 85 Utah, 570, 136 Am. St. Rep. 1075.

#### Temporarily unenforceable obligation

"Liability," in a legal sense, is the state or condition of one who is under obligation to do at once, or at some future time, something which may be enforced by action. It may exist without the right of immediate enforcement." Hyatt v. Anderson's Trustee (Ky.) 74 S. W. 1094, 1096 (quoting and adopting definition in White v. Green, 74 N. W. 929, 105 Iowa, 181, and citing Fisse v. Einstein, 5 Mo. App. 78; Home Ins. Co. of New York v. Peoria & P. U. Ry. Co., 52 N. E. 862, 178 Ill. 64; Pittsburgh & O. R. Co. v. Clarke, 29 Pa. 146; Cochran v. United States, 15 Sup. Ct. 628, 157 U. S. 296, 39 L. Ed. 704).

#### LIABILITY CREATED BY LAW

See also, Legally Liable.

The liability of a stockholder for his proportion of a corporate debt is a "liability created by law," as that term is used in the statute of limitations. O'Neill v. Quarnstrom, 92 Pac. 391, 392, 6 Cal. App. 469.

An action against a railroad company to recover for personal injuries alleged to have been caused by the violation by defendant of Safety Appliance Act, is one "upon a liability created by statute" within the meaning of Ky. St. § 2515, limiting the time for bringing such actions to five years, and, in absence of any federal statute of limitations, is governed by that section where the action is in that state. Nichols v. Chesapeake & O. Ry. Co., 195 Fed. 913, 916, 115 C. C. A. 601.

Though the master's liability for injury to an employé in a mine through negligence of a fellow servant did not exist prior to Rev. Codes, § 5248, yet such statute is to be regarded not as creating a new cause of action, but as merely carrying forward the right of the injured party, and removing a defense theretofore available in such class of cases; so that as regards the statute of limitations, the action for personal injuries is founded on actionable negligence, and not on a "liability created by statute" within section 6449, subd. 1; which phrase has come to have a fixed application to a class of cases quite distinct from those elsewhere mentioned or referred to in the chapter on limitations. Beeler v. Butte & London Copper Development Co., 110 Pac. 528, 530, 41 Mont. 465.

City taxes on omitted property are a "liability imposed by statute," within the meaning of that term as used in the statute of limitations, and are barred in five years. Muir's Adm'r v. City of Bardstown, 87 S. W. 1096, 1100, 120 Ky. 739.

Taxes are a "liability created by statute," within Ky. St. § 2515, limiting an action on a liability created by statute. Chatterton v. City of Louisville, 140 S. W. 647, 145 Ky. 485.

## LIABILITY OF COUNTY

The state may authorize drainage districts to incur indebtedness for which they alone are liable and to issue evidence of indebtedness for which lands within the districts are alone liable, and where such bonds are issued they are not a "liability of the county," within Const. art. 12, § 5, prohibiting the loan of credit by any county to any corporation or association. *Lee Wilson & Co. v. Wm. R. Compton Bond & Mortgage Co.*, 146 S. W. 110, 113, 103 Ark. 452.

## LIBEL

See Criminal Libel.

Malice in libel and slander, see Malice. See, also, Actionable Per Se; Jactitation; Privileged Communication.

"Libel" is the invasion of the reputation of private persons. *State ex inf. Crow v. Shepherd*, 76 S. W. 79, 92, 177 Mo. 205, 99 Am. St. Rep. 624. See, also, *Brown v. Publishers: George Knapp & Co.*, 112 S. W. 474, 485, 213 Mo. 655.

A "libel" is a malicious defamation expressed in printing or writing, or by signs, pictures, etc., tending to injure the reputation of another, thereby exposing such person to public hatred, contempt, or ridicule. *Henry v. Cherry & Webb*, 73 Atl. 97, 99, 30 R. I. 13, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006; *State v. O'Hagan*, 63 Atl. 95, 73 N. J. Law, 209 (quoting 4 Black. Com. 150; *Ogders on Libel and Slander*); *Horton v. Binghamton Press Co.*, 106 N. Y. Supp. 875, 876, 122 App. Div. 332; *Hughes v. New York Evening Post Co.*, 100 N. Y. Supp. 982, 984, 115 App. Div. 611.

A "libel" is a malicious publication, expressed either in printing or in writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, and ridicule. *Watson v. Detroit Journal Co.*, 107 N. W. 81, 84, 143 Mich. 430, 5 L. R. A. (N. S.) 480, 8 Ann. Cas. 131 (quoting and adopting definition of Chief Justice Parsons in *Commonwealth v. Clap*, 4 Mass. 168, 3 Am. Dec. 212); *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982, 985.

"A 'libel' is malicious defamation, expressed either by writing or printing, or by signs, pictures, effigies, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty or integrity or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation." *Hubbard v. Furman University*, 57 S. E. 478, 76 S. C. 510 (quoting and adopting the definition in *Smith*

*v. Bradstreet Co.*, 41 S. E. 763, 764, 63 S. C. 525, 530).

"Libel," in the criminal law, is "a malicious defamation, expressed either in printing or writing, or by signs or pictures, tending to blacken the memory of one who is dead, with intent to provoke the living; or the reputation of one who is alive and to expose him to public hatred, contempt, or ridicule." *State v. Kiernan*, 41 South. 55, 116 La. 739 (quoting and adopting the definition in *Bouv. Law Dict.* and *Black, Law Dict.*).

"A 'libel' is the malicious defamation of a person, made public by any printing or writing which tends to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse. A 'libel' is a tort, and, generally speaking, neither the intention with which a tortfeasor acted, nor the state of his feelings toward the person injured or mankind at large, lessens his responsibility for injuries actually caused by his wrongful act. He must make recompense, although he was free from moral delinquency. Any false or defamatory publication which is not privileged gives rise to a case for damages sustained from it. This is true of libel, notwithstanding the formula so often reiterated that malice is the gist of the action. The essential facts are the falsity of the charge, and its publication and libelous nature. If true, no degree of malice in the publisher will make it libel, nor, if false, will rectitude of purpose exonerate him." *Farley v. Evening Chronicle Pub. Co.*, 87 S. W. 565, 567, 113 Mo. App. 216.

A "libel" is a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to injure the memory of one dead or the reputation of one living, and exposes him to public ridicule or contempt; the injury to reputation in the case of one living being the gist of the action. *Cohen v. New York Times Co.*, 138 N. Y. Supp. 206, 209, 153 App. Div. 242.

A "libel" is a malicious publication expressed either in printing or writing or by signs or pictures, tending to blacken the memory of the dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. As the falsity of the publication is essential to render a publication a libel, which may be defined as any publication injurious to the reputation of another, an instruction in an action upon a libel which, in purporting to define a libel, failed to mention the element of falsity, is erroneous. Words written of a person's trade or business may be libelous when they might not be so if spoken of the individual personally, for every publication, written or printed, which as a necessary or natural consequence will occasion pecuniary loss to a business man, is a libel. *Dobbin v. Chicago*,



R. I. & P. Ry. Co., 188 S. W. 682, 685, 157 Mo. App. 689 (citing 5 Words and Phrases, p. 4116).

Since, under the statute, the truth of an alleged libelous article may be shown in justification, the word "false" must be added to the definition of libel as any publication injurious to the reputation of another. *Julian v. Kansas City Star Co.*, 107 S. W. 496, 500, 209 Mo. 35.

"A 'libel' is anything written or printed which from its terms is calculated to injure the character of another by bringing him into hatred, contempt, or ridicule, and which is published without lawful justification or excuse." "Scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be had of the plaintiff or to make him contemptible and ridiculous." *Cranfill v. Hayden*, 80 S. W. 609, 612, 97 Tex. 544.

"Libel" is that which is written and published to injure the reputation of another, by bringing him into ridicule, hatred, or contempt. Petitioners, as members of a society, published an article charging a majority of their fellow members with unjust and stupid attacks and low and vile insinuations against petitioners, causing them to resign from a celebration committee. It was also alleged that the "new brave committee" were inefficient to conduct a contemplated celebration by reason of illiteracy, etc., and charged the president with being "more unreasonable still and childishly ambitious," bringing to the society dishonor, and that petitioners, representing a minority, did not recognize the celebration of the majority as a celebration of the society, for the purpose of safeguarding the dignity of its members. Held, that such article was defamatory, and warranted petitioners' expulsion from the society under a by-law authorizing such expulsion for defamation of the association. *Del Ponte v. Societa Italiana Di M. S. Guglielmo Marconi*, 60 Atl. 237, 240, 27 R. I. 1, 70 L. R. A. 188, 114 Am. St. Rep. 17.

"Any false and malicious writing published of another is 'libelous per se' when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him." *Williams v. Fuller*, 94 N. W. 118, 119, 68 Neb. 354 (citing *Cooley*, Torts, 206; *World Pub. Co. v. Mullen*, 61 N. W. 108, 43 Neb. 126, 47 Am. St. Rep. 737).

Any written words which directly or indirectly charge a person with crime, or which tend to injure his reputation in any other way, or to expose him to public hatred, contempt, or ridicule, if published without legal excuse or justification, constitute a "libel," and the person in respect to whom they are written may sue therefor, without alleging or proving special damages. *Rich-*

*ardson v. Thorpe*, 63 Atl. 580, 73 N. H. 532 (citing *Giles v. John B. Clarke Co.*, 36 Atl. 876, 69 N. H. 92; *Palmer v. City of Concord*, 48 N. H. 211, 97 Am. Dec. 605; *Newell, Slander & Libel* [2d Ed.] 43-45).

Any publication in writing which holds one up to ridicule, contempt, hatred, or obloquy is "libelous," even though it charge no criminal offense. *Gordon v. New York Evening Journal Pub. Co.*, 111 N. Y. Supp. 574, 575, 127 App. Div. 853.

It is not necessary, to constitute a libel, that the publication charge one with the commission of a crime or with having a contagious disease, but any words which impute to him conduct or qualities tending to injure his character, or to degrade him or which expose him to contempt, ridicule, or public hatred, are libelous per se. *Weeks v. News Pub. Co.*, 83 Atl. 162, 164, 117 Md. 126.

A letter, to be libelous, must be defamatory, and communicated to bring another into contempt, ridicule, or hatred. *Dickinson v. Hathaway*, 48 South. 136, 137, 122 La. 644, 21 L. R. A. (N. S.) 33.

To make a writing actionable as being libelous, it must impute something which tends to disgrace a man, lower him in or exclude him from society, or bring him into contempt or ridicule. It is not intended by this that to make a publication libelous it must contain a direct and open charge. The publication must be judged by its general tenor, and if, taking the terms in their ordinary acceptation, it conveys a degrading imputation, however indirectly, it is a "libel." If the article complained of represents a person as a dishonest or dishonorable man, it would be a libel. *Todd v. Every Evening Printing Co. (Del.)* 66 Atl. 97, 99, 6 Pennewill, 233 (citing *Rice v. Simmons* [Del.] 2 Har. 429, 31 Am. Dec. 766).

A false and malicious printed or written publication, which imputes conduct or qualities tending to disparage or degrade the plaintiff, or exposes him to contempt, ridicule, or public hatred, or prejudice his private character, or credit, is "libelous per se." A publication stating that the vestryman of a church "relentlessly turned his back on moral and legal obligations to the detriment of a rector, who had suffered himself to become debilitated while plodding along the path of duty to the congregation," or that the vestryman had violated a promise he had made to the members of the church whereby objections to his election as vestryman were prevented, was libelous per se. *Goldborough v. Orem & Johnson*, 64 Atl. 36, 40, 103 Md. 671.

Any language written of another that tends to degrade him or to bring him into ill repute or to destroy the confidence of his neighbors in his integrity, or to cause other like injury, is libelous per se. *Stewart v. Codrington*, 45 South. 809, 812, 55 Fla. 327.

To constitute a publication respecting a person libelous per se, it must reflect on the character of such person by bringing him into ridicule, hatred, or contempt, or affect him injuriously in his trade or profession, and a statement in a newspaper concerning a woman that she had hysterics, the same not containing any imputation upon her as an individual or in respect to her profession, is not, though untrue, per se libelous, and cannot be ground of recovery of damages in the absence of proof of special damage. *Cleveland Leader Printing Co. v. Nethersole*, 95 N. E. 735, 737, 84 Ohio St. 118, Ann. Cas. 1912B, 978.

A publication is "libelous per se" where it has a tendency to injure a person in his business or occupation or exposes him to public hatred, contempt, ridicule, or disgrace. *Bergstrom v. Ridgway-Thayer Co.*, 108 N. Y. Supp. 1093, 1094, 53 Misc. Rep. 95.

A written or printed publication, false, defamatory, and tending to expose one to ridicule or contempt, or to render him odious, or injure him in his business or calling or in his social standing, is a libel. *Register Newspaper Co. v. Worten*, 111 S. W. 693, 697.

A writing is libelous if it subjects the person referred to to odium or ridicule, or tends to subject him to obloquy. *Kentucky Journal Pub. Co. v. Brock*, 131 S. W. 1, 140 Ky. 373.

The test whether a newspaper article is "libelous per se" is whether to the mind of an intelligent man, the tenor of the article and the language used naturally import a criminal or disgraceful charge. It is libelous per se to charge a person with but a single commission of an act, if the act itself amounts to or imports moral delinquency or disreputable conduct. *Church v. Tribune Ass'n*, 119 N. Y. Supp. 885, 886, 135 App. Div. 30.

An article designed and calculated to exhibit plaintiff as a shallow, ridiculous, and contemptible person, dishonest and undeserving of confidence, is libelous per se. *Morse v. Times-Republican Printing Co.*, 100 N. W. 867, 869, 124 Iowa, 707.

A written or printed statement or article published of or concerning another, which is false, and tends to injure his reputation and thereby expose him to public hatred, contempt, scorn, obloquy, or shame, is "libelous per se." *Woolworth v. Star Co.*, 90 N. Y. Supp. 147, 148, 97 App. Div. 525 (citing *Triggs v. Sun Printing & Publishing Co.*, 71 N. E. 739, 742, 179 N. Y. 144, 153, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326).

To call a white man a negro is a "libel," since it tends to interfere with his social relation with his fellow white men. *Flood v. News & Courier Co.*, 50 S. E. 637, 639, 71 S. C. 112, 4 Ann. Cas. 685.

### Statutory definitions

The California statute (Civ. Code, § 45) defines "libel" which may be the subject of a civil action for damages as a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or has a tendency to injure him in his occupation. Under this definition, malice is not an ingredient of a cause of action for a civil libel, and a recovery of full and compensatory damages may be had, though absence of malice is proved. Another provision (Pen. Code, § 248) defines "libel," the basis of a criminal prosecution, to consist of a malicious defamation, expressed either by writing, printing, signs, pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. While malice is an essential element of the offense of libel so defined, prima facie proof of such malice is made by evidence that an injurious publication concerning another has been made without justifiable motive, whereupon the law presumes malice sufficient to support a criminal charge, as provided by section 250. *Davis v. Hearst*, 116 Pac. 530, 531, 160 Cal. 143.

The Idaho statute (Rev. St. 1887, § 6787) defines "libel" as a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule. It is sufficient that the defamation tends to impeach the honesty, integrity, virtue, or reputation, and thereby to expose such person to public hatred, contempt, or ridicule. To constitute libel, it is not necessary that the alleged libelous matter charge the person named with a crime. *State v. Sheridan*, 93 Pac. 656, 657, 14 Idaho, 222, 15 L. R. A. (N. S.) 497.

Under the Colorado Statute (*Mills' Ann. St. § 1313*), defining "libel" as a malicious defamation expressed either by printing, or by signs, or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive, and thereby to expose him or her to public hatred, contempt, or ridicule, a publication to be libelous must be malicious. *Rocky Mountain News Printing Co. v. Fridborn*, 104 Pac. 958, 958, 46 Colo. 440, 24 L. R. A. (N. S.) 891.

The Georgia Statute defines "libel" as a false and malicious defamation of another,

expressed in print or writing, or pictures, or signs, tending to injure the reputation of an individual and exposing him to public hatred, contempt, or ridicule. To falsely publish of another that there are criminal cases pending against him is libelous per se. *Witham v. Atlanta Journal*, 53 S. E. 105, 107, 124 Ga. 688, 4 L. R. A. (N. S.) 977.

Cr. Code, § 177 (Hurd's Rev. St. 1909, c. 38), defines libel as a malicious defamation, expressed either by printing or by signs or pictures, tending to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive and thereby expose him to public hatred, contempt, ridicule, or financial injury. A newspaper article published by accused charging prosecutor with improper and dishonest actions as state's attorney, and with having prostituted his office for private interests and political purposes, and that he was in collusion with violators of the liquor law, that he was actuated by improper motives with reference to an alleged bridge trust, and that there was no doubt but that such trust had "proven a fat goose to some one," that there was also good ground to suspect something dishonest and crooked in the matter, and that it was not prosecutor's purpose to enforce the law, was libelous per se. *People v. Strauch*, 98 N. E. 126, 130, 247 Ill. 220.

At common law any publication is a "libel" which degrades and injures another person, or brings him into contempt, hatred, or ridicule, or which accuses him of a crime, punishable by law, or of an act odious and disgraceful in society. It is defined by the Penal Code of Indiana to be a malicious publication of any false charge of and concerning another, accusing such other of any degrading or infamous act. *Cronin v. Zimmerman*, 88 N. E. 718, 719, 44 Ind. App. 118; *Id.*, 90 N. E. 339, 45 Ind. App. 712.

The Iowa statute (Code, § 5086), defines libel as the malicious defamation of a person, made public by any printing, etc., tending to provoke hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence and social intercourse. In a criminal prosecution for libel, the information alleged that defendant charged the prosecutor with scheming to disbar certain attorneys, because they acted as attorneys for a temperance organization, and that he was guilty of grossly unprofessional conduct by testifying as a witness while acting as prosecutor in the disbarment cases, and that the prosecution was an attempt to cover the record of prosecutor as county attorney for unprofessional conduct before the grand jury, and that he attempted to falsify the court record in the disbarment proceedings, and suppressed certain affidavits in the investigation, which charges defendant published in a temperance paper edited by him. Held, that the publication charged was libelous per se, and it was

error to leave to the jury the question whether it was libelous, as there was no ambiguity in the language. *State v. Cooper*, 116 N. W. 691, 692, 138 Iowa, 516.

The Kansas statute (section 2271, Gen. St. 1901) defines a "libel" as a malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends. To say of a man that he is a eunuch is actionable per se. *Eckert v. Van Pelt*, 76 Pac. 909, 910, 60 Kan. 357, 66 L. R. A. 266.

It is libelous per se to write of a clergyman, an applicant for a pulpit, "I would not have anything to do with him or touch him with a ten-foot pole," if the words would expose the person written of to hatred or contempt, or injury to his business or occupation within the definition of "libel" in the Minnesota statute (Rev. Laws 1905, § 4916). *Cole v. Millsbaugh*, 126 N. W. 626, 111 Minn. 159, 28 L. R. A. (N. S.) 152, 137 Am. St. Rep. 546, 20 Ann. Cas. 717.

The Missouri statute (Rev. St. 1899, § 2259) defining libel as a malicious defamation of a person made public by any printing, writing, sign, picture, etc., tending to provoke him to wrath, or expose him to public hatred, contempt, and ridicule, etc., and section 2260 making the circulation of a libel a misdemeanor, made all classes of libels misdemeanors and actionable per se, but did not make publications libelous that were not so at common law. *Kenworthy v. Journal Co.*, 93 S. W. 882, 885, 117 Mo. App. 327. Under the statute of this state (Rev. St. 1899, §§ 2260, 2263; Ann. St. 1906, pp. 1426, 1637), declaring that one publishing a libel shall be guilty of a misdemeanor, and providing that it is actionable to publish falsely that any person has been guilty of adultery, it is libel to allege in a circular printed and published that one has committed adultery. *State v. Sant-huff*, 110 S. W. 624, 626, 131 Mo. App. 620. The statute of this state (Rev. St. 1909, § 4818) defining a libel as the malicious defamation of a person by printing so as to expose him to public hatred, contempt, or ridicule, though a part of the Criminal Code, is applicable to civil actions, and, under it, a newspaper article stating that plaintiff was served with a summons in an alleged fraudulent cattle transaction, and that he had taken advantage of the bankruptcy law to escape liability, is libelous per se. *Sotham v. Drovers' Telegram Co.*, 144 S. W. 423, 431, 239 Mo. 606. Under this statute the publication, without consent, of the picture of a

child five years old, with the false statement that "Papa is going to buy mamma an Elgin watch for a present, and some one (I must not tell who) is going to buy my big sister a diamond ring, so don't you think you ought to buy me something?" as an advertisement in aid to business, is libelous, as exposing the child to ridicule. *Munden v. Harris*, 134 S. W. 1076, 1081, 153 Mo. App. 652.

Under the Montana statute defining "libel" as a false and unprivileged publication in writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation, the existence of malice is not a necessary ingredient to entitle plaintiff to recover. *Paxton v. Woodward*, 78 Pac. 215, 217, 31 Mont. 195, 107 Am. St. Rep. 416, 3 Ann. Cas. 546.

The Penal Law of New York (Consol. Laws, c. 40) § 1346, provides that an indictment for a libel contained in a newspaper published in the state against a resident thereof may be found in the county where the paper was published or in the county where the person libeled resided when the offense was committed, and section 1347 provides that in libel against a nonresident the indictment shall be found and the trial had at the place where the paper containing the libel purports on its face to be published, or, if no county is indicated thereon, in any county where the paper is circulated. Code Cr. Proc. § 138, contained substantially similar provisions relating to the place of indictment and trial where the person libeled is a resident and nonresident. Penal Law, § 1340, defines libel as a malicious publication by writing, printing, etc., which exposes any living person to contempt, etc. Held, that the purpose of sections 1346 and 1347 was to designate the place of indictment and trial, and not to define libel; and hence do not limit the operation of section 1340 by excluding books or writings other than newspapers, and, under the latter section, as well as at common law, one could be prosecuted for a libel published in a book in this state, though committed against a nonresident. *People v. Fornaro*, 119 N. Y. Supp. 746, 748, 65 Misc. Rep. 457.

The North Dakota statute (Rev. Codes 1889, § 2715) defines "libel" as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." If the language of an alleged libel is fairly susceptible of a construction which renders it defamatory, the complaint states a cause of action. It is not necessary to render the words defamatory and action-

able that they shall make the charge in direct terms. *Lauder v. Jones*, 101 N. W. 907, 911, 13 N. D. 525.

The statute (Rev. Codes 1905, § 8877) defines "criminal libel" as "the malicious defamation of a person made public by any printing, writing, sign, picture, reputation or effigy tending to expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence or social intercourse. \* \* \*" And the following section provides that: "Every person who makes or composes, dictates or procures the same to be done or who willfully publishes or circulates such libel or in any way knowingly or willfully aids or assists in making, publishing or circulating the same is guilty of a felony." The gist of the crime is the malicious defamation of a person made public in one or more of the modes prescribed and tending to expose such person to public hatred, contempt, or ridicule, etc. *State v. Tolley*, 136 N. W. 784, 785, 23 N. D. 284.

It is not necessary, in order to render a publication libelous, that it should charge any crime or public offense, inasmuch as the South Dakota statute (Civ. Code, § 29) defines "libel" as a false and unprivileged publication, by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. *Barron v. Smith*, 101 N. W. 1105, 1106, 19 S. D. 50; *Nichols v. Smith*, 102 N. W. 1135, 19 S. D. 159.

The Texas statute (Acts 1901, p. 30, c. 26) defining a "libel" as a defamation tending to blacken the memory of the dead or to injure the living, or expose him to public hatred, contempt, ridicule, or financial injury, or to impeach his honesty and integrity, etc., includes any case which, in the absence of statute, was libelous at common law, and a publication directly impeaching one's integrity and truthfulness is libelous per se. *Fleming v. Mattinson*, 114 S. W. 650, 652, 52 Tex. Civ. App. 476. In view of this statute, words libelous per se and from the publication of which damages are implied as a matter of law are such words as tend to expose one to public hatred or disgrace or vilify him or injure his character. *Allen v. Earnest* (Tex.) 145 S. W. 1101, 1103.

Under Pen. Code, art. 721, declaring that he is guilty of "libel" who, with intent to injure, makes, publishes, or circulates any malicious statement affecting the reputation of another as to any matter or thing pointed out in the chapter, and article 727 declaring that the written, printed, or published statement, to come within the definition of "libel," must convey the idea that the person to whom it refers has been guilty of some penal offense, etc., it was held that an indictment

for libel, alleging that defendant published a malicious statement concerning complainant, reciting that he was a United States federal guard, that he was a highwayman and cowardly assassin, and the murderer of a certain person who on the morning of March 19, 1906, was cowardly assassinated on a public highway, etc., sufficiently charged complainant with a penal offense, and was therefore sufficient. *Gonzalez v. State*, 124 S. W. 987, 988, 58 Tex. Cr. R. 141.

The Texas statute (Rev. Civ. St. 1911, art. 5595), defining a libel as a defamation expressed in printing or writing tending to injure the reputation of a person and expose him to public hatred, contempt, or ridicule, or to impeach his honesty, integrity, or virtue, modifies the common-law rule as to libel and slander, and a publication is libelous whether it is libelous *per se* or not; it being sufficient if it can be shown by innuendo that the matter imputed had the tendency described in the statute and had reference to the plaintiff. *Guisti v. Galveston Tribune*, 150 S. W. 874, 876, 105 Tex. 497.

A "libel," as defined by the Washington statute, is the defamation of a person made public by any words, printing, writing, sign, picture, representation, or effigy tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends. *Reynolds v. Holland*, 90 Pac. 648, 650, 46 Wash. 537; *Chambers v. Leiser*, 86 Pac. 627, 628, 48 Wash. 285, 10 Ann. Cas. 270; *State v. Mays*, 107 Pac. 363, 365, 57 Wash. 540. And where a newspaper published an article stating that plaintiff's father had been charged with using the mails to defraud in selling land, and would be arrested, giving the details of the fraudulent operations, and published a photograph of the members of his family, including plaintiff, his young daughter, the publication of plaintiff's photograph in connection with the article concerning her father was not a "libel," within this statute. *Hillman v. Star Pub. Co.*, 117 Pac. 594, 596, 64 Wash. 691, 35 L. R. A. (N. S.) 595. As this statute does not expressly make malice an ingredient of libel, a publication which tends to expose a person to public hatred, contempt, or ridicule is libelous, without regard to the existence of actual malice. *Byrne v. Funk*, 80 Pac. 772, 774, 38 Wash. 506, 8 Ann. Cas. 647. And so, where there has been an unwarranted publication in a newspaper of a list of conditional sales made by a retail dealer taken from memoranda legally filed by him with the county auditor, the dealer to charge a criminal libel under Rem. & Bal. Code, § 2424, defining libel as a

malicious publication exposing any person to hatred, contempt, or ridicule, or injuring him in his business, must allege facts to show that the publication produced such results. *State v. Darwin*, 115 Pac. 309, 311, 63 Wash. 303, 33 L. R. A. (N. S.) 1026.

#### Injury to business or trade

To be libelous, as tending to injure one in his business or profession, the words must have a direct tendency to hurt, as in the case of a charge of incapacity, dishonesty or insolvency. To publish concerning a lawyer that he was thrown into jail by a magistrate without a chance to tell his side of the case on the complaint of a woman for whom he had collected a debt, and from which amount of money collected he had deducted only the legal percentage for collection, was not "libelous," since the only fair import was that the lawyer was wrongfully thrown into jail which could not reflect upon his previous conduct, capacity, or character and did not tend to injure him in his profession. *Hughes v. New York Evening Post*, 100 N. Y. Supp. 982, 984, 115 App. Div. 611.

Any written words are "libelous" which in any manner are prejudicial to another in the way of his employment or trade. In a publication referring to plaintiff twice as a detective, and stating that, when plaintiff was attacked by robbers, he showed great cowardice and attempted to hide under the seat of the vehicle, the tendency of the words was to hold him up to scorn as a detective, and was "libelous." *Holland v. Flick*, 61 Atl. 828, 829, 212 Pa. 201.

#### Construction of language

The fact that an alleged libelous article uses a slang word upon which its libelous character depends does not render the article any the less libelous, provided the word used has a well-recognized meaning, or by the article itself is given a meaning which conveys to the reader the understanding that the word is used so as to impeach the honesty or reputation of the person named and expose him to public hatred, contempt, or ridicule. *State v. Sheridan*, 93 Pac. 656, 657, 14 Idaho, 222, 15 L. R. A. (N. S.) 497.

In a published statement, referring to plaintiff, a candidate for public office, that "no man in the community has any interest in seeing the county disgraced by sending a 'social leper' to speak and act for her in public councils," the term "social leper" may mean that his moral traits of character are such as to require his banishment from society, and, if there is an inducement and innuendo, which, fairly interpreted, would give this meaning, may be "libelous." *Sweeney v. Baker*, 13 W. Va. 158, 183, 31 Am. Rep. 757.

Defendant wrote and published a letter to the mayor of New York, stating that defendant had written a letter to the Governor

to get redress "for the scoundrelism" herein-after mentioned through the power of removal of city officials, but on second thought concluded to seek redress from the mayor. He then proceeded to make complaint against plaintiff as police commissioner for alleged incompetency and lawlessness in the administration of the police force of New York; the scoundrelism referred to being plaintiff's refusal as police commissioner to remove the photograph and record of a certain boy from the Rogues' Gallery; plaintiff being the only one defendant was complaining of, and his removal from office being the only redress sought. Held, that the word "scoundrelism" referred to plaintiff with sufficient certainty, and was libelous per se. *Bingham v. Gaynor*, 126 N. Y. Supp. 353, 360, 141 App. Div. 301.

#### **Imputation of crime**

When a newspaper published a news article stating that, within 15 minutes after the discovery of the body of plaintiff's wife, plaintiff had a quarrel with the undertaker, who had been called by her sister, and threatened to kill the undertaker unless he left the house, since the publication represented, in effect, that plaintiff threatened to kill another in a passion, without just cause, it would necessarily bring him into contempt and hatred so as to make the publication actionable libel. *Gordon v. New York Evening Journal Pub. Co.*, 111 N. Y. Supp. 574, 575, 127 App. Div. 353.

#### **Imputation of death**

It is libelous per se to publish of a living person that he is dead, because, exposing him to ridicule; a libel being a malicious publication tending to expose one to public hatred, contempt, or ridicule. *Cohen v. New York Times Co.*, 132 N. Y. Supp. 1, 74 Misc. Rep. 618.

#### **Malice**

A publication tending to expose one to contempt, ridicule, hatred, and derogation of character, if malicious, is "libelous." *Mulderig v. Wilkes-Barre Times*, 64 Atl. 636, 637, 215 Pa. 470, 114 Am. St. Rep. 967.

#### **As misdemeanor**

See Misdemeanor.

#### **As personal injury**

See Personal Injury.

#### **Slander distinguished**

Included in slander by writing or speaking, see Slander by Writing or Speaking.

A "libel" differs from a "slander" in that a publication may be libelous when, if spoken orally, it would not be slanderous. This distinction is said by the books to be based upon the grounds that a vocal utterance does not import the same quality of deliberation, and is more prone to be the ebullition of mere effervescence or lack of mental equipoise, and to be accepted as in-

dicative of feeling, rather than of conviction, and therefore not so much gravity is allowed to it as to words deliberately written down and published; the latter justifying the inference that they are the expression of settled conviction and affect the public mind correspondingly. So, too, an oral charge merely falls upon the ear, and the agency of the wrongdoer in inflicting injury comes to an end when his utterance has died on the ear, but not so with the written or printed charge, which may pass from hand to hand indefinitely, and may renew its youth, so to speak, as a defamation as long as the libel itself remains in existence, and hatch a new crop of slanders, to be blown hither and yon like thistledown at every sight of the libel, so that a printed slander, when published, takes a wider and more mischievous range than mere oral defamation, and is more reprehensible in the eye of the law. *Cooley, Torts* (2d Ed.) 240; *Odgers, L. & Sland.* (2d Ed.) 3; *Dexter v. Spear*, 7 Fed. Cas. 624, 4 Mason, 115. Thus, for instance, to publish of a man that he is a "skunk" (*Massure v. Dickens*, 35 N. W. 349, 70 Wis. 83), a "swine" (*Solverson v. Peterson*, 25 N. W. 14, 64 Wis. 198, 54 Am. Rep. 607), a "drunkard," a "cuckold," a "tory" (*Giles v. State*, 6 Ga. 276), "I look on him as a rascal" (*Williams v. Karnes*, 4 Humph. [23 Tenn.] 9), "an imp of the devil and a cowardly snail" (*Price v. Whitely*, 50 Mo. 439), or that he has been "in collusion with ruffians" (*Snyder v. Fulton*, 34 Md. 128, 6 Am. Rep. 314), are each and all libelous. *Ukman v. Daily Record Co.*, 88 S. W. 60, 64, 189 Mo. 378 (citing *Nelson v. Musgrave*, 10 Mo. 648; *Hermann v. Bradstreet Co.*, 19 Mo. App. 227; *Manget v. O'Neill*, 51 Mo. App. 35).

"Libel" is a published writing, picture, or similar production of such a nature as to immediately tend to do mischief to a party, or injure the character of an individual. Slander of title is a false and malicious statement, whether by word of mouth or in writing, in reference to a person's title to some right or property belonging to him, as where a person alleges that the plaintiff has a defective title to land. A written slander of title is sometimes called a libel in the nature of slander of title. Words, though not slanderous in themselves, yet if published in writing, tending in any way to the discredit of a man, are "libel." *Macurda v. Globe Newspaper Co.*, 165 Fed. 104, 107 (citing *Bacon's Abridgement* and *Rapalje*).

Written or printed matter which is communicated to third persons stands on a different footing from spoken words, and is often actionable when it would not be if spoken, and if it is of a character conducive to blacken the reputation of the person referred to, or excite ridicule or wrath against him, or destroy public confidence in him, it is

actionable without proof of special damages, because written or printed injurious statements about a person imply a deliberate purpose to do harm, whereas detrimental words are often spoken thoughtlessly or in a passion. Weight is allowed, also, to the more enduring character and wider vogue of published statements. *Farley v. Evening Chronicle Pub. Co.*, 87 S. W. 565, 568, 113 Mo. App. 216 (citing *Odgers, L. & Sland*. [4th Ed.] p. 4).

#### As trespass

See Trespass.

## LIBERAL

### LIBERAL CONSTRUCTION

Strict construction distinguished, *see* Strict Construction.

### LIBERALITY

See Salvage.

## LIBERTIES

See Indecent Liberties.

## LIBERTY

See Abuse of Liberty; Civil Liberty; Constitutional Liberty; Individual Liberty; Life, Liberty, and Property; Life, Liberty, and Pursuit of Happiness; Personal Liberty; Restrained and Deprived of Liberty.

Restrained of Liberty, *see* Restrained.

The term "liberty" includes the individual rights of citizenship and its privileges. *State ex rel. Guion v. Miles*, 109 S. W. 595, 610, 210 Mo. 127.

One definition of "liberties" is privileges or licenses taken in violation of the laws or propriety. *Dekelt v. People*, 99 Pac. 330, 331, 44 Colo. 525 (adopting definition in *Webst. Dict.*).

"Liberty," in its broad sense, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. *Wyatt v. James McCreery Co.*, 111 N. Y. S. 86, 88, 126 App. Div. 650 (quoting and adopting definition in *Fisher Co. v. Woods*, 79 N. E. 836, 187 N. Y. 90, 12 L. R. A. [N. S.] 707); *Health Department of City of New York v. Rector, etc., of Trinity Church*, 39 N. E. 833, 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579; *People v. Gillson*, 17 N. E. 343, 109 N. Y. 389, 4 Am. St. Rep. 465; *Colon v. Lisk*, 47 N. E. 302, 153 N. Y. 188, 60 Am. St. Rep. 609; *Lawton v. Steele*, 14 Sup. Ct. 499, 152 U. S. 133, 38 L. Ed. 385; *People ex rel. Tyroler v. Warden of City Prison*, 51 N. E. 1006, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep.

763; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Gilman v. Tucker*, 28 N. E. 1040, 128 N. Y. 190, 200, 13 L. R. A. 304, 26 Am. St. Rep. 464; *Frank L. Fisher Co. v. Woods*, 79 N. E. 837, 187 N. Y. 90, 12 L. R. A. (N. S.) 707.

"Liberty," in its broad sense, means the right not only of freedom from actual restraint of the person but the right of such use of his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel those rights or restrict his freedom of action or his choice of methods in the transaction of his lawful business are infringement upon his fundamental right of "liberty" and are void. *People v. Lochner*, 69 N. E. 873, 386, 177 N. Y. 145, 101 Am. St. Rep. 773.

The "liberty" guaranteed by the fourteenth amendment of the federal Constitution against deprivation without due process of law is a liberty of natural, not artificial, persons. *Western Turf Ass'n v. Greenberg*, 27 Sup. Ct. 384, 386, 204 U. S. 359, 51 L. Ed. 520.

"Liberty" includes not only the right to be out of prison, free to come and go, if the law is not violated in so doing, but to engage in all lawful pursuits, earn a livelihood, and own and enjoy property. To exclude from entry into the United States, or to deport therefrom, a citizen of the United States deprives him of liberty in the constitutional sense. *In re Sing Tuck*, 126 Fed. 386, 394.

Const. U. S. Amend. 14, and Const. R. I. art. 1, § 10, providing that no person shall be deprived of "liberty" without due process of law, were borrowed from the thirty-ninth article of the Great Charter, declaring that no free man shall be taken or imprisoned, or disseised, or outlawed or punished or in any ways destroyed, nor "will we pass upon him, or send upon him, unless by legal judgment of his peers, or by the law of the land"; the words corresponding to "liberty" in the first pronouncement being "taken," "imprisoned," "outlawed," and "punished," which are not confined to mere freedom from incarceration or imprisonment. *Henry v. Cherry & Webb*, 73 Atl. 97, 107, 30 R. I. 13, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

The word "liberty," as used in Const. art. 2, providing that no person shall be deprived of life, liberty, or property except by due process of law, means not only the right to freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation. *State ex rel. Galle v. City of New Orleans*, 36 South. 999, 1001, 113 La. 371, 67 L. R. A. 70, 2 Ann. Cas. 92 (cit-

ing *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636).

"By the term 'liberty,' as used in the provision [Fourteenth Amendment], something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment." *Powell v. Pennsylvania*, 8 Sup. Ct. 992, 1259, 127 U. S. 678, 32 L. Ed. 253 (Field, J., dissenting).

"The liberty of which the fourteenth amendment forbids a state from depriving any one without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the words 'life, liberty or property' in the fourteenth amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of 'due process of law.'" *Taylor v. Beckham*, 20 Sup. Ct. 890, 1016, 178 U. S. 548, 44 L. Ed. 1187 (Harlan, J., dissenting).

"The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but it is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." *MacMullen v. City of Middletown*, 98 N. Y. Supp. 145, 149, 112 App. Div. 81 (quoting *Rapallo, J.*, in *People v. Marx*, 2 N. E. 29, 99 N. Y. 377, 52 Am. Rep. 34).

"'Liberty,' in the sense in which the term is employed in the Constitution, is not restricted to mere freedom from imprisonment, but it embraces the right of a person to use his God-given powers, employ his faculties, exercise his judgment in the affairs of life, and to be free in the enjoyment and disposal of his acquisitions, subject only to such restraints as are imposed by the law of the land for the public welfare. The word 'liberty,' as thus employed in the Constitution and understood in the United States, is a term of comprehensive scope. It embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights, including the right in each subject to purchase, hold, and sell or dispose of property in the same way that his neighbor may; and of such liberties no one can be deprived except by due process of law." *Block v. Schwartz*, 76 Pac. 22, 25, 27

*Utah*, 387, 65 L. R. A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550.

The word "liberty," as used in the constitutional guaranty against deprivation of liberty, means the right, not only to freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation. *City of New Orleans v. Smythe*, 41 South, 33, 36, 116 La. 685, 6 L. R. A. (N. S.) 722, 144 Am. St. Rep. 566 (citing *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 2 N. E. 29, 52 Am. Rep. 34, 99 N. Y. 386; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676).

By the term "liberty," as used in the fourteenth amendment to the federal Constitution, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment. *Kansas Natural Gas Co. v. Haskell*, 172 Fed. 545, 566 (citing *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77).

The "liberty" mentioned in the fourteenth amendment of the Constitution of the United States means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the employment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling. It is a part of every man's civil right that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. *Ex parte Drayton*, 153 Fed. 986, 989 (quoting and adopting definition in *Allegier v. State of Louisiana*, 17 Sup. Ct. 431, 165 U. S. 589, 41 L. Ed. 832; *Cooley, Torts*, p. 278).

"The term 'liberty,' as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." It is not every equal law which is a just law, but, within limits, it may be said that equality is an attribute of liberty. *McKinster v. Sager*, 72 N. E. 854, 857, 163 Ind. 671, 68 L. R. A. 278, 106 Am. St. Rep. 268 (quoting and adopting definition



in *People v. Gillson*, 17 N. E. 343, 345, 109 N. Y. 389, 398, 4 Am. St. Rep. 465).

The state may decline to confer official power on residents of other states without depriving such nonresidents of "liberty" or "property," within the meaning of those words as used in the Constitution. "Liberty," as the term is used in the constitutional provision, includes freedom from servitude and unlawful restraint, the right to pursue any ordinary calling, trade, or employment, and acquire property thereby, but does not include any supposed right of a nonresident to receive an appointment to a position created by the general laws of the state for the purpose of carrying into effect legislation affecting the state and its people. No nonresident enjoys the right of "liberty" or property in the fees or emoluments of the office of the executor or administrator. In *re Mulford*, 75 N. E. 345, 346, 217 Ill. 242, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986.

#### Right to contract

Freedom to contract is "liberty," within Const. art. 1, § 5, and Const. U. S. Amend 14, § 1. *Sturgess v. Atlantic Coast Line R. Co.* (S. C.) 60 S. E. 1135, 1141.

The privilege of contracting is both a "liberty" and a property right, and is protected by the Constitution. *People v. Steele*, 83 N. E. 236, 237, 231 Ill. 340, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321.

"It has been held that the word 'liberty,' as used in the Constitution, was not to be confined to the mere liberty of person, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on its business." *Addyston Pipe & Steel Co. v. United States*, 20 Sup. Ct. 96, 102, 175 U. S. 211, 44 L. Ed. 136.

"Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects." *United States v. Joint Traffic Ass'n*, 19 Sup. Ct. 25, 33, 171 U. S. 505, 43 L. Ed. 259.

"The word 'liberty,' as used in the constitutional declarations, means more than freedom of locomotion. It includes and comprehends, among other things, freedom of speech, the right to self-defense against unlawful violence, and the right to buy and sell as others may." Rev. St. 1899, § 8142, prohibiting any person or corporation from issuing, in payment of wages, any order or evidence of indebtedness not negotiable and redeemable at its face value in lawful money of the United States by the person issuing it, section 8143, requiring all persons issuing such orders during business hours to be ready to redeem the same in lawful money of the United States at the option of the holder, and section 8144, providing that a violation of the preceding sections shall con-

stitute a misdemeanor subject to fine or imprisonment or both, are unconstitutional as depriving persons or corporations issuing such orders of their property without due process of law, in that they restricted their freedom, or "liberty," to contract. *State v. Missouri Tie & Timber Co.*, 80 S. W. 933, 941, 181 Mo. 536, 65 L. R. A. 588, 103 Am. St. 614, 2 Ann. Cas. 119 (citing 2 Story, Const. [5th Ed.] § 1950).

The "liberty" guaranteed by the fourteenth amendment to the federal Constitution means, not only the right of the citizen to be free from mere physical restraint of his person, but the term embraces the right of the citizen to be free in the enjoyment of his faculties in lawful ways, to earn his livelihood by any lawful calling, to pursue any livelihood, and for that purpose to enter into contracts which may be proper, but the freedom of contract is a qualified right, and the freedom of contract is not unconstitutionally infringed by Code Iowa, § 2071, defining the liability of railway corporations for injuries from negligence, so that a railway company, when sued on such liability, is precluded from making the defense that a recovery is barred by the acceptance of benefits under a contract of membership in its relief department. *Chicago, B. & Q. R. Co. v. McGuire*, 81 Sup. Ct. 259, 262, 219 U. S. 549, 55 L. Ed. 328 (quoting and adopting definition in *Allgeyer v. State of Louisiana*, 17 Sup. Ct. 427, 165 U. S. 578, 41 L. Ed. 832).

"The fourteenth amendment, however, does not guarantee the citizen the right to make within his state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state, within her own limits, involves a clear non sequitur, and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction." *Hooper v. California*, 15 Sup. Ct. 207, 211, 155 U. S. 648, 39 L. Ed. 297.

#### Right to choose employment

"Privileges and immunities" of a citizen, as well as his "liberty," within the guaranties of Const. U. S. Amend. 14, involve the right, not only to be free from physical restraint, but the right to follow any lawful business or avocation in life and to make all proper contracts in furtherance thereof. *Ex parte Hollman*, 60 S. E. 19, 30, 79 S. C. 9, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105.

"Liberty," as guaranteed by the Constitution, is the right of a citizen to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any law-

ful trade or avocation. *Ives v. South Buffalo Ry. Co.*, 94 N. E. 431, 439, 201 N. Y. 271, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

"Liberty," in the constitutional sense, means, not only freedom from servitude and restraint, but embraces the right of every man to be free in the use of his faculties and to adopt such avocation as he may choose, subject only to the restraints necessary to secure the common welfare, and the right of every man to choose his own occupation is included in the constitutional right to the pursuit of happiness. *People v. Steele*, 83 N. E. 236, 237, 231 Ill. 340, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321; *City of Chicago v. Powers*, 83 N. E. 240, 231 Ill. 560.

The word "liberty," as used in the fourteenth amendment to the federal Constitution, means not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizens to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation and for the purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned. *Toney v. State*, 37 South. 332, 333, 141 Ala. 120, 67 L. R. A. 286, 109 Am. St. Rep. 29, 3 Ann. Cas. 319 (quoting *Allgeyer v. Louisiana*, 17 Sup. Ct. 427, 165 U. S. 578, 41 L. Ed. 832); *Hodges v. United States*, 27 Sup. Ct. 6, 16, 203 U. S. 1, 35, 36, 51 L. Ed. 65; *Crescent Liquor Co. v. Platt*, 148 Fed. 894, 902 (quoting and adopting definition in *Allgeyer v. State of Louisiana*, 17 Sup. Ct. 427, 431, 165 U. S. 578, 589, 41 L. Ed. 832).

"Liberty," in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, or which limit him in his choice of a trade or profession, are infringements upon his fundamental rights of liberty which are under constitutional protection. *State ex rel. Richey v. Smith*, 84 Pac. 851, 42 Wash. 237, 5 L. R. A. (N. S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577 (quoting *In re Aubry*, 78 Pac. 900, 36 Wash. 308, 104 Am. St. Rep. 952, 1 Ann. Cas. 927).

"The word 'liberty,' as used in the Constitution of the United States and the several states, has frequently been construed, and means more than mere freedom from restraint. It means, not merely the right to go where one chooses, but to do such

acts as he may judge best for his interest, not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment. The liberty mentioned is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned. These are individual rights, formulated as such under the phrase 'pursuit of happiness,' in the Declaration of Independence, which begins with the fundamental proposition that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." *Ex parte Drexel*, 82 Pac. 429, 430, 147 Cal. 763, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878 (quoting and adopting definition in *Young v. Commonwealth*, 45 S. E. 327, 101 Va. 853).

In its broad sense, as used in this country, "liberty" means the right, not only to freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. An act requiring examination by and a license from a dental board before one may own, run, or manage a dental office, as distinguished from the actual practice of dentistry, is not a proper exercise of the police power, but is unconstitutional. *State v. Brown*, 79 Pac. 635, 637, 37 Wash. 97, 68 L. R. A. 889, 107 Am. St. Rep. 798 (quoting and adopting definition in *Re Aubry*, 78 Pac. 900, 36 Wash. 308, 104 Am. St. Rep. 952, 1 Ann. Cas. 927).

Sess. Laws 1901, p. 116, c. 67, providing for the examination and registration of horseshoers, is unconstitutional, as depriving citizens of their liberty and property without due process of law. "One may be deprived of his liberty, and his constitutional rights thereto may be violated, without the actual imprisonment or restraint of his person. 'Liberty,' in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in a lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit him in his choice of a trade or profession, are infringements of his fundamental rights of liberty, which are under constitutional protection." *In re Au-*

bry, 78 Pac. 900, 902, 36 Wash. 306, 104 Am. St. Rep. 952, 1 Ann. Cas. 927 (citing *People ex rel. Nechamcus v. Warden of City Prison*, 39 N. E. 686, 144 N. Y. 529, 27 L. R. A. 718).

"The term 'liberty,' as used in the fourteenth amendment to the federal Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of a man to be free in the employment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation," so that Laws 1901, c. 128, amending Pen. Code, § 640, by making it an offense, in cities of the first and second classes, for any person to offer real property for sale without the written authority of the owner, or his attorney in fact, appointed in writing, or of the holder of a written contract with the owner for the purchase of such property, is unconstitutional. *Grossman v. Caminez*, 79 N. Y. Supp. 900, 902, 79 App. Div. 15 (quoting and applying *People v. Gillson*, 17 N. E. 343, 345, 109 N. Y. 389, 399, 4 Am. St. Rep. 465).

#### Right to labor

St. 1903, p. 33, c. 10, providing an eight-hour day for workmen in mines, smelters, and mills, does not contravene the constitutional provision relating to deprivation of "liberty." *Belknap, C. J.*, dissenting, quotes to the effect that the term "liberty," in the Constitution, is not dwarfed into mere freedom from physical restraint of the person, but embraces the right to be free in the enjoyment of the faculties with which the citizen has been endowed by his Creator, and that "liberty," in its broad sense, as understood in this country, means the right not only of freedom from servitude or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. In *re Boyce*, 75 Pac. 1, 17, 27 Nev. 299, 65 L. R. A. 47, 1 Ann. Cas. 66.

#### Restraint by law implied

"Even 'liberty' itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, 'liberty' regulated by law." *McLaury v. Watelsky*, 87 S. W. 1045, 1047, 39 Tex. Civ. App. 394 (quoting and ap-

proving *Crowley v. Christensen*, 11 Sup. Ct. 13, 137 U. S. 86, 34 L. Ed. 620).

"Liberty," as understood in this country, is not license but liberty regulated by law. The personal liberty of every man is subject to such reasonable regulations as in the wisdom of the Legislature are regarded as necessary to promote, not only the peace and good order of society, but its well-being. Rev. St. § 4234, prohibiting generally the keeping open on Sunday of any place of business for the purpose of transacting business therein, is not, as applied to a barber's shop, unconstitutional, as being an undue restraint of personal liberty, and depriving a person of life, liberty, and property without due process of law, but is a proper exercise of the police power of the state. *State v. Sopher*, 71 Pac. 482, 484, 25 Utah, 318, 60 L. R. A. 468, 95 Am. St. Rep. 845 (quoting and adopting *State v. Powell*, 50 N. E. 900, 58 Ohio St. 324, 41 L. R. A. 854).

The industrial insurance law (Laws 1911, c. 74), which undertakes, by requiring contributions from employers to an accident or insurance fund, to provide fixed and certain relief for workmen injured in extrahazardous work, and for families and dependents, regardless of questions of fault or negligence, to the exclusion of every other remedy or compensation, and which, by section 11, provides that no employer shall exempt himself from the burden or waive the benefits of the act by any contract, agreement, or regulation, and that any such contract or regulation shall be pro tanto void, is not an interference with the right to contract, since there is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses, and since the term "liberty" means absence of arbitrary restraint, and not immunity from reasonable regulations and provisions imposed in the interests of the community. *State ex rel. Davis-Smith Co. v. Clausen*, 117 Pac. 1101, 1112, 65 Wash. 156, 37 L. R. A. (N. S.) 466.

#### LIBERTY OF CONTRACT

Liberty of contract does not imply liberty in a corporation or individuals to defy the national will when legally expressed; nor does it involve a right to deprive the public of the advantages of free competition in trade and commerce. The enforcement of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, declaring illegal every combination or conspiracy in restraint of interstate or foreign commerce, and forbidding attempts to monopolize such commerce, or any part of it, does not infringe on liberty of contract. *Northern Securities Co. v. United States*, 24 Sup. Ct. 436, 462, 193 U. S. 197, 48 L. Ed. 679.

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and univer-

sal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets, to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy." *Frisbie v. United States*, 15 Sup. Ct. 586, 588, 157 U. S. 160, 39 L. Ed. 657.

"Liberty to contract" is one of the inalienable rights of man, guaranteed to every citizen by the Bill of Rights (Const. art. 1, § 1), subject only to such restrictions as clearly appear to be for the general welfare. The mere fact that the General Assembly has enacted a law which narrows the liberty of contract as to the whole people or to a class of citizens is not decisive. Where an act relating to the giving of surety bonds makes security by surety companies exclusive and compulsory, it is not promoted by consideration of the public necessity or public welfare, and hence it follows that it is an unconstitutional restriction on the liberty to contract, guaranteed by the Constitution. *State v. Robins*, 73 N. E. 470, 471, 71 Ohio St. 273, 69 L. R. A. 427, 2 Ann. Cas. 485.

Act Dec. 10, 1906, No. 117, requiring certain corporations to pay their employes each week in lawful money, is not invalid as restricting the rights of employes to contract with their employer; such restriction not being direct, but resulting from the employer's right, and that restriction being valid as to the employer. *Lawrence v. Rutland R. Co.*, 80 Vt. 370, 67 Atl. 1091, 1096, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475.

## LIBERTY OF SPEECH AND THE PRESS

The "freedom of the press" consists in a right to print what he chooses without previous license, but subject to be held responsible therefor. *Lever v. Daily States Pub. Co.*, 49 South. 206, 211, 123 La. 594, 23 L. R. A. (N. S.) 726, 131 Am. St. Rep. 356.

The phrase "liberty of the press" means, in the language of the Bill of Rights, that any citizen may write or publish his sentiments on all subjects, being responsible only for the abuse of that right. *Williams Printing Co. v. Saunders*, 73 S. E. 472, 477, 118 Va. 156, Ann. Cas. 1913E, 578.

The press has only the same privilege as to publications as private individuals; the phrase "liberty of the press" merely meaning that newspaper publications shall not be subject to censorship. *Williams Printing Co. v. Saunders*, 73 S. E. 472, 477, 118 Va. 156, Ann. Cas. 1913E, 578.

The "liberty of the press" is not guaranteed by the Constitution against the publication of deliberate falsehood and misrepresentation in regard to decisions of courts, even though the publishers may think that public and political interests would be subserved by such falsehood and misrepresentation. *McDougall v. Sheridan*, 128 Pac. 954, 963, 23 Idaho, 191.

"Liberty of speech and of the press" implies not only liberty to publish but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. *People ex rel. Attorney General v. News-Times Pub. Co.*, 84 Pac. 912, 948, 35 Colo. 253 (adopting definition in *Cooper v. People ex rel. Wyatt*, 22 Pac. 790, 13 Colo. 337, 378, 6 L. R. A. 430).

"Liberty of the press" is not synonymous with license, nor does it give a newspaper any greater license to publish libelous matter than the ordinary citizen may have. *Lowe v. News Pub. Co.*, 70 S. E. 607, 9 Ga. App. 103.

The "liberty of the press," as the law now stands, is only a more extensive and improved use of the liberty of speech which prevailed before printing became general, and is the right belonging to every one, whether the conductor of a newspaper or not, to publish whatever he pleases without the license, interference, or control of the government; the publisher being responsible only for the abuse of the privilege. *Williams v. Black*, 124 N. W. 723, 732, 24 S. D. 501 (citing 25 Cyc. pp. 406, 407).

Liberty and freedom of speech guaranteed by the Constitution does not mean the unrestricted right to do and say what one pleases at all times and under all circumstances. Act Cong. Sept. 26, 1888, c. 1039, 25 Stat. 496, forbidding deposit in the mails of anything upon the exposed surface of which appears language scurrilous, defamatory, threatening, or calculated and obviously intended to reflect injuriously on the character or conduct of others, is not objectionable as denying or abridging freedom of speech. *Warren v. United States*, 183 Fed. 718, 721, 106 C. C. A. 156, 33 L. R. A. (N. S.) 800.

"Liberty of the press" consists in the right to publish, with impunity, truth with good motives and for justifiable ends, whether it respects the government, magistries, or individuals." Laws 1889, p. 66, c. 20, forbidding the publication by newspapers of detailed accounts of the execution of criminals convicted of murder, is not in conflict with Const. art. 1, § 3, which preserves the liberty of the press. *State v. Pioneer Press Co.*, 110 N. W. 867, 868, 100 Minn. 173, 9 L. R. A. (N. S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351 (quoting and adopting definition of Chancellor Kent).

"Liberty of the press" is still an undefined term, and, like some other familiar phrases of constitutional law, must remain undefined. Certain boundaries are fairly discernible within which the liberty must be displayed, but precise rules cannot be formulated in advance to govern its exercise on particular occasions. In the decision of controversies, the character, the organization, the needs, and the will of society at the present time must be given due consideration. The press, as we know it to-day, is almost as modern as the telephone and the phonograph. The functions which it performs at the present stage of our social development, if not substantially different in kind from what they have been, are magnified many fold, and the opportunities for its influence are multiplied many times. Generally publication should be no wider than the moral or social duty to publish. If it be designedly or unnecessarily or negligently excessive, privilege is lost. But, if a state newspaper, published primarily for a state constituency, have a small circulation elsewhere, it is not deprived of its privilege in the discussion of subjects of state-wide concern because of that fact. *Coleman v. MacLennan*, 98 Pac. 281, 283, 78 Kan. 711, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390.

The "liberty of the press," guaranteed by Const. art. 1, § 7, guaranteeing to every person the liberty to speak, write, and publish his sentiments on all subjects, but holding him responsible for the abuse of that right, has never been held to mean that the publisher of a newspaper shall be any less responsible than any other person would be for publishing otherwise the same libelous matter. The contrary rule has been affirmed by the courts of this country and England with great uniformity. *Morse v. Times-Republican Printing Co.*, 100 N. W. 867, 873, 124 Iowa, 707 (citing *Jones v. Townsend's Adm'x*, 21 Fla. 431, 58 Am. Rep. 676; *Shekell v. Jackson*, 10 Cush. [64 Mass.] 25; *Aldrich v. Press Printing Co.*, 9 Minn. 138 [Gil. 129] 86 Am. Dec. 84; *Root v. King* [N. Y.] 7 Cow. 628; *Tillson v. Robbins*, 68 Me. 295, 28 Am. Rep. 50; *Smart v. Blanchard*, 42 N. H. 137; *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367; *Eviston v. Cramer*, 3 N. W. 392, 47 Wis. 659; *Edwards v. San Jose Printing & Pub. Soc.*, 34 Pac. 128, 99 Cal. 431, 37 Am. St. Rep. 70; *McAllister v. Detroit Free Press*, 43 N. W. 431, 76 Mich. 338, 15 Am. St. Rep. 318; *Upton v. Hume*, 33 Pac. 810, 24 Or. 420, 21 L. R. A. 468, 41 Am. St. Rep. 883; *Smith v. Tribune Co.*, 22 Fed. Cas. 689; *Davis v. Sladden*, 21 Pac. 140, 17 Or. 259; *Barnes v. Campbell*, 59 N. H. 128, 47 Am. Rep. 183; *Mallory v. Pioneer Press Co.*, 26 N. W. 904, 34 Minn. 521; *Delaware State Fire & Marine Ins. Co. v. Crossdale* [Del.] 6 Houst. 181; *Palmer v. City of Concord*, 48 N. H. 216, 97 Am. Dec. 605).

"The Constitution of this state declares what is meant by 'liberty of speech' and 'liberty of the press' in the following words: 'Any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty.' Civ. Code 1895, § 5712. The right preserved and guaranteed against invasion by the Constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege, by invading the legal rights of others. The Constitution uses the word 'sentiments,' but it is used in the sense of thoughts, ideas, opinions. To make intelligent, forceful, and effective an expression of opinion, it may be necessary to refer to the life, conduct, and character of a person; and, so long as the truth is adhered to, the right of privacy of another cannot be said to have been invaded by one who speaks or writes or prints, provided the reference to such person, and the manner in which he is referred to, is reasonably and legitimately proper in an expression of opinion on the subject that is under investigation. It will therefore be seen that the right of privacy must in some particulars yield to the right of speech and of the press. It is well recognized that slander is an abuse of the liberty of speech, and that a libel is an abuse of the liberty to write and print, but it is nowhere expressly declared in the law that these are the only abuses of such rights. And that the law makes the truth in suits for slander and in prosecutions and suits for libel a complete defense may not necessarily make the publication of the truth the legal right of every person, nor prevent it from being in some cases a legal wrong. The truth may be spoken, written, or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest. The truth may be uttered and printed in reference to the life, character, and conduct of individuals whenever it is necessary to the full exercise of the right to express one's sentiments on any and all subjects that may be proper matter for discussion. But there may arise cases where the speaking or printing of the truth may be considered an abuse of the 'liberty of speech and of the press,' as in a case where matters of purely private concern, wholly foreign to a legitimate expression of opinion on the subject under discussion, are injected into the discussion for no other purpose and with no other motive than to annoy and harass the individual referred to. Such cases might be of rare occurrence, but, if such should arise, the party aggrieved may not be without a remedy. The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such wide scope as has

been indicated would impose a very serious limitation upon the right of privacy, but, if it does, it is due to the fact that the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with the free expression of one's sentiments, and the publication of every matter in which the public may be legitimately interested. In many cases the law required the individual to surrender some of his natural and private rights for the benefit of the public, and this is true in reference to some phases of the right of privacy as well as other legal rights. Those to whom the right to speak and write and print is guaranteed must not abuse this right, nor must one in whom the right of privacy exists abuse this right. The law will no more permit an abuse by one than by the other. Liberty of the speech and of the press is and has been a useful instrument to keep the individual within limits of lawful, decent, and proper conduct; and the right of privacy may be well used within its proper limits to keep those who speak and write and print within the legitimate bounds of the constitutional guarantees of such rights. One may be used as a check upon the other, but neither can be lawfully used for the other's destruction." *Pavesich v. New England Life Ins. Co.*, 50 S. E. 68, 73, 74, 122 Ga. 190, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

## LIBERUM TENEMENTUM

The plea of "liberum tenementum" was at one time used only where plaintiff's declaration was very general in its description of the land, not specifying it, and this plea performed the office of compelling a new assignment or more definite description, but the plea has long since performed a wider function, and its office is to confess that the plaintiff had possession of the land at the time the act complained of was committed, and that such act was in fact committed by defendant, as set forth, but avoiding the allegation by the averment of a right to enter and do the act as alleged. In legal effect the plea admits possession in the plaintiff sufficient to enable him to maintain the action against the wrongdoer and asserts a freehold in the defendant, with right to immediate possession as against plaintiff. On the filing of this plea, defendant must prove his title either by deed or other documentary evidence, or by an actual adverse and exclusive possession for 20 years, since by the issue he undertakes to show a title in himself by which the presumption arising from plaintiff's possession will be avoided. Since the plea raises the question of title and boundary, a judgment on the plea is conclusive on the question of title to land,

and therefore a writ of error will lie to review the judgment. *Dickinson v. Mankin*, 56 S. E. 824, 825, 61 W. Va. 429.

## LIBRARY

St. 1909, § 4260, obligates a county revenue agent to cause to be listed for taxation all property omitted by the assessor and other taxing officer, and provides that he shall file a statement of property omitted, and that such statement shall contain "a description and value of the property proposed to be assessed." A revenue agent acting under such statute filed a statement of property belonging to a person named omitted from taxation, and such statement specified, among other things, a "library" of a value specified. Held, that the statement was sufficient as to the library, as "library" means such books or works of literature, science, art, or business as one may have in his residence or office. *Commonwealth v. Glover*, 116 S. W. 769, 774, 132 Ky. 588.

### As charity

See *Charity*.

### As educational corporation

See *Educational Corporation*.

### As public place

See *Public Place*.

## LICENSE

See *Exclusive License*; *Implied License*; *Irrevocable License*; *Life License*; *Mining License*; *Resident License*; *Simple License*.

A "license" is a permission to do something. *People ex rel. Moses v. Gaynor*, 137 N. Y. Supp. 196, 198, 77 Misc. Rep. 576.

A mere "license" is but an authority to do a particular act or series of acts upon another's land without possessing any estate therein. *Dawson v. Western M. R. Co.*, 68 Atl. 301, 305, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678.

"A 'license' is technically an authority given to do some one act or series of acts on the land of another without passing any estate in the land." Where an owner orally offered to give land to another, providing the latter would not construct a building in such a way as to cut off the light of a window in the owner's house, and the offer was accepted, and a building erected according to the plans agreed on, the owner merely gave a parol license for the erection of the building. *Shipley v. Fink*, 62 Atl. 360, 362, 102 Md. 219, 2 L. R. A. (N. S.) 1002.

A "license" merely—a verbal license—is the right to do a particular act or series of acts, without any interest in the land. Such

a license will exempt a party from an action of trespass for entering the land of another to dig ore and will give him the property in the ore which is actually dug under it, but it is revocable at the pleasure of him who gives it. *Clark v. Wall*, 79 Pac. 1052, 1063, 32 Mont. 219.

"A 'license' is a personal revocable and nonassignable privilege conferred either by writing or parol to do one or more acts on land without possessing any interest therein." *Rodefer v. Pittsburg, O. V. & O. R. Co.*, 74 N. E. 183, 186, 72 Ohio St. 272, 70 L. R. A. 844 (quoting and adopting definition in *Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co.*, 81 N. E. 874, 875, 134 N. Y. 435, 439); *Yeager v. Tuning*, 86 N. E. 657, 658, 79 Ohio St. 121, 19 L. R. A. (N. S.) 700, 128 Am. St. Rep. 679; *Reeve v. Duryee*, 129 N. Y. Supp. 748, 750, 144 App. Div. 647.

A "license" is a mere personal or revocable privilege to do an act or series of acts upon lands of another without possessing any interest or estate in the lands. *City of Berwyn v. Berglund*, 99 N. E. 705, 706, 255 Ill. 498.

A "license" is a personal privilege to do certain acts upon the lands of another, but creates no estate therein, is revocable at will, and may rest in parol. *Howes v. Barmon*, 81 Pac. 48, 49, 11 Idaho, 64, 69 L. R. A. 568, 114 Am. St. Rep. 255.

A "license" contemplates not a denial of a right or power, but the regulation of such right or power. A license is a permission to do something under regulations, and not a prohibition. *People ex rel. Empire City Trotting Club v. State Racing Commission*, 105 N. Y. Supp. 528, 530, 120 App. Div. 484.

A "license" implies that the licensee shall not be evicted from its enjoyment, and such an eviction is a defense to a suit for royalties accruing after it occurred. *American Street Car Advertising Co. v. Jones*, 142 Fed. 974, 977, 74 C. C. A. 236.

A "license" is simply a permission or authority to do something, and a license to take timber would be an authority or permission to go on the land and cut and remove the timber specified in the license. *Snyder v. East Bay Lumber Co.*, 97 N. W. 49, 50, 135 Mich. 31.

A "license" is defined to be: "An authority to do some act, or a series of acts, on the land of another, without passing an estate in the land. It amounts to nothing more than an excuse for the act which would otherwise be a trespass. Being a personal privilege, it can be enjoyed only by the licensee. It is not assignable, so that an undertenant can claim the benefit of the license to the licensee." Plaintiffs conveyed to defendant by deed all the timber and

trees on the tract of land described; the deed providing that the grantee should have all the rights of way and privileges over and upon the land usually extended to lumbermen, provided that the timber should be removed within three years, and that all refuse, timber, barns, houses, cabins, sheds, etc., remaining on the premises at that time, should revert to and become the property of plaintiffs. Held, that such deed was not a mere "license," but was sufficient to create the relation of landlord and tenant. *Alexander v. Gardner*, 96 S. W. 818, 819, 123 Ky. 552, 124 Am. St. Rep. 378 (citing *Tayl. Land. & Ten. § 237*; *Wood, Land. & Ten. § 227*; *Haywood v. Fulmer*, 32 N. E. 574, 158 Ind. 658, 18 L. R. A. 491).

A ticket of admission to a race track, a theater, a concert, or any such entertainment is a mere revocable "license." *Buenzle v. Newport Amusement Ass'n*, 68 Atl. 721, 722, 723, 29 R. I. 23, 14 L. R. A. (N. S.) 1242.

An instrument leasing the side wall of defendant's property to plaintiff for advertising purposes, "until said wall is obstructed so it is not available for advertising purposes," grants a mere "license" revocable at the owner's option. *Manheimer v. Gudat*, 106 N. Y. Supp. 461, 462, 55 Misc. Rep. 330.

Where the owner of a building executed a written contract granting defendant the right to use one of the walls thereof for advertising purposes for a specified consideration and for a definite period, and providing that, in case of an obstruction of the wall by other buildings, defendant should have an abatement of the land, together with necessary access through and upon the premises, and warranting title to the leasehold for the term mentioned, the contract was to be regarded as a "license." A license may, if executed in proper form, take effect as a grant as to some things and as a mere license as to others. *Levy v. Louisville Gunning System*, 89 S. W. 528, 530, 121 Ky. 510, 1 L. R. A. (N. S.) 359.

A contract for a right to erect advertising matter was described as a "wall or fence permit," and provided that, in consideration of \$50 cash payable yearly in advance, the owner leased to the R. Sign Company the entire side wall of a certain building for advertising purposes for one year with privilege of renewal at the same rate, and that, in case the sign was obstructed or the house sold, the money would be returned for the unexpired term. Held, that the instrument constituted a mere "license" revocable by the owner at will on returning a pro rata amount of the license fee for the unexpired term. *Reeve v. Duryee*, 129 N. Y. Supp. 748, 749, 144 App. Div. 647.

"A siding or switch constructed by a railroad company from its road to a manufactory at the expense and over the land of

the latter, solely for its benefit, and for the sole purpose of affording it facilities for receiving and shipping freight, and under a written agreement silent as to the length of time it is to remain, may not be maintained by the railroad company against the objection of the owner of the manufactory; the agreement, so far as the right of the railroad company is concerned, being merely a 'license' revocable at the option of the licensor or his grantee." *Rodefer v. Pittsburg, O. V. & C. R. Co.*, 74 N. E. 183-186, 72 Ohio St. 272, 70 L. R. A. 844.

The interest conveyed by an oil and gas lease is a mere "license" to explore, an incorporeal hereditament, a profit à prendre. A mechanic's lien will not attach to the interest acquired in lands by the lessee under an ordinary oil or gas lease, notwithstanding oil or gas is discovered. *Phillips v. Springfield Crude Oil Co.*, 92 Pac. 1119, 76 Kan. 783.

Where the president of a corporation by a verbal agreement grants permission to another to box and gather the turpentine from the pine trees growing upon the land of the corporation, such permit amounts to nothing more than a "license," which terminates and becomes void on the appointment of a receiver for the corporation. *McKinnon-Young Co. v. Stockton*, 44 South. 237, 247, 53 Fla. 734.

Where the right of way on which plaintiff's decedent was killed was not on or parallel to an adjoining street, but was entirely inclosed to prevent its use by the public, its use by the public in sometimes passing that way did not amount to a "license." *Louisville & N. R. Co. v. Redmon's Adm'r*, 91 S. W. 722, 724, 122 Ky. 385.

A paper, entitled "Application for Sewer Attachment," executed by a property owner and a sewer company, allowing the owner to attach his property to the main sewer pipe, sewer to be used at named rates per year, and reciting that the owner applies for sewer attachment as above, and agrees to comply with all the company's present and future rules relative to the use of sewer, is a "license" to connect. *Fogg v. Ocean City Sewer Co.*, 66 Atl. 609, 610, 72 N. J. Eq. 736.

#### **Covenant running with land distinguished**

An instrument giving a person the right to construct a drainage ditch through the land of the person executing the instrument, without consideration and not acknowledged and recorded, was a mere "license," revocable at the will of the licensor and his grantee, and not "a covenant running with the land." *Williams v. Beatty*, 122 S. W. 323, 326, 139 Mo. App. 167.

#### **Dedication distinguished**

Mere user by the public of a supposed street, though long continued, will be regarded as a mere "license," revocable at the

pleasure of the owner of the land, and not to constitute a dedication, where it does not appear that any public or private interests have been acquired on the faith of the supposed dedication of the land for a street. *Town of West Point v. Bland*, 56 S. E. 802, 805, 106 Va. 792 (quoting *Harris' Case*, 20 Grat. [60 Va.] 840; *Talbott v. Richmond & D. R. Co.*, 31 Grat. [72 Va.] 688, 689).

#### **Easement distinguished**

Irrevocable license as easement, see Easement.

With reference to real estate, "license" is a permission or authority to do a particular act or series of acts on the land of another without possessing any estate therein. So, with reference to personal property, "license" implies and carries the power to do some act upon or in reference to or to do something with the property of another. Herein it differs from an easement. The word "easement" always implies an interest in the land. *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 188 (citing 5 Words and Phrases, p. 4133).

A "license" is an authority given to do some act or acts on the land of another without giving any estate in the land itself. It differs from an easement in that the latter is a permanent interest with a right at all times to enter and enjoy it, while the continuance of the former depends on the will of the person who has created it. There is a distinction between an easement and a license, although in some cases it is difficult to see a substantial difference between them. An easement is a privilege in land founded upon a deed or other writing or upon prescription. It is a permanent interest in another's land with the right to enjoy it fully and without objection. It may attach to the land and pass with the dominant tenement as an appurtenant thereto. *Asher v. Johnson*, 82 S. W. 300, 301, 118 Ky. 702 (quoting 5 Lawson, Rights, Rem. & Pr. § 2668).

A "license" is a permission to do some act or series of acts on the land of the licensor, without having a permanent interest in the land, and is distinguished from an "easement" in that an easement is a right with reference to certain land conferring on the owner of the easement a permanent interest in the land; the word "permanent," being used not in the sense of perpetual, but as relating to a specific period. *Borough Bill Posting Co. v. Levy*, 129 N. Y. Supp. 740, 742, 144 App. Div. 784.

A "license" is distinguished from an easement in that a license is an authority to enter on land, but confers no interest in the estate; it is generally granted by parol, and may be revoked by the licensor at pleasure, and, being a personal privilege, is not assignable, and usually amounts to an excuse for what would otherwise be a trespass, while an easement confers an interest in the land



and invests the owner with privileges that he cannot be deprived of at the mere will or wish of the proprietor of the servient estate. *Rittenhouse v. Swango* (Ky.) 97 S. W. 743, 744 (citing *Wilkins v. Irvine*, 33 Ohio St. 138).

A "license" in respect of real property is authority to do a particular act or series of acts on the land of another without possessing an estate or interest therein, while an easement always implies an interest in the land involving two distinct elements, a dominant tenement to which the right is appurtenant, and a servient tenement upon which the servitude is imposed; but a license is in the nature of a personal privilege, which may be revoked before any rights have been asserted under it, or money expended on the faith thereof. Where an easement is granted specifically or by language from which such an interest is implied under settled rules of construction, the covenant will be enforced accordingly, but, where the language used is of doubtful meaning, it is for the court to construe the grant and determine whether it is of a permanent interest running with the land, or only a personal privilege affecting the rights of the parties. *Lehigh & N. E. R. Co. v. Bangor & P. Ry. Co.*, 77 Atl. 552, 553, 228 Pa. 350.

A permission, given without consideration by an owner for the use by a township of his land for the discharge across his land of the surplus water of an artesian well sunk by the township on its land for irrigation purposes for the inhabitants of the township, and not given in the form of a grant or conveyance in writing, is a mere license, subject to revocation by the owner or his grantee; a "license," in real estate, being an authority to do a particular act on the land of another without possessing any estate therein, and being founded in personal confidence, revocable at will; and an "easement" being a privilege in land, without profit, existing distinct from the ownership of the land, founded on a grant in writing, within the statute of frauds (Civ. Code, § 1238). *Butz v. Richland Tp.*, 134 N. W. 895, 898, 28 S. D. 442.

#### As incumbrance

See Incumbrence.

#### Invitation distinguished

There is a clear distinction between a "license" and an "invitation" to enter premises, and an equally clear distinction as to the duty of the owner in the two cases. An owner owes to a licensee no duty as to the condition of the premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril or willfully cause him harm, while to one invited he is under obligation for reasonable security for the purposes of the invitation. Mere permission to enter creates the relation of licensee. *Mandeville Mills v. Dale*, 58 S. E. 1060-1062, 2 Ga. App. 607 (quoting and adopting *Beehler v. Daniels*, 29 Atl. 6, 18 R. I.

563, 565, 27 L. R. A. 512, 49 Am. St. Rep. 790).

As respects the question whether a person is on premises as a licensee or by invitation, "invitation is inferred where there is a common interest or mutual advantage, while 'license' is inferred where the object is the mere pleasure or benefit of the person using it." *Southern R. in Kentucky v. Goddard*, 89 S. W. 875, 876, 121 Ky. 567, 12 Ann. Cas. 116 (quoting and adopting distinction stated in 1 Whart. Neg. § 849).

A "licensee" who goes on the premises of another by that other's invitation and for that other's purposes is an "invitee," and the duty to take ordinary care to prevent injury is at once raised, and the word "invitation," in the rule, covers and includes in it, enticement, allurement, and inducement if the case holds such features, and the invitation may also be implied by a dedication, or it may arise from known customary use, or it may be implied by any state of facts on which it naturally and reasonably arises. Where a proprietor of a store invited plaintiff to come to the store to advise him in a business transaction, and plaintiff, on reaching the store, found the proprietor busy, and while waiting, as he was required to do, he asked permission to go to the basement to a closet, and permission was granted, and while going he fell into an unguarded pit in the basement, plaintiff was on the premises in response to the proprietor's invitation and was not a bare licensee at the time, and the proprietor owed him the duty of exercising ordinary care for his protection. *Glaser v. Rothschild*, 120 S. W. 1, 3, 221 Mo. 180, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576.

"It is sometimes difficult to determine whether the circumstances make a case of 'invitation,' in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a "license" is inferred where the object is the mutual pleasure or benefit of the person using it.'" Defendant operated a railroad to the summit of Pikes Peak and leased certain buildings to H. for a hotel for 25 per cent. of H.'s gross receipts. The hotel was higher than the station platform, and a retaining wall protected the platform from loose stones which might roll down the side of the mountain. The wall was ascended by a flight of steps, and the buildings were located 16 feet from the top thereof. Plaintiff arrived at the hotel at about 10 o'clock p. m., and, after being informed that the beds were all full, he obtained an employe's bed. Later in the night he went out of doors for a private purpose and, not keeping within the light reflection from the house, stepped off the retaining

wall and was injured. Held, that plaintiff was not an invited guest of the railroad company, but was at most a mere licensee thereof, as to whom it owed no active duty to light or rail the wall. *Watson v. Manitou & Pikes Peak Ry. Co.*, 92 Pac. 17, 19, 41 Colo. 138, 17 L. R. A. (N. S.) 916.

An implied "invitation" to use dangerous premises, as distinguished from a mere "license," arises when a benefit accrues to the owner from such use, or when the use is in the interest of both parties, or is connected with the owner's business. *Cleveland, C., C. & St. L. R. Co. v. Powers*, 88 N. E. 1073, 1077, 173 Ind. 105.

#### Lease distinguished

The difference between a license and a lease is that a lease gives to the tenant the right of possession against the world, while a license creates no interest in the land, but is simply the authority or power to use it in some specific way. *Joplin Supply Co. v. West*, 130 S. W. 156, 161, 149 Mo. App. 78.

A license in respect to real estate is an authority to do a particular act or series of acts on the land of another without possessing an estate therein. The test to determine whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive use of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, the question to be determined by a construction of the instrument. *Shaw v. Caldwell*, 115 Pac. 941, 943, 16 Cal. App. 1.

The test to determine whether an agreement for the use of real estate is a "lease" or a "license" is whether the contract gives exclusive possession of the premises against the world, including the owner, in which case it is a lease, or whether it merely confers a license to occupy under the owner. An instrument by which the owner of premises let to defendant "his ice business and privileges in \* \* \* with the use and benefit of his icehouses," for a term ending on a certain date, gave defendant the exclusive possession of, and the entire beneficial interest in, the icehouses and the land under them, so as to constitute a lease of the premises, instead of a mere contract for their use as licensee under the owner. *Roberts v. Lynn Ice Co.*, 73 N. E. 523, 524, 187 Mass. 402.

A contract whereby it was agreed that plaintiff should have the exclusive privilege of the public stenographer's office in a certain hotel, plaintiff agreeing to pay the rent promptly each month in advance for the exclusive privilege of the public stenographer's office, and to do private correspondence for the hotel management, and to furnish competent stenographers for this service, was not a lease, but a mere agreement to allow plaintiff to carry on business in the hotel. *Hess*

*v. Roberts*, 106 N. Y. Supp. 894, 895, 124 App. Div. 328.

An agreement whereby tenants of a store building, leased for a plumbing business, allowed a third person to occupy part of it in conducting an electrical supply business, was a "lease," though called a "license" by them. *Denecke v. Henry F. Miller & Son*, 119 N. W. 380, 384, 142 Iowa, 486, 19 Ann. Cas. 949.

An instrument by which defendant contracted to "let," and plaintiff to "take," the right to maintain, at a race park, three stands for sale of candies, said right being exclusive for said business within said park, also the storeroom under the tracks, and one of said stands, not to exceed a certain size, to be in the main pavilion, and providing the period of "letting," and the amount and times of payment of the "rent," instead of being a "license," is a "lease," affecting defendant in the exclusive use of the land, so that plaintiff, having paid the rent, can recover no part of it, though the park is destroyed by fire before the end of the period of letting. *Mehlman v. Atlantic Amusement Co.*, 119 N. Y. Supp. 222, 223, 65 Misc. Rep. 25.

A contract to let to plaintiffs the exclusive news, confectionery, view, and checking privileges on defendant's steamers for certain specified seasons, though denominated a lease, was not a "lease," but a "license." *Nash v. Thousand Island Steamboat Co.*, 108 N. Y. Supp. 336, 342, 123 App. Div. 148.

An instrument granting, demising, and leasing certain land for the purpose solely of mining and operating for oil, gas, and other minerals, laying pipe lines, building tanks, and structures to take care of the products is a lease conveying an interest in the land, and not merely a "license" to enter and operate for oil or gas. *Barnsdall v. Bradford Gas Co.*, 74 Atl. 207, 225 Pa. 338, 26 L. R. A. (N. S.) 614.

An instrument by which the owner of land therein described grants to another all the gas and oil under it, with the exclusive right to enter thereon at all times to drill and operate for oil or gas, etc., and provides for the time within which the various wells shall be completed, with a stipulated monthly rental for each well not finished on time, and that each location shall consist of ten acres more or less, and that no well shall occupy more than one acre is not a "lease," as leases are usually understood, but a mere grant of an exclusive right to enter and explore for oil and gas, and prosecute such business, occupying no more land than is needed for that purpose, not more than one acre to a well. *Stahl v. Illinois Oil Co.*, 90 N. E. 632, 633, 45 Ind. App. 211.

A contract simply giving a right to take ore from a mine, no estate being granted, confers a mere "license," and licensee ac-

quires no right to the ore until separated from the freehold; but an instrument demising land for mining purposes, for a designated term of years, at a fixed rent; and giving the right to erect all necessary buildings, is a "lease," not merely a mining "license." *Barnsdall v. Bradford Gas Co.*, 74 Atl. 207, 208, 225 Pa. 338, 26 L. R. A. (N. S.) 614.

**As office**

See Office.

**As a revocable authority**

A "license" is a mere authority to use real property, and hence is revocable. *United Merchants' Realty & Improvement Co. v. American Billposting Co.*, 128 N. Y. Supp. 666, 667, 71 Misc. Rep. 457.

A deed whereby, for value, one grants the right to lay pipes to convey petroleum, together with all rights and privileges necessary to the enjoyment of the grant and to the removal of the pipes, the pipes to be laid within ten feet of the line of the grantor's property, does not grant a "license" which may be revoked at the grantor's will. *Standard Oil Co. v. Buchi*, 66 Atl. 427, 429, 72 N. J. Eq. 492.

**Patents**

A grant of any interest in or right under a patent, less than the exclusive rights as to making, using, and vending the same, is a "license." *Paulus v. M. M. Buck Mfg. Co.*, 129 Fed. 594-596, 64 C. C. A. 162.

**Same—Assignment distinguished**

A conveyance by a patentee to another of the sole and exclusive right and license to use and to build for use within territory described the machines of the patent, with certain express exceptions, and also reserving to the patentee the right to build machines in said territory for use outside thereof, is a mere "license," and not an "assignment." *Bowers v. Atlantic, Gulf & Pacific Co.*, 162 Fed. 895, 902.

A patent secures the exclusive right to make, use, and vend the invention it protects. A grant of all these exclusive rights throughout the United States or a specified part thereof is an assignment of an interest in the patent by whatever name it is designated. A grant of any interest in or right under a patent, less than these, is a "license." *Paulus v. M. M. Buck Mfg. Co.*, 129 Fed. 594, 596, 64 C. C. A. 162.

**LICENSE (Governmental Regulation)**

See Sale Without a License.

Application for as civil action, see Civil Action—Case—Suit—etc.

Licenses of all kinds, see All.

Order granting license as judgment, see Judgment.

Renewal license, see Renewal.

Requiring license to sell liquor as taking property, see Taking (In Eminent Domain).

"The popular understanding of the word 'license' undoubtedly is a permission to do something which, without the license, would not be allowable. The object of the license is to confer a right that does not exist without the license." *Commonwealth v. Central Hotel Co.*, 90 S. W. 565, 121 Ky. 846, 12 Ann. Cas. 172 (quoting and adopting definition in *Standard Oil Co. v. Commonwealth*, 82 S. W. 1021, 119 Ky. 75).

A "license" is a mere permit to do something that without it would be unlawful. *Littleton v. Burgess*, 82 Pac. 864, 866, 14 Wyo. 173, 2 L. R. A. (N. S.) 631.

A "license" confers the right to do that which, without the license, would be unlawful. *Board of Com'rs of Jefferson County v. Mayr*, 74 Pac. 458, 81 Colo. 173 (citing *People v. Raima*, 39 Pac. 341, 20 Colo. 489); *Schwartz v. People*, 104 Pac. 92, 103, 46 Colo. 239 (quoting and adopting definition in *People v. Raima*, 39 Pac. 341, 20 Colo. 489).

"The word 'license' means permission or authority, and a license to do any particular thing is a permission or authority to do that thing, and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all rights which the grantor can transfer to do what is in the terms of the license." *Ryman Steamboat Line v. Commonwealth*, 101 S. W. 403, 404, 125 Ky. 253, 10 L. R. A. (N. S.) 1187 (citing *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 1, 6 L. Ed. 23).

The law dictionary and lexicographers concur in saying that a "license" is a "permit" to do a certain thing, and it is clear that these words are used synonymously in the act in Sess. Laws 1895, p. 221, c. 96, giving municipal corporations power to "license" the sale of liquor and grant "permits" to druggists for the sale of liquor for medicinal uses, and the contention that the license to sell liquors and the permit were distinct things was untenable. *Parsons v. People*, 76 Pac. 666, 669, 82 Colo. 221.

A "license" is a privilege granted by the state directly or indirectly through the municipality usually upon payment of the consideration, and confers authority to do something which would be illegal if done without a license. License fees may be imposed for regulation, revenue, or prohibition. *Metropolis Theater Co. v. City of Chicago*, 92 N. E. 597, 599, 246 Ill. 20.

"Power to 'license,' conferred on a municipality, is generally understood to mean power to regulate by prescribing the conditions or compliance with which the thing shall be permitted." *Village of St. Anthony v. Brandon*, 77 Pac. 322, 325, 10 Idaho, 205 (quoting Cent. Dict.).

"A 'license' is a permit to do business paid for in advance, and, in the nature of

things, all questions pertaining to its issuance should be determined before the privilege is exercised and as early in the current tax year as is practicable. Like an assessment, a license apportionment once made and returned cannot be changed without express legislative authority." A social club is not subject to license taxation, except in so far as it engages in the sale of intoxicating liquors to its members. Where such club has for five successive years paid license taxes based on sworn returns, which were accepted as correct by the taxing officers, no action will lie in behalf of the state to recover additional license taxes for the same year. *State v. New Orleans Chess, Checkers & Whist Club*, 40 South. 526, 528, 116 La. 46.

A tax on the net receipts of an insurance company is not a "license" to do business. *People v. Cosmopolitan Fire Ins. Co.*, 92 N. E. 922, 927, 246 Ill. 442.

A "license to practice medicine" is a privilege or franchise granted by the government, and a refusal to grant such franchise, whatever the reason may be for such refusal, does not constitute a penalty. *Morse v. State Board of Medical Examiners*, 122 S. W. 446, 448, 57 Tex. Civ. App. 93.

A "license" to sell intoxicating liquors is the authority of the state to carry on the business, and Act March 21, 1906, making it unlawful for any person to bring into any county, etc., where the sale of intoxicating liquors is prohibited, or may be prohibited, any intoxicating liquors, does not apply to liquor destined for one whose "license" to sell liquor has not expired. *Sheehan v. Louisville & N. R. Co.*, 101 S. W. 380, 381, 125 Ky. 478.

Act March 12, 1909 (100 Ohio Laws, p. 89), providing that no person shall engage in the sale of intoxicating liquors without having properly answered certain specified questions, was not objectionable as thereby licensing those who answered the questions correctly in violation of Const. Schedule, § 18, providing that no license to traffic in intoxicating liquors shall be granted in the state, but that the General Assembly may by law provide against the evils resulting therefrom; the term "license" as so used meaning permission to do something which without the license would not be allowed, to confer a right that did not exist without it, the granting of a special privilege to one or more persons not enjoyed by citizens generally, or the class to which the license belongs. *Bloomfield v. State*, 99 N. E. 309, 310, 86 Ohio St. 253, 41 L. R. A. (N. S.) 726, Ann. Cas. 1913D, 629 (citing 5 Words and Phrases, p. 4133).

The word "license," as used in an ordinance requiring every person and corporation erecting and using poles on the public streets of a city to pay as a license therefor a certain sum for each pole, means the sum

paid for permission to erect or maintain poles in the streets and alleys of the city, for the purpose of defraying the expenses of regulating and controlling the use of the same under the police power of the city. *City of Ft. Smith v. Hunt*, 82 S. W. 103, 105, 72 Ark. 556, 66 L. R. A. 238, 105 Am. St. Rep. 51.

An ordinance, requiring a fee to be paid by milk and meat dealers to the inspector of milk and meats solely to defray the cost of inspection, is not in the nature of a "license" as that word is used in Acts 1911, p. 347, § 1, making it unlawful for any city council to impose a tax or license upon any person in the selling of any farm products including meats; the statute being intended to prohibit the issuance of a license as a condition to carrying on the business. *Carpenter v. City of Little Rock*, 142 S. W. 162, 164, 101 Ark. 238.

Acts 1905, p. 253, c. 129, authorizing any city to tax, license, or regulate junk stores, etc., authorizes the enactment of ordinances regulating the general business of junk dealers, and not merely the places where junk is dealt in, in view of the purposes of the act and the granting of authority to license; a "license" being a privilege granted to a person, and not to an inanimate object, to pursue some occupation or exercise some right declared unlawful, except upon compliance with such conditions. *Grossman v. City of Indianapolis*, 88 N. E. 945, 947, 173 Ind. 157.

The \$2 on each \$100 of premiums paid by foreign insurance companies doing business in the state, which is required to be paid into the state treasury, is no part of the 22 cents on each \$100 valuation of property or corporate franchises directed to be assessed for taxation for the school fund by Ky. St. 1903, § 4370, subd. 5, nor is it a "fine," "forfeiture," or "license," within subdivision 6, providing that a portion of such revenues be paid into the school fund. *Fuqua v. Hager*, 84 S. W. 325, 119 Ky. 407.

The word "licenses," as used in the Illinois act relating to the Chicago City Railways, and providing that any deeds of transfers of rights, privileges, or franchises between railway corporations, or any two of them, and all contracts, stipulations, licenses, and undertakings made, entered into, or given, and as made or amended by and between the common council of the city and any one or more of the railway corporations respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of the city, etc., refers to the designation by the council of the streets to be occupied by the companies. *Govin v. City of Chicago*, 132 Fed. 848, 857.

Where a city ordinance regulating automobiles required registration and numbering thereof at a cost to the owner of \$1 to cover the value of figures furnished by the city to form the number, such provisions are not ob-

jectionable as a "license"; it being at most a mere means of regulation and not a license for revenue. The court said: "If the provision for registration and numbering, which involved no discrimination, and requires the payment of nothing more than is necessary to pay for the number which the municipality furnishes, can be regarded as a license (for conflicting definitions of 'license,' see Cooley, Tax. [3d Ed.] p. 1137; *Adler v. Whitbeck*, 9 N. E. 672, 44 Ohio St. 539) it is not a license for the purpose of raising revenue. If it were, it might well be contended that it did not pass as an incident to the power to regulate. See Cooley, Tax. (3d Ed.) p. 1141; *The Laundry License Case*, 22 Fed. 703. It is a license (if a license at all) as a mere means of regulation; indeed, we might say, as already shown, as a necessary means of regulation. This proposition is self-evident, viz., that the grant of authority to accomplish a certain purpose carries with it authority to use any proper and lawful means without which that purpose cannot be accomplished. If, therefore, the speed of automobiles cannot be effectually regulated without licensing them, the grant of the power to regulate confers upon the city power to license, unless some other provision of law forbids the exercise of that power." *People v. Schneider*, 103 N. W. 172, 173, 139 Mich. 673, 69 L. R. A. 345, 5 Ann. Cas. 790.

*Buffalo City Charter* (Laws 1891, p. 187, c. 105, § 17, subd. 6, as amended by Laws 1904, p. 83, c. 31), empowering the city to enact an ordinance imposing a "tax" on automobiles "for the privilege" of operating the same on its streets, and to prohibit such use in case of nonpayment of the tax, and to provide a penalty for violation of the ordinance, is repealed by a later act, the Motor Vehicle Law (Laws 1904, p. 1316, c. 538, § 4, subd. 4), providing that the city shall have no power to pass, maintain, or enforce ordinances requiring from owners of automobiles "licenses" or permits to use the streets, or prohibiting them from the free use thereof; a tax for the privilege of operating automobiles on the streets being but a license. *City of Buffalo v. Lewis*, 108 N. Y. Supp. 450, 123 App. Div. 163.

A city ordinance provided that it should be unlawful for any person to keep any saloon where intoxicating liquors were sold or drunk as a beverage without first paying a license fee of \$300 per annum, and that the city treasurer, on payment of the fee, should give a receipt for the amount paid, which should constitute a license for the keeping of a saloon. Held, that the ordinance applied only to saloons where intoxicating liquors were sold, and hence was an attempt to "license" the sale of such liquors contrary to Comp. Laws 1897, § 3107, giving such city authority to license all taverns and houses of public entertainment, saloons, restaurants, and eating houses, but providing that such

act should not authorize the licensing of the sale of intoxicating liquors. *Fitzpatrick v. Weaver*, 111 N. W. 163, 164, 147 Mich. 382.

#### As a contract

See Contract.

#### As written document

The word "license," in Gen. St. 1902, tit. 16, entitled "Intoxicating Liquors," providing for the issuance of liquor licenses, and prohibiting the sale of liquor without a license, etc., signifies an intangible right granted to the licensee and signifies the writing signed by the county commissioners, which is the instrument, and evidence of that grant, but the grant of such right can only be had by writing signed by the county commissioners in which the town and the particular building in which the sales licensed are to be made and person who is licensed to make them, as provided by sections 2669, 2672, 2675. *Connecticut Breweries Co. v. Murphy*, 70 Atl. 450, 452, 81 Conn. 145.

The word "license," as used in Act March 11, 1903, relating to the appropriation of public waters, and regulating the issuance of a certificate and license after inspection by the state engineer, applies to the paper to be issued on proof of application to beneficial use of the waters. *Idaho Power & Transportation Co. v. Stephenson*, 101 Pac. 821, 823, 16 Idaho, 418.

The word "license," in Acts 1905, p. 492, § 1, providing that no person shall be eligible to the office of county superintendent of schools unless he shall hold a 36 months' license, a 60 months' license, a life or professional license to teach in the schools of the state, means the written document by which permission or authority has been granted to the holder thereof to teach in the common schools for the period of time required by the act, and such a document, in the absence of fraud affecting it, is conclusive evidence that the person to whom it is issued has the legal qualifications of a teacher. *State ex rel. Benham v. Bradt*, 84 N. E. 1084, 1087, 170 Ind. 480 (citing *Elmore v. Overton*, 4 N. E. 197, 104 Ind. 548, 54 Am. St. Rep. 343).

#### As lawful act

A "license" to carry on a business or trade has been defined to be an official permit to carry on the same, or perform other acts forbidden by law except to persons obtaining such permit. *Bouvier's Law Dictionary*. *City of Savannah v. Cooper*, 63 S. E. 138, 140, 131 Ga. 670.

#### Franchise distinguished

Permission given by a city ordinance for the exercise of a corporate franchise within the city is a "license" and not a franchise. *People ex rel. Fitzhenry v. Union Gas & Electric Co.*, 98 N. E. 768, 771, 254 Ill. 395.

The right to construct a street railway within any municipality comes from the state as a "franchise," while the power to

consent and designate the streets to be occupied comes from the municipality as a "license" or contract right. *Potter v. Calumet Electric St. R. Co.*, 158 Fed. 521, 527 (citing *Chicago City Ry. Co. v. People ex rel. Story*, 73 Ill. 541).

A gas "franchise" is property, a vested right protected by the Constitution, while a "license" is a mere personal privilege, and revocable, except in rare instances and under peculiar conditions. *Elizabeth City v. Banks*, 64 S. E. 189, 192, 150 N. C. 407, 22 L. R. A. (N. S.) 925.

A "franchise" is a privilege which emanates from the sovereign power of the state or government. A power conferred upon a railroad company by ordinance to locate and maintain a railroad in the streets of a city is a "license," which, after the road is built, may be irrevocable, but such ordinance does not create or confer on the railroad company constructing the railroad in the street a "franchise." The "license" granted by the ordinance is no more a "franchise" than would be a grant of right of way by a private citizen to the company to construct its road over his lands, and it is as competent for the city as for a private owner to extend the time of performance or to amend, modify, or annul the contract by mutual agreement. *City of Chicago v. Rothschild & Co.*, 72 N. E. 698, 699, 212 Ill. 590 (citing *Chicago City Ry. Co. v. People ex rel. Story*, 73 Ill. 541, 547; *Metropolitan City Ry. Co. v. Chicago, W. D. Ry. Co.*, 87 Ill. 317; *Board of Trade of Chicago v. People ex rel. Sturges*, 91 Ill. 80; *Mills v. Parlin*, 106 Ill. 60; *Chicago Municipal Gas-light & Fuel Co. v. Town of Lake*, 22 N. E. 616, 130 Ill. 42; *City of Belleville v. Citizens' Horse Ry. Co.*, 38 N. E. 584, 152 Ill. 171, 26 L. R. A. 681; *People ex rel. City of Pontiac v. Central Union Tel. Co.*, 61 N. E. 428, 192 Ill. 307, 85 Am. St. Rep. 338; *Rostad v. Chicago Suburban Water & Light Co.*, 71 N. E. 978, 211 Ill. 248; *Davis v. Mayor, etc., of City of New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Bank of Augusta v. Earle*, 13 Pet. [38 U. S.] 579, 10 L. Ed. 274; *City of Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Morgan v. Louisiana*, 98 U. S. 217, 23 L. Ed. 860).

A right not essential to the general purpose of a grantee, and such that a private party might grant over his property, such as a revocable permission to occupy a portion of some public ground, highway, or street, is a "license," and not a franchise. *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, 10, 87 C. C. A. 619.

The grant by a municipality of a franchise to use its streets is the exercise by delegation of a power which resides in the state, and which is by its nature governmental; hence, if grounds for forfeiture arise, the state may alone enforce it, and may alone waive it; for a franchise may be said

to be a grant from the state to a corporation of authority to occupy the city streets, "licenses" to be the designation by the city council of the streets to be occupied, and "contracts" the stipulated arrangements between the companies and the city as to the manner of occupancy. *State on Inf. of Jones v. West End Light & Power Co.*, 152 S. W. 67, 75, 246 Mo. 618.

#### Invalid license

A dramshop license issued without compliance with an ordinance, requiring the application to be signed by a majority of the property owners according to frontage on both sides of the street in the block where the dramshop is to be kept, or by a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block on which the dramshop has its entrance, is invalid, and a dramshop, operated under such a license is "operated without a license" within *Hurd's Rev. St.* 1909, c. 43, § 7, providing that an unlicensed dramshop shall be a nuisance. *Hoyt v. McLaughlin*, 95 N. E. 464, 467, 250 Ill. 442.

#### As a personal trust or privilege

A license is a grant of special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by a class of citizens to which the licensee belongs, and grants a permission to do something which, without a license, is not allowable. *State v. Parker Distilling Co.*, 139 S. W. 453, 466, 236 Mo. 219, 237 Mo. 103 (quoting 5 Words and Phrases, p. 4137).

"A 'license' to deal in intoxicating liquors is in the nature of a personal trust, and the applicant for such privilege must be a person able, willing, and competent to carry out such trust, and not delegate it entirely to others, whose character may not be such as the law requires of the licensee." In *re Krug*, 101 N. W. 242, 244, 72 Neb. 576 (quoting and adopting definition in *Watkins v. Grieser*, 66 Pac. 332, 11 Okl. 302).

A "license" for the sale of liquor is but a personal privilege and not assignable except as authorized by the Legislature and in the mode therein prescribed. Though a trustee in bankruptcy cannot sell a retail liquor license issued to a bankrupt, he can sell the unexpired lease of a licensed saloon with the furniture and fixtures, on condition that the license shall be transferred to the purchaser by the license court, and, where the purchaser abandons his purchase without any attempt to secure a transfer of the license, he is liable for loss on resale. *Snyder v. Bougher*, 63 Atl. 893, 894, 214 Pa. 453 (citing in support of definition, *Blumenthal's Petition*, 18 Atl. 395, 125 Pa. 412).

A "license" to sell intoxicating liquor is a personal privilege, which may be valuable as property, in a certain sense, for the personal use of the holder, but which is not assignable or transferable by him in any way.

Tracy v. Ginzberg, 75 N. E. 637, 638, 189 Mass. 280, 285.

**As a mere receipt**

Under Pen. Code 1895, art. 112, penalizing the pursuit of a profession without a "license" therefor, a receipt for the occupation tax is, in the absence of a statutory provision as to what the license shall contain, a "license." *Fonts v. State*, 101 S. W. 223, 224, 51 Tex. Cr. R. 3.

The word "license," in the Chicago Wheel Tax Ordinance, which requires owners of automobiles to obtain a license or permit to use a vehicle in the city in addition to the license or permit obtained from the Secretary of State, as required by the Motor Vehicle Law, is used in the sense of tax, and the issuance of the license thereunder amounts to no more than the giving of a receipt showing that the annual tax imposed by the ordinance has been paid. *Ayres v. City of Chicago*, 87 N. E. 1073, 1076, 239 Ill. 237.

Under the statutes of Alabama all occupation taxes are evidenced by a receipt, which is called a "license," and the fact that an act imposing a tax on the occupation of an emigrant agent called the receipt evidencing the payment thereof a license did not render it any less a tax on the occupation for revenue. *Kendrick v. State*, 39 South. 203, 204, 142 Ala. 43.

**Assignment distinguished**

See Assignment.

**As property**

See Property.

**Regulate distinguished**

To "license" means to permit, to give authority, to conduct or carry on. It differs from "regulate" in that regulate means to prescribe the manner in which a thing may be conducted. *Pacific University v. Johnson*, 84 Pac. 704, 706, 47 Or. 448.

**Tax distinguished**

See Tax—Taxation.

**As vested right**

See Vested Right.

**LICENSE FEE**

A "license fee" is a sum demanded of an individual in return for the grant of a privilege which he did not previously possess, and is not a tax, as ordinarily understood, as a contribution demanded by a sovereign from his subjects in return for his protection. The power to enforce the terms of a treaty with the Choctaw and Chickasaw Indians that no person shall expose goods for sale without a permit is a duty imposed on the executive department of the government, and in the discharge of that duty it is not within the jurisdiction of the courts to enjoin such action. *Zevely v. Weimer*, 82 S. W. 941, 943, 5 Ind. T. 646.

"A 'license fee' is understood to be a charge for the privilege of carrying on a business or occupation, and is not the equivalent or in lieu of a property tax." The contract arrangements for the payment to a municipality of a "license fee" on each street car, modified as to the amount of such fees under the authority of a statute accepted by the street railway company, stating that such fees should be taken "in full satisfaction for the use of the streets or avenues," does not exempt the company from the tax imposed, under Laws N. Y. 1899, c. 712, on its franchise. *People of State of New York ex rel. Brooklyn City R. Co. v. State Board of Tax Com'rs*, 25 Sup. Ct. 713, 714, 199 U. S. 48, 50 L. Ed. 79.

The registration fee of \$2, required by St. 1903, p. 507, c. 473, § 1, providing for the registration of automobiles, is a "license fee," and not a tax for revenue. *Commonwealth v. Boyd*, 74 N. E. 255, 256, 188 Mass. 79, 108 Am. St. Rep. 464.

A tax on the gross receipts of a street railroad company imposed as a condition to the exercise of the special privileges granted it is not a property tax but is a "license fee." *North Jersey St. Ry. Co. v. Jersey City*, 67 Atl. 33, 34, 74 N. J. Law, 761.

Under Tax Law, § 46, providing that where a city has assessed a tax upon the special franchise of a corporation, and it appears that the corporation has paid to the city any sum based on a percentage of gross earnings or other income or any license fee or any sum of money on account of such special franchise, which payment was in the nature of a tax, such payment shall be deducted from the franchise tax assessed, where a subway company, under the conditions of its franchise, was compelled to furnish free, to the city, space in its subways, the giving of this free space was not a "license fee"; the term "license fee" not meaning anything else than a payment in cash. *Consolidated Telegraph & Electrical Subway Co. v. Metz*, 104 N. Y. Supp. 922, 923, 119 App. Div. 835.

**LICENSE, REGULATE, AND RESTRAIN**

See, also, Regulate and Restrain.

The grant of power to "license, regulate, and restrain" shops for the sale of intoxicating liquors is sufficiently broad to warrant a city ordinance requiring applicants for such license to procure the written assent of a majority of the property owners in the immediate district. *City of Baton Rouge v. Butler*, 42 South. 650, 653, 118 La. 73.

**LICENSE, REGULATE, AND TAX**

The new charter of the city of Baltimore (section 6), authorizing the mayor and council "to license, tax, and regulate all busi-

nesses, trades, avocations or professions," conferred on the city the power to impose a charge on commission merchants for the privilege of selling in the city market; such charge being a tax for revenue, and not a license or regulation tax. *Meushaw v. State*, 71 Atl. 457, 459, 109 Md. 84.

# LICENSE TAX

As tax, see Tax—Taxation.

A "license tax" is one imposed on the privilege of exercising certain callings, professions, and avocations, and, when collected, is a part of the general funds of a city. *State ex rel. Smith v. Berryman*, 127 S. W. 129, 132, 142 Mo. App. 373.

Every "license tax" is imposed for raising revenue or as a police regulation, or for both purposes. *Johnson v. City of Great Falls*, 99 Pac. 1059, 1060, 38 Mont. 369, 16 Ann. Cas. 974.

A "license tax" is "either a license, strictly so called, imposed in the exercise of ordinary police power of the state, or it is a tax laid in the exercise of the power of taxation. *City Council of Montgomery v. Kelly*, 38 South. 67, 68, 142 Ala. 552, 70 L. R. A. 209, 110 Am. St. Rep. 43 (citing *Tied. Lim. Police Power*).

The words "license tax," used with reference to corporations exclusively, mean no more necessarily than a charge of some kind imposed upon them solely for their corporate privilege. *Kaiser Land & Fruit Co. v. Curry*, 103 Pac. 341, 344, 349, 155 Cal. 638.

The tax authorized by Sess. Laws 1902, p. 73, c. 3, § 65, called a "license tax," is, in form of an excise, a tax on the business of foreign corporations levied for the purpose of state revenue, and is not a property tax, and so does not violate the uniformity clause of the Constitution. *American Smelting & Refining Co. v. People ex rel. Lindsley*, 82 Pac. 531, 533, 34 Colo. 240.

The tax imposed by Act Ky. March 28, 1906, upon persons engaged in compounding, rectifying, adulterating, or blending distilled spirits, is a "license or occupation tax," and not a property tax. *Brown-Forman Co. v. Commonwealth of Kentucky*, 30 Sup. Ct. 578, 580, 217 U. S. 563, 54 L. Ed. 883.

An ordinance enacted by the board of supervisors of the city and county of San Francisco is entitled "An ordinance imposing a license for the purpose of regulation upon persons \* \* \* selling \* \* \* malt or fermented liquors \* \* \* in quantities of one quart or more, less than five gallons, when the same is contained in sealed packages, and not to be drunk on the premises where sold, \* \* \* requiring a permit therefor." The ordinance makes it unlawful to sell such liquors "without first having obtained a permit therefor from the board of police commissioners, and paying

the license fee herein provided"; requires any person doing such act to procure a license, paying therefor "a license fee of \$150 per annum"; requires application for renewals to be passed upon by the board of police commissioners, and declares that the ordinance and "the license herein imposed" are enacted to regulate the business described. The charter of the city and county of San Francisco (article 2, c. 2, § 1) authorizes the board of supervisors to make all necessary police regulations; and subdivision 15 authorizes it to impose "license taxes," but provides that no license taxes shall be imposed upon one who, at any fixed place of business, sells goods, etc., except such as require permits from the board of police commissioners, as provided in this charter. Held, that the ordinance was enacted solely for regulation, and not for revenue, and the license imposed was a "license tax" within subdivision 15, so that the board had no power to impose it, since, while a "tax," technically, only includes charges imposed for producing revenue, and not for purposes of regulation under the police power, the term "license tax," as used in the statutes and by the courts, includes license charges of every character, whether imposed for revenue or police regulations, or both. *John Rapp & Son v. Kiel*, 115 Pac. 651, 652, 159 Cal. 702.

# LICENSED

See Duly Licensed.

# LICENSEE

A "licensee" is one who goes onto the land of another for his own purposes only. *Williams v. Belmont Coal & Coke Co.*, 46 S. E. 802, 806, 55 W. Va. 84.

The terms "mere licensee" or "bare licensee" are often used as synonymous with "trespasser." *Pittsburgh, C. & St. L. R. Co. v. Simons (Ind.)* 76 N. E. 883, 886.

A "mere licensee" is one who is clothed with no right and to whom no invitation has been extended but who is upon the premises of another by permission or acquiescence. *Norfolk & W. Ry. Co. v. Denny's Adm'r*, 56 S. E. 321, 328, 106 Va. 383.

A person is a mere "licensee" where he was not on the premises by invitation expressed or implied, nor for any business connected with defendant nor in relation to any business for which the freight house in which he was injured was used, but went there of his own volition, uninvited, concerning a matter which was personal to himself in which the defendant had no interest. *Means v. Southern Cal. R. Co.*, 77 Pac. 1001, 1002, 144 Cal. 473, 1 Ann. Cas. 206.

A person is a "licensee" when he is on the land of others with their consent, expressed or implied. If a person is a licensee, he is rightfully on the landowners' premises,



and it cannot be found he is in fault when he shows he was exercising ordinary care. Consequently he may recover if it appears they failed to do what the ordinary man would have done to prevent an accident. *Brown v. Boston & M. R. R.*, 64 Atl. 194, 199, 73 N. H. 568.

Where plaintiff went on defendant's premises to transact private business with the defendant's employes, in which defendant had no interest, he was a mere "licensee," though defendant directed him to use the elevator in which he was injured; and, no active negligence being shown, he was not entitled to recover for injuries sustained in using the elevator. *Muench v. Heinemann*, 96 N. W. 800-802, 119 Wis. 441.

"In a strict and legal sense there is a well-defined distinction between a mere 'licensee' and one who goes upon the premises of another by invitation, express or implied. In a general sense, one upon the premises of another by invitation is a licensee, and, if sued for trespass, his defense would be leave and license of the owner; but, in a strict and somewhat technical sense, to go upon premises upon an implied invitation means more than a mere license." *Pauckner v. Wakem*, 83 N. E. 202, 204, 231 Ill. 276, 14 L. R. A. (N. S.) 1118.

The occupant of a stall in a public market is not necessarily a mere "licensee." *Swayze v. City of Monroe*, 40 South. 926, 928, 116 La. 643.

A newsboy who enters a stone quarry to sell papers, in his own interest or that of his employer, or who enters by permission to sell his papers, or to accommodate some workman who wishes to purchase a paper, is only a "licensee," as his business has no relation to the business of the proprietor, and it was not the duty of the proprietor to have the grounds reasonably safe for such licensee. *Norris v. Hugh Nawn Contracting Co.*, 91 N. E. 886, 887, 206 Mass. 58, 31 L. R. A. (N. S.) 623, 19 Ann. Cas. 244.

Where a complaint for injuries to plaintiff alleged that he was employed by defendants, and that defendants by their agent offered to convey plaintiff in a sleigh to his place of employment, which offer plaintiff accepted, and was injured by the negligent driving of such agent, plaintiff was not precluded by the complaint from proving that, at the time of the injury, the relationship existing between him and defendants was that of "licensor and licensee," and not that of master and servant. *Pigeon v. Lane*, 67 Atl. 886, 887, 80 Conn. 237, 11 Ann. Cas. 371.

Unless mainly imposed for revenue a license fee is not a tax, but the price paid for the privilege of exercising a franchise. Sums imposed in the regulation of the business of running vehicles for hire are license fees and not occupation taxes. *Ex parte Denny*, 129 S. W. 1115, 59 Tex. Cr. R. 579.

"A 'bare licensee' is one who enters upon the land of another simply without objection of the owner or by sufferance of the owner or occupier, whether such land be inclosed or uninclosed. Such bare licensee enters the land at his own risk, and if, while on such land, such bare licensee be injured by the negligence of the owner or occupant of such land, he has no right to recover." *Connell v. Keokuk Electric R. & Power Co.*, 109 N. W. 177, 178, 131 Iowa, 622.

A person accompanying passengers to assist them in entering a train, though not a passenger, is not a "bare licensee," as he has at least a tacit invitation of the carrier by virtue of the relation existing between the carrier and the passenger, and the carrier must exercise at least ordinary care to avoid injuring him by defective station facilities or approaches thereto. *Chesapeake & O. Ry. Co. v. Paris' Adm'r*, 59 S. E. 398, 399, 107 Va. 408.

A bare "licensee," barring wantonness or some form of intentional wrong or active negligence by the owner or occupier, takes the premises as he finds them, and mere permission involves leave and license but bestows no right to care. Where a proprietor of a store invited plaintiff to come to the store to advise him in a business transaction, and plaintiff, on reaching the store, found the proprietor busy, and while waiting, as he was required to do, he asked permission to go to the basement to a closet, and permission was granted, and while going he fell into an unguarded pit in the basement, plaintiff was on the premises in response to the proprietor's invitation and was not a bare licensee at the time, and the proprietor owed him the duty of exercising ordinary care for his protection. *Glaser v. Rothschild*, 120 S. W. 1, 3, 221 Mo. 180, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576.

A "licensee" of a patent is one who is not the owner of an interest in the patent, but who has, by contract, acquired a right to make, or use, or sell machines embodying the invention. *Hartman v. John D. Park & Sons Co.*, 145 Fed. 358, 368; *Cortelyou v. Charles Eneu Johnson & Co.*, 138 Fed. 110, 117 (quoting and adopting definition in *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, and citing *Gayler v. Wilder*, 10 How. [51 U. S.] 477, 13 L. Ed. 504; *Oliver v. Rumford Chemical Works*, 3 Sup. Ct. 61, 109 U. S. 75, 27 L. Ed. 862).

A club incorporated by Acts 1858, p. 121, c. 95, as amended as a social club, and maintaining a clubhouse in the city of Baltimore, and there furnishing to its members refreshment, including intoxicating liquors, and holding a license to sell liquors in the city of Baltimore, is a "licensee" under Pub. Loc. Laws Baltimore City, art. 4, relating to intoxicating liquors, and by virtue of Acts 1898,

p. 778, c. 246, and Acts 1906, p. 474, c. 278, is liable to the penalty prescribed by Baltimore City Charter, § 685, for selling liquor on Sunday, though the sale is made to its members. *State v. Maryland Club*, 66 Atl. 667, 669, 105 Md. 585.

"Licensee," as that term is used in connection with railway property, and the operation of railway trains, is one who goes upon the station grounds or tracks for purposes other than transportation by permission, either express or implied. Where the wife of a station agent was accustomed to assist her husband with the work in the station office, which was known to the officers of the road in charge of the division, and not objected to by them, she was a licensee, and the road was liable for injuries to her while so in the office, owing to the derailment of a train caused by running it at a dangerous speed over a defective track. *Croft v. Chicago, R. I. & P. R. Co.*, 108 N. W. 1053, 1056, 132 Iowa, 687.

The relation of carrier and passenger is one of contract. There must be an agreement by the carrier and generally a consideration paid by or for the passenger to bring the relation into being. Where plaintiff, upon the invitation of his brother, a switch brakeman, attempted to ride upon a portion of a freight train being switched in railroad yards and was injured, he was neither a passenger nor a "licensee." *Skirvin v. Louisville & N. R. Co. (Ky.)* 100 S. W. 308.

Where the roadbed of a railroad had long been used with the knowledge and tacit consent of the railroad as a common passageway by the public generally at all times, a pedestrian on the roadbed was a "licensee," and the railroad owed him the duty of ordinary care to avoid injuring him. *Chesapeake & O. Ry. Co. v. Corbin's Adm'r*, 67 S. E. 179, 181, 110 Va. 700.

A "licensee" is a person who is neither a passenger, servant, nor trespasser, and not standing in any contractual relation to the railroad, and permitted to come on its premises for his own interest, convenience, or gratification. *Gainesville & Gulf R. Co. v. Peck*, 46 South. 1019, 1022, 55 Fla. 402.

Mere failure to pay fare does not deprive one riding on a street car of his rights as a passenger, nor does it convert his relation to the owner into that of a mere "licensee." *Gabbert v. Hackett*, 115 N. W. 345, 347, 135 Wis. 86, 14 L. R. A. (N. S.) 1070 (citing *Cleveland, C. C. & St. L. Ry. Co. v. Ketcham*, 33 N. E. 116, 133 Ind. 346, 19 L. R. A. 339, 36 Am. St. Rep. 550; *Hurt v. Southern R. Co.*, 40 Miss. 391; *Muehlhausen v. St. Louis R. Co.*, 2 S. W. 315, 91 Mo. 332; *Rose v. Des Moines Val. R. Co.*, 39 Iowa, 246; *Shear. & R. Neg.* § 491; *Todd v. Old Colony & F. R. R. Co.*, 8 Allen [85 Mass.] 18, 80 Am. Dec. 49; *Wilton v. Middlesex R. Co.*, 107 Mass. 108, 9 Am. Rep. 11; *Jacobus v. St. Paul & C. Ry.*

*Co.*, 20 Minn. 125 [81L 110], 18 Am. Rep. 360; *Philadelphia & R. R. Co. v. Derby*, 14 How. [55 U. S.] 468, 14 L. Ed. 502; *The New World v. King*, 16 How. [57 U. S.] 466, 14 L. Ed. 1019).

#### LICENSEE BY EXPRESS INVITATION

"A 'licensee by express invitation' is one who is directly invited by the owner of the land to enter upon it, and such person is rightfully upon such land." *Connell v. Keokuk Electric R. & Power Co.*, 109 N. W. 177, 178, 131 Iowa, 622.

#### LICENSEE BY IMPLIED INVITATION

"A 'licensee by implied invitation' is one who has been invited to enter upon the land either by the owner or occupier of the same by some affirmative act done by such owner or occupant, or by appearances which justify persons generally in believing that such owner or occupant had given his consent to the public generally to enter upon or to cross over his premises; and, while such licensee is acting within the scope and limit of such implied invitation, he has the lawful right to be where he is so invited." *Connell v. Keokuk Electric R. & Power Co.*, 109 N. W. 177, 178, 131 Iowa, 622.

#### LICENSEE WITH AN INTEREST

"One who, in the performance of his own interests or those of his master's, assists servants of another in the performance of their work, is not a 'fellow servant' of such servants, nor a 'volunteer,' but occupies a third position, viz., that of a 'licensee with an interest.'" *Kelly v. Tyra*, 114 N. W. 750, 753, 103 Minn. 176, 17 L. R. A. (N. S.) 334 (quoting and adopting definition in *Ryan v. John O'Brien Boiler Works*, 68 Mo. App. 148, 151).

#### LICENTIOUSNESS

See Lewdness.

#### LIEN

See Attorney's Lien; Builder's Lien; Carrier's Lien; Charging Lien; Common-Law Lien; Equitable Lien; Factor's Lien; Grantor's Lien; Judgment for Recovery of Property or for Enforcement of Lien; Judgment Lien; Maritime Lien; Mechanic's Lien; Partner's Lien; Possessory Lien; Preferred Lien; Seller's Lien; Statutory Lien; Tax Lien; Valid Lien; Vendor's Lien.

Other lien, see Other.

Secured by legal proceedings, see Legal Proceedings.

Such lien, see Such.

"A 'lien' is said to be a qualified right which, in a given case, may be exercised over the property of another." *Advance Thresher Co. v. Beck*, 128 N. W. 315, 316, 21 N. D. 55,

Ann. Cas. 1913B, 517 (quoting and citing a definition in *Anderson v. State*, 23 Miss. 459).

A "lien" is a right by which a person is entitled to obtain satisfaction of a debt by means of property belonging to the person indebted to him. *Frick v. Hillard*, 95 N. C. 117, 122.

In the strict legal sense, a "lien" is a right in one person to detain that which is in his possession belonging to another until certain demands of such person in possession are satisfied. In *re Ransford*, 194 Fed. 658, 660, 115 C. C. A. 560.

A "lien" is a holding or claim which one person has on the property of another as security for a judgment or some charge or debt out of that property. *United States Oxygen Co. v. Bernard A. Buge*, 136 N. Y. Supp. 297, 301 (citing 5 Words and Phrases, p. 4144); *Meanor v. Goldsmith*, 65 Atl. 1084, 1086, 216 Pa. 489, 10 L. R. A. (N. S.) 342 (quoting definition in 2 Bouv. Law Dict. 226).

A "lien" is the right of the creditor to take his debt out of a specified res, which, though it may be a changing fund, must nevertheless be ascertained, since it is a property right, and could not be said to arise by a mere custom restricting a borrower's right to use the money loaned to release certain securities from a former pledge, nor by a promise to pay the creditor from a particular fund. *Hotchkiss v. National City Bank of New York*, 200 Fed. 287, 291.

The term "lien," in a narrow technical sense, signifies a right by which a person in possession of personal property holds and detains it against the owner in satisfaction of a demand. The term, however, has a more extensive meaning, being used to denote a legal claim or charge on property, real or personal, for the payment of a debt or duty; every such claim or charge being still a "lien," though the property be not in the possession of him to whom the debt or duty is due. It is a hold or claim which one has on the property of another as security for some debt or charge and may exist independent of possession. As in maritime law and in equity, the term is used as synonymous with a charge or incumbrance on the thing where there is neither *jus in re* nor *ad rem*, nor possession of the thing. In *re Maher*, 169 Fed. 997, 999 (citing 5 Words and Phrases, p. 4144 et seq.).

"The term 'lien,' in a narrow and more technical sense, signifies the right by which a person in possession of personal property holds and detains it against the owner in satisfaction of a demand; but it has a more extensive meaning, and in common acceptance is understood and used to denote a legal claim or charge on property, either real or personal, for the payment of any debt or duty. Every such claim or charge is still a lien on the property, although the property be not in the possession of him to whom the

debt or duty is due. A 'lien' is defined to be a hold or claim as security for some debt or charge. At common law there could be no lien without possession. It is therein defined as a right in one man to retain that which is in possession and belonging to another. In maritime law, liens exist independently of possession, either actual or constructive; and in the courts of equity the term 'lien' is used as synonymous with a charge or incumbrance upon the thing, where there is neither *jus in re* nor *ad rem*, nor possession of the thing." Irrespective of whether the lien upon the funds impounded by the service of the summons of garnishment attaches before final judgment or not, the service of the summons of garnishment so far places the funds found in the hands of the garnishee (especially when the money is paid into court, or in lieu thereof a dissolving bond given) into the custody and control of the court administering the case that it will be entitled to hold and subject the fund, despite the subsequent bankruptcy of the defendant, if the petition in bankruptcy be filed more than four months after such custody is obtained. *National Surety Co. of New York v. Medlock*, 58 S. E. 1131, 2 Ga. App. 665 (quoting 5 Words and Phrases, p. 4144).

The "lien" given persons who have furnished material for the construction of a vessel has been defined as "a tie hold or security," or "a sort of proprietary interest springing from the nature of the transaction and beneficial service rendered to the ship," or as a "hold upon property specifically attaching thereto for the satisfaction of some claim." *Wight v. Maxwell*, 4 Mich. 45, 55.

A bank holding notes of a depositor which are due has the right to charge the same to the depositor's account. Such right is not strictly a lien, within the meaning of the bankruptcy law, but a right of set-off; but it can be exercised only as to notes which are due. *Irish v. Citizens' Trust Co. of Utica, N. Y.*, 163 Fed. 880, 891.

The word "lien" is inaptly applied to a general deposit which is the property of the bank itself, but can be properly applied to special specific deposits of chattels, choses in action, valuables, etc. *Wynn v. Tallapoosa County Bank*, 53 South. 228, 236, 168 Ala. 469.

A right to a "lien" does not include the right to every onerous burden which may be thought to be advantageous to the favored creditors. The burden sought to be enforced must be something that can reasonably be considered as naturally a part of the thing granted—the lien. But a lien on real property is a thing entirely different and distinct from a personal obligation in the form of a bond. The latter is not included in the former, and is, indeed, a totally different kind of security. *Shaughnessy v. American Surety Co.*, 71 Pac. 701, 138 Cal. 543.

Under Civil Damage Act (Code 1906, c. 32) § 26, providing that if a landlord's property be "seized or taken" for any fine, etc., by reason of his tenant's unlawful acts, such landlord may recover damages and costs, a "lien" upon a landlord's property, being defined as a hold or claim which one has upon the property of another as a security for some debt or charge, does not constitute a "seizure or taking" of his property within the meaning of the statute. *Brown v. United States Fidelity & Guaranty Co.*, 74 S. E. 868, 869, 70 W. Va. 618.

The right of creditors of a mortgagor, dying without sufficient personal estate to pay his debts, to sell the real property for that purpose within three years after administration, as authorized by Code Civ. Proc. §§ 2749, 2750, is a mere statutory power, and not a "lien" on the lands, which would make them necessary parties to a foreclosure action. *Heldgerd v. Reis*, 119 N. Y. Supp. 921, 923, 135 App. Div. 414.

A contract with a subagent to solicit insurance for commissions, stipulating that the general agent will advance him \$25 per week, and providing that all money collected by the subagent for premiums on policies must be turned over to the general agent, and that the subagent will repay the general agent all sums advanced, said advances to constitute a lien against all commissions, absolutely binds the subagent to repay all advances; the word "lien" meaning a claim which one has on the property of another as a security for a debt, contemplating that the advances constitute a debt. *Straus v. Rosenthal*, 121 N. Y. Supp. 267, 269.

Pub. St. 1901, c. 245, § 28, provides that, if a trustee is adjudged chargeable for any personal property subject to mortgage, pledge, or other lien, the court may appoint a receiver. Section 29 provides that, if a trustee is adjudged chargeable for any security for payment of money, or any chose in action upon which execution cannot be levied, the court may appoint a receiver. Section 30 provides that the trustee may be adjudged trustee for the value of any note, chose in action, etc., which he refuses to deliver to the receiver. The trustee held a check payable to himself and defendant, who transferred his interest to claimant, after service of the writ with claimant's knowledge. Held, that the check was a chose in action, the possession of which was a "lien" within the statute, though defendant did not indorse the check to him for collection, so that the trustee was chargeable therefor, and a receiver was properly appointed to collect it. *Musgrove v. Goss*, 72 Atl. 371, 373, 75 N. H. 208.

Under Civ. Code 1895, § 2801, subd. 2, as amended by the act of 1899 (Acts 1899, p. 33; Van Epps' Code Supp. § 6176), giving to mechanics, contractors, materialmen, and persons furnishing material for the improve-

ment of real estate, special liens thereon, and when work done or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or other persons than the owner, the lien shall attach to the real estate improved, for the amount of work done, or material furnished, unless the owner shows that such lien has been waived in writing, or produces the sworn statement of the contractor, or other person, at whose instance the work was done, or material was furnished, that the agreed price or reasonable value thereof has been paid, the word "liens" is to be construed to mean, not the perfected and recorded liens, but the inchoate or imperfect liens, or claims arising by the mere furnishing of material or the performance of labor. *Green v. Farrar Lumber Co.*, 46 S. E. 62, 63, 119 Ga. 30.

Lien Law (Consol. Laws 1909, c. 33) § 17, providing that, if a lienor is made defendant to a suit to enforce another lien, and plaintiff or such defendant has filed notice of pendency of the suit, the lien of such defendant is continued, does not extend to municipal "liens." *William Bradley & Son v. Henry Huber Co.*, 131 N. Y. Supp. 388, 390, 146 App. Div. 630.

The word "lien," in Comp. Laws, § 5031, giving a "lien" to warehousemen which shall extend to all legal demands for storage against the owner of the property, means a general "lien," and, where goods removed without payment of charges are subsequently stored, the warehouseman may retain them for payment of the first charges. *Kaufman v. Leonard*, 102 N. W. 632, 139 Mich. 104.

The "lien" given under Wilson's Rev. & Ann. St. 1903, c. 3, §§ 108, 110, providing that any person employed in feeding or herding any domestic animals shall, for the amount due for such feeding or herding, have a "lien" on the animals, is similar to a lien under a chattel mortgage. It may be foreclosed, and the property sold to satisfy it. *Crismon v. Barse Live Stock Commission Co.*, 87 Pac. 876, 877, 17 Okl. 117.

Where a deed provides that the grantee shall assume and pay existing mortgages, "liens," taxes, and claims of any and every description, the assumption clause making use of the general word "liens" includes not only mechanics' liens but all kinds of "liens." *Gage v. Cameron*, 72 N. E. 204, 209, 212 Ill. 146.

#### Assessment or tax

A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge. In the nature of things, no tax or assessment can exist, so as to become a lien or incumbrance upon real estate, until the amount thereof is ascertained and determined. *Gillmor v. Dale*, 75 Pac. 932, 934, 27 Utah, 372.

Where the owners of a tenement house on November 1, 1906, contracted to convey the same free from all incumbrances and violations of the tenement house act (Laws 1901, p. 889, c. 334), and on May 25th had been served with notice to install a water meter, which was installed by the water department on October 8th, but the cost was not certified until November 1st, nor the bill certified to the comptroller until December 13, 1906, the assessment therefor was not a lien on the premises, when conveyed on December 11th, the words "lien or incumbrance" being used to cover only a charge against the property after it has been ascertained or determined. *Feder v. Rosenthal*, 116 N. Y. Supp. 2, 4, 62 Misc. Rep. 610.

Defendant vendors covenanted to pay any assessment of a kind mentioned therein for the payment of which any lien existed July, 1899, on the lot conveyed; there being then no power to lay any such assessments, and the land not being subject to any existing lien for such assessments. A valid assessment was thereafter laid under St. 1902, c. 527. Held, that the word "lien," in defendants' covenant, referred to the lien of an existing incumbrance, and was not to be extended to include the possibility of a future incumbrance being created by subsequent legislation, and hence that the defendants were not bound to pay such subsequent assessment. *Campbell v. Haven*, 97 N. E. 611, 612, 211 Mass. 121.

Tax liens held by the state of Minnesota are within the terms of Laws 1905, p. 459, c. 305, § 13, providing that it shall be joined as a party defendant whenever it has an interest in or "lien upon the land" in suit. In re National Bond & Security Co., 104 N. W. 678, 679, 96 Minn. 119.

#### Assignment

The right created by the assignment, as security, of one's expectancy in the estate of his living ancestor, being a present equitable charge, which, when the descent is cast, at once ripens into a "lien" on the property, is within Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564, exempting from its operation and preserving all liens created by the bankrupt, and therefore enforceable against the bankrupt after his discharge, especially where the property did not come into the possession of the assignee in bankruptcy, because not then acquired by the bankrupt. *Bridge v. Kedon*, 126 Pac. 149, 152, 163 Cal. 493, 43 L. R. A. (N. S.) 404.

#### As claim or demand

A personal claim against a bankrupt's estate does not constitute a "lien." *Eason v. Garrison & Kelly*, 82 S. W. 800, 801, 36 Tex. Civ. App. 574.

Where a contract for the sale of land containing a mine limited the application of \$60,000 of the price to the payment of "liens,"

a claim against the vendors was not a valid "lien" against the property, unless it appeared of record. *Brown v. Gordon-Tiger Mining & Reduction Co.*, 97 Pac. 1042, 1045, 44 Colo. 311.

Under a provision, in a certificate of preferred stock in a corporation, that no mortgage or "lien of any nature" should be placed upon the property of the company without the unanimous consent of the preferred stockholders, the words "lien of any nature" did not include the claims of general creditors, since a "lien" is something distinct from a claim and in the nature of a security. *Fryer v. Wiedemann*, 146 S. W. 752, 755, 148 Ky. 379, 39 L. R. A. (N. S.) 1011.

#### As contractual lien

Under Civ. Code Prac. § 62, subd. 3, requiring an action for the sale of real property under a mortgage lien, or other incumbrance or charge, etc., to be brought in the county in which the subject of the action, or some part thereof, is situated, the words "lien, or other incumbrance or charge," do not embrace an attachment lien, but refer to liens or charges created by contract or judgment. *Hatton v. Rogers*, 121 S. W. 698, 699, 134 Ky. 840.

#### Dower

Dower is not a "lien" of any kind, but an estate. The fact that it is an incumbrance does not constitute it a lien. An incumbrance is not always a lien, though a lien is always an incumbrance. *Wilson v. Wilson*, 105 N. Y. Supp. 151, 153, 120 App. Div. 581.

#### Equitable lien

The term "lien" is used in equity in a broader sense than at law, and denotes any right of a special nature over a thing, which constitutes a charge or incumbrance upon it, and may be enforced by proceeding against it, and to the existence of such a lien possession is not essential. An equitable lien is distinct from the general title, and may exist separate from it, or both may be vested in the same person. In re National Cash Register Co., 174 Fed. 579, 581, 98 C. C. A. 425.

A "lien," from a legal standpoint, embodies the idea of a deed or bond, and necessarily implies that there is something in existence to which it attaches. In equity there may be an agreement that there shall be a lien upon a thing if and when it exists, but that agreement is not itself a "lien." On an equitable assignment of money to be earned in the future by the assignor, the assignee acquires no "lien" on the money unless the assignor has earned it. *Cogan v. Conover Mfg. Co.*, 80 Atl. 408, 414, 89 N. J. Eq. 358.

#### As estate

See Estate.

#### As interest in land

See Interest (In Property).

**Interest of plaintiff in garnishment**

Service of a writ of garnishment gives plaintiff, at least before judgment against the garnishee, a specific right to have his claim satisfied out of the funds in the garnishee's hands, which is a "lien," within Bankr. Act July 1, 1898, c. 541, § 67, subd. "f," 80 Stat. 564, 565, making void all attachments or other liens obtained through legal proceedings against the insolvent within four months after filing the petition in bankruptcy; the statute applying to voluntary as well as involuntary proceedings, in view of section 1, subd. 1, providing that the term "a person against whom a petition has been filed" shall include one filing a voluntary petition. *Longley Bros. v. McCann*, 119 S. W. 268, 269, 90 Ark. 252.

**Judgment or attachment**

An attachment on mesne process under the statute creates a lien. This lien does not depend upon possession. It is created by process of law, sometimes by a record of the doings of an officer, as in the case of attachments of real estate and of personal property that cannot easily be removed. Undoubtedly an attachment by trustee process gives a lien on property which will be good against bankruptcy, if more than four months old. *Snyder v. Smith*, 69 N. E. 1089, 1090, 185 Mass. 58.

A "lien," in its usual and ordinary signification, is a claim which one person has on the property of another as security for some debt or charge for the payment or satisfaction of which the property may be sold, and Comp. Laws Dak. 1887, § 4339, giving one who has a lien the right to redeem from a superior lien on the same property, does not give an attaching creditor, whose claim has not been reduced to judgment, the right to redeem from a purchaser of the attached property at an auction sale before the passing of the sheriff's deed, which, under other statutory provisions, is not issued until the expiration of a year after the sale; the interest of such purchaser not being a lien in a legal sense, but rather an inchoate ownership which may automatically ripen into a legal title without any further act on his part. *Hardin v. Kelley*, 144 Fed. 353, 354, 75 C. C. A. 355.

A judgment is a purely legal "lien" on land, and in an action in a court other than that in which the judgment was rendered, and in which the issue was as to whether one of the parties who had paid the judgment was entitled to subrogation, the land on which the judgment was a lien could not be made the subject of a direct order or decree, the proper mode of control being by directions as to the legal ownership or control of the judgment. *Boice v. Conover*, 61 Atl. 159, 163, 69 N. J. Eq. 580.

**Mortgage or trust deed**

A mortgage is a "lien," and a pledge is a lien, so that under Rev. Codes 1909, § 4303, subd. 1, providing that the clerk of the court must issue a writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, setting forth *inter alia* that the payment of the debt sought to be collected has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, etc., an affidavit partially following the language of the statute in regard to the debt not being secured, and fails to state that it is not secured by pledge of personal property, and contains no statement equivalent to that, is not sufficient as it does not contain the language of the statute or language equivalent to that required by the statute. *Knutsen v. Phillips*, 101 Pac. 596, 598, 16 Idaho, 267.

A deed of trust on a homestead is not a "lien," within Code Civ. Proc. § 1475, requiring the presentation of the claim against the estate as a condition precedent to enforcing a lien or incumbrance on the homestead, so that a trust deed executed by a husband and wife on the homestead was enforceable without presenting a claim to the husband's administrator for the debt secured thereby. *Athearn v. Ryan*, 98 Pac. 390, 391, 154 Cal. 554.

"A 'lien' is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act." Civ. Code, § 2872. Hence a deed of trust is not a lien, within Code Civ. Proc. § 1475, declaring that, if there are subsisting liens on the homestead of a decedent, the claims secured thereby must be presented and allowed as other claims against the estate. *Weber v. McCleverty*, 86 Pac. 706, 708, 149 Cal. 316.

**Same—Power of sale**

Civ. Code, §§ 858, 2932, provide that a power of sale in a mortgage shall be deemed a part of the security, and section 2872 declares that a lien is a charge imposed in some mode other than by a transfer in trust on specific property, by which it is made security for the performance of a particular act. Held, that a power of sale contained in a mortgage is a "lien," and can no longer be exercised after an action on the debt is barred. *Goldwater v. Hibernia Savings & Loan Society*, 126 Pac. 861, 862, 19 Cal. App. 511.

**Possession required**

The word "lien," at common law, signifies that a person who has bestowed labor upon an article of personal property shall be authorized to retain possession until his reasonable charges are paid; it must be so understood, as used in Rev. St. 1889, § 2843, giving a lien for cutting wood, so that there is no enforceable lien after the property has lawfully passed out of the debtor's posses-

mon to a third person. *Turner v. Horton*, 106 Pac. 688, 691, 18 Wyo. 281.

#### As right of priority

"A 'lien' is a priority. It is that, and something more. That something more is that it is a hold on the property covered by it that fixes the priority so that it cannot be affected by subsequent events." In *re Bennett*, 153 Fed. 673, 690, 82 C. C. A. 531.

"A 'lien' is a right of one to retain property in his possession belonging to another until certain demands of him in possession are satisfied." A right to prior payment is not in itself a "lien." *Welsel v. Old Dominion S. S. Co.*, 91 N. Y. Supp. 140, 141, 99 App. Div. 568 (quoting and adopting definition in *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467, 30 Am. Rep. 319).

The creditors of a firm have the privilege, sometimes loosely denominated a "lien," to have debts due to them paid out of the assets of the firm in course of liquidation, to the exclusion of creditors of its several members. This equity is a derivative one. It is practically a subrogation to equity of the individual partner to have partnership property applied to the payment of partnership debts in preference to those of any individual partner. *People's Nat. Bank of Jackson v. Wilcox*, 100 N. W. 24, 29, 136 Mich. 567, 4 Ann. Cas. 465 (quoting *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370).

#### As security

See Security.

#### As specific lien

Civ. Code, § 2872, declares that a "lien" is a charge imposed upon specific property by which it is made security for the performance of some act, and, if the contract with a water company provides that the agreement to furnish water shall bind its canal, there would be created thereby a lien on the canal for the performance of the act of furnishing the water as agreed. *Stanislaus Water Co. v. Bachman*, 93 Pac. 858, 863, 152 Cal. 716, 15 L. R. A. (N. S.) 359 (citing *Fresno Canal & Irr. Co. v. Rowell*, 22 Pac. 53, 80 Cal. 114, 3 Am. St. Rep. 112; *Same v. Dunbar*, 22 Pac. 275, 80 Cal. 530).

#### LIEN CLAIMANT

Act March 13, 1899, § 1 (Laws 1899, p. 143, c. 90), provides that costs shall not be allowed in a suit to foreclose a logger's lien unless a demand for payment of the lien has been made before suit, unless the court finds that the claimant had reasonable grounds to believe that the owner or a person having control of the property on which the lien was claimed was attempting to defraud the claimant. Held, that the terms "lienholder" and "lien claimant" included a person having a lienable claim, though not perfected, and hence a demand before the filing of the lien notice was a sufficient compliance therewith.

*Sumpter v. Burnham*, 99 Pac. 752, 753, 51 Wash. 599.

#### LIEN OR INTEREST CREATED THEREBY

The owner of property, exempt from taxation under its charter (Pub. & Loc. Laws 1869, c. 149), executed a mortgage to secure a loan, and executed its bonds to secure the mortgage, and agreed that it would pay all taxes and assessments imposed on the mortgaged property, all taxes assessed or imposed on the mortgage, and all taxes assessed against the lien or interest created by the mortgage. St. 1898, § 1042d, added by Laws 1903, c. 378, § 2, provided that, whenever taxable real estate is subject to mortgage, the mortgage, for the purposes of taxation, should be an interest in the real estate taxable as such where the real estate was located or might be separately assessed and taxed. Held, in the mortgagee's action to foreclose because of the mortgagor's refusal to pay taxes against the bonds in the hands of purchasers from the mortgagee, that the first obligation referred only to general taxes or special assessments levied on the property; that the third obligation referred to an assessment against some interest in the mortgaged real estate, not including an assessment on the bonds; that the words "mortgage" and "lien or interest created thereby" were synonymous; that the obligation to pay taxes on the "mortgage" did not comprehend such taxes assessed on the bonds, and that the mortgagor was not liable therefor. *Citizens' Savings & Trust Co. v. School Sisters of Notre Dame*, 189 N. W. 439, 441, 151 Wis. 619.

#### LIENABLE ARTICLE

Gas appliances, such as pendants, chandeliers, brackets, and globes, are not fixtures nor "lienable articles," within the statute giving liens for material furnished and labor done on buildings, in the absence of evidence of an intention on the part of the owner when he has them put in to make them permanent parts of the building, and such intention is not shown by the mere fact that they are put in by the original owner of the building, and remain in the same after it is sold by him to another. *Frank Adam Electric Co. v. Gottlieb*, 86 S. W. 901, 903, 112 Mo. App. 226.

#### LIENABLE CLAIM

The term "lienable claim" suggests mere right to obtain an interest in specified property, instead of an interest in present therein. *Jackman v. Eau Claire Nat. Bank*, 104 N. W. 98, 106, 125 Wis. 465, 115 Am. St. Rep. 955.

#### LIENHOLDER

As owner, see Owner.

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## LIEU OF

See In Lieu of.

## LIFE

See During Natural Life; Expectancy of Life; For Life; Imprisonment for Life or Less Than Natural Life; Quarterly During His Natural Life; Take His Own Life.

"By the term 'life,' as here used [referring to the fourteenth amendment of the Constitution], something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which 'life' is enjoyed. The provision equally prohibits the mutilation of the body, by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation, not only of 'life,' but of whatever God has given, to every one with 'life' for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision." *MacMullen v. City of Middletown*, 98 N. Y. Supp. 145, 150, 112 App. Div. 81 (quoting *Feld, J.*, in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77).

The use of the word "life," in a will creating a trust, devising the fund to the trustees to hold and collect the rents, income, and profits thereof, and pay over the same to such three children annually, during the term of their natural "life," in the singular, if significant, tends to show that the testator was thinking of the life of each. *Brown v. Farmer*, 68 N. E. 32, 33, 184 Mass. 136.

## LIFE AND ACCIDENT INSURANCE

"Life and accident insurance" is a contract whereby one, for a stipulated consideration, agrees to indemnify another against injuries by accident or death. *State v. Willett*, 86 N. E. 63, 70, 171 Ind. 296, 23 L. R. A. (N. S.) 197.

## LIFE ESTATE

See Conventional Life Estate; Legal Life Estate.

As dower of use, benefit, and profits, see Dower.

An "estate for life" is a "freehold" estate not of inheritance. *Cummings v. Cummings*, 75 Atl. 210, 211, 76 N. J. Eq. 568.

Life estates are freehold estates not of inheritance, and an estate that may last for a life or lives, that is not inheritable, not at will or for any fixed period of time, is a "life estate." *Disley v. Disley*, 75 Atl. 481, 483, 30 R. I. 366.

"The very idea of a 'life estate' presupposes a fee as existing elsewhere than in the tenant for life, though the latter may be empowered to convey the fee and thus divest him who, but for the exercise of the power, would be holden of the fee conditionally, or a contingent remainderman." *Beatson v. Bowers*, 91 N. E. 922, 924, 174 Ind. 601.

An "estate for life" is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons or to the happening or not happening of some uncertain event. Where a grantee agreed that the grantors should remain on the premises during their natural lives, free from rent, the grantors had a life estate. *Robb v. New York & C. Gas Coal Co.*, 65 Atl. 938, 939, 216 Pa. 418.

"At common law there were two classes of 'life estates': First, conventional 'life estates,' or those which were created by contract; and, second, those which came into existence by operation of law. The former were not impeachable for waste, unless expressly made so by the conveyance. The reason assigned for this rule is that it is presumed that, if the grantor intended to limit the enjoyment of the estate, he would have expressed his intention in the deed. As to the second class of 'life estates,' on the other hand, they are, as a general rule, impeachable for waste; that is to say, the tenant for life cannot use the property for any purpose which would result in an injury to the inheritance, save those only to which it had been devoted at the time the life estate came into existence." *Swayne v. Lone Acre Oil Co.*, 86 S. W. 740, 742, 98 Tex. 597, 69 L. R. A. 966, 8 Ann. Cas. 1117.

Testator having devised certain lands to his three sons by clauses under which, without more, they would have taken the lands in fee, in a subsequent clause provided that the estates so taken by his sons should only be "life estates," and, in case any of them died without issue, the land thereby willed for life should go to the other living children or the issue of such as had died. Held that, two sons having died subsequently to testator's death, without issue, the third took a fee simple, and not merely a life estate; the words "life estate" being equivalent to defeasible fee. *Smoot v. Kirk* (Ky.) 104 S. W. 716, 717.

A life estate may be created by a deed, lease, or devise, with or without a stipulation



for rent. A lease of premises, to have and to hold unto lessee, his heirs, etc., so long as he should wish to live in the city in which the premises were, vested a life estate, terminable only at his death or removal from the city. *Thompson v. Baxter*, 119 N. W. 797, 798, 107 Minn. 122, 21 L. R. A. (N. S.) 575.

**Base fee distinguished**

See Base Fee.

**Life right synonymous**

See Life Right.

**As property**

See Real Property.

**Tenancies at will, from year to year, or at sufferance distinguished**

A life estate differs from tenancies at will, or from year to year, or at sufferance; the principal distinction being that the former confers a freehold and the latter a mere chattel interest. *Thompson v. Baxter*, 119 N. W. 797, 798, 107 Minn. 122, 21 L. R. A. (N. S.) 575.

**LIFE INSURANCE**

See Life and Accident Insurance.

Proceeds of, see Proceeds.

Since the term "life insurance" includes accident policies, Act Pa. June 23, 1885, providing that when a policy of life insurance contains a warranty of the truth of the answers contained in the application no untrue statement made in good faith shall effect a forfeiture, unless the untrue statement relates to some matter material to the risk, is applicable to accident insurance. *Miller v. Maryland Casualty Co.*, 193 Fed. 343, 348, 113 C. C. A. 267.

**As chose in action**

See Chose in Action.

**As contract to pay certain sum**

Life insurance is a promise to pay a certain sum upon the death of the insured. *Ellison v. Straw*, 97 N. W. 168, 170, 119 Wis. 502.

An "insurance" upon life is a contract by which the insurer, for a stipulated sum, engages to pay a certain sum of money if another dies within the time limited by the policy. It is a chose in action and even before the death of the insured may be assigned. *Rylander v. Allen*, 53 S. E. 1032, 1033, 125 Ga. 206, 6 L. R. A. (N. S.) 128, 5 Ann. Cas. 355.

As expressly defined by Civ. Code Ga. 1895, § 2114, "life insurance" is "a contract, by which the insurer for a stipulated sum engages to pay a certain amount if another dies within the time limited by the policy. The life may be that of the assured, or of another in whose continuance the assured has an interest." *Mutual Life Ins. Co. of New York v. Lane*, 151 Fed. 276, 278.

A "life insurance" policy is not merely a contract of indemnity. It is a contract to pay to the beneficiary a sum certain in the event of death; and if the contract was valid in its inception, and so continues until its maturity, the beneficiary is entitled to the whole of the stipulated sum. *Keckley v. Coshocton Glass Co.*, 99 N. E. 290, 300, 86 Ohio St. 213, Ann. Cas. 1913D, 607.

A "life insurance policy" is not a contract of indemnity, but is a contract to pay money upon the death of the assured in consideration of certain payments made during his life. *Wayland v. Western Life Indemnity Co.*, 148 S. W. 626, 630, 166 Mo. App. 221; *Reed v. Provident Sav. Life Assur. Soc.*, 82 N. E. 734, 736, 190 N. Y. 111.

**As insurance**

See Insurance.

**Benefit societies**

A certificate in a mutual benefit association, providing that defendant association would pay on the member's death to his sister as beneficiary a specified sum on certain conditions, was a life insurance policy, within Act April 11, 1903 (Acts 1903, c. 119), providing that, after its passage, the suicide of a policy holder of any life insurance company doing business within the state should not be a defense to the policy, whether the suicide was voluntary or involuntary, or the holder was sane or insane. *Head Camp Pacific Jurisdiction Woodmen of the World v. Sloss*, 112 Pac. 49, 50, 49 Colo. 177, 81 L. R. A. (N. S.) 831.

A "life insurance contract" or policy is "a contract by which a company or association agrees to pay a certain sum of money on the death of a member, in consideration of the payment by the member of fixed sums at fixed periods." A certificate issued by a fraternal mutual benefit society, providing that on the death of the member a specified sum will be paid his wife out of the mortuary fund on condition of payments by the member of fixed sums at fixed periods, is a life insurance contract or policy, within Code 1887, § 3251, providing what shall be a sufficient declaration in an action on a policy, and is not merely a certificate of membership in a beneficial society. *Cosmopolitan Life Ins. Co. v. Koegel*, 52 S. E. 166, 168, 169, 104 Va. 619 (citing *Logan v. Fidelity & Casualty Co.*, 47 S. W. 948, 146 Mo. 114; 1 Bacon Benefit Societies & Life Insurance, § 52).

The object of an association was to furnish each of its members at death a specific sum for application to his funeral expenses, by a system of mutual contribution; the members at the death of any member paying death assessments. It employed agents to solicit business from the general public and was not founded on principles of philanthropy. Held, that its contracts with its

members constituted "life insurance," within Burns' Ann. St. 1908, § 4713, forbidding the taking of an application for insurance upon the life of any person in the state in favor of a person not having a bona fide insurable interest in the life of insured, or who is not related to him within a certain degree. State v. Willett, 86 N. E. 68, 71, 171 Ind. 296, 23 L. R. A. (N. S.) 197.

### LIFE INSURANCE COMPANY

In the ordinary sense, a fraternal order is not a "life insurance company." That class of fraternal organizations which agree to pay a sum of money upon the death of a member have that characteristic in common with life insurance companies, but the two classes of corporations are organized under different acts and for different purposes. The insurance company is an ordinary business corporation, and its policies are obtained for ordinary business purposes, for investment, for security for the benefit of credit, as well as the protection of the family, while the beneficiary association is not organized for purposes of profit, its certificates cannot be used for business purposes, and its members can receive no pecuniary advantage from its certificates and creditors cannot reach them. The Modern Woodmen of America is not an insurance company within the meaning of a question in an application for life insurance, "Have you ever been declined or postponed by any company?" Peterson v. Manhattan Life Ins. Co., 91 N. E. 406, 469, 244 Ill. 329, 18 Ann. Cas. 96.

### LIFE, LIBERTY, AND PROPERTY

Under the Constitution, no one may be deprived of life, liberty, or property, without due process of law, and the terms, "life," "liberty," and "property" include every personal, political, and civil right, including that to labor, to contract, and to acquire property. Josma v. Western Steel Car & Foundry Co., 94 N. E. 945, 946, 249 Ill. 508.

"The terms 'life,' 'liberty,' and 'property' embrace every right which the law protects; they include not only the right to own and hold, but also the right to use and enjoy, property." Kansas City Gas Co. v. Kansas City, 198 Fed. 500, 510 (quoting Spring Valley Water Co. v. San Francisco, 165 Fed. 667).

The terms "life," "liberty," and "property" are representative terms, and intended to cover every right to which a member of the body politic is entitled under the law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, and the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away,

except by due process of law. Coffeyville Vitrified Brick & Tile Co. v. Perry, 76 Pac. 848, 850, 69 Kan. 297, 66 L. R. A. 185, 1 Ann. Cas. 936 (citing Gillespie v. People, 58 N. E. 1007, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176).

The terms "life," "liberty," and "property," as used in the fourteenth constitutional amendment, embrace every right which the law protects; they include not only the right to own and hold, but also to use, property, and profits and income are within the protection of the amendment, subject, however, to the rule that when property is devoted to a public use the owner is entitled to earn only such income therefrom as is just and reasonable as between him and the public. Spring Valley Water Co. v. City and County of San Francisco, 165 Fed. 667, 676.

"The term 'life, liberty, and property,' as used in the federal Constitution, embraces every right which the law protects. They include, not only the right to hold and enjoy, but also the means of holding and enjoying, acquiring, and disposing of, property. The right to labor is property. It is one of the most valuable and fundamental of rights. The right to work is the right to earn one's subsistence, to live and to support wife and family. The right of master and servant to enter into contracts, to agree upon the terms and conditions under which the one will employ and the other will labor, is property. The master has the right to fix the terms and conditions upon which he is willing to give employment; the servant has the right to fix the terms and conditions upon which he is willing to labor; and any statute which curtails or limits that right deprives the party affected of his property, and, in the same measure, of his liberty. Both parties are free to enter into, or refuse to enter into, the contract. Before the law there is the same freedom to employ as to work, to buy as to sell, to choose one's employé as to choose one's employer." Branson v. Industrial Workers of the World, 95 Pac. 354, 361, 30 Neb. 270 (quoting Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500).

### LIFE, LIBERTY, AND PURSUIT OF HAPPINESS

The refusal to permit one to engage in a business of an undertaker is a violation of a right to enjoy "life, liberty, and the pursuit of happiness," secured under the state and federal Constitutions, unless there is some good reason for the refusal; and the refusal to permit one to bury the dead body of a relative or friend, except under an unreasonable limitation, is an unlawful interference with a private right. Wyeth v. Board of Health of City of Cambridge, 86 N. E. 925, 927, 200 Mass. 474, 23 L. R. A. (N. S.) 147, 128 Am. St. Rep. 439.

**LIFE LICENSE**

An act approved March 7, 1905 (Acts 1905, p. 492, § 1; Burns' Ann. St. Supp. 1905, § 5902a), provides that no person shall be eligible to the office of county superintendent of schools unless he shall hold a 36 months' license, a 60 months' license, a life or professional license to teach in the common schools of the state. The act concerning common schools, approved March 6, 1899 (Acts 1899, p. 488, c. 214, § 1; Burns' Ann. St. 1901, § 5905b), provides for the issuance of a 36 months' license and a 60 months' license by the state superintendent of public instruction. The act of 1899 (Acts 1899, p. 243, c. 143, § 7; Burns' Ann. St. 1901, § 5905a), provides for the issuance of a professional license on such examination held by the county superintendent as may be prescribed by the state board of education, and that such license shall issue only on the approval of the state board. The school law of 1865 (Acts 1865, p. 34, c. 1, § 155; Burns' Ann. St. 1901, § 5851), provides for the issuance of state certificates of qualification by the state board of education, which shall entitle the holder to teach in any of the schools of the state without further examination and be valid during the lifetime of the holder. The act approved March 5, 1873 (Acts 1873, p. 199, c. 86, § 3; Burns' Ann. St. 1901, § 6049), in amendment of and supplemental to the original act creating the State Normal School, authorizes the board of trustees to grant certificates of proficiency to teachers completing the prescribed courses of study, and provides that two years after graduation, satisfactory evidence of professional ability to instruct having been received, such teachers shall be entitled to diplomas appropriate to such professional degrees as the trustees shall confer on them, which diplomas shall be considered sufficient evidence of qualification to teach in any of the schools of the state. Held, that a post graduate diploma, granted pursuant to the act approved March 5, 1873 (Acts 1873, p. 199, c. 86; Burns' Ann. St. 1901, § 6049), to a graduate of the State Normal School of two years' standing, was not a life license within the act approved March 7, 1905 (Acts 1905, p. 492, c. 163, § 1; Burns' Ann. St. Supp. 1905, § 5902a). State ex rel. Benham v. Bradt, 84 N. E. 1084, 1086, 170 Ind. 480.

**LIFE OF AGREEMENT**

See During Life of Agreement.

**LIFE OF CONSPIRACY**

See During Life of Conspiracy.

**LIFE OR LIVES IN BEING**

A corporation or joint-stock company to which an annuity is bequeathed will not be deemed a life in being where so to regard it would cause a trust created by the will to violate the rule against perpetuities. Fitchie

v. Brown, 29 Sup. Ct. 106, 108, 211 U. S. 321, 53 L. Ed. 202.

The rule has reference to time, and not to persons; the term "life or lives in being" referring not to the persons who are to take, as testator may select as the measure of time the lives of any persons in existence, and "twenty-one years afterward" are 21 years in gross without regard to the life or coming of age of any person. Hays v. Martz, 89 N. E. 308, 305, 173 Ind. 279.

**LIFE POLICY**

Old line life policy, see Old Line Policy.

**LIFE RIGHT**

The devise of a "life right" creates a "life estate." Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 68 S. E. 929, 930, 153 N. C. 49.

**LIFE TENANT**

As owner, see Owner.

**LIFE USE**

A provision in a judgment awarding to a widow a "life use" of an interest in certain property in controversy instead of a right of dower therein was improper, the life use not being the same as a dower interest, prior to assignment of dower. Humphrey v. Gerard, 79 Atl. 57, 58, 84 Conn. 216.

**LIFT**

See Topping Lift.

**LIGHT—LIGHTING**

See Flare up Light; Joss Light.  
As public work, see Public Work.  
Kind of light, see Kind.

**LIGHT STATION**

See Electric Light Station.

**LIGHTING COMPANY**

As quasi public corporation, see Quasi Public Corporation.

**LIGHT (WEIGHT)****LIGHTER MATERIAL**

In a claim of a patent for a frame or foundation for collars of dresses, a description of an upper band as of "lighter material" than the lower band applies to material of which the band is composed, as distinguished from the band itself, and requires it to be comparatively different—whether lighter in weight, or simply more pliable—from material composing the other. Warren Featherbone Co. v. Roberts & Co., 128 Fed. 745, 747.

**LIGHTER**

As private carrier, see Private Carrier.

## LIGHTNING

Under a fire insurance policy containing a clause extending the policy to "any direct loss or damage caused by the lightning" meaning thereby the commonly accepted use of the term "lightning," and excluding loss by cyclone or windstorm, damage to goods from water and debris, into which they were thrown by the falling of the wall as a result of lightning, was the direct and natural consequence of the lightning. *Cummins v. Pennsylvania Fire Ins. Co.*, 134 N. W. 79, 83, 153 Iowa, 579, 37 L. R. A. (N. S.) 1169, Ann. Cas. 1913E, 235.

### LIGHTNING ARRESTER

A device used by a telephone company to divert lightning from the line to the ground is spoken of as a "lightning arrester," though it might have more properly been termed a lightning diverter; its office being, not to arrest the lightning, but to divert it from the wire by offering a comparatively easy course to the earth. *Wells v. Northeastern Telephone Co.*, 64 Atl. 648, 652, 101 Me. 371.

## LIKE

See With Like Intent.  
See, also, Same.

### LIKE CASES

The phrase "in like cases as natural persons," as used in Const. Ala. 1901, § 240, giving the right to foreign corporations to sue in all courts "in like cases as natural persons," must mean, where the cases are alike, the same description of contract or tort. *Seaboard Air Line Ry. Co. v. Railroad Commission of Alabama*, 155 Fed. 792, 799 (citing *Smith v. Louisville & N. R. Co.*, 75 Ala. 449).

The word "like" has been judicially defined to mean "having the same or nearly the same appearance, qualities, or characteristics; resembling; similar to; equal in quantity, quality, or degree" (19 Am. & Eng. Ency. of Law, 130); and, when the Constitution declares that "all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons," it must be construed to mean exactly what it says, and, if the facts are such as to give a private individual a cause of action under similar circumstances, if there are facts which bring the case within equitable principles, a municipal corporation has the same rights that a private corporation or an individual would have. *Village of Haverstraw v. Eckerson*, 108 N. Y. Supp. 506, 507, 124 App. Div. 18.

### LIKE CIRCUMSTANCES

An instruction that "ordinary care" was such care as the great majority of mankind would and do exercise in the transactions of human life under like conditions and circumstances, was not erroneous because of the

use of the expression "under like circumstances"; this being the equivalent of "under the same or similar circumstances," which is the proper standard. *Warden v. Miller*, 87 N. W. 828, 830, 112 Wis. 67.

### LIKE COMPANY

As used in Ky. St. 1899, § 4077, imposing a franchise tax on 20 enumerated classes of corporations, all having special or exclusive privileges or franchises not allowed by law to natural persons, and on every other like company, the word "like" refers to corporations having or exercising some special or exclusive privilege or franchise not allowed by law to natural persons, or performing some public service. *Aetna Life Ins. Co. v. Coulter*, 74 S. W. 1050, 1052, 115 Ky. 787.

### LIKE EFFECT

Under an instruction that an affidavit produced by defendant on cross-examination, to impeach the credibility of the witness who made it, may be considered in connection with the affiant's deposition, as evidence against the plaintiff of the facts therein stated under oath with "like effect" as his deposition, the words "with like effect" were evidently intended to instruct the jury that the deposition and the affidavit were each independent of the other and each affirmative testimony, not, however, that they were of equal weight, and such instruction should be given where such affidavit is introduced in evidence by plaintiff on the cross-examination of another witness. *Connecticut Mut. Life Ins. Co. v. Hillmon*, 23 Sup. Ct. 294, 296, 188 U. S. 208, 47 L. Ed. 446.

### LIKE KIND

The words "like kind," as used in Code, c. 151, § 1, providing that a person who shall keep or exhibit a gaming table commonly called A. B. C. or E. O. table, or faro bank, or keno table, or "table of like kind," etc., shall be punished, etc., are used in a broad sense, and the act forbids certain kinds of gaming, among which are faro banks and keno tables, and all other games like them. So, on a trial for unlawfully keeping and exhibiting a slot machine, it is not error to instruct the jury that if they shall believe that the slot machine described is a gaming table, and that the machine is so constructed that it offers unequal chances to the player and exhibitor, and that the unequal chances are in favor of the exhibitor, then the slot machine is a gaming table of like kind and character to A. B. C. and E. O. tables, faro bank, and keno table. *State v. Gaughan*, 48 S. E. 210, 212, 55 W. Va. 692.

The expression "like kind of property," as used in Rev. St. 1899, § 1129, providing that, if a carrier shall charge a greater or less compensation for any services in the transportation of any kind of property than it charges any other person for doing him a

like service in the transportation of a "like kind of property" under substantially the same conditions, it shall be deemed guilty of discrimination, means "of the same kind," and does not put all live stock in one class, and hence the charge of a higher freight rate for transportation of sheep than that fixed for cattle and other live stock does not constitute a discrimination. *Wynn v. Wabash R. Co.*, 86 S. W. 562, 564, 111 Mo. App. 642.

# LIKE MANNER

Testator provided that, on the death of one of his children, one-third of the income of his share of a trust fund should be payable "in like manner" for the benefit of his widow for life, and, on her decease leaving lawful issue of testator's son then living, such one-third of the income and principal was to go to such issue in the same manner as the other two-thirds had been decreed. Held, that the phrase "in like manner" was used to designate the mode in which the recipients were to be benefited, and not to describe such recipients. *Sterling v. Ives*, 62 Atl. 948, 954, 78 Conn. 498.

St. 1898, § 925—184, provides that, if a landowner assessed for street improvement feels himself aggrieved, he may appeal to the circuit court, which appeal shall be tried "in like manner" as appeals from the disallowance of claims. Held, that the words "in like manner" did not mean that equitable issues should be tried to a jury merely because legal claims and demands against a city were so triable and did not prevent an amendment on the appeal so as to allow the presentation of issues connected with the subject-matter not triable below. *Nelson v. City of Waukeaha*, 132 N. W. 887, 888, 147 Wis. 163.

# LIKELIHOOD

See In All Likelihood.

# LIKELY

See Reasonably Likely.

The term "likely" means probable or reasonably to be expected. *Vohs v. Shorthill & Co.*, 107 N. W. 417, 419, 130 Iowa, 538 (citing *Webst. Dict.*; *Cent. Dict.*).

Since the word "likely" means "worthy of belief," according to *Webst. Dict.*; "reasonable expectation," according to *Stand. Dict.*; or "as may be reasonably supposed," according to *Cent. Dict.*—an instruction in regard to future suffering should not leave the jury in doubt as to what future losses they may consider in estimating the damages, and thus give the jury a roving commission to find what damages they saw fit, and an instruction authorizing the jury to find such damages as "plaintiff will be liable to suffer in the future" was not rendered erroneous by the use of the word "likely," in that it authorized the jury to estimate the damages

irrespective of such as they might believe from the evidence would reasonably result from the injuries in the future. *Holden v. Missouri R. Co.*, 84 S. W. 133, 135, 108 Mo. App. 665 (citing *Illinois Cent. Ry. Co. v. Davidson*, 76 Fed. 517, 22 C. C. A. 306; *Scott Tp. v. Montgomery*, 95 Pa. 444; *Curtiss v. Rochester & S. R. Co.* [N. Y.] 20 Barb. 282; distinguishing *Schwend v. St. Louis Transit Co.*, 80 S. W. 40, 105 Mo. App. 534; *Hardy v. Milwaukee St. Ry. Co.*, 61 N. W. 771, 89 Wis. 183; *White v. Milwaukee City Ry. Co.*, 21 N. W. 524, 61 Wis. 536, 50 Am. Rep. 154; *Kucera v. Merrill Lumber Co.*, 65 N. W. 374, 91 Wis. 637).

"Among other definitions of the term 'likely' given by some of the lexicographers are the following: 'Worthy of belief.' *Webst. Dict.* 'Reasonably expected.' *Stand. Dict.* 'As may be reasonably supposed.' *Cent. Dict.* Of course, the term has other significations less definite than the foregoing, and for this reason it should not be used in an instruction to a jury when plainness and definiteness of direction are required; but we do not think the jury understood by the instruction that they were commissioned to estimate the damages irrespective of what they might believe from the evidence would reasonably result in the future from the consequences of the injury, but did not understand that the future losses for which they might assess present damages were such losses as were reasonably certain to accrue from the injury. It was in this sense the learned trial court understood the term as used in the instruction, and there is nothing in the record to induce us to believe that the jury had a different understanding. We think a fair construction of the term, as used in the instruction, means, and was understood by the jury to mean, such losses as were reasonably certain to accrue in the future as the result of the injury complained of." There is but a slight shade of difference between "reasonably expected" and "reasonably certain," and "likely," as used in a question to an expert medical witness as to what results were likely to follow, was competent; the term being used synonymously with "reasonably expected," which might be substituted for "reasonably certain." *Garrard v. Manufacturers' Coal & Coke Co.*, 105 S. W. 767, 771, 207 Mo. 242 (quoting *Holden v. Missouri R. Co.*, 84 S. W. 133, 108 Mo. App. 665).

While the term "likely" has in it to a certain extent an element of probability, it is not strong enough to make proper evidence facts which are likely to occur. In an action for injuries, a medical expert cannot be asked as to whether an injury such as the plaintiff received would be "likely" to produce the condition related to the witness. *Higgins v. United Traction Co.*, 89 N. Y. Supp. 76, 77, 96 App. Div. 69.

In an action for personal injuries, it was not error to refuse to strike out, on the ground that it was indefinite and speculative expert testimony, that it was not "likely" that there would be any improvement thereafter in plaintiff's sight, the word "likely," although not synonymous with "probable," having practically the same meaning in this connection. *Graham v. Joseph H. Bauland Co.*, 89 N. Y. Supp. 595, 598, 97 App. Div. 141 (citing *Knoll v. Third Avenue R. Co.*, 62 N. Y. Supp. 16, 46 App. Div. 527).

To constitute "wantonnness" it is sufficient that the act complained of indicates that the injury was the "likely" and not improbable result of the wrongful act. The word "likely" is here used in the sense of something more than possible and less than probable. *Conchin v. El Paso & S. W. R. Co.*, 108 Pac. 260, 261, 13 Ariz. 259, 28 L. R. A. (N. S.) 88.

**Liabile synonymous**

See Liabile.

**LILY OF THE VALLEY**

In construing the provision in Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule G, par. 234½, 28 Stat. 525, for "lily of the valley" \* \* \* plants used for forcing," held that "lily of the valley" roots, sprouted, which are imported for forcing, are dutiable thereunder, being included within the term "plants" in a popular sense, though not technically. "Lily of the valley" roots are not covered by Tariff Act Aug. 28, 1894, c. 349, § 2, Free List, par. 558, 28 Stat. 542, relating to "moss, seaweeds, and vegetable substances," not being vegetable substances in the class of moss and seaweeds. *McAllister v. United States*, 147 Fed. 773.

**LIMB**

The word "limb" includes the part of a human being from the hip to the sole of the foot. *Lorts & Frey Planing Mill Co. v. Well* (Ky.) 113 S. W. 474, 475.

**LIMES**

As fruit, see Fruit.

Limes in brine held not to be dutiable as "limes" under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 266, 30 Stat. 172, but to be free of duty under section 2, Free List, par. 556, of said act, 30 Stat. 198, as "fruits in brine, not specially provided for." *Brennan v. United States*, 136 Fed. 743, 744, 69 C. C. A. 395.

**LIMESTONE**

As mineral, see Mineral.

Hauteville stone, a compact "limestone" susceptible of a fairly high polish and used for decorative work in the interiors of build-

ings, is dutiable as "marble," under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 114, 30 Stat. 158, rather than as "limestone" \* \* \* not specially provided for," under paragraph 117, 30 Stat. 159. The definitions of "limestone" and "marble" as given in Century and Worcester's Dictionaries, New American Cyclopaedia, and New International Encyclopedia, do not aid in any great measure in determining the dividing line between what is "marble" and what is "limestone" other than "marble." *Bockmann v. United States*, 154 Fed. 1000, 1001.

Marble is defined as a "limestone" having a granular and crystalline structure, but it is a crystalline limestone. Hauteville stone is not a crystalline limestone, but is a high-grade limestone ornamental and polishable. In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 114, 30 Stat. 158, the term "marble" is used according to its more precise definition as a limestone having a granular and crystalline structure, rather than its broader sense of being a limestone susceptible of a high polish. Hence Hauteville stone, though an ornamental, polishable, high-grade limestone, is not crystalline, not dutiable under the provision, but under paragraph 117, as limestone. *Bockmann v. United States*, 158 Fed. 807, 808, 86 C. C. A. 67.

Hauteville stone, and various other stones of substantially the same character, which are susceptible of a high polish and are used as an interior decorative stone, are not the kind of limestone that is "marble," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 114, 30 Stat. 158, but are dutiable as "limestone," under paragraph 117, 30 Stat. 159. *United States v. C. D. Jackson & Co.*, 175 Fed. 884, 885.

**LIMIT**

See May Limit; Patrol Limits; Territorial Limit; Within the Limits; Without Time Limit.

"Limit," as applied to a game of poker, means simply the maximum amount which under the rules of the game can be wagered in one bet. *Ford v. State*, 38 South. 229, 86 Miss. 123.

**As restrict**

See Restrict.

**Exempt synonymous**

See Exempt.

**LIMIT AND CONTROL**

The words "limit and control," as used in Acts 1902, p. 420, c. 300, entitled "An act to limit and control the expenditure of money upon public highways" by a designated county, are sufficiently broad to cover a provision in the body of the act prohibiting the county commissioners from levying taxes on the assessable property of the county for the purpose of constructing, maintaining, and re-

pairing any highway, bridge, or public road not in whole or in part within the county; and hence the act is not in conflict with Const. art. 3, § 29, providing that every law shall express but one subject, which shall be described in its title. *Commissioners of Queen Anne's County v. Commissioners of Talbot County*, 57 Atl. 13, 99 Md. 13.

### LIMITS OF THE VEIN

In the absence of defined walls and of mineralization appreciably greater than that contained in the general mass of the mountain, broken, stained, and fissured material, or crushed and brecciated matter, characteristic of the district, cannot be held to constitute a vein or lode, and, in such cases, the limits of fracturing do not constitute the "limits of the vein," and even if there be found an occasional vug, or fragment of ore, yet, where it is disconnected from any ore body and so intermingled with the surrounding country rock that it cannot be regarded as continuous, it does not mark the line of the vein or lode, within the meaning of the law. *Grand Central Min. Co. v. Mammoth Min. Co.*, 83 Pac. 648, 649, 676-680, 29 Utah, 490.

### LIMITATION

See Conditional Limitation; Executory Limitation; Small Limitations; Title by Limitation or Prescription.

The word "limitation," as used in a lease for a term of years, reciting that it is subject to the conditional limitations herein stated, and stipulating in the following paragraph that the occupation of the premises by the tenant and his family as a strictly private dwelling apartment is a specific consideration for the granting of the lease, means restriction. *Schworer v. Connolly*, 88 N. Y. Supp. 818, 819, 44 Misc. Rep. 222.

An "estate upon limitation" is one which is made to determine absolutely upon the happening of some future event. The technical words generally used to create limitations are conjunctions relating to time, such as during, while, so long as, until, etc. These words are not, however, absolutely necessary, for, where necessary in order to carry out the intent of the grantor, an estate will be construed to be a limitation, though words ordinarily used in the creation of an estate upon condition appear in their stead. An "estate upon limitation" differs from one upon condition in this: That the estate is determined *ipso facto* by the happening of the contingency and does not require any entry by the grantor in order to defeat it. *Diamond v. Rotan (Tex.)* 124 S. W. 196, 200 (quoting and adopting definition in *Tied. Real Prop.* § 211).

Where an estate is so expressly limited by the words of its creation that it cannot endure for any longer time than until the contingency happens upon which the estate

is to fail, the provision is a limitation. *Low v. Thompson*, 111 N. Y. Supp. 607, 608.

Code, § 1329, which provides that "any limitation by deed" to the heirs of a living person shall be construed to be to his children, abolishes the common-law rule that a deed to the heirs of a living person is void for uncertainty, and makes a deed to the heirs of a living person a valid deed to his children; the word "limitation" in the statute meaning the creation of an estate. "The confusion which has frequently arisen in the use of the word 'limitation' has been due to a failure to appreciate the distinction, its original sense, namely, that of a member of a sentence expressing the limits or bounds to the quantity of an estate, and its derivative sense, in which it is used, as an entire sentence, creating and actually or constructively marking out the quantity of an estate. In our statute the word is manifestly used in its derivative or secondary sense." *Campbell v. Everhart*, 52 S. E. 201, 204, 139 N. C. 508 (citing 2 *Fearne, Remainders* [4th Am. Ed.] marg. p. 10, § 24; *Starnes v. Hill*, 16 S. E. 1101, 112 N. C. 1, 22 L. R. A. 598).

### Estate on condition distinguished

The distinction between an "estate on limitation" and one "on condition" is that in the former the event or occurrence relied on to determine the first estate and as the beginning of another merely marks the end or limit of the first, and thus indicates the boundary between the two, while in estates on condition it actively defeats what might otherwise be a greater interest. *Diamond v. Rotan (Tex.)* 124 S. W. 196, 200.

### As perpetuity

See Perpetuity.

### As proviso

See Proviso.

### LIMITATION OF ACTIONS

The "statute of limitations" is a statute of repose. *McWhorter v. Cheney*, 49 S. E. 603, 606, 121 Ga. 541.

The statute of limitations is a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation be presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. *Burleigh County v. Kidder County*, 125 N. W. 1063, 1065, 20 N. D. 27.

"Statutes of 'limitation' are statutes of repose intended to prescribe a definite limit of time within which the remedies included within their provisions must be prosecuted. They are designed to afford security from stale demands, when from lapse of time, death of witnesses, failure of memory, loss of vouchers, or other causes, the true state of the transactions may be incapable of ex-

planation, and the rights of the parties cannot be satisfactorily investigated." *Davis v. Munie*, 85 N. E. 943, 944, 235 Ill. 620.

The "statutes of limitation" are based on the theory of laches. *Schroeder v. Bozarth*, 79 N. E. 583, 586, 224 Ill. 310 (citing *Mettler v. Miller*, 22 N. E. 529, 532, 129 Ill. 630, 642).

A "statute of limitation" is but the action of the state in determining that, after the lapse of a specified time, a claim shall not be legally enforceable. *State of South Dakota v. State of North Carolina*, 24 Sup. Ct. 269, 288, 192 U. S. 286, 48 L. Ed. 448.

"Statutes of limitation" are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced. *Peters v. Hanger*, 134 Fed. 586, 588, 67 C. C. A. 386.

"Statutes of limitation," as applied in courts of law, are inflexible and framed upon the theory that mere lapse of time, irrespective of other considerations, should bar the claim, while the doctrine of "laches," applied in courts of equity, is sufficiently flexible to give reasonable effect to the special circumstances of any case, and rests not alone upon the lapse of time, but upon the inequity of permitting the claim to be enforced, because of some change in the condition or relations of the property or the parties. *Stevens v. Grand Central Min. Co.*, 133 Fed. 28, 31, 67 C. C. A. 284 (citing *Hammond v. Hopkins*, 12 Sup. Ct. 418, 143 U. S. 224, 250, 36 L. Ed. 134; *Townsend v. Vanderwerker*, 16 Sup. Ct. 258, 160 U. S. 171, 186, 40 L. Ed. 383; *Ward v. Sherman*, 24 Sup. Ct. 227, 192 U. S. 168, 176, 48 L. Ed. 391; *Bryan v. Kales*, 10 Sup. Ct. 435, 134 U. S. 126, 135, 33 L. Ed. 829).

"Limitation," when relied upon as a defense in an action of trespass to try title, is in no sense a plea of confession and avoidance. Unlike a plea of limitation, when urged against an action of debt, it confesses nothing. In the latter class of actions this character of pleading admits that the debt once existed, and seeks to avoid its collection by showing that the right of action is barred by the lapse of time. In those suits the plaintiff states specifically the facts by which he expects to prove his debt, and facts showing the promise, either express or implied, upon which he relies. But in an action of trespass to try title the defense of limitation does not expressly or impliedly admit that the plaintiff ever did have any title to the land sued for. On the contrary, it is as much the assertion of an affirmative title, or right to the land, acquired by the defendant under the provisions of the statute, giving absolute title by reason of adverse use and possession for the statutory period, as a denial of the right of recovery by reason of the lapse of time. It is not

simply a defense limited in its effect to disproving the plaintiff's right of action, but the setting of a superior claim in the defendant. In this respect it occupies the same plane as would a superior right or title acquired from any other source, and is no more to be regarded as a confession that the plaintiff once had a title than would the pleading of a written conveyance acquired under such conditions as would render it superior to that under which the plaintiff might claim. *Meade v. Logan (Tex.)* 110 S. W. 188, 191.

Gen. Laws 1865, p. 749, c. 191, § 31, providing that every judgment should be presumed to be paid after 20 years from rendition thereof, but that in any suit in which the party against whom such judgment was rendered was a party the presumption might be repelled by written acknowledgment or proof of payment of some part of the amount recovered by the judgment, but that in all other cases it should be conclusive, is not one of limitation, and the absence of a judgment debtor from the state did not affect the running of time in favor of the presumption. *Cobb v. Houston*, 94 S. W. 299, 301, 117 Mo. App. 645.

The provision of Civ. Code 1901, par. 989, requiring claims against counties to be presented within six months, is not a "law of limitation" within Civ. Code 1901, par. 2968, providing that laws of limitation shall not be available in any suit unless specially pleaded as a defense, but is a special statutory limitation of the essence of the right created, and the lapse of which not only bars the remedy but extinguishes the right. *Cochise County v. Wilcox (Ariz.)* 127 Pac. 758, 760.

Pub. St. 1901, c. 187, § 7, permitting a petition to have the probate of a will re-examined in solemn form within one year after the date of the decree, is a statute of limitations designed to secure the final probate of wills, while the facts are within the knowledge of living persons, and to promote the requirement of public policy looking to the speedy settlement of decedent's estates, and such a petition cannot be maintained more than a year after the probate decree. *Knight v. Hollings*, 63 Atl. 38, 42, 73 N. H. 495.

The statute allowing two years for redemption from a tax sale is not a statute of limitations within Const. § 104, providing that limitations shall not run against the state or any county, etc., and a county has not the right after the expiration of the two-year period to redeem land, which after the tax sale it bought at a trustee's sale, to protect a loan made by it on the land prior to the tax sale. *Tallahatchie County v. Little*, 46 South. 257, 258, 93 Miss. 88.

Statutes of limitation do not run against the state in respect to "public rights," unless



the state is expressly included within the terms of the statute; but where the state becomes a partner with individuals or engages in business, it divests itself of its sovereign character and is subject to the statute. The rule that statutes of limitation do not run against the state also extends to counties, cities, towns, and minor municipalities in all matters respecting strictly public rights, as distinguished from private and local rights; but as to matters involving private rights they are subject to statutes of limitation to the same extent as individuals. *Brown v. Trustees of Schools*, 79 N. E. 579, 580, 224 Ill. 184, 115 Am. St. Rep. 146, 8 Ann. Cas. 96 (citing *County of Platt v. Goodell*, 97 Ill. 84; *Lee v. Town of Mound Station*, 8 N. E. 759, 118 Ill. 304; *President, etc., of Kaskaskia v. McClure*, 47 N. E. 72, 167 Ill. 23).

#### Equitable actions

"Limitations" and "laches," when applied to the period within which an equitable right may be asserted, are not synonymous. "Limitations" signify that fixed statutory period, whether expressly applicable to suits in chancery or followed by analogy, while "laches" signifies unreasonable delay independent of statute or any fixed period of time. "Laches" also involves prejudice, actual or implied, resulting from the delay. It does not arise from delay alone, but from delay which works disadvantage to another, as the defense of laches is neither a limitation nor an estoppel, but partakes of the characteristics of both. *Wilder's Ex'r v. Wilder*, 72 Atl. 203, 205, 82 Vt. 123.

#### As prescription

"So far, therefore, as the title to property is concerned, or, at all events, so far as the title to real property is concerned, 'prescription' and 'limitation' are convertible terms; and a plea of the proper statute of limitations is a good plea of prescriptive right. The language of decisions with reference to water rights has been in accordance with this view." Hence, "where defendant at the time plaintiff commenced its action had already had a prescribed right to divert the waters of a certain ditch, the extent of that right is to be determined from the nature and character of the adverse user on which it is founded, and is commensurate with the extent to which it was adversely enjoyed for the requisite statutory period sufficient to vest the right. *Wutchumna Water Co. v. Ragle*, 84 Pac. 162-164, 148 Cal. 759 (quoting and adopting *Alhambra Addition Water Co. v. Richardson*, 14 Pac. 381, 72 Cal. 601).

The term "limitations," as used in statutes of this country relating to adverse possession, is merely synonymous with the word "prescription" used in the Roman law; and means the time prescribed by statute within which a title to property may be acquired by

adverse possession. *Brock v. Kirkpatrick*, 48 S. E. 72, 79, 69 S. C. 231 (citing *Tyler on Ejectment*, p. 88).

#### LIMITATION OF LIABILITY

See *Agreement Limiting Liability*.

#### LIMITATION OF A REMAINDER

A "limitation of a remainder," strictly so called, is a clause creating or transferring an estate or interest in lands or tenements which is limited, either directly or indirectly, to take effect in possession or in enjoyment, or in both, subject, only, to any term of years or contingent interest that may intervene immediately after the regular expiration of a particular estate or freehold previously created together with it by the same instrument out of the same subject of property. *Biggerstaff v. Van Pelt*, 69 N. E. 804, 806, 207 Ill. 611 (citing *Smith, Ex. Int.* § 159).

#### LIMITATION SPECIALLY PRESCRIBED BY LAW

See *Specially Prescribed by Law*.

#### LIMITED

Determine equivalent, see *Determine*.

#### LIMITED BY LAW

See, also, *Law*.

The expression "limited by law," employed in a statute, refers to statutory law. *People v. Knapp*, 182 N. Y. Supp. 747, 750, 147 App. Div. 436.

#### LIMITED JURISDICTION

The Supreme Court of Appeals is a "court of limited jurisdiction," as defined by the Constitution and laws passed in pursuance thereof, and the burden is on one invoking its authority to establish its jurisdiction over the matter in controversy. *Forbes v. State Council, Junior Order United American Mechanics of Virginia*, 60 S. E. 81, 107 Va. 853.

#### LIMITED PARTNERSHIP

Code Civ. Proc. § 758, as amended in 1877 (Laws 1877, c. 416, § 1, subd. 169), provides that in the case of death of one of two or more defendants, if the entire cause of action survives against the others, the action may proceed against the survivors, but that the estate of one jointly liable upon contract with others shall not be discharged by his death; and Partnership Law (Laws 1897, c. 420) § 3, makes a partnership formed otherwise than as prescribed in the chapter for the formation of a limited partnership a general partnership. Section 4 defines a "limited partnership" as one or more persons called "general partners," and also one or more called "special partners." Section 5 makes every general partner the agent for the firm. Section 6 makes every general partner liable for all firm obligations jointly and severally with his general copartner. Section 7 makes a

special partner liable only to the amount of the capital invested by him, and article 3 is entitled "Limited Partnership." Section 36 provides that the general partner "in such partnership" shall be jointly and severally liable as general partners are by law, and that special partners shall not be liable beyond the fund contributed by them to the capital. Held, that section 6 of the partnership law is confined to limited partnerships, and does not make the partners of a general firm jointly and severally liable to the firm creditors, and hence the representative of a deceased partner could not be substituted for him in an action for firm debts. *Seligman v. Friedlander*, 92 N. E. 1047, 1049, 199 N. Y. 373.

### LIMITED PERIOD

While the Legislature can authorize the assignment of a homestead upon the granting of a divorce to either party absolutely, whether such homestead is carved out of the separate property of one or selected from the community, yet, under Civ. Code, § 146, subd. 4, which limits the right of such party in a homestead selected from the separate property of the other to its enjoyment "for a limited period," there may be enjoyment or occupation by the innocent party for a long period of years, even during the life of such party, but it does not mean that the court has the power of vesting the homestead absolutely in such party unless he is the former owner of property from which the homestead was selected. *Zanone v. Sprague*, 116 Pac. 989, 991, 16 Cal. App. 333.

### LIMITED PUBLICATION

A "limited publication" is one which communicates market quotations to a select few on condition expressly or impliedly precluding their rightful ulterior communication, except in restricted private intercourse. *Chamber of Commerce of Minneapolis v. Wells*, 111 N. W. 157, 159, 100 Minn. 205 (quoting and adopting definition in *Keene v. Wheatley*, 14 Fed. Cas. 180).

### LIMITED TERM

See Fixed and Limited Term.

### LINE

See Back Line; Building Line; Center Line; Conditional Line; Connecting Lines; Continuous Line; Curb Line; Dividing Line; Each Line of Tax Roll; Half Section Line; Lot Line; Main Line; Marked Line; Meander Line; On Its Line; Property Line; Shore Line; Side Lines; Stage Line; Telephone Line; True Line.

A building line, see A.

Competing lines, see Competing. Straight line, see Straight.

In a deed granting by metes and bounds a small parcel of land out of the northeastern

corner of a large tract known to contain coal, and also the privilege, should the grantee, "his heirs, or assigns, open a coal mine on said (granted) tract of land, of undermining southward beyond the lines of said tract of said land, so far as not to injure the tract of land of which this was a part, and now taken from," the word "lines" strongly imported an intention to make a larger grant than that of the coal lying immediately south. *Higgins v. Round Bottom Coal & Coke Co.*, 59 S. E. 1064, 1068, 63 W. Va. 218.

The St. Louis city charter, which authorizes the assembly to establish "a building line" along boulevards, does not prevent the assembly from establishing different building lines along the same boulevard; the word "line," as used in the charter, meaning a mark of division or demarkation, an outline or contour, a limit or boundary, and not a straight line. *City of St. Louis v. Handlan*, 145 S. W. 421, 423, 242 Mo. 88.

### In printing

"The word 'line' is not a technical term, but one in common use, and having, in common usage, when applied to printing matter, a well-known signification. It then means a row of words, letters, or figures printed across a page or column, without regard to the size of the type," and it has this meaning in act approved April 14, 1892 (2 Gen. St. p. 2325), enacted to regulate the price of legal advertising. *Sheehy v. Hoboken*, 40 Atl. 626, 627, 62 N. J. Law 184 (quoting and adopting *Maillard v. Lawrence*, 16 How. 251, 261, 14 L. Ed. 925; *Daly v. Ely*, 31 Atl. 396, 53 N. J. Eq. 270).

### In surveying

That the description of a survey called for the marked "line" of another survey between designated points which was not a straight line but consisted of four lines and three marked corners was immaterial; the word "line" being often used for the plural, and vice versa, and the singular being also sufficient to describe the exterior boundary of the survey line called for between the designated points. *Bell v. Powers* (Ky.) 121 S. W. 991, 993.

### LINE OF DESCENT

The "line of descent" is the course that property takes according to law when the owner dies. Under Domestic Relations Law (Laws 1896, p. 226, c. 272, § 64), providing that the foster parent and the minor sustain toward each other the legal relation of parent and child with all the rights and subject to all the duties of that relation, including the right of inheritance from each other, a son of an adopted daughter of a testator is a "lineal descendant" within Tax Law 1896 (Laws 1896, p. 869, c. 908, § 221), providing that the transfer of property from a decedent to any lineal descendant shall not be taxable under the transfer tax law, etc. In *re Cook's Estate*, 79 N. E. 991, 994, 187 N. Y. 253.

# LINE OF DUTY

Laws 1903, p. 102, c. 41, authorizing a pension to the widow and children of a policeman on his death "while in the line of duty," does not authorize a pension where a policeman while at his place of duty committed suicide because of insanity, where there was no showing that the insanity was the result of the performance of his duty. A policeman would be in the line of his duty while walking upon his beat or while going to any point where his duty called him, but if he should meet a person against whom he held a grudge, and without provocation or cause he should assault him, and in self-defense such person should take his life, it could not in reason be said that he came to his death while in the line of his duty. Again, a policeman's duty might call him to where intoxicating liquors are sold to be drunk as a beverage, and while there he would partake of such liquors until he became intoxicated, and while in that condition go upon the street and get killed as a direct result of his intoxication, it would be travesty to say that his death resulted from the performance of a duty enjoined upon him, or that he was killed "in the line of his duty." In either event his death would not be the result of his being a policeman, or the result of his attempting to discharge any duty as such. *Hutchens v. Covert*, 78 N. E. 1061, 1062, 39 Ind. App. 382.

# LINE OF RAILROAD

The term "line" in the general railroad act declaring that the directors of every company formed under the act may, by a vote of two-thirds of their whole number, at any time, alter or change the route, if it shall appear to them that the line can be improved, means the same as "route." By "line" is not meant the organization of the several particulars taken together, which, when used for the active affairs of the company might colloquially be termed the "line," but it is that specific thing which, taken by itself, even before the company goes into active operation, is called its "line" or "route." *Webb v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 102 N. Y. Supp. 762, 767, 52 Misc. Rep. 46.

"Two carriers may use the same road, but each has its separate 'line.' The defendant may lease trackage rights to any other company, but the joint use of the same track does not create the 'same line,' so as to compel either company to graduate its tariffs by that of the other." A joint traffic arrangement by which connecting carriers haul from a point on one road to a point on the other road for less than the first carrier charges from the same point on its road to its terminus between the points is not in violation of Ky. St. § 820, making it an offense for a carrier to charge more for hauling for a shorter distance than for a longer distance over the same line in the

same direction; the expression "over the same line" not including a shipment passing in part over the line of each. *Commonwealth v. Chesapeake & O. R. Co.*, 72 S. W. 361, 363, 115 Ky. 57 (quoting and adopting *Chicago & N. W. R. Co. v. Osborne*, 52 Fed. 912, 3 C. C. A. 347).

As used in Rev. St. 1883, c. 6, § 42, as amended by Pub. Laws 1901, p. 160, c. 145, relating to taxation, the word "railroad" comprehends the equipment, roadbed, sites of depots and warehouses and other real estate, and the words "line or system" cannot be disconnected from it, and mean in this connection a railroad operated as a part of a line or system extending beyond the state. *State v. Canadian Pac. R. Co.*, 60 Atl. 901, 902, 100 Me. 202.

# LINE OF SHIP CHANNEL

A description of a boundary as following the "line of ship channel" means the line of low tide. *Western Pac. Ry. Co. Southern Pac. Co.*, 151 Fed. 376, 386, 80 C. C. A. 606.

# LINE OF TELEGRAPH OR TELEPHONE POLES

By a "line of telegraph or telephone poles" is meant a line of poles carrying an unlimited number of wires, and such a line is not rendered plural in its nature by having more than one line stretched upon it. It still remains a single line. *Northeastern Telephone & Telegraph Co. v. Hepburn*, 65 Atl. 747, 749, 72 N. J. Eq. 7.

# LINE SHAFT

The word "shaft," as used in connection with or applied to factories, is a revolving bar to convey the force which is generated by some prime mover to the different working machines, and a "line or main shaft" is a bar of considerable length, and usually bearing a number of pulleys by which power is transmitted to countershafts. *Hohenstein-Harmetz Furniture Co. v. Matthews*, 92 N. E. 196, 199, 46 Ind. App. 616.

# LINE TREES

"Line trees" are "trees standing directly on the boundary between lands of adjoining owners," and are "usually considered common property, which neither may destroy without the consent of the other." *Harndon v. Stultz*, 100 N. W. 329, 330, 124 Iowa, 440 (citing *Musch v. Burkhart*, 48 N. W. 1025, 83 Iowa, 301, 12 L. R. A. 484, 82 Am. St. Rep. 305).

Under the express provisions of Civ. Code, § 834, "line trees" are those whose trunks stand partly on the land of two or more coterminous owners, and belong to them in common. *Scarborough v. Woodill*, 93 Pac. 383, 7 Cal. App. 39.

Where adjoining owners were co-tenants of certain line trees, neither was at liberty to cut the trees without the consent of the

other, if he thereby injured the common property in the trees. *Scarborough v. Wood-ill*, 93 Pac. 383, 7 Cal. App. 39.

## LINEAL

"Lineal" is that which subsists between persons of whom one is descended in a direct line from the other, as between son, father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between son, grandson, great-grandson, and so downwards in the direct descending line. *State v. De Hart*, 33 South. 605, 606, 109 La. 570.

The Century Dictionary defines "lineal" as "proceeding in a direct or unbroken line; unbroken in course; distinguished from collateral; as lineal descent; lineal succession." Worcester defines "lineal" as in a direct line from an ancestor, pertaining to a direct line of descent, hereditary. In *re Cook's Estate*, 100 N. Y. Supp. 628, 629, 50 Misc. Rep. 487.

## LINEAL CONSANGUINITY

"Consanguinity" or kindred is the connection or relation of persons descended from the same stock or common ancestor, and is either lineal or collateral; and "lineal consanguinity" is that which subsists between persons of whom one is descended in a direct line from the other. *Suman v. Harvey*, 79 Atl. 197, 204, 114 Md. 241.

## LINEAL DESCENDANTS

Testator devised part of his estate to trustees, to hold equally for the benefit of testator's three children, and to pay to each of them the rents and profits of his or her portion for life, and at his or her death to transfer and convey to his or her "lineal descendants," if any, and, if none, then equally to the survivors of testator's descendants, or to their lineal descendants, if any; that the descendants of any child should have the portion which their parent, if living, would have taken, and, in case of death of all of testator's children without issue, to convey the trust res to testator's heirs at law. Held, that the words "lineal descendants" had the same legal effect as "heirs of the body," and that equitable estates in fee tail were therefore created by the will, with contingent cross-remainders to the survivors or their descendants, if either child died without issue. *Paine v. Sackett*, 61 Atl. 753, 755, 27 R. I. 300.

A trust deed conveying property to trustees during their lives and the life of the survivor of them recited that the grantor wished to provide for the maintenance of the beneficiaries named, directed the trustees to distribute the proceeds among the beneficiaries, provided for the distribution thereof on the death of one or more of the beneficiaries with or without "lineal descend-

ants," and that, on the termination of the trust estate by the death of the last surviving trustee, the "lineal descendants" of the beneficiaries named should take the body of the fund, and further provided that the beneficiaries should not take any other interest in the grantor's property in the state than that therein granted. Held, that the phrase "lineal descendants" must be taken in its technical sense, and the contingencies on which the corpus of the fund devolved on the issue of the beneficiaries were that all the beneficiaries, as well as all the trustees, should be dead. *Parrish v. Mills*, 106 S. W. 882, 883, 101 Tex. 276.

## Adopted child

A legally adopted child is a "lineal descendant" of its adopting parents. In *re Winchester's Estate*, 74 Pac. 10, 140 Cal. 468 (citing *Warren v. Prescott*, 24 Atl. 948, 84 Me. 483, 17 L. R. A. 435, 30 Am. St. Rep. 370).

The Century Dictionary defines the words "lineal descendant" to mean "descended from father to son through successive generations," and "descendant" as "an individual proceeding from an ancestor in any degree; issue, offspring, near or remote." "Lineal" is defined as "proceeding in a direct or unbroken line; unbroken in course; distinguished from collateral; as lineal descent; lineal succession." Worcester defines "descendant" as "the offspring of an ancestor; progeny," and "descent" as "proceeding from an original or progenitor, extraction." A son of an adopted daughter of testator is not a "lineal descendant" within the transfer tax act, so as to exempt his legacy from the transfer tax. In *re Cook's Estate*, 100 N. Y. Supp. 628, 629, 50 Misc. Rep. 487.

A "lineal descendant" is one who is in the line of descent from a certain person, but, since the passage of the domestic relations law, not necessarily in the line of generation. Under Domestic Relations Law (Laws 1896, p. 226, c. 272, § 64), providing that the foster parent and the minor sustain toward each other the legal relation of parent and child with all the rights and subject to all the duties of that relation, including the right of inheritance from each other, a son of an adopted daughter of testator is a "lineal descendant" within Tax Law 1896 (Laws 1896, p. 869, c. 908, § 221), providing that the transfer of property from a decedent to any "lineal descendant" shall not be taxable under the transfer tax law, etc. In *re Cook's Estate*, 79 N. Y. 991, 994, 187 N. Y. 253.

## As descendant

See Descendant.

## LINEAL HEIRS

The words "lineal heirs," like "heirs of the body," mean all lineal descendants to

the remotest posterity, and are words of inheritance, and not of purchase, unless the instrument clearly shows they were used in a restricted sense to denote "children." *Clark v. Neves*, 57 S. E. 614, 615, 76 S. C. 484, 12 L. R. A. (N. S.) 298 (citing *Duckett v. Butler*, 45 S. E. 137, 67 S. C. 130; *Holman v. Wesner*, 45 S. E. 206, 67 S. C. 307).

The phrase "lineal heirs" is equivalent to the words "legal representative." In *re Tuttle's Estate*, 59 Atl. 44, 45, 77 Conn. 310 (citing *Ketchum v. Corse*, 31 Atl. 486, 65 Conn. 89).

### LINEAL INHERITANCE TAX

A tax on the interests of lineal descendants is a lineal inheritance tax, and that on collateral descendants a collateral inheritance tax. In *re Macky's Estate*, 102 Pac. 1075, 1078, 46 Colo. 79, 23 L. R. A. (N. S.) 1207.

### LINEAL ISSUE

Act Cong. June 13, 1898, c. 448, 30 Stat. 448, as amended by Act March 2, 1901, c. 806, 31 Stat. 938, imposing a succession tax, classified legatees and distributees with reference to their degree of blood relationship to the deceased, and regulated the taxes accordingly. In the first class were placed the lineal issue or lineal ancestor, brother or sister of the decedent; in the second the descendants of a brother or sister; in the third the brother or sister of the father or mother or a descendant; in the fourth class, the brother or sister of the grandfather or grandmother or a descendant; and in the fifth all beneficiaries found to be in any other degree of collateral consanguinity, or who may be a stranger in blood to the person dying seised of the property. Held, that an adopted child, though under the laws of the state entitled to all the rights of heirship of a child born in lawful wedlock, was not a "lineal issue" within the first class, but was a stranger in blood within the fifth class. *Kerr v. Goldsborough*, 150 Fed. 289, 290, 80 C. C. A. 177.

### LINER

A machine known as a "liner," a heavy, hollow, revolving iron roller, filled with steam of high temperature, with a smaller roller above, between which papers were passed by the operator, was not the character of machinery required to be guarded by Burns' Ann. St. 1908, § 8029, requiring employers to guard "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery"; the liner being neither a "vat" nor a "gearing." *Jenkins v. Lafayette Box Board & Paper Co.*, 87 N. E. 992, 993, 43 Ind. App. 463.

### LINK

The word "link," in an instruction on reasonable doubt on a trial for crime where

the testimony of the complaining witness to the main fact was direct and the only circumstantial evidence in the case was corroborative, that it was not necessary that every fact and circumstance and every "link" in the chain must be proven beyond a reasonable doubt, but that all the evidence in the case, when considered as a whole, must satisfy the jury beyond a reasonable doubt that defendant was guilty, is used to refer only to evidentiary facts which may add force or weight to other facts from which the inference of guilt may be drawn, and the instruction is not erroneous. *People v. Rich*, 94 N. W. 375, 378, 133 Mich. 14.

### LINOLEUM

See Granite Linoleum.

Plank linoleum, made by running upon the burlap foundation paste of two colors in stripes of equal width, a process differing from that employed in making inlaid linoleum, is, under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 337, 30 Stat. 180, dutiable as "linoleum \* \* \* figured or plain," rather than as "inlaid linoleum." *United States v. Scott & West*, 164 Fed. 285, 286.

### LINSEED OIL

Laws 1897, p. 403, c. 217, provides that no person or corporation shall manufacture or sell any linseed oil, unless the same answers a chemical test for purity recognized in the United States Pharmacopœia, and declares that the same shall be sold under its true name and in vessels bearing proper stamps, describing it as pure linseed oil raw or pure linseed oil boiled. Laws 1901, c. 332, amends the act, and provides that no person or corporation shall manufacture linseed oil, unless the same answers to a certain described test. The amendment makes no reference to raw or boiled oil. The words "linseed oil," as used in the amendment, includes both raw and boiled oil. *State v. Williams*, 100 N. W. 641, 642, 93 Minn. 155.

### LINT COTTON

Acts 1896, p. 172, c. 156, § 16, imposes a tax on all "lint cotton" annually grown in a levee district, etc., and Acts 1904, p. 126, c. 90, § 5, makes it unlawful for any person to remove from the district any "cotton" grown therein without first paying the levee tax thereon, and declares that the levee board may recover from the person wrongfully removing such cotton a certain penalty tax on each bale or hundredweight of "seed cotton" so removed. Held, that the words "lint cotton" in the first act and "cotton" and "seed cotton" in the second act were limited to "lint cotton" ginned by ordinary gins, and did not include "linter" or "Grabbot" cotton obtained by reginning cotton

seed and hard locks of cotton and cotton mixed with hulls, bolls, and other substances which could not be removed by ordinary ginning. *Mississippi Levee Com'rs v. Refuge Cotton Oil Co.*, 44 South. 828, 829, 91 Miss. 480.

## LINTER COTTON

See Lint Cotton.

## LIQUEUR

Vermuth is not a "wine," "cordial," or "liqueur," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174, prohibiting an allowance for the leakage of those three articles. *United States v. Julius Wile, Sons & Co.*, 178 Fed. 269, 270, 101 C. C. A. 574.

## LIQUID

See Inflammable Liquid; Poisonous Liquid.

## LIQUID MIXTURE

The terms "beverage," "liquid mixture," or "decoction," as used in Ky. St. 1903, § 2557a, making the sale at retail of a beverage, liquid mixture, or decoction which produces intoxication, unlawful in a territory wherein the sale of intoxicating liquor is prohibited, are used interchangeably, each synonymous with the other. *Commonwealth v. Jarvis & Williams*, 86 S. W. 556, 557, 120 Ky. 334.

## LIQUIDATE

Laws 1907, c. 244, entitled an act "for the liquidation and payment of the claim \* \* \* against the state in full and final settlement of said claim and all other demands," does not indicate any legislative intention to pay a debt or claim which did not exist, as the word "liquidate" is defined to be the act of settling and adjusting debts, or ascertaining the amounts or balance due. *Hanly v. Sims*, 94 N. E. 401, 403, 175 Ind. 345 (citing 5 Words and Phrases, p. 4130).

## LIQUIDATED

Plaintiff's demand in an action on notes is liquidated, within Rev. St. 1895, art. 754, providing that, if the suit be founded on a certain demand, defendant may not set off unliquidated damages. *Wise v. Ferguson* (Tex.) 138 S. W. 816, 818.

Whether a claim is of a nature connoted by the term "set-off," and whether, as to its liquidated or unliquidated character, capable of being the subject of set-off, is to be determined by applying the test, Will an action of indebitatus assumpsit lie thereon? If so, it is liquidated within the legal meaning of the word "set-off." *Links v. Marlowe*, 84 Atl. 1056, 1057, 83 N. J. Law, 389.

The words "sum liquidated," as used in a statute providing that no demand shall be set off unless for the price of real or personal estate sold or for money paid, money had and received, or for services done, unless it be for a sum liquidated or one that may be ascertained by calculation, do not include an unliquidated claim for use and occupation. *Hall v. Glidden*, 39 Me. 445, 447.

The word "liquidated," in the sense of the rule that payment of a lesser sum is a discharge of the remainder where the amount in dispute is unliquidated, but that it is not a discharge where it is liquidated, means that the amount due has been ascertained and agreed on by the parties or fixed by operation of law. The rule does not apply where there is a bona fide dispute as to the amount actually due. A demand is not liquidated, even, if it appears that something is due, unless it appears how much is due; and when it is admitted that one of two specific sums is due, but there is a general dispute as to which is the proper amount, the demand is regarded as "unliquidated" within the meaning of the term as applied to the subject of accord and satisfaction. *T. B. Redmond & Co. v. Atlanta & B. Air Line Ry.*, 58 S. E. 874-876, 129 Ga. 133 (quoting 5 Words and Phrases, p. 4174).

A petition which shows that the amount sued for was the price of an article sold by plaintiff to defendant, and which alleges that defendant promised to pay plaintiff the sum sued for, which sum was the agreed value thereof, states a cause of action for a liquidated demand within Sayles' Ann. Civ. St. 1897, arts. 754, 755, providing that, where a suit is founded on a certain demand, an unliquidated demand cannot be set off unless it is connected with the cause of action, and defendant cannot set up as a counterclaim a demand for unliquidated damages for breach of warranty in the sale of the other goods, the word "liquidated" meaning adjusted, certain, or settled in respect to the amount; a debt being liquidated when the amount is agreed on by the parties, or fixed by the operation of law. *Brooks Tire Mach. Co. v. Shields*, 108 S. W. 1005, 1006, 48 Tex. Civ. App. 531.

A claim is a "liquidated claim" where the amount due is fixed by law or has been ascertained and fixed by the parties. *Scarritt Estate Co. v. J. F. Schmelzer & Sons Arms Co.*, 86 S. W. 489, 491, 110 Mo. App. 406 (citing Bouv. Law Dict.; Chicago, R. I. & P. R. Co. v. Mills, 69 Pac. 317, 18 Colo. App. 8; Commercial Union Assur. Co. of London v. Meyer, 29 S. W. 93, 9 Tex. Civ. App. 7; Mitchell v. Addison, 20 Ga. 50; Kennedy v. Queens County, 62 N. Y. Supp. 276, 47 App. Div. 250).

"A demand is not 'liquidated,' even if it appears that something was due, unless it appears how much was due." The courts

have defined the meaning of "liquidated demand" in language so broad that almost any claim short of damages for an assault and battery might be embraced in the definitions given, but on principle and under the cases the court holds that plaintiff's claim for services in this case was not a "liquidated demand" because the number of days he worked for defendant was in serious dispute, and the value of his services was also in controversy; the evidence showing that the demand might be anywhere from \$25 to \$75. *White v. Curtis*, 98 N. Y. Supp. 319, 320, 49 Misc. Rep. 50 (quoting from *Nassoi v. Tomlinson*, 42 N. E. 715, 148 N. Y. 326, 330, 51 Am. St. Rep. 695).

A demand is a "liquidated demand" whenever the amount due is agreed on by the parties or fixed by operation of law. Another definition is adjusted, certain, or settled in respect to amount. In an action for the price of goods sold, defendant pleaded that he had paid plaintiff for a car load of goods previously sold by plaintiff to defendant at a certain price per sack, but that on opening the car defendant had found a shortage and a certain number of sacks so worthless that they were rejected. Held, that the total of the price per sack for each missing and rejected sack constituted a "liquidated demand," and hence might be set off in the action. *Harrington Lumber Co. v. Smith*, 99 S. W. 110, 112, 44 Tex. Civ. App. 363 (quoting and adopting definitions in *Wat. Set-Off*, § 337; *Abb. Law Dict.*).

Where one agreed to pay an attorney, for professional services to be rendered, 5 per cent. of the value of certain timber, title to which was to be acquired as a result of the attorney's efforts, the claim of the attorney for compensation became, upon the performance of the services, a liquidated demand, and, as such, bore interest from the date it became due, notwithstanding the contract provided that, in the event of disagreement as to value, the owner of the timber should submit to the attorney a "give and take proposition," and thereafter refused to do so. *Council v. Hixon*, 76 S. E. 603, 607, 11 Ga. App. 818.

#### LIQUIDATED BY LITIGATION

The words "liquidated by litigation," within Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561, limiting the time for proof of claims liquidated by litigation, are not intended merely to preserve to litigant creditors their rights against a bankrupt estate, so as to preclude right of surety on bankrupt's bond for costs on appeal to prove a claim to recover reimbursement. In *re Lyons Beet Sugar Refining Co.*, 192 Fed. 445, 447.

The phrase "liquidated by liquidation," as used in Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561, is not sufficiently comprehensive to include the judgment or decree of a court depriving a creditor of a voidable

preference at the suit of the trustee. In *re Otto F. Lange Co.*, 170 Fed. 114, 115.

The term "liquidated by litigation," as used in Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561, permitting proof of claims after a year if liquidated by litigation, applies to a case where the creditor has claimed to hold security, and has litigated that question and been defeated and thereafter attempts to prove as a general creditor. In *re Salvator Brewing Co.*, 188 Fed. 522, 524.

After bankruptcy, certain proceedings were brought in the state court to set aside a conveyance of property from the bankrupt to claimants before adjudication. If the conveyance had been held good, the claims would have been satisfied from the property conveyed, which claimants sought to hold as security for their claims, in which they were unsuccessful. Held that, though such litigation did not in terms relate to the amounts due claimants, the question litigated necessarily involved a determination of the net amount for which their claims should be finally allowed, and hence such claims should be regarded as "liquidated by litigation," within Bankr. Act July 1, 1897, c. 541, § 57n, 30 Stat. 561, providing that if claims are liquidated by litigation, and final judgment therein is rendered within 30 days before or after the expiration of a year from the adjudication, they shall be proved within 60 days after the rendition of such judgment. In *re Keyes*, 160 Fed. 763, 764.

The term "liquidated by litigation," as used in Bankr. Act July 1, 1898, § 57n, providing that claims shall not be proved against a bankrupt estate subsequent to a year after the adjudication or if they are liquidated by litigation and the final judgment therein is rendered within 30 days before or after the expiration of such time, then within 60 days after the rendition of such judgment, means that a creditor who during the year was engaged in litigation with the bankrupt's estate concerning its liability to him is entitled to additional time, though the litigation was to determine whether a mortgage securing the creditor was invalid as a preference, which question was determined in the affirmative. *Powell v. Leavitt*, 150 Fed. 89, 91, 80 C. C. A. 43.

#### LIQUIDATED DAMAGES

Where a fire insurance loss was adjusted and the amount due agreed on, such amount was "liquidated damages." *C. H. Brown Banking Co. v. Baker*, 74 S. W. 454, 455, 99 Mo. App. 660 (citing *Bouv. Law Dict.*).

A contract for a penalty is an agreement to pay a stipulated sum in case of default, intended to coerce performance, to punish default, or to secure the payment of actual damages, while a contract for liquidated damages is a contract by which the parties in advance of breach fix the amount of dam-

ages which will result therefrom and agree on its payment. *Muehlebach v. Missouri & K. I. Ry. Co.*, 148 S. W. 453, 456, 166 Mo. App. 305.

The term "liquidated damages" is used in reference to the breach of a contract or nonperformance of duty as expressing a fixed sum which is agreed upon between the parties as the ascertained damage which the one is to receive and the other to pay because of the default. *United States v. United States Fidelity & Guaranty Co.*, 151 Fed. 534, 536.

#### Construction of contracts

There are two rules for inferring that the sum to be paid for breach of a contract is intended as liquidated damages: First, where the damages are not readily capable of ascertainment by any known rule, whether the uncertainty lies in the nature of the subject, or in the circumstances of the case; and, second, where from the agreement it is apparent that the damages have been the subject of a fair adjustment between the parties. *Charleston Lumber Co. v. Friedman*, 61 S. E. 815, 816, 64 W. Va. 151.

In determining whether a sum named in a contract is to be considered as a "penalty" or as "liquidated damages," the courts are aided by circumstances extraneous of the writing. When parties to a contract stipulate that in case of a violation thereof the party making the default shall pay a stipulated sum, the courts will take the sum so fixed as the injured party's measure of damages only when it appears that to do so will no more than compensate his loss; but, if the sum so fixed in such contract will more than compensate the innocent party, the court will regard the same as a penalty. *Lee v. Carroll Normal School Co.*, 96 N. W. 65, 66, 1 Neb. (Unof.) 681 (citing *Gillilan v. Rollins*, 59 N. W. 893, 41 Neb. 540).

When damages arising from breach of contract are uncertain, and are not readily susceptible of proof, and, as stipulated, are not so disproportionate to the probable damage suffered as to appear unconscionable, the stipulation will be regarded to provide for "liquidated damages," and not a "penalty"; but if it is inserted to secure the payment of a definite sum of money, or if the actual damages are easily ascertainable, and are less than the stipulated sum, or if the principal agreement provides for the performance of several acts of different degrees of importance, and the stipulated sum is to be paid on a violation of any or all of them, and the sum will, in some instances, be too large, or it is uncertain whether the parties intended liquidated damages or a penalty, it will be treated as a "penalty." Thus, where a contract for the exchange of real estate provided that, if either of the parties should fail to comply with the conditions thereof, he should pay in forfeit to the other the sum

of \$500 as liquidated and agreed damages, which amount was not so disproportionate to the probable damage suffered as to appear unconscionable, it would be construed as liquidated damages, and not a penalty. *Madler v. Silverstone*, 104 Pac. 165, 166, 55 Wash. 159, 34 L. R. A. (N. S.) 1.

"Where an absolute sum is fixed in a contract as security against all breach or breaches of the contract without reference to the magnitude of the breaches or the number thereof and without referring to the amount of the actual damages which might ensue from such breach or breaches whether great or small, and this where there might be several breaches and each of a greater or less magnitude, and each followed by greater or less damages, such fixed sum cannot be considered as agreed or 'liquidated damages,' but must be considered as a 'penalty.'" Where a party sold his business and good will and, as a part of the same transaction, executed a written instrument in which he said that he bound himself in the sum of \$500; that he would not engage in the same business at the same place for the period of five years, the sum named in the instrument was a penalty and not "liquidated damages." *Heatwole v. Gorrell*, 12 Pac. 185, 137, 35 Kan. 692.

When a sum which it is stipulated in a contract shall be paid for its breach is disproportionate to presumable or probable damage or to a readily ascertainable loss, the courts will treat it as a "penalty" and will rely on the principle that the precise sum was not the essence of the agreement, but was in the nature of security for performance. *Hicks v. Monarch Cycle Mfg. Co.*, 68 N. E. 127, 128, 176 N. Y. 111 (citing *Ward v. Hudson River Bldg. Co.*, 26 N. E. 256, 125 N. Y. 230; *Curtis v. Van Bergh*, 55 N. E. 398, 161 N. Y. 47; 3 Pars. Cont. [6th Ed.] 157).

A stipulation that for each day's delay beyond the time for completing a water supply works the contractor should pay \$500 as "liquidated damages," and not as a penalty, was not in fact a penalty and not liquidated damages, where, by failure to complete the water supply works, the city would be deprived of the right of selling its surplus water to municipalities and other persons outside its corporate limits, and the damages which it would thereby suffer were altogether uncertain in amount and not readily susceptible of proof. *Jersey City v. Flynn*, 70 Atl. 506, 507, 74 N. J. Eq. 104.

While it may be stated, as a general proposition, that courts do not look upon forfeitures with favor, and will, when possible, construe provisions therefor as one for a penalty rather than as one for liquidated damages, the true rule is to give such a construction to the provision as will carry out the intent of the parties if clearly as-



certainable from the contract. *Turner v. Fremont*, 159 Fed. 221, 225.

Where damages are not capable of being ascertained by any satisfactory rule and the language of the contract admits of the construction, the sum reserved is "liquidated damages," but where the loss may be easily determined by proof of market values, the sum reserved is a "penalty" subject to the intention of the parties as evidenced by the contract. *Kellam v. Hampton (Tex.)* 124 S. W. 970, 971.

Where the sum named in a contract is declared to be fixed as liquidated damages and is not clearly disproportionate to the loss that may result from a breach, and the damages are not measurable by any exact pecuniary standard, the sum designated is "liquidated damages." *Burley Tobacco Soc. v. Gillaspay (Ind.)* 100 N. E. 89, 91.

In determining whether a specified sum was intended and must be treated as a penalty or as liquidated damages, it is a well-established principle of construction that it will be treated and enforced as liquidated damages where it is agreed to be paid for doing or failing to do an act in respect to which the damages are uncertain and not measurable by any exact pecuniary standard. In a contract for the improvement of a city street providing for completion before October 1st, on failure to do which the contractor agreed to "pay and forfeit" to the city as "liquidated damages" the sum of \$25 per day after October 1st, though the word "forfeit" ordinarily means "penalty," its meaning, like that of the words "liquidated damages," is to be determined by the connection in which it is used, and in view of the fact that it was necessary to complete such improvement in the summer months, and damages might reasonably flow from a failure to complete within the time limited, the damages will be considered liquidated damages, and not a penalty, regardless of whether the city actually suffered damages by the delay. *Barber Asphalt Pav. Co. v. City of Wabash*, 86 N. E. 1034, 1036, 43 Ind. App. 167 (quoting and adopting *People v. Love*, 19 Cal. 676; citing and adopting *Merica v. Burget*, 75 N. E. 1083, 36 Ind. App. 453; *Chaude v. Shepard*, 25 N. E. 358, 122 N. Y. 397; *Noyes v. Phillips*, 60 N. Y. 408; *Ex parte Alexander*, 39 Mo. App. 108; *Pogue v. Kaweah Power & Water Co.*, 72 Pac. 144, 138 Cal. 664; *Eakin v. Scott*, 7 S. W. 777, 70 Tex. 442; *Wilbaux v. Grinnell Live-Stock Co.*, 22 Pac. 492, 9 Mont. 154; *Mayne, Dam.* [5th Ed.] 146; *Pastor v. Solomon*, 55 N. Y. Supp. 956, 26 Misc. Rep. 125; 3 Pars. Cont. [9th Ed.] \*157; *Streep v. Williams*, 48 Pa. 450).

"Even if the thing to be done is called a 'penalty' or 'liquidated damages,' or given no name at all, it will be treated according to the evident intent of the parties and the subject-matter of the contract." A provision in a contract that, if defendant failed to

divert from a river a certain amount of water through a certain uncompleted ditch, which it agreed to complete within a specified time, and to continuously deliver such amount of water, it would surrender to plaintiff all rights which it had acquired through deeds of rights of way or water rights executed by plaintiff to its predecessor, was in the nature of liquidated damages, and not a penalty, within Civ. Code, § 3369. *Pogue v. Kaweah Power & Water Co.*, 72 Pac. 144, 145, 138 Cal. 664 (citing and adopting *People v. Love*, 19 Cal. 677).

"If there are several covenants in the contract of different degrees of importance, and the same sum is stipulated to be paid for a breach of either, the courts incline to treat the sum as a 'penalty,' and, in case of the breach of a covenant, to assess no greater damages than will compensate the obligee." Where a vendor in a contract for the sale of realty bound himself to keep the premises in repair, insure the buildings against fire, furnish an abstract within 80 days, and put a deed in escrow in the same time, a stipulation for payment of \$500 if either party failed to perform his part of the contract was for a simple "penalty," and not for liquidated damages. *Boulware v. Crohn*, 122 Mo. App. 571, 99 S. W. 796, 800 (citing *Gower v. Saltmarsh*, 11 Mo. 271; *Hathaway v. Lynn*, 43 N. W. 956, 75 Wis. 186, 6 L. R. A. 551; *Wilkinson v. Colley*, 30 Atl. 286, 164 Pa. 41, 26 L. R. A. 114).

A bidder for the erection of a public building for a city, who made a deposit with the city and agreed that the amount thereof was the amount of damages which the city would sustain by failure to carry out the proposal, made the deposit liquidated damages, and not a penalty. *Wheaton Building & Lumber Co. v. City of Boston*, 90 N. E. 598, 601, 204 Mass. 218.

When damages arising from the breach of a contract are uncertain in their nature, and not readily susceptible of proof by the ordinary rules of evidence, and are not so disproportionate to the probable damages suffered as to appear unconscionable, and it is reasonably clear from the whole agreement that it is the intention of the parties to provide for liquidated damages and not a penalty, such a stipulation is for liquidated damages. *Herberger v. H. E. Orr Co.*, 114 Pac. 178, 180, 62 Wash. 526.

In a contract for the purchase and sale of an article of merchandise, to be delivered in stated quantities periodically during a term of over five years, a provision that in case of breach by either party the other may be released and recover as liquidated damages a sum equal to the entire purchase price to be paid during the term, is one for a "penalty," having no reference to the actual damages, which in such case are readily ascertainable, and the amount being grossly excessive in case the contract had been per-

formed for any considerable time before the breach. *McCall Co. v. Deuchler*, 174 Fed. 133, 135, 98 C. C. A. 169.

Where a contract provides for the payment of a certain sum as liquidated damages on nonperformance of a specific act which may produce damages of an uncertain character, and no language is used that such damages shall be considered only as a "penalty," the same is to be regarded as "liquidated damages." Where a street railroad, in consideration of \$3,481.07 paid to it by the owner of property fronting on its line, agreed that during one-half of the period named in the company's charter the road should be maintained and operated during its entire length, and that in event of its failure to do so it would pay the property owner the sum of \$3,481.07, with interest, the sum specified was not a "penalty," but "liquidated damages," which the property owner was entitled to recover on a breach by the railroad. *Santa Fé St. Ry. v. Schutz*, 83 S. W. 39, 44, 37 Tex. Civ. App. 14.

Where the payment of a certain sum is agreed to be made for the breach of a single stipulation in a contract, and the damages for such breach are not readily susceptible of proof, if such sum cannot be said to be in excess of what might reasonably be recovered in a suit for such damages, this sum will be held to be for "liquidated damages," and not a penalty. *Gussow v. Belneson*, 68 Atl. 907, 76 N. J. Law, 209.

A bond given by a bidder for a mail contract conditioned as required by the federal statute, which provides that the contractor and his sureties shall be liable for the amount of the bond as "liquidated damages to be recovered in an action of debt on said bond," is an absolute undertaking to pay the amount named therein as "liquidated damages" in case of condition broken, and not one of indemnity or security to the government against loss or damages for breach of contract, and in an action thereon the actual damages cannot be inquired into. *United States v. Alcorn*, 145 Fed. 995, 1001.

Where, on a contract to convey land, \$300 was paid by the vendee on condition that the vendor furnish a fee-simple title, and to be returned on failure to do so, such sum, in the absence of any showing that it was disproportionate to the damages likely to result from the breach, was properly treated as "liquidated damages." *Pinkney v. Weaver*, 74 N. E. 714, 717, 216 Ill. 185.

The rule generally affirmed by authorities is that, where it is agreed by the parties that the sum or rate fixed in a contract shall be "liquidated damages," and the case is one in which they are at liberty to so agree, such an agreement must stand and control unless it is inconsistent with other parts of the contract or is unreasonable or unconscionable in view of the probable damages which may flow

from a breach of such a contract. Where defendant milkman contracted with plaintiff for the purchase of 1,000 pounds of milk each day, which plaintiff was to be permitted to purchase from certain territory without interference by defendant, the stipulation that plaintiff should pay five cents as damages for each gallon of milk which he failed to furnish was for "liquidated damages." *Mondamin Meadows Dairy Co. v. Brudl*, 72 N. E. 643, 645, 163 Ind. 642.

A clause for liquidated damages must be construed as a penalty, if the damages upon a breach are capable of exact computation, or if the so-called liquidated damages are out of all proportion to possible damages; and hence, where a party agrees to pay a definite sum in damages for his failure to pay rent, such sum cannot be regarded as "liquidated damages," since, where a larger sum is to be paid in default of paying a smaller sum agreed to be paid by the same instrument, the larger sum is a "penalty," although the instrument denominates it "liquidated damages." *Feinsot v. Burstein*, 138 N. Y. Supp. 185, 188, 78 Misc. Rep. 259.

B. being the owner of stock in a coal company, which owned no property except a contract assigned to it by B., whereby U. agreed to sell coal land to B., and B. agreed to buy it for \$34,000, payable in three installments, a tripartite agreement was made, whereby the company agreed to sell to R. and R. agreed to buy 20,000 shares of its stock for \$5,000, of which \$1,500 was then paid, with right to R. to rescind if representations made be found untrue; gave R. for the recited consideration of such agreement and the payment made an option to buy another 20,000 shares at 25 cents a share; recited that it was understood and agreed that the company was indebted to U. in the sum of \$32,000 payable in three stated installments; that B. was thereby given by the company 35,000 shares of its stock, in consideration of which he thereby agreed to pay all its said indebtedness as it became due; that, if such sums were not so paid, said 35,000 shares should be delivered to R., who should either pay all such debts and release the company, or deliver such 35,000 shares to the company; and that B. should deliver to a bank the 50,000 shares of stock of the company owned by him, and, if he failed to pay the debts of the company as agreed, then the bank should deliver the 50,000 shares to R., and R. should become the absolute owner thereof. Held, that the provision as to the 50,000 shares was neither part of the consideration nor one for liquidated damages, but a penalty or forfeiture; it being applicable whether B. failed in the payment of one or all of the installments to U., and even though R. did not pay such indebtedness, and found that misrepresentations had been made, and on that account rescinded his contract of purchase. A provision which would be one for a penalty if in-

volving a sum of money is technically one for a forfeiture if involving loss of chattels or security pledged. *Bell v. Scranton Coal Mines Co.*, 110 Pac. 628, 631, 59 Wash. 659.

#### Forfeiture as indicating penalty

See Forfeit—Forfeiture.

### LIQUIDATION

See Partial Liquidation.

"Liquidation" implies a winding up of the affairs of a corporation. *Assets Realization Co. v. Howard*, 127 N. Y. Supp. 798, 816, 70 Misc. Rep. 651.

"Liquidation" in its general sense means "the act or operation of winding up the affairs of a firm or company, by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss." *In re Silkman*, 105 N. Y. Supp. 872, 875, 121 App. Div. 202 (quoting 5 Words and Phrases, p. 4180).

The word "liquidation," as used in the Customs Laws, means the ascertainment of the duties due the United States, taxed at the rate prescribed by law upon the particular class of merchandise imported. *United States v. Sommers*, 171 Fed. 57, 63, 96 C. C. A. 299.

*Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561*, declares that claims shall not be proved against a bankrupt's estate subsequent to one year after the adjudication, or, if liquidated, by litigation, and the final judgment is rendered within 30 days before or after the expiration of such time, then within 60 days after the rendition of such judgment. Held, that the term "liquidation," as so used, was not limited to proceedings having for their object only the ascertainment of the amount due on the claim, but included as well proceedings to ascertain the kind and character as well as the amount of the claim, and hence proceedings against a bankrupt's estate to establish certain bonds as a preferred lien on the bankrupt's assets covered by mortgage given to secure the bonds were proceedings for liquidation, so that, on adverse determination, the bondholders were entitled within 60 days to file their claims on the bonds as general creditors. *In re Standard Telephone & Electric Co.*, 186 Fed. 586, 591.

Complainant held 250 shares, of which 185 had been pledged to decedent in his lifetime as security for complainant's note to testator. The remaining 250 shares were held, 100 by defendant trustees and 150 by two other persons individually. The business being unsuccessful, it was decided to liquidate, whereupon the estate, fearing that the dividend distributable to complainant on the pledged stock would be insufficient to pay the note, proposed that if complainant would turn over his other 65 shares the note would be surrendered, with the understanding that if, in liquidation, the property of the com-

pany amounted to more than enough to pay the note and accrued interest, the balance would be turned over to complainant, which proposition was accepted in terms, after which complainant participated in the liquidation agreement, one of the clauses of which declared that after the corporation's indebtedness was paid the treasurer should divide the balance among the stockholders in proportion to their several holdings. Held, that the word "liquidation," as used in such agreement, meant the act of winding up the affairs of the company by getting in the assets, settling with its debtors and creditors, and apportioning the amount of profit or loss, and that the agreement should be construed to mean only that, if complainant's proportion of the net assets amounted to more than enough to pay the note, he should receive the balance, and not that he should receive all of the net assets above the amount necessary to pay the note. *Fuller v. Perkins*, 73 Atl. 372, 373, 30 R. I. 3; *Jones v. Seaman*, 117 N. Y. Supp. 288, 133 App. Div. 127.

### LIQUOR

See Corn Liquor; Imitation Malt Liquor; Intoxicating Liquor; Malt Liquor; Nonintoxicating Liquor; Spirituous Liquors; Substitute for Malt Liquor; Vinous and Spirituous Liquors; Vinous Liquor.

Furnishing liquor, see Furnish.

Manufacture of liquor, see Manufacture.

Sale of, see Liquor; Sell.

Sale of as commerce, see Commerce.

Selling liquor as business, see Business.

The term "liquor or liquors" includes all kinds of intoxicating decoctions, whether spirituous, vinous, malt, or alcoholic. *Marks v. State*, 48 South. 864, 868, 159 Ala. 71, 133 Am. St. Rep. 20.

The word "liquor" and the associated word "drinks" in a statute regulating or forbidding the sale of intoxicants, mean an alcoholic beverage. *Pennell v. State*, 123 N. W. 115, 116, 141 Wis. 35.

"Liquor" is defined as: "(1) A liquid or fluid substance, as water, milk, blood, sap, etc. (2) A strong or active liquid of any sort specifically, an alcoholic or spirituous liquor either distilled or fermented; an intoxicating beverage especially a spirituous or distilled drink as distinguished from fermented beverages as wine and beer. (b) A strong solution of a particular substance used in the industrial arts." It is also defined as: "Any liquid or fluid substance, as water, milk, blood, sap juice and the like. (2) Especially alcoholic or spirituous fluid either distilled or fermented. A decoction, solution or tincture." *Luther v. State*, 120 N. W. 125, 128, 83 Neb. 455, 20 L. R. A. (N. S.) 1146 (dissenting opinion of Letton, J.; citing Cent. Dict.; Webst. Dict.).

Generally, the term "liquor" implies intoxicating liquor. Therefore proof that defendant sold "liquor" is sufficient to show, in the absence of adverse testimony, that he sold intoxicating liquor, especially where it is shown that it looked like rye whisky. *Carswell v. State*, 66 S. E. 488, 7 Ga. App. 198.

The measurement intended by the statute prohibiting the sale without a license of liquor in less quantities than five gallons is a measurement of the quiet liquor after it has been released from confinement and the gas, froth, or foam arising when the liquor is released from the vessel in which it is contained cannot be considered in determining the quantity of liquor. *People v. Nylin*, 86 N. E. 156, 158, 236 Ill. 19.

The word "liquor" is collective, its significance including the plural as well as the singular, and a conviction in a prosecution for selling alcoholic, spirituous, malt and intoxicating liquor may be supported by proof of the sale of liquor which is either alcoholic, spirituous, malt, or intoxicating in quality without proof that it possesses more than one of such qualities. *Wilburn v. State*, 68 S. E. 460, 461, 8 Ga. App. 28.

Acts 1909, c. 479, imposed a privilege tax for revenue on liquor dealers selling liquor under different conditions, and provided that "liquor dealers" should include every person, company, or firm selling spirituous, vinous, or malt liquors, beer, ale, or intoxicating bitters, or any medicated or adulterated cider, or any club or association handling such liquors for sale, etc. Held, that the words "liquor" and "liquor dealers" should be construed as limited to beverages and persons selling beverages containing a sufficient amount of alcohol to make them intoxicating, and that the act did not impose such tax on a vendor of soft drinks containing a small percentage of alcohol, insufficient in quantity to render the liquors intoxicating. *Austin v. Shelton*, 127 S. W. 446, 447, 122 Tenn. 634.

Laws 1897, p. 207, c. 312, § 2, provides that the term "liquors" as used in the act shall include all distilled or rectified spirits, wines, fermented or malt liquors. Section 31, p. 233, provides that it shall not be lawful for any person who has not paid a tax and posted the certificate provided by the act to sell liquors in any quantity in less than five wine gallons at a time. Held, that an indictment charging violation of the latter section need not allege that the liquors sold were distilled or rectified spirits, wines, fermented or malt liquors; it being sufficient to charge the offense in the language of such section. *People v. Myers*, 77 N. E. 1193, 185 N. Y. 558.

Under Laws 1897, p. 207, c. 312, § 2, the term "liquors," as used in that act, includes all "distilled, rectified spirits, wines, fer-

mented or malt liquors." *People v. Myers*, 95 N. Y. Supp. 993, 994, 109 App. Div. 143.

Liquor Tax Law, § 2, defines "liquor" as meaning all distilled or rectified spirits, wine, fermented or malt liquors. *Cullinan v. Dwight*, 100 N. Y. Supp. 896, 897, 51 Misc. Rep. 221.

Flavoring extracts, composed of from 40 to 50 per cent. alcohol, 3 per cent. flavoring principle, and water, the quantity of alcohol being no greater than is required to hold the flavoring principle in solution, which are not made, nor used, nor capable of being used, as a beverage, but which are chiefly used in flavoring soda water syrups, the quantity of extract used in each glass of the beverage being about 3 or 4 drops, are not "beverages," nor "liquors," within the meaning of Rev. St. § 3244, and the manufacturer is not subject to special tax as a rectifier or wholesale or retail dealer in liquors. *Allen v. Liquid Carbonic Co.*, 170 Fed. 315, 317, 95 C. C. A. 11.

A sale of liquor known as "malt rose" containing between .74 per cent. and 1.18 per cent. in volume of alcohol, and intended to aid in the evasion and defeat of the liquor law, is a violation of Liquor Tax Law (Laws 1897, p. 207, c. 312) § 2, defining liquors, as used in the act, to include all distilled or rectified spirits or fermented or malt liquors. *People v. Cox*, 94 N. Y. Supp. 526, 527, 106 App. Div. 299; *Id.*, 92 N. Y. Supp. 125, 45 Misc. Rep. 311.

#### Beer

The sale of "lager beer" which was drunk on the premises during the hours when the sale of malt liquors was prohibited was a violation of Liquor Tax Law (Laws 1897, p. 207, c. 312) § 2, defining liquors as used in the act to include all distilled or rectified spirits or fermented malt liquors. *Cullinan v. McGovern*, 94 N. Y. Supp. 525, 526.

#### LIQUOR DEALER

See Retail Liquor Dealer.

Where one sold liquor under a valid license and bond, though the application on which the license was granted was defective, he was a "liquor dealer" under the laws of Texas, with the right to sell liquor, and subject to the penalties arising from an infraction of his bond. *Castellano v. Marks*, 83 S. W. 729, 731, 37 Tex. Civ. App. 273.

Acts 1909, c. 479, imposed a privilege tax for revenue on liquor dealers selling liquor under different conditions, and provided that "liquor dealers" should include every person, company, or firm selling spirituous, vinous, or malt liquors, beer, ale, or intoxicating bitters, or any medicated or adulterated cider, or any club or association handling such liquors for sale, etc. Held, that the words "liquor" and "liquor dealers" should be construed as limited to beverages

and persons selling beverages containing a sufficient amount of alcohol to make them intoxicating, and that the act did not impose such tax on a vendor of soft drinks containing a small percentage of alcohol, insufficient in quantity to render the liquors intoxicating. *Austin v. Shelton*, 127 S. W. 446, 447, 122 Tenn. 634.

Where a statute prohibited a merchant and dealer in spirituous liquors from keeping open his place of business on Sunday for the purpose of traffic and sale, a member of a firm engaged in the sale of spirituous liquors was a "dealer," within such statute, and was amenable in his individual capacity. *Morris v. State*, 89 S. W. 832, 833, 43 Tex. Cr. R. 562.

#### LIQUOR DRUMMER

See Drummer.

#### LIQUOR LICENSE

See License (Government Regulation).

Application for, as civil action, see Civil Action—Case—Suit—etc.

As contract, see Contract.

As franchise, see Franchise.

As property, see Property.

#### LIQUOR TAX CERTIFICATE

As property, see Property.

### LIS

#### LIS MOTA

The phrase "lis mota" means the commencement of the controversy. *Mutual Reserve Life Ins. Co. v. Jay*, 109 S. W. 1116, 1118, 50 Tex. Civ. App. 165.

In an action involving plaintiff's legitimacy, testimony by a deceased kinsman of plaintiff, in a prior action, given when a controversy existed on the question, but before the present suit was brought, tending to establish plaintiff's legitimacy, was not admissible; the term "lis mota," as used in the rule requiring *ex parte* declarations of decedents to have been made *ante litum motam* to be admissible, meaning the beginning of the controversy, and not of the action. *Rollins v. Wicker*, 70 S. E. 934, 935, 154 N. C. 559.

#### LIS PENDENS

"Lis pendens" by itself does not constitute a cloud or incumbrance upon a title, and does not, of itself, furnish any ground in reason why a purchaser should not be compelled to complete his purchase. *Baecht v. Hevesy*, 101 N. Y. Supp. 413, 415, 115 App. Div. 509.

Though the result of a suit in one court may enter as a factor into the determination of another in a different tribunal, "lis pendens" cannot be properly pleaded on the ground of the coexistence of the suits, where the causes of action are not identical. Cen-

tral Improvement & Contracting Co. v. Grasser Contracting Co., 44 South. 10, 13, 119 La. 263.

Whether the doctrine of *lis pendens* is based on constructive notice or on the policy of the law, forbidding parties to convey property pending litigation concerning it to the prejudice of the other party, the rule is that during the pendency of a suit neither party can alienate the property in dispute, so as to affect the rights of the other party. *Maes v. Thomas* (Tex.) 140 S. W. 846, 847.

"Lis pendens" denotes those principles and rules of law which define and limit the operation of the common-law maxim, "*Pendente lite nihil innovetur*." Pending the suit nothing should be changed, if it has the effect to bring the subject-matter of the litigation within the control of the court; and to render the parties powerless to place it beyond the power of the final judgment. *Powell v. National Bank of Commerce in Denver*, 74 Pac. 536, 538, 19 Colo. App. 57 (citing *Freem. Judgm.* § 193).

"As a general rule an action or suit brought solely for the recovery of a money judgment or for other relief not directly affecting property will not constitute a 'lis pendens'; and, in the absence of fraud or collusion between the parties thereto, alienations are valid until the property is affixed with a judgment or execution lien, or taken into custody by an attachment, receivership, or other auxiliary proceeding." *Moragne v. Doe*, 39 South. 161, 162, 143 Ala. 459, 111 Am. St. Rep. 52, 5 Ann. Cas. 331.

Where no steps were taken from March 4, 1887, until September 29, 1902, by plaintiff city in the prosecution of its action to recover taxes due for 1885, and in the meantime defendant became a lender and purchaser for value in good faith, without actual notice of the pendency of the suit or the claim for taxes, and no reason for delay in prosecuting the suit was shown, a "lis pendens" did not exist in favor of the city at the time defendant's rights intervened. *City of Louisville v. Burke* (Ky.) 87 S. W. 269, 270.

The object of a "lis pendens" notice is to warn persons and put them on their guard in their dealings with defendants regarding the subject-matter of a pending action. *First Nat. Bank of Peoria v. Farmers' & Merchants' Nat. Bank of Wabash* (Ind.) 82 N. E. 1013, 1016.

"Lis pendens" is simply a rule to give effect to the rights ultimately established by the judgment. It merely precludes any change in the subject-matter to the prejudice of plaintiff during the pendency of the action, and the filing of the statutory notice is designed to effect that result, not to give constructive notice of plaintiff's claim as does the recording of a deed or mortgage.

Whatever effect actual notice of a pending action may have, the filing of a statutory notice of pendency does not constitute constructive notice of anything more than the pendency of the action, and, when the action has ceased to be pending under the law of lis pendens, the statutory notice ceases to be effectual for any purpose. Its purpose is to prevent any alienation of the subject-matter in litigation, pending the action, that could prejudice plaintiff's rights or impair or defeat any interest he should establish as against defendant in the suit, and does not constitute such notice of plaintiff's equity as would affect the conscience of a purchaser. *McVay v. Tousley*, 105 N. W. 932, 935, 20 S. D. 258, 129 Am. St. Rep. 927.

The doctrine "lis pendens" applies not merely to purchasers from the defendant, but also to purchasers from the plaintiff. The rule has been applied to all cases of transfer during the progress of the cause, notwithstanding the hardships of individual cases from considerations of public policy and convenience. The rule applies to a judgment creditor whose rights as an incumbrancer are acquired during the existence of the lis pendens, and also to a purchaser at a judicial sale, had in execution of a judgment in favor of a person whose interests in the property sold are affected by the lis pendens. While in England and in some of the states it has been held that lis pendens begins upon service of process or subpoena, in this state a pending suit is notice from the filing and docketing of the cause, if followed by the issuance and service of process and due prosecution of the suit. Civ. Code 1895, § 3936. The question as to when lis pendens begins, as applied to a cross-bill, depends largely on what is the extent of the lis pendens arising on the original suit, or of what the original suit gives notice to one dealing with the property affected. When a suit is filed by a plaintiff, any one taking from the defendant a conveyance of the property involved takes with notice of plaintiff's action, including ordinary or amplifying amendments which do not change the identity of the suit or affect its general purpose or object or create a new lis pendens. A purchaser, pending a suit, must anticipate that the defendant will resist the action and will file appropriate defensive matter thereto, but he is not bound to anticipate that defendant will bring a cross-action against the plaintiff, setting up some equitable right and demanding affirmative equitable relief in regard thereto. *Bridger v. Exchange Bank*, 56 S. E. 100, 101, 126 Ga. 821, 8 L. R. A. (N. S.) 463, 115 Am. St. Rep. 118 (citing *Secombe v. Steele*, 61 U. S. 105, 15 L. Ed. 833; *Fash v. Ravesties*, 32 Ala. 451; *Berry v. Whitaker*, 58 Me. 442; *Cole v. Winnipisseeogee Lake Cotton & Woolen Mfg. Co.*, 54 N. H. 242; *Olson v. Lehpke*, 81 N. W. 801, 110 Iowa, 595, 80 Am. St. Rep. 327; *Welton v.*

*Cook*, 61 Cal. 481; *Borrowscale v. Luttle*, 5 Allen [87 Mass.] 377; 2 Pom. Eq. Jur. [3d Ed.] § 633; *Story*, Eq. Pl. [10th Ed.] § 156; *Carmichael v. Foster*, 69 Ga. 372; *Bennett*, *Lis Pendens*, p. 242, § 181; *Allen v. Halliday*, 28 Fed. 261; *Cotton v. Dacey*, 61 Fed. 481; *Freeman*, *Judgm.* § 205; *Hope v. Blair*, 16 S. W. 595, 105 Mo. 85, 24 Am. St. Rep. 366; *Watson v. Wilson*, 2 Dana [32 Ky.] 406, 26 Am. Dec. 459; *Ettenborough v. Bishop*, 26 N. J. Eq. 262; *McCauley v. Rogers*, 104 Ill. 578; *Weems v. Harrold*, 75 Ga. 867; *Cherry v. North & S. R. R. Co.*, 65 Ga. 633; *S. C. Hall Lumber Co. v. Gustin*, 20 N. W. 616, 54 Mich. 624; *Henderson v. Wanamaker*, 79 Fed. 736, 25 C. C. A. 181; *Kinney v. Consolidated Va. Mining Co.*, 14 Fed. Cas. 612; *English v. Thorn*, 96 Ga. 557, 23 S. E. 843; *Garver v. Graham*, 51 Pac. 812, 6 Kan. App. 314; *Mansur & Tebbetts Implement Co. v. Beer*, 45 S. W. 972, 19 Tex. Civ. App. 311, 313; *Tinsley v. Rice*, 31 S. E. 174, 105 Ga. 285).

#### As notice

A "lis pendens" is not the commencement of an action as against the defendants. It is a mere notice to outside parties that such an action is about to be or actually has been commenced. *Cohen v. Biber*, 108 N. Y. Supp. 249, 250, 123 App. Div. 528.

A "lis pendens" is for the purpose of giving notice of the jurisdiction or control which the court acquired over property involved in a suit pending the continuance of the action. *State v. Washington Dredging & Improvement Co.*, 86 Pac. 936, 938, 43 Wash. 508 (adopting definition in *Washington Dredging & Improvement Co. v. Kinnear*, 64 Pac. 522, 24 Wash. 405).

That the transferee of corporate stock knew that suit was pending for the appointment of a receiver and dissolution of the corporation, and to require the transferor to account for property alleged to have been wrongfully appropriated, did not prevent it from purchasing the stock free from all equities between the transferor and another stockholder, or the corporation, as the doctrine of constructive notice by "lis pendens" does not apply to such property. *Central Sav. Bank v. Smith*, 95 Pac. 307, 311, 43 Colo. 90.

#### LIST

See Classified List; Tax List.

Such list, see Such.

Unfair list, see Unfair.

"List," in its common ordinary sense, means to put into a list or catalogue, register, or enroll. *Strout Co. v. Gay*, 72 Atl. 881, 882, 105 Me. 108, 24 L. R. A. (N. S.) 562.

#### Of witnesses

Rev. St. § 1033, requiring that in a capital case the list of the witnesses and jurors shall be delivered to the defendant at least

two entire days before the trial, by "list of the witnesses" means a list containing the names of the witnesses, and necessarily this means the names which they then bear, and which identify them. A woman who has been married and divorced is not incompetent as a witness in a capital cause because she is designated on the list of witnesses furnished to the defendant in compliance with the statute by her maiden name, under which she has gone since her divorce some 10 or 12 years ago. *Bird v. United States*, 23 Sup. Ct. 42, 45, 187 U. S. 118, 47 L. Ed. 100.

#### Tax List

The phrase "list of all shares of stock," used in the statute providing persons owning shares of stock in banks shall not be required to deliver to the assessor a list thereof, but the president or other chief officer shall deliver to the assessor a list of all shares of stock held therein and the face value thereof, necessarily means "a list of all shares of stock, with the names of the owner or holders thereof, and the amount of such holdings"; and under the statute the stock is not assessable to the bank. *State ex rel. Wilson v. First Nat. Bank of Carterville*, 79 S. W. 943, 945, 946, 180 Mo. 717.

The terms "list," "tax list," and "delinquent tax list" are, by common usage, understood to refer to the notices or other matters with which such lists are included, and the list within Comp. St. 1905, c. 77, art. 9, § 7, requiring the publication of a delinquent list, is a part of the notice of the pendency of the suit and is a complete list of the lands against which there are delinquent taxes, while the list required by section 17 is a part of the notice of sale under the decree, and is merely a list of all the lands on which decrees have been rendered. The latter list is not the delinquent tax list within the act, nor as the term is generally understood, and the publication under section 7 precedes that under section 17. *State ex rel. Cronin v. Cronin*, 106 N. W. 986, 987, 75 Neb. 738.

#### With real estate agent

A contract to "list" real estate is not satisfied by taking a description of it by the broker, but it would at least require that some mention of the real estate should appear in some of the broker's advertisements, and, in the absence of such listing, the broker could not recover a commission provided in case of withdrawal of the land by the owner. *E. A. Strout Co. v. Gay*, 72 Atl. 881, 882, 105 Me. 108, 24 L. R. A. (N. S.) 562.

"It is probably beyond dispute that the ordinary transaction by which land is said to be 'listed' with an agent—that is, where an owner informs a real estate broker of his wish to sell property upon stated terms, and invokes his professional services in that respect—does not imply any grant of power to execute a contract for its sale." *Brown v. Gilpin*, 90 Pac. 267, 270, 75 Kan. 778.

#### LISTING

Assessment as including, see Assessment (In Taxation).

### LITERARY

#### LITERARY INSTITUTIONS

An incorporated school is a "scientific" or "literary" association within St. 1898, § 1038, exempting from taxation property of such associations. *Board of Trustees of Lawrence University v. Outagamie County*, 136 N. W. 619, 620, 150 Wis. 244.

The property of a corporation organized to provide a home for working girls at a moderate cost, which has no capital stock, and which can divide none of the income or profits among the members or use it for any other than literary, educational, benevolent, charitable, or scientific purposes, is exempt from taxation under Rev. Laws, c. 12, § 5, cl. 3, exempting the property of "literary, benevolent, charitable, and scientific institutions." *Franklin Square House v. City of Boston*, 74 N. E. 675, 676, 188 Mass. 409.

Under Rev. St. c. 9, § 8, providing for taxation of real estate against the person in possession, a university fraternity in possession of a chapter house, built on the campus under a contract to purchase from the university, is liable for taxes assessed against the property; the fraternity not being exempt as a literary or scientific institution within section 6, par. 2. *Inhabitants of Orono v. Kappa Sigma Society*, 80 Atl. 831, 832, 108 Me. 320.

#### LITERARY PROPERTY

The owner of a common-law copyright has a perpetual right of property and the exclusive right of first general publication, and may, prior thereto, enjoy the benefit of a restricted publication without forfeiture of the right of general publication. Under Rev. St. § 4952, giving to the owner of a copyrighted book the right to copy and vend the same, protection against multiplication of copies and the incidents thereof constitute the only protection afforded by the copyright statutes to the publisher. There is a distinction between the common-law right of "literary property" commonly called common-law copyright and copyright under the statute. A copyright is an incorporeal right to print and publish, being a property in notion without corporeal, tangible substance. A copyright is property distinct from the corporeal property out of which it arises, and each of these classes of property is capable of existing and being owned and transferred especially and independent of each other. The property of an author in his intellectual production is absolute until he voluntarily parts therewith. He cannot be compelled to publish his production or to permit others to enjoy it, but he has the right to exclude all persons from its employment, and any use of

the property without his consent is a violation of his right. He may permit one or more persons to use it to the exclusion of all others, and in doing so he may restrict the use which shall be made of it. He may give a copy of a manuscript to a person without parting with his literary property in it and may circulate copies among his friends for their own personal enjoyment without giving them the right of publication. Common-law copyright and statutory copyright cannot co-exist in the same composition, and when the statutory right begins the common-law right ends. *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, 18, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766 (citing *Ager v. Murray*, 105 U. S. 126, 26 L. Ed. 942; *Stephens v. Cady*, 14 How. [55 U. S.] 528, 14 L. Ed. 528; *Stevens v. Gladding*, 17 How. [58 U. S.] 447, 15 L. Ed. 155; *Werckmeister v. American Lithographic Co.*, 134 Fed. 321, 323, 324, 69 C. C. A. 553, 555, 68 L. R. A. 591; *Drone, Copyr.* 100, 102, 103; *Bartlette v. Crittenden*, 2 Fed. Cas. 981, 4 McLean, 300; *Bartlett v. Crittenden*, 2 Fed. Cas. 967, 5 McLean, 32; *Press Pub. Co. v. Monroe*, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353; *Holmes v. Hurst*, 19 Sup. Ct. 606, 174 U. S. 82, 43 L. Ed. 904; *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, 49 N. E. 872, 155 N. Y. 241, 247, 41 L. R. A. 846, 63 Am. St. Rep. 666; *Palmer v. De Witt*, 47 N. Y. 532, 536, 7 Am. Rep. 480; *Cop. Copyr.* [3d Ed.] 1; *Wheaton v. Peters*, 8 Pet. [33 U. S.] 591, 8 L. Ed. 1055; *Id.*, 29 Fed. Cas. 862, 8 Pet. [33 U. S.] 725; *Johnson v. Donaldson*, 3 Fed. 22; *Perris v. Hexamer*, 99 U. S. 674, 25 L. Ed. 308; *Henry Bill Pub. Co. v. Smythe*, 27 Fed. 914; *Garst v. Hall & Lyon Co.*, 61 N. E. 219, 179 Mass. 588, 591, 55 L. R. A. 631; *Harrison v. Maynard, Merrill & Co.*, 61 Fed. 689, 10 C. C. A. 17).

## LITHOPHONE

Where it was proved that "lithophone," composed of 70 per cent. sulphate of barytes and 30 per cent. sulphide of zinc, was known as "lithophone," whether dry or ground in oil, and by commercial designation was known as "sulphide of zinc white," it was classifiable for duty as such under Tariff Act July 24, 1897, par. 57, c. 11, 30 Stat. 154, and not as a white paint or pigment containing zinc, but not containing lead. *Gabriel & Schall v. United States*, 123 Fed. 296, 59 C. C. A. 352.

## LITHOGRAPH

### LITHOGRAPHIC PRINTS

"Lithographic prints" consist of complete articles of a character of pictures ready for use in mounting, binding or framing, and are the product of the art of lithography, which is the art of making a picture, design, or writing on stone in such a manner that ink impressions can be taken from the work of producing such impressions by a process analogous to ordinary printing. *United*

*States v. O. G. Hempstead & Son*, 159 Fed. 290, 292.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188, relating respectively to "lithographic prints" and to "booklets," articles consisting of several post cards folded together and ready to be detached, with a paper cover pasted thereon, are covered by the former rather than the latter term. *Downing & Co. v. United States*, 172 Fed. 447, 448.

Calendars composed of lithographic sheets with a metal strip at each end, and having a calendar pad composed of lithographic sheets attached thereto, the lithographic prints being the most important feature of the importation, are dutiable as "lithographic prints" bound, under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188, rather than as printed matter (paragraph 403, 30 Stat. 189), or as manufactures of paper (paragraph 407, 30 Stat. 189). *Luyties Bros. v. United States*, 180 Fed. 1022, 1023.

The expression "lithographic prints," in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188, had no such definite, general, and uniform meaning in the wholesale trade and commerce of the United States at the time of the passage of that act as to control its construction. *Knauth, Nachod & Kuhne v. United States*, 155 Fed. 144, 146.

Articles composed of cardboard on which lithographic prints have been pasted, and which is cut into forms adapted to be folded into pockets to hang on walls, some of them having pincushions or calendars attached, are not dutiable as "lithographic prints," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188, but as "manufactures of paper," under paragraph 407, 30 Stat. 189. *Knauth, Nachod & Kuhne v. United States*, 155 Fed. 144, 146.

## LITIGATED

### LITIGATION

See Liquidated by Litigation; Necessary Litigation; Without Litigation. Expenses of legal proceeding, see Expenses.

A proceeding to have one declared an incompetent is not a "litigation," in the ordinary sense of the term; and, in the absence of express contract for services of an unofficial stenographer in taking the testimony, the alleged incompetent is not liable therefor, except upon an implied contract. *Carpenter v. Hammond*, 125 N. Y. Supp. 31, 32, 68 Misc. Rep. 438.

"The purpose of all 'litigation' is to preserve and enforce rights and secure compliance with the law of the state, either statute or common." *Missouri, K. & T. Ry. Co.*



v. Hickman, 22 Sup. Ct. 18, 21, 188 U. S. 53, 46 L. Ed. 78.

San Diego City Charter, c. 5, art. 3, § 2, provides "that the common council shall have control of all litigation of the city, and may employ other attorneys to take charge of any such litigation, or assist the city attorney therein." Held, that the term "litigation of the city" applies to civil actions only, and that the council has no power to appoint a special prosecutor to prosecute criminal violations of ordinances, so that no liability results from such appointment. *Dadmun v. City of San Diego*, 90 Pac. 983, 984, 9 Cal. App. 549.

## LITTORAL AND AQUATIC RIGHTS

"Littoral and aquatic rights" are simply those rights which, in default of special statutory provisions to the contrary, appertain to lands abutting upon tide-waters, to which the common-law doctrine of riparian ownership does not apply. *Barataria Canning Co. v. Ott*, 37 South. 121, 124, 84 Miss. 737.

Land fronting on a sound was leased, and the lessee obtained from the county board of supervisors the right to bank, plant, and cultivate oysters in the sound within the limits of the entire front of the property, and thereafter the lessor deeded the land to the lessee, reserving all "littoral and aquatic rights appurtenant to the land," and in a suit between the parties it was decided on appeal that, the lessor having had no exclusive right to the water or fish, and the grant of the supervisors having vested a property right in the lessee, the reservation was of a thing which would not otherwise have passed under the deed, and did not deprive the lessee of his exclusive right to the oysters. Held, that such decision did not bar a reformation of the deed after remand of the cause on the ground that the real intent of the agreement between the parties had been that the lessor should have the right to the oysters and oyster beds. *Barataria Canning Co. v. Ott*, 41 South. 378, 379, 88 Miss. 771.

## LIVE—LIVING

See *Then Living*.

### As resides

"One of the definitions given in the dictionaries of the word 'live' is to dwell, to reside, to abide." *Powers v. United States*, 119 Fed. 562, 565, 56 C. C. A. 128.

A witness could state in a "trustee suit" to collect taxes, in which defendant's residence was involved, that defendant lived in P. in a certain year; the word "live" not stating the ultimate fact of residence, but a fact bearing on the question of residence. *Coolidge v. Taylor*, 80 Atl. 1038, 1041, 85 Vt. 39.

Statement of a witness that he lived at a certain street and number in a specified city was not inconsistent with his "residence" in another county, since a person may "live" in one place, and have a legal residence in another. *O'Brien v. O'Brien*, 116 Pac. 692, 694, 16 Cal. App. 103.

Under Rev. Laws, c. 154, § 6, providing that the libel for divorce must be filed, heard, and determined in the county in which one of the parties "lives," a wife who has separated from her husband because of his adultery may obtain a domicile in a county other than that in which he resides, and bring a libel against him for divorce at the domicile so obtained. *Clark v. Clark*, 77 N. E. 702, 191 Mass. 128.

The word "lives," in Code, § 1313, providing that moneys and credits shall be listed where the owner "lives," is the equivalent of "residence." *Cover v. Hatten*, 113 N. W. 470, 471, 136 Iowa, 63.

The place where a person lives, within Code, § 1313, providing that moneys and credits shall be listed and assessed where the owner lives, is the place of his residence. *Glottelty v. Brown*, 126 N. W. 797, 798, 148 Iowa, 124.

As used in St. 1821, c. 60, § 27, providing that in extending execution upon real estate the officer may appoint an appraiser for the debtor, if he neglect or refuse to choose one after being duly notified by the officer, if the debtor be living in the county where the land lies, the phrase "living in the county" means actual residence at the time of the levy in the county where the land levied upon is situated. *Dodge v. Farnsworth*, 19 Me. 278, 279.

### Death of testator or life tenants referred to

Testator gave to his son and the son's wife the use of certain real estate for life, and provided that at their death the property should descend to the son's children living at the time and the issue of any child of the son then deceased. Held, that such description of the remaindermen did not mean children of the son living at the time of testator's death, but excluded children living at testator's death who did not survive the life tenants. *Birdsall v. Birdsall* (Iowa) 132 N. W. 809, 810, 36 L. R. A. (N. S.) 1121.

## LIVE APART

Under Ky. St. 1903, § 2117, making "living apart" without any cohabitation for five consecutive years next before the application a ground for divorce, the time elapsing since a spouse became a lunatic cannot be counted as part of the five years required by the statute, but if the parties lived apart without cohabitation for five years before one became a lunatic, and they have since continued to live apart, divorce may be granted. *Andrews v. Andrews' Committee*, 87 S. W. 1080, 1081, 120 Ky. 718.

**LIVE IN ADULTRY**

See, also, Live Together.

To constitute "living in adultery," there must be more than a single act, but there need not be a living together continuously, or for a given time, nor is it necessary for the man to abide in the same house with the woman; but the offense is committed if he at stated periods, or frequently, spends the day or night, or any considerable part of his time, with a woman, not his wife, at such times having carnal knowledge of her at will, though at other times he be domiciled with his wife. *Baker v. Baker*, 124 S. W. 866, 867, 136 Ky. 617.

A single act of criminal intercourse does not constitute "living in adultery or fornication." *Lawson v. State*, 42 S. E. 752, 116 Ga. 571 (citing *McLeland v. State*, 25 Ga. 477; *Bish. St. Crimes*, § 697).

One act, or even occasional acts, of illicit intercourse do not constitute the offense of "living together in a state of adultery or fornication, or of adultery and fornication," in violation of Pen. Code 1895, § 381. *Winkles v. State*, 61 S. E. 1128, 1129, 4 Ga. App. 559.

**LIVE TOGETHER**

See, also, Live in Adultery.

A husband and wife are "living together" when they dwell under the same roof, eat at the same table, and hold themselves out to the world and conduct themselves towards each other as husband and wife, and it is incorrect to say that they are living as husband and wife when they do not occupy the same room or have sexual intercourse. *Levy v. Goldsoll (Tex.)* 131 S. W. 420, 421.

The mere fact that a man took his meals at the house of a married woman did not constitute a "living together" by such man and woman, within the meaning of the statute defining the crime of adultery. *Paul v. State*, 90 S. W. 171, 49 Tex. Cr. R. 20.

Where defendant had sexual intercourse with prosecutrix while she was living in defendant's house as his general servant, during the illness of defendant's wife, defendant was not guilty under an indictment charging that defendant and prosecutrix "lived together and had carnal intercourse." The statute does not intend to convey the idea that a married man with a family was "living together" with a servant merely because the servant might occupy a room in the house of the master. To give the statute such construction would be to hold that, where a landlord or family slept under the same roof with the servant, this would be a "living together" with the servant. *Boswell v. State*, 85 S. W. 1076, 1077, 48 Tex. Cr. R. 47, 122 Am. St. Rep. 731.

Civil Code, art. 1481 providing that those who "have lived together" in open concubinage are incapable of making to each other

any donation of immovables, does not mean that the parties must have dwelt or resided together. Succession of Jahraus, 38 South. 417, 418, 114 La. 456.

**LIVED UPON**

Where, on a trial for violating Act April 28, 1909 (Laws 1909, c. 196), punishing any person who shall knowingly live on or be supported in whole or in part by the money procured by any female through the prostitution of any other female, accused relied on the fact that the money given him by a third person was received in payment of debts or to redeem jewelry for the third person, and the third person testified that she never gave accused any money for his own use, a charge authorizing a conviction if accused received money from the third person with knowledge that the same was derived through the prostitution of another, and that he used the same for his own living or personal expenses, was erroneous, because broader than the statute, and as eliminating the defense; the phrase "lived upon" meaning to be maintained in life; to acquire a livelihood; to subsist with, on, or by, as to live on spoils. *Trozzo v. People*, 117 Pac. 150, 156, 51 Colo. 323.

**LIVE ENGINE**

An engine having no steam is called a "dead engine," and one with steam is a "live engine." *Turner v. Atchison, T. & S. F. Ry. Co.*, 111 Pac. 433, 83 Kan. 315.

**LIVE SPRINGS**

Springs occupying a space of about one-half acre in a ten-acre tract, marshy part of the year, resting right upon the brow of a little drop-off, so that there was quite a lot of water standing around in the springs, of which it looked as there might be five or six, but into which no stream led, and the water from which formed no channel or stream, though, during a part of the wet season, some of the water would flow down the hillside for a short distance and disappear in the soil, were not "live springs," but constituted nothing more than a bog occasioned by seepage of the water. *Dickey v. Maddux*, 93 Pac. 1090, 1091, 48 Wash. 411.

**LIVE STOCK INSURANCE COMPANY**

A "live stock insurance company" incorporated under Rev. St. 1895, art. 642, subd. 46, authorizing the incorporation of fire, marine, life, and live stock insurance companies, to conduct a live stock insurance company on a mutual or co-operative plan without capital stock, and to issue policies of indemnity on live stock to its members, is a live stock insurance company conducted on the mutual or co-operative plan, and is not a "mutual relief association" within article 3096, providing that nothing in the title—title 58, entitled "Incorporation of Insurance Companies"—shall apply to mutual relief as-

sociations. *State v. Burgess*, 109 S. W. 922, 923, 101 Tex. 524.

### LIVE STOCK SANITARY COMMISSIONER

An information drawn under section 27, c. 495, p. 823, Sess. Laws 1905, relating to the inspection by the "live stock sanitary commissioner" of cattle imported from places beyond the south line of the state, which charges a want of inspection by the live stock sanitary "commission," and charges generally the want of any inspection, is not invalidated by the omission of the terminal syllable "er" from the word used to describe the official having power to make the inspection, since there is no substantial difference between a commission composed of a body of individuals having lawful warrant to perform certain acts and a commissioner having identical authority. Both terms are general characterizations without fixed legal signification and import an office with prescribed duties. *State v. Asbell*, 86 Pac. 457, 458, 74 Kan. 397, 121 Am. St. Rep. 345.

### LIVE WIRE

The term "live wire" is used in electricity to describe a wire charged with a dangerous voltage of electricity. *Potts v. Shreveport Belt Ry. Co.*, 84 South. 103, 110 La. 1, 98 Am. St. Rep. 452.

A "live wire" is one charged with a deadly current of electricity. *City of Owensboro v. Knox's Adm'r*, 76 S. W. 191, 192, 116 Ky. 451.

A "live wire" is one charged with a deadly current of electricity. *Mangan's Adm'r v. Louisville Electric Light Co.*, 91 S. W. 703, 705, 122 Ky. 476, 6 L. R. A. (N. S.) 459 (quoting and adopting *City of Owensboro v. Knox's Adm'r*, 76 S. W. 191, 116 Ky. 451).

### LIVING

The word "living," as ordinarily used in reference to legatees, without anything in the context to qualify its meaning, signifies such legatees as are living at the time of making the will. *Bryant v. Flanders*, 87 N. E. 574, 575, 201 Mass. 373.

#### *Child en ventre sa mere*

The term "en ventre sa mere" comes clearly within the description "a child living at the time of its father's death." *State v. Atwood*, 102 Pac. 295, 297, 54 Or. 526, 21 Ann. Cas. 516.

### LIVING HEIRS

See *Remaining Living Heirs*.

### LIVING IN STATE OF COHABITATION AND ADULTERY

The words "living in a state of cohabitation and adultery" in Pen. Code, § 269a, as amended by Act March 21, 1911 (Laws 1911, p. 426), punishing living in a state of cohabitation and adultery, mean the living together as husband and wife; and to justify a conviction it must appear that there existed between defendants an adulterous cohabitation. *People v. Breeding*, 126 Pac. 179, 181, 19 Cal. App. 359.

### LIVING ISSUE

See *Issue (Descendants)*.

### LIVERY STABLE

As mercantile pursuit, see *Mercantile*.

A "livery stable" is a building where horses or vehicles are kept or let for hire; a "place where horses are groomed, fed, and hired; where vehicles are let;" a stable where horses are kept at livery and hire, and vehicles are let; a stable where horses are kept for hire; and where stabling is provided. *Elliott v. Hodgson & Jackson*, 85 S. E. 405, 407, 133 Ga. 209, 184 Am. St. Rep. 206 (quoting and adopting definition in *Williams v. Garignes*, 30 La. Ann. 1094; *Stand. Dict.*; and *Webster, International Dict.*).

A "livery stable" is ordinarily a place where horses and carriages are kept to be let for hire, and, in the ordinary conduct of the business, the horse or vehicle so let is in charge and under the control of the hirer or his representative. *City of Des Moines v. Bolton*, 102 N. W. 1045, 1046, 128 Iowa, 108, 5 Ann. Cas. 906.

### LIVERY STABLE KEEPER

A "livery stable keeper" has been defined to be the keeper of a stable where horses or vehicles are kept or let for hire; one whose business it is to keep horses for hire or to let, or to keep, feed, or board, horses for others; one who takes horses to bait and board, and he usually keeps horses to let; the keeper of a stable where horses are groomed, fed, and hired, where vehicles are let; the keeper of a stable where horses are kept at livery and hire, and vehicles are let, where horses are kept for hire and stabling is provided. While it is not absolutely necessary for a stable keeper to exercise all the different functions mentioned in the above definitions in order to be a livery stable keeper, his business must be substantially that as indicated. *Elliott v. Hodgson & Jackson*, 85 S. E. 405, 407, 133 Ga. 209, 184 Am. St. Rep. 206 (quoting *Abbott, Law Dict.*; *Anderson, Law Dict.*; *Black, Law Dict.*; *Stand. Dict.*; *Webster, International Dict.*; *Groves v. Klugore*, 72 Me. 489; *Williams v. Garignes*, 30 La. Ann. 1094).

A "livery stable keeper" is "one whose business it is to keep horses for hire, or to let, or to keep, feed, or board, horses for others"; one who takes horses to bait and board; and he usually keeps horses to let. It is not absolutely necessary for a livery stable keeper to exercise all of the different functions which may be sometimes performed

by him in order to be a "livery stable keeper," within the meaning of the lien law, but his business must be substantially that indicated thereby. Under Civ. Code 1895, § 2810, his lien includes, not only the actual feeding of a horse placed with him, but also such charges as are directly connected with his keeping as were naturally in the line of a livery stable keeper's business, but expenses of transporting a horse by railroad to races in or out of the state, and of entering him therein, do not furnish the basis of a lien; and where a horse is left with a stableman to be boarded or kept at an agreed price, and the stableman had two or more stables in this state for the accommodation of stock, and by agreement with the owner kept the horse at one of the stables, the fact that he was not kept at one of the stables rather than at another would not defeat his lien, although, where a horse is delivered to a livery stable keeper and, under contract with the owner, is sent to races at distant points and kept in the stable of another person who is paid by the liveryman, the liveryman thereby acquires no statutory lien. *Elliott v. Hodgson & Jackson*, 65 S. E. 405, 407, 133 Ga. 209, 134 Am. St. Rep. 206.

An owner and keeper of a livery stable, who boarded horses by the month at so much per stall, but did not feed or care for them, is entitled to a lien as a "livery stable keeper," within Lien Law (Laws 1897, p. 533, c. 418, § 74, as amended by Laws 1899, p. 942, c. 465), giving a person keeping a livery stable or a boarding stable, or boarding animals, a lien for the care, keeping, or boarding of such animals; and the relation between the parties was not that of landlord and tenant. *Selner v. Lyons*, 110 N. Y. Supp. 1049, 1050.

"Livery stable keepers" are those whose business it is to care for the horses and carriages of others and to let their own horses and carriage either with or without drivers, but they are not common carriers of passengers, within the legal meaning of that term, and the rule of law which requires the highest degree of diligence of a carrier of passengers is not applicable to them. *Stanley v. Steele*, 60 Atl. 640, 642, 77 Conn. 688, 69 L. R. A. 561, 2 Ann. Cas. 342.

## LLOYDS

The word "Lloyds" has, by use, come to be understood by the general public as synonymous with "insurance." Under General Corporation Law (Laws 1909, p. 15, c. 28 [Consol. Laws, c. 23]) § 6, providing that no corporation shall be organized with the name of "insurance" in it, except a corporation formed under the banking or the insurance law, a corporation cannot be formed under the business corporations law with the name "Lloyds" in its name, as that word has by use become synonymous with "insurance."

*Barker v. Koenig*, 119 N. Y. Supp. 777, 778, 135 App. Div. 18.

## LOAD

See Car Load.

## LOADER

See Ground Loader.

## LOADING

See Time Saved in Loading.

Ready for loading, see Ready.

Under a charter party for a vessel to carry a cargo of coal, which provided that she should "have turn in loading" and "be loaded promptly," she was entitled to be loaded promptly in view of the facilities of the port and the climatic conditions which existed at the time, and to have such facilities used to their normal capacity, not only in her own loading, but also in the loading of other vessels after her arrival while she was waiting her turn. *Harding v. Cargo of 4,698 Tons of New Rivers Steam Coal*, 147 Fed. 971, 973 (citing *Abb. Shipp.* [13th Ed.] 297).

Charter parties required the vessel in each case to load a cargo of phosphate at Port Inglis, Fla., and provided that the vessel should proceed to the Port Inglis anchorage, "or as near thereunto as she may safely get, and there load. \* \* \* The cargo to be brought alongside and taken from alongside free of risk and expense to the vessel, any custom of the port to the contrary notwithstanding. \* \* \* Steamer or vessel to proceed to safe anchorage at port of loading and there load." Also: "The cargo to be supplied at the average rate of not less than 400 tons per weather working day, \* \* \* commencing 24 hours after vessel is in loading berth and is ready to receive cargo and written notice given to that effect." Vessels were obliged to load at such port some miles from shore, and the government had established there two loading buoys. Three vessels were ordered to proceed to the port at the same time, and they reached there and anchored, and gave notice that they were ready to load. Held, that the "loading berth" referred to in the charter was the "safe anchorage" spoken of in the prior clause; that, having reached such anchorage and given the required notice, the lay days commenced, and the charterer could not require the vessels to await their turn at the loading buoys before the time commenced, even though that may have been the custom of the port, nor avoid liability for demurrage because of their detention for two or three weeks beyond the time, either because they could not get to the buoys or because they could not, perhaps have been fully loaded where they lay—its duty being to load them there, so far as could be safely done, and then permit them to move further out for its completion. *Constantine & Pickering S. S. Co. v. Auchincloss*, 161 Fed. 843, 846, 88 C. C. A. 661.

The sum added to the net life insurance premium to meet expenses and contingencies is called "loading" the premium. *United States Life Ins. Co. v. Spinks* (Ky.) 96 S. W. 889, 893, 13 L. R. A. (N. S.) 1053.

Where insurance premiums and renewal premiums were greater than the amount necessary to pay for the insurance, the excess is called "loading." *Mutual Benefit Life Ins. Co. v. Commonwealth*, 107 S. W. 802, 806, 128 Ky. 174.

## LOAF

See *Loiter, Loaf, and Idle*.

## LOAN

See *Money Loaned and Invested; Sell, Barter, or Loan; Stock Loan; Temporary Loan*.

Passing a loan, see *Pass*.

See, also, *Lend; Money Lent*.

From the use of the word "loan," in its ordinary signification, the law implies a promise to repay. *Herlihy v. Coney*, 59 Atl. 952, 953, 99 Me. 469.

Rev. St. c. 48, § 64, providing that premiums for building association loans shall consist of a percentage charged on the amount lent in addition to interest, and section 65, providing that the monthly interest shall not be at a greater rate than 6 per cent. per annum, mean by the words "loan" and "lent" the whole sum contracted for, not the sum actually advanced. *Tibbetts v. Deering Loan & Building Ass'n*, 72 Atl. 162, 165, 104 Me. 404.

A party advancing money to another to enable the latter to manufacture lumber on an understanding that the lumber shall be sold by the former on commission, so that the former may get back the advances, does not make a "loan," within the strict definition of the term. *Murphy v. Dalton*, 102 N. W. 277, 139 Mich. 79.

Where the note of a borrowing member of a building and loan association contained the words "monthly installments on said share," but no reference indicated an agreement to apply such installments on the member's loan, and the deed to secure the loan was conditioned on the payment of the "loan" and of "installments on certain shares," referring to the principal debt covered by the note both as a "loan upon 18 membership shares," the terms "loan" and "installments" were not used synonymously. *Cooper v. Newton*, 160 Fed. 190, 193.

Rev. St. 1895, art. 2547, provides that where any loan of goods or chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained for the space of two years without demand made and pursued by due process of law on the part of the

pretended lender, or when any reservation or limitation shall be pretended to have been made of a use of property, by way of condition, etc., the transfer shall be held fraudulent, unless the loan is declared by a written instrument duly acknowledged or proved and recorded. Held, that such section had no application to a chattel placed in the hands of bailees to be stored without charge for a reasonable time without any agreement that such bailees should have the right to use the same. *Woodward v. San Antonio Traction Co.* (Tex.) 95 S. W. 76, 78 (citing *Templeman v. Gibbs*, 24 S. W. 792, 86 Tex. 359; *Hunstock v. Roberts* [Tex.] 65 S. W. 676).

Evidence, in an action by an ex-county treasurer against the county for commission, on the theory that a transaction by which, during his term, a judgment creditor of the county transferred the judgment to a bank, it paying him therefor, was a loan by the bank to the county and a payment of the judgment creditor by the county, so that such treasurer was entitled to commissions for receiving and disbursing the money, held sufficient to support a finding that the transaction was not a "loan," but a purchase by the bank of the judgment. *Benefield v. Marion County*, 95 S. W. 713, 43 Tex. Civ. App. 245.

The word "loan" is defined to mean "to deliver to another for temporary use, on condition that the thing be returned, or to deliver for temporary use, on condition that an equivalent in kind shall be returned with a compensation for its use." *State v. Brown*, 102 S. W. 394, 395, 83 Ark. 44, 119 Am. St. Rep. 109 (quoting and adopting definition in *Webst. Dict.*).

Where a bond guaranteed that the principal would return certain securities on a specified day, and contained no provision either permitting or requiring the principal to discharge his obligation by payment of money on or before the day named, which he was authorized to do by a collateral agreement, the bond was not given for the "loan or forbearance of money" within the New York usury law (1 Rev. St. [1st Ed.] pt. 2, c. 4, tit. 3, § 5), making all bonds, whereon is reserved any greater sum than 6 per cent. for the loan or forbearance of any money, void. *Klein v. Title Guaranty & Surety Co.*, 166 Fed. 365, 368.

Though payment of money be called a "loan," it is not a loan where the money was not to be paid back at all events but the agreement was that on a certain condition it should be paid back. *Teed v. Parsons*, 66 N. E. 1044, 1046, 202 Ill. 455.

A corporate officer having misappropriated funds, acceptance by the directors of his notes in satisfaction of the misappropriations did not constitute a "loan," within a charter provision prohibiting "loans" of corporate funds to corporate officers or employees. *Mur-*

phy v. Penniman, 66 Atl. 282, 287, 105 Md. 452, 121 Am. St. Rep. 583.

**Bailment distinguished**

See Bailment.

**Deposit**

The deposit of a national bank constitutes "loans" to it and confers on the depositor a mere chose in action. *State v. Clement Nat. Bank*, 78 Atl. 944, 950, 84 Vt. 167, Ann. Cas. 1912D, 22.

The transaction between a depositor and the bank is really a "loan" of money and not a deposit, in the strict legal sense of the term. *Schippers v. Kempkes* (N. J.) 67 Atl. 1042, 1043.

An ordinary deposit of money in a bank is not a "loan" of the money to the bank. *Elliott v. Capital City State Bank*, 103 N. W. 777, 778, 128 Iowa, 276, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198.

A "deposit" in a bank is a "loan" payable on demand, and the depositor may not, as a general rule, maintain an action for his deposit until he has first made a demand for its payment. *Pratt v. Union Nat. Bank*, 75 Atl. 313, 314, 79 N. J. Law, 117.

A national bank had through an employé deposited money with a savings bank, and subsequently, upon a request for more money, the national bank wrote, offering to deposit more money, but refusing to make a loan. In response, it received a certificate of deposit with a letter, asking that it be placed to the credit of the savings bank. The certificate was issued to L., the president, of the savings bank, and was by him indorsed to A., an employé of the national bank, who, in turn, indorsed it to the bank, which gave credit on its books to the savings bank for the amount of the certificate. The certificate was marked "Paid," taken up, and renewal certificates issued from time to time in the same way. After failure of the savings bank, recovery was sought on the last certificate, which was issued directly to A., and signed by the cashier of the savings bank. Held, that the transaction was a "loan" and not a "deposit," and hence did not create a preferential claim. *State v. Corning State Sav. Bank*, 113 N. W. 500, 503, 136 Iowa, 79.

A bank wrote to its correspondent that \$30,000 worth of bonds had been allotted to it, and that it would have to take up and carry about \$15,000 of old bonds, stating that it would have to finance the deal, and asked if the correspondent could help out on \$10,000 for 30 or 40 days; that, if so, it would send up some paper maturing the next month; and that it did not object to any fair rate. Seven days later two certificates of \$5,000 each bearing 7 per cent. interest payable in 40 and 45 days were mailed to the correspondent. Credit for the full amount was given. Held, that the transaction was a "loan," and not a deposit, and hence did

create a preferential claim. *State ex rel. Carroll v. Corning State Sav. Bank*, 115 N. W. 937, 940, 139 Iowa, 838.

A deposit of moneys belonging to an insurance corporation in a bank, returnable on demand in accordance with certificates of deposit issued at the time, is not a "loan," within Insurance Law (Consol. Laws 1909, c. 28) § 36. *People v. Thomas*, 130 N. Y. Supp. 246, 249, 71 Misc. Rep. 339.

**As purchase money**

See Purchase Money.

**As sale**

See Sale.

**LOAN ASSOCIATION**

See Homestead Loan Association.

**LOAN FOR CONSUMPTION**

"A 'loan for consumption' is a transfer of personal property, such as corn or money, to be consumed by the borrower and to be returned to the lender in kind and quality." *State v. Brown*, 102 S. W. 394, 395, 83 Ark. 44, 119 Am. St. Rep. 109 (quoting and adopting definition in *Kinne v. Kinne* [N. Y.] 45 How. Prac. 61).

**LOBBY**

"Lobbying," which has a well-defined meaning, and signifies to address or solicit members of a legislative body for the purpose of influencing their votes, is contrary to public policy, whether or not it is carried on in such manner as to constitute a crime under the statute; and a note given for money advanced for the expenses of a person to enable him to engage in the business of lobbying will not be enforced. *Le Tourneux v. Gilliss*, 82 Pac. 627, 628, 1 Cal. App. 546.

A lobbyist is one who solicits members of a legislative body, in the lobby or elsewhere, with the purpose of influencing their votes, and a contract to render such services, or services which consist in part of lobbying, is void as against public policy, and an action cannot be maintained thereon. *Burke v. Wood*, 162 Fed. 533, 537.

**LOCAL**

A "local," in railroad parlance, is a train which stops at all stations and does not run with great rapidity when in motion. *Hicks v. Union Pac. R. Co.*, 107 N. W. 798, 800, 76 Neb. 496.

The words "local and special" are frequently used interchangeably, though they do not have the same meaning; "local" signifying a belonging or confinement to a particular place and being a counter term to "general." *People v. Wilcox*, 86 N. E. 672, 673, 237 Ill. 421.

The word "local," which is the restrictive word used in the phrase "local improve-

ments," is often used in reference to towns and cities so as to include the whole municipality. We speak of the "local affairs" of a town, its "local government," the rights of its inhabitants to "local option," or their liability to "local taxation," referring in each instance to the whole corporation. In the same way, if the local authorities of a town should undertake a general system of street improvement or a general system of sewerage, covering every street, we might, using the language in its ordinary meaning, speak of such work as a "local improvement"; the purpose thereof being a benefit to the local inhabitants. *Crane v. City of Siloam Springs*, 55 S. W. 955, 957, 87 Ark. 30.

## LOCAL ACT

See Local Law.

## LOCAL ACTION

Where the cause of action can arise in one place only, the action is local; but, if the cause of action is one that might have arisen anywhere, the action is transitory. *Woolf v. McGaugh*, 57 South. 754, 755, 175 Ala. 290.

Trespass to real property is a "local action," and the suit must be brought in the county or place where the cause of action arose. *Mayor, etc., of City of Baltimore v. Meredith's Ford & Jarrettsville Turnpike Co.* in Baltimore & Harford Counties, 65 Atl. 85, 36, 104 Md. 851.

Ejectment is a "local action," such as can be maintained only in the district where the land lies. Act Cong. March 3, 1887, c. 373, 24 Stat. 552, provides that no civil suit shall be brought before either of the federal courts of original jurisdiction against any person or by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant. Held, that the restriction as to venue is not applicable to local actions, and hence ejectment can be brought in a federal court in the district where the land lay, though both plaintiff and defendant are foreign corporations and nonresidents of the state. *Elk Garden Co. v. T. W. Thayer Co.*, 179 Fed. 553, 557 (citing 5 Words and Phrases, p. 4202).

By the common law an action for the recovery of damages for injuries to land is "local," and can be brought only where the land is situated; and such is the law in most of the states of the Union. In Minnesota, an action for pecuniary damages for trespass to real estate in another state is viewed, not as relating to the real estate, but only as affording a personal remedy. It is there deemed to be transitory in its nature, and not local. *Peyton v. Desmond*, 129 Fed. 1, 4, 63 C. C. A. 651.

A "local action" as distinguished from a transitory action is one where the principal facts on which it is founded are of a local nature, or which could have arisen only in some particular county. *Perry v. Seaboard Air Line Ry. Co.*, 68 S. E. 1060, 1061, 153 N. C. 117.

"The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribe generally where one should be sued included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated." A suit to enjoin a defendant from diverting, in California, the waters naturally flowing down a river having its source in that state and flowing into and through the state of Nevada, where complainant's lands are situated, he being the lowest proprietor on the river, is an action transitory in its nature, so that a court in Nevada, having acquired jurisdiction of defendant's person, had jurisdiction to try the same. *Miller & Lux v. Rickey*, 127 Fed. 573, 577 (citing *Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52).

A suit for partition is a local action within the provisions of Act March 3, 1876, c. 137, § 8, 18 Stat. 472, and one in which any question between any of the parties, plaintiffs or defendants, affecting their rights or interests in the land may be put in issue and determined; and a federal court is not without jurisdiction because questions may arise between plaintiffs who are citizens of the same state, nor will it make a realignment of parties to defeat its jurisdiction because such questions may arise, where the bill, although properly setting out the interest of each party in the premises, does not disclose any controversy which renders it necessary. *German Savings & Loan Soc. v. Tull*, 136 Fed. 1, 11, 69 C. C. A. 1 (citing *Greeley v. Lowe*, 15 Sup. Ct. 24, 155 U. S. 58, 67, 74, 39 L. Ed. 60).

"Originally the pleader was required to state truly the place where each fact asserted by him occurred, and, if issue was joined thereon, the fact was tried by a jury summoned from that neighborhood or venue. Afterwards, when jurors were no longer expected to decide issues of fact upon their own knowledge, a fictitious venue was, in some actions, permitted, and the pleader assigned to his facts, under a *videlicet*, the place in which he desired the trial to be held. These actions were then styled 'transitory.' But this fiction was not allowed when the cause of action was so related to a certain piece of land that it must have arisen on or near the land. Actions for such causes were styled 'local,' and triable only in the vicinity where the land lay." *Defiance Fruit Co. v. Fox*, 70 Atl. 460, 461, 76 N. J. Law, 482 (quot-

*ing Hill v. Nelson*, 57 Atl. 411, 70 N. J. Law, 378, 378).

An action to recover only the value of ore or timber severed from land is transitory, and may be maintained wherever the trespasser can be served with summons, although plaintiff therein may be compelled to allege and prove ownership of the land from which the timber is cut, or the ore extracted; but, where the whole or any part of the damages claimed is for injury to the freehold, the action is "local" and must, if the land is located in this state, be tried, by the express provisions of Code Civ. Proc. § 392, in the county where the land is situated, or, if the land is located in another state, it must be tried in the courts of that state. *Ophir Silver Min. Co. v. Superior Court of City and County of San Francisco*, 82 Pac. 70, 72, 147 Cal. 467, 3 Ann. Cas. 340.

Since the Missouri statutes provide for every contingency as to the bringing of actions, the rule of the common law, which regarded an action for breach of covenants of seisin and warranty as "local" and not "transitory," was completely altered, and as to such action such rule of the common law no longer obtains in Missouri; the title to real estate being only incidentally involved in such action. *Coleman v. Lucksinger*, 123 S. W. 441, 443, 224 Mo. 1, 26 L. R. A. (N. S.) 934.

### LOCAL AFFECTION

A "local affection" is not a local disease within the meaning of a warranty in a policy of insurance, unless such affection has sufficiently developed to have some bearing on the general health. *Cady v. Fidelity & Casualty Co. of New York*, 113 N. W. 967, 971, 134 Wis. 322, 17 L. R. A. (N. S.) 260.

### LOCAL AGENT

See, also, Agent.

The term "local agent," within Rev. St. 1895, art. 1223, providing for service of writs in suits against foreign corporations on any local agent within the state, means an agent at a given place or within a definite district, and an "agent for the state" is not a local agent within the state. *Western Cottage Piano & Organ Co. v. Anderson*, 79 S. W. 516, 517, 97 Tex. 432.

Under Code, § 217, authorizing service of summons to be made upon a corporation by delivering a copy thereof to the president, secretary, etc., "or local agent thereof," and providing that any person receiving or collecting moneys within the state for any domestic or foreign corporation shall be deemed a local agent for the purpose of service of summons, a traveling auditor of a foreign corporation, which has ceased to do any business in the state, who is not authorized to collect or receive money, for the corporation, is not a "local agent," on whom service may

be made. *Sherwood Higgs & Co. v. Sperry & Hutchinson Co.*, 51 S. E. 1020, 1021, 139 N. C. 299.

Under a statute providing that citation or other process against a foreign corporation may be served on any "local agent" of the corporation within the state, where a citation directed the officers to summon defendant foreign corporation by delivering to B., "agent," and the return recited delivery to B., "agent," and the petition alleged that B. was defendant's agent in the state of Texas, who resided in a specified county, and on whom service could be had, the return was insufficient to show that B. was a "local agent," within the state, and the defect was not cured by the allegation in the petition; hence a judgment by default was not authorized. *National Cereal Co. v. Earnest (Tex.)* 87 S. W. 734.

Rev. St. 1895, art. 1223, provides that citation may be served on a foreign corporation by service on the "local agent," and article 1194, subd. 25, provides that a foreign corporation may be sued in any county where it has an agency or representative. Held, that the statute contemplates service on a person employed in forwarding the particular business for which the corporation was organized, and service on an attorney representing the defendant, and who was in the county at the time of service merely for the purpose of settling certain claims between the parties to the action, was insufficient. *Bay City Iron Works v. Reeves & Co.*, 95 S. W. 739, 740, 43 Tex. Civ. App. 254.

One who, without compensation, procured a watchman for a foreign corporation's sawmill and sold oil belonging to it for \$7, which he applied to the payment of the watchman's services, was not the agent of the corporation, within Revised 1905, § 440, providing that service of summons on a corporation may be made upon a "local agent," and that any person receiving or collecting moneys in the state for any corporation shall be deemed a local agent. *Kelly v. Lefauver & Co.*, 56 S. E. 510, 511, 144 N. C. 4 (citing *Moore v. Freeman's Nat. Bank*, 92 N. C. 590; *Copland v. American De Forest Telegraph Co.*, 48 S. E. 501, 136 N. C. 11).

The local operator of defendant wireless telegraph company, who is in sole charge of defendant's property at a particular place and in control of its business there, and has received messages from ships at sea for pay, though the office is not yet open for general business, is defendant's "local agent," within a code provision, authorizing summons in an action against a corporation to be served on its local agent; the proviso that any person receiving or collecting moneys in the state for any corporation shall be deemed a "local agent" for the purpose of the section not being intended to limit but to extend the meaning of the term "local agent." Cop-



land v. American DeForest Wireless Telegraph Co., 48 S. E. 501, 136 N. O. 11.

Under Rev. St. 1895, art. 1222, requiring the citation to be served on the president, etc., or upon the local agent representing the company in the county, in actions against an incorporated company, considered in view of article 1223, permitting process to be served on the president, general manager, or upon any "local agent" within the state, in suits against a foreign corporation, service upon the manager of a domestic corporation was not sufficient to sustain a default judgment against the corporation, since the term "local agent" implies a representative of a corporation appointed to transact its business and represent it in a particular locality, and it does not embrace the idea of an agent who casually happens to be in the particular territory, or one who is temporarily sent to such locality to perform some particular purpose or specified act, or to superintend the business in a general way; and while, under certain circumstances and in a certain sense, the terms "general manager" and "local agent" may convey much the same idea, they were not used in the statute as synonymous. *Latham Co. v. J. M. Radford Grocery Co.*, 117 S. W. 909, 54 Tex. Civ. App. 510.

Findings in a default judgment that citation was served on defendant corporation by delivering a copy to the local agent of defendant, resident in a certain city, who was the representative, general manager, and local agent of the corporation, sufficiently showed that the person served was the "local agent representing such company" in the county in which suit was brought, within the meaning of Rev. St. 1895, art. 1222, relative to the service of process upon corporations. *El Paso & S. W. R. Co. v. Kelly* (Tex.) 83 S. W. 855, 859.

#### LOCAL ASSESSMENTS

See, also, Special Assessment.

A special assessment or forced contribution levied on particular property specially benefited by the maintenance of a levee system is a "local assessment." The general temporary exemption of new railroads from "taxation," as granted in article 230 of the Constitution of 1898 and in the constitutional amendment of 1904 (Laws 1904, p. 19, No. 10), includes all ad valorem district levee taxes, but not "local assessment," such as acreage and produce taxes and the mileage tax levied on railroads. *Louisiana Ry. & Nav. Co. v. Madere*, 50 South. 609, 610, 124 La. 635.

Special taxes voted in aid of railroads under constitutional sanction are not "local assessments," since the word "special" implies merely an additional tax over and above the general tax authorized by the Constitution. *Louisiana & A. Ry. Co. v. Shaw*, 46 South. 994, 995, 121 La. 997.

#### LOCAL AUTHORITIES

The term "local authorities," within Railroad Law (Laws 1890, c. 565) § 33 (Consol. Laws 1910, c. 49, § 53), providing that where a railroad crosses a highway at grade and the railroad company refuses, on request of the local authorities, to station a flagman there, the Supreme Court may, on application of the local authorities, order one stationed there, means the officer particularly charged with the care of the highway, who under Town Law (Consol. Laws, c. 62) § 80, as amended by Laws 1909, c. 491, § 1, is the superintendent of highways. *Local Authorities of Town of Pawling v. New York, N. H. & H. R. Co.*, 129 N. Y. Supp. 643, 144 App. Div. 791.

Const. Ill. 1870, art. 11, § 4, prohibits the granting of a right to construct a street railroad in a street without the consent of the "local authorities," and street railway act (2 Starr & C. Ann. St. 1896, p. 2110, c. 66, § 3) requires the consent of the "corporate authorities." Held, that the terms "local authorities" and "corporate authorities" were synonymous, and used to indicate those representatives either directly elected by the people or appointed in some mode to which the people had given their assent. *Potter v. Calumet Electric St. Ry. Co.*, 158 Fed. 521, 527.

The Legislature having conferred upon the commissioners' courts the power to establish, change, and discontinue public highways, and to exercise general superintendence over all highways in their counties, commissioners' courts are the "local authorities" within the Constitution, from whom permission to build a street railway along the public highways of counties must be obtained. *Galveston, H. & S. A. Ry. Co. v. Houston Electric Co.*, 122 S. W. 287, 289, 57 Tex. Civ. App. 170.

#### LOCAL BUSINESS

A contract by a foreign corporation for the installation of a new elevator and the repair of an old elevator is local business, within Pub. Acts 1903, p. 40, No. 34, requiring a foreign corporation doing business in the state to first record a copy of its charter or articles of incorporation. *Haughton Elevator & Machine Co. v. Detroit Candy Co.*, 120 N. W. 18, 19, 156 Mich. 25.

#### LOCAL CONCERN

The formation of towns and cities, or the change of their boundaries, is not a "local concern," of which the county court has exclusive jurisdiction, under Const. 1874, art. 7, § 28, giving to such courts exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, etc., and in every other case that may be necessary to the internal improvement and local concerns of the county. The local concerns over which the county court is given exclu-

sive jurisdiction are those which relate specially to county affairs, such as public roads, bridges, ferries, and other matters of the kind mentioned in the section. *City of Little Rock v. Town of North Little Rock*, 79 S. W. 785, 788, 72 Ark. 195.

## LOCAL COURTS

See *Inferior or Local Courts*.

## LOCAL FREIGHT

As the term is ordinarily employed, a shipment between points on the same line of road is "local freight." *Hill v. Wadley Southern Ry. Co.*, 57 S. E. 795, 799, 128 Ga. 705.

The term "local freight" means a train of freight cars receiving and delivering goods within a limited distance, and carrying a caboose for the accommodation of the train crew, and, incidentally, a few passengers. *State v. Missouri Pac. Ry. Co.*, 117 S. W. 1173, 1175, 219 Mo. 156.

The words "local freight" may refer either to shipments from one way station to another, or to freight to be carried wholly within the boundaries of a particular state. *Selectmen of Clinton v. Worcester Consol. St. Ry. Co.*, 85 N. E. 507, 510, 199 Mass. 279 (citing *Mobile & M. R. Co. v. Steiner*, 61 Ala. 579; *Shipper v. Pennsylvania R. Co.*, 47 Pa. 344).

## LOCAL IMPROVEMENT

A "local improvement," within the meaning of the law, is an improvement which, by reason of its being confined to a locality, enhances the value of property situated within the particular district, as distinguished from benefits diffused by it throughout the municipality. *City of Butte v. School Dist. No. 1*, 74 Pac. 869, 870, 29 Mont. 336.

The term "local improvements," for which a city asserts the right to make special assessments, as applied to a street, means the improvement of the street whereby by the real property abutting or adjacent is specially benefited in its market value. A local assessment can only rest upon substantial enhancement in values, rather than upon the idea that the public may be imposing this burden upon the citizen because he is so situated that he can most promptly and conveniently perform a duty highly salutary and advantageous to the public, a doctrine which is alleged to rest upon the police power of the state. A statute authorizing a municipal corporation to assess cost of street sprinkling on abutting land in proportion to the frontage is unauthorized. *Stevens v. City of Port Huron*, 113 N. W. 291, 296, 149 Mich. 536, 12 Ann. Cas. 603.

A "local improvement" is a public improvement which, through its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality, and

though a system of sewers to relieve the congested condition of existing sewers by furnishing additional means, whereby the surface water caused by excessive rain may be carried away, may benefit all the property in a village, if the improvement will specially enhance the adjacent property, it is local and may be paid for by special assessment. *Northwestern University v. Village of Wilmette*, 82 N. E. 615, 617, 230 Ill. 80.

The term "local improvement" in Const. art. 9, § 9, authorizing the General Assembly to vest municipalities with power to make improvements by special assessment of contiguous property, means such improvements as are paid for by special assessment or special taxation, and the test whether an improvement is local is whether it specially benefits the property assessed and a local improvement is an improvement within and under the control of one municipality. *Loeffler v. City of Chicago*, 92 N. E. 586, 589, 246 Ill. 43, 20 Ann. Cas. 335.

A "local improvement" is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from an improvement which benefits the whole municipality. The term, when used without some specific designation, is not to be limited merely to street improvements and sewers, but it also includes the laying of a water main. *Vreeland v. City of Tacoma*, 94 Pac. 192, 193, 48 Wash. 625.

## LOCAL LAW

See, also, *General Law; Private Law; Special Law*.

As applied to legislation, the word "local" is used as a counter term to "general," and signifies legislation relating to only a portion of the territory of a state. *People v. Wilcox*, 86 N. E. 672, 673, 237 Ill. 421 (citing *Bouv. Law Dict.*; *Burrill, Law Dict.*; *People v. O'Brien*, 38 N. Y. 193; *People v. Newburgh & S. P. R. Co.*, 86 N. Y. 1; *Ellis v. Frazier*, 63 Pac. 642, 38 Or. 462, 53 L. R. A. 454).

A law is not local or special when it is general and uniform in its operation upon all in like situation. *People ex rel. Johnson v. Earl*, 94 Pac. 294, 302, 42 Colo. 238.

"Where a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, it is not open to the objection that it is 'local or special legislation.'" *Allen v. Kennard*, 116 N. W. 63, 64, 81 Neb. 289 (citing *State ex rel. Jones v. Graham*, 19 N. W. 470, 16 Neb. 74; *State v. Berka*, 30 N. W. 267, 20 Neb. 375; *Van Horn v. State*, 64 N. W. 865, 46 Neb. 62; *Livingston Loan & Building Ass'n v. Drummond*, 68 N. W. 375, 49 Neb. 205).

An act entitled "An act providing for the permanent location of the seat of government and capital of the state, creating a

board of capital commissioners and defining its powers and duties, authorizing the Governor to accept, for capital purposes, the proceeds of the sale of land, or donations from other sources, and declaring an emergency," is not a "local law," within Const. art. 5, § 32, providing that no special or local law shall be considered by the Legislature until notice of the intended introduction thereof shall first have been published in newspapers, etc. *Coyle v. Smith*, 113 Pac. 944, 948, 28 Okl. 121.

Acts 81st Leg. c. 20, § 2, providing for a state tax and authorizing a county tax for maintaining in prohibition territory a cold storage where intoxicating or nonintoxicating liquors are kept on deposit for others, is not a "local or special law," within the prohibition of Const. art. 3, §§ 56, 57. *Ex parte Flake (Tex.)* 149 S. W. 146, 151.

Rev. St. 1899, §§ 8278-8317c, providing for the drainage of overflowed land, applies to and governs all persons equally who come within its scope, and is not a "local law," within Const. art. 4, § 58, prohibiting local laws. *State ex rel. Applegate v. Taylor*, 123 S. W. 892, 916, 224 Mo. 393 (citing *State v. Etchman*, 88 S. W. 643, 189 Mo. 648; *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 218 Mo. 1; *Coffey v. City of Carthage*, 98 S. W. 562, 200 Mo. 616).

"In order to determine whether or not a given law is general, the purpose of the act and the objects on which it is intended to operate must be considered. If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation to be a class by themselves, and legislation affecting such a class to be general. But if the characteristics used to distinguish the objects to which the legislation applies from other be not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then the classification is incomplete and faulty, and the legislation not general, but 'local and special.'" *Parker-Washington Co. v. Kansas City, Kan.*, 85 Pac. 781, 782, 73 Kan. 722.

An act is "general," as contradistinguished from, and inconsistent with, "local," in the sense the latter term is used in Const. art. 4, § 18, providing that no private or local bill shall embrace more than one subject, and that shall be expressed in the title only when its operation extends to the whole state, or perhaps to the whole of some class of localities therein which the Legislature may constitutionally make upon the principle recog-

nized and approved for the classification of cities for the purpose of general legislation. An act is "general" in the restricted sense in which the term is used in article 7, § 21, providing that no general law shall be in force until published, when it is of that character within the broad meaning of the term, and also when it is "public" in that its effects extend to the people of a locality such as a county, city, town, or village, or a collection of localities not forming a legislative class formed for some legitimate cause; the term "general" and the term "public" being considered in this respect synonymous. When an act is "general" merely because it is "public," it is, at the same time, "local," and must be tested as to its validity by section 21, art. 7, and section 18, art. 4, as well, and, if it belong to one of the prohibited classes of special legislation, it must also be tested by the constitutional restriction upon that subject. *Milwaukee County v. Isenring*, 85 N. W. 181, 135, 109 Wis. 9, 53 L. R. A. 635.

Where all objects which can constitutionally be included in a class are by legislation recognized by inclusion therein, such legislation will be general in the constitutional sense, and *P. L. 1907, p. 365, art. 25*, supplementary to the school law creating and providing for the Teachers' Retirement Fund, is not a private, local, or special law, violative of Const. art. 4, § 7, par. 11, prohibiting the passage of such laws in certain cases, because for constitutional reasons it did not compel teachers whose contracts antedated the enactment of the supplement to become members of the fund, but only those whose contracts were made after it became effective. *Allen v. Board of Education of City of Passaic*, 79 Atl. 101, 103, 81 N. J. Law, 135.

A law, general in its terms, applying to all persons alike throughout the state, is not a "local law" within Const. arts. 48, 49, forbidding local laws, merely because the conditions under which it can operate prevail only in certain parts of the state, and *Rev. St. § 910*, as amended by *Acts 1902, No. 66*, relating to the sale of intoxicating liquor and restricted so as to apply only to prohibition parishes, and *Acts 1902, No. 107*, as re-enacted by *Acts 1908, No. 176*, fixing the punishment for illegal sales of liquor, construed to apply only to nonprohibition parishes, are not local laws. *State v. Donato*, 53 South. 662, 664, 127 La. 393.

Act April 17, 1908, providing for special elections for the relocation or removal of county seats, being applicable to all the counties of the state alike, is not invalid as a special or local law, prohibited by Const. art. 5, §§ 32, 46. *City of Pond Creek v. Haskell*, 97 Pac. 338, 341, 21 Okl. 711.

Laws 1903, p. 9, c. 7, authorizing every city, "heretofore" incorporated under a special charter, having less than "10,000" inhabitants, to be determined by the "last pre-

ceding United States census," and having "power to make special assessments to construct sewers," to make such assessments in a specified manner, is not unconstitutional as a "local or special law," within Const. art. 3, § 27, prohibiting such laws for the incorporation of municipalities, or changing or amending their charters, etc., on the theory that the restriction of the act to cities theretofore incorporated under a special charter prevented other cities from entering the class, since the only cities under special charters are those theretofore incorporated, and since under the Constitution no other city can be especially incorporated. And the act is not "local or special" within such constitutional prohibition, on the theory that the phrase "last preceding United States census" limits the act to cities having the required population at the last census before the passage of the act, since the phrase relates to the census last preceding any date which may become material in ascertaining whether any particular city has come within the statute. And the act is not "local or special" within such constitutional prohibition, because restricted to cities, incorporated under a special charter, having 10,000 inhabitants. And the act is not "local or special" within such constitutional prohibition, because limited to cities acting under a special charter, and having the prescribed population, "having power to make special assessments to construct sewers," though a particular city is the only one which could make such assessments when the act was passed. *McGarvey v. Swan*, 96 Pac. 697, 701, 17 Wyo. 120.

Const. art. 11, § 2, grants to the legal voters of every city and town power to enact and amend their municipal charter, and article 4, § 1a, provides that the initiative and referendum powers reserved to the people are further reserved to legal voters of every district as to all local, special, and municipal legislation. Held that, as the words "local" and "special" mean enactments intended only to affect certain persons who operate in specified localities, an incorporated port cannot under a special election had under such powers extend its boundaries by annexing other territory without the consent of the inhabitants of the territory annexed, this being particularly true in view of L. O. L. § 3209, and Laws of 1911, p. 158, § 3, both of which provide for the annexation of new territory to municipalities and ports only with the consent of the inhabitants of the territory to be annexed. *State ex rel. Anderson v. Port of Tillamook*, 124 Pac. 637, 640, 62 Or. 332.

Highway Law (Consol. Laws 1909, c. 25) § 59a, added by Laws 1910, c. 701, providing that awards under any statute for damages to real estate by change of grade of any street, etc., shall bear interest, is a general, and not a local, law, as affecting the suffi-

ciency of the title of the act. *People ex rel. Central Trust Co. of New York v. Prendergast*, 95 N. E. 715, 717, 202 N. Y. 188.

The good roads law, Rev. Codes, §§ 1049-1068, inclusive, providing for organization and government of good road districts, being general in its application, applying alike to all sections of the state where the taxpayers are willing to assume the burden of additional taxation to improve the roads within such sections and applying to all good road districts within the state, relating to all of a class, is not a local or special law within Const. art. 3, § 19, prohibiting the Legislature from passing local and special laws in certain cases. *Hettinger v. Good Road Dist. No. 1 of Washington County*, 113 Pac. 721, 723, 19 Idaho, 313.

A "local statute" is one which applies only to a particular locality or limited part of the state and the inhabitants of that part. But a law is not local or special that is applicable throughout the state, even though its operation in any locality is made to depend upon a local contingency, or a particular expediency to be ascertained or determined by a public vote in the locality or by petition, or adjudication of a court or other authority authorized by the act. It is, nevertheless, open to every locality when brought within its terms. Within Const. art. 4, § 23, subd. 10, forbidding the enactment of special or local laws for the assessment and collection of taxes for state, county, township, or road purposes, Act Nov. 22, 1905 (Laws 1905, p. 410), providing for the improvement of roads at the expense of the lands benefited thereby on petition of a majority of the resident landowners, etc., is general and applicable throughout the state, and is not a local statute applicable only to a particular locality or limited part of the state and the inhabitants of that part, though its operation is contingent, depending on the wish of the landowners in the vicinity of a proposed improvement and the existence of certain conditions. *St. Benedict's Abbey v. Marion County*, 93 Pac. 231, 233, 50 Or. 411 (citing *Fouts v. Hood River*, 81 Pac. 370, 46 Or. 492, 1 L. R. A. [N. S.] 483, 7 Ann. Cas. 1160; *Baxter v. State*, 88 Pac. 677, 49 Or. 353; *Goodrich v. Winchester & D. Turnpike Co.*, 26 Ind. 119; *Palmer v. Stumph*, 29 Ind. 329; *Paul v. Gloucester County*, 15 Atl. 272, 50 N. J. Law, 585, 1 L. B. A. 86).

To understand the signification of the words "municipal legislation," as used in Const. art. 11, § 2, prohibiting the Legislature from amending the charters of cities and towns, the right of which is reserved to the voters thereof, and article 4, providing that the referendum may be demanded by the people, which power is reserved to the legal voters of every municipality and district as to all local, special, and municipal legislation of every character in and for their respective

municipalities and districts, requires an interpretation of the term "local and special legislation," the right to formulate rules in relation to which is impliedly denied to cities and towns, on the principle that the expression of one thing is the exclusion of another. The qualifying words "local" and "special" are synonymous, and, in the sense in which they are used, mean any enactment that is plainly intended to affect a particular person or thing or to be in effect in some specified locality only. The words "municipality" and "district" are evidently expressions of equivalent import, for a district legally created from a designated part of the state and organized to promote the convenience of the public at large is a municipal corporation. The authority of such a corporation has been heretofore derived from an act of the legislative assembly creating it, and, as such statute is applicable to and enforceable in a part of the state only, it is a local or special law. The change in the organic law deprives the legislative assembly of all authority to enact, amend, or repeal any charter of a town, the legal voters of which reserve to themselves the exercise of all such power, except the right of repeal, and it was evidently the intention of the framers of such constitutional provision, and also the people who ratified it, to vest an incorporated city or town with authority to provide the manner of exercising the initiative and referendum powers as to amendments of a charter, which change is reasonably within the term of "municipal legislation." *Acme Dairy Co. v. City of Astoria*, 90 Pac. 153, 154, 49 Or. 520.

Gen. St. 1906, §§ 3772, 3775, regulating the catching of fish in rivers, creeks, bays, bayous, or other waters on the coast, are not "local or special laws," where the first provision therein covers the full territory of the state defined as on the coast of the state, while the latter applies to all the rivers of the state, and are not in violation of Const. art. 3, §§ 20, 21. *Carlton v. Johnson*, 55 South. 975, 976, 61 Fla. 15.

A class of laws are known in common parlance as "local option laws," relating to subjects which, such as intoxicating liquors or the running at large of cattle, may be differently regarded in different localities, and are sustained on the ground that the subject, though not embraced within the ordinary power of the municipalities to make by-laws and ordinances, is within the class of police regulations in respect to which it is proper that the local judgment should control. In *re O'Brien*, 75 Pac. 196, 200, 29 Mont. 530, 1 Ann. Cas. 373 (citing *Cooley*, Const. Lim. 146).

#### Law applying to class

A "local or special law," within the constitutional prohibition against the passage of such laws, is one which relates to particu-

lar persons or things of the same class. *Hall v. Bell County (Tex.)* 138 S. W. 178, 179 (citing 5 Words and Phrases, p. 4208; 7 Words and Phrases, p. 6577).

A "local law" applies to all persons within the territorial limits prescribed by the act, while a special law applies to particular persons or things of a class. *Commissioners of Prince George's County v. Baltimore & O. R. Co.*, 77 Atl. 433, 434, 113 Md. 179.

#### Classification as to population

A statute classifying counties for certain purposes and providing that the twenty-seventh class, consisting of only one county, should be classified according to the population, as shown by the federal census of 1900, whereas the method of ascertaining the population in all other counties is different, is a "local and special law." *Johnson v. Gunn (Cal.)* 84 Pac. 370, 371.

A statute classifying counties according to population, providing that the population of some of the counties shall be determined by the federal census of 1900, and that in other counties the population shall be determined by different modes, is not a "local or special law," in violation of Const. art. 11, § 5. *Johnson v. Gunn*, 84 Pac. 665, 666, 148 Cal. 745.

Act April 3, 1903 (P. L. 136), authorizing county commissioners in counties having a population of over 500,000 and less than 1,000,000 to erect a memorial hall or building in memory of the soldiers and sailors of the War of the Rebellion, is not a "local act" regulating the affairs of Allegheny county alone, but is a classification of counties according to population in order to permit expenditure of public money in a specified way. *Yoho v. Allegheny County*, 67 Atl. 648, 650, 218 Pa. 401 (citing *Commonwealth v. Gilligan*, 46 Atl. 124, 195 Pa. 504; *Seabolt v. Commissioners of Northumberland County*, 41 Atl. 22, 187 Pa. 318).

A law is not "local" or "special," within the constitutional inhibition against such laws regulating county and township affairs, for classifying counties and townships on the basis of population, if population makes a substantial difference in the conditions affected by the statute, and the statute, if considered as regulating county and township affairs, did not violate the constitutional inhibition for fixing a lower tax rate in counties and cities having a larger population. *People ex rel. Booth v. Opel*, 91 N. E. 458, 461, 244 Ill. 317.

#### Laws having local application

A law which has a bona fide application to the entire state as to some of its chief features is a "general" and not a "local law," as defined by Const. 1901, § 110, though it does not apply in every detail. The law is a "general" and not a "local law," notwith-

standing the fact that local laws on the subject were passed at the same session and approved on the same day. *State ex rel. Collman v. Pitts*, 49 South. 441, 442, 160 Ala. 133, 135 Am. St. Rep. 79.

"Local law" means that code of laws which governs the affairs of a certain prescribed jurisdiction. *Mather v. Cunningham*, 74 Atl. 809, 813, 105 Me. 326, 29 L. R. A. (N. S.) 761, 18 Ann. Cas. 692.

Const. § 110, defines a "local law" as a law which applies to any political subdivision or subdivision of the state less than the whole. *State ex rel. Attorney General v. Sayre*, 39 South. 240, 142 Ala. 641.

Const. § 104, prohibits the Legislature from passing a special or local law in specified instances, and section 110 defines "local law" in this connection as one which applies to any subdivision or subdivisions of the state less than the whole. *Sisk v. Cargle*, 35 South. 114, 117, 138 Ala. 164.

The word "local," as applied to legislation, signifies legislation relating to part of the territory of a state only, while the word "special" is more appropriately applied to laws granting some special right, privilege, or immunity, or imposing some particular burden upon some portion of the people of the state less than all. *People v. Wilcox*, 86 N. E. 672, 673, 237 Ill. 421.

A statute compelling the parish of Orleans to erect a courthouse with its own funds is a "local law," whose enactment should have been preceded by the publication of the notice required by article 50 of the Constitution. Such a statute does not lose its character of a "local law" from the fact that it provides that the state shall contribute towards the erection of the building and be part owner thereof. Such provision adds a public side to the statute, but does not do away with the local side, as to which the inhabitants of the locality are entitled under the Constitution to be notified and to be heard. *Benedict v. City of New Orleans*, 39 South. 792, 796, 115 La. 645.

An act providing for the accomplishment of an object and providing means for payment therefor does not contain two subjects, and hence the provision of the Public Service Commissions law (Laws 1907, p. 889, c. 429) for payment of salaries and expenses of the commission for the First district by New York City does not constitute a local act joined with general legislation, within Const. art. 3, § 16, providing that no local act shall embrace more than one subject, etc.; such provision being a matter of apportionment, within the taxing power. *Gubner v. McClellan*, 115 N. Y. Supp. 755, 757, 130 App. Div. 716.

Act Feb. 25, 1905, abolishing the Watson judicial district of Desha county, and providing for the transfer of cases pending in

the several courts of that district is not a "local or special act," within Const. 1874, art. 5, § 26, declaring that no "local or special act" shall be passed until the notice provided for shall have been duly published. *Watterman v. Hawkins*, 86 S. W. 844, 845, 75 Ark. 120.

Act Sept. 26, 1903 (Acts 1903, p. 369), providing for the removal of causes from the city court of Bessemer, Jefferson county, to other courts in the county, is a "local law," within Const. § 106, requiring the publication of notice of intention to apply for the enactment of local laws. *Dudley v. Fitzpatrick*, 39 South. 384, 385, 143 Ala. 162 (citing *Wallace v. Board of Revenue of Jefferson County*, 37 South. 321, 140 Ala. 491).

A "local law" is one "which applies to any political subdivision or subdivisions of the state, less than the whole." An act to consolidate the courts of a certain state and county is a "local law." *Wallace v. Board of Revenue of Jefferson County*, 37 South. 321, 322, 140 Ala. 491 (quoting Const. § 110).

Gen. Acts 1907, p. 542, which amends Loc. Acts 1907, p. 285, § 11, so as to provide for the organization of grand juries for the circuit court of a designated county, is a "local law," within Const. 1901, § 110, defining a local law as one which applies to any political subdivision or subdivisions of the state less than the whole. *Sellers v. State*, 50 South. 340, 341, 162 Ala. 35.

#### Law applying to single city

A "local statute" enacted for a particular municipality, for reasons satisfactory to the Legislature, is intended to be exceptional and for the benefit of such municipality. *Ex parte Young*, 95 S. W. 98, 104, 49 Tex. Cr. R. 536.

A "local act" is one confined to a particular municipality or particular part of the state. *Gubner v. McClellan*, 115 N. Y. Supp. 755, 759, 130 App. Div. 716.

"The term 'local,' as applied to statutes, is of modern origin, and is used to designate an act which operates only within a single city, county, or other particular subdivision or place and not throughout the entire legislative jurisdiction. In this sense, the term 'local' is the antithesis of 'general.'" *State ex rel. Attorney General v. Sayre*, 39 South. 240, 142 Ala. 641 (citing *State v. Chambers*, 93 N. C. 600; *Kerrigan v. Force*, 68 N. Y. 381).

The act passed in 1907 (Laws 1907, p. 517) to make judges of the Montgomery city court elective by the people is a "local law," within the requirement of Const. § 106, that notice of such acts be given. *State ex rel. Thomas v. Gunter*, 54 South. 283, 284, 170 Ala. 165.

An act to consolidate the courts of a certain city and county, is a "local law," defined by Const. § 110, as a law which applies to any political subdivision or subdivisions of

the state less than the whole. *Wallace v. Board of Revenue of Jefferson County*, 37 South. 321, 322, 140 Ala. 491.

Without undertaking to discriminate nicely or define with precision, it may be said that the character of a law as general or "local" depends on the character of its subject-matter. If that be of a general nature, existing throughout the state, in every county, a subject-matter in which all the citizens have a common interest, if it be a court organized under the constitution and laws within and for every county of the state, and possessing a legitimate jurisdiction over every citizen, then the laws which relate to and regulate it are laws of a general nature, and, by virtue of the prohibition referred to, must have a uniform operation throughout the state, 92 Ohio Laws, p. 683, providing for the pensioning of school-teachers in school districts in cities of the third grade of the first class, is in violation of Const. art. 2, § 26, providing that laws of a general nature shall have a uniform operation throughout the state; such act at the time of its passage and taking effect being applicable only to the city of Toledo, and containing a provision in section 2 requiring the board of education to select three members of a pension committee at its first regular meeting within 30 days after the law went into effect, and making no provision in such regard for cities which might thereafter come into the class. *Hibbard v. State*, 64 N. E. 109, 111, 65 Ohio St. 574, 58 L. R. A. 654 (citing *Kelley v. State*, 6 Ohio St. 269, 271).

#### **Charter of building and loan association**

The charter of a building and loan association, obtained under the general law, is not a "local" or "private" law, within Code 1906, § 8, providing that private and local laws, not revised and brought into the Code, are not affected by its adoption; and so is not saved from the operation of section 2673, revising the usury law, and doing away with the exception thereof, whereby building and loan associations could receive more than 10 per cent. interest. *Mississippi Building & Loan Ass'n v. McElveen*, 56 South. 187, 189, 100 Miss. 16.

#### **As special law**

The words "local" and "special," as used in Const. art. 3, § 30, providing that no local or special laws shall be passed for the incorporation of cities and towns, are synonymous words of description. *Eckerson v. City of Des Moines*, 115 N. W. 177, 183, 137 Iowa, 452.

The words "local" and "special" in Const. art. 4, § 1a, reserving the initiative and referendum powers to the voters of every municipality as to all local, special, and municipal legislation, are synonymous, and mean enactments intended to affect only certain persons, or to operate in specified localities;

and an act is "local" when the subject relates to a portion only of the people or their property, or when it operates only within a single city, county, or other particular division. *Schubel v. Olcott*, 120 Pac. 375, 378, 60 Or. 503.

The terms "local law" and "special law" are used interchangeably. Const. 1901, § 10, defines a "local law" as one applicable to any political subdivision of the state, and a "special law" as one which applies to an individual association or corporation. *Montgomery City Charter* (Acts 1892-93, p. 377) § 20, exempts persons procuring a liquor license from the city from paying any tax or license to the county. Act March 4, 1903 (Gen. Acts 1903, p. 184), provides for a county liquor tax, and repeals all laws, general and "special," inconsistent with itself, and Act Sept. 30, 1903 (Gen. Acts 1903, p. 298) § 4, again confers power on counties to levy a liquor tax, and provides that the statute shall not affect the exemption provided by any city charter. Held that, notwithstanding the constitutional definitions, the exemption was repealed by Act March 4, 1903 (Gen. Acts 1903, p. 184), and not revived by Act Sept. 30, 1903 (Gen. Acts 1903, p. 298) § 4. *Gaston v. O'Neal*, 41 South. 742, 743, 145 Ala. 484 (citing *Maxwell v. State*, 7 South. 824, 89 Ala. 150; *Holt v. City of Birmingham*, 19 South. 735, 111 Ala. 369).

#### **LOCAL LEGISLATION**

See Local Law.

#### **LOCAL NATURE**

A suit by a creditor of a railroad company to have its property, situated in different federal districts of the same state, administered for the benefit of all creditors is one of a "local nature," which, under Rev. St. § 742, may be brought in either of such districts, and the appointment of a receiver therein is an equitable attachment of all property of the defendant within the state. *Horn v. Pere Marquette R. Co.*, 151 Fed. 626, 632.

#### **LOCAL OFFICER**

Const. art. 10, § 2, provides that city, town, and village officers whose appointment is not provided for by the Constitution shall be elected by the electors of such cities, etc., or appointed by such authorities thereof as the Legislature shall designate. No provision for election or appointment of local health officers is provided for. *Public Health Law* (Laws 1893, p. 1501, c. 661) § 20, as amended by Laws 1907, p. 427, c. 225, provides that the state commissioner of health shall appoint a health officer for each municipality except cities on the nomination of the local board of health, devolves certain duties upon the commissioner respecting the competency and qualifications of applicants, and provides that there shall continue to be "local" health officers in the several villages,

etc. Laws 1893, p. 1502, c. 661, § 21, as amended by Laws 1907, p. 287, c. 189, provides that every local board of health shall prescribe the duties and powers of the "local health" officer. Held, that municipal health officers are local officers within the Constitution, and the provision of the statute empowering the state commissioner to appoint them and pass on their competency and qualifications was violative of the Constitution; the right of appointment resting wholly in the local authorities. *Towne v. Porter*, 113 N. Y. Supp. 758, 761, 128 App. Div. 717.

### LOCAL OPTION ELECTION

Where the question of the sale of intoxicating liquors may be submitted to the electors of each municipality at each biennial election, the determination of the electors is the exercise of "local option." *People ex rel. Sandman v. Brush*, 71 N. E. 731, 733, 179 N. Y. 93.

"Local option elections" mean recurring elections, and mean recurring elections for the territory specified in Const. 1876, art. 16, § 20, as amended in 1891, providing for the submission to voters of the question whether the sale of intoxicating liquors shall be prohibited within prescribed limits. *Ex parte Mills*, 79 S. W. 555, 556, 46 Tex. Cr. R. 224.

### LOCAL OPTION LAW

The term "local option" implies the grant of a right to one locality to adopt and another to decline to avail itself of a law. *State ex rel. Hooyer v. Hickerson*, 109 S. W. 108, 109, 130 Mo. App. 47 (citing *Ex parte Handler*, 75 S. W. 922, 176 Mo. 389).

"A 'local option law' is a law framed for the purpose of prohibiting, or severely restricting, the sale of intoxicating liquors, under penalties, and containing a provision that the several counties, townships, or other divisions of the state may hold elections to determine, by popular vote, whether they desire the law to be in force in their limits, and with a further provision that, in each case where such election results in favor of the adoption of the law, it shall take effect in the district so voting, but that each district rejecting it shall continue to be governed in this respect by the existing laws. \* \* \* But the overwhelming preponderance of authority is to the effect that such a statute, if it is a complete enactment in itself, requiring nothing further to give it validity, and depending upon the popular vote for nothing but a determination of the territorial limits of its operation, is a valid and constitutional exertion of the legislative power." *State ex rel. Crothers v. Barber*, 101 N. W. 1078, 1081, 19 S. D. 1 (quoting and adopting definition in *Black, Intox. Liq.* § 45).

### LOCAL OPTION TERRITORY

Local Option Law, Act March 23, 1907, p. 495, c. 198, § 1, provides that anti-saloon territory shall mean all the territory within the limits of any city, town, ward, ward subdivision, district, or precinct in which, through the action of the qualified electors therein, as provided in the act, the keeping and sale of intoxicating liquors is prohibited, etc. Section 2 provides for a simultaneous submission by a ward, and by a precinct within the ward, of a proposition to become anti-saloon territory. Section 7 provides that all the territory within any political subdivision which has become anti-saloon territory shall continue to be such through its entire extent, etc. Held, that the several political subdivisions enumerated are given the right to control within their own territory upon the question of prohibition, and each has the privilege of saying exclusively and conclusively that prohibition shall prevail within its limits, but not that it shall not prevail; and, where the question is submitted simultaneously in a ward, and in a precinct of the ward, and the ward votes for prohibition, and the precinct votes against it, prohibition will prevail throughout the entire ward. *Schwartz v. People*, 104 Pac. 92, 94, 46 Colo. 239.

Under Acts 1910, c. 190, § 30, requiring shipments of ardent spirits into local option or no-license territory to be plainly marked, showing the kind and quantity of spirits and the consignee of the package, and section 19c, defining "local option territory" as territory which, by vote under the local option law, has declared against the issuance of licenses for the sale of ardent spirits, and "no-license territory" as territory in which, under the provisions of that or some other act, no license for the sale of such spirits can be granted, a conviction cannot be sustained for failure to mark as specified a shipment into a magisterial district, where licenses may be issued under certain conditions, and which voted against local option at the last local option election, although no licenses are actually in effect. *Armstead v. Commonwealth*, 74 S. E. 399, 400, 113 Va. 765.

### LOCAL PROPERTY

Rolling stock of a railroad company, which is one place to-day and another to-morrow, and which is continually carried along the line of the road in the actual operation, has no actual situs for the purposes of local taxation, and hence is not "local property," within the meaning of the Constitution. *San Francisco & S. J. V. Ry. Co. v. City of Stockton*, 84 Pac. 771, 774, 149 Cal. 83.

### LOCAL ROUTE

A street railway franchise which provides for the exchange of transfers with any other company operating street railways, which shall give and receive transfers on the



basis of settlement that the transfer shall be redeemed at such a proportionate part of the fare paid as the run or local route of the car on which the transfer is received bears to the sum of the runs of the local route of the cars from which the transfer is issued, and on which it is received, gives a passenger the same right to travel as to distance over the railway system to which a transfer is tendered as if he pays fare on that system, and two street railway companies operating systems under the franchise and giving and receiving transfers are each entitled to one-half of the fares earned from passengers receiving and using transfers, the words "local route" meaning the entire distance a passenger may travel on the system as if he paid fare, whether he changes cars on that system or not, and the word "sum" referring to the result of two units added so that the entire distance a passenger may travel on each system constitutes a unit or the sum which goes to make up the entire service required to be furnished on the payment of one fare. *State ex rel. Linhoff v. Seattle, R. & S. Ry. Co.*, 114 Pac. 431, 433, 62 Wash. 544.

## LOCAL STATUTE

See Local Law.

## LOCALITY

See General Locality.

The word "locality" within Rev. St. 1908, § 5625, providing that a nonproducing gold, silver, lead, copper, etc., mine shall not be assessed at a greater amount per acre than is assessed per acre against the lowest producing mine in the same locality, is not synonymous with "mining district"; the term "locality" having a variable meaning, depending on particular circumstances. *Foster v. Hart Consol. Min. Co.*, 122 Pac. 54, 55, 52 Colo. 429.

Under Cr. Code, § 563 (22 Stat. at Large, p. 128, § 7), providing that, where the county board of control designates a locality for a dispensary on 20 days' public notice, a majority of the voters of the township can prevent its location by petition to the board, a designation is sufficient without stating the exact location as to street or number of the building in which the dispensary is to be situated. A particular town is a "locality" in a township, while a street or street number is a "locality" in a town. *Severance v. Murphy*, 46 S. E. 35, 38, 67 S. C. 409.

In an action for value of wood burned by fire set by a railroad company's engine, instruction that the measure of damages was the value of the wood in the locality where it was, and not what it could be sold for elsewhere, was not erroneous because of the use of the word "locality," since such word would be understood by the jury to mean "place."

*Hart v. Atlantic Coast Line R. R.*, 56 S. E. 559, 144 N. C. 91, 12 Ann. Cas. 706.

The word "locality" is a word of somewhat limited signification, but it has purely a relative meaning. By Pub. St. 1882, c. 113, §§ 43-45, the Legislature intended to give the board of railroad commissioners power to regulate the fares charged by street railway companies, whether or not fixed in accordance with restrictions imposed by municipal officers, subject to the condition that fares so established for a municipality should not be raised except by mutual agreement with such officials, and even if the fares between a city granting a location and another city in the state were not established for a "locality," within the statute, a street railway company cannot complain of the fares fixed in granting a location, when no attempt has been made to have the fares revised by the railroad commissioners. *Selectmen of Clinton v. Worcester Consol. St. Ry. Co.*, 85 N. E. 507, 510, 199 Mass. 279.

## LOCALIZED PROPERTY

Acts 1897, p. 102, c. 5, requiring railroads to file a schedule setting forth the length in miles of its railroad bed, switches, and side tracks, and the value of the whole, providing that the road of any railroad shall include side tracks, switches, etc., and that the roadbed, rolling stock, franchises, choses in action, and personal property having no actual situs shall be known as distributable property," and shall be valued separately, and that the depot buildings and other property, real, personal, and mixed, having an actual situs, shall be known as the "localized property," and shall be valued separately, divides the taxation of railroad property into "localized" and "distributable" property; and switches and industrial tracks off the main right of way, but used as a part of the general system, and for the same purposes as switch tracks on the right of way are used, must be assessed as "distributable" property, but all buildings, coal bins, roundhouses, machine shops, depot buildings, and other structures located on the terminal yards must be assessed as "localized" property. *Nashville, C. & St. L. Ry. Co. v. Patterson*, 122 S. W. 467, 469, 122 Tenn. 1.

## LOCALLY CLOSED CIRCUIT

The term "locally closed circuit," as used in the patent by the patentee of the Thomson Patent, No. 430,328, and in prior patents, means a circuit disconnected from the main line. It refers to a circuit which does not extend over the source of energy, but pertains to the local place and no other. As used in such patent and interpreted by its use in former patents, and construed in the light of the file wrapper and contents, it must be understood in its general and ordinary sense. *Thomson-Houston Electric Co. v. Wagner Electric Mfg. Co.*, 119 Fed. 178-180.

## LOCATE

See Relocate.

Webster defines "locate" as "to place; to set in a particular site or position; to designate the place of." The Century Dictionary defines it as "to fix in a place; to establish in a particular spot or position; to fix the place of; to reside; to place one's self or be placed; adopt or form a fixed residence." Where a foreign corporation had no office in a county, and its loan business therein was carried on by a traveling solicitor, who sent applications to the office of the company in another state, where the notes evidencing the loan were payable, the corporation was not "located" within the county, within section 348 of Rev. St. Ariz. 1887, requiring the filing with the county recorder, of the appointment of an agent, upon whom notices and processes may be served. *Industrial Building & Loan Ass'n v. Meyers-Abel Co.*, 95 Pac. 115, 117, 12 Ariz. 48.

### As establish and fix

A petition for a highway was not objectionable, because it prayed that the court "locate and establish" a road, instead of asking to have the road "laid out"; the term "laid out" being colloquial, meaning "to plan in detail," while "to locate" is to define the limits, to establish in a particular place, and, in a road proceeding, is as comprehensive as "lay out"—the term "lay out" expressing the work to be done by the viewers in establishing on the ground the lines and angles of the road. *Feagins v. Wallowa County*, 123 Pac. 902, 62 Or. 186.

Const. art. 7, § 23, designates the temporary location of the seat of government, the state university, insane asylum, and penitentiary, and the last clause thereof provides that the Legislature shall not locate any other public institutions except under general laws and by vote of the people. Act Jan. 10, 1891, provides that the establishment of the Wyoming Agricultural College be located by a vote of the people, and such college was located by a vote of the people at Lander. Subsequently Act Feb. 7, 1905, was passed purporting to repeal Act Jan. 10, 1891, but it was claimed that the last law was in contravention of Const. art. 7, § 23, providing that the Legislature shall not "locate" any other public institutions, except under general laws, and by a vote of the people, in that the repeal of the act constituted an attempt to dissolve an institution created by the people by their own vote in locating it. Held, "that the institution was not, however, created or established by the people as distinct from the Legislature, either through their votes in locating it or otherwise. Nor have the people by the fundamental instrument of their state government reserved the right to themselves to establish or create public institutions. The people have reserved the power to vote upon the location of such institutions estab-

lished or proposed to be established. \* \* \* Unless, therefore, to 'locate' is to 'establish' an institution of the character of the college in question, it is erroneous to say that the people established it. \* \* \* Examples are numerous in the books of public institutions which were established and in existence in advance of their location, or the selection of a site. They may not be in a position to conduct operations until located; but that they may constitute an existing institution, if so declared by the Legislature and provided with a governing board, is, we think, self-evident. \* \* \* The location of an institution differs essentially from its creation." Hence the dissolution by the Legislature of the Wyoming Agricultural College was not in contravention of the Constitution, notwithstanding it was located by vote of the people. *State ex rel. Wyoming Agricultural College v. Irvine*, 84 Pac. 90-106, 107, 14 Wyo. 318.

Laws 1909, c. 133, creates Lincoln county, and section 3 provides that the town of Libby shall be the county seat until the county seat is designated as provided, and that for the purpose of "definitely fixing and creating" a county seat the board of county commissioners shall insert on the ballots in the general election, "for the county seat of Lincoln county ———," and the town receiving the largest number of votes shall be the county seat. Held, that the section contravened Const. art. 5, § 26, prohibiting the Legislature from passing special acts locating or changing the county seats, which was substantially adopted from Act Cong. July 30, 1886, c. 818, 24 Stat. 170, relating to the territories, construing the constitutional provision and act of Congress in view of their legislative history; "locating," as used in the statute, meaning to establish and fix a permanent county seat, and "changing" meaning the removal of an established, permanent county seat. *State ex rel. Geiger v. Long*, 117 Pac. 104, 105, 43 Mont. 401.

### As purchase

See Purchase.

### As selection of place

To "locate" is to select by fixed boundaries. *Petersburg School Dist. of Nelson County v. Peterson*, 103 N. W. 756, 758, 14 N. D. 344.

A deed to an electric railway company of a strip 25 feet in width and such additional width as may be required for the use of the railway at cuttings and embankments and also for side tracks and turnouts as finally located, executed in consideration of the company locating its railway on the land of the grantor, limits the grant to the necessities of the railroad as finally located and limits the grant of land for side tracks and turnouts to such as were originally constructed, and the company may not take additional land for side tracks and turnouts; the word

"locate," when referring to roads, meaning a determination and designation by those authorized to do so of the precise place where the road is to be built, or referring to the actual construction of the road. *Kensington Ry. Co. of Montgomery County v. Moore*, 80 Atl. 614, 615, 115 Md. 36, Ann. Cas. 1912C, 1306 (5 Words and Phrases, pp. 4217, 4218, 4221).

In an action to rescind a lease for failure of defendant lessor to make certain improvements before the commencement of the term, the answer alleged the pendency of proceedings to open and establish a road, and averred that the location of the improvements was to be fixed after the road had been definitely located through the land, and convenient to the road when it was opened and ready for travel. Held that, while the term "located" as applied to a road is of uncertain significance, and may refer to the fixing of the line which the road is to occupy or to the actual construction of the road, it was meant as used in the answer to describe the act of the public officials in determining the place which the road was to occupy, and hence a finding that the improvements were to be placed after the road was located "and built" was beyond the issues. *Schwartz v. Carpenter*, 108 Pac. 318, 319, 157 Cal. 432.

The word "locate," as used in the treaty of September 24, 1819, with the Chippewa Nation, reserving lands for the use of the Indians to be located at and near the Grand Traverse of the F. river in such manner as the President of the United States should direct, does not mean to patent, but to have the several sections surveyed, marked out, and a map made of them showing the particular section belonging to each of the reservees. *Francis v. Francis*, 27 Sup. Ct. 129, 131, 203 U. S. 233, 51 L. Ed. 165 (citing *Stockton v. Williams* [Mich.] *Walk. Ch.* 120, 129).

Under the Nelson Act, allowing allotments to Indians located on the White Earth Reservation, the expression "located" includes those Indians born after the passage of the act. *United States v. La Roque*, 198 Fed. 645, 646, 117 C. C. A. 349.

An Indian need not have been on the reservation at the instant when the act of February 28, 1891, amending the general allotment act of February 8, 1887, was passed, in order to avail himself of the benefit of the provision of the later act giving to each Indian "located" thereon one-eighth section of land. *Fairbanks v. United States*, 32 Sup. Ct. 292, 298, 223 U. S. 215, 56 L. Ed. 409.

#### LOCATED PROPERTY

Stock in a nonresident railroad corporation, owned by a domestic railroad company, is taxable for county and municipal purposes in that county and city wherein the principal office of such corporation is fixed by its charter or by-law. Such property is "located property," in the meaning of the law of this

state providing the machinery for distributing the property of railroad companies for county and municipal taxation. *Greene County v. Wright*, 54 S. E. 951, 953, 126 Ga. 504.

#### LOCATION

See Each Location; Final Location; Lode Location; Mining Location; Placer Location; Relocation.

Removal, see Remove—Removal.

#### As site or situation

A notice of election for the removal of a county seat is not objectionable in using the word "site" in respect to both building and offices. The word "location" is used in the statute in respect to offices, and, while it may be preferable, both words are frequently employed in the same sense, and no confusion could have resulted. *Stanton v. Board of Sup'rs of Essex County*, 96 N. Y. Supp. 840, 842, 48 Misc. Rep. 415.

#### Highway

"Location" of a highway and "alteration" of a highway do not amount to the same thing. *Ford v. Erskine* (Me.) 83 Atl. 455, 457.

The word "location," as used in Pol. Code, § 2689, relating to the establishment of highways, refers to proceedings designed to fix the line of the highway at a time prior to its actual construction and opening. *Schwartz v. Carpenter*, 108 Pac. 318, 320, 157 Cal. 432.

#### Franchise distinguished

See Franchise.

#### Railroad

Under Laws 1854-55, p. 264, c. 228, § 29, providing that in the absence of contract in relation to land through which a certain railroad may pass it shall be presumed that the land has been granted by the owner to the company, unless the owner shall apply for an assessment of the value of the land within two years next after the road has been "located," the location of the railroad is its physical location by the laying of its track. *City of Hickory v. Southern Ry. Co.*, 49 S. E. 202, 204, 137 N. C. 189.

Under the rule that, where a railroad company, to which has been given the power to choose its particular route between designated termini, has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its "location," without express legislative authority, the authorities differ somewhat as to what will constitute a "location," within the rule, but, after the selection of the route and actual construction, they generally concur that the "location" is fixed. *Brown v. Atlantic & B. Ry. Co.*, 55 S. E. 24, 26, 126 Ga. 248, 7 Ann. Cas. 1026 (citing *Mahaska County R. Co. v. Des Moines Val. R. Co.*, 28 Iowa, 437; 4 Am. & Eng. Ry. Cas. 199, 200, note to *Western Penn. R. Co.'s Appeal*).

"Location" of a railroad, within the legal definition of the terms, is a proceeding in the exercise of the power of eminent domain, amounting to an appropriation of the particular place selected for the site of the road, as against all persons except the owner of the land, and a person who may have perfected a prior location thereon; and, as to the landowner, it gives a right to acquire his title by purchase, or the further exercise of the power of eminent domain, paramount to that of a company claiming under a subsequent location. A mere survey made by the engineers of a company, not adopted or determined upon by the corporation itself, by an act of its board of directors, as the location of its road, is not an appropriation or location giving priority of right as against third persons. A survey staked out upon the ground as a center line, a preliminary line, or an actual location, whether delineated on paper or not, if adopted by the corporation as aforesaid, is a sufficient "location." A "location," as between rival companies, need not be exact as to the width of the right of way claimed or other matters of mere detail. If the site intended to be held is substantially shown, the location is sufficient. A survey made by promoters of a railroad corporation, for the purposes, before the company is incorporated, or by an existing railroad company, for an extension of its road, before filing, in the office of the Secretary of State, a certificate of extension, as required by section 53 of chapter 54 of the Code of 1899, may be adopted as a location after incorporation or the filing of the certificate, as the case may be. If, acting in good faith and diligently prosecuting the enterprise, it professes to have undertaken the construction of its road, a railroad corporation may seize and hold, as against a rival company, by location thereon, land on any part of its proposed route, without having made a survey of its entire road. Though not the only mode of adopting a survey, so as to make it a location, the filing of a map of it in the office of the Secretary of State, by order of the board of directors of the company, is prima facie proof of such adoption. The mere filing of such plat in such office, without proof that it was authorized by the corporation, is not evidence of an adoption of the survey shown by it. A location can be made only by act of the corporation through its board of directors, but acts done by agents under the orders of the board of directors, for the purpose of claiming and holding a location designated by the board as such, are evidence of intent on the part of the board of directors to claim and hold such location. *Chesapeake & O. R. Co. v. Deepwater Ry. Co.*, 50 S. E. 890, 894, 57 W. Va. 641.

## LOCATOR

See Original Locator; Relocator.

## LOCK

See Foot-Lock.

In an action against a railroad company to recover for killing stock, an instruction that plaintiff could not recover if he had failed to "lock" the gate leading to the right of way was erroneous, since the only obligation of plaintiff was to secure the gate by the usual means, and the word "lock" implying an obligation to lock the gate with a key. *Brownfield v. Union Pac. R. Co.*, 104 N. W. 876, 877, 74 Neb. 440.

"A 'lock' is almost invariably used in connection with a canal, and forms part of it. It cannot exist except in connection with a canal or some equivalent situation." *Winnebago Paper Mills v. Kimberly-Clark Co.*, 120 N. W. 411, 413, 138 Wis. 425.

## LOCKED STOREROOM

"Locked storeroom," as used in an insurance policy covering goods in a locked storeroom provided for the exclusive use of the assured by the landlord in the same house, does not include a separate laundry, under lock and key, in the basement of a flat house, set aside for the use of an occupant of one of the flats used by him for laundry purposes, cooking, storing of vegetables, and wherein he stored trunks packed with winter clothing. *Michaels v. Fidelity & Casualty Co. of New York*, 105 S. W. 788, 784, 128 Mo. App. 18.

## LOCKOUT

An employer's discharge of employes about to enter upon a strike, done before they can strike, is commonly called a "lock-out." *Atchison, T. & S. F. R. Co. v. Gee*, 140 Fed. 153.

"A 'lockout' is a cessation of the furnishing of work to employes in an effort to get for the employer more desirable terms." *Iron Molders' Union No. 125 of Milwaukee, Wis., v. Allis-Chalmers Co.*, 166 Fed. 45, 52, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315.

## LOCO PARENTIS

See In Loco Parentis.

## LOCOMOTIVE

Operating locomotive, see Operate.

Code 1907, § 5473, providing that the engineer having the control of the running of a locomotive on any railroad shall give specific signals in designated situations, does not apply to a street or interurban railroad operated by electric power; for a street car, in its popular sense, is not a "locomotive." *Birmingham Ry., Light & Power Co. v. Green*, 58 South. 801, 4 Ala. App. 417.

Rev. St. 1899, § 1106, provides that when any stock shall go on a railroad right of way

at a place where the road is not fenced, and the stock is frightened by any locomotive or train and injured, the company shall be liable; and section 4160 provides that words and phrases shall be taken in their plain and usual sense. Held, that a "speeder"—a contrivance similar to a hand car, save that it is operated by a gasoline engine—is not a "locomotive," within the statute, and a railroad is not liable for injuries to stock frightened thereby. *Henson v. Williamsville, G. & St. L. Ry. Co.*, 85 S. W. 597, 598, 110 Mo. App. 595.

Rev. Laws, c. 106, § 71, cl. 3, declaring that a master shall be liable for injuries to a servant caused by the negligence of a person in his employ, who is in charge of an engine or train on a railroad, extends to a manufacturing plant which operates a system of railroad tracks in its yard in connection with a commercial railroad, and an engine and cars operated on the tracks constitute a "locomotive and train on a railroad." *Hines v. Stanley G. I. Elec. Mfg. Co.*, 85 N. E. 851, 852, 199 Mass. 522.

A whirley, derrick, or locomotive crane built upon car trucks, and equipped with a boiler and engine furnishing the power to operate the crane, and to move the machine about upon the railroad tracks in the vicinity where it is being operated by a railway company for the purpose of unloading heavy materials to be used in the construction of docks, and not employed by the railway company in its business as a common carrier in moving state traffic, is not, while being so operated, a "locomotive, car, tender, or similar vehicle used in moving state traffic," required by sections 8950 and 8952 of the General Code to be equipped with an automatic coupler and provided with drawbars of standard height. Where a railway company, as a common carrier, has deposited on tracks built upon a partly constructed dock, cars loaded with materials to be used by it in the further construction of such dock, the use of this machine to shift these loaded cars a short distance to meet the needs and convenience of the employes engaged in unloading the same, does not bring the machine, during the time it is so employed, within the provision of these sections. *Lake Shore & M. S. Ry. Co. v. Benson*, 97 N. E. 417, 419, 85 Ohio St. 215, 41 L. R. A. (N. S.) 49, Ann. Cas. 1913A, 945.

The term "locomotive engine" has a well-known significance, and is used generally for an engine to draw a train of trucks or cars along a permanent or temporary set of rails. There is also a well-known class of engines, such as traction engines, which, though they are capable of being moved from place to place, are never spoken of as locomotive engines. A pile driver, consisting of a steam engine placed on a flat car at one end and a driver used in raising the hammer at the other end, all forming one machine, capable

of self-propulsion by means of a sprocket wheel on the axle under the boiler, connected by a chain with the engine, the chain being removed when driving a pile, is not a "locomotive engine," within *Burns' Rev. St.* 1901, § 7083, subd. 4, providing that every railroad, etc., shall be liable for injuries suffered by an employé, and caused by the negligence of any other employé having charge of any "signal, telegraph office, switch yard, shop, round-house, locomotive engine, or train upon a railway." *Jarvis v. Hitch*, 67 N. E. 1057, 1059, 161 Ind. 217.

*Ky. St.* § 786, relating to "railroads," requiring every company to provide every locomotive engine on its road with a bell and steam whistle, and to ring the one and sound the other outside cities, at a grade crossing of its road with a highway, in view of section 842a, subsec. 1, providing that all interurban electric companies authorized to construct a railroad 10 miles long shall be under the same duties, so far as practicable, as railroad corporations, requires such an interurban electric to sound the gong and electric whistle of its motors at such crossings; any engine used in producing motion, whether by steam or other power, being a locomotive engine, within the statute; and the gong and electric whistle, being but substitutes for the bell and steam whistle required by the statute. *Commonwealth v. Louisville & E. R. Co.*, 133 S. W. 230, 231, 141 Ky. 583.

An inspection car, operated by a steam engine placed in the center thereof, and designed to run from place to place for use by the officers of the railroad in making inspections, is a locomotive engine within a city ordinance limiting the speed of engines, and requiring the giving of signals, and within *Rev. St.* 1899, § 1102, requiring the giving of signals at crossings, though the term "locomotive engine" usually signifies a steam engine used to draw a car or train of cars along a railroad. *Mudd v. Missouri, K. & T. Ry. Co.*, 124 S. W. 59, 61, 146 Mo. App. 388.

By the words "locomotive engine or train upon a railroad" must be understood a railroad and locomotive engine and trains operated and run, or originally intended to be operated and run, in some manner and to some extent by steam. *Employers' Liability Act* March 4, 1893, p. 295, c. 130, § 1 (*Burns' Ann. St.* 1901, § 7083), providing that every railroad or other corporation shall be liable for damages for personal injuries suffered by an employé, where the injury was caused by the negligence of any employé having charge of any signal, telegraph office, "locomotive engine, or train upon a railroad," does not apply to employes operating electric cars; such a car not being a "locomotive engine" or a "train upon a railroad," within the meaning of the statute. *Indianapolis & G. Rapid Transit Co. v. Andis*, 72 N. E. 145, 150, 33 Ind. App. 625.

**As any car**

See Any.

**As freight car**

See Freight Car.

**As vehicle**

See Vehicle.

## LOCOMOTIVE ENGINEER

See Engineer.

## LODE

See Known Lode or Vein; Mineral Lode.

### As any mineral matter

A "lode," within the meaning of the federal statute making the discovery of a vein or "lode" a prerequisite to the location of a mining claim, is whatever the miner could follow and find ore. A valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore, and a valid location may be made of a ledge deep in the ground and appearing at the surface, not in the shape of ore, but in vein matter only. *Columbia Copper Min. Co. v. Duchess Mining, Milling & Smelting Co.*, 79 Pac. 385, 386, 13 Wyo. 244 (quoting and adopting definition in 1 Lindley, *Mines* [2d. Ed.] p. 610).

### Defined boundaries required

"A 'vein' or 'lode' is mineral-bearing rock or other earthy matter in place in a fissure in rock, so that its boundaries are sharply defined by rocky walls in place." *Webb v. American Asphaltum Mining Co.*, 157 Fed. 203, 204, 84 C. C. A. 651.

A "lode" is a zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock. *Ambergris Min. Co. v. Day*, 85 Pac. 109, 112, 114, 12 Idaho, 108 (quoting and adopting definition in *Eureka Consol. Min. Co. v. Richmond Min. Co.*, 8 Fed. Cas. 819, and citing definitions quoted in 5 Words & Phrases, p. 4423).

A vein or "lode," within Rev. St. U. S. § 2333, providing that, where an application for a patent for a placer claim does not include an application for a known vein or lode within its boundaries, the application shall be construed as a declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but that, where the existence of a vein or lode claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof, is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain, and that a "known vein or lode" is one clearly ascertained, and of such extent as to render the land more valuable on that account and justify its exploitation

and development. *Noyes v. Clifford*, 94 Pac. 842, 847, 37 Mont. 188.

Veins or "lodes" are lines or aggregations of metal imbedded in quartz or other rock in place, consisting of a strip of mineral-bearing rock within defined boundaries in the general mass of the mountain, which must be continuous and without interruption, bounded by country rock mineralized to no greater extent than the general condition of the vicinity. Rock or matter of any kind, in order to constitute a vein or "lode," within the meaning of the statute, must be metaliferous and contain such mineral value as will distinguish it from the country rock, especially where no well-defined walls appear. What values the filling or material of a fissure should contain to constitute it a vein, within the meaning of the act of Congress, must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character, as to boundaries, of the vein itself. Values, therefore, of the filling of the vein must be considered with special reference to the district where the vein or lode is found. In the absence of defined walls and of mineralization appreciably greater than that contained in the general mass of the mountain, broken, stained, and fissured material, or crushed and brecciated matter, characteristic of the district, cannot be held to constitute a vein or "lode," under the statute. In such case the limits of fracturing do not constitute the limits of the vein, and even if there be found an occasional vug or fragment of ore, yet where it is disconnected from any ore body and so intermingled with the surrounding country rock that it cannot be regarded as continuous, it does not mark the line of the vein or "lode," within the meaning of the law. *Grand Central Min. Co. v. Mammoth Min. Co.*, 83 Pac. 648, 676, 677, 678, 679, 29 Utah, 490.

### Placer distinguished

A "lode" is a solid vein of metal, while a "placer" is earth, sand, or gravel containing valuable mineral in particles. A mining lode is a totally different thing from a placer mine, and not a mere state or condition of such mine. They are two distinct things, and not two different states of the same thing. *McCarter v. Sooy Oyster Co.*, 75 Atl. 211, 215, 78 N. J. Law, 394 (quoting and adopting definition in *Webst. Dict.*).

## LODE CLAIM

Laws 1903, p. 360, entitled "An act to regulate the construction, equipment and operation of metalliferous mines, \* \* \* providing penalties for violation thereof, \* \* \*" provides by section 18 (Rev. St. 1908, § 4297) "that all abandoned mine shafts, pits or other excavations endangering the life of man or beast shall be securely covered or fenced." The complaint in an action

against the owner of an unused mining shaft for damages for the death of plaintiffs' infant son, resulting from the alleged negligence of the owner in failing to cover or fence the shaft, averred that the shaft was abandoned, that it belonged to the defendant, that the defendant was a corporation existing under the laws of this state and engaged in mining gold and other precious metals, and that the shaft was located upon mining property known as the Australia lode mining claim belonging to the defendant. Held that, while the act applied only to mines yielding metals, the term "lode claim" meant a mining claim containing a vein of metallic ore, and hence that the complaint sufficiently averred that the shaft was upon a metalliferous mine. *Richardson v. El Paso Consol. Gold Mining Co.*, 118 Pac. 982, 985, 51 Colo. 440.

### LODE LOCATION

A "lode location" is a location of mineral-bearing rock in place in a fissure in rock in the manner prescribed by the act of Congress. *Webb v. American Asphaltum Mining Co.*, 157 Fed. 203, 204, 84 C. C. A. 851.

"A valid 'lode mining location' must be open, unoccupied, and unappropriated public domain." *Hoban v. Boyer*, 85 Pac. 837, 838, 37 Colo. 185.

### LODGE

#### LODGER

See, also, Guest.

Ordinarily the landlord supplies a "lodger" with furnished rooms, the care and occupation of which the landlord has, the lodger merely having the use of rooms without the exclusive possession, while the tenant has exclusive possession. *Mathews v. Livingston*, 85 Atl. 529, 531, 86 Conn. 263.

One who is in the possession of apartments by virtue of a formal lease in writing, by the terms of which the absolute right of use and occupation is given to the lessee for the purpose of a dwelling for himself and family, the lessor having no right to enter except for the purpose of making repairs or alterations, and in which the lessee is designated as "tenant" and the lessor as "landlord," is not a "lodger," within the intent of Laws 1899, p. 834, c. 380, giving a lien to a lodging house keeper on the baggage and other property brought upon the premises by a lodger. *Shearman v. Iroquois Hotel & Apartment Co.*, 85 N. Y. Supp. 865, 866, 42 Misc. Rep. 217.

### LOFT

Of barn as building, see Building.

### LOG

See Prize Logs; Saw Logs.

The word "log," as used in a logging contract, does not mean "tree." *Des Alle-*

*mands Lumber Co. v. Morgan City Timber Co.*, 41 South. 332, 340, 117 La. 1.

#### Lumber distinguished

See Lumber.

#### As merchandise

See Merchandise.

#### As timber

See Timber.

### LOG MEASURE

See Scribner's Log Rule.

### LOGS AND BOX MATERIALS

Blocks of wood from 6 to 15 inches in diameter and 38 to 42 inches long, sawed from round logs in their natural state, are not classified as "logs and box materials" by the 110 commodities act (Laws 1907, p. 209); and a contract for their transportation, which describes them as cordwood, at the rate fixed for cordwood, is binding on the shipper and carrier; and the mere fact that the consignee or subsequent buyer may manufacture the blocks into barrel heads does not justify the carrier in reclassifying them as logs and box material, and demanding a higher rate as a condition precedent to a delivery. *Southern Ry. Co. v. Lowe*, 54 South. 51, 170 Ala. 598.

### LOGS AND OTHER TIMBER PRODUCTS

See Other Timber.

### LOGS AND ROUND UNMANUFACTURED TIMBER

Pulp wood subjected to the rossing process, by which the bark and excrescences are mechanically removed, in order to prepare it for use, is not, by reason of this treatment, to be excluded from the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 699, for "logs and round unmanufactured timber," including pulp woods, \* \* \* not specially provided for." *United States v. Pierce*, 140 Fed. 962, 963.

### LOGS AND TIMBER

Under Rev. St. 1878, § 8330, as amended by Laws 1879, c. 187, § 1, giving a lien on "logs and timber" to any person furnishing supplies to those engaged in getting out logs and timber, the word "logs" clearly means the stem or trunks of trees cut into convenient lengths for the purpose of being afterwards manufactured into timber of various kinds, and does not include manufactured lumber of any kind nor timber which is squared or otherwise shaped for use without further change in form, and the word "timber" was clearly intended to include the same stems or trunks of trees when cut and shaped for use in the erection of buildings or other structures, and not to be manufactured into lumber, within the meaning of the word "lumber." Railroad ties are usually made from the stems of small trees and shaped for

use in the construction of a railroad track, and are clearly "timber," within the meaning of the word as used in the statute. *Kollock v. Parcher*, 9 N. W. 67, 69, 52 Wis. 393.

### LOGS, LUMBER, AND OTHER TIMBER

See Other Timber.

### LOGS OF WOOD

Sandalwood in pieces of varying sizes, several feet long and several inches thick, to which nothing has been done beyond removing the bark and sawing the wood into lengths convenient for transportation, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 198, 30 Stat. 167, as "wood, unmanufactured, not specially provided for," but is free of duty, under the provision in paragraph 699 of said act (section 2, Free List, 30 Stat. 202, for "logs of wood." *George Lueders & Co. v. United States*, 131 Fed. 655.

### LOGGING RAILROAD

As railroad, see Railroad—Railway.

### LOGROLLING

"Logrolling" consists in framing a bill with numerous separate or independent provisions, none of which would pass upon its own merits, but each of which is made attractive enough to command a certain number of votes, which, being united, are sufficient to pass the bill. *People v. Sullivan*, 65 N. E. 989, 996, 173 N. Y. 122, 63 L. R. A. 353, 93 Am. St. Rep. 582.

What is commonly known as "logrolling" is passing through a measure, not on its own merits, by combining it with other measures, each of which has a certain strength, and thus pulling them through by virtue of their combined strength. *Christie v. Miller*, 57 S. E. 697, 698, 128 Ga. 412 (quoting and adopting the definition of Judge McCay in *Conner's Case*, 51 Ga. 573).

"Logrolling," as applied to elections, consists in the combining of several questions so that a voter cannot exercise his judgment as to one or more of the several propositions, but must either adopt or reject them as an entirety. *Tolson v. Police Jury*, 43 South. 1011, 1014, 119 Ga. 215, 12 Ann. Cas. 847.

### LOITER

### LOITER, LOAF, AND IDLE

In Gen Laws 31st Leg. c. 59, § 1, par. "d," defining as vagrants all able-bodied persons who habitually "loaf, loiter, and idle" in any public place, etc., for the greater part of their time, without any regular employment or visible means of support, and declaring that one is not relieved from a charge of vagrancy who habitually loafs, loiters, and idles, if he is without visible means of sup-

port, by the fact that only occasionally he has employment at odd jobs, being for the most part without employment, the terms "loiter," "loaf," and "idle," when construed with the words "larger portion of their time," require proof, to sustain a conviction of vagrancy, that the person charged was able to work, and, being so able, habitually loafed, loitered, and idled in the city for the greater part of his time, without employment or visible means of support. *Ex parte Strittmatter*, 124 S. W. 906, 907, 58 Tex. Cr. R. 156, 137 Am. St. Rep. 937, 21 Ann. Cas. 477.

### LOITERER

The term "loiterer," in a charge that, if plaintiff was a mere "loiterer" about defendant's station after his discharge, he could not recover for injuries, of necessity implies plaintiff's presence about the station without consent, permission, or license, and, if anything, it is even broader than those terms, for one may be about the premises without consent, permission, or license, and yet not be a "loiterer" but a trespasser. *Hern v. Southern Pac. Co.*, 81 Pac. 902, 907, 29 Utah, 127.

### LONE ENGINE

A "lone engine" is a locomotive not hauling any cars, except its own tender. *Kielbeck v. Chicago, B. & Q. R. Co.*, 97 N. W. 750, 70 Neb. 571.

### LONG

### LONG ACCOUNT

The services of an attorney, rendered in an action or actions under a single or different retainers, which merely involves charges in connection with the various steps in the litigation, cannot be said to constitute a long account. On the contrary, the charge in each action, although the service be permissible of exhaustive itemization, is essentially a single charge respecting each action, and exceptional circumstances must be made to appear in order to remove the case from the operation of such rule. *Prentice v. Huff*, 90 N. Y. Supp. 780, 782, 98 App. Div. 111.

Where the issues framed by the pleadings in a cause are very numerous, involving many dealings between the parties growing out of farming transactions under a contract under which plaintiff farmed certain lands for the defendant, also growing out of sale of personal property of various kinds and at various dates, and for work, labor, and services performed by plaintiff for defendant, also for numerous items or claims for money advanced to and paid out and expended at various dates by each party at the request of and for the benefit of the other, and where there are numerous causes of action set forth in the complaint, as well as those set forth in various counterclaims contained in the answer, are all for the recovery of money upon contract, and some of the causes



of action embrace many separate items of account, all of which are denied by the opposite party, and where the issues are such as to render it practically impossible for a jury to intelligently try and determine the same, the case is one eminently proper to be referred as involving the examination of a "long account." *Smith v. Kunert*, 115 N. W. 76, 78, 17 N. D. 120 (citing *Sutton v. Wegner*, 43 N. W. 167, 74 Wis. 347; *Turner v. Nachtsheim*, 36 N. W. 637, 71 Wis. 16; *La Coursier v. Russell*, 52 N. W. 176, 82 Wis. 265; *Chicago & N. W. Ry. Co. v. Faist*, 58 N. W. 744, 87 Wis. 360; *Ittner v. St. Louis Exposition & Music Hall Ass'n*, 11 S. W. 58, 97 Mo. 561; *People v. Peck* [N. Y.] 57 How. Prac. 315; *Spence v. Simis*, 33 N. E. 554, 137 N. Y. 617; *Salem Traction Co. v. Anson*, 67 Pac. 1015, 69 Pac. 675, 41 Or. 562; *Lewis v. Snook*, 84 N. Y. Supp. 634, 88 App. Div. 343; *Haig v. Boyle*, 45 N. Y. Supp. 816, 20 Misc. Rep. 155).

The statute authorizing references does not apply to an action, *ex delicto*, though there may be a great number of items involved, since such an action does not involve the examination of a long account as contemplated by the statute. *Foster v. Missouri Pac. Ry. Co.*, 128 S. W. 36, 87, 143 Mo. App. 547.

An action for work performed and material furnished does not involve a "long account," within the meaning of New York Code, so as to require a reference, where the work done, though upon 43 different apartments in an apartment house appears to have been under a single employment, and the only work specified in the bill of particulars is papering and kalsomining, and none of the items making up the charge appears to be at all complex, and all of them must of necessity have been of the same general character. *Levine v. Royal State Bank*, 113 N. Y. Supp. 523, 61 Misc. Rep. 226.

A complaint alleged that between December and the following May plaintiff rendered medical services for defendant, and attached to the complaint was a schedule giving the date and charge for each visit. The answer admitted that the services were rendered, but denied the dates and values of the visits, and that the services were rendered as set forth in the schedule. Held, that the pleadings did not indicate that the trial would necessarily involve the "examination of a 'long account,'" within Code Civ. Proc. § 1013, authorizing a compulsory reference in such a case. *Fowler v. Peck*, 99 N. Y. Supp. 816, 817, 51 Misc. Rep. 645.

Where services relate to one matter, or can be grouped into so few separate matters that a jury can easily bear them in mind, a compulsory reference is improper, for numerous itemized charges for one matter do not make a "long account," within the meaning of Code Civ. Proc. § 1013, authorizing the

court to direct a reference, upon motion of either party without the consent of the other where the trial will require the examination of a long account on either side, and will not require the decision of difficult questions of law; and hence, in an action by an attorney for services and disbursements, where the disbursements are insignificant, and of the 25 separate charges for services 3 are retainers, and the remaining 22 relate to services performed in five separate matters, not complicated in character, consisting mainly of consultations, conferences, and negotiations of settlements, a reference should be refused. *Russell v. McDonald*, 110 N. Y. Supp. 950, 951, 125 App. Div. 844.

In an action to recover part of the price paid for shoes, defendant claimed that plaintiff told him he would sell him the shoes at cost, and the way to figure the cost was to divide the first figure marked on each pair of shoes by 4, and add 5 to the next figure, and plaintiff admitted that the true way to find the cost was to divide the first figure by 4, but that he did not agree to sell the shoes at cost, but at 50 cents above cost, which was the price paid by defendant. Held that, under the compulsory reference statute, there was no long account involved so as to authorize a reference. *Barger v. Beach*, 127 S. W. 120, 121, 142 Mo. App. 389.

#### LONG AS

See As Long as; So Long as.

#### LONG ON

In the parlance of the stock and produce exchange, to say that one was "long on cotton" means that he had too much cotton. *Whitley v. Newman*, 70 S. E. 686, 690, 9 Ga. App. 89.

#### LONG PRICE

Tobacco in bond is sold in two ways: At the "long price," which denotes that the duty does not come in question but that the goods are sold at a flat price without reference to duty; and "short price" is that the merchandise and the duties are separated. *Friend v. Rosenwald*, 108 N. Y. Supp. 701, 702, 124 App. Div. 226.

#### LONG TIME

In a suit to enjoin the alleged illegal use of a trade-name, an affidavit that complainant had used the name for a "long time" is too indefinite for judicial action. *Charles R. De Bevoise Co. v. H. & W. Co.*, 60 Atl. 407, 69 N. J. Eq. 114.

Where the owner of lots wrote real estate agents that he would sell the lots for a given price, so much cash, and the balance on "long time," the agents were not authorized to sell on terms whereby notes running from one to four years, given by the purchaser for the balance, were payable "on or before" certain dates. The quoted words placed in each

of the notes gave the maker the privilege of paying them at any time he might choose, and they did not comply with the terms of the authority, because they were not long-time notes. *Colvin v. Blanchard*, 106 S. W. 323, 325, 101 Tex. 231.

### LONG TON

A "long ton" is a ton consisting of 2,240 pounds. *Hale Bros. v. Milliken*, 90 Pac. 365, 370, 5 Cal. App. 344.

### LONGER PERIOD THAN ONE YEAR

An oral lease for one year, the term to begin a day or two in the future, is not invalid, under Rev. Civ. Code 1903, § 1238, subd. 5, providing that an agreement for the leasing of real estate "for a longer period than one year," or some note or memorandum thereof, must be in writing. *Paulton v. Kreiser*, 101 N. W. 46, 18 S. D. 487, 5 Ann. Cas. 827.

### LOOK

"A man does not discharge his duty to 'look' out for cars before going on a track by looking where his sight is obstructed." *Risler v. St. Louis Transit Co.*, 87 S. W. 578, 579, 113 Mo. App. 120.

### LOOKOUT

The word "lookout," as used in an instruction in an action for injuries to a street car passenger in jumping from a car to escape an imminent collision with a railroad train, as to whether such street car company kept a reasonably sufficient lookout for such train, was used in a sense of looking to ascertain the coming or presence of a train. *Galveston, H. & S. A. R. Co. v. Vollrath*, 89 S. W. 279, 283, 40 Tex. Civ. App. 46.

A "lookout" is only one of the many precautions which a prudent navigator should provide, but it is not indispensable, where, from the circumstances of the case, a lookout could not possibly have been of service; the object being to discover dangers that are unknown, such as the advance of an approaching vessel or appearance of a light on the coast, the discovery of a dangerous object, and many other things, the existence and presence of which could not be so easily and quickly known to the pilot as to the person whose sole business it was to make and communicate such discoveries. *The Pocomoke*, 150 Fed. 193, 198 (quoting and adopting definition in *The Farragut*, 10 Wall. [77 U. S.] 333, 19 L. Ed. 946).

### LOOSE

#### LOOSE BEADS

Metal beads temporarily strung on cotton cords or strings for the purpose of facilitating transportation are not dutiable, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189, as loose beads.

*Henry E. Frankenberg Co. v. United States*, 27 Sup. Ct. 628, 629, 206 U. S. 224, 51 L. Ed. 1034.

### LORD CAMPBELL'S ACT

The English Act of 1846 (Stats. 9 and 10 Vict. c. 93) is commonly known as "Lord Campbell's Act," and related to the right to recover for death due to the negligence or wrongful act of another. This act has served as a model for all subsequent legislation on the subject. *Casey v. St. Louis Transit Co.*, 91 S. W. 419, 421, 116 Mo. App. 235 (citing *Hayes v. Williams*, 80 Pac. 352, 17 Colo. 465; *Cooley*, Torts [2d Ed.] 308).

### LOSE

As applied to property, the word "lose" ordinarily refers to an involuntary, not a voluntary, deprivation. No man may be said to have lost that which on his motion he abandons or resigns, and in common speech the expression a woman "has lost her husband" generally refers to a loss by death, and not to a voluntary divorce by the wife. *Snorgrass v. Thomas*, 150 S. W. 106, 108, 166 Mo. App. 603 (citing 5 Words and Phrases, p. 4237 et seq.).

To "lose" is casually and involuntarily to part with the possession, so that the mind has no impress of, and can have no recourse to, the event; and, if the property is found on the surface of the earth, the conditions suggest that it has been intentionally abandoned, and as such has returned to the common mass of things, in a state of nature, which belongs to the first occupant or finder, the owner not appearing; the distinction between "losing" and "abandonment" being that one is involuntary, while the other is by intent or design. But the result, as it relates to the property, is practically the same; the owner not appearing to lay claim to it. In the one case the finder has the right to the possession against all except the true owner. In the other he acquires the absolute property by right of his occupancy. It is the presumption of abandonment that obtains until the owner appears and claims the property that gives the right as legal possessor to the first occupier; the presumption being disputable by the rightful owner. Such presumption or inference does not obtain as to property intentionally left or deposited in a designated place, and possibly forgotten for the time being, as the loss depends upon something more than knowledge or ignorance, or the memory or want of memory of the owner as to the locality at any given moment. "In such case the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict." And where plaintiff, while in pos-

session of defendant's premises under a lease, discovered rich specimens of gold-bearing quartz lying on top of the ground, and by investigation he dug up a large quantity of such quartz found lying in the soil unconnected with any ledge, pocket, placer, or other natural deposit, the quartz being imbedded in the loose surface soil, there being also evidences of a sack or duck cloth in which the quartz might have been buried, such quartz was not "lost" or "abandoned property," and therefore belonged to the owner of the soil, and not to the finder. *Ferguson v. Ray*, 77 Pac. 600, 602, 44 Or. 557, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 1 Ann. Cas. 1 (citing 1 Black. Com. [Lewis' Ed.] c. 8, \*295, 296; 2 Bl. Com. [Lewis' Ed.] c. 28, \*402; 2 Kent, Com. \*356; *McLaughlin v. Waite* [N. Y.] 5 Wend. 405, 21 Am. Dec. 232).

### LOSE A DOMICILE

"To 'lose a domicile,' when once acquired, there must be an intention to do so. A mere change of the place of abode, however long continued, is not sufficient, unless the proper animus or intention is present. This intention, it is true, may be inferred from circumstances, and the residence may be of such a character and accompanied by such indices of a permanent home that the law will apply to the facts a result contrary to the actual intention of the party. Thus one cannot make a permanent fixed commercial residence with all the surroundings of a permanent home in one place and a domicile in another by a mere mental act. But a residence for mere pleasure or health is not regarded as of any great weight in determining the question of a change of domicile, for in such case it is just as likely that the party intends to retain as to abandon his present domicile." *Pickering v. Winch*, 87 Pac. 763, 767, 48 Or. 500, 9 L. R. A. (N. S.) 1159.

### LOSE A HAND

The term "lose a hand," in the constitution of a fraternal benefit association, is used in its ordinary and popular sense, and does not mean that there must be a total destruction of the hand, anatomically speaking, but that the loss of the use of it for the purposes to which a hand is adapted would be a loss of it. *Sisson v. Supreme Court of Honor*, 78 S. W. 297, 299, 104 Mo. App. 54.

### LOSER

Cr. Code, § 132, providing that any person who shall by gaming lose and pay or deliver to any person any sum of money or other valuable thing may recover the same, was intended to afford a remedy by way of restitution, enabling the person losing to recover back the money or other valuable thing lost, and the "loser" is the person to whom such money or other valuable thing belongs. *Ware v. Dumont*, 123 Ill. App. 1, 6.

### LOSING

See Person Losing.

### LOSING PARTY

An appellant, who dismisses his appeal after bringing the cause to the Appellate Court and causing the same to be placed on its docket, on procuring a settlement out of court from the appellee, is the "losing party," within *Burns' Ann. St. 1901*, § 1337, imposing a docket fee of \$10 on the losing party. *Stafford v. Conwell*, 75 N. E. 600, 36 Ind. App. 813.

*Burns' Ann. St. 1908*, § 1394, providing for filing a petition for a rehearing by any losing party, in any case in the Appellate Court, and, after such petition has been overruled, authorizing such party to apply for a transfer of the case to the Supreme Court, on the ground that the opinion of the Appellate Court contravenes ruling precedents of the Supreme Court, is a remedial statute, and to be liberally construed, and appellant is a "losing party," notwithstanding the fact that the judgment of the trial court has been reversed, if the reversal was based on the misconduct of counsel for appellee, and the ruling upon other points alleged to contravene ruling precedents of the Supreme Court, makes a retrial of the case wholly unavailing to appellant. *United States Cement Co. v. Cooper*, 88 N. E. 69, 70, 172 Ind. 599.

### LOSS

See Actual Loss; Constructive Total Loss; Direct Loss; Irreparable Loss; Partial Loss; Pecuniary Loss; Proof of Loss; Technical Total Loss; Total Loss.

"'Loss' is a relative term. A failure to keep that which one has is 'loss.'" *Foehrenbach v. German-American Title & Trust Co.*, 66 Atl. 561, 563, 217 Pa. 331, 12 L. R. A. (N. S.) 465, 118 Am. St. Rep. 916.

The word "loss," as used in Civ. Code 1895, § 2629, declaring that a joint interest in the profits and losses sustained by the partnership, means something more than the mere failure to realize profits. *Edwards v. Hale*, 58 S. E. 817, 129 Ga. 302.

"Loss," in relation to fire insurance, refers to the damages of the assured measured in money. *Stephenson v. Agricultural Ins. Co.*, 93 N. W. 19, 21, 116 Wis. 277.

*Sand. & H. Dig.* § 4133, excludes the application of the insurance laws to mutual insurance societies conducted upon the assessment plan, but requires them to give bond conditioned for the prompt payment of all assessments to the parties entitled thereto, and makes the sureties liable for any violation of conditions thereof, or for any "loss" to the policy holders, and section 4124 requires all fire, etc., insurance companies to give bond conditioned for the prompt payment

of all claims. Held, that the sureties on a bond given and conditioned under section 4133 are not required to pay the loss absolutely. The word "loss," as used in section 4133, means such a loss as would accrue to policy holders if the assessments were not promptly paid over, and hence the obligation of the sureties ceases when the assessments are collected and paid over promptly. *Ingle v. Batesville Grocery Co.*, 117 S. W. 241, 243, 89 Ark. 378.

A policy insuring a vessel against "loss sustained by collision" with another vessel is identical with one insuring it against the risk of collision sustained. *Burnham v. China Mut. Ins. Co.*, 75 N. E. 74, 189 Mass. 100, 109 Am. St. Rep. 627.

A liability insurance policy provided that no action should lie thereunder, unless brought to reimburse insured for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. An employé recovered judgment against the insured for personal injuries, and release thereof was obtained by giving insured's note for the amount of the judgment, in full satisfaction thereof. Held, that there was a "loss" within the meaning of the policy which would support an action thereunder, notwithstanding the possibility of insured's insolvency or of compromise for less than the amount of liability under the policy. *Seattle & S. F. Ry. & Nav. Co. v. Maryland Casualty Co.*, 96 Pac. 509, 510, 50 Wash. 44, 18 L. R. A. (N. S.) 121.

The words "loss or damage," in the provision in the contract of defendant railway company to carry goods to Boston by its own and specified connecting lines, and of a steamship company to carry the goods from Boston to Liverpool: "No carrier shall be liable for loss or damage not occurring on its road or its portion of the through route, nor after said property is ready for delivery to the next carrier. \* \* \* The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at place and time of shipment"—and according to which claims for loss or damage must be made within a certain time after delivery or time therefor, are limited to loss of or injury to the property, and do not include damages for loss of a market because of delay in transportation. *Johnson v. Missouri, K. & T. Ry. Co. of Texas*, 95 N. Y. Supp. 182, 186, 107 App. Div. 374.

A provision in a live stock shipment contract, requiring the shipper to give notice in writing of any claim for loss or injury to the stock before its removal from the place of destination, is limited to loss or injury arising during transportation, and does not apply to a claim for loss caused by a falling market during delayed transportation. *Estes v. Denver & R. G. R. Co.*, 113 Pac. 1005, 1007, 49 Colo. 378.

### Damage synonymous

Damage means "loss"; compensation would be inadequate that did not cover the loss sustained. *Turner v. Woodward*, 51 S. E. 762, 123 Ga. 866.

It is not error for the court in its instructions to use the words "loss" and "damage" interchangeably. *Turner v. Woodward*, 51 S. E. 762, 123 Ga. 866.

### Destruction synonymous

Under Code Civ. Proc. §§ 1855, 1937, providing for secondary proof of "loss" of written instruments, the term "loss" is not synonymous with destruction, for, in the case of destruction, loss would necessarily follow, but not so in case of loss. "The instrument may be lost for all practical purposes of the trial when it cannot be found after diligent search, and yet it may exist. We do not think that reasonable diligence in making the search should require the exploration of all possible places where the instrument might be." *King v. Samuel*, 93 Pac. 391, 395, 7 Cal. App. 55.

### Injury distinguished

The phrases "loss of property" and "injury to property" are not synonymous. The one means a total destruction of property and the other partial destruction of property. *Nelson v. Great Northern R. Co.*, 72 Pac. 642, 648, 28 Mont. 297.

### LOSS BY FIRE

In an insurance policy covering loss or damage by fire, it is not necessary that the damage shall be occasioned by direct contact with the fire. To render the fire the immediate or proximate cause of the damage, it is not necessary that any part of the insured property actually ignited or was consumed by the fire. Where a building and machinery used for generating electricity for electric lighting was insured against loss or damage by fire, and a fire occurred which caused a short circuit of the electric current resulting in damage to certain machinery in the building not reached by the fire, the injury to the machinery was a "loss or damage by fire" within the meaning of the policy. *Russell v. German Fire Ins. Co.*, 111 N. W. 400, 403, 100 Minn. 528, 10 L. R. A. (N. S.) 326 (citing *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 38 N. E. 690, 158 Mass. 570, 20 L. R. A. 297, 35 Am. St. Rep. 540).

### LOSS BY THEFT

A policy of fire insurance providing that the company shall not be liable for loss caused directly or indirectly "by theft" or by neglect of insured to use all reasonable means to save and preserve the property at and after a fire, etc., includes theft committed during the fire or when the goods are exposed as a consequence of a fire. *Sklencher v. Fire Ass'n of Philadelphia*, 60 Atl. 232, 72 N. J. Law, 48.

**LOSS OF CONSORTIUM**

The "loss of consortium" is a deprivation of the full society, affection, and assistance to which a wife is entitled. *Angell v. Reynolds*, 58 Atl. 625, 628, 26 R. I. 160, 106 Am. St. Rep. 707.

**LOSS OF CONTROL**

"Such a movement of a team, as would not be uncommon, is not necessarily a 'loss of control.'" Horses are not considered beyond the control of their driver when they merely shy or start, or for a moment have their own way. *Johnson v. City of Marquette*, 117 N. W. 658, 660, 154 Mich. 50.

**LOSS OF EARNINGS**

See Future Loss of Earnings.

The term "loss of earnings," as used in a charge, in a personal injury action against a street car company, that plaintiff's damages, if any, should be assessed at such sum as would be a reasonable pecuniary compensation to him for all "loss of earnings," referred to such loss of earnings as plaintiff had sustained by reason of his injuries up to the time of trial, and not those that he would probably lose in the future, so as to be erroneous, where the petition only charged diminished earning capacity, without any actual past loss of earnings. *Dallas Consol. Electric St. Ry. Co. v. Hardy (Tex.)* 86 S. W. 1053, 1054.

**LOSS OF LIMB**

See, also, Lost.

A beneficial certificate entitling the member to one-fourth of his benefit if he should "lose a foot," does not mean that there must be a severance of the foot from the body, but means a permanent loss of use of the foot; the language "loss of a foot" in common parlance meaning the loss of the use of that member. *Modern Order of Prætorians v. Taylor (Tex.)* 127 S. W. 260, 261.

Injuring a hand to the extent that it becomes useless as a hand is "loss of the hand," within the meaning of an accident policy, though the injury does not require amputation of the hand above the wrist. *Lord v. American Mut. Acc. Ass'n*, 61 N. W. 293, 294, 89 Wis. 19, 26 L. R. A. 741, 46 Am. St. Rep. 815.

The term "loss of a hand" may be applicable to an injury where the use of the hand is destroyed, and in the case of a "loss" of both feet, the term may cover loss of the use of the feet by paralysis. *Fishburn v. Burlington & N. W. R. Co.*, 103 N. W. 481, 488, 127 Iowa, 483 (citing definition in *Sneck v. Travelers' Ins. Co.*, 34 N. Y. Supp. 545, 88 Hun. 94; *Lord v. American Mut. Acc. Ass'n*, 61 N. W. 293, 89 Wis. 19, 26 L. R. A. 741, 46 Am. St. Rep. 815; *Sheanon v. Pacific Mut. Life Ins. Co.*, 46 N. W. 799, 77 Wis. 618, 9 L. R. A. 685, 20 Am. St. Rep. 151).

**LOSS OF RENTS**

An insurance policy which covers loss of rents includes loss of income where the premises in question were not demised for a specific term. *Gray v. Merchants' Ins. Co.*, of Newark, 125 Ill. App. 370, 372.

**LOSS OF TIME**

"Loss of time," as an element of damages for a personal injury means time totally lost because of the inability of the injured person to follow any wage-earning occupation and is more than the impairment of the power to earn money, as "impairment" implies that he can perform some services and his ability to earn money, though reduced, is not totally destroyed. *Blue Grass Traction Co. v. Ingles*, 131 S. W. 278, 281, 140 Ky. 488.

An averment of "loss of time," in a petition for negligent injuries, is the same in legal effect as an averment of "loss of earnings." *Scholl v. Grayson*, 127 S. W. 415, 417, 147 Mo. App. 652.

The law treats "loss of time," generally speaking, as synonymous with "the loss of those earnings which accrue from employing time in labor or business." *Wall v. Continental Casualty Co.*, 86 S. W. 491, 499, 111 Mo. App. 504.

An accident policy insuring one against injury necessarily resulting in "loss of time" arising from inability to engage in any business insures against such a "loss of time" as immediately arises from an inability to work, and an accident and an injury do not affect the policy unless there is a "loss of time," and it must be a "loss of time" which is at once followed, or which is at once caused by the inability to work, and the insurer is liable for disability resulting from plaintiff's injury, though loss of time does not immediately follow it. *Baumister v. Continental Casualty Co.*, 101 S. W. 152, 153, 124 Mo. App. 88.

**LOSS THROUGH HIS LEAVING**

An agreement by a third person to become bound in a specified sum, in case an employé left his master during a certain season and the master sustained loss through his leaving, did not render the third person liable for a defalcation by the employé; for the words "sustained loss through his leaving" must be read in connection with what immediately precedes, and, when so read, they refer to the direct pecuniary loss that may be suffered as the result of the employé's leaving the employment during the period of his employment. *Freeman v. Waxman*, 88 N. Y. Supp. 129, 130, 43 Misc. Rep. 656.

**LOSSES**

See Claim for Losses.

All other losses, see All Other.

Sharing losses as constituting partnership, see Partnership.

**LOSSES OF BUSINESS**

The "losses" of a business necessarily include such accounts as are bad and uncollectible. *Crawford v. Calkins*, 136 N. W. 369, 370, 170 Mich. 587.

**LOST**

The law exempting those from payment of a poll tax who have "lost" a hand or foot does not exempt one who has lost part of his fingers or whose foot is useless. The word "lost" must be taken in its ordinary acceptation, and, when we speak of a person losing a limb, we mean that it is gone, and not that it is injured or mutilated. A man may lose the use of a limb and not lose the limb. If the word "lost," as used in the statute, is held to mean the absence of three fingers, it could be held to mean the loss of one finger, and so on. *Bigham v. Clubb*, 95 S. W. 675, 677, 42 Tex. Civ. App. 312.

**Deposits**

The word "lost," as used in the banking law, providing that if any banker shall fraudulently receive any money, etc., of a person not indebted to him at a time when he is insolvent whereby the deposit shall be "lost" to the depositor, the banker shall be guilty of embezzlement, etc., means a deprivation of the use of the deposit or some part thereof which may occur, though the estate is found ultimately sufficient to pay all debts. *State v. Krasher*, 83 N. E. 498, 500, 170 Ind. 43.

**LOST ALL HOPE OF RECOVERY**

The words of the statute "lost all hope of recovery," relating to dying declarations mean that it is a belief of the declarant in death which excludes any hope of recovery. *Craven v. State*, 90 S. W. 311, 49 Tex. Cr. R. 78, 122 Am. St. Rep. 799.

**LOST CORNER**

Section 2 of a circular of the United States General Land Office relative to the restoration of lost or obliterated corners defines an "obliterated corner" as one where no visible evidence remains of the work of the original surveyor in establishing it; and defines a "lost corner" as one, the position of which cannot be determined beyond reasonable doubt, either from original or reliable marks or reliable external evidence. *Craven v. Lesh*, 126 Pac. 774, 775, 22 Idaho, 463.

**LOST HER HUSBAND**

As applied to property, the word "lose" ordinarily refers to an involuntary, not a voluntary, deprivation. No man may be said to have lost that which on his motion he abandons or resigns, and in common speech the expression a woman "has lost her husband" generally refers to a loss by death, and not to a voluntary divorce by the wife. *Snorgrass v. Thomas*, 150 S. W. 106, 108, 166 Mo. App. 603 (citing 5 Words & Phrases, p. 4237 et seq.).

**LOST PROPERTY**

Accidentally leaving goods in a particular place is not a case of "lost property," and the taking would be from the owner's possession. *Moxie v. State*, 114 S. W. 375, 378, 54 Tex. Cr. R. 529 (citing *Statum v. State*, 9 Tex. App. 273).

Property to be "lost" must have been unintentionally or involuntarily parted with, and money discovered in the highway or on the ground or the floor will be considered as having been casually and unknowingly dropped, and thus lost; but where it is intentionally put down, as in a drawer or on a table, and the owner forgets where he left it and cannot find it, it is not in a legal sense lost. *Foster v. Fidelity Safe Deposit Co.*, 145 S. W. 139, 142, 162 Mo. App. 165.

**Treasure trove distinguished**

"At common law a distinction was made between lost property and treasure trove. Lost property was such as was found on the surface of the earth, and with which the owner had involuntarily parted. The presumption arising from the place of finding was that the owner had intended to abandon his property, and that it had gone back to the original stock, and therefore belonged to the finder or first taker, until the owner appeared and showed that its losing was accidental, or without an intention to abandon the property. Treasure trove, on the other hand, was money or coin found hidden or secreted in the earth or other private place; the owner being unknown. It originally belonged to the finder, if the owner was not discovered, but Blackstone says it was afterwards adjudged expedient, for the purposes of state, and particularly for the coinage, that it should go to the king; and so the rule was promulgated that property found on the surface of the earth belonged to the finder until the owner appeared, but that found hidden in the earth belonged to the king. (1 Bl. Comm. \*295.) In this country the law relating to treasure trove has generally been merged into the law of the finder of lost property, and it is said that the question as to whether the English law of treasure trove obtains in any state has never been decided in America." *Danielson v. Roberts*, 74 Pac. 913, 914, 44 Or. 108, 65 L. R. A. 526, 102 Am. St. Rep. 627.

**LOT**

See Building Lot; City Lot; Entire Width of Lot; Equal Apportionment by Lot; One Lot; Small Lot; Town and Village Lots.

My house and lot, see My.

**As expressive of quantity**

A "lot" sometimes means a great deal, but as used in a confession, stating that a short time before the alleged crime defend-

ant drank a "lot" of blackberry wine without saying how much or what effect it had on him, it is too indefinite and unsatisfactory to authorize an instruction on the effect of drunkenness. *State v. Church*, 98 S. W. 16, 17, 24, 199 Mo. 605.

The word "lot," as used in an agreement under which a party purchased a quantity of apricots in the following words: "This agreement made by and between the J. K. A. Co. and the G. Fruit Company, witnesseth: That the said J. K. A. Co. has this day sold and the said G. Fruit Company has this day bought twenty-five hundred boxes apricots, more or less, consisting of: Lot A, 287 boxes, lot K, 104 boxes, lot C, 1400 boxes, lot E, 715 boxes at seven (7) cents per pound plus one per cent. net cash f. o. b. cars at Pomona, on surrender of bill of lading; shipment to be made during the month of October, 1901"—is not an ambiguous word of warranty, but a word used solely to describe and identify. All definitions of the word display its derivation from "share, portion, or parcel." Neither the grammatical construction of the language used in the contract nor the definition given to the word by the lexicographers justifies attributing to it a meaning which imports quality or warranty and to hold that the words, "lot A, 287 boxes," considered either in their ordinary use or as used in a commercial way, relate to warranty, rather than identification, would do violence to the use of language. *German Fruit Co. v. J. K. Armsley Co.*, 96 Pac. 819, 322, 153 Cal. 585.

#### As distinct or separate portion of land

*Milwaukee City Charter* (Laws 1874, c. 184) subc. 7, § 8, authorizing the board of public works to assess the damages to lots which they deemed benefited by a change of the street grade, and section 7, speaking of such lots as lots fronting on the improvement, do not limit such an award of damages to platted lots abutting on the improvement, since parcels forming a distinct homestead or other inclosure, message, or unit of property fronting on the improvement, but laid out, occupied, or inclosed without regard to platted lines, may constitute a "lot" fronting on the improvement. *Schmidt v. City of Milwaukee*, 135 N. W. 883, 887, 149 Wis. 367.

Laws 1890, p. 376, c. 132, § 32, provides that the assessor shall actually view when practicable and determine the true and full value of each "lot" of real property listed for taxation and shall enter the value thereof in one column, etc., and the statutes further provide that the term "tract" or "lot" and "piece" or "parcel of real property," and "piece" or "parcel of land," whenever used in the act relating to revenue and taxation, shall be held to mean any contiguous quantity of land in the possession, owned by, or recorded as the property of, the same

claimant, person, or company. Held, that under the statutes smaller tracts or subdivisions composing a larger tract could not be assessed as one tract, where the land was owned by different persons under recorded titles or in joint ownership, and assessments in one tract of different ownerships or estates in different tracts seem to be inhibited where the different titles are of record. *State Finance Co. v. Myers*, 112 N. W. 76, 78, 16 N. D. 193.

#### Improvements

The words "lot," "piece," and "parcel" apply peculiarly to the land itself, and are never employed to describe improvements. *Canty v. Staley*, 123 Pac. 252, 254, 162 Cal. 379.

That an advertisement of a mortgage sale described the premises to be sold as "lots," without mentioning the improvements upon them, was not a good objection to confirmation of the sale if the price was not grossly inadequate. *Guarantee Trust & Safe Deposit Co. v. Jenkins*, 2 Atl. 13, 15, 40 N. J. Eq. 451.

#### As platted lots or blocks

The ordinary meaning of the term "lot," when used with reference to a town or city property, is a subdivision of a block according to the map or survey of such town or city. A statute relative to disconnecting territory from a town provided that it must appear that no part of the territory has been platted into lots and blocks as part of the town. Held, that where the territory in question constituted a portion of a subdivision of the town included in the town site at the time of the incorporation, and the plat of the subdivision showed the streets of the town proper running east and west, and each alternate street running north and south laid out through the subdivision, and the spaces between the streets divided into parcels of various dimensions, the parcels being numbered, the territory could not be disconnected; it being platted into lots and blocks. *Town of Fruit v. Williams*, 80 Pac. 132, 133, 33 Colo. 157.

The ordinary meaning of the word "lot," when used with reference to town or city property is a subdivision of a block according to the map or survey of such city, and so Acts 1859, p. 184, c. 122 (*Burns' Ann. St. 1901*, § 4394), entitled "An act to compel owners of town lots to grade and pave or plank sidewalks, and providing for proceedings to compel the same," does not authorize the fixing of a lien for such paving on large tracts of land. *Town of Greendale v. Suit*, 71 N. E. 658, 659, 163 Ind. 282.

A city charter defined the term "lot," as used in connection with the establishment of assessment districts for street improvements, to mean lots shown by recorded plats of additions or subdivisions, but, if there were

no such recorded plat, or if the owner had disregarded the lots as platted, the whole plat should be treated as one lot. The allotment of portions of a tract in the survey of a partition suit, and the recording of such allotments with the commissioner's deed, did not constitute a division of the lots by recorded plat, as contemplated by the charter; the allotment not having been approved by the board of public improvements, nor recorded in the platbook in the recorder's office. *Collier's Estate v. Western Paving & Supply Co.*, 79 S. W. 947, 953, 180 Mo. 362.

St. Louis City Charter, art. 6, § 14, with reference to the establishment of special assessment districts, provides that, if the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved, etc. It also declares that the word "lot" shall mean the lot as shown by recorded plats of additions or subdivisions, but if there be no such recorded plat, or if the owners of property have disregarded the lines of lots as platted, and have treated two or more lots or fractions thereof as one, then the whole parcel of ground or lots so treated as one shall be regarded as a lot for the purpose of the creation of the assessment district. Held, that the term "lot" as so used was not limited to a platted lot; and hence, where original platted lots are divided either by deed or by distinct use, each of such subdivisions constitutes a lot within such charter provision. *State ex rel. Skrainka Const. Co. v. City of St. Louis*, 111 S. W. 89, 94, 211 Mo. 591.

Comp. Laws, § 10,710, as amended, limits the area of land to which a mechanic's lien attaches to the "lot" or tract upon which the improved structure is erected, not exceeding 160 acres of rural land, or the "lot or lots" upon which the improvement is made if in a city. Held, that the term "lot or lots" refers to surveyed lots conforming to a plat. *Adams v. Central City Granite Brick & Block Co.*, 117 N. W. 932, 935, 154 Mich. 448, 129 Am. St. Rep. 484.

A lot owner, to be entitled to an award of damages on account of the grading of a public street, must show that his lots abut on that part of the street graded; but the term "lot" does not mean necessarily the platted lot. In determining whether a given area of land which does not directly border on a graded street is to be regarded as a part of the abutting land for the purpose of awarding damages for a change of the grade, all of the facts and circumstances of the particular situation should be considered in ascertaining whether the area in question is so identified with the intervening land under common ownership that the two cannot be separated in use without injury to the value of each. Where plaintiff owned two

lots on a corner of two streets, both lots being divided by the recorded plats into independent subdivisions, and both were separately acquired and improved, plaintiff was not entitled to an award of damages to the inside lot for an alleged change of grade of the street on which it did not abut. *Burde v. City of St. Joseph*, 110 S. W. 27, 28, 130 Mo. App. 453.

Const. art. 16, § 51, provides that a rural homestead shall consist of not more than 200 acres, and that an urban homestead shall consist of a "lot or lots" not to exceed in value \$5,000. Land, designated as a lot in a particular block in the city plan, and within the limits of a city, was purchased and used for a residence in connection with the owner's business as a merchant, and afterwards the owner purchased land adjoining his residence property, but separated from it by the city's limits as generally recognized, which he used for pasturing the family horses or cattle, and for raising products for home consumption; both lots being valued at less than the constitutional limit for urban homesteads. The city exercised no jurisdiction over such tract and levied no taxes thereon, nor was it rendered for city taxation. Held, that the term "lot or lots" must be taken in its popular sense, and did not embrace land within the limits of the corporation not connected with the plan of the city; that the original homestead was urban in character, and the later acquisition was rural; and that, as there could be no blending of urban and rural homesteads, the tract last purchased was not a part of the owner's homestead, and hence was subject to foreclosure under a deed of trust. *First Nat. Bank v. Litchfield (Tex.)* 144 S. W. 350, 352.

#### Public street

See, also, *Lots, Blocks, Tracts, and Parcels of Land*.

That the fee of the street where a railroad bridge is built across it, together with the fee thereof between that point and a distant block abutting on the street, is owned by the owner of such block, and not by the owners of the lots abutting at the point of the bridge and between it and such block, does not make the land under the bridge and such block one parcel, within the rule as to damages to the residue where part of a tract is taken. *Coatsworth v. Lehigh Valley Ry. Co.*, 131 N. Y. Supp. 300, 301, 73 Misc. Rep. 645.

#### As tract or parcel

When work is done and materials furnished to erect a building for the owner of a whole tract of land without visible divisions, the whole tract is one "lot" within Pub. St. c. 191, § 1, providing for a lien on the "lot of land" on which a building is situated for which labor and materials are furnished. *Orr v. Fuller*, 52 N. E. 1091, 172 Mass. 597.



Rev. St. 1899, § 5979, authorizes fourth-class cities to open and improve streets, make sidewalks, etc., and gives them exclusive control of all streets within their limits. Section 5981 authorizes them to repair sidewalks and levy special assessments on all lots and pieces of ground abutting such improvements. Held, that an unplatted tract within the limits of a fourth-class city can be taxed for the construction of sidewalks, provided such exercise of the taxing power is reasonable under the circumstances; the word "lot" used in section 5981 including tracts or parcels of land, even if the section did not authorize assessments on all pieces of grounds. *City of Salem ex rel. Roney v. Young*, 125 S. W. 857, 861, 142 Mo. App. 160.

#### Two or more lots

St. Louis City Charter, art. 6, § 14, relating to the assessment of property for local improvements, declares that the word "lot," as used in the section, shall mean the lots as shown by recorded plats of additions or subdivisions, but if there was no recorded plat, or if the owners had disregarded the lines of lots as platted, and have treated two or more lots or fractions thereof as one lot, then the whole parcel so treated as one shall be regarded as a lot for the purpose thereof. Held that, where the owner of a tract or lot had used the same in disregard of platted lot lines, and had occupied it in disregard of a platted street for a race track since 1878, it was properly assessed for a street improvement as a single lot, regardless of its original platted subdivisions. *Granite Bituminous Paving Co. v. McManus*, 129 S. W. 448, 452, 144 Mo. App. 593.

#### LOT LINE

The term "lot line" or "property line" has a well known and understood meaning. The fee to the streets and the sidewalks is in the city. The "property line" or "lot line" extends only to the inner edge of the sidewalk. If the walks were to be constructed one foot from the "lot line" or "property line," that description definitely defines the location. *Gage v. City of Chicago*, 79 N. E. 294, 295, 223 Ill. 602.

#### LOTS, BLOCKS, TRACTS, AND PARCELS OF LAND

The interests of a street railroad company in the part of a street improved is not subject to assessment for the improvement, under Ballinger's Ann. Codes & St. § 796, providing for assessing the "lots, blocks, tracts, and parcels of land" that will be specially benefited thereby. *City of Seattle v. Seattle Electric Co.*, 94 Pac. 194, 195, 48 Wash. 599, 15 L. R. A. (N. S.) 486.

#### LOTTERY

Lottery or similar scheme, see Similar Scheme.

See, also, By Chance; Gift Enterprise; Prize.

A lottery is a species of gaming which may be defined as a scheme for the distribution of prizes by chance among the persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize. *Burks v. Harris*, 120 S. W. 979, 980, 91 Ark. 205, 23 L. R. A. (N. S.) 626, 134 Am. St. Rep. 67, 18 Ann. Cas. 566.

Every drawing, where money or property is offered as prizes to be distributed by chance according to a specified scheme or plan, and a ticket or tickets sold which entitles the holder to money or property, and which is dependent upon chance, is a "lottery." *Grant v. State*, 112 S. W. 1068, 1069, 54 Tex. Cr. R. 403, 21 L. R. A. (N. S.) 876, 130 Am. St. Rep. 897, 16 Ann. Cas. 844.

In "lottery" there must be union of three elements; consideration; chance and prize. *Russell v. Equitable Loan & Security Co.*, 58 S. E. 881-884, 129 Ga. 154, 12 Ann. Cas. 129.

The three necessary elements of a "lottery" are the furnishing of a consideration, the offering of a prize, and the distribution of the prize by chance rather than entirely upon a basis of merit. *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579, 581.

Chance is an essential element of a lottery, whether it be as to any return or merely as to the amount or value thereof, and, where there is a hazard in which sums are ventured on the chance of obtaining a greater value, the scheme partakes of the nature of a lottery; that is, something gained or won by lot. *State v. Perry*, 70 S. E. 387, 388, 154 N. C. 616 (citing 5 Words and Phrases, p. 4245).

"The word 'lottery' has no technical meaning. A lottery is nothing more nor less than a scheme or device of chance." *State v. Willis*, 2 Atl. 848, 849, 78 Me. 70.

"It has been said in some of the books and by several of the courts that, while the word 'lottery' is not a technical term of the law, and to dispose of property of any kind by lottery is not an offense which has a recognized and established legal definition, and that the meaning of the word must be determined with reference to a popular sense of the mischief intended to be redressed by the statute, yet when thus construed, it indicates a scheme for the distribution of prizes and for the obtaining of money or goods by chance. The word 'lottery' has been variously defined as a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or other articles; a distribution of prizes won by lot or chance; a kind of game or hazard, wherein several lots of goods or merchandise are deposited in prizes for the benefit of the fortunate; or a sort of gaming contract, by which, for valuable consideration, one may, by favor of the lot, obtain a prize superior to the amount or value of

that which he risks. Tested by any one of these approved definitions, a lottery always involves the element of chance, fortune, or hazard. It is gaming, pure and simple." *City of Winston v. Beeson*, 47 S. E. 457, 459, 135 N. C. 271, 65 L. R. A. 167 (citing *State v. Mumford*, 73 Mo. 647, 650, 39 Am. Rep. 532; *State v. Clarke*, 33 N. H. 329, 334, 66 Am. Dec. 723).

"Lottery" has been held to be a gaming device, and the keeping of a house for the purpose of selling lottery tickets is the keeping of a "gambling house" within the power of a city to suppress gaming and gambling houses. *Portland v. Yick*, 75 Pac. 706, 709, 44 Or. 439, 102 Am. St. Rep. 633.

"We approve the language used in the opinion of *Ballock v. State*, 20 Atl. 184, 73 Md. 1, 8 L. R. A. 671, 25 Am. St. Rep. 559, where it is said: 'Our statute does not justify a court in deciding a thing is not a "lottery" simply because there can be no loss, when there may be considerable contingent gain, or because it lacks some element of a lottery according to some particular dictionary definition when it has all the other elements, with all the pernicious tendencies which the state is seeking to prevent.'" *People v. McPhee*, 103 N. W. 174, 176, 139 Mich. 687, 69 L. R. A. 505, 5 Ann. Cas. 835.

The general definition of a "lottery" was declared to correspond with Gen. St. Minn. 1894, § 6576, defining it as a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, or gift enterprise, or by some other name. *State ex rel. Hathorn v. United States Express Co.*, 104 N. W. 556, 558, 95 Minn. 442 (citing 5 Words and Phrases, pp. 4245-4248).

A "lottery" embraces the elements of procuring through lot or chance, by the investment of a sum of money, some greater amount of money. A contract containing a prize feature dependent on chance, the writing of new contracts and lapsation, both of which are contingencies over which the parties have no control and which they cannot forecast, is a "lottery." *Fidelity Funding Co. v. Vaughn*, 90 Pac. 84, 37, 18 Okl. 13, 10 L. R. A. (N. S.) 1123.

A company operated a scheme containing investment and loan features. The opportunity to obtain a loan was determined to a large extent by the way in which the applications were received at the office of the company, and where a number of applications were received at the same time they were put on the records of the company as they were opened and recorded. The investment features were not particularly attractive, and the main feature of the scheme was the loan feature, and the proposed loan contracts contained attractive terms. Held, that the

scheme was a lottery because of a consideration and because of the existence of chance, based on obtaining a low number and thereby obtaining a loan, and because the obtaining of a loan at an early date was the prize in the scheme, since to constitute a lottery there must be a consideration, chance, and prize. *United States v. Purvis*, 195 Fed. 618, 620.

A contract for the sale and purchase of stamps for delivery by the buyer to his customers, which contemplates that the holders thereof shall by chance dispose of an automobile furnished by the seller of the stamps, is a lottery, and the contract is void. *American Copying Co. v. Thompson (Tex.)* 110 S. W. 777, 779.

The derivation of the word "lottery" indicates its general definition as the "distribution of anything by lot" or "the drawing of lots," and the scheme known as "lottery" is defined as one "for raising money by selling chances to share in a distribution of prizes" or a "scheme for the distribution of prizes by chance among persons purchasing tickets; the corresponding numbered slips, or lots representing prizes or blanks, being drawn from a wheel." An indictment for using the mails to defraud, in violation of Rev. St. § 5480, by subdividing a tract of land in Louisiana of small value into lots 10 or 20 feet square, and selling certificates, each purporting to give the holder an option to purchase an interest in a lot, upon false representations that the lots were within an oil district and very valuable, and that large cash offers had been made for certain of the same, construed, and held to charge a scheme and artifice to defraud within the meaning of the statute, which, when carried on by means of correspondence through the mails, constituted a violation thereof, and not to describe a "lottery" or "gambling enterprise." *Gourdain v. United States*, 154 Fed. 453, 458, 83 C. C. A. 309 (quoting and adopting the definition in Century Dictionary, and citing *Lottery Case*, 23 Sup. Ct. 321, 188 U. S. 321, 353, 47 L. Ed. 492).

"Bishop defines a 'lottery' as 'any scheme whereby one on paying money or other valuable thing to another becomes entitled to receive from him, such a return in value or nothing, as some formula of chance may determine.'" An indictment under Rev. St. § 3894, for sending through the mails a newspaper containing an advertisement of a lottery or gift enterprise, or a complete or partial list of prizes awarded at the drawing of a lottery or gift enterprise, must aver, either specifically or by necessary intendment, the existence of a lottery or gift enterprise. *United States v. Irvine*, 156 Fed. 376, 377 (quoting 2 Bish. St. Crimes, § 952).

A financial co-operative scheme, which contemplates the creation of a fund out of enrollment fees and monthly dues, to be re-

turned to the members at the end of a fixed period of membership in the shape of "realizations," the amount of which will depend upon the growth in membership, the plan being certain to involve a loss to every one interested as soon as the number of members ceases to increase, because of the absence of any provision for a reserve fund, is a lottery, or scheme for the distribution of money by lot or chance, within the meaning of the provisions of Rev. St. § 3929, as amended by Act Sept. 19, 1890, c. 908, 26 Stat. 465, and of section 4041, and of Act March 2, 1895, c. 191, § 4, 28 Stat. 964, empowering the Postmaster General to deny the privileges of the mails and the money order and registered letter service to persons engaged in certain prohibited enterprises. *Public Clearing House v. Coyne*, 24 Sup. Ct. 789, 796, 194 U. S. 497, 48 L. Ed. 1092.

The term "lottery" in law is of wide signification. In *Horner v. United States*, 13 Sup. Ct. 409, 147 U. S. 449, 37 L. Ed. 237, Mr. Justice Blatchford discussed various definitions of lottery, and among others approved that found in *Worcester's Dictionary*, in which it is defined to be "a game of hazard in which small sums are ventured with the chance of obtaining a large value, either in money or other articles." A scheme by which certificates are issued by a corporation, on each of which the holder agrees to pay \$1 per week, subject to forfeiture for nonpayment, and about 75 per cent. of which payments are paid into a "mutual benefit credit fund" until all certificates prior in date have matured and been canceled, when his own certificate shall mature, and he shall be paid from such fund the sum of \$2 for each week such certificate has been in force, provided there is so much in the fund, not exceeding however \$160, is a "lottery" within the meaning of Rev. St. § 3894, and any person engaged in conducting such scheme by means of letters or circulars sent through the mails is guilty of a criminal offense under said section. *Fitzsimmons v. United States*, 156 Fed. 477, 479, 84 C. C. A. 287, 13 L. R. A. (N. S.) 1005; *Id.*, 156 Fed. 482, 84 C. C. A. 292.

Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a "lottery." It is a sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to that of the amount or value of that which he risks. It is a scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished. However, it should not be concluded that the term "lot or chance" implies that if any element of certainty or

skill enters into the scheme it therefore relieves it of its character as a "lottery" or scheme of chance. A guessing contest instituted by a newspaper company, by which persons are invited to deliver to the company 50 cents each, 24 cents of which being payment for a subscription to the newspaper and 26 cents for the privilege of making a guess upon the total vote for a state officer who is to be chosen at an approaching election, the guesser coming nearest to the actual total vote cast to receive a money prize from the fund equal to one-tenth thereof, and others next nearest to receive from the fund lesser money prizes, is within the condemnation of the statute of Ohio against "lotteries" and schemes of chance, and is an unlawful enterprise. And a similar scheme, involving the same amount of payment by each person, but differing from the former, in that there is to be no subscription to a paper, and the prizes promised are definite amounts from \$5,000 down to \$2, is equally within the condemnation of the statute and unlawful. *Stevens v. Cincinnati Times-Star Co.*, 73 N. E. 1058, 1060, 72 Ohio St. 112, 106 Am. St. Rep. 586.

A guessing contest prior to the presidential election of November, 1904, by which defendant agreed to give \$10,000 to the person who would make the nearest correct estimate of the total popular vote cast for the office of President of the United States, on November 8, 1904, and \$5,000 for the second nearest correct estimate, persons filing guesses being required to pay small sums as a subscription to a periodical named in the advertisement, constituted a "lottery" in violation of the federal laws and also of Comp. Laws Mich. § 11,344, providing that every person who shall set up or promote within the state any "lottery" or gift enterprise for money, or shall dispose of any property, real or personal, goods, chattels, or merchandise, or any valuable thing, by way of "lottery" or gift enterprise, shall be punished, etc. *Walte v. Press Pub. Ass'n*, 155 Fed. 58, 59, 85 C. C. A. 576, 11 L. R. A. (N. S.) 609, 12 Ann. Cas. 319.

#### Bond investment scheme

Where an investment company issues bonds, numbered consecutively in the order in which applications happen to be received by the secretary, and the time of payment of the bonds, and consequently their value, depend on the number they happen to receive, the scheme is a lottery. *Silver v. Guarantee Inv. Co.*, 81 S. W. 1098, 1100, 183 Mo. 41.

#### Disposal of property by chance

Under Pen. Code, §§ 323, 327, defining a lottery as a scheme for the distribution of property by chance among persons who have paid a valuable consideration for the chance, and making advertising a lottery a misdemeanor, a scheme for the distribution of money and cigars among purchasers of cer-

tain brands of cigars who will estimate most closely the number of cigars of all brands on which taxes would be collected by the government during a named month is a "lottery," though the distribution does not depend exclusively on chance, and the advertising of the same is a misdemeanor. People ex rel. Ellison v. Lavin, 71 N. E. 753, 754, 179 N. Y. 164, 86 L. R. A. 601, 1 Ann. Cas. 165.

**As gambling device**

See Gambling Device.

**Game of skill**

"A lottery is commonly understood as a scheme for the distribution of prizes by lot or chance, especially a gaming scheme in which one or more tickets bearing particular numbers draw prizes, and the rest of the tickets are blank." A knife rack, consisting of an inclined table, with knives stuck therein, and so arranged that rings could be thrown on them, which rings are sold to customers, who endeavor to ring the knives on the table, they being entitled to any knives rung, or on which the rings caught, is not a lottery. McRea v. State, 81 S. W. 741, 46 Tex. Cr. R. 489.

**Gift enterprise**

Under the provisions of Rev. St. § 3394, as amended by Act Aug. 5, 1909, c. 6, § 33, that no packages of manufactured tobacco shall be permitted to have packed in them "any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in, or dependent upon, the event of a lottery," the definition of a lottery is not limited to a scheme whereby the value of the certificate or ticket is dependent upon lot or chance, but includes as well a scheme, whereby the possession of a certificate or prize, having a fixed value, is made to depend on lot or chance, and the statute is violated by concealing in 1 out of each 100 five-cent cuts of plug tobacco a tag redeemable by the maker for 50 cents. United States v. One Box of Tobacco, "Foot Prints," 190 Fed. 731, 732, 111 C. C. A. 459.

Defendant, to induce the sale of a cereal called "Mother's Oats," placed in each package a coupon on which one of the letters which spelled the word "Mother's" was printed, and offered premiums to persons holding coupons which would spell the word "Mother's"; the letter "O" being placed on only one coupon in 500. Held, that such scheme was a lottery, within Act Cong. March 2, 1895, c. 191, providing that any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or representing a ticket, chance, share, or interest in, or dependent upon the event of, a lottery, etc., or other similar enterprises offering prizes dependent upon lot or chance, shall be guilty, etc. United States v. Jefferson, 134 Fed. 299, 300.

**Policy playing**

A scheme, generally known as "playing policy," whereby an association sells for five cents, or any other specific sum of money, certificates or tickets which entitle the purchaser to a lead pencil of trifling value, and also permits such purchaser to select certain numbers, say 3-9-13, which, if all drawn by a blind-folded boy from a revolving wheel in which several numbers are placed, entitle the person purchasing the certificate or ticket to a prize of money much larger in amount than he has paid for his certificate or ticket, is a "lottery." State ex rel. Kellogg v. Mercantile Ass'n, 25 Pac. 984, 985, 45 Kan. 351, 11 L. R. A. 430, 23 Am. St. Rep. 727.

**Pool selling**

Rev. Code 1852, amended to 1893, p. 396, provides that if any person shall sell or dispose of any lottery policy, certificate, or of anything by which such person or any number of persons promises or guarantees that any particular number, character, ticket, or certificate shall, in an event or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property, or evidence of debt, every person so offending shall on conviction be subject to a penalty. Held, that the fact that tickets representing membership in a baseball pool did not in themselves show a promise or guaranty that on the happening of an event, the holder should be entitled to money, did not save the scheme from being a violation of the statute, since the term "lottery," as used therein, includes any scheme for the distribution of money or prizes by chance, not limited to a sale of tickets nor to the terms or promises printed or written upon them. State v. Sedgwick (Del.) 81 Atl. 472, 473, 2 Boyce, 453.

**As public nuisance**

See Public or Common Nuisance.

**Trading stamp business**

There can be no "lottery," in the absence of the element of chance. A trading stamp business, consisting of the selling of checks or stamps to merchants, who give the same to their customers on purchases of goods, the number of stamps given being determined by the amount of the purchase, and the stamps, on presentation at the trading stamp store, entitling the holders to select any article from the assortment of articles, each article being plainly marked with its value in stamps, such value not being greater than the market value of the articles, is not a "lottery," within a statute denouncing lotteries, etc. State v. Shugart, 35 South. 28, 29, 138 Ala. 86, 100 Am. St. Rep. 17.

Three things must concur in order to constitute a "lottery": (1) There must be the purchase of a right; (2) the right must be a contingent one to receive something greater than that which is purchased; and (3) the

contingent right must depend upon a lot or chance. Const. art. 18, § 2, and Mills' Ann. St. § 2927, prohibiting "lotteries" or gift enterprises, does not authorize an ordinance prohibiting gift enterprises, designed to include the giving of trading stamps, since the term "gift enterprise" as used in the Constitution and statute applied only to transactions in which the element of chance is involved. *City and County of Denver v. Frueauff*, 88 Pac. 389, 394, 39 Colo. 20, 7 L. R. A. (N. S.) 1131, 12 Ann. Cas. 521 (quoting and adopting definitions in *Lohman v. State*, 81 Ind. 17).

### LOTTERY TICKET

A "ticket" is a thing which is holder's means of making good his rights. Policy slips written by a customer to indicate a choice of numbers and delivered by him to an agent of the policy game to be forwarded by him to headquarters in another state are not within the provisions of the act of Congress making it an offense against the United States to be caused to be carried from one state to another any ticket in a "lottery." *Francis v. United States*, 23 Sup. Ct. 334, 335, 188 U. S. 375, 47 L. Ed. 508.

### LOW

See Too Low.

### LOW BRIDGE

In railroad parlance, a "low bridge" is one so low as to prevent those engaged upon box cars in the freight service from passing under the same in a standing position. *Koller v. Chicago, St. P., M. & O. Ry. Co.*, 129 N. W. 220, 221, 113 Minn. 173.

### LOW JOINT

A "low joint" in a railroad is where a tie underneath that joint has been pounded so many times by wheels passing over it that there is a little space underneath that tie, so that the rails will give when the wheels go over it. *Chicago, M. & St. P. R. Co. v. Benton*, 132 Fed. 460, 461, 65 C. C. A. 660.

### LOW-WATER MARK

Ordinary Low-Water Mark.

The "low-water mark" which under Act Aug. 19, 1749, is the boundary line between York and Lancaster counties, is the line to which the water recedes at ordinary states of low water, and not the lowest line the water has ever been known to reach. *Appeal of York Haven Water Power Co.*, 62 Atl. 97, 98, 100, 212 Pa. 622.

Where in ejectment the location of a "low-water mark" of tidewater on the easterly side of a creek is involved, it cannot be assumed without proof that that mark was not west of the center line of the creek, since one bank may have fallen sheer, and the other have been a shoal very nearly the

whole width of the creek. *Heiney v. Nolan*, 67 Atl. 1008, 1009, 75 N. J. Law, 397.

"Low-water mark" of natural fresh water rivers is the water's edge at its lowest stage. *City of Peoria v. Central Nat. Bank*, 79 N. E. 296, 299, 224 Ill. 43, 12 L. R. A. (N. S.) 687.

Fresh rivers not subject to tide may rise and fall at certain seasons and thus have defined high and low water marks. The "low-water mark" is the point to which the river recedes at its lowest stage, while the "high-water mark" is the line which the river impresses on the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture. *State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow*, 69 S. W. 374, 377, 169 Mo. 109 (citing *Gould, Waters* [3d Ed.] § 45).

The margin of the bed of a river which lies between high and low water mark is called the "beach" or "shore," which is actually a part of the bed of the river, and, when the river is at its full flow, whether caused by the tide or by the natural increase of waters by rains, floods, and the like, filling its natural bed to its highest reach of flow, it marks its high-water, while its lessened range of flow by summer heats shows its low-water, mark. *Sun Dial Ranch v. May Land Co.*, 119 Pac. 758, 762, 61 Or. 205.

### LOW WOMAN

The statement of a person of another that she is a "low woman" and "half negress" does not impute a want of chastity. *Kenworthy v. Brown*, 92 N. Y. Supp. 34, 35, 45 Misc. Rep. 292.

### LOWERMOST PORTION

The words "beginning from the lowermost portion thereof" should be construed as meaning from the lowermost portion of the bed of stream; not from the lowest depths of some hole or sudden depression therein, but from the lowermost part of the general contour of the channel. *Krause v. Oregon Iron & Steel Co.*, 77 Pac. 833, 835, 45 Or. 378.

### LOWEST BIDDER

A single bid for public work made under due advertisements for bids, pursuant to an ordinance requiring such method of letting contracts, authorizes the city council to contract with the bidder; the term "lowest," in such connection, being used in its logical and practical, rather than its grammatical, sense. *Hager v. Melton*, 66 S. E. 13, 17, 66 W. Va. 62.

The expression "lowest bidder" necessarily implies a common standard by which to measure the respective bids, and that common standard must necessarily be previously prepared specifications of the work to be done and materials to be furnished. Where an equipment of an automatic fire alarm office for a city, as designed by the city electrician,

was authorized by ordinance, a subsequent notice to bidders, after call for bids had been published, which abrogated the specifications and established in lieu thereof an equipment which the board and city electricians might deem adequate, rendered the bids void under the requirements of the city charter that public improvements made by contract should be let to the "lowest bidder" and that the contracts and specifications must at that time be on file subject to public inspection. *Goshert v. Seattle*, 107 Pac. 860, 862, 57 Wash. 645.

### LOWEST RESPONSIBLE BIDDER

The expression "lowest bidder" necessarily implies a common standard by which to measure respective bids, which standard must necessarily be previously prepared specifications of work to be done and materials to be furnished; specifications freely accessible to all who may desire to compete, on which alone their respective bids must be based. By the phrase "lowest responsible bidder," as used in a statute relating to school buildings, it was not intended to limit the power of the board to the simple examination of the different bids tendered without reference from whom they came, and that they should blindly select one solely from the consideration that it was lowest in price, but it required the board to select that bidder who, all things being considered, had ability to respond to the requirements of the contract having full regard to the subject-matter. The word "responsible," as employed in the act when applied to contracts requiring for their execution not only pecuniary ability, but also judgment and skill, imposes not merely a ministerial duty on the city authorities, but also duties and powers deliberate and discretionary. *Hannan v. Board of Education of City of Lawton*, 107 Pac. 646, 650, 654, 25 Okl. 372, 30 L. R. A. (N. S.) 214 (citing *Mazet v. City of Pittsburgh*, 20 Atl. 693, 137 Pa. 548; *Commonwealth ex rel. Snyder v. Mitchell*, 82 Pa. 343).

The statute requiring that contracts for public improvements shall be let to the lowest responsible bidder does not require the letting of contracts to the lowest bidder, on ascertaining his financial responsibility only, but the term "responsible" includes the ability to respond by the discharge of the contractor's obligations in accordance with what may be expected or demanded under the contract, and where the board of local improvements has exercised its discretion in the award of a contract for a public improvement, the presumption arises that its action was legal, and the party asserting the contrary has the burden of overcoming the presumption by proof that the board acted without jurisdiction or fraudulently. *Hallet v. City of Elgin*, 98 N. E. 530, 532, 254 Ill. 343.

The word "responsible" in the phrase "lowest responsible bidder," as used in Gen.

St. 1909, § 1017, providing for competitive bids before awarding contracts for public improvements, implies skill, judgment, and integrity necessary to a faithful performance of the contract, as well as sufficient financial resources and ability. *Williams v. City of Topeka*, 118 Pac. 864, 866, 85 Kan. 857, 38 L. R. A. (N. S.) 672, Ann. Cas. 1913A, 497.

Where one whose bid for county road work was the lowest as to part of the work failed to submit samples of material to be tested as reasonably requested and the bid of the one to whom the contract was awarded was the lowest on all the work, such latter bid could be regarded and accepted by the county commissioners as the "bid of the lowest responsible bidder," as required by statute. *Suburban Inv. Co. v. Hyde*, 55 South. 76, 78, 61 Fla. 809.

### LUBRICATOR

See Force Feed Lubricator.

### LUCID INTERVAL

The court was well within the rule laid down by text-writers and cases, in instructing that by the term "lucid interval" is meant that period of time during which the person concerned, had so far regained the position of her faculties as to be of sound and disposing mind and memory as defined therein, and that it does not mean that there has been a simple diminution in her insanity, but that her mind has been temporarily restored to sanity, and sufficiently restored to qualify her to make a will as a person of sound and disposing mind and memory. *King v. Gilson*, 90 S. W. 367, 370, 191 Mo. 307.

"A 'lucid interval,' under the civil law, is not an apparent tranquillity or seeming repose. It is not a simple diminution or remission of the disease, but a temporary cure—an intermission so clearly marked that it perfectly resembles a return to health. And, as the nature of the interval cannot be ascertained in an instant, it must continue during a length of time sufficient to give the certainty of the temporary return to reason. The time must in all cases be considerable. \* \* \* The Roman jurists distinguished two classes of insane persons. One class they called 'furiosos'; the other, 'mente captos.' \* \* \* All the Roman laws which speak of 'lucid intervals' have exclusive reference to the first class. For instance, the Law 39, Digest de Judiciis, authorized the insane of the first class to discharge judicial functions during lucid intervals. But this was never permitted in cases of simple insanity." *Succession of Morere*, 38 South. 435, 437, 114 La. 506 (quoting and adopting definition in *Aubert v. Aubert*, 6 La. Ann. 108, quoting from *Coin-Delisle, Donations et Testaments*, p. 82).

"By 'lucid intervals' is meant, not merely a cessation of the violent symptoms of the disorder, but a temporary restoration of reason such as to create responsibility for acts done during its continuance. Still, restoration of the mental faculties to their original condition is not necessary. It is sufficient if there be such restoration that the person is able, beyond doubt, to comprehend and to do the act with such reason, memory, and judgment as to make it a legal act." *Team v. Bryant*, 51 S. E. 148, 150, 71 S. C. 331.

## LUCRATIVE OFFICE

The deputy auditorship of a county is a "lucrative office" within *Burns' Ann. St. 1908*, § 9539, providing that no person holding a lucrative position shall be a notary public, and his acceptance of such office shall vacate his appointment as notary. *Sharp v. State* (Ind.) 99 N. E. 1072, 1075.

A "lucrative office" is one whose pay is affixed to the performance of its duties; and, when the duties of the office are fixed by statute, it is immaterial that the compensation of the officer is fixed by some other board or officer. The office of deputy sheriff, whether entitled to the compensation fixed by contract between the sheriff and the deputy, or entitled to the fees allowed by law, is a lucrative office, within *Const. art. 2, § 26*, declaring that no person shall hold more than one lucrative office at the same time. *State v. Slagle*, 89 S. W. 326, 327, 115 Tenn. 336 (citing *State ex rel. Platt v. Kirk*, 44 Ind. 401, 15 Am. Rep. 239; *Chambers v. State ex rel. Barnard*, 26 N. E. 893, 127 Ind. 365, 11 L. R. A. 613).

*Rev. St. U. S. §§ 1245-1259*, provide for the retirement of army officers. Section 1259 authorizes the assignment of retired officers to duty at the Soldiers' Home, and by subsequent enactments retired officers may be detailed for service with the militia of the several states or in colleges and military schools, and in time of war may be employed on active duty other than in command of troops. *Act March 2, 1903*, c. 975, 32 Stat. 927, 932; *Act April 23, 1904*, c. 1485, 33 Stat. 259; *Act Nov. 3, 1893*, c. 13, 28 Stat. 7; *Act Aug. 6, 1894*, c. 228, 28 Stat. 223, 2 Supp. *Rev. St. U. S. 226*; *Act April 21, 1904*, c. 1403, 33 Stat. 225. Held, that a retired army officer is not, by reason of such retirement, holding an office within *State Const. art. 4, § 20*, making any person holding any lucrative office under the United States ineligible to any civil office of profit under the state. *Reed v. Schon*, 88 Pac. 77, 78, 2 Cal. App. 55.

## LUGGAGE

See Ordinary Luggage; Personal Luggage.

See, also, Baggage.

## LUMBER

See Dressed Lumber; Fire Proofed Lumber; Logs, Lumber, and Other Timber; Sawed Lumber.

Merchantable lumber, see Merchantable.

The word "lumber" is in common use to describe both trees suitable to saw and the products into which they are sawed. Where a deed of standing lumber and trees suitable to saw into lumber stipulated that the lumber remaining on the premises at the end of a specified time should revert to the grantor, but not suggesting that the trees were to be sawed on the premises, it was held that the forfeiture clause applied only to standing trees, and the sawed lumber which remained on the premises after expiration of the specified time did not revert to the grantor. *Tuttle v. D. W. Pingree Co.*, 73 Atl. 407, 408, 75 N. H. 288.

The meaning of the word "lumber" is vague and indefinite, and it has different senses according to the context in which it is used or the nature of the transactions to which the parties refer. Most often it designates materials of wood used in constructing houses, fences, and other like structures—wooden building material. The *Standard Dictionary* defines it as "timber sawed into merchantable form; especially boards;" the *Century*, as "timber sawed or split for use, such as joists, boards, planks, staves, hoops, and the like;" *Webster's Unabridged*, as "timber sawed or split into the form of beams, joists, boards, planks, staves, hoops, etc.; especially that which is smaller than heavy timber." Plaintiffs, who were regular shippers of "lumber," ties, and piling, wrote to defendant railroad, asking the rate on "lumber." Defendant replied, guaranteeing a rate to the point of delivery to a connecting carrier. Plaintiff shipped ties, for which defendant charged and collected a greater rate than agreed on in its letter to plaintiff. Defendant's tariff sheet did not include ties within the term "lumber," and there was no evidence that defendant understood or could have been reasonably expected to have understood, when applied to by plaintiff, that the latter intended to ship ties, when he asked the rate on "lumber." Held, that the letter written by defendant did not amount to an agreement to carry ties on the rate specified therein. *Greason v. St. Louis, I. M. & S. Ry. Co.*, 86 S. W. 722, 725, 112 Mo. App. 116.

When plaintiff applied for cars for the transportation of oak cross-ties, one of defendant carriers had a joint rate to Kansas points, including the destination of the ties, applying to "lumber, car loads, all kinds," of 24 cents per 100 pounds. The other defendant carrier had a similar rate on "lumber, all kinds," but neither carrier had a specific rate on cross-ties. Held, that "lumber" being generally defined to include "any timber saw-

ed or split for use," whether by maul, wedge, or the use of machinery in a mill, anything manufactured out of a log with saw, ax, maul, wedge, or machine, for building houses, bridges, fences, or railroads, after the product leaves the log for commercial use, it included the cross-ties within such joint-rate schedules. Classification of railway cross-ties in a different class from "lumber," imposing on them a higher rate, constitutes unjust discrimination. *American Tie & Timber Co. v. Kansas City Southern Ry. Co.*, 175 Fed. 28, 32, 99 C. C. A. 44.

Rev. St. 1903, c. 93, § 46, provides that whoever labors at cutting, hauling, rafting, or driving logs or lumber shall have a lien thereon for the amount due for his personal services and the service performed by his team. Held, that in view of the original provision in the statute (Laws 1848, c. 72), providing a lien for "cutting, hauling, or driving logs, masts, spars, or other lumber," meaning other lumber ejusdem generis, in a condition similar to logs, masts, and spars, that is, felled but not manufactured, but designed for ultimate manufacture, as are logs, or not to be manufactured, as are spars and masts, the word "lumber" in section 46 is not used in its broadest meaning as including both the manufactured and the unmanufactured product; but no lien is given for cutting or hauling manufactured lumber. *Mitchell v. Page (Me.)* 78 Atl. 570, 571.

**As goods, wares and merchandise**  
See Goods.

#### **Logs or timber distinguished**

"Lumber" is to be distinguished from logs or timber, and in common parlance, as well, means more than ordinary logs. *Craze v. Alabama State Land Co.*, 46 South. 479, 490, 155 Ala. 431 (citing definition in *Webst. Dict.*).

**As merchandise**  
See Merchandise.

#### **Timber synonymous**

Where, in a suit by attachment the affidavit set up a lien for stumpage, under Code 1907, § 4814, for timber sold, and the complaint charged for lumber sold, but also claimed under a lien for stumpage under the statute, which gives a lien for timber sold, the word "lumber," as used therein, is synonymous with "timber," when considered in connection with all the averments of the complaint and the affidavit, as against an objection that there was a fatal variance between the pleading and proof, since it can reasonably be construed to harmonize with the affidavit and evidence showing a sale of timber, as distinguished from lumber. *Sligh v. Frix*, 51 South. 601, 602, 165 Ala. 230.

#### **LUMBER AND TIMBER**

Slabs are not included in the material designated as "lumber and timber" in the statute giving a lien on the lumber and tim-

ber for services in cutting logs. *Engl v. Harrell*, 100 N. W. 1046, 1048, 123 Wis. 407.

#### **LUMBER DEALER OR MERCHANT**

As engaged in mercantile pursuit, see Mercantile.

One engaging in the business of keeping and selling lumber in considerable quantities is properly called a "lumber merchant." *Jackson v. Town of Union*, 73 Atl. 773, 774, 82 Conn. 266.

#### **LUMP SUM**

Code 1899, c. 54, § 26, relating to contracts with building and loan associations, demands "that the extent of payment of premiums be definite, and to answer that demand there must be a 'lump sum,' but \* \* \* it may be taken out in advance, or be distributed in stated periodical payments; but such lump sum need not in words be specified, and then distributed, because if the periodical payments be fixed in amount and number, they make up a 'lump sum.'" *Tahaney v. Washington Nat. Bldg. & Loan Ass'n*, 58 S. E. 791, 59 W. Va. 296.

#### **LUMPER**

See Lumping.

#### **LUMPING**

A charge in the items of a mechanic's lien is not a "lumping" one, where it includes only lienable items which are the subject of an express contract for a given price, which, in case of a subcontract, is also shown to be the reasonable value thereof. *Holland v. Cunliff*, 69 S. W. 737, 740, 96 Mo. App. 67 (citing *Hilliker v. Francisco*, 65 Mo. 598; *Deardorff v. Roy*, 50 Mo. App. 70).

The term "lumping," in the vernacular of members of a trade union is used to designate a method of doing work where the contractor is only the figurehead of the owner who purchases the material and assumes all the responsibility in connection with the contract and the "lumper" merely furnishes the labor and acts as superintendent upon an agreed compensation for his services. *People v. Weinselmer*, 102 N. Y. Supp. 579, 581, 117 App. Div. 603.

#### **LUNACY**

The words "lunacy" and "unsound mind" have been bent out of their technical sense in some instances, a legislative construction being given thereto in harmony with the broad views of courts that they include every phase of unsound mind rendering one incapable of caring for himself or his property. In *re Streiff*, 97 N. W. 189, 191, 119 Wis. 566, 100 Am. St. Rep. 903.

Under section 7, Statutory Construction law, the terms "lunatic" and "lunacy" include



every kind of unsoundness of mind except idiocy. *Schoenberg & Co. v. Ulman*, 99 N. Y. Supp. 650, 652, 51 Misc. Rep. 83.

Under Statutory Construction Law (Laws 1892, p. 1487, c. 677) § 7, defining "lunacy" to include every kind of unsoundness of mind except idiocy, the word "lunacy" in Code Civ. Proc. § 2335, providing that, where a petition alleges that the person with respect to whom it prays for the appointment of a committee is incompetent by reason of "lunacy," the inquiry with respect to the competency must be confined to the question whether he is incompetent at the time of the inquiry, includes all phases of incompetency including imbecility arising from old age. In *re Preston's Will*, 99 N. Y. Supp. 312, 313, 118 App. Div. 732 (citing *Matter of Schrodt*, 67 N. Y. Supp. 244, 32 Misc. Rep. 540; *Matter of Clark*, 67 N. Y. Supp. 631, 57 App. Div. 5).

## LUNATIC

As natural person, see Natural Person.  
As person, see Person.

Under section 7, Statutory Construction Law, the terms "lunatic" and "lunacy" include every kind of unsoundness of mind except idiocy. *Schoenberg & Co. v. Ulman*, 99 N. Y. Supp. 650, 652, 51 Misc. Rep. 83.

Rev. Laws, c. 87, §§ 6, 79, places the burden of support of insane persons on the state. Rev. Laws, c. 8, § 5, cl. 6, provides that, in construing statutes the words "insane person" and "lunatic" shall include every idiot, non compos, lunatic, and insane and distracted person. Held, that persons committed to the School for Feeble-Minded are not insane persons, and hence the state is not liable for their support. *Chapin v. City of Lowell*, 80 N. E. 618, 619, 194 Mass. 496.

## LUNAR MONTH

As month, see Month.

## LUNCH WAGON

As building, see Building.

## LUTHERAN

The name "Lutheran" is a distinguishing characteristic of the churches adhering to and adopting certain writings in and shortly after the time of Martin Luther as conclusive expression of the creed, and inerrant interpretation of the Scriptures, and rejecting certain other writings which are adopted by what are called the "German Reformed Church" as correct interpretation of the Scriptures. The Lutherans prescribe certain books as necessary to be used in Sunday school and confessions of faith, and the like, and yield almost inspirational authority to the writings of Dr. Luther. *Marien v. Evangelical Creed Congregation of Milwaukee*, 113 N. W. 66, 67, 132 Wis. 650.

## LUXURIES

Food supplies ordered by the master of a fishing schooner, who was also managing owner, for the use of the crew on a fishing voyage, under the usual lay contracts, in the absence of any showing of bad faith on his part, will be presumed to be supplies "necessary" for the employment of the vessel, within the meaning of the Maine statute giving a lien for such supplies, and the court will not undertake to determine that certain of the articles were "luxuries" for which the vessel is not liable. The term "luxuries" is an entirely relative term. *The Mary F. Chisholm*, 133 Fed. 598, 600.

## LYCHEE

Dried lychee as edible fruit, see Edible Fruit.

## LYING

### LYING BETWEEN PIERS

Where an insurance policy on a vessel provided that the company should not be liable for injuries in consequence of ice except when the vessel was "lying between piers," the exception should be construed as requiring that the vessel should be placed between piers sufficiently near to each other to afford protection from floating ice on both sides; and hence, where the piers between which the vessel was moored at the time of her injuries were 2,200 feet apart, she was not "lying between piers" within the policy. *Huntley v. Providence Washington Ins. Co.*, 79 N. Y. Supp. 35, 36, 77 App. Div. 196.

### LYING IN WAIT

"Lying in wait" means hiding in ambush or concealment. It does not necessarily refer to the attitude of the body, but rather to its location, and the purpose of taking the person attacked unawares. It is the mental poise of the wild beast in quest of prey, and necessarily implies malice, premeditation, deliberation, and the willful intent. If a person, armed with a club, was hiding in the darkness with the purpose of assaulting another when unaware of danger, he was, though standing, technically "lying in wait." *State v. Tyler*, 97 N. W. 983, 985, 122 Iowa, 125.

### LYING OR BEING WITHIN

Const. art. 8, § 5, declares that all railroad property within the limits of any city shall bear its proportionate share of municipal taxation, and, if not previously rendered, the city authorities shall have power to require its rendition and collect the usual municipal tax thereon. Section 8 declares that property of railroad companies shall be assessed and taxes collected in the several counties in which the property is situated, including so much of the roadbed and fix-

tures as shall be in each county; and that the rolling stock shall be assessed in gross in the county where the principal office of the company is located, and the county tax paid on it shall be apportioned by the comptroller in proportion to the distance the road may run through any such county among the several counties through which the road passes, as a part of their assets. Held that, under Rev. St. 1895, art. 5083, providing for the general taxation of the rolling stock of railroad corporations, and article 500, providing that only property situated within the limits of a city is taxable by it, a city containing the principal office of a railroad company was not, for that reason, authorized to levy municipal taxes on all the railroad's rolling stock, only a small portion of which would necessarily be within the city on the 1st day of January of each year; the term "lying or being within the limits of any city or incorporated town," etc., when applied to tangible movable property, meaning only such property as is actually and physically within the limits of the city. *City of Tyler v. Oker* (Tex.) 124 S. W. 729, 730.

## LYNCHING

"The word 'lynching' has been defined by legal as well as other lexicographers, and according to such definitions, and as the term is generally understood, the illegal acts commonly termed 'lynching' cannot be committed by a single individual. Yet one person alone

could be guilty of the crime of breaking and entering a jail with intent to kill under this statute. 'Lynching' is defined by *Raphe & Lawrence* as 'mob vengeance upon a person suspected of crime.' *Law Dictionary*, 778. It is 'a term descriptive of the action of unofficial persons, organized bands, or mobs, who seize persons charged with or suspected of crimes, or take them out of the custody of the law, and inflict summary punishment on them, without legal trial, and without warrant or authority of law.' *Black's Law Dictionary*, p. 737. 'A common phrase used to express the vengeance of a mob inflicting injury and committing an outrage upon a person suspected of some crime.' *Worcester and Webster* define the word as the infliction of punishment without legal trial by a mob or by unauthorized persons. The word derives its origin, according to *Worcester*, from a Virginia farmer named *Lynch*, who, having caught a thief, instead of delivering him to the officers of the law, tied him to a tree and flogged him with his own hands. Lynching has no technical legal meaning. It is merely a descriptive phrase, used to signify the lawless acts of persons who violate established law at the time they commit the acts, and is universally understood to signify the illegal infliction of punishment by a combination of persons for an alleged crime." *State v. Lewis*, 55 S. E. 600, 610, 611, 142 N. C. 626, 9 Ann. Cas. 361 (quoting *Bouv. Law Dict.* 287. See, also, *State v. Aler*, 20 S. E. 585, 39 W. Va. 558).

## M

## MACADAM

The word "macadam" has a variety of meanings. Thus, where plaintiff contracted to furnish for two years all the crushed stone needed by defendant in construction and repair of its streets, defendant agreeing to use said crushed stone in all street construction work and all repair work done by it where the improvement is made with "macadam," the contract was ambiguous, and plaintiff might show that the parties, when making the contract, understood that the word included river and mining gravel as well as crushed stone. *Viernow v. City of Carthage*, 123 S. W. 67, 68, 139 Mo. App. 276.

## MACADAMIZE

According to the *Standard Dictionary*, to "macadamize" is "to cover or pave, as a path or roadway, with small broken stone, on either a soft or a hard substratum." Judicially speaking, the word "macadamizing" has a fixed and definite meaning, and refers not only to the kind of material to be used in covering the street or road, but also to the manner in which it is to be laid. It means to cover a street or road by a process introduced by Macadam, which consists of the use of small stones of a uniform size, consolidated and levelled by heavy rollers. *Jones v. Plummer*, 118 S. W. 109, 111, 137 Mo. App. 337.

A "macadamized roadway" does not mean one made up of a mixture of clay, gravel, limestone, and slag, that will not sustain an ordinary load in wet weather. In the common practice and understanding such a roadway has been regarded as one covered with small, broken stones, so as to form a smooth, hard, convex surface, capable of sustaining ordinarily heavy traffic. *Gage v. People*, 65 N. E. 1084, 1085, 1086, 200 Ill. 432.

Complainants conveyed certain land to a city for a street, the city agreeing to grade and "macadamize" the street which was in an outlying district where it was well known to both parties that the city was in the habit of macadamizing only the center of the street to a width of from 14 to 16 feet, for a driveway. Held, that the contract should not be construed to require the city to macadamize the street to its full width, but only in accordance with its recognized custom. *City of Versailles v. Brown* (Ky.) 96 S. W. 1108, 1109.

The term "pave" in its generic sense means to place some substance on the street so as to form an artificial roadway or wearing surface which shall change the natural condition of the street. The word is much more comprehensive than the term "macadamize," but it embraces all that the term

"macadamize" covers. *Ross v. Gates*, 81 S. W. 1107, 1109, 183 Mo. 338.

**Macadamized road as highway**

See Highway.

## MACHINE

See Elevating Machine; Reaming Machine; Slot Machine; Sticker Machine; Traversing Parts of a Machine; Winnowing Machine.

Other machine, see Other.

"The term 'machine' includes every mechanical device or combination mechanical powers and devices to perform some function and produce a certain effect or result." A "machine" is a concrete thing consisting of parts, or of certain devices and combination of devices, and a machine is not a principle or an idea. The mere function or operation of a machine or other device, as distinguished from the machine or device itself, is not patentable. *American Steel & Wire Co. v. Denning Wire & Fence Co.*, 160 Fed. 108, 111, 112 (quoting and adopting definitions in *Corning v. Burden*, 15 How. [56 U. S.] 252, 14 L. Ed. 683; *Burr v. Durgee*, 1 Wall. [68 U. S.] 531, 17 L. Ed. 650).

In patent law, a "machine" is a concrete thing consisting of parts or of certain devices, or combination of devices. "A machine is not a principle or an idea." *United States Consol. Seeded Raisin Co. v. Selma Fruit Co.* (U. S. C. C. A.) 195 Fed. 264, 270, 115 C. C. A. 234.

**Bitransit railway system**

A new method of handling passengers to secure rapid transit in a large city, termed a "bitransit railway system," is not a "machine" within the patent law, and the patent therefor is void for lack of patentable novelty. *Fowler v. New York*, 121 Fed. 747, 58 C. C. A. 113.

**Crane**

The term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. A crane used to lift molten metal in a manufacturing establishment, and operated by hand, is a "machine" within the factory act (Acts 1899, p. 234, c. 142, § 9; *Burns' Ann. St.* 1901, § 70871), requiring the operator of a manufacturing establishment to guard vats, cogs, belting, etc., or machinery. *Crawford & McCrimmon Co. v. Gose* (Ind.) 82 N. E. 984, 985 (quoting and adopting the definition in *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Green v. American Car & Foundry Co.*, 71 N. E. 268, 163 Ind. 185).

**Drop**

The term "machine" includes every mechanical device, or combination of mechanical powers and devices, to perform some function and produce a certain effect or result. A steel hammer of 1,500 pounds, resting in the center of the floor, within four large upright posts, with attachments to a power for the purpose of hauling it to the top of the frame and letting it drop, is a machine, within the meaning of Burns' Ann. St. 1901, § 7087, relating to the duty of an employer, and requiring that all vats, pans, saws, and machinery of every description shall be properly guarded. *Green v. American Car & Foundry Co.*, 71 N. E. 268, 270, 163 Ind. 135 (citing *Corning v. Burden*, 56 U. S. [15 How.] 252, 14 L. Ed. 683).

A "drop," a device consisting of a fixed derrick which raises a large steel ball to a considerable height and allow it to fall upon scrap iron, etc., for the purpose of breaking it, is a "machine." *Inland Steel Co. v. Kachwinski*, 151 Fed. 219, 221, 80 C. C. A. 571.

**Emery belt**

An emery belt, used in a factory to polish metal, is a "machine," within Burns' Ann. St. 1901, § 7087, requiring machinery of every description in factories to be properly guarded. *La Porte Carriage Co. v. Sullender* (Ind.) 71 N. E. 922, 924. See, also, *Pein v. Miznerr*, 83 N. E. 784, 786, 41 Ind. App. 255, overruling *La Porte Carriage Co. v. Sullender*, 75 N. E. 277, 165 Ind. 290.

**Machinery distinguished**

See Machinery.

**Mangle**

"A 'machine' is a mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result." A laundry mangle is within the scope of the factory act providing that "all vats, pans," etc., and "machinery of every description," shall be properly guarded. *Pein v. Miznerr*, 83 N. E. 784, 786, 41 Ind. App. 255.

**Pile driver and engine**

As used in Civ. Code, § 1970, providing that an employer shall be liable for injuries to a servant sustained through the employer's negligence or the default of a co-employee, employed on a machine or other appliance than that on which the employee injured was employed, the word "machine" means an instrument composed of one or more of the mechanical powers, and capable when set in motion of producing by its own operation certain predetermined physical effects, being distinguished from all other mechanical instruments in that its rule of action resides within itself, and hence, where a servant employed to steady piles in front of a pile driver was injured by the negligence of the engineer operating the engine by which the

hammer was lifted, the pile driver and the engine being connected only by a rope by which the power was transmitted to the hammer, plaintiff and the engineer were not working on the same machine within such section. *Korander v. Penn Bridge Co.*, 116 Pac. 384, 385, 16 Cal. App. 249.

**Process distinguished**

"A 'machine' is a thing. A 'process' is an act, or a mode of acting. The one is visible to the eye, an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result." *Expanded Metal Co. v. Bradford*, 29 Sup. Ct. 652, 657, 214 U. S. 366, 53 L. Ed. 1084; *Eastern Extracting Co. v. Greater New York Extracting Co.*, 110 N. Y. Supp. 738, 739, 126 App. Div. 928 (quoting *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279); *Kirchberger v. American Acetylene Burner Co.*, 124 Fed. 764, 775.

The term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, of one substance to another, such modes, methods, or operations are called "processes." A new process is usually the result of a discovery; a machine, of invention. But the term "process" is often used in a more vague sense in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it. *Denning Wire & Fence Co. v. American Steel & Wire Co.*, 160 Fed. 795, 796, 95 C. C. A. 259.

**Railroad switch**

A railroad switch is not a "machine" for the construction of waterworks, within the statute providing that persons furnishing machinery to erect waterworks may have a lien thereon. *Potter Mfg. Co. v. A. B. Meyer & Co.*, 86 N. E. 837, 839, 171 Ind. 513, 131 Am. St. Rep. 267.

**As structure**

See Structure.

**Tram railroad**

A tram railroad is not a "machine," within Rev. St. 1899, § 8486, taxing manufacturers on tools, machinery, and appliances. *State ex rel. Western Tie & Timber Co. v. Pulliman*, 135 S. W. 443, 444, 233 Mo. 229.

**MACHINE FINISH**

The term "machine finished" is used in the manufacture of paper to represent sized, glazed, and supercalendered paper. *Jackson v. Grissom*, 94 S. W. 263, 264, 196 Mo. 624.

**MACHINERY**

See *Dangerous Machinery; Defective Machinery; Domestic Machinery; Patterns for Machinery; Steam Machinery; Ways, Works, Machinery, or Plant.*

Other machinery, see *Other*.

A mortgage trust deed covering the "machinery" belonging to a cotton print works company included the copper rolls on which the designs to be printed on the cloth were engraved, which were not a part of the printing presses, but were purchased in the market separate from the presses for use therein, and were unavailable for use except in the presses. According to *Bouvier's Law Dict.*, "machinery" is a more comprehensive term than "machine" and includes the appurtenances necessary to the working of a machine. According to *Webster's International Dictionary*, second definition, "machinery" is the working parts of a machine, engine, or instrument. According to the *Century* and the *Standard Dictionaries*, "machinery" is the parts of a machine considered collectively, or any construction of mechanical means designed to work together to accomplish a given end. *Doty v. Oriental Print Works Co.*, 67 Atl. 586, 591, 28 R. I. 372 (citing *Seavey v. Central Mut. Fire Ins. Co.*, 111 Mass. 540; *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26, 33; *Brewer v. Ford*, 12 N. Y. Supp. 621, 59 Hun, 17; *State v. Avery*, 44 Vt. 629; *Brower v. Locke*, 67 N. E. 1015, 31 Ind. App. 353, 358).

**As all machinery**

The word "machinery," in *Labor Law* (Laws 1897, c. 415) § 81, imposing on the owner or person in charge of a factory the duty to properly guard specified parts of "machinery," including shafting by name and "machinery of every description," means machinery which needs to be and can be guarded for the safety of the employes. *Poole v. American Linseed Co.*, 103 N. Y. Supp. 1047, 1048, 119 App. Div. 136.

The factory act, providing that "all vats, pans," etc., and "machinery of every description," shall be properly guarded, requires all dangerous machinery to be guarded, including a laundry mangle; the quoted phrase not being limited by the enumeration of vats, pans, etc., since that enumera-

tion is not an enumeration of machines, and the genus of those words is not of the same nature as of "machinery of every description." *Pein v. Miznerr*, 83 N. E. 784, 41 Ind. App. 255, overruling *La Porte Carriage Co. v. Sulkender*, 75 N. E. 277, 281, 186 Ind. 290.

A "machine" consisting of rollers and knives revolving at a high rate of speed, and set immediately below an opening in a floor, and used for the purpose of mixing sawdust, damp clay and dirt thrown into the opening, is not within the factory act, providing that in all manufacturing establishments "all vats, pans, saws, planers, cogs, gearing, belting, set screws, and machinery of every description therein" shall be guarded. *National Fire Proofing Co. v. Roper*, 77 N. E. 370-372, 38 Ind. App. 600.

**Castings**

Iron castings from 10 to 24 feet in length, known as "sill castings or channels," were furnished to a tobacco company with the necessary bolts for use in its factories, to support tobacco presses. Most of them were used for supporting presses or tables connected therewith, without being fastened to the floor and without being put under all the presses. Some were used for other purposes, such as skids, and "dunnage"; that is, were put under goods to raise them above the floor. Those under presses and tables could be readily removed, and were in fact taken from one building to another. There was no proof that they were customarily thus placed in tobacco factories, or were in any way necessary to carry on the work, or that it could not be done as well without them. Held, that the castings were not "material" or "machinery," within Rev. St. 1899, § 4203 (Ann. St. 1906, p. 2277), giving a lien to a person furnishing the same for a building. *Banner Iron Works v. Aetna Iron Works*, 122 S. W. 762, 763, 143 Mo. App. 1.

**Conveyor**

A conveyor, consisting of a long, cylindrical, rotating rod, to which flanges are attached, is a shafting or "machinery," within the factory act (Acts 1899, p. 234, c. 142, § 9; *Burns' Ann. St. 1901*, § 70871), providing that all shafting and "machinery" shall be guarded. *United States Cement Co. v. Cooper* (Ind.) 82 N. E. 981, 983.

**Crane**

Under Code Supp. 1907, § 4909a2, requiring "machinery" in factories to be guarded, a traveling crane is a machine, and, if injury is reasonably to be apprehended therefrom to those working in its vicinity, it should be provided with proper guards. *McCarney v. Bettendorf, Axle Co.* (Iowa) 136 N. W. 920, 925.

**Derrick and appliances**

Where, on the sale of a derrick, the president of the seller corporation wrote the buyer, "We fully guarantee machinery, and

if the same gives out through any fault of ours, we will replace it," the term "machinery" was sufficiently broad to include the whole of the derrick and appliances furnished by the seller. *Miller v. F. R. Patch Mfg. Co.*, 91 N. Y. Supp. 870, 871, 101 App. Div. 22.

#### **Emery wheel**

An emery wheel used as a part of a factory equipment to grind tools is not within the phrase "machinery of every description," in the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 70871), providing that "all vats, pans, saws," etc., and "machinery of every description," shall be properly guarded. *National Drill Co. v. Myers*, 81 N. E. 1103, 40 Ind. App. 322 (citing *La Porte Carriage Co. v. Sullender*, 75 N. E. 277, 165 Ind. 290, 303).

#### **Hammer**

A hammer used by a track hand on a railroad was not a part of the "machinery" of the railroad company within the meaning of a statute declaring that such a company shall be liable for any damage done by the running of the locomotives or cars or other machinery thereon. *Williams v. Garbutt Lumber Co.*, 64 S. E. 65, 70, 132 Ga. 221 (quoting *Georgia Railroad & Banking Co. v. Nelms*, 9 S. E. 1049, 83 Ga. 70, 20 Am. St. Rep. 308).

#### **Harness**

The harness of a horse attached to a delivery wagon which an employé was driving was not a part of the employer's "machinery," within Rev. Laws, c. 106, § 71, cl. 1, giving an employé the same right of action against his employer for personal injuries by a defect in the ways, works, and machinery connected with the employer's business, as if he had not been an employé; "machinery" only including such machines or mechanical devices as are in use, and such appurtenances thereof as are used incidental to the use of the machine. *Murphy v. O'Neill*, 90 N. E. 406, 407, 204 Mass. 42, 26 L. R. A. (N. S.) 146.

#### **Heating boiler**

Ky. St. § 2463, provides that a person who furnishes materials in the erection or repairing of a house, or for any fixture or machinery therein, or for the improvement of real estate by contract with, or by the written consent of, the owner, contractor, subcontractor, or authorized agent, shall have a lien thereon, etc. Held, that a heating boiler purchased by a contractor and installed in defendant's residence constituted a "fixture" and "machinery," within the statute, and also an improvement of the property, within the section, so as to entitle the seller to a materialman's lien therefor. *Menne v. American Radiator Co.*, 150 S. W. 24, 25, 150 Ky. 151.

#### **As improvement of land**

See Improvement.

#### **Kiln doors**

Where a contract to furnish "machinery as follows" enumerates among other articles kiln doors, such doors are "machinery," for the purposes of the contract. *Thomas China Co. v. C. W. Raymond Co.*, 135 Fed. 25, 29, 67 C. C. A. 629.

#### **Machine distinguished**

The word "machinery," in a fire policy insuring a laundry and machinery, included the boiler, pipes, and fittings; steam being used, not only as a motive power, but for providing heat for drying purposes, etc. According to Webster's International Dictionary a "machine" is any mechanical contrivance, while "machinery" is the means and appliances by which anything is kept in action or a desired result is obtained; a complete system of parts adapted to a purpose. More narrowly and technically, "machinery" is said to be the working parts of a machine, engine, or instrument arranged and constructed so as to apply and regulate force. *Tubbs v. Mechanics' Ins. Co.*, 108 N. W. 324, 326, 131 Iowa, 217.

#### **As personal property**

See Personal Property.

#### **Railroad track**

Labor Law (Laws 1897, p. 480, c. 415, § 81) requires that all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and "machinery of every description" shall be properly guarded. Held, that other mechanical appliances constituting similar hazards were included in the words "machinery of every description," but that they did not include a railroad track some three feet above the floor of a gallery in a machine shop, on which trucks were operated; there being no inherent danger in the track, nor reasonable ground to believe that an employé in falling would be injured by putting his hand in front of the wheel of a truck which was being operated on the track. *Wynkoop v. Ludlow Valve Mfg. Co.*, 89 N. E. 827, 828, 196 N. Y. 324, 30 L. R. A. (N. S.) 86.

#### **Water mains and pipes**

Pipes and water mains of waterworks company are not taxable as "machinery employed in manufactures," within Rev. Laws, c. 12, § 23, providing for the taxation of such machinery within the state. *Coffin v. Artesian Water Co.*, 79 N. E. 262, 263, 193 Mass. 274.

#### **MACHINIST**

The term "machinists" does not include plumbers, painters, plasterers, and such like artisans. Hence a plumber furnishing the labor and materials to connect a soda fountain, gas drum, and generator, etc., is not a "machinist" within Laws 1906, p. 187, c. 72, providing that every machinist who expends labor, skill, and materials on any chattel shall have a lien for his services. *Modern Plumbing & Heating Co. v. American Soda*

Fountain Co., 106 Pac. 628, 629, 57 Wash. 148, 135 Am. St. Rep. 975.

In an action by a passenger against a street car company, where the declaration alleged that plaintiff was a machinist when he was injured, the fact that the evidence showed that he was a tool maker did not prevent him from recovering damages for decreased earning capacity as a skilled workman, the proof showing that tool makers were machinists, as the word "machinist" was broad enough to cover skilled machinists. *Fillingham v. Michigan United Rys. Co.*, 117 N. W. 635, 636, 154 Mich. 233.

## MACKEREL

Evidence is admissible to show a trade custom construing the word "mackerel" to mean clear and not rusty mackerel. *Procter v. Atlantic Fish Cos.*, 94 N. E. 281, 208 Mass. 351.

## MADE

See *Duly Given or Made; Duly Made*.  
See, also, *Make*.

The words "so made," in Code, § 549 (Gen. St. 1897, c. 95, § 590; Gen. St. 1899, § 4843), which after providing for the making and service of the case and the suggestion of amendments, provides that the case, "when so made," shall be settled, certified, and signed by the judge, making no mention of the service of the case, evidently include all the preliminary steps to the presentation of the case to the judge for settlement. *Butler v. Scott*, 75 Pac. 496, 497, 68 Kan. 512 (citing *Chicago, B. & Q. Ry. Co. v. Guild*, 59 Pac. 283, 61 Kan. 213).

### Completion imported

The word "made," as ordinarily used, "applies to completed transactions but not necessarily so." A father's guaranty to a bank against any loss on personal loans "made" to his son or on account of any business paper discounted to amounts designated, at a time when the bank had already made personal loans to the son and discounted paper for an amount less than that fixed by the guaranty, was a continuing guaranty covering not only past but future transactions. *National Bank of Chester County v. Thomas*, 69 Atl. 813, 814, 220 Pa. 360.

### Delivery imported

A conveyance is "made or given," within section 67e of the bankruptcy act of July 1, 1898, relating to conveyances made within four months prior to the filing of a petition, when it is delivered. *Underleak v. Scott*, 134 N. W. 731, 732, 117 Minn. 136.

*Ballinger's Ann. Codes & St.* § 2198, provides that the board of appraisers or commissioners of public lands may review and reconsider any of its official acts relating to lands of the state until such time as the

lease or contract for any of such lands shall have been made, executed, and signed by the commissioner of public lands, or by the board itself, and *Pierce's Code* 1905, § 8178a (Laws 1903, p. 113, c. 79), declares that any sale or lease of state lands made by mistake, or not in accordance with law or made by misrepresentation, shall be void. Held that, where affidavits alleging fraud in the sale of certain tide lands were presented to the board of public land commissioners, after the execution of a deed but before its delivery, the board had power to suspend the delivery of the deed, and investigate the charges. The court said: "Respondent contends that the expression 'made, executed, and signed' is equivalent to the words 'made, executed, and delivered,' which are commonly found in deeds of conveyance, and urges that the deed is not 'made and executed' until it is 'drafted, signed, acknowledged, and delivered,' and that it was not the intention of the Legislature to deprive the officers of the state of the power to deal with the subject as long as the deed was not actually delivered. Whether this contention of respondent can be upheld in its entirety, we are not now called upon to decide; but we think that his position is tenable, to the extent that the land commissioner or the board of state land commissioners may at any time refuse to deliver a deed when matters are brought to his or their attention which give reason to believe that said deed is being obtained by means of fraud." *State ex rel. Shores v. Ross*, 87 Pac. 262, 263, 44 Wash. 246.

### As communicated

"Made" signifies action; but, when a person has "communicated" to another a written statement by reading it to him and delivering it to him, that statement has been "made to" such other person, within the meaning of the law. The words "made to" do not necessarily imply that the one communicating and using the statement also composed it or made it up. "Make known" is a synonym of "communicate," according to *Soule's Dictionary of English Synonyms*, 84. The verb "make" has many significations and conveys many meanings, among which is "to put forth; give out; deliver." Also, "to inform; apprise." *Century Dictionary*. Thus when a person seeking credit hands to a merchant a materially false written statement concerning his financial condition, no matter who composed and signed it, if it be one calculated to deceive, and then reads it to such merchant, and thereby obtains property from him on credit, he has obtained property on credit upon a materially false statement in writing "made to" such person. In *re Aldridge*, 168 Fed. 93, 98, 99.

### As entered on docket

*Under Pen. Code*, § 1428, requiring a justice of the peace to keep a docket in which must be entered each action and all proceed-

ings therein, an order holding accused to answer is in fact and law "made" when it is entered on the justice's docket, so that a failure to indorse the same on the complaint or depositions does not deprive the order of its validity nor affect defendant's substantial rights. *People v. Sacramento Butchers' Protective Ass'n*, 107 Pac. 712, 716, 12 Cal. App. 471.

#### As filed

The word "made," in the statute providing that where the term does not continue longer than 30 days the motion for new trial must be "made" during the term, is synonymous with "filed," and the word "made" cannot be construed as meaning simply to prepare and present to the judge such motion, and a motion which has not been so filed must be dismissed, though the judge before whom the case is tried may have granted a rule nisi during the term and within the term fixed by law for filing the motion, and this is true though counsel for the successful party may have consented to a continuance of the hearing of the motion; the same having been returnable in vacation. *Hilt v. Young*, 43 S. E. 76, 77, 116 Ga. 708.

The word "made," as used in Code Civ. Proc. § 1295, providing that the superior court of that county in which application for the appointment of an administrator is "first made" has exclusive jurisdiction of the settlement of the estate, has reference to the time of filing the application with the clerk of the superior court. *Dungan v. Superior Court of Fresno County*, 84 Pac. 767, 769, 149 Cal. 98, 117 Am. St. Rep. 119.

#### As maintained

As used in Act Cong. Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), declaring illegal all inclosures made, erected, or constructed on lands to any of which the person making the same had no claim at the time the inclosure was made, and declaring unlawful "the maintenance, erection, construction or control of any such inclosure," the word "made" has a more comprehensive meaning than the words "constructed" or "erected." A person "makes" an inclosure so long as he maintains it. Since the statute was violated, where a person maintained the inclosure of land to which he had no claim, an indictment charging such an inclosure was not defective for failure to allege that, at the time the inclosure was made, defendant had no claim or color of title to the land made or acquired in good faith or a right thereto asserted with a view to entry. *Bircher v. United States*, 169 Fed. 589, 591, 95 C. C. A. 87.

#### As sworn to

Act March 4, 1904, c. 394, providing that proofs, affidavits, and oaths required under the public land laws may be made before any United States Commissioner, and that

the fees for entries and for final proofs when made before him shall be for each affidavit 25 cents, for each deposition of claimant or witnesses when not prepared by the officer 25 cents, and for each deposition prepared by the officer \$1, and making it a misdemeanor to demand or receive a greater sum, fixes the fees of United States Commissioners for administering the oath and attaching the jurat to affidavits required under the land laws, but it is not part of their duty to draft affidavits, in whole or in part, and a United States Commissioner who drafts an affidavit or any part thereof, or who completes the application part of a combined application and affidavit under the land laws, may charge compensation therefor as services beyond his official duty; an affidavit being "made" before an officer when subscribed and sworn to before him by whomsoever drafted. *In re James*, 195 Fed. 981, 983.

#### MADE ACQUAINTED

A certificate of acknowledgment of a married woman that she was "made acquainted" with the contents of the deed is equivalent to a certificate that the contents were made known and explained to her. *Chauvin v. Wagner*, 18 Mo. 531, 544.

#### MADE OUT IN ITEMS

Civ. Code 1902, § 806, requires that all claims against counties shall be "made out in items," and section 808 provides that no claim shall be valid and payable unless it be presented to and filed with the county board during the fiscal year in which it is contracted or the next thereafter. Held, that a claim is not properly "made out in items" which does not indicate the year in which it arose, so as to indicate that it accrued within the period prescribed. *State ex rel. People's Bank of Greenville v. Goodwin*, 62 S. E. 1100, 1105, 81 S. C. 419.

#### MAGAZINE

"Magazines" are defined by Webster as pamphlets published periodically, containing miscellaneous papers or compositions. They are "periodical publications" entitled to the privileges of second-class mail matter. *Houghton v. Payne*, 24 Sup. Ct. 590, 592, 194 U. S. 88, 48 L. Ed. 888.

#### MAGIC

Healer by magic as physician, see Physician.

#### MAGIC LANTERN

Not dutiable as optical instruments, see Optical Instrument.

#### MAGISTRATE

Removal of magistrate as special proceeding, see Special Proceeding.



A "magistrate" is an "officer having power to issue a warrant for the arrest of a person charged with a public offense." *People v. Swain*, 90 Pac. 720, 722, 5 Cal. App. 421 (citing Pen. Code, § 807).

"A 'magistrate' is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime. The following persons are magistrates: (1) The justices of the Supreme Court; (2) the judges of the Circuit Court; (3) the county judges and justices of the peace; (4) all municipal officers authorized to exercise the powers and perform the duties of a justice of the peace." *Wallowa County v. Oakes*, 78 Pac. 892, 46 Or. 83.

The clerk of the county court having no authority to issue a warrant for a misdemeanor is not a "magistrate" within Snyder's Comp. Laws, § 6575, providing that a "magistrate" is an officer having power to issue a warrant for the arrest of a person charged with a public offense. *Bowen v. State*, 115 Pac. 376, 5 Okl. Cr. 605.

The word "magistrate," as used in Rev. St. c. 133, § 17, providing for appeals from the decisions or sentences of magistrates, includes judges of municipal courts as well as trial justices. *Sprague v. Inhabitants of Androscoggin County*, 71 Atl. 1090, 1091, 104 Me. 352.

Code 1907, § 7519, providing that judges of city courts, etc., are "magistrates," within the meaning of the chapter ("Proceedings to Preserve the Peace"), and authorized to require persons to give security to keep the peace, etc., refers only to affidavits and warrants under that chapter, and not in prosecutions for illegal liquor selling. *Herring v. State*, 48 South. 476, 477, 158 Ala. 31.

#### **District attorney**

The district attorney to whom a confession is made is not a magistrate before whom accused is brought for a judicial hearing, and required by Code Or. Proc. §§ 188, 196, to advise him that he is entitled to the aid of counsel, and to inform him that he has the right to make a statement in relation to the affair. *People v. Randazzo*, 87 N. E. 112, 116, 194 N. Y. 147.

#### **As judge**

See Judge.

#### **Notary public**

Where a notary public was authorized by state law to issue a warrant of arrest for misdemeanor, and on such affidavit the governor of the state had instituted requisition proceedings, the notary was a "magistrate" within Rev. St. § 5278, governing interstate extradition, and providing that the same may be based on a magistrate's warrant. *Compton v. State of Alabama*, 29 Sup. Ct. 605, 606, 214 U. S. 1, 53 L. Ed. 885, 16 Ann. Cas. 1098.

## **MAGNETISM**

See Electro—Magnetism.

## **MAHOGANY**

See San Domingo Mahogany.

## **MAIL**

See By Mail; Fast Mail; Fraudulent Use of the Mails; Send by Mail.

Service by mail, see Service (In Practice).

Use of, as commerce, see Commerce.

"The term 'mail' is perhaps universally comprehended as being that over which the government has the management for the purposes of conveyance and distribution." *Searight v. Stokes*, 8 How. 151, 185, 11 L. Ed. 537.

## **MAIL CARRIER**

As civil officer, see Civil Officer.

As officer, see Officer.

## **MAIL CLERK**

As passenger, see Passenger.

## **MAIL MATTER**

A post office superintendent discovered a misboxed letter, which had been placed in a "dead" pigeonhole at the top of the case, where defendant, a clerk, was engaged in sorting mail. The letter was removed by the superintendent and handed to a post office inspector, who took it to the addressee, and, without delivering it, obtained permission to open it. He then returned it to the post office, unsealed the letter, and took from it an express order for \$2, a statement of account, and a letter from the sender of the money order. After making a copy of the letter, he placed it in the envelope with two marked \$1 bills, and forwarded the money order and the statement to the addressee. The envelope containing the letter and bills, having been duly sealed, was returned to the dead pigeonhole, and a short time thereafter was embezzled by defendant. Held, that the letter at the time it was returned by the inspector to the dead pigeonhole had not ceased to be "mail matter," and that defendant was therefore properly convicted of embezzling a letter containing inclosures, in violation of Rev. St. § 5467. *Ennis v. United States*, 154 Fed. 842, 843, 83 C. C. A. 478 (citing *Montgomery v. United States*, 16 Sup. Ct. 797, 162 U. S. 410, 40 L. Ed. 1020; *Scott v. U. S.*, 19 Sup. Ct. 209, 172 U. S. 343, 43 L. Ed. 471; *Goode v. U. S.*, 16 Sup. Ct. 136, 159 U. S. 663, 40 L. Ed. 297).

## **MAIL ORDER**

The chief element of the "mail order" method of doing business consists in dealing directly with the customer or consumer by means of placing in his hands a printed catalogue containing a description of the articles of merchandise offered for sale and the price

thereof. An association of retail dealers can lawfully agree among themselves that they will not purchase merchandise from wholesalers and jobbers who sell to mail order houses and to inform each other as to what wholesalers and jobbers do sell to such houses. *Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Ass'n*, 150 Fed. 413, 415.

### MAILED

The word "mailed," as used in the specifications on which a contract for the sale of coal was made, requiring notice of a failure to deliver to be "mailed," being used in its ordinary sense, referred to mailing in accordance with the ordinary method of business, and did not contemplate the sending of a notice by registered mail, so that the mere delivery to the postal authorities and registration of a notice did not put the seller in default. *Price v. City of New York*, 93 N. Y. Supp. 967, 970, 104 App. Div. 198.

The general statement of one that he "mailed" a letter to another is sufficient evidence that he did everything necessary to raise the presumption that it was received in due course of mail, and thereby show that the addressee had notice of matters therein stated. To be properly "mailed" a letter must be addressed, stamped, and deposited in the proper place for the receipt of mail, and, since the word "mailed" implies the doing of all these acts, a general statement that a letter was "mailed" is sufficient. *Ward v. D. A. Morr Transfer & Storage Co.*, 95 S. W. 964, 965, 119 Mo. App. 83 (citing *Pier v. Heinrichshoffen*, 67 Mo. 163, 29 Am. Rep. 501; *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51).

### Prepayment of postage

The word "mailed," when applied to a letter, means that it was properly prepared for transmission by mail, and was placed in the custody of the officer whose duty it was to forward the mail. *Southern Engine & Boiler Works v. Vaughan*, 135 S. W. 913, 915, 98 Ark. 388, Ann. Cas. 1912D, 1062.

In testimony that a letter containing a notice was mailed, the word "mailed" implies the payment of the necessary postage. *City of Omaha v. Yancey*, 135 N. W. 1044, 1047, 91 Neb. 261.

The single word "mailed," as used by a notary in his certificate, is held to imply that the requisite postage was prepaid. *Cutting v. Harrington*, 71 Atl. 374, 377, 104 Me. 96, 129 Am. St. Rep. 373 (citing *Rolla State Bank v. Pezoldt*, 69 S. W. 51, 95 Mo. App. 404).

### MAIM

"Maiming" is to deprive a person of some member of his body. *Cooper v. State*, 182 S. W. 356, 358, 60 Tex. Cr. R. 411.

In an affidavit, which charged that defendant unlawfully, wantonly, or maliciously killed or maimed a cow, followed the Code form for an indictment for wanton and malicious injury to animals (Code 1907, §§ 6230, 7161, form 71), except that the word "maimed" was substituted for the word "injured," the word "maim" implied a deprivation of a necessary part, a crippling, disabling, or permanent injury, and was more than equivalent in meaning to the word "injure," and included the meaning of the word "injure." Hence the affidavit sufficiently charged the statutory offense. *Richmond v. State*, 58 South. 973, 974, 4 Ala. App. 139 (citing 5 Words and Phrases, p. 4275).

To "maim" an animal, within the meaning of a statute making it an offense to kill or maim cattle, is to be understood in its technical signification, and the person who inflicts upon an animal injury of a character less than that which would deprive it of or render useless one or more of its useful members, is not guilty of an offense under the statute, and the owner of the animal is remitted to his action for damages. But one who injures one of the useful members of an animal, such as its members of locomotion, or such as are useful to the owner of the animal, violates the statute. *Brown v. State*, 56 S. E. 405, 406, 127 Ga. 287.

White's Ann. Pen. Code, art. 612, provides that "to maim" is to willfully deprive a person of the hand, arm, finger, toe, foot, leg, nose, or ear; to put out the eye, or deprive a person of any member of his body. Article 614 provides that "to disfigure" is to willfully place any mark on the face or other part of the person. Article 604 provides a punishment for assault with intent to commit the offense of maiming or disfiguring. Held, that a charge of maiming and disfiguring carries with it a charge of assault with intent to maim and disfigure. *Pool v. State*, 129 S. W. 1135, 1136, 59 Tex. Cr. R. 482.

### MAIN

### MAIN CHANNEL

The "main channel" of the Mississippi river means the principal navigable and navigated channel, the one customarily followed in steamboat navigation. *Franzini v. Layland*, 97 N. W. 499, 502, 120 Wis. 72. See, also, *State v. Muncie Pulp Co.*, 104 S. W. 437, 442, 119 Tenn. 47.

### MAIN LINE

The words "main line," in municipal ordinances granting, respectively, the right to construct a small extension to the Garden Street branch of the Cleveland street railway system and the right to lay a second track on a portion of that branch, to terminate with the expiration of the grant for the main line, must be deemed to refer to the rest of the Garden Street branch, and not to the

Euclid Avenue line. *Cleveland Electric Ry. Co. v. City of Cleveland*, 27 Sup. Ct. 202-210, 204 U. S. 116, 51 L. Ed. 399.

### MAIN SEA

"Main sea" and "high sea" are synonymous. *United States v. Newark Meadows Imp. Co.*, 173 Fed. 426, 428.

### MAIN SHAFT

The word "shaft," as used in connection with or applied to factories, is a revolving bar to convey the force which is generated by some prime mover to the different working machines, and a "line or main shaft" is a bar of considerable length, and usually bearing a number of pulleys by which power is transmitted to countershafts. *Hohenstein-Harmetz Furniture Co. v. Matthews*, 92 N. E. 196, 199, 46 Ind. App. 616.

### MAIN STEM

The term "main stem," as used in the New Jersey statute relating to taxation of railroads, is expressly defined to include the roadbed not exceeding 100 feet in width with its rails and sleepers and structures thereon not including passenger or freight buildings. The original statute made passenger depots a part of the main stem. *United New Jersey R. & Canal Co. v. Parker*, 69 Atl. 239, 243, 75 N. J. Law, 771.

Under Act 1888 (Gen. St. p. 3325, § 214) as amended (P. L. 1906, p. 220, c. 122), defining the "main stem" of a railroad for purposes of taxation as "the 'roadbed' not exceeding one hundred feet in width with its rails and sleepers, and all structures erected thereon and used in connection therewith, not including, however, any passenger or freight buildings erected thereon," does not extend beyond the "roadbed," although such "roadbed" be less in width than 100 feet. The court said: "'Roadbed' signifies the bed or foundation upon which rests the superstructure of rails and sleepers. Giving due effect to the word 'main' in the phrase 'main stem,' the 'roadbed' that is to constitute 'main stem' must be deemed the bed or foundation of the principal tracks of the railroad at the place in question. The width of 100 feet, as used in the statute, is a measure of limitation, not of extension; and the fact that a railroad company at any place on its line owns land of the width of 100 feet or more does not extend 'main stem' to the width of 100 feet, unless the 'roadbed' of its principal tracks at the place in question extends to that width." In *re New York Bay R. Co.*, 67 Atl. 1049, 1051, 75 N. J. Law, 389 (quoting and adopting definition in *re United New Jersey Railroad & Canal Co.*, 67 Atl. 1075, 75 N. J. Law, 385).

The act of 1888 (Gen. St. p. 3325, par. 214), relating to the taxation of railroad and canal property, declares that the "main stem"

of a railroad, the assessment of which shall be made by the state authorities, shall include "the 'roadbed,' not exceeding 100 feet in width with its rails and sleepers, (and) depot building used for passengers connected therewith." A supplement to such act (P. L. 1906, p. 220) declares that "main stem" shall hereafter be held to include the "roadbed" not exceeding 100 feet in width with its rails and sleepers, and all structures erected thereon and used in connection therewith, not including, however, any passenger or freight buildings erected thereon. The term "roadbed" is of plain import and significance, the bed or foundation on which rests the superstructure of rails and sleepers. By giving due effect to the word "main" in the phrase "main stem," the "roadbed" that is to constitute "main stem" must be deemed the bed or foundation of the principal tracks of the railroad at the place in question. In *re United New Jersey R. & Canal Co.*, 67 Atl. 1075, 1076, 75 N. J. Law, 385.

Act April 8, 1906 (P. L. 1906, pp. 122, 220), providing a method for the taxation of railroad property, defines the "main stem" of a railroad as the roadbed, "not exceeding 100 feet in width, with its rails and sleepers, and all structures erected thereon and used in connection therewith, not including, however, any passenger or freight buildings erected thereon." The statute has made a distinction between the strictly essential right of way of a railroad, the existence of which is indispensable to its operation and the remaining land of the company used for railroad purposes, and this distinction rests upon the ground, not that these different classes of property are put to different uses, but upon the dependence of the several companies upon local police protection, and, as compensation for that protection, the local municipal governments are permitted to tax that part of the railroad property not included within the "main stem" of the railroad. *Central R. Co. of New Jersey v. State Board of Assessors*, 67 Atl. 672, 674, 680, 681, 75 N. J. Law, 120.

A "main stem," as the term is used in P. L. 1884, p. 142, as amended by P. L. 1888, p. 269, providing for the taxation of railroads, includes the roadbed not exceeding 100 feet in width, with its rails and sleepers, depot buildings used for passengers connected therewith, and must always exist in every incorporated railroad operated for the transportation of freight and passengers, or either. *Jersey City v. State Board of Assessors*, 68 Atl. 227, 228, 74 N. J. Law, 720.

Land on which railroad tracks are maintained, which originally formed a part of the main line, and which were left out of the main line by a straightening of tracks, but are continued in operation for railroad purposes, do not form parts of the "main stem" of the principal line of the railroad, and are not branch railroads having their own main

stem, but are in contemplation of law the same as a "siding." *Jersey City v. State Board of Assessors*, 69 Atl. 200, 201, 75 N. J. Law, 571.

### MAIN TRACK

A short piece of railroad track used only for freight, to which defendant's trains were deflected by a switch, admitting them to defendant's freight depot, and ending at a post, was not defendant's "main track," within Laws 1907, p. 475, § 1, relating to railroad crossings, and providing that any railroad company desiring to cross the main track of another railroad company should, before constructing any such crossing, apply to the railroad and warehouse commission for permission so to do, and comply with certain proceedings therein specified. *Chicago, P. & St. L. Ry. Co. v. Jacksonville Ry. & Light Co.*, 91 N. E. 1024, 1027, 245 Ill. 155.

In the Revenue Act, § 89 (Laws 1903, pp. 414-418, c. 73), relating to assessment of railroads, and providing that the valuation of each mile shall be determined by dividing the whole value by the number of miles of the "main track" of each road or line, the words "main track" are clearly used to distinguish from side or second track, and turnout, spur, and warehouse tracks, and not to distinguish the main line from the branch line. *State ex rel. Platte County v. Sheldon*, 113 N. W. 208, 210, 79 Neb. 455.

### MAINLAND

The word "mainland," in Revisal 1905, § 3474, forbidding anchoring of a floathouse for fishing or hunting wild fowl in shoal water not more than 300 yards from the mainland on the west side of Currituck Sound, means the principal land, as opposed to island. *State v. Barco*, 63 S. E. 673, 674, 150 N. C. 792.

### MAINS

Water mains as personal property, see Personal Property.

By the word "mains," in Laws 1890, c. 586, p. 1148, § 65, providing that any owner or occupant of any premises within 100 feet of any main laid down by any gas light corporation may require it to supply him with gas, were intended those pipes through which the company distributed the gas that was designed to be taken therefrom into the buildings to be lighted. *Moore v. Champlain Electric Co.*, 85 N. Y. Supp. 37, 39, 88 App. Div. 289.

### MAINTAIN

See Establish and Maintain.

Keep and maintain, see Keep.

The word "maintain" has been defined as meaning to support that which has already been brought into existence. *Kendrick &*

*Roberts v. Warren Bros. Co.*, 72 Atl. 461, 464, 110 Md. 47.

"Maintain" is defined to mean to hold or keep in a particular state or condition, especially in a state of efficiency; to support, sustain, not to suffer to decline. *Kovachoff v. St. Johns Lumber Co.*, 121 Pac. 801, 803, 61 Or. 174.

The power to "maintain and operate" waterworks and electric light plants is not necessarily incident to or implied in the power to "purchase or construct" waterworks or electric light plants. The word "maintain" does not mean to provide or construct, but to keep up and preserve. *State ex rel. City of Chillicothe v. Wilder*, 98 S. W. 465, 467, 200 Mo. 97.

Where a boom company agreed with a riparian owner, during the continuance of a license granted such company by the owner to use the river and maintain therein piers and booms convenient in its business and releasing the company from all claims for future damages to plaintiff's land by acts of defendant in the management of its business, to maintain a boom of logs along the bank on the owner's land to protect the banks from injury, the word "maintain," as used in the contract, meant to keep up in a particular state or condition, and did not bind the company to indemnify the landowner against loss, where such maintenance became impossible for a time because of an unprecedented flood, which carried away the boom, where the company had constructed a boom and exercised due care in its maintenance, and renewed it within a reasonable time after the flood. *Coleman v. Mississippi & Rum River Boom Co.*, 131 N. W. 641, 642, 114 Minn. 443, 35 L. R. A. (N. S.) 1109.

Civ. Code, § 551, which provides that no canal can be laid out, constructed, or maintained so as to obstruct any public highway, and that the one so maintaining or using such a canal must repair the bridges, etc., was enacted in its present form in 1905. Before that it provided that every water or canal corporation must construct and keep in good repair at all times for public use across their canal, flume, etc., all the bridges that the county may require. This section was based on prior statutory provisions, passed nearly half a century before. Pol. Code, § 2694, provides that when highways are laid across canals on public lands those using the canals must prepare them so that the highway may cross without danger, and section 2737, providing penalties for obstructing or injuring highways, contains provisions for bridging ditches which cross pre-existing highways. Held that, in view of these provisions the original act did not impose upon the owners of canals the duty of bridging them whenever the public should lay out a road over them, and that the present section does not impose that duty, for the word "maintain," which is

the basis of the claim, should be construed merely as a prohibition against maintaining a canal in such a way that it would injure an existing highway. *City of Madera v. Madera Canal & Irrigation Co.*, 115 Pac. 936, 938, 159 Cal. 749.

#### As clean

The cleaning of streets is "repairing" or "maintaining" them within Laws 1898, p. 252, c. 264, authorizing the street and park commissioners to build, construct, repair, and maintain highways in the city, in view of Laws 1893, c. 59, requiring towns to keep their highways in good repair, suitable for travel thereon, and creating a liability for fine and responsibility for damages suffered by travelers from defects in highways; for the presence of rubbish, dirt, and ashes in a street may cause it to be in a bad state of repair and in an unsuitable condition for travel, and any act that is reasonably necessary to put or keep the street in good repair suitable for travel thereon is "repairing" or "maintaining" the street. *Connor v. City of Manchester*, 60 Atl. 486, 437, 73 N. H. 233.

#### As commence an action

The word "maintained" in the Employers' Liability Act, providing that no action for injuries thereunder shall be "maintained" unless notice of the time, place, and cause of injury is given to the employer, is synonymous with the word "begun" or "commenced" and the statute makes the giving of such notice a condition precedent to the bringing of an action under it. *Grasso v. Holbrook*, *Cabot & Daly Contracting Co.*, 92 N. Y. Supp. 101, 103, 102 App. Div. 49 (citing *Burbank v. Inhabitants of Auburn*, 31 Me. 590; *Boutiller v. Steamboat Milwaukee*, 8 Minn. 97, 105 [Gil. 72]; *Smith v. Lyon*, 44 Conn. 178; *Byers v. Bourret*, 64 Cal. 73, 28 Pac. 61; *Mertz v. City of Brooklyn*, 11 N. Y. Supp. 778, affirmed 128 N. Y. 617, 28 N. E. 253).

The word "maintain" in a statute in reference to actions comprehends the institution as well as the support of the action, though it may be used to express a meaning corresponding to its more restricted definition. *National Mines Co. v. Sixth Judicial Dist. Court Humboldt County*, 116 Pac. 996, 1000, 84 Nev. 67.

A prohibition against "maintaining" an action implies a prohibition against beginning it, for the beginning of the action is one of the necessary steps in maintaining it. A foreign corporation, incapacitated from suing at the time of an institution of a suit by it on the ground that it has not obtained the license required by Rev. St. 1899, §§ 1025, 1026 (Ann. St. 1906, pp. 888, 890), cannot cure the incapacity by thereafter taking out a license. *Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.*, 120 S. W. 31, 34, 221 Mo. 7, 23 L. R. A. (N. S.) 492.

#### As continue an action

The word "maintained," as used in section 54, c. 66, R. S., means to prosecute to a conclusion an action already begun. *Shurtleff v. Redlon*, 82 Atl. 645, 648, 109 Me. 62.

The verb "maintain" in pleading has a distinct technical signification. It signifies to support what has already been brought into existence. Under a statute requiring partnerships transacting business under a designation not showing the persons interested to file a certificate stating the names of all the members, and to publish it once a week for four weeks, etc., and providing that persons doing business as partners contrary to the statute shall not maintain any action until they have filed the certificate and made the publication therein required, where an action is brought by a partnership, the firm name of which does not indicate all the partners, failure to file the required certificate is matter of defense, and must be set up in the answer by way of abatement; but if the requirement as to the filing and publication are complied with before the defense is interposed, it will be sufficient, even though the publication was not completed at the time the action was commenced. *Nicholson v. Auburn Gold Min. & Mill. Co.*, 92 Pac. 651, 6 Cal. App. 547 (quoting *California Savings & Loan Soc. v. Harris*, 43 Pac. 525, 111 Cal. 133, 138).

The statute requiring foreign corporations to file a designation of a person on whom process may be served within 60 days after commencing business within the state, and providing that unless it does so it shall not "maintain" any action in the courts of the state, does not deprive foreign corporations of the right at any time to commence an action for the protection of its property or the enforcement of its rights, and it is within its power at any time after the commencement of the action to comply with the statute and thereafter maintain such action. *Black v. Vermont Marble Co.*, 82 Pac. 1060, 1062, 1 Cal. App. 718.

It was held in *Carson-Rand Co. v. Stern*, 31 S. W. 772, 129 Mo. 381, 32 L. R. A. 420, that the word "maintain" meant literally "to hold by the hand," and in its ordinary use, "to uphold," "to sustain," "to keep up"; and in pleading it means "to support what has already been brought into existence." *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 90 S. W. 1020, 1022, 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808.

Under a statute providing that "no action shall be 'maintained'" by a foreign corporation so long as it fails to comply with the law, when considered in connection with other provisions of the act imposing penalties on officers and corporations for failing to comply with the law, and providing that a failure to comply shall not affect the valid-

ity of contracts made by such corporations, an action by a foreign corporation must be stayed during the period of its noncompliance with the law, on noncompliance being properly pleaded in abatement; the word "maintain" carrying a different meaning from "institute" or "begin," and implying that an action has been begun before it can be maintained. *National Fertilizer Co. v. Fall River Five Cents Sav. Bank*, 82 N. E. 671, 672, 196 Mass. 458, 14 L. R. A. (N. S.) 561, 18 Ann. Cas. 510.

The words "may maintain an action," as generally used, mean may successfully maintain an action. *Greentree v. Wallace*, 93 Pac. 598, 599, 77 Kan. 149 (citing and distinguishing *In re Massey*, 42 Pac. 365, 56 Kan. 120).

**As having control and custody of place**

A hotel porter who, for a guest of the hotel, received and stored in a room of the house a barrel of bottled beer belonging to the guest, and who afterwards, as required by the guest, iced the liquor and served it at the guest's room, where it was drunk by him and his friends, was guilty of maintaining a place where persons were permitted to resort for the purpose of drinking intoxicating liquor as a beverage, contrary to the provisions of Laws 1901, c. 232, § 1 (Gen. Stat. 1909, § 4387). *State v. Ross*, 121 Pac. 908, 909, 86 Kan. 799.

**As erection**

The word "maintain" ordinarily means to preserve something which is already in existence; but, considering that, by the use of the words "unless one of them chooses to let his land lie without fencing," Civ. Code, § 1301, declaring that coterminous owners are mutually bound equally to maintain the boundaries and monuments between them and the fences between them, unless one of them chooses to let his land lie without fencing, applies to land not fenced, it is comprehensive enough, in the light of the subject-matter, to include the erection, as well as the maintenance, of the fences. *Hoar v. Hennessy*, 74 Pac. 452, 454, 455, 29 Mont. 253.

**Keep synonymous**

See *Keep*.

**As keep in repair**

Where plaintiff, under a contract with abutting property owners, constructed a pavement and agreed to "maintain and keep it in repair" for a period of five years, and after the pavement was completed it was torn up and damaged by the bursting of a water main beneath the surface of the street, plaintiff's contract to "maintain and keep in repair" did not impose on it the duty of repairing a damage of the kind in question, but merely contemplated such repairs as use and wear might render necessary. Hence in repairing the pavement plaintiff was a mere volunteer and could not recover dam-

ages of the city. *Green River Asphalt Co. v. City of St. Louis*, 87 S. W. 985, 986, 188 Mo. 576.

The word "maintain," within Gen. St. 1902, § 388, requiring widows to "maintain" and keep in repair the property set apart to them as dower, does not mean "to provide" or "construct," but means to "keep up, not to suffer to fall or decline"; "keep in repair" and "maintain" as used in the statute being synonymous. *Ferguson v. Rochford*, 79 Atl. 177, 178, 84 Conn. 202, Ann. Cas. 1912B, 1212.

The word "maintain" is practically the same thing as "repair," which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction, and, when used in reference to railroad right of way, includes the idea of keeping the right of way in such a condition that it can be used for the purpose for which it was intended. *Missouri, K. & T. R. Co. of Texas v. Bryan* (Tex.) 107 S. W. 572, 576 (citing *Verdin v. City of St. Louis* [Mo.] 27 S. W. 447).

**As make**

See *Make*.

**As operation**

The word "maintain," as used in a contract by which the owners of an adjoining office building agreed on a common entrance and hallway on the center line dividing the premises, and to pay the expense of keeping up and "maintaining" common conveniences including an elevator, was held to include the operation of such elevator, and not simply to mean to put it in and have it stand idle at the behest of one of the parties, which was contrary to the construction given the contract by sharing the expense of operation. *Globe Ins. Co. v. Wayne*, 80 N. E. 13, 18, 75 Ohio St. 451.

**Permanence**

Defendant railroad in May, 1848, covenanted with plaintiffs' predecessors, their heirs and assigns, to construct and maintain a turnout and side track at Dorsey's Run, to take up and set down at the siding by defendant's passenger cars all persons going to and from the farm then occupied by the first parties and to leave at the siding to be unloaded all freight weighing at least 3,000 pounds shipped to the first parties on which the cost of transportation had been paid at the place of loading. Defendant complied with its covenant until 1907, when it constructed a cut-off on its main stem by which a large part of the right of way over plaintiff's land was abandoned, when it discontinued the turnout, and refused longer to maintain a station at that point. Held, that the word "maintain" as used in such covenant did not require defendant to continue the turnout and station permanently, and that the length of time during which the covenant had been complied with constituted a substantial performance thereof, so that the

railroad company was not liable for damages for its breach. *Whalen v. Baltimore & O. R. Co.*, 76 Atl. 166, 167, 112 Md. 187.

**As rebuild or reconstruct**

The word "maintain" in a contract for the extension of a railway branch from a railroad company's railroad to the mines of a mining company, whereby the mining company agreed to construct the substructure, and the railroad company to lay the track of the branch railroad, and to "maintain" and operate the same, requires the railroad company to reconstruct a bridge constructed by the mining company after the bridge was washed away by an extraordinary freshet, though the bridge would become the mining company's property after being completed under the contract which contemplated that the structure should remain the mining company's property. *Louisville & N. R. Co. v. United States Iron Co.*, 101 S. W. 414, 419, 118 Tenn. 194.

**As supplying food**

Laws 1903, p. 14, c. 13, appropriating money for "maintaining" the executive residence, does not authorize the employment of any part of the sum so appropriated for the purchase of provisions to be used there. *Bailey v. Kelly*, 79 Pac. 735, 70 Kan. 869.

**MAINTENANCE**

The Kingston city charter created a board of water commissioners, with power, with the consent of the common council, to construct and maintain a waterworks system. Section 98 provided that the moneys derived therefrom should be applied to the payment of the cost of maintaining, operating, and extending the waterworks, and to the payment of principal and interest on bonds as they fall due. The board, by section 99, was given power to keep the system in operation independent of the city council, and to fix and collect water rates, and make and enforce rules and regulations. By section 101 the moneys derived from water rates and penalties were required to be paid to the city treasurer, to be credited to the water fund and applied to the payment of expenses of ordinary maintenance and management, the balance, if any, to the payment of principal and interest on bonds, and any surplus still remaining to be used for any lawful city purpose. Held, that additional filters, requiring an expenditure of \$16,235, was not an ordinary "maintenance" expense, and that the board had no power to incur such expense without the consent of the city council. *Coykendall v. Harrison*, 134 N. Y. Supp. 446, 450, 150 App. Div. 46.

**Creation of road system**

Const. art. 8, § 9, providing that the Legislature may pass local laws for the "maintenance" of public roads without the local notice ordinarily required for special laws, is applicable to the Shelby county special road

law, which provides for the creation as well as maintenance of a road system. *Ex parte Cooks (Tex.)* 135 S. W. 139, 141.

**Establishment of highway**

Const. art. 3, § 56, subd. 5, declares that the Legislature shall not, except as otherwise provided in the Constitution, pass any local or special laws authorizing the laying out, opening, altering, or maintaining of roads. Article 11, § 2, declares that the laying out, constructing, and repairing of county roads shall be provided for by general laws. Article 8, § 9, declares that the Legislature may authorize an additional ad valorem tax for the further maintenance of the public roads, and that the Legislature may pass local laws for the maintenance of public roads or highways without the local notice required by special or local laws. Section 9, art. 8, was added to the other provisions by amendment. Held, that the word "maintenance" as used in article 8, § 9, included the laying out and constructing of roads, and hence Acts 24th Leg. (Laws 1895) p. 218, c. 132, creating a road system of Dallas county, was not unconstitutional. *Dallas County v. Plowman*, 91 S. W. 221, 222, 99 Tex. 509.

**As rebuild or reconstruct**

Ky. St. § 1840, giving the fiscal court power to appropriate county funds for the maintenance of highways, and section 4306, giving the fiscal court general charge and supervision of the public roads with authority to repair same, the fiscal court had power to reconstruct a turnpike road. *Hanlon v. Cleary*, 133 S. W. 953, 954, 142 Ky. 46.

**State institution**

The provision for "maintenance," in Laws 1907, p. 18, c. 23, making appropriations for the Institution of the Feeble-Minded at Grafton, does not include employee's wages, fuel, etc., for which specific sums were appropriated, but does include the cost of food and clothing of inmates; there being no specific appropriation for these items. *State v. Lewis*, 119 N. W. 1037, 1039, 18 N. D. 125.

**MAINTENANCE (Of Manual Training School)**

A will recited that it was the purpose of the husband of testatrix to found an institution wherein sound business principles might be taught, and where pupils might be fitted for manufacturing and business careers, and that to carry out his wishes she made a donation to prepare, construct, and maintain a manual training school to teach cooking, sewing, and domestic economy to girls, and all things of mechanical and other technical work to young men, and to teach both boys and girls such things as are usually taught in modern manual training schools, and required the city to raise a specified sum for the purpose, and provided that thereupon the property should be transferred to the city to perpetually maintain the school. Held, that

the will contemplated the "maintenance of a manual training school" within St. 1898, § 496b, as amended by Laws 1907, c. 503, and the charter of the city (Laws 1891, c. 59), authorizing the maintenance of schools of manual training, so that the city could accept the donation and comply with the conditions. *Maxcy v. City of Oshkosh*, 128 N. W. 899, 905, 144 Wis. 238, 31 L. R. A. (N. S.) 787.

#### MAINTENANCE (Of Office)

Under Stock Corporation Law (Consol. Laws 1909, c. 59) § 33, which provides that every foreign stock corporation, having an office for the transaction of business in the state, shall keep therein a stockbook, containing the names of stockholders, the number of shares held by them, and the amounts paid thereon, which shall be open for the inspection of stockholders, judgment creditors, and certain authorized state officers, and that, if any such foreign stock corporation has a transfer agent, such stockbook may be deposited with such agent, to be open to the same inspection, subject to a penalty on refusal, imposes such duty only upon stock corporations having an office for the transaction of business in this state; and the mere fact that a foreign corporation, which does not own, rent, or occupy an office of its own within the state, has a transfer agent for the convenience of stockholders, does not constitute "the maintenance of an office for the transaction of business," and hence the transfer agent is not subject to a penalty upon refusal to allow inspection of the stockbook. *Wadsworth v. Equitable Trust Co. of New York*, 138 N. Y. Supp. 842, 153 App. Div. 737.

#### MAINTENANCE (Of Persons)

Kirby's Dig. § 3803, requiring a guardian to give bond to faithfully conduct a sale, etc., applies only to sales for reinvestment, and a sale to discharge a mortgage on other land was not a sale for reinvestment, though the petition and order for sale designated it as such; the words "education" and "maintenance" in another statute authorizing sales being broad enough to authorize a sale to protect the ward's estate. *Harper v. Smith*, 116 S. W. 674, 675, 89 Ark. 284, 131 Am. St. Rep. 93.

Testator devised land to her husband, with power to sell and to have the proceeds, but charging the land or its proceeds with the maintenance of a nephew, 14 years old when the will was made, and with the expense of preparing him for "any profession he may wish" or testatrix's husband might "think best," and reciting that it was supposed that the charge would take all the land or its proceeds, but that, if it did not, the remainder was left to the husband to give to the nephew or "to dispose of as he may wish." Held, that the husband took a fee-simple title subject only to the charge for the

nephew's maintenance and education; that the nephew took no interest in the surplus proceeds; that the "maintenance" contemplated was maintenance during the nephew's minority; and that he, having reached his majority before testatrix's death, is only entitled to such part of the proceeds of the land on the husband's death as may be necessary to educate him for a profession, if he is good faith desires to be so educated. *Knight v. Collins* (Ky.) 113 S. W. 131, 133.

#### Permanent alimony synonymous

"Maintenance" and "permanent alimony" are synonymous terms and mean an allowance in money to be recovered on decree of divorce from the party in fault for the support of the innocent party." *Huffman v. Huffman*, 86 Pac. 593, 595, 47 Or. 610, 114 Am. St. Rep. 943.

#### As support

The "maintenance" of dependents is such support as consists in the furnishing of food, clothing, lodging, or education. "Maintenance" in the matter of clothing does not refer to occasional gifts of clothing, but such a regular supply of clothing as may be reasonably necessary to make the body comfortable. *Western Commercial Travelers' Ass'n. v. Tennent*, 106 S. W. 1073, 1077, 128 Mo. App. 541 (quoting *Alexander v. Parker*, 33 N. E. 183, 144 Ill. 355, 19 L. R. A. 187).

#### MAINTENANCE (Of Suits)

See, also, *Champerty*.

Maintenance is an officious intermeddling in a suit that in no way belongs to one by assisting either party, with money or otherwise, to prosecute or defend. It is said to be an offense against good morals, in that it keeps alive strife and perverts the remedial powers of the law into an engine of oppression. *Lacey v. Davis* (Iowa) 98 N. W. 366, 367 (quoting 6 Cyc. p. 850); *Smith v. Hartsell*, 63 S. E. 172, 174, 150 N. C. 71, 22 L. R. A. (N. S.) 203; *Gelo v. Pfister & Vogel Leather Co.*, 113 N. W. 69, 70, 132 Wis. 575 (quoting and adopting definition in *Andrews v. Thayer*, 30 Wis. 228, 233); *Mud Valley Oil & Gas Co. v. Hitchcock*, 81 N. E. 111, 112, 40 Ind. App. 105 (citing *Anderson's Law Dict.*; 4 Black. Comm. 135). "The terms of this definition obviously do not include all kinds of aid in the prosecution of defenses of another's cause, and it has therefore always been held not to extend to persons having an interest in the thing in variance, nor to persons acting in the lawful exercise of their profession as counsel or attorneys at law. Nor does the doctrine of the common law as to maintenance apply to persons who either have a legal interest in the suit prosecuted by them, or who act under the bona fide belief that they have." *Gelo v. Pfister & Vogel Leather Co.*, 113 N. W. 69, 70, 132 Wis. 575 (quoting and adopting definition in *Davies v. Stowell*, 47 N. W. 879, 78 Wis. 336, 10 L. R.



A. 190). Such contracts are unenforceable at common law, as they tend to pervert the process of the law into an engine of oppression. *Mud Valley Oil & Gas Co. v. Hitchcock*, 81 N. E. 111, 112, 40 Ind. App. 106.

#### Entire want of interest

"Maintenance" is an officious intermeddling in a suit that in no wise belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. "Champerty," which is a species of maintenance, is the unlawful maintaining of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it; the champertor agreeing to carry on the suit at his own expense. Where, however, the person promoting the suit of another has any interest in the subject-matter, he is justified in participating and is not guilty of officious intermeddling within the definition of "champerty" or "maintenance." *Finlen v. Heinze*, 73 Pac. 123, 127, 28 Mont. 548.

#### Champerty distinguished

"Maintenance" is defined as an "officious intermeddling in a suit that no way belongs to one, by assisting either party, with money or otherwise, to prosecute or defend." The offense may be committed by stepping in after litigation has been begun, as by encouraging and aiding its origin. "Champerty" is generally treated in connection with "maintenance." The champertor has in view a profit to himself in a share of the spoils of the litigation. The maintainer is more of a voluntary intermeddler and stirs up the strife for the love of it. He is described as an officious intermeddler. In other words, he interferes where he has no business. *Breeden v. Frankford Marine, Accident & Plate Glass Ins. Co.*, 85 S. W. 930, 931, 110 Mo. App. 312 (citing *Duke v. Harper*, 66 Mo. 51, 37 Am. Rep. 314).

#### Aiding poor man

The law of "maintenance," as I understand it, upon the modern construction, is confined to cases where a man improperly, for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defenses which they have no right to make. To give financial aid to a poor suitor who is prosecuting a meritorious cause of action does not constitute "maintenance," in the absence of any bargain to share the recovery, and is not violative of law or public policy. *Jahn v. Champagne Lumber Co.*, 157 Fed. 407, 418 (citing *Davies v. Stowell*, 47 N. W. 371, 78 Wis. 334, 338, 10 L. R. A. 190).

## MAJOR LEAGUE

Three organizations, the National League, the American League, and the National Association, include in their membership practically every professional baseball club

in the United States. The first two are known as the "major leagues," and the last as the "minor league." *Kelly v. Herrman*, 155 Fed. 887, 888.

## MAJORITY

See Requisite Majority.

See, also, Votes Cast.

By the word "majority" is meant the greater number; more than half of the whole number or a given number or group. A majority of voters is a greater part of such voters. *Mills v. Hallgren*, 124 N. W. 1077, 1079, 146 Iowa, 215.

L. O. L. § 4052, subd. 14, authorizing selection of a school building site by a "majority of the voters present" at a school meeting, requires a vote of more than one-half of those present, and not a mere plurality. *Baxter v. Davis*, 113 Pac. 438, 58 Or. 109 (citing 5 Words and Phrases, p. 4286).

Wherever the words "the council for the time being shall, by a majority vote of all the members elected," or words of like import, occur in the charter of a municipal corporation, relative to the members of the common council thereof, they will be construed to mean a majority of the whole number of members to which the common council is entitled under the charter. *Wood v. Gordon*, 52 S. E. 261, 262, 58 W. Va. 321 (distinguishing *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640).

In a will devising property to four trustees named "and to the survivors of them," and empowering them to act, "or the 'majority' of them," "the term 'majority' has reference to a majority of the survivors and not to a majority of the full number of trustees." *Bascom v. Weed*, 105 N. Y. Supp. 459, 466, 53 Misc. Rep. 496.

Under chapter 341, p. 624, Laws 1899, the word "majority" means a majority of all votes cast at the caucus, including blank ballots. *State ex rel. Dietrich v. Patterson*, 96 N. W. 1135, 119 Wis. 52.

#### As majority of entire body

As used in Ky. St. 1903 (Charter of Cities of the Second Class) § 3044, providing that a majority of members elect of both the board of aldermen and the general council shall constitute a quorum for the transaction of business in joint session, a "majority of both boards" means a majority of the members taken as a whole, and not a majority of each board considered separately. *Davis v. Claus*, 100 S. W. 263, 265, 125 Ky. 4.

#### As majority of those acting as a body in session

Where a city charter provided that the mayor should nominate all appointive officers, and that his appointment should be final unless within five days thereafter a "majority of the common council" should file objections

in writing, the term "majority of the common council" did not mean the common council acting as a body in session, but the provision was satisfied by the filing of objections by a majority of the body without reference to the time or manner of their action. *State ex rel. Paulette v. Bandel*, 97 S. W. 222, 223, 121 Mo. App. 516.

The statute authorizing majority of the board to hire a teacher means a majority acting at a legal meeting, and not a majority of the directors acting separately. *Johnson v. Dye*, 127 S. W. 413, 414, 142 Mo. App. 424.

#### **As majority of those entitled to vote**

The words "majority of the qualified voters and taxpayers of any school district," as used in Rev. St. 1899, § 9772 (Ann. St. 1906, p. 4483), providing that when a majority of the qualified voters and taxpayers of any school district, at any annual or special meeting called for that purpose, shall deem it necessary to have additional ground for school purposes, the board of directors may proceed to condemn, etc., meant that the proposition must receive a majority of all the qualified voters and taxpayers of the district, and that a mere majority of all those present, unless it also be a majority of all the qualified voters and taxpayers of the district, is insufficient. *School District Mo. 3 v. Oellien*, 108 S. W. 529, 530, 209 Mo. 464.

#### **As majority of legal votes cast**

Under St. 1912, c. 559, pt. 3, § 1, revising the charter of the city of Salem, which provided that the act should be submitted to the registered voters at the state election in 1912, for a vote primarily on the question whether the present charter should be repealed, and secondarily on the question whether, if it was repealed, the new charter should be plan 1 or plan 2, and that if, on a "majority of the ballots cast," the votes should be for a repeal, the plan receiving the largest number of votes cast should be adopted as the city charter, the ballot on which the questions were printed contained, besides the names of a large number of candidates for state and national offices, questions upon the adoption of constitutional amendments, and the total number of ballots cast was 6,966, of which, on the question of repealing the charter 1,676 were blank, 2,240 were against repeal, and 3,050 were for repeal. Held that, in view of the legislative policy to make an acceptance of a city charter turn upon the affirmative votes of a majority of those voting on the question, the word "ballots" was synonymous with "votes," and that only the ballots carrying votes on the question of repeal were to be counted, and hence that, as there was a "majority of the ballots cast" in favor of repeal, the old charter was repealed, and the plan receiving the larger number of votes was adopted as the new charter. *Cashman v. Entwistle*, 100 N. E. 58, 59, 213 Mass. 153.

The "majority of ballots" necessary, under Rev. St. 1898, § 865, to determine the question of incorporation of a village means the majority of the legal ballots cast on the proposition and not a majority of those who vote or attempt to vote but whose ballots are properly rejected because illegal. *State ex rel. Town of Holland v. Lammers*, 86 N. W. 677, 679, 89 N. W. 501, 113 Wis. 398.

#### **As majority of quorum**

Under a by-law of a social corporation providing that an assessment could be made by a majority of the executive committee, which consisted of 20 members, 5 of whom constituted a quorum, by a "majority of the committee" was meant a majority of the whole committee, and not a majority of a quorum of 5. *Rogers v. Boston Club*, 91 N. E. 321, 322, 825, 205 Mass. 261, 28 L. R. A. (N. S.) 743.

Where an orphan asylum claimed, for support of children committed to its care by a county after the adoption of a resolution by a majority vote of a quorum of the board of supervisors, that such children be removed therefrom, and, after demand for the children and refusal to surrender, no recovery could be had, since Laws 1895, c. 267, § 2, authorizes a county, by a majority vote of its county board of supervisors, to remove such children, to the support of which it contributes, and Rev. St. § 665, declares that a majority of the supervisors entitled to a seat constitute a quorum for the transaction of business, and make all questions determinable by a majority of the supervisors present, unless otherwise provided. *St. Æmilianus Orphan Asylum v. Milwaukee County*, 82 N. W. 704, 705, 107 Wis. 80.

#### **As majority of those present and voting**

Rev. St. 1899, § 9750, subd. 11 (Ann. St. 1906, p. 4470), providing that in each case a "majority vote of the voters who are resident taxpayers" of the district shall be necessary to remove a site nearer the center of the district, means a majority of the taxpayers of the district, present and voting in the election. *Tucker v. McKay*, 111 S. W. 867, 868, 131 Mo. App. 728.

#### **As majority of those voting**

The phrase "majority vote of legal voters," in Sp. Act Feb. 26, 1903, providing that it shall take effect when approved by a majority vote of the legal voters within the district, means, according to Act March 18, 1903, a majority vote of the legal voters voting. *Foy v. Gardiner Water Dist.*, 56 Atl. 201, 202, 98 Me. 82.

"A majority of the registered voters of the city," as used in Acts 1889, c. 3963, § 12, means a majority of the qualified electors who actually voted at the election in question, and not a majority of all the voters who had the right to vote; those voters who are

silent being supposed to assent that the question shall be determined by those who vote. *Bell v. City of Ocala*, 58 South. 683, 684, 62 Fla. 431.

Const. art. 10, § 9, does not provide the procedure for levying a tax for school district purposes in excess of five mills on the dollar, and not exceeding ten additional mills, but leaves the same to be provided for by the Legislature, provided that a tax in excess of five mills shall not be levied except on condition that a majority of the voters of the district voting at an election of the district vote for same. Const. art. 10, § 9, does not require that a levy in excess of five mills on the dollar in any year for school district purposes, not exceeding fifteen mills, shall receive a majority of the votes of the voters in the district, but only a majority of said voters voting at the election. *Tilley v. Overton*, 116 Pac. 945, 948, 29 Okl. 292.

Const. § 41, providing that no county seat shall be removed except by a "majority" vote of the qualified electors of the county, does not mean a majority of all the qualified electors, but merely a majority of the votes cast. *Ex parte Owens*, 42 South. 676, 148 Ala. 402, 8 L. R. A. (N. S.) 888, 121 Am. St. Rep. 67.

Const. art. 13, § 5, provides that no county shall incur any indebtedness or liability for a single purpose to an amount exceeding \$10,000 without the approval of a majority of the electors, voting at an election to be provided by law. Rev. Codes, § 2933, declares that county boards shall not borrow money for any single purpose to an amount exceeding \$10,000 without the approval of a majority of the electors of the county and without first having submitted the question of a loan to a vote of such electors; and section 2937 declares that, if a majority of the votes cast are in favor of the loan, then the board may make the loan and issue the bonds. Held, that the enactment of section 2933 was not intended to add any requirement to that prescribed by the Constitution, and that the words "majority of the electors of the county," as used therein, should be construed to mean "a majority of the votes cast." *Morse v. Granite County*, 119 Pac. 286, 291, 44 Mont. 78.

#### **As majority voting on particular issue**

Where the language of an act is "a majority of the votes cast," or "a majority of all votes cast," it means a majority of the votes cast on the question submitted; and that, whether the votes are cast at a general or special election. *Territory ex rel. McGuire v. Board of Trustees for High School of Logan County*, 76 Pac. 165, 167, 13 Okl. 605.

As used in Const. § 111, providing that county courts shall have jurisdiction of certain civil and criminal causes. "whenever the voters of any county having a population

of two thousand or over shall decide by a majority vote that they desire the jurisdiction of that court increased," the words "majority vote" mean a majority of all votes cast on the question of increased jurisdiction, and not a majority of all the votes cast at the election. *State v. Fabrick*, 121 N. W. 65, 68, 18 N. D. 402.

As used in Const. § 168, providing that changes in the boundaries of organized counties shall be submitted to the electors of the county or counties to be affected, and be adopted by a "majority of all the legal votes cast" at such election, the phrase "votes cast" means the total of the separate votes, or expressions of voters' preference for or against such a change, and should be limited to mean the votes cast on that proposition. To effect such change requires merely a majority of the votes cast upon the question of a change, and not a majority of the highest number of votes cast for any candidate, or upon any proposition voted upon at the election, since to hold otherwise would be to give as much effect to the act of an elector who did not vote on such change as that of one who voted in the negative. *State v. Blaisdell*, 119 N. W. 360, 361, 18 N. D. 31.

Pub. Laws 1903, p. 327, § 73, provides for submission to the voters of a city, at the next principal election after a resolution of the city council for issue of bonds, of the question of approval of the resolution, and states that the election officers shall report the number of votes in favor of issuing the bonds and the number against such issue, and that, if it shall be found that the resolution has been approved by "a majority of the voters voting at such election," the bonds may be issued. Gen. Election Law (P. L. 1898, p. 319), § 185, provides that, when the approval of a "majority of the legal voters" is required by a statute before a proceeding under it shall be lawful, the meaning of the words "legal voters" in the statute shall be "persons entitled to vote and who do vote \* \* \* on the question or proposition submitted," and that the persons who do not vote at such election shall not be considered on the question of what is a majority of the legal voters with respect to the proposition submitted. Held, that "a majority of the voters voting at such election" required for approval of a resolution for bond issue means only a majority of the persons voting on such proposition, and not a majority of the persons voting at such election on that and other questions. *Murphy v. City of Long Branch* (N. J.) 61 Atl. 593, 594.

By "majority" is meant a majority of the whole number of electors voting at the election, and not a majority of the votes recorded for or against license. In re Election Contest, 136 N. W. 1031, 1032, 118 Minn. 371.

Where a question is required to be submitted at a certain regular election, and is

made to depend on a "majority of the votes cast at such election," a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question. *Santa Rosa v. Bower*, 75 Pac. 829, 830, 142 Cal. 299.

The words "such election," as used in the section of the Constitution which provides how constitutional amendments shall be passed through the General Assembly for submission to the people, and for publication for at least six months "immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the state for approval or rejection, and, if a majority of the electors voting in such election adopt such amendments, the same shall become a part of the Constitution," evidently refer to the general election for Senators and Representatives, and the "majority" necessary to adopt an amendment must be the majority of electors voting at the general election for Senators and Representatives, and not a mere majority voting on the subject of the amendment. *Rice v. Palmer*, 96 S. W. 396, 400, 78 Ark. 432 (citing *Knight v. Shelton*, 134 Fed. 423; *State ex rel. McClurg v. Powell*, 77 Miss. 545, 27 South. 927, 48 L. R. A. 652).

Laws 1905, p. 659, c. 397, § 10, providing for submission of the proposition of establishing county high schools, and that, when "a majority of the voters voting" in any county shall be in favor of such proposition, the provisions of that act shall apply thereto, requires, where the election is a general one, a majority of all the voters voting on any office or proposition at such election. *Board of Education of City of Humboldt v. Klein*, 99 Pac. 222, 223, 79 Kan. 209.

#### **As determined by casting vote of presiding officer**

*Stamford City Charter* (13 Sp. Laws, p. 1152), § 8, creates a board of appropriation and apportionment for the condemnation of land required by the city, consisting of eight members; the mayor being a member ex officio and president of the board, with power to vote only in case of a tie. 14 Sp. Laws 1905, p. 858, § 6, provides that the taking of land for park purposes shall be by a "majority" vote of all the members of the board, both present and absent. Held, that, in case of a tie, when all the members of the board were present and voted, the mayor's vote was sufficient to make a majority. *Bohannon v. City of Stamford* 67 Atl. 372, 373, 80 Conn. 107.

#### **MAJORITY OF STOCKHOLDERS**

An election to be held by a "majority of stockholders" means a majority in interest. In *re P. B. Mathlason Mfg. Co.*, 99 S. W. 502, 504, 122 Mo. App. 437 (quoting and adopting definition in 2 Cook Corp. [5th Ed.] § 609).

## **MAKE**

See, also, *Made*.

#### **As maintain**

A covenant in a conveyance of land for a right of way that the railroad would "make and maintain" a wire fence on both sides of the land conveyed, "and also make" a farm crossing, in pursuance of which the railroad did supply, maintain, and keep in repair a crossing for a number of years, obligated the railroad not only to make, but also to maintain, the crossing. *Pittsburg, C., C. & St. L. Ry. Co. v. Wilson*, 72 N. E. 666, 668, 34 Ind. App. 824.

#### **Compel synonymous**

Where defendant's mother stated that defendant's brother said he would "make" decedent apologize, an instruction that defendant was guilty of murder if he armed himself with the intention of "compelling" decedent to apologize, and on his failing to do so killed him, was not erroneous; "compelled" being substantially synonymous with "make." *Pipkins v. State*, 97 S. W. 61, 63, 80 Ark. 617.

#### **A book**

See *Bookmaking*.

#### **Effort**

Where defendant accepted plaintiffs' offer to make ice cans at a certain price, on condition that they were made and shipped within 30 days, and plaintiffs accepted the order and promised to "make every effort" to have the cans delivered at the time indicated, the assurance must be construed as the expression of purpose to comply with the strongly emphasized requirement for shipment in 30 days, and not as a modification thereof. *Wall v. St. Joseph Artesian Ice & Cold Storage Co.*, 87 S. W. 574, 575, 112 Mo. App. 659.

#### **False entry**

Concealment by the president of a national bank from the bookkeeper of facts necessary to enable the latter to make accurate entries in the books of the bank, by reason of which fact he made false entries, does not constitute the making of false entries by the president which is made a criminal offense by Rev. St. § 5209. *United States v. McClarty*, 191 Fed. 523.

#### **False writing**

There is a distinction between falsely making a certificate of acknowledgment and "making a false certificate." The former term contemplates a certificate which is not genuine, while the latter imports a genuine certificate, the contents or allegations of which are false. *Territory v. Gutierrez*, 84 Pac. 525, 526, 13 N. M. 312, 5 L. R. A. (N. S.) 375.

"Make" has many significations and conveys many meanings, among which is "to put forth; give out; deliver;" also "to inform;

apprise." Cent. Dict. Thus when a person, seeking credit, hands to a merchant a materially false written statement concerning his financial condition, no matter who composed and signed it, if it be one calculated to deceive, and then reads it to such merchant, and thereby obtains property from him on credit, he has obtained property on credit upon a materially false statement in writing "made to" such person. In re Aldridge, 168 Fed. 93, 98, 99.

#### Promulgate distinguished

The word "make," as used in Act Cong. March 3, 1905, c. 1496, § 3, which requires the Secretary of Agriculture to "make" and "promulgate" rules and regulations governing the method and manner of shipment, inspection, and delivery of cattle from quarantined territory, is not synonymous with "promulgate," and means only the writing and official signing of such rules; the "promulgation" of them requiring notice to the officers of transportation companies, etc., and their publication in the selected newspapers within the affected district. United States v. Louisville & N. R. Co., 165 Fed. 936, 939.

#### Quarrel

In a trial for murder, the court instructed that it is the duty of one engaged in a quarrel to avoid an attack, and not to become the aggressor, unless other means are unavailable, and that if defendant, after being engaged in a quarrel with deceased, descended to the street, knowing that deceased was in the street, with intent to continue the quarrel, and in order to make "his quarrel effective," took with him a dangerous weapon, and sought out deceased, and stabbed him, his action was not justifiable homicide, though deceased drew a revolver, was not erroneous, whether the phrase "making the quarrel effective" meant that defendant took the weapon with intent to take the life of deceased, or meant, if defendant renewed the quarrel, whether with or without intent to take life, the killing was not justifiable. People v. Filippelli, 66 N. E. 402, 405, 173 N. Y. 509.

#### Record

Where a clerk of a Circuit Court makes and certifies a record in response to a writ of error or appeal, he is not merely making a transcript or copy, but is "making a record." within Rev. St. § 828, providing that a clerk of the Circuit Court shall be entitled for making a record to 15 cents a folio. Hoyerdt v. Delaware, L. & W. R. R., 182 Fed. 880, 882.

#### Rule

In Act Cong. March 3, 1905, c. 1496, § 3, requiring the Secretary of Agriculture to "make" and "promulgate" rules governing the inspection, delivery, and shipment of cattle from a quarantined state into any other state, and section 1 requiring publication of

notice of quarantine and the giving of notice to the proper officers of carriers doing business in any quarantined state, the words "make" and "promulgate" are not synonymous, and the duty to "make" rules was sufficiently accomplished by writing them and signing them officially, but to "promulgate" them required the giving notice thereof to the officers of carriers, etc., and their publication in the selected newspapers within the affected district. United States v. Louisville & N. R. Co., 165 Fed. 936, 939.

#### Sale

The words "to sell" or "to make a sale," as used in a communication from the owner of real estate to a broker with respect to the sale thereof, are often used as meaning to negotiate or arrange for a sale. Brown v. Gilpin, 90 Pac. 267, 271, 75 Kan. 773.

#### Signature

Under a statute making a writing, not signed in the presence of witnesses, invalid as a will, unless testatrix acknowledged the "making thereof," the phrase quoted refers to the making of the signature in the presence of the witnesses. Manners v. Manners, 66 Atl. 588, 584, 72 N. J. Eq. 854.

#### MAKER

##### Of note

See Accommodation Maker; Comaker; Joint Maker; Principal Maker.

Indorser distinguished, see Indorser.

"One not before a party to a note, who signs his name on the back of it in blank, is prima facie a 'maker,' and assumes the same obligation as if he wrote his name upon the face of the instrument." Lyndon Savings Bank v. International Co., 62 Atl. 50, 52, 78 Vt. 169, 112 Am. St. Rep. 900 (quoting and adopting definition in Lyndon Savings Bank v. International Co., 54 Atl. 191, 75 Vt. 224).

Where a note reciting, "I promise to pay," was signed on the face by two persons, they were both "makers." Ullery v. Brohm, 79 Pac. 180, 20 Colo. App. 389.

The transferrer of a nonnegotiable written contract does not, by signing his name on the back of it, make himself liable as "maker," "guarantor," or "indorser," within Rem. & Bal. Code, § 6250, providing that the discounting of commercial paper, where the borrower makes himself liable as maker, guarantor, or indorser, shall be considered as a loan for the purpose of the chapter relating to usury. Thomson v. Koch, 113 Pac. 1110, 1111, 62 Wash. 438.

#### MAKING

"Making" is defined as the action of one who makes. Town of Checotah v. Town of Eufaula, 119 Pac. 1014, 1017, 31 Okl. 85.

#### MAKING SALES

See Salesmen Making Sales.

**MAL**

See Petit Mal.

**MALA FIDE PURCHASER**

"A person who purchases an estate, although for a valuable consideration, with notice of a prior equitable right, makes himself a 'mala fide purchaser,' and will himself even be held a trustee for the benefit of the person whose right he sought to defeat." *Mansfield v. Wardlow* (Tex.) 91 S. W. 859, 863 (citing Pom. Eq. Jur. § 659).

**MALA IN SE**

See Contracts Mala In Se.

A distinction is made between acts which are "mala in se," which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them, and acts which are mala prohibita, which are void or voidable, according to the nature or effect of the act prohibited. *Peterson v. Berry*, 125 Fea. 902, 906, 60 C. C. A. 610 (citing *Ewell v. Daggs*, 2 Sup. Ct. 408, 108 U. S. 143, 27 L. Ed. 682); *In re T. H. Bunch Co.*, 180 Fed. 519, 527.

**MALA PROHIBITA**

See Mala in Se.

**MALADMINISTRATION**

As applied to public officers, "maladministration" is not in ordinary use distinguished from misadministration. *Territory v. Sanches*, 94 Pac. 954, 956, 14 N. M. 493, 20 Ann. Cas. 109.

**MALCONDUCT**

The reception of illegal votes at an election for a public office is not "malconduct" on the part of the election officers, within Code Civ. Proc. § 2010, authorizing an elector to contest an election for malconduct on the part of the judges of election, but constitutes a separate ground for contest under the express provisions of the section. *Coleman v. Kerr*, 83 Pac. 393, 394, 33 Mont. 198.

An officer who violates his public obligation, and betrays his trust by selling his official influence or vote, is guilty of "malconduct in office." *Etzler v. Brown*, 50 South. 416, 417, 58 Fla. 221, 138 Am. St. Rep. 113.

**MALARIA**

"Malaria" is "a morbid condition produced by exhalations from decaying vegetable matter in contact with moisture, giving rise to fever and ague and many other symptoms characterized by their tendency to recur at definite and usually uniform intervals." *City of St. Louis v. Galt*, 77 S. W. 878, 879, 179 Mo. 8, 63 L. R. A. 778 (quoting Webster Dict.).

**MALE****MALE HEIRS**

See Heirs Mala.

**MALFEASANCE**

"'Malfeasance' is the unjust performance of some act which the party had no right, or which he had contracted not to do." *Dudley v. Flemingsburg*, 72 S. W. 327, 115 Ky. 5, 60 L. R. A. 575, 103 Am. St. Rep. 253, 1 Ann. Cas. 958.

"Malfeasance" is the doing of an act which a person ought not to do at all. Where an officer either through ignorance, inattention, or malice does that which he has no legal right to do at all, or acts without any authority whatever, or exceeds, ignores, or abuses his powers, he is guilty of "malfeasance." *State, to Use of Cardin, v. McClellan*, 85 S. W. 287, 288, 118 Tenn. 616, 3 Ann. Cas. 992.

The taking of the property of one, by a coroner, on a writ against another, is a "malfeasance in office," constituting a breach of his bond given for "the faithful performance of the duties of his office." *Harris v. Hanson*, 11 Me. 241, 245.

Permission by a sheriff to a prisoner to escape is "malfeasance," within Kirby's Dig. § 7993, providing for removal of county officers on conviction of an offense amounting to malfeasance. *Haupt v. State*, 140 S. W. 294, 297, 100 Ark. 409, Ann. Cas. 1913C, 690.

While to convict an officer of the felony denounced by Comp. Laws 1907, § 4083, punishing every person who with intent to defraud, presents for allowance and payment a fraudulent claim, the proof must show that he presented the claim with intent to defraud, yet such proof is not essential to sustain a conviction for malfeasance in a proceeding for his removal under section 4565; the term "malfeasance" meaning the commission of an act which is positively unlawful. *Law v. Smith*, 98 Pac. 300, 307, 34 Utah, 394.

"While 'malfeasance in office' is defined generally to be the wrongful or unjust doing of some official act, which the doer has no right to perform, or which he has stipulated by contract not to do, it is essential that an evil intent or motive must accompany the act, or that it must have been done with such gross negligence as to be equivalent to fraud." An indictment of a county clerk for unlawfully issuing a license to sell liquor in a local option precinct, which fails to aver that his action was from a corrupt motive or fraudulent, or that he knew at the time that it was unlawful for him to issue the license, is insufficient. *Commonwealth v. Wood*, 76 S. W. 842, 843, 116 Ky. 748 (citing *Bishop's New Cr. Law*, §§ 972, 884).

"Malfeasance" is the doing of an act which is positively unlawful or wrongful which one ought not to do at all. It is an act wholly wrongful and unlawful. It is said that misconception of one's rights affords no ground for a conclusion of malfeasance. It is not malfeasance in office, for which, under Highway Law, N. Y. (Consol. Laws 1909, c. 25) § 30, a county superintendent of highways may be removed by the county supervisors, that he presents to a town, and has paid, a personal bill for preparing, under employment by it, plans and specifications for an avenue therein, the work on which was done by his private employes in his business of civil engineer, as not only under sections 33, 48, relative to his duties, is the county superintendent under no absolute duty to do such work, but, even if he cannot legally present a claim against the town, such action would be wrongful to the town only, whereas the malfeasance justifying his removal must be such as affects his performance as county superintendent, and he having at most misconceived his rights, in supposing there was no legal objection to his rendition of the account, which affords no ground for a conclusion of malfeasance. *People ex rel. Seaman v. Cocks*, 184 N. Y. Supp. 808, 810, 149 App. Div. 883 (citing Cent. Dict.; *Bell v. Josselyn*, 3 Gray [69 Mass.] 309, 63 Am. Dec. 741; *Coite v. Lynes*, 33 Conn. 100; *Stokes v. Stokes*, 48 N. Y. Supp. 722, 23 App. Div. 558).

#### Nonfeasance distinguished

"There is a distinction between nonfeasance and misfeasance or malfeasance; and this distinction is often of great importance in determining an agent's liability to third persons. In this connection, 'nonfeasance' means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking, which he has agreed with his principal to do. 'Misfeasance' means the improper doing of an act which the agent might lawfully do, or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons; and 'malfeasance' is the doing of an act which he ought not to do at all. It is not every omission or failure to perform a duty that will constitute a nonfeasance, but only an omission to perform such distinct duties as he owes to his principal, as distinguished from those which he owes to third persons, or the public in general as a member of society. Nonfeasance does not extend to the omission or failure to do some act, whereby a third person is injured after he has once entered upon the performance of his contractual obligations. For example, if an agent undertakes to perform certain acts for another, and he refuses or fails to enter upon such performance, it is nonfeasance; but if he once begins the performance of such acts, and in doing so fails or omits to do certain

acts which he should have done, whereby a third person is injured, it is not a nonfeasance, but a misfeasance. Misfeasance may involve the omission to do something which ought to be done, as where an agent engaged in the performance of his undertaking, omits to do something which it is his duty to do under the circumstances, as when he does not exercise that degree of care which due regard for the rights of others requires." *Orcutt v. Century Bldg. Co.*, 99 S. W. 1062, 1068, 201 Mo. 424, 8 L. R. A. (N. S.) 929 (quoting and adopting definition in *Clark & Skyles*, Law of Agency, § 596).

## MALICE

See Constructive Malice; Express Malice; Implied Malice; Premeditated Malice; Universal Malice; With Malice Aforethought; Without Previous Malice.

Absence of, see Voluntary Manslaughter. Implied from willful or willfully, see Willful—Willfully.

As known to the law, "malice" is a wrongful act done intentionally, without just cause or excuse. *Leavell v. Leavell*, 99 S. W. 460, 461, 122 Mo. App. 654; *Hathaway v. Commonwealth (Ky.)* 82 S. W. 400, 402; *Connell v. State*, 81 S. W. 746, 747, 46 Tex. Cr. R. 259; *London Guarantee & Accident Co. v. Horn*, 69 N. E. 528, 530, 206 Ill. 493, 99 Am. St. Rep. 185; *Schonwald v. Ragains*, 122 Pac. 208, 211, 32 Okl. 223, 39 L. R. A. (N. S.) 854; *McFadden v. Lane*, 60 Atl. 365, 367, 71 N. J. Law, 624.

"Malice" is not necessarily personal hate or ill will, but is a state of mind which is reckless of law and the legal rights of citizens. *Bowles v. Lowery*, 59 South. 696, 697, 5 Ala. App. 555.

"Malice" in law does not, as is generally understood, mean spite or ill will, but means the intentional doing of a wrongful act. *Williams v. Williams*, 111 S. W. 837, 838, 132 Mo. App. 266.

An instruction defining "malice" as the doing of a wrongful act intentionally is correct. *Butcher v. Hoffman*, 73 S. W. 266, 268, 99 Mo. App. 239.

"Malice" has always been divided into two kinds: Implied malice, or malice in law, and express malice, or malice in fact." *Lauder v. Jones*, 101 N. W. 907, 915, 13 N. D. 525 (quoting and adopting *Gambrill v. Schooley*, 52 Atl. 500, 508, 95 Md. 260, 63 L. R. A. 427).

"Malice" is not necessarily personal hate, but is rather an intent and disposition to do a wrongful act greatly injurious to another. *Chicago, R. I. & P. Ry. Co. v. Whitten*, 119 S. W. 835, 837, 90 Ark. 462, 21 Ann. Cas. 726.

"Malice" comprehends ill will, a wickedness of disposition, cruelty, recklessness, a

mind regardless of social duty. *Brett v. State*, 47 South. 781, 783, 94 Miss. 609.

"Malice" is the expression of a wicked and depraved heart and mind and of a cruel disposition. *State v. Harmon* (Del.) 60 Atl. 866-868, 4 Pennewill, 580.

"Legal malice" is defined as an act growing out of the wicked or mischievous intention of the mind; an act showing a wanton inclination to mischief, an intention to injure or wrong, and a depraved inclination to disregard the rights of others. *Morasca v. Item Co.*, 52 South. 565, 566, 126 La. 426, 30 L. R. A. (N. S.) 315.

"Malice" in a trespass need not be ill will or hatred; it being sufficient that the trespass be intentional and in known violation of the owner's rights. *Southern Ry. Co. v. McEntire*, 53 South. 158, 159, 169 Ala. 42.

"Malice" implies wickedness, or the willful and intentional doing of a wrongful act, without just cause or excuse, and is implied from an unlawful act, willfully done, till the contrary is shown. *State v. Murphy*, 68 S. E. 570, 86 S. C. 268.

"Malice" is implied by law from every deliberate cruel act committed by one person against another, no matter how sudden such an act may be, as the law construes that he who does a cruel act voluntarily does it maliciously. *State v. Mills* (Del.) 69 Atl. 841, 842, 6 Pennewill, 497.

Hatred, ill will, or actual malice towards the injured party is not a necessary ingredient of legal malice as applied to torts, nor is it necessary that the act complained of proceed from a spiteful, malignant, or revengeful disposition. If it be wrongful, unlawful, and intentional, and the natural and probable result of the act is to accomplish the injury complained of, "malice" is implied. *Flandermeyer v. Cooper*, 98 N. E. 102, 108, 85 Ohio St. 327, 40 L. R. A. (N. S.) 860, Ann. Cas. 1913A, 983.

"Legal or implied malice," as distinguished from ill will or malice in the vernacular sense of the word, is defined to be the intentional doing of a wrong act without just cause or excuse. *Ickenroth v. St. Louis Transit Co.*, 77 S. W. 162, 166, 102 Mo. App. 597.

Where the court charged that "malice" meant wickedness, and that, when a man did a thing with a malicious heart, it meant a heart devoid of social duty and fatally bent on mischief, a charge defining malice as the willful and intentional doing of a wrongful act by one knowing the act to be against the law, and by one doing it willfully, was not objectionable as insufficiently defining "malice." *State v. Crosby*, 70 S. E. 440, 442, 88 S. C. 98.

"Malice," in the law, means the intentional doing of a wrongful act without justi-

fication or excuse. A "wrongful act," within the meaning of this definition, is any act which, in the ordinary course, will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right. *Brennan v. United Hatters of North America*, Local No. 17, 65 Atl. 165, 171, 73 N. J. Law, 729, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698.

"In 5 Words and Phrases, p. 4298, 'malice' is defined as follows: 'Malice, in common acceptation, means ill will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse.' Bouvier defines malice as being: 'A wicked intention to do an injury.' Webster defines the word to mean: 'Extreme enmity of heart; malevolence; a disposition to injure others without cause, from mere personal gratification, or from a spirit of revenge,' etc." *Lynch v. People*, 137 Ill. App. 444, 446.

In general a malicious act involves all that is usually understood by the term "willful," and is further marked by either hatred or ill will toward the party injured or by such utter recklessness and disregard of the rights of others as denotes a corrupt or malevolent disposition. It is true that "malice" may be and is often implied or presumed from the willfulness of the wrongful act. *State v. Willing*, 105 N. W. 355, 356, 129 Iowa, 72.

"Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set, and actually accomplishing that result, be actionable unless there was actual malice. 'Malice,' as here used, does not merely mean intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and, if a wrongful act is done to the detriment of the right of another, it is malicious, and an act maliciously done with the intent and purpose of injuring another is not lawful competition." *O'Brien v. People ex rel. Kellogg Switchboard & Supply Co.*, 75 N. E. 108, 115, 216 Ill. 354, 108 Am. St. Rep. 219, 3 Ann. Cas. 966 (quoting and adopting definition in *Doremus v. Hennessy*, 52 N. E. 924, 925, 176 Ill. 608, 43 L. R. A. 797, 68 Am. St. Rep. 208); *Everett Waddey Co. v. Richmond Typographical Union* No. 90, 53 S. E. 273, 276, 105 Va. 188, 5 L. R. A. (N. S.) 792, 8 Ann. Cas. 798.

Whatever is done willfully and purposely, whether the motive is to injure accused, to gain some advantage to prosecutor, or through mere wantonness or carelessness, if at the same time wrong or unlawful within



the knowledge of the actor, is done maliciously, and personal ill will or desire for revenge is not essential to the existence of "malice." *Gulsky v. Louisville & N. R. Co.*, 52 South. 392, 394, 167 Ala. 122.

"Malice," in legal proceedings, does not necessarily mean personal ill will or spite. It means a wrongful act done intentionally without just cause or excuse. *Pittsburg, J., E. & E. R. Co. v. Wakefield Hardware Co.*, 50 S. E. 571, 573, 138 N. C. 174, 3 Ann. Cas. 720.

An instruction, defining legal "malice" as where a party has ill will toward another, bad feeling, bad blood, something of that kind, held proper. *State v. Reeder*, 51 S. E. 702, 703, 72 S. C. 223.

The term "malice," in its ordinary sense, implies hatred, spite, or ill will; but in legal parlance it is frequently used in a different sense, depending on the connection, and may mean "a wrongful act done intentionally without just cause or excuse." In legal parlance, malice "may be actually implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse. In civil controversies, the very essence of malice is a disposition or willfulness to do a wrongful act greatly injurious to another." *Kavanaugh v. McIntyre*, 112 N. Y. S. 987, 990, 128 App. Div. 722 (quoting 5 Words and Phrases, p. 4298 et seq.).

Any malice which is an ingredient in a tort consisting of an act the direct object of which is to injure another's property is malice in law; that is, the intent to injure, as distinguished from the intent to do an act which may incidentally injure. *Albro J. Newton Co. v. Erickson*, 126 N. Y. Supp. 949, 953, 70 Misc. Rep. 291.

"Malice" in common acceptance means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. *McGurk v. Cronenwett*, 85 N. E. 576, 577, 199 Mass. 457, 19 L. R. A. (N. S.) 561.

The term "malice," as used in *Hurd's Rev. St. 1906*, c. 72, § 2, authorizing the discharge of persons arrested in civil actions except when "malice" is of the gist of the action, signifies a wrong inflicted on another with an evil intent or purpose. *Kellar, Ettinger & Fink v. Norton*, 81 N. E. 1087, 1038, 228 Ill. 356.

"Malice" excludes passion, and passion presupposes the absence of malice. *State v. Edmunds*, 104 N. W. 1115, 1116, 20 S. D. 135.

"By 'malice' or 'malicious' is meant a wish or desire to vex, harass, or annoy another." *Kerley v. Gernscheid*, 106 N. W. 136, 137, 20 S. D. 363.

"Malice" arises from the voluntary doing or saying something without just cause or excuse, which is likely to injure another, and

which shows a spirit lacking in proper regard for social duty and the rights of others, even when said or done without particular ill will. *Israel v. Israel*, 84 S. W. 453, 456, 109 Mo. App. 366.

In an action of tort, an instruction defining "malice" as "the doing of any act" injurious to another without just cause is erroneous for omitting the word "intentional" before the word "doing." *Hanley v. Blandino* (Tex.) 89 S. W. 1108, 1109.

To make the conduct of a fraternal association, in expelling a member, actionably malicious it is not necessary that "malice" in the sense of hatred or ill will, on the part of the defendant toward appellant, be shown. "Malice" in such case would be sufficiently shown if it were proven that they acted knowingly and willfully in the violation of the rights of appellant and to his injury. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 91 S. W. 834, 839, 41 Tex. Civ. App. 176.

"Malice," as usually understood, has its foundation in ill will, and is evidenced by an attempt wrongfully to vex, injure, or annoy another. This is "malice in fact," and is that referred to in *Pen. Code*, § 7, subd. 4, declaring that the words "malice" and "maliciously" import a wish to vex, annoy, or injure another person. There is another sort of malice, the presumption of the existence of which is raised by the law in certain cases on certain proofs, and this is the malice described in the same section as "an intent to do a wrongful act, established either by proof or presumption of law." This is a malice of pleading and proof made necessary by the exigencies of definitions of offenses against the law, and may exist with malice in fact, but may also exist independent thereof, and in some instances is conclusively presumed against a defendant, while in others the presumption is rebuttable. *Davis v. Hearst*, 116 Pac. 530, 587, 160 Cal. 143.

#### As justifying punitive damages

Legal malice, as distinguished from actual malice, will justify an award of punitive damages. The "malice" which would justify an award of punitive damages merely implies the intentional doing of a wrongful act without just cause or excuse. *Lampert v. Judge & Dolph Drug Co.*, 141 S. W. 1095, 1098, 238 Mo. 409, 37 L. R. A. (N. S.) 533, Ann. Cas. 1913A, 351.

"Malice" essential to justify punitive damages does not mean ill will against a person, but a wrongful act done intentionally and without just cause is done with malice. *McMillen v. Elder*, 140 S. W. 917, 919, 160 Mo. App. 399.

Exemplary damages are allowed in enhancement merely of ordinary damages, the propriety of allowing the same depending en-

tirely on the malice or wantonness of the defendant, "malice" in that sense meaning not general malice, nor malice exhibited in other matters or at other times, but malice in the very matter he is found liable for. *Moore v. Duke*, 80 Atl. 194, 197, 84 Vt. 401.

The term "malice," as used in the rule that, wherever an injury complained of had been inflicted with malice or wantonly and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person, is not merely the doing of an unlawful or injurious act, but the word implies that the act complained of was conceived in a spirit of mischief or a criminal indifference to civil obligation. *Philadelphia, B. & N. R. Co. v. Green*, 71 Atl. 986, 989, 110 Md. 32.

In order to justify the imputation of "malice," within the rule of punitive damages, the injury must have been conceived in a spirit of mischief and partake of a criminal or wanton nature. *Baxter v. Campbell*, 97 N. W. 386, 387, 17 S. D. 475.

For the purpose of determining whether exemplary damages are properly allowed, the word "malice" means that the act done must have been without right or justifiable cause. *Smith v. Morgantown Ice Co.*, 74 S. E. 961, 963, 159 N. C. 151.

"Malice," in 2 *Rap. & L. Law Dict.* p. 784, is defined as follows: "Malice," in common acceptation, means ill will against a person; but, in its legal sense, it means a wrongful act done intentionally, without just cause or excuse." In 2 *Bouv. Law Dict.* (Rawle's Ed.) p. 295, it is defined as follows: "A malicious act is a wrongful act intentionally done without cause or excuse." In defining "malicious," Black, in his *Law Dictionary* (page 745), says: "Evinced malice; done with malice and an evil design; willful." An instruction that "by 'malicious,' as used in this instruction, is meant a doing of the wrongful act without legal right" was wrong as authorizing exemplary damages for any entry without legal right on the premises of another. The instruction should have used the word "intentional." *Ohio Valley Tel. Co. v. Meyer* (Ky.) 56 S. W. 673, 674.

In an action by a street car passenger for injuries caused by an assault by the conductor, the charge that, if the jury found for plaintiff, then, in assessing damages, they were not limited to physical injury inflicted, if any, but in addition thereto, if they found that the wrongful acts of the conductor were "malicious" (i. e., the intentional doing of a wrongful act without cause or excuse), they might allow such punitive damages as would be a punishment and a wholesome warning to others, in the absence of a request for a more specific instruction on the measure of damages, was not objectionable as

misleading. *Mills v. Metropolitan St. Ry. Co.*, 137 S. W. 1006, 1007, 157 Mo. App. 529.

#### In alienation of affections

"The term 'malice,' as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another." Hence the law implies malice, where defendant unwarrantedly alienated the affections of plaintiff's husband. *Sickler v. Manix*, 93 N. W. 1018, 68 Neb. 21 (citing *Weckerly v. Geyer* [Pa.] 11 Serg. & R. 89).

In an action for alienation of a wife's affections, the term "malice" does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but, if the conduct was unjustifiable and actually caused the injury, malice in law will be implied. *Boland v. Stanley*, 115 S. W. 163, 166, 88 Ark. 562, 129 Am. St. Rep. 114.

#### In bankruptcy act

The provision of the bankruptcy act, excepting from the operation of a discharge judgments for "malicious injuries," etc., contemplates something more restricted than "malice" in the broader sense. *Flanders v. Mullin*, 66 Atl. 789, 80 Vt. 124, 12 Ann. Cas. 1010.

The term "malicious," as used in Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550, providing that a discharge in bankruptcy shall relieve the bankrupt from all his provable debts, except judgments in actions for willful and malicious injuries to the person or property of another, means nothing more than that disregard of duty which is involved in the intentional doing of a wrongful act to the injury of another. *McChristal v. Clisbee*, 76 N. E. 511, 190 Mass. 120, 3 L. R. A. (N. S.) 702, 5 Ann. Cas. 769.

The word "willful," as used in Bankr. Act July 1, 1898, c. 541, § 17, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1907, p. 1026), providing that a discharge in bankruptcy shall relieve the bankrupt from all provable debts except liabilities for obtaining property by false pretenses, or false representations, or for "willful and malicious" injuries to the person or property of another, means nothing more than intentional; while the word "malice," as there used, is intended to imply nothing more than a disregard of duty which is involved in the intentional doing of a willful act to the injury of another. *Kavanaugh v. McIntyre*, 112 N. Y. Supp. 987, 990, 128 App. Div. 722.

Where a lessee assigned his lease to his wife with the consent of the landlord, and the landlord subsequently instituted summary proceedings to dispossess the lessee with-

out making the wife a party, and under the judgment of dispossession the landlord, through agents, took possession of the premises and removed the wife's property and forcibly removed the wife, a judgment for the wife for damages for the acts of the landlord was based on "willful" and "malicious" acts, within Bankruptcy Act July 1, 1898, c. 541, § 17, providing that a discharge in bankruptcy does not release the bankrupt from judgments for willful and malicious injuries to the person or property of another; the word "willful" meaning nothing more than "intentional," and the word "malice" in its legal sense meaning a wrongful act done intentionally, without just cause or excuse. In re Munro, 195 Fed. 817, 823 (citing 5 Words and Phrases, pp. 4298-4312).

"Malice, in common acceptation, means ill will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act and done intentionally. If I am arraigned of felony and willfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not." The law will imply that degree of malice in an act of criminal conversation which is sufficient to bring a judgment for damages therefor within the exception mentioned in Bankr. Act July 1, 1898, c. 541, § 17, subd. 2, 30 Stat. 550, declaring that judgments for willful and malicious injuries to the person or property of another shall be exempted from a discharge in bankruptcy. Tinker v. Colwell, 24 Sup. Ct. 505, 508, 193 U. S. 473, 48 L. Ed. 754.

#### In criminal law

"Malice" is an essential ingredient of the crime of murder of either degree, and it is a condition of the mind or heart, not being restricted to spite or malevolence toward the particular person slain, but also including that general malignity and reckless disregard of human life which proceed from a heart void of a just sense of social duty and fatally bent on mischief. State v. Underhill (Del.) 69 Atl. 880, 882, 6 Pennewill, 491; State v. Wiggins (Del.) 76 Atl. 632, 634, 7 Pennewill, 127; State v. Brown (Del.) 61 Atl. 1077, 1078, 5 Pennewill, 339; State v. Watson (Del.) 82 Atl. 1066, 1067; State v. Tilghman (Del.) 63 Atl. 772, 773, 6 Pennewill, 44; State

v. Johns (Del.) 65 Atl. 763, 764, 6 Pennewill, 174; State v. Honey (Del.) 65 Atl. 764-766, 6 Pennewill, 148; State v. Powell (Del.) 61 Atl. 966, 971, 5 Pennewill, 24; State v. Brown (Del.) 80 Atl. 146, 149, 2 Boyce, 405; State v. Bell (Del.) 62 Atl. 147, 148, 5 Pennewill, 192; State v. Roberts (Del.) 78 Atl. 305, 309, 2 Boyce, 140; State v. Russo (Del.) 77 Atl. 743, 745, 1 Boyce, 538; State v. Reese (Del.) 79 Atl. 217, 220, 2 Boyce, 434; State v. Todd, 92 S. W. 674, 676, 194 Mo. 377; State v. McCarver, 92 S. W. 684, 686, 194 Mo. 717.

"Malice" is the ingredient that characterizes murder, and distinguishes it from homicide of other grades. It is express when admitted or asserted, or may be implied from any unlawful acts of the assailant which in itself denotes a wicked heart fatally bent on mischief, or a reckless disregard of human life. State v. De Paolo (Del.) 84 Atl. 213, 214.

In criminal law "malice" may denote that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. Alt v. State, 129 N. W. 432, 436, 88 Neb. 259, 35 L. R. A. (N. S.) 1212.

"Malice," as used in the law of homicide, means a wrongful act done intentionally without just cause or excuse. State v. Kinder, 83 S. W. 964, 969, 184 Mo. 276.

"Malice" is a deliberate intention unlawfully to take human life. Robinson v. State, 58 S. E. 842, 843, 129 Ga. 836.

Legal "malice" is the intent unlawfully to take human life in cases where the law neither mitigates nor justifies the killing. Mann v. State, 53 S. E. 324, 326, 124 Ga. 760, 4 L. R. A. (N. S.) 934; Tucker v. Same, 66 S. E. 250, 251, 133 Ga. 470.

"Malice," which is a necessary element of murder in the first and second degrees, means a killing without legal excuse, and is presumed from killing with a deadly weapon. State v. Roberson, 64 S. E. 182, 185, 150 N. C. 837.

The law implies malice, where there is a homicide with a deadly weapon, and there are no circumstances of mitigation, justification, or excuse. Clardy v. State, 131 S. W. 46, 47, 96 Ark. 52.

"Malice," in homicide, is a condition of the mind or heart, and is not restricted to spite or malevolence toward decedent, and includes that general malignity and reckless disregard of human life which proceeds from a heart fatally bent on mischief. State v. Brooks (Del.) 84 Atl. 225, 227.

"Malice," legally speaking, in relation to murder, is a conscious violation of law to the prejudice of another; evil design in general; the dictates of a wicked, depraved, and malignant heart. United States v. Hart, 162 Fed. 192, 194.

Though one's heart may be full of sin, it is not legally malicious, unless it prompts the willful or intentional doing of a wrongful act without just cause or excuse. *State v. Ferguson*, 74 S. E. 502, 506, 91 S. C. 235.

"Legal malice," as applied to homicide, is not ill will or hatred, but is an unlawful intention to kill without justification or mitigation existing at the time of killing. The intention need not exist for any length of time before the killing, and a man may form the intention to kill, do the killing instantly, and regret the deed as soon as done. *Long v. State*, 56 S. E. 444, 446, 127 Ga. 350 (citing *Bailey v. State*, 70 Ga. 617 [29]); *Weeks v. State*, 3 S. E. 323 [4], 79 Ga. 37).

"Malice," in homicide, includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill will towards an individual, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done with a wicked mind, where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty and fatally bent on mischief. Malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned and malignant heart. *Parsons v. People*, 75 N. E. 993, 996, 218 Ill. 386.

"Malice" in law does not necessarily mean hate or ill will, but is that mental condition which prompts the willful doing of an unlawful act; and so, in a prosecution for killing an officer, an instruction that if the accused, being subject to arrest, merely killed the officer to escape arrest the killing is malicious, is proper. *McGuffin v. State* (Ala.) 59 South. 635, 636.

"Malice" in common acceptation means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. *Bromage v. Prosser*, 10 E. C. L. 321. In law "malice" is a term of art, importing wickedness, and excluding a just cause or excuse. *State v. Doig* (S. C.) 2 Rich. 182. There can be no doubt that malice is presumed from an intentional killing, in the absence of facts or circumstances in evidence tending to show want of malice. *State v. McDaniel*, 47 S. E. 384, 387, 68 S. C. 304, 102 Am. St. Rep. 661.

"Malice" is not restricted to spite or malevolence toward the deceased in particular, but in its legal sense it is understood to mean the general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of a just sense of social duty and fatally bent on mischief. Malice is implied by law from every deliberate, cruel act committed by one person against another, no matter how sudden such act may be; for the law considers that he who does a cruel act voluntarily does it

maliciously. *State v. Brinte* (Del.) 58 Atl. 258, 262, 4 Pennewill, 551.

In the statute declaring it murder in the first degree for any person to purposely and in his deliberate and premeditated malice kill another, "malice" is not confined to ill will toward an individual, but it is intended to denote an action flowing from any wicked and corrupt motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duties and fully bent on mischief, indicates malice, within the meaning of the law. Malice may be either expressed or implied. Express malice may appear from all the evidence and circumstances of the alleged killing. Implied malice may appear where there is no just cause or excuse of the alleged killing. *State v. Lindgrind*, 74 Pac. 565, 566, 33 Wash. 440.

"Malice," which is a condition of the mind, and is not restricted to spite or malevolence toward a particular person, but includes general malignity and reckless disregard of human life, is an essential to the crime of murder. *State v. Short* (Del.) 82 Atl. 239, 241, 2 Boyce, 491.

"Malice" in homicide does not mean mere spite or ill will, as generally understood, but signifies an unlawful state of the mind, and such state of the mind as one is in who intentionally does an unlawful act." *State v. Brown*, 79 S. W. 1111, 1112, 181 Mo. 192.

"Malice," in homicide "does not mean mere spite or ill will, as it is ordinarily understood, but means that condition of the mind which prompts one person to take the life of another without just cause or justification, and it signifies a state or disposition which shows a heart regardless of social duties and fatally bent on mischief." *State v. Atchley*, 84 S. W. 984, 989, 186 Mo. 174.

"Malice" is a condition of the mind or heart." As used in the definition of murder, the term is not restricted to spite or malevolence toward the particular person slain, but includes that reckless disregard of human life which proceeds from a heart void of a just sense of social duty and fatally bent on mischief. Wherever the fatal act is done deliberately or without adequate cause, the law presumes that it was done with "malice," and the burden is on the prisoner to show that the act was not so done. *State v. Powell* (Del.) 61 Atl. 966, 971, 5 Pennewill, 24.

"Malice," in law, is manifested by the intentional doing of a wrongful act to the injury of another, without just cause or excuse; and in the law of homicide it may mean either an intent to do either serious bodily harm or to take life. *State v. Silverio*, 76 Atl. 1069, 1072, 79 N. J. Law, 482.

"Malice" is the chief and distinguishing characteristic of murder, is either express

or implied, and may be proven by a deliberately formed design to kill, by the preparation of the weapon or other means for doing great bodily harm, by circumstances of brutality attending the act, or by previous hostility, or threats and declarations of intention to kill, or to do serious injury. *Esterline v. State*, 66 Atl. 269, 270, 105 Md. 629.

The "malice" essential to constitute murder is not restricted to spite or malevolence towards decedent, but means that general malignity or recklessness which proceeds from a heart devoid of a just sense of social duty and fatally bent on mischief, and is implied by law from every deliberate cruel act committed by one person against another; and where the act from which death ensues appears *prima facie* to have been committed deliberately, the law presumes that it was done in malice, and accused must show that the offense is of a mitigated character and does not amount to murder. *State v. Blackburn* (Del.) 75 Atl. 536, 539, 7 Pennewill, 479.

Under the statute making any person who willfully and maliciously burns any dwelling house, etc., guilty of arson, etc., the malice intended by the law signifies the intent from which flows the unlawful act, committed without legal justification; and when the act constituting the attempt is proved to have been done, and to have been done willfully, it is then inferred to have been done maliciously. *State v. Lockwood* (Del.) 74 Atl. 2, 3, 1 Boyce, 28.

The "malice" which would make an act murder may be proved by direct evidence, or may be implied from any unlawful act, indicating a wicked heart bent on mischief, or a reckless disregard of human life, such as the deliberate selection and use of a deadly weapon. *State v. Jackson* (Del.) 82 Atl. 824, 825.

In a prosecution for murder, "malice" may be implied from any unlawful act denoting a wicked heart bent on mischief, and so the deliberate selection and use of a deadly weapon upon another is evidence of malice. *State v. Stockley* (Del.) 82 Atl. 1078, 1079.

Where a killing is accomplished with a deadly weapon, malice is presumed, in the absence of evidence to the contrary. *State v. Primrose* (Del.) 77 Atl. 717, 719, 2 Boyce, 164; *Same v. Russo* (Del.) 77 Atl. 743, 745, 1 Boyce, 538.

Wherever murder is done deliberately or without adequate cause, the law presumes that it was done with malice; and the burden is on the prisoner to show that the act was not malicious. *State v. Brown* (Del.) 80 Atl. 146, 149, 2 Boyce, 405; *Same v. Bell* (Del.) 62 Atl. 147, 148, 5 Pennewill, 192; *Same v. Primrose* (Del.) 77 Atl. 717, 719, 2 Boyce, 164; *Same v. Roberts* (Del.) 78 Atl. 305, 309, 2 Boyce, 140; *Same v. Russo* (Del.) 77 Atl. 743, 745, 1 Boyce, 538.

"Malice," essential to murder of the second degree, is implied by law from every unlawful and cruel act committed by one person against another, so that, where the killing is done with a deadly weapon likely to produce death it is presumed to have been done maliciously. *State v. Roberts* (Del.) 78 Atl. 305, 310, 2 Boyce, 140.

"Malice," in the law of homicide, is a condition of the mind or heart, which may be shown by the deliberate selection and use of a deadly weapon, or by antecedent menaces or threats, such as disclose a purpose on the part of accused to commit the act charged. Malice, in the law of homicide, may be implied from any unlawful act, such as in itself denotes a wicked heart fatally bent on mischief, or a reckless disregard of human life, or from an act from which death ensues, unaccompanied by circumstances of justification, excuse, or mitigation, and on such act being shown it is incumbent on accused to show to the satisfaction of the jury that the killing was not malicious. *State v. Johnson* (Del.) 78 Atl. 605, 606, 2 Boyce, 49.

"Malice" may be implied when an act which produces death is attended by such circumstances as are the ordinary symptoms of a wicked and depraved spirit, or from attending circumstances of atrocity and cruelty, or from the unlawful use of a deadly weapon; and, where an unlawful homicide is shown and no circumstances of mitigation or excuse appear, malice will be presumed. *State v. Kritchman* (Conn.) 79 Atl. 75, 77.

"Under Pen. Code, art. 4, § 7, defining the words 'malice' and 'maliciously' as importing a wish to vex, annoy, or injure another person, or an intent to do a wrongful act established either by proof or presumption of law," where a defendant was on trial for assault in the first degree, the crime involved a specific intent as the gist of the offense, and it was error for the court to instruct that, when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent, and the law presumes that a person intends the ordinary consequences of any voluntary act committed by him. *State v. Schaefer*, 88 Pac. 792, 793, 35 Mont. 217.

A charge defining murder substantially as it is defined in Pen. Code, § 188, and stating that malice does not necessarily mean that the accused must have entertained toward the deceased feelings of spite, hatred, or ill will, but that the word meant more under the statute, and that there might be legal malice where there was no spite or hatred or ill will, and explaining that an unlawful act done intentionally, without just cause or excuse, is an act, in the contemplation of law, done with malice as that word is understood in criminal judicature,

was not erroneous. *People v. McRoberts*, 81 Pac. 734, 736, 1 Cal. App. 25.

Where, in a prosecution for homicide, the court defined "malice," as an element of murder, as a deliberate intention unlawfully to take away the life of a fellow creature, without provocation or under circumstances showing an abandoned or malignant heart, as provided by statute, defendant was not prejudiced by the fact that the court also stated that "malice" imported a wish to vex, annoy, or injure another, or an intent to do a wrongful act, as provided by section 7; though such definition was inapplicable to "malice" as an element to murder. *People v. Waysman*, 81 Pac. 1087, 1 Cal. App. 246.

Rev. St. 1898, § 4053, defines "malice" and "maliciously" as importing a wish to vex, annoy, or injure another person, or an intent to do a wrongful act. Section 4427 provides that every person who willfully, unlawfully, and maliciously administers any poison to an animal, the property of another, is punishable. Under such sections, the fact that the owner of a dog poisoned by defendant was unknown to defendant did not preclude a finding that the poison was administered maliciously. *State v. Coleman*, 82 Pac. 465, 466, 29 Utah, 417.

On the subject of murder, and in defining "malice," the court properly charged that it was a wicked condition of the heart, a wicked purpose, a performed purpose to do a wrongful act without sufficient legal provocation. *State v. Gallman*, 60 S. E. 682-686, 79 S. C. 229.

"'Malice' is implied when an act dangerous to others is done so recklessly or wantonly as to evince depravity of mind and disregard of human life." Where two persons fought with firearms in a public place, their reckless disregard of law amounted to malice, rendering both guilty of murder. *State v. Lalliston*, 54 S. E. 427, 141 N. C. 857, 115 Am. St. Rep. 705.

An instruction that malice has been defined to be a term of art importing wickedness and excluding just cause and excuse is not erroneous, on the ground that it leads the jury to believe that mere wickedness is malice. *State v. Miller*, 53 S. E. 426, 427, 73 S. C. 277.

An instruction was held proper which defined "malice," as applied to assault with intent to kill, as "the intent to take human life unlawfully, where there are no circumstances of justification or mitigation for the act if the life should be taken as intended. It means the deliberate, intentional use of a deadly weapon for the purpose of taking human life, from whatever motive it springs, if there are no circumstances surrounding the transaction which mitigates or justifies the act." *Napper v. State*, 51 S. E. 592, 593, 123 Ga. 571.

On a trial for murder, an instruction that "malice is the intentional killing of a person, knowing it to be wrong, intending to do it, knowing it to be wrong," without legal excuse, is not error, especially when followed by a full statement of the law as to manslaughter. *State v. Byrd*, 51 S. E. 542, 544, 72 S. C. 104.

After defining murder and malice, express and implied, in the language of the Penal Code (sections 60-62), it furnished no ground for reversal that the court added that malice was an unlawful intention to kill, without justification or mitigation. *Leonard v. State*, 66 S. E. 251, 253, 133 Ga. 435.

It is not error to charge that, whenever a person kills another with an intent to kill, that intent is malice, if it is a deliberate intention unlawfully to take human life. *Rhodes v. State*, 66 S. E. 887, 133 Ga. 723.

Where a homicide was committed by accused with an instrument which the jury found was a weapon likely to produce death, the law, from the use of such weapon, presumes malice and an intent to kill; there being evidence to authorize the finding of homicide unaccompanied with circumstances of mitigation. *Flanagan v. State*, 69 S. E. 171, 172, 135 Ga. 221.

In a murder trial where there was evidence furnishing a basis for implied malice, an instruction: "Malice is not confined to ill will toward an individual, but is intended to denote an action following from any wicked and corrupt motive—a thing done with a wicked mind—where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duties and fatally bent on mischief; hence malice is implied from any deliberate and cruel act against another, however sudden, which shows an abandoned and malignant heart"—was correct. *People v. Lucas*, 91 N. E. 659, 664, 244 Ill. 603.

It was held proper to instruct the jury that "'malice,' in its legal sense, denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. It means any willful and corrupt intent of mind, and as applied to this case, if you should be satisfied by all the evidence beyond a reasonable doubt that the defendant without just cause or excuse committed the offense charged in the manner and form as charged in the indictment, then it was done with malice or maliciously." *Cate v. State*, 114 N. W. 942, 944, 80 Neb. 611.

An instruction defining "murder in the second degree" as the killing of a human being "willfully, premeditatedly and with malice aforethought," and then defining "willfully" to mean intentionally, not by accident, "premeditatedly" to mean thought of beforehand for any length of time, however

short, and stating that "malice" did not mean mere hatred or dislike, but that condition of mind which prompted a person to intentionally take the life of another, and that "malice aforethought" meant malice with premeditation, properly defined "murder in the second degree." *State v. Myers*, 121 S. W. 131, 135, 221 Mo. 598.

"Malice" means that condition of the mind which prompts one to do a wrongful act intentionally, and to take the life of another without legal justification or excuse. It does not mean mere spite, hatred, or ill will, but it signifies the state of disposition which shows a heart regardless of social duty and fatally bent on mischief. Malice may be presumed from the intentional use of a deadly weapon in a manner likely to produce death. *State v. Vaughan*, 98 S. W. 2, 5, 200 Mo. 1.

In a prosecution for murder, the court charged that "malice is also necessary to murder in the first degree. The distinguishing feature, so far as malice is concerned, is that, in murder of the first degree, malice must be proven to your satisfaction beyond a reasonable doubt as an existing fact, while in murder of the second degree malice will be implied from the fact of an unlawful killing." Held that, if the instructions stood alone, the latter part of the paragraph might be erroneous, but as it was followed by an instruction defining malice as being that which the law infers from certain acts, however suddenly done, as when the fact of an unlawful killing is established and the facts do not establish malice beyond a reasonable doubt, though they tend to excuse or justify the act, then the law implies malice, and the murder is murder of the second degree, and also that if the killing is unlawful and done with implied malice aforethought, it would be murder in the second degree, the instructions taken together were correct. *Eggleston v. State (Tex.)* 128 S. W. 1105, 1109.

The term "malice" does not mean mere hatred or ill will, as the term is commonly understood, but it means the intentional doing of a wrongful act, and signifies that state of the mind or disposition that would prompt one man to take the life of another, or do him some great bodily harm, without just cause or excuse. *State v. Bond*, 90 S. W. 830, 831, 191 Mo. 555.

The distinguishing feature in the degrees of murder, so far as the element of malice is concerned, is that, in murder in the first degree, "malice" must be proved to the satisfaction of the jury beyond a reasonable doubt as an existing fact, while in murder in the second degree "malice" will be implied from the fact of the unlawful killing. *McLain v. State*, 90 S. W. 1107, 1108, 48 Tex. Cr. R. 549.

"Malice," as used in defining murder, does not mean mere spite or ill will, as gener-

ally understood, but signifies an unlawful state of the mind, and such state of the mind as one is in who intentionally does an unlawful act. *State v. Hottman*, 94 S. W. 237, 239, 196 Mo. 110.

"Malice" does not mean mere spite or ill will, as the term is commonly understood, but means the intentional doing of a wrongful act, and signifies that state of mind or disposition which would prompt one person to take the life of another or do him some great bodily harm without just cause or excuse. *State v. Tetrick*, 97 S. W. 564, 565, 199 Mo. 100.

Where one intentionally, willfully, without justification or excuse, and while his mind was cool enough to realize the nature of his acts, shot another with intent to kill, he was actuated by "malice." *Williams v. State*, 135 S. W. 552, 553, 61 Tex. Cr. R. 589.

"Malice," as an element of murder, contemplates wickedness and excludes a just or legal cause of excuse. It is "expressed" where there is positive direct evidence showing that, at the time of the killing, it was really entertained and "implied," where the evidence does not directly show that the malice was entertained at that time but is necessarily indirectly implied from the circumstances and facts which have been proved. *State v. Lee*, 60 S. E. 524, 525, 79 S. C. 223.

A charge on a trial for murder that malice included not only anger, hatred, ill will, and desire for revenge, but every other unlawful and unjustifiable motive; that a thing done with a wicked mind and attended with such circumstances as plainly indicated a heart regardless of social duty and fully bent on mischief indicates malice within the meaning of the law; and that the existence of malice is inferred from acts committed or words spoken—was not erroneous, nor was the substitution of the word "fully" for "fatally" prejudicial. *Maynard v. State*, 116 N. W. 53, 57, 81 Neb. 301.

As respects the offense of willfully and maliciously burning property of another, the "malice" must have as its object some person, ordinarily the owner of the property, and not the property itself; but it is not necessary that the offender knew who the owner was, it being enough that he was bent on mischief against the owner, whoever he might be. *State v. Leslie*, 115 N. W. 897, 898, 138 Iowa, 104, 128 Am. St. Rep. 160.

In a prosecution for assault with intent to kill, a charge that, if the jury believed from the evidence beyond a reasonable doubt that accused intentionally and maliciously shot at prosecuting witness with a gun with the intent to kill her, he should be convicted, and defining malice as including not only anger, hatred, and revenge, but every unlawful and unjustifiable motive used by a person in the commission of an act, was not erroneous

in view of Snyder's Comp. Laws 1909, § 2307, providing that every person who intentionally and wrongfully shoots, shoots at, or attempts to shoot at another with any kind of a firearm, with intent to kill any person, is punishable. *Bartell v. State*, 111 Pac. 669, 670, 4 Okl. Cr. 135.

"Malice" in law does not necessarily mean hate or ill will, but is defined as any unlawful act, willfully done, without just cause or legal excuse. It is that mental state or condition which prompts the doing of an unlawful act without legal justification or extenuation. *Patterson v. State*, 47 South. 52, 54, 156 Ala. 62.

An instruction that "malice" signifies a condition of the mind void of social duty and fatally bent on mischief, or an unlawful intention to kill or do some great bodily harm to another without just cause or excuse, is correct. *State v. Forsha*, 88 S. W. 746, 751, 190 Mo. 296, 4 L. R. A. (N. S.) 576.

Where the court at the request of the jury in a homicide case, returning for further instructions, read a definition of "malice" in a law book as not necessarily hatred or ill will, but as an intentional doing of an unlawful act, and that malice, as an ingredient of murder, was the killing of a human being without justification, excuse, or extenuation, and then stated that malice, as an ingredient of murder, did not necessarily mean hatred or ill will, but was the unlawful and willful killing of a human being without any legal excuse or justification, the definition adopted by the court was proper, and the definition read from the law book was not calculated to convey to the jury the impression that it was adopted as a part of the definition requested. *Coates v. State*, 56 South. 6, 8, 1 Ala. App. 35.

The "malice" essential to convict of murder may be ascertained from previous threats and measures taken in preparation, and it may also arise suddenly and be implied from circumstances, as from the intentional use at the outset of a deadly weapon. *Brown v. State*, 54 South. 305, 98 Miss. 786, 84 L. R. A. (N. S.) 811.

"Malice" essential to constitute murder, as distinguished from manslaughter, includes all those states of the mind in which a homicide is committed without legal justification, extenuation, or excuse, and where an unlawful homicide is shown to have been committed, and its attending circumstances disclose nothing to mitigate, extenuate, or excuse the act, "malice" on the part of the slayer is presumed. *State v. Marx*, 60 Atl. 690, 692, 78 Conn. 18.

#### In libel and slander

"Malice" in the law of slander is used in a popular sense. *Hubbard v. Allyn*, 86 N. E. 356, 359, 200 Mass. 166, 22 L. R. A. (N. S.) 780.

While it is true that in slander "malice" is the gist of the action, yet the term "malice" is always used in such cases in a legal sense. *Weller v. Western State Bank of Waukomis*, 90 Pac. 877, 882, 18 Okl. 478.

The word "malice," as used in the law of libel and slander, does not mean hatred or ill will, but the want of legal excuse for the publication. *Sheibley v. Nelson*, 121 N. W. 458, 460, 84 Neb. 393.

"Malice" in fact may be defined as a spiteful or rancorous disposition which causes an act to be done for mischief. Implied malice is sufficient to support an action for slander, where the other elements exist. Proof of express malice authorizes punitive damages. Where one charges another with larceny, the law imputes malice. *Lee v. Crump*, 40 South. 609, 610, 146 Ala. 655 (quoting and adopting definition in *Childers v. San Jose Printing & Publishing Co.*, 38 Pac. 903, 105 Cal. 284, 45 Am. St. Rep. 40).

"Malice" is presumed from the making by one person of derogatory statements with reference to another in regard to his competency or fitness for his trade or profession, and such derogatory language is slanderous per se." *Vial v. Larson*, 109 N. W. 1007, 132 Iowa, 208 (citing *Newell, Slander & Libel* [2d Ed.] 182, 393).

Malice, as used in cases of slander and libel, does not necessarily imply actual evil intent, but rather the want or absence of any legal excuse for the speaking or publication of the injurious words. Where slanderous words are actionable per se, malice is presumed. *McDonald v. Nugent*, 98 N. W. 506, 508, 122 Iowa, 651.

Where words are spoken which are slanderous per se, malice is presumed; but the malice which is thus presumed is known as legal malice, as distinguished from actual or express malice, or malice in fact. In an action for slander, the absence of actual malice will not defeat the action, and the party injured may recover his actual damages; but where actual malice is charged in a complaint, and more than compensatory damages are claimed for the injury, the actual motive or intent with which the publication was made becomes an important fact from which to determine the amount of damages to be awarded. *Wrege v. Jones*, 100 N. W. 705, 707, 13 N. D. 267, 112 Am. St. Rep. 679, 3 Ann. Cas. 482.

"The term 'malice,' as employed in the definition of libel per se, is often misunderstood by the general reader, and is sometimes misapprehended by lawyers. It does not necessarily mean personal hatred or ill will toward the person at whom the libel is directed. Legal malice in the publishing of a libel is not inconsistent with honesty of purpose and good motive. \* \* \* In other words, malice is the want of legal excuse for



an act done to the injury of another. Whoever gives currency to libelous matter (not protected as being privileged) must be prepared to prove its truth, if he would avoid liability to the party injured." *Morse v. Times-Republican Printing Co.*, 100 N. W. 867, 871, 124 Iowa, 707.

Where, in libel for newspaper articles, some of which did not refer to plaintiff, and some of which were not libelous per se, there was no averment of extrinsic facts that the articles referred to plaintiff or any innuendo from which it could be inferred that they charged plaintiff with such conduct as to render it libelous per se, an instruction that "malice" means the intentional doing of a wrongful act without excuse, and that if the articles published were libelous in whole or in part, and were published concerning plaintiff, and were not true, the law presumed that they were published maliciously, and it was not necessary to prove any malice to warrant a verdict for plaintiff, was erroneous, because it did not confine the presumption of malice to the articles which were libelous per se. *Flowers v. Smith*, 112 S. W. 499, 509, 214 Mo. 98 (citing and adopting *Mitchell v. Bradstreet Co.*, 22 S. W. 362, 116 Mo. loc. cit. 240, 20 L. R. A. 138, 38 Am. St. Rep. 592).

An averment of "malice," in an action for libel, is not equivalent to a charge that defendant wrote the libel knowing it was untrue. *Dickinson v. Hathaway*, 48 South. 136, 137, 122 La. 644, 21 L. R. A. (N. S.) 33.

"The unprivileged publication in writing or print of a false charge that another is guilty of a crime, or of a false charge which tends to expose another to public hatred or contempt, entitles the person thus defamed to recover of the publisher full compensation in damages for all the injury to his reputation, business, and feelings which the defamatory publication caused. A written or printed article of this character is libelous in itself. From its publication the conclusive presumption of actual damages to its victim, and of 'legal malice' (that is to say, of 'an act done wrongfully without legal justification or excuse'), at once arises. The fact that the publisher was without malice, in the popular acceptance of that term (that is to say, without ill will, bad motive, hatred, or intent to injure his victim), constitutes no defense to the latter's claim for compensatory damages, and no evidence to mitigate or reduce their amount, because the actual damages to the party libeled are the same whether they are inflicted by the publisher with a good or an evil intent, and the victim is as clearly entitled to full compensation for a wrong inflicted with a laudable motive, or through mistake or inadvertence, as for one perpetrated with a diabolical purpose or intent. The intent or purpose with which such a publication is made is immaterial in the trial of the claim for the actual or compensa-

tory damages which the party injured may seek. It is important only when a claim for exemplary damages is to be considered." *Post Pub. Co. v. Butler*, 137 Fed. 723, 726, 71 C. C. A. 309 (quoting and adopting definition given in *Palmer v. Mahen*, 120 Fed. 737, 741, 57 C. C. A. 41, 45).

"By 'legal malice,' as explained by Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 255 (E. C. L. R. vol. 10), is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act, without any proof of malice in fact. \* \* \* In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill will towards the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if, in pursuing that design, he willfully inflicts a wrong on others, which is not warranted by law, such act is malicious." *Star Pub. Co. v. Donahoe* (Del.) 58 Atl. 513, 517, 65 L. R. A. 980 (quoting and adopting definition in *Commonwealth v. Snelling* [Mass.] 15 Pick. 340).

The kind of "malice" which "overcomes and destroys the privileges is, of course, quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an 'indirect and wicked motive which induces the defendant to defame the plaintiff.'" *Denver Public Warehouse Co. v. Holloway*, 83 Pac. 131, 133, 34 Colo. 482, 3 L. R. A. (N. S.) 696, 114 Am. St. Rep. 171, 7 Ann. Cas. 840 (quoting and adopting *Hemmens v. Nelson*, 34 N. E. 342, 138 N. Y. 524, 20 L. R. A. 440; *Odgers, L. & S.* 267).

Pen. Code, § 242, defines criminal libel as a malicious publication, section 244 provides that a publication having such tendency is deemed malicious if no justification or excuse is shown, and section 718, subd. 3, provides that the terms "malice" and "malicious" each import an evil intent, wish, or design to annoy or injure another. Held, that a corporation may be convicted of criminal libel; the evil intent of its agents who published the libel being attributed to it. *People v. Star Co.*, 120 N. Y. Supp. 498, 500, 135 App. Div. 517.

Civ. Code, § 47, defines a "privileged communication" as one without malice, to a person interested therein, by one who is also interested; one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive innocent, or who is requested by the person interested to give the information; and sec-

tion 48 declares that the "malice" so referred to is not inferred from the communication or publication. Held, that "malice" as used in section 47 meant malice in fact, or a libel published with an actual, malicious intent. *Davis v. Hearst*, 116 Pac. 530, 540, 160 Cal. 143.

"By 'malice' is not meant, necessarily, spite or ill will, but it is also meant the doing of a wrongful act intentionally, without just cause or excuse; and if an article complained of was published of and concerning plaintiff, and was not true, and was a libel on him, then the law presumes it was published maliciously. \* \* \* Only legal malice is exacted, and on analysis this sinks into a myth or fiction, for so much malice as is necessary to afford compensation for actual damages is inferred from the fact that a false writing was published concerning plaintiff, although in truth the publisher felt no ill will, and believed he was telling the truth. This result eliminates malice from actions for libel, as a practical factor, save as a reason for awarding more than compensative damages or overcoming the defense of privileged communication." What is meant by "malice" in these actions is that the publication of the false matter was without legal excuse, or, to present the rule in a perfectly definite and intelligible form, that it was unprivileged. If it was a privileged communication, no malice is inferred from the publication, and the case fails, unless malice is otherwise proved, and where, through a mistake as to identity, plaintiff's picture was published in connection with an article which was false and libelous as to him, it was malicious. *Farley v. Evening Chronicle Pub. Co.*, 87 S. W. 565, 568, 118 Mo. App. 216.

#### **In malicious mischief**

Malice, as an element of malicious mischief, is not restricted to ill will or revenge against the owner or possessor of the property injured; but a willful or wanton injury to property, under circumstances indicating a malignant spirit or mischief, is sufficient to constitute malicious mischief, and such malice may be either expressed or implied. *State v. Wright (Del.)* 79 Atl. 399, 400, 2 Boyce, 393.

On a trial for malicious mischief in violation of Rev. Pen. Code, § 712, an instruction that such acts in relation to the property of another as evince a disposition of wanton deviltry and reckless disregard of the rights and property of another are, in law, malice, together with the charge that to justify a conviction the jury must find not only that accused willfully and intentionally, but that he wantonly and in a spirit of revenge, injured the property of another, sufficiently describes "malice," as defined by section 811 as importing a wish to annoy or injure another. *State v. Tarlton*, 118 N. W. 706, 708, 22 S. D. 495.

#### **In malicious prosecution**

"Malice" is a wrongful motive which prompts a wrongful act. The institution of criminal proceedings with any other motive than that of bringing a guilty person to justice is a malicious prosecution. *Rullison v. Collins*, 82 S. W. 748, 750, 5 Ind. T. 282 (quoting and adopting definition in *Addison, Torts [Wood's Ed.]* § 853; *Johns v. Marsh*, 52 Md. 323; *Garvey v. Wayson*, 42 Md. 173; *Harpham v. Whitney*, 77 Ill. 32).

The malice required to be shown is the wrongful motive prompting the prosecution, and may be established by proof of any motive other than that of bringing a guilty party to justice. *Moneyweight Scale Co. v. McCormick*, 72 Atl. 537, 540, 109 Md. 170.

In an action for malicious prosecution, a definition of malice as a "disposition to do the person prosecuted a wrong without legal excuse" was not prejudicial to plaintiff. *Gaither v. Carpenter*, 55 S. E. 625, 626, 143 N. C. 240.

The malice essential to sustain an action for malicious prosecution, does not mean personal ill will, but a wrongful act, knowingly and intentionally done, without just cause, constitutes malice. *Stanford v. A. F. Messick Grocery Co.*, 55 S. E. 815, 817, 143 N. C. 419.

"Malice" need not indicate anger or vindictiveness, but it imports bad faith in a malicious prosecution, or the want of sincere belief that the facts and circumstances justify the prosecution. *Griswold v. Griswold*, 77 Pac. 672, 673, 143 Cal. 617.

The fact that an action was commenced and prosecuted without probable cause may be considered by the jury on the question of malice. Actual malicious purpose or personal ill will is not essential to constitute the legal malice which must be shown to support an action for malicious prosecution. The malice required to support the action may be inferred by the jury from the want of probable cause. *Connelly v. White*, 98 N. W. 144, 145, 122 Iowa, 391.

"Malice," in law, is the intentional doing of a wrongful act without just cause or excuse. It is not sufficient, to sustain an action for malicious prosecution, to prove that the affidavit upon which the arrest was made was false. It must also appear that the affiant either knows it was false, or did not have reasonable and probable cause to believe it to be true. *Izzo v. Viscount*, 64 Atl. 953, 954, 74 N. J. Law, 65 (quoting and adopting *McFadden v. Lane*, 60 Atl. 367, 71 N. J. Law, 630).

"Malice," in its legal sense, as used in actions for malicious prosecution, "is not to be considered in the sense of spite or hatred against an individual, but of malus animus, and as denoting that the party is actuated

by improper and indirect motives," or, as defined by Newell, *Mal. Pros. c. 71, § 7, p. 239*, it means "a general wickedness of intent; a depraved inclination to do harm, or to disregard the rights or safety of mankind generally." *Campbell v. Baltimore & O. R. Co.*, 55 Atl. 532, 97 Md. 841 (quoting *Johns v. Marsh*, 52 Md. 323).

"Legal malice," as distinguished from "express" or "actual malice," and which is sufficient to support an action for maliciously suing out process, but not to support an award of punitive damages, consists in a wrongful act intentionally done, without just and lawful cause or excuse. *Wright v. Harris*, 76 S. E. 489, 492, 160 N. C. 542.

In an action for malicious prosecution, an instruction that: "'Malice' is defined as any indirect motive of wrong; \* \* \* and, in the legal sense, any unlawful act, which is done willfully and purposely to the injury of another, is, as against that person, malicious; and by malice is meant not the act, but the motive which prompts the act. It consists of a bad motive, or such reckless disregard of the rights of others as to show evil intent. It is an action based upon an improper motive, and does not necessarily presuppose personal hatred, ill will, or revenge. The improper motive or want of proper motive inferable from a wrongful act, based upon no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of the action. The malice necessary to be shown in order to maintain this action is not necessarily revenge or other base and malignant passion; whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malice. If, however, the accused is in fact guilty of the offense charged, that would be a complete defense in this action, and it would be immaterial whether the proceedings complained of were malicious or not"—was correct. *Miles v. Walker*, 92 N. W. 1014, 1016, 66 Neb. 728.

"Malice," as an element of malicious prosecution, does not necessarily mean anger, wrath, or vindictiveness, but, while any such ill feeling may constitute malice, it need be no more than the antithesis of bona fides, and hence particular malice or malicious or wrongful purpose, in the sense of personal ill will or malevolence existing toward the person prosecuted by the prosecutor is not required. *Downing v. Stone*, 68 S. E. 9, 10, 152 N. C. 525, 136 Am. St. Rep. 841, 21 Ann. Cas. 753.

Under Civ. Code 1910, § 4451, providing that malice may consist in personal spite, or in a general disregard of the right consideration of mankind directed by chance against the individual injured, a charge, in an action for illegal arrest and malicious

prosecution, that to constitute malice it would not be necessary to show ill will or hatred to the person injured, but that malice may be inferred from any offensive act, or any act of an offensive nature, which would show disregard of the person injured and a violation of proper consideration of him, was too broad, and made the definition turn rather on whether the act was offensive to the person injured than on the intent, purpose, or state of mind of the actor. *McPherson v. Chandler*, 72 S. E. 948, 949, 137 Ga. 129.

In an action for malicious prosecution, held, that it was proper to instruct the jury that: "'Malice' in law means an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling or spite or a desire to injure another. It is enough if defendant be actuated by improper or sinister motives. \* \* \* If the purpose of the arrest was anything else than to vindicate the law and punish crime, then they might infer that defendant had a malicious motive in causing the same." *Hackler v. Miller*, 114 N. W. 274, 276, 79 Neb. 209.

#### Negligence distinguished

The doing of an act without that ordinary prudence and discretion which persons of mature mind and sound judgment are presumed to have constitutes "negligence," but will not alone warrant an inference of "malice." Malice is distinguishable from mere negligence in that it arises from some purpose, while negligence arises from absence of purpose. The characteristic of negligence is inadvertence or an absence of an intent to injure. This does not imply that the act was done involuntarily or unconsciously, but merely that the person doing it was not conscious that the act constituted a want of reasonable care. *Jenkins v. Gilligan*, 108 N. W. 237, 238, 131 Iowa, 176, 9 L. R. A. (N. S.) 1087 (citing *Pickens v. South Carolina & G. R. Co.*, 32 S. E. 567, 54 S. C. 498).

#### Lack of probable cause distinguished

"'Malice' and 'lack of probable cause' are not convertible terms. Neither follows as a legal presumption from the other. The jury may infer malice as a fact from proof of want of probable cause; but they cannot infer a lack of probable cause from proof of malice. Both must be proved. Honesty of purpose precludes malice. Malice is any improper or sinister motive for instituting the suit. It need not spring from any spirit of malevolence, or be prompted by any malignant passion." While many authorities hold that probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that there were grounds for the attachment, the better rule and the one approved is that belief and rea-

sonable grounds must unite to constitute probable cause. However, the distinction may be more metaphysical than real. *Foster v. Pitts*, 38 S. W. 1114, 63 Ark. 387 (citing to the quotation *Lemay v. Williams*, 32 Ark. 166; *Cooley*, Torts, p. 185; *Spengler v. Davy*, 15 Grat. [56 Va.] 381; *Burkhart v. Jennings*, 2 W. Va. 242; *Commonwealth v. Snelling*, 15 Pick. [82 Mass.] 337; *Mitchell v. Wall*, 111 Mass. 492; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116; *Williams v. Hunter*, 14 Am. Dec. 597, note; *Bozeman v. Shaw*, 37 Ark. 160; *Frowman v. Smith*, 12 Am. Dec. 265, notes; and citing to the rule approved *King v. Colvin*, 11 R. I. 582, 584; *Newell*, Mal. Pros. p. 252).

### MALICE AFORETHOUGHT

As applied to murder, "malice aforethought" is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts done or words spoken. *Connell v. State*, 81 S. W. 746, 747, 46 Tex. Cr. R. 259.

The term "malice aforethought" involved in second-degree murder, within Code, § 4727, providing that whoever kills any human being with malice aforethought is guilty of murder, does not necessarily require an intent to murder, and may be implied where there is no intent to kill, such as an intent to commit a felony from which death results. *State v. Gibbons*, 120 N. W. 474, 475, 142 Iowa, 96.

Under Code, § 4728, providing that all murder perpetrated by means of poison is murder in the first degree, the administration of poison to another unlawfully, and with bad intent, constitutes malice aforethought, without a specific intent to kill; and hence an instruction that, if defendant, with bad intent, caused poison to be taken by deceased, which caused her death, he was guilty of murder in the first degree, otherwise he was not guilty, was not objectionable on the theory that such act might constitute manslaughter. *State v. Thomas*, 109 N. W. 900, 902, 135 Iowa, 717.

The use of the words "malice of forethought" in place of the words "malice aforethought," as provided by the form set out in the Code, does not impair the validity of the indictment as charging murder in the first degree, under Code 1907, § 7136, declaring the use of words conveying the same meaning as those in the statute sufficient. *Flowers v. State*, 56 South. 98, 100, 2 Ala. App. 65.

The malice which is an essential element in the offense of murder has always been described as "malice aforethought." It is descriptive of the state of mind of the slayer preceding and at the instant of the unlawful act of killing. Although no definite or appreciable space of time in law is required to be

shown for the existence of malice, yet it must be aforethought; that is, it must be related to the unlawful act in the nature of cause and effect. An indictment for murder in the second degree, charging that defendant "unlawfully and with malice aforethought did, etc.," was objectionable for failure to charge that the act was done with "malice aforethought." *Etheridge v. State*, 37 South. 337, 141 Ala. 29.

The phrase "malice aforethought" was properly defined as "the voluntary and intentional doing of an unlawful act, with the purpose, means, and ability to accomplish the reasonable and probable consequences of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief, by one of sound mind and discretion, the evidence of which is inferred from acts committed or words spoken." *Barr v. State*, 120 S. W. 422, 56 Tex. Cr. R. 372.

A charge in question requiring the homicide to have been committed "unlawfully, and with a mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which may be inferred from acts committed or words spoken and in the perpetration of robbery, and with 'malice aforethought,'" etc., embraces sufficiently the definitions of "malice aforethought." *Jones v. State*, 96 S. W. 930, 931, 50 Tex. Cr. R. 329 (citing *Martinez v. State*, 16 S. W. 797, 30 Tex. App. 129, 28 Am. St. Rep. 895; *Hedrick v. State*, 51 S. W. 252, 40 Tex. Cr. R. 532; *Rupe v. State*, 61 S. W. 929, 42 Tex. Cr. R. 477).

"Malice aforethought" means a thing done with a wicked and corrupt motive. It is not confined to anger, hatred, and revenge by one against another, although it evidences a thing done through anger, hatred, or revenge. It also evidences any other unjustifiable motive with which the act is done. Hence malice is not confined to ill will which one individual holds toward another, but it is intended to denote any action flowing from a wicked and corrupt motive. A thing done with a wicked mind, when the act has been attended with such circumstances as evince plain indications of a heart which regards not its social duty, and which is fatally bent on mischief, is done with malice." *State v. Wetter*, 83 Pac. 341, 346, 11 Idaho, 433.

The mere fact that a killing has been accomplished by means of poison does not show "malice aforethought," within the definition of murder as the unlawful killing of a human being with "malice aforethought." *State v. Phinney*, 89 Pac. 634, 13 Idaho, 307, 12 L. R. A. (N. S.) 935, 12 Ann. Cas. 1079.

"Malice," within the definition of murder in Pen. Code, § 187, as the unlawful killing of a human being with "malice aforethought," may be express or implied. *People v. Frank*, 83 Pac. 578, 579, 2 Cal. App. 283.

**Deliberation or premeditation implied**

"Malice aforethought" means that the act was done with malice and premeditation. *State v. Vaughan*, 98 S. W. 2, 5, 200 Mo. 1.

The phrase "malice aforethought" means a predetermination to do the act of killing without legal excuse, and it is immaterial how suddenly or recently before the killing such determination was formed. *Hill v. Commonwealth (Ky.)* 91 S. W. 1123, 1124 (quoting and adopting the definition in *Clark v. Commonwealth [Ky.]* 63 S. W. 740).

"Malice aforethought" means in law that it has been thought of beforehand, so that, to constitute murder, the evidence must show that the defendant thought of it beforehand, but as to the length of time it is immaterial." *Green v. United States*, 104 S. W. 1159, 1160, 7 Ind. T. 733.

"Express malice aforethought" is shown where one person kills another with a sedate, deliberate mind and formed design. *State v. Watson (Del.)* 82 Atl. 1086, 1087.

"Malice aforethought," as it exists in murder, is a deliberate and formed design to kill, which may be manifested by a lying in wait, antecedent threats, former grudge, ill will, spite, hatred, or any circumstances that show the accused's intent toward his victim at the time of the killing. *State v. Primrose (Del.)* 77 Atl. 717, 719, 2 Boyce, 164.

In a prosecution for murder, it was error, in attempting to define "malice aforethought," to charge the jury: "If the thought came to the mind (of the defendant), 'I will kill,' and he did kill immediately after that, it is thought of beforehand; that is, 'malice aforethought'"—since it made the conscious act of the defendant malicious, regardless of the fact whether he was acting in self-defense or otherwise. *Green v. United States*, 101 Pac. 112, 114, 2 Okl. Cr. 55.

To constitute an "assault with intent to murder" within Gen. St. 1146, the assault must be made with malice aforethought, and when an assault is actuated by malice, no matter how short a time it existed previous to the forming of the intent to kill, the malice is "malice aforethought." *State v. McGuire*, 80 Atl. 761, 765, 84 Conn. 470, 38 L. R. A. (N. S.) 1045.

An instruction, defining "malice aforethought" as a predetermination to do a wrongful act without lawful excuse, and that it was immaterial how suddenly or how recently such predetermination was formed in the mind, was not objectionable as including a predetermination to do a wrongful act in general without requiring that the wrongful act be to kill decedent. *Howard v. Commonwealth*, 139 S. W. 844, 845, 144 Ky. 644.

The phrase "malice aforethought," as used in an indictment charging willful murder and in the instruction defining willful murder and voluntary manslaughter, means

a predetermination to do the act of killing without legal excuse, and it is immaterial at what time before the killing such a determination was formed. *Ball v. Commonwealth*, 101 S. W. 956, 960, 125 Ky. 601.

On a trial for murder, it is proper to advise the jury that "malice aforethought" means a predetermination to do the act of killing without a legal excuse, and it is immaterial as to what time before the killing such a determination was formed. *Burns v. Commonwealth*, 124 S. W. 409, 412, 136 Ky. 468.

On a trial for murder, the court should instruct that the words "malice aforethought" mean a predetermination to do the act of killing without legal excuse, and that it is immaterial how suddenly or recently before the killing such determination formed. *Ewing v. Commonwealth*, 111 S. W. 352, 355, 129 Ky. 237.

An instruction that the words "with malice," as used in the instruction, denoted a wrongful act intentionally done, and that the term "aforethought," as used, meant a predetermination to do the act, however suddenly or recently formed before the act was done, sufficiently defined "malice aforethought," especially when taken in connection with another instruction defining "feloniously" as meaning to proceed from an evil heart or purpose, done with the deliberate intention to commit a crime, though the definition of malice aforethought did not require that the act be done "without legal excuse." *Potter v. Commonwealth*, 134 S. W. 462, 142 Ky. 378.

The phrase "malice aforethought" in an instruction declaring that, where the act of killing is done willfully, feloniously, and with malice aforethought, accused is guilty of murder, means a predetermination to do the act of killing without legal excuse, and it is immaterial how suddenly or recently before the killing such determination was formed. *Combs v. Commonwealth (Ky.)* 112 S. W. 658, 660.

Rev. Laws, c. 207, § 1, declares that murder committed with deliberately premeditated malice aforethought, or in the commission or attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree, and punishable with death. In a prosecution for such offense, the court charged that the words "deliberately premeditated malice aforethought" meant simply "thought upon, resolved upon beforehand, not a thing done suddenly, not a thing that comes into the mind of a sudden, and is done before there is time to think about it, but a thing thought upon or planned some time before, or thought upon long enough before the act is done so that it can reasonably be said to have become a purpose of the mind," that "no particular length of time is necessary" and il-

illustrated the same by stating that if a robber with a dirk or pistol turns a corner and meets a bank messenger with a roll of bills, and determines in one moment to get it, and the next shoots or stabs the messenger dead, takes the package, and flees, his malice was deliberately premeditated, though it occupied only a few seconds to accomplish. Held, that both the definition and illustration were proper. *Commonwealth v. Tucker*, 78 N. E. 127, 138, 140, 141, 189 Mass. 457, 7 L. R. A. (N. S.) 1056.

An instruction, in a prosecution for murder, that "malice aforethought" means with malice and premeditation is correct. *State v. McCarver*, 92 S. W. 684, 686, 194 Mo. 717.

"Malice aforethought," as it exists in murder, is a deliberate and formed design to kill, which may be manifested by a lying in wait, antecedent threats, former grudge, ill will, spite, hatred, or any circumstances that show the accused's intent toward his victim at the time of the killing. *State v. Primrose*, (Del.) 77 Atl. 717, 719, 2 Boyce, 164.

#### Ill will implied

"Malice aforethought," either expressed or implied, is manifested by the doing of an unlawful and felonious act intentionally and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured. *People v. Balkwell*, 76 Pac. 1017, 1019, 143 Cal. 259.

The intent essential to constitute an "assault with intent to murder" relates to the condition of the mind of accused, and it may arise from improper motives, as from hatred toward the person assaulted, or from an evil design in general, a wanton and depraved spirit, a mind devoid of social duty and fatally bent on mischief. To constitute an "assault with intent to murder" within Gen. St. § 1146, the assault must be made with intent to kill, and when an assault is actuated by malice, no matter how short a time it existed previous to the forming of the intent to kill, the assault committed is assault with intent to murder. *State v. McGuire*, 80 Atl. 761, 84 Conn. 470, 38 L. R. A. (N. S.) 1045.

"Malice aforethought" is manifested by the doing of an unlawful or felonious act intentionally and without legal cause or excuse. It does not imply a pre-existing hatred or enmity towards the individual injured. *People v. Fallon*, 86 Pac. 689, 690, 149 Cal. 287.

#### Maliciously distinguished

In a prosecution for mayhem, a request for a charge that before the accused could be convicted, the jury must be satisfied beyond a reasonable doubt that the act was done unlawfully, intentionally, and with malice aforethought, was properly refused, since the term "malice aforethought" is not necessarily synonymous with "maliciously," as used by the

statute defining mayhem. *Green v. State*, 44 South. 194, 195, 151 Ala. 14, 125 Am. St. Rep. 17, 15 Ann. Cas. 81.

"Maliciously" and "malice aforethought" do not mean the same thing. Malice comprehends ill will, a wickedness of disposition, cruelty, recklessness, a mind regardless of social duty, etc., while "malice aforethought" or "premeditated" design has a more intense meaning. They comprehend, not only what is included within the term "malice," but in addition thereto mean "premeditated malice." *Butt v. State*, 47 South. 781, 783, 94 Miss. 669 (citing 5 Words and Phrases, p. 4304; 1 Bish. Cr. Law [8th Ed.] p. 261; *Patterson v. State*, 66 Ind. 185; *Tutt v. Commonwealth*, 46 S. W. 675, 104 Ky. 299; *State v. Green*, 7 South. 793, 42 La. Ann. 644; *State v. Curtis*, 70 Mo. 594; *Cravey v. State*, 35 S. W. 658, 36 Tex. Cr. R. 90, 61 Am. St. Rep. 833).

#### MALICE IN LAW OR FACT

Malice in law is not personal hate or ill will of one person towards another. It refers to that state of mind which is reckless of law and the legal rights of the citizens in a person's conduct towards that citizen. *Foley v. Northrup*, 105 S. W. 229, 230, 47 Tex. Civ. App. 277.

"Malice in fact" is a spiteful or rancorous disposition which causes an act to be done for mischief, and is always a question of fact for the jury. *Walker v. Chanslor*, 94 Pac. 606, 608, 153 Cal. 118, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61.

In an action for slander, "malice in law" may be implied from facts proved, while "malice in fact" is actual malice. *Davies v. Starrett*, 55 Atl. 516, 518, 97 Me. 568.

"Malice in fact," in common acceptation, means ill will against a person, while malice in law is a wrong done against a person intentionally. An instruction, in an action for malicious prosecution, that there are two kinds of malice, malice in fact and malice in law, that the former means ill will against a person, and the latter means the doing of a wrongful act intentionally, and that if defendants or either of them were moved by ill will against plaintiff, or the prosecution of him was wrongfully caused or maintained by them, the jury should find that the prosecution was malicious, was not erroneous, as permitting a recovery if the prosecution was wrongfully maintained, where the petition claimed damages for the malicious continuance of the prosecution. *Carp v. Queen Ins. Co.*, 101 S. W. 78, 97, 203 Mo. 295.

"Malice," as usually understood, has its foundation in ill will, and is evidenced by an attempt wrongfully to vex, injure, or annoy another. This is "malice in fact," and is that referred to in Pen. Code, § 7, subd. 4, declaring that the words "malice" and "maliciously" import a wish to vex, annoy, or injure another person. There is another sort of

malice, the presumption of the existence of which is raised by the law in certain cases on certain proofs, and this is the malice described in the same section as "an intent to do a wrongful act, established either by proof or presumption of law." This is a malice of pleading and proof made necessary by the exigencies of definitions of offenses against the law, and may exist with malice in fact, but may also exist independent thereof, and in some instances is conclusively presumed against a defendant, while in others the presumption is rebuttable. *Davis v. Hearst*, 116 Pac. 530, 537, 160 Cal. 143.

"Malice which is presumed," or "malice in law," as distinguished from "malice in fact," "is not personal hate or ill will of one person toward another; it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen." *Shoemaker v. Sonju*, 108 N. W. 42, 44, 15 N. D. 518, 11 Ann. Cas. 1173.

One has an inherent right to dispose of his labor, which can only be lawfully interfered with by one acting in the exercise of an equal or superior right which comes in conflict therewith, and an intentional interference with such right without lawful justification is "malicious in law," even if it springs from good motives and is without express malice. *Berry v. Donovan*, 74 N. E. 608, 604, 188 Mass. 353, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 490, 3 Ann. Cas. 788.

In an action for alienation of a husband's affections, malice is a jury question of fact, and not one of law. *Kelso v. Kelso*, 86 N. E. 1001, 43 Ind. App. 115.

## MALICIOUS

"The legal meaning of the term 'malicious' is the unintentional doing of a wrongful act without just cause or excuse." *McNamara v. St. Louis Transit Co.*, 81 S. W. 880, 881, 182 Mo. 676, 66 L. R. A. 486.

Whatever is done willfully and purposely, be it at the same time wrong and unlawful, is, in legal contemplation, malicious. *Anderson v. International Harvester Co. of America*, 116 N. W. 101, 102, 104 Minn. 49, 16 L. R. A. (N. S.) 440.

Any unlawful act, done willfully and purposely, to the injury of another, as against that person is "malicious" in a legal sense, as such term is used in the law of malicious prosecution. *Plummer v. Collins* (Del.) 77 Atl. 750, 751, 1 Boyce, 281.

*Kirby's Dig.* § 1655, provides that if any person shall maliciously or contemptuously disturb or disquiet any congregation assembled in any church for religious worship, etc., he shall, on conviction, be fined, etc. Held, that the words "malicious" and "contemptuous" refer to the manner of disturbance, and not to the intent with which the disturbance

was effected. *Walker v. State*, 146 S. W. 862, 864, 103 Ark. 336.

Under the Bankruptcy Act excepting from liability released by a discharge in bankruptcy those incurred for "malicious" injury to the property of another, a judgment for taking cattle without the consent of the owner and appropriating them to the bankrupt's own use is not released. *Bever v. Swecker*, 116 N. W. 704, 705, 706, 138 Iowa, 721.

In a legal sense, malice has a meaning different from its popular signification. Acts willfully and designedly done, which are unlawful, are "malicious" in respect to those to whom they are injurious. One may prosecute a laudable purpose with an honest intention, but in such a manner, and in such disregard of the rights of others, as to render his acts unlawful. Prosecutions may be instituted and pursued with pure motives, to suppress crimes, but so regardless of established forms of law, and of judicial proceedings, as to render the transactions illegal and malicious. The general motive may be upright and commendable, while the particular acts in reference to others, may be malicious, in the legal acceptance of the term, so that an act may be malicious in a legal sense, which is not prompted or characterized by malevolence or corrupt design. *Page v. Cushing*, 38 Me. 523, 526.

In a prosecution under a statute making willful and malicious misconduct in office a misdemeanor, the omission of the word "malicious" from the information is immaterial, when the acts complained of necessarily involve a willful disregard of the obligations owed by the officer to the public. *State v. Dixon*, 103 Pac. 180, 131, 80 Kan. 650.

*Pen. Code*, § 242, defines criminal libel as a malicious publication, section 244 provides that a publication having such tendency is deemed malicious if no justification or excuse is shown, and section 718, subd. 3, provides that the terms "malice" and "malicious" each import an evil intent, wish, or design to annoy or injure another. Held, that a corporation may be convicted of criminal libel; the evil intent of its agents who published the libel being attributed to it. *People v. Star Co.*, 120 N. Y. Supp. 498, 500, 135 App. Div. 517.

"The term 'malicious,' used in this connection [procuring a breach of contract], is to be given a liberal meaning. The act is malicious when the thing done is with the knowledge of the plaintiff's rights, and with the intent to interfere therewith. It is a wanton interference with another's contractual rights. Ineffective persuasion to induce another to violate his contract would not of itself be actionable, but if the persuasion be used for the purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff, with a knowledge of the subsist-

ence of the contract, it becomes a malicious act, and, if injury ensues from it, a cause of action accrues to the injured party." *Employing Printers' Club v. Doctor Blosser Co.*, 50 S. E. 353, 356, 122 Ga. 509, 69 L. R. A. 90, 106 Am. St. Rep. 137, 2 Ann. Cas. 694.

The word "malicious," in Rev. St. 1899, § 1959 [Ann. St. 1906, p. 1325], which makes it a misdemeanor for any one to "willfully and maliciously, or wantonly and without right," enter the premises of another and destroy any tree, etc., means an unlawful act, willfully or purposely done to the injury of another, and to authorize the conviction of one for willfully and maliciously injuring trees of another, the malicious intent must be found. *State v. Graeme*, 108 S. W. 1131, 1133, 130 Mo. App. 138.

The word "malicious," as used in Cr. Code, div. 1, § 203 (Hurd's Rev. St. 1908, p. 752, c. 38), prohibiting the malicious wounding of any domestic animal, the property of another, is not used in the sense of "wrongfully, intentionally and without just cause or excuse," but as importing actual malice towards the owner, as distinguished from a spirit of cruelty toward the animal. *People v. Jones*, 89 N. E. 752, 756, 241 Ill. 482, 16 Ann. Cas. 332 (citing 5 Words and Phrases, p. 4307).

Under Rev. St. 1887, § 7153, making the "malicious" killing, maiming, or wounding of a dog an offense, the word "malicious," as used, is not equivalent to the word "wrongful," as used in the law of torts. The former word means more than the latter. It necessarily involves crime, while the latter does not necessarily do so. *State v. Churchill*, 98 Pac. 853, 857, 15 Idaho, 645, 16 Ann. Cas. 947 (citing *Chappell v. State*, 35 Ark. 345; *State v. Hussey*, 60 Me. 410, 11 Am. Rep. 209; 2 Wharton's Crim. Law, §§ 1068-1070; *State v. Phipps*, 64 N. W. 411, 95 Iowa, 491; *United States v. Gideon*, 1 Minn. 292 [Gil. 226]; *State v. Rector*, 34 Tex. 565).

"Willful," in a statute against libel, is covered by "malicious" in an indictment; the latter meaning all that the former does, and more. *Glover v. People*, 68 N. E. 464, 466, 204 Ill. 170 (quoting and adopting definition in 1 Bishop, Crim. Proc. [3d Ed.] § 613).

Under section 245 of the Penal Code, providing that any malicious publication by picture, effigy, or sign, which exposes a person to contempt, ridicule, or obloquy, is a libel, "malicious" means simply "intentional and willful." *Roberson v. Rochester Folding Box Co.*, 64 N. E. 442, 448, 171 N. Y. 538, 59 L. R. A. 478, 89 Am. St. Rep. 828.

The word "malicious," as ordinarily employed in criminal statutes, is the equivalent of wrongful, intentional, and without just cause or excuse; but, as used in many statutes directed against the unlawful destruction of property, it is held to have a restrict-

ed meaning peculiar to such statutes, implying that the act to which it relates must have resulted from actual ill will or revenge. The special meaning noted had its origin in England in prosecutions under the "Black Act" (St. 9 Geo. I, c. 22), enacted in 1722, so called because it was designed to repress the depredations of marauders calling themselves "blacks." The act provided that, if any person or persons shall unlawfully and maliciously kill or wound any cattle, etc., such persons shall be adjudged guilty of felony. It was held that in prosecutions under this act for injuries to cattle, in order to bring an offender within the law, the malice must be directed against the owner of the cattle, and not merely against the animal itself. In the United States most statutes prescribing a penalty for the malicious destruction of property are sufficiently like those of England to warrant the inference that they were modeled on them, and for this reason they have generally, but not always, been given the same construction. But the effect of Crimes Act, § 112 (Gen. St. 1901, § 2105), providing that every punishment and forfeiture imposed on any person maliciously committing any offense prohibited by the provision of preceding sections shall equally apply and be in force, whether the offense shall be committed from malice conceived against the owner of property in respect to which it shall be committed or otherwise, is to take from the word "malicious" the specific meaning that had been attributed to it in laws against the destruction of property, and restore it to the usual sense in which it is used in criminal statutes. *State v. Boies*, 74 Pac. 630, 68 Kan. 167, Ann. Cas. 491.

## MALICIOUS ABUSE OF PROCESS

See, also, Abuse of Process.

Malicious prosecution distinguished, see Malicious Prosecution.

Regular use of civil process does not become an actionable malicious abuse of process by being used with a bad intent. To establish actionable malicious abuse of civil process, there must appear an ulterior purpose and the improper use of process. *Keithley v. Stevens*, 87 N. E. 375, 376, 238 Ill. 199, 128 Am. St. Rep. 120.

The "malicious suing out of an attachment" contemplates a wrongful motive in the securing of the issuance of the attachment from want of probable cause or other reason, while an "abuse of process" contemplates the use of it after its issue for a wrongful purpose, and a party cannot have damages for the latter offense unless the process issued was perverted to a purpose not intended or contemplated by the law. *Wright v. Harris*, 76 S. E. 489, 492, 160 N. C. 542.

The regular and legitimate use of process, though with a bad intent, is not a "malicious abuse of process." Two elements



are necessary to constitute malicious abuse of legal process: First, the existence of an ulterior purpose; and, second, an act in the use of a process not proper in the regular prosecution of the proceeding. To constitute "malicious abuse of process" lawfully issued, it must be used for a purpose not intended by law. *Ingalls v. Christopherson*, 114 N. W. 704, 705, 21 S. D. 574 (quoting 1 Cooley, Torts [3d Ed.] 354).

An action for "malicious use of process" lies, though the process was lawfully issued on a valid judgment for a just cause, and is valid in form; the wrong being the illegal and malicious abuse of the power conferred by the judgment and the writ. *Gonsouland v. Rosomano*, 176 Fed. 481, 486, 100 C. C. A. 97.

### MALICIOUS ACT

In general a malicious act involves all that is usually understood by the term "willful," and is further marked by either hatred or ill will toward the party injured, or by such utter recklessness and disregard of the rights of others as denotes a corrupt or malevolent disposition. *State v. Willing*, 105 N. W. 355, 356, 129 Iowa, 72.

### MALICIOUS ATTACHMENT

"Malicious attachment" of corporate property is not a personal tort, but gives rise to a cause of action for injury to property, which passes to the trustee in bankruptcy of the corporation. *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 117 N. W. 926, 927, 105 Minn. 491, 81 L. R. A. (N. S.) 727.

### MALICIOUS INJURY

See Willful and Malicious Injury.

To constitute an offense under Rev. Pen. Code, § 712, punishing the "malicious injury or destruction of property," the act must not only be done willfully, but for the purpose of avenging some wrong sustained by the person charged with the offense. One who, on becoming angry without cause, destroyed without justification and in a spirit of wantonness the property of another, violated Rev. Pen. Code, § 712, punishing the malicious injury or destruction of property. *State v. Tarlton*, 118 N. W. 706, 708, 22 S. D. 495.

A willful act is one done subject to the volition and will of the doer and intentionally, and a willful or malicious injury is one caused by design. Willfulness and malice alike import intent, and the characteristic element of "willful" or "malicious injury" is the design to injure, either actually entertained or to be implied from the conduct and circumstances. *Sharkey v. Skilton*, 77 Atl. 950, 951, 83 Conn. 503.

### MALICIOUS MISCHIEF

Malice in malicious mischief, see Malice.

Malicious mischief includes all malicious physical injuries to the rights of another,

which impair utility or materially diminish value. Malice, express or implied, is a necessary ingredient of the offense of malicious mischief, though the malice need not be specifically to the owner of the property destroyed or injured. Willful or wanton cruelty, or injury to or destruction of property, committed under such circumstances as to indicate a malignant spirit of mischief, is sufficient to constitute the offense of malicious mischief. In a prosecution for malicious mischief, malice may be shown by proof of willful and wanton acts, or it may be inferred from attendant facts and circumstances. The sawing down of telegraph poles by defendants themselves, or by some unknown person through their procurement, would constitute malicious mischief; but if they, either as principal or accomplice, did not destroy or injure the poles or wires of the company, acts of resistance or interference, which they may have committed, would not be sufficient to constitute the offense. *State v. McCallister* (Del.) 76 Atl. 226, 229, 7 Penne-will, 301.

Under Revisal 1905, § 3621, making it a felony for one to maliciously assault another with a deadly weapon by waylaying, etc., and section 3291, defining a misdemeanor as an offense not punishable by death or imprisonment in the state's prison, and Acts 1870-71, p. 94, c. 43, punishing by fine or imprisonment a person convicted of an assault, with or without intent to kill, a prosecution for an assault with a deadly weapon with intent to kill is a prosecution for a misdemeanor, and not for malicious mischief, defined by section 2676 as willfully injuring personal property with malice to the owner, and is barred in two years by section 3147, providing that all misdemeanors, except for "malicious mischief, and other malicious misdemeanors," shall be presented within two years after the commission of the same, the words "other malicious misdemeanors" being intended to describe an offense of which malice is a necessary ingredient, as in the case of malicious mischief. *State v. Frisbee*, 55 S. E. 722, 724, 142 N. C. 671.

### MALICIOUS PROSECUTION

Malice in malicious prosecution, see Malice.

"Malicious prosecution," as a ground of action, must be both malicious and without probable cause. *Kendrick v. Cypert*, 10 Humph. (29 Tenn.) 291, 294; *Hegan Mantel Co. v. Alford* (Ky.) 114 S. W. 290, 291.

A malicious prosecution is one begun in malice without probable cause to believe that it can succeed, and which finally fails. *Schmidt v. Medical Society of New York County*, 127 N. Y. Supp. 365, 367, 142 App. Div. 635; *Burt v. Smith*, 73 N. E. 495, 496, 181 N. Y. 1, 2 Ann. Cas. 576.

To recover for malicious prosecution, it must be averred and proved that the prosecution was instituted maliciously and without probable cause. *Wehmeyer v. Mulvihill*, 130 S. W. 681, 683, 150 Mo. App. 197.

To constitute malicious prosecution, the arrest complained of must have been made by legal process and the prosecution must have been instigated by malice and without probable cause. *McIntosh v. Bullard*, *Earnheart & Magness*, 129 S. W. 85, 87, 95 Ark. 227.

In order to recover in an action for "malicious prosecution," plaintiff must allege and prove that there was a prosecution; that it terminated in his favor; that defendants were the prosecutors; that they were actuated by malice; that there was want of probable cause, and the damages sustained by plaintiff. *Russell v. Chamberlain*, 85 Pac. 926, 927, 12 Idaho, 299, 9 Ann. Cas. 1173.

To maintain an action for malicious prosecution, plaintiff must show that the prosecution was instigated by defendant, that it has been determined in plaintiff's favor, that there was no probable cause, and that defendant acted from malice. *Orefice v. Savarese*, 113 N. Y. Supp. 175, 176, 81 Misc. Rep. 88.

To sustain a motion for "malicious prosecution," plaintiff must show that he was prosecuted for a criminal offense at the instigation of defendant, who had no probable cause for the prosecution, and who acted with malice, and that the prosecution terminated in an acquittal. A sufficient termination of the prosecution in favor of plaintiff is established when he is discharged by a magistrate, either because of insufficiency of evidence, or because defendant withdrew the prosecution or failed to make any complaint or to appear. Lack of probable cause is not shown by the abandonment of the prosecution, by the dismissal of the charge by the prosecutor, by the voluntary discontinuance of the prosecution, or by the dismissal for want of prosecution. *Sasse v. Rogers*, 81 N. E. 590, 591, 40 Ind. App. 197 (citing *Cottrell v. Cottrell*, 25 N. E. 905, 126 Ind. 184; *Sayles v. Briggs*, 4 Metc. [45 Mass.] 421; *Moyle v. Drake*, 6 N. E. 520, 141 Mass. 238; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Cockfield v. Braveboy* [S. C.] 2 McMul. 270, 39 Am. Dec. 123; *Flickinger v. Wagner*, 46 Md. 580).

"In an action for 'malicious prosecution,' it is incumbent upon the plaintiff to show that there was no probable cause for the prosecution, and also that the defendant was actuated by malice in instituting such prosecution. There must be want of probable cause and malice. If probable cause is shown, then the question of malice becomes immaterial, because, there being probable cause, one of the essential elements necessary to maintain the action is disproved." *Miller v. Lal*, 71 Atl. 63, 77 N. J. Law, 135.

"Malicious prosecution" is "a wanton prosecution made by a prosecutor in a criminal proceeding, without probable cause, by a regular process and proceeding, which the facts do not warrant, as appears by the result." *Harrington v. Tibbet*, 76 Pac. 816, 817, 143 Cal. 78 (quoting *Bouv. Dict. [Rawley's Revised Ed.]*).

Proof, or evidence tending to prove the following facts, is essential to authorize the submission of a cause for "malicious prosecution" to a jury: First, the institution or prosecution by the defendant of the proceedings complained of; second, that the proceedings have finally terminated in favor of the plaintiff; third, want of probable cause on the part of defendant to believe plaintiff guilty of the offense charged; fourth, malice on the part of defendant in instituting or continuing the prosecution. Where a street car passenger tendered a defaced nickel, which was all the money he had, and the conductor refused to receive it, and started to eject him, and the passenger, on reaching the door, offered resistance and prevented his removal by a scuffle, but without fighting or offering to fight, or violent language, and the conductor called a policeman and had the passenger arrested upon the charge of disturbing the peace, the question of legal malice, which might be inferred from the fact that the prosecution was intentional, wrongful, and without justification or excuse, was for the jury. *Ruth v. St. Louis Transit Co.*, 71 S. W. 1055, 1058, 98 Mo. App. 1.

"Malice and the want of probable cause must both concur to support the charge of 'malicious prosecution.' Neither is alone sufficient." A verdict for exemplary damages for a wrongful sequestration is authorized only where the writ was sued out wrongfully, maliciously, and without probable cause. *Lynch v. Burns* (Tex.) 79 S. W. 1084, 1086 (quoting and adopting definition in *Culbertson v. Cabeen*, 29 Tex. 256).

Malice and want of probable cause are essential elements which must concur in an action for "malicious prosecution," although the former may be an inference from proof of facts establishing want of probable cause. *Jordan v. Chicago & A. Ry. Co.*, 79 S. W. 1155, 1158, 105 Mo. App. 446 (citing *Stubbs v. Mulholland*, 67 S. W. 650, 168 Mo. 47; *Sharpe v. Johnston*, 59 Mo. 557).

"Malicious prosecution" has been defined in England as "the malicious institution against another of criminal, bankruptcy, or liquidation proceedings without reasonable and probable cause," and not confined to the malicious institution of proceedings strictly criminal. *King v. D. Sullivan & Co.* (Tex.) 92 S. W. 51, 52 (quoting and adopting definition in *Fraser, Torts*, 121).

To maintain an action for "malicious prosecution," three things are necessary to be made out by the plaintiff: First, a want

of probable cause; second, malice of the defendant; and, third, damage to plaintiff—and that malice may be implied from the want of probable cause, but this implication may be explained and repelled by facts and circumstances. *Jones v. Louisville & N. R. Co. (Ky.)* 96 S. W. 793 (citing *Wood v. Weir (Ky.)* 5 B. Mon. 544).

Malice and want of probable cause must coexist to warrant an action for "malicious prosecution," and, where it is shown that the prosecutor consulted the prosecuting attorney in good faith, communicated to him all the ascertainable facts, and acted on his advice in instituting the criminal proceeding, he should be exonerated. *Pinson v. Campbell*, 101 S. W. 621, 624, 124 Mo. App. 260.

To support an action for "malicious prosecution," plaintiff must show that the one procuring his arrest not only acted maliciously but without probable cause. Malice may be inferred from want of probable cause, but probable cause cannot be inferred from anything else. Where one, before procuring the arrest of another, laid all the facts on which he based his prosecution before a competent attorney, obtained his advice that the prosecution was legal, and in good faith acted on the advice, it is a complete defense to an action for malicious prosecution. *National Life & Accident Ins. Co. v. Gibson (Ky.)* 101 S. W. 895, 897, 12 L. R. A. (N. S.) 717.

To justify an action for "malicious prosecution," it must be shown, not only that there was a lack of probable cause for the criminal prosecution complained of, but that it was instigated maliciously. *Van Meter v. Bass*, 90 Pac. 637, 638, 40 Colo. 78.

In a suit for malicious prosecution, the essential elements are the commencement or continuance of a criminal or civil proceeding, that defendant caused it to be instituted or continued, its bona fide termination in favor of plaintiff, the absence of probable cause, the presence of malice, and damages to defendant. *Sawyer v. Shick*, 120 Pac. 581, 80 Okl. 353.

In an action for malicious prosecution, plaintiff is bound to prove that there was a prosecution instituted against him by defendant as alleged, that it was malicious and without probable cause, that it terminated in plaintiff's favor, and that by reason thereof he sustained damage. *Plummer v. Collins (Del.)* 77 Atl. 750, 751, 1 Boyce, 281.

#### False imprisonment distinguished

There is a well-marked distinction between an action for false imprisonment and an action for "malicious prosecution." An action for false imprisonment may be maintained when the imprisonment is without legal authority, but, where there is a valid or apparently valid power to arrest, the remedy is by an action for malicious prosecution.

The want of lawful authority is an essential element in an action for false imprisonment. Malice and want of probable cause are the essentials in an action for malicious prosecution. *Roberts v. Thomas*, 121 S. W. 961, 962, 135 Ky. 63, 21 Ann. Cas. 456.

The distinction between "false imprisonment" and "malicious prosecution" is "that 'false imprisonment' is some interference with the personal liberty of the plaintiff which is absolutely unlawful and without authority. 'Malicious prosecution' is in procuring the arrest or prosecution under lawful process on the forms of law, but from malicious motives and without probable cause." A presiding judge of an election, who, without authority, arrests and detains a voter, is liable for false imprisonment, though he is a judicial officer and has a judicial discretion within prescribed limits. *Smyth v. State*, 103 S. W. 899, 901, 51 Tex. Cr. R. 408 (quoting and adopting the definition in *Herzog v. Graham*, 9 Lea [77 Tenn.] 152).

An amendment of a count of a complaint for "malicious prosecution" by striking out an allegation that plaintiff was arrested on a warrant, and substituting an allegation that she was arrested and held without a warrant, changed the cause of action stated, under the law of Alabama, from one in case for "malicious prosecution" to one in trespass for "false imprisonment," and rendered the charge of the court, based on the theory that the count was for "malicious prosecution," misleading and erroneous. *Western Union Telegraph Co. v. Thompson*, 144 Fed. 578, 580, 75 C. C. A. 334.

"False imprisonment" is distinguished from "malicious prosecution" in that it is, as defined by Pen. Code, § 236, an unlawful violation of another's personal liberty, an unlawful arrest or detention of one without warrant or by an illegal warrant, or a warrant illegally executed, while if the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is a malicious prosecution. *Donati v. Righetti*, 97 Pac. 1128, 1129, 9 Cal. App. 45.

Where a peace officer arrests a person without process and takes him before a magistrate, before whom he files a written complaint against the prisoner, describing no offense against the law, and after hearing the person is set at liberty, an action for "malicious prosecution" does not lie, but the party has immediate cause of action for false imprisonment. *Hackler v. Miller*, 112 N. W. 303, 79 Neb. 206.

The two actions of "false imprisonment" and "malicious prosecution" are quite distinct and different. "False imprisonment is the unlawful violation of the personal liberty of another" (Pen. Code, § 236), the interference with the personal liberty of the plaintiff in a way which is absolutely unlawful

and without authority. "Malicious prosecution" is procuring the arrest or prosecution of another under lawful process, but from malicious motives and without probable cause. The provocation, motive, and good faith of the defendant, in an action for false imprisonment, constitute no material element in the case, and can be considered only where punitive or exemplary damages are asked, and then only as affecting the measure of such damages. On the other hand, malice and want of probable cause are the gist of the action for malicious prosecution. Without allegation and proof of both, the action will fail. No one can recover damages for a legal arrest and conviction. Therefore, in cases of malicious prosecution, it becomes necessary to await the final determination of the action. But the same principle does not apply to an action for false imprisonment, as the form of action is based upon an illegal arrest, and no matter *ex post facto* can legalize an act which was illegal at the time it was done. From this it will be seen that one of the essential elements of a complaint for malicious prosecution is that the proceeding upon which it is based has finally terminated in favor of the plaintiff, while it is equally apparent that this is not a necessary or proper allegation in an action for false imprisonment. *Neves v. Costa*, 89 Pac. 860, 863, 5 Cal. App. 111.

#### **Malicious abuse of process distinguished**

An action for "malicious prosecution" is distinguished from one for abuse of process in that, in the former, malice, want of probable cause, and termination of the former proceedings must be shown, and in the latter none of these, but an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding, must be shown. *Pittsburg, J., E. & E. R. Co. v. Wakefield Hardware Co.*, 55 S. E. 422, 423, 143 N. C. 54 (citing *Pittsburg, J., E. & E. R. Co. v. Wakefield Hardware Co.*, 50 S. E. 571, 138 N. C. 174, 3 Ann. Cas. 720; 1 Cooley, Torts [3d Ed.] 354; 1 Jaggard, Torts, § 203; Hale, Torts, § 185; *Mayer v. Walter*, 64 Pa. 283; *Jackson v. American Telephone & Telegraph Co.*, 51 S. E. 1015, 139 N. C. 356, 70 L. R. A. 738); *Pittsburg, J., E. & E. R. Co. v. Wakefield Hardware Co.*, 50 S. E. 571, 573, 138 N. C. 174, 3 Ann. Cas. 720.

There is a clear distinction between the malicious prosecution of an action so as to interfere with another's property or business, and the malicious abuse of process, which is the willful and wrongful use of the process itself, and does not require a termination of the suit in which the process issued to be available as a cause of action. *Ludwick v. Penny*, 73 S. E. 228, 231, 158 N. C. 104.

The principal distinction between an action for malicious abuse of process and one for malicious prosecution is that, while the former lies for an improper use of process

after it issues, the latter is grounded on a malicious suing out of the process without probable cause. *Brantley v. Rhodes-Haverty Furniture Co.*, 62 S. E. 222, 225, 181 Ga. 278.

#### **MALICIOUS SEVERANCE FROM FREEHOLD**

The words "malicious severance from the freehold," in Kirby's Dig. § 1901, prohibiting the malicious severance from the freehold of another of anything attached thereto, do not cover the act of a tenant in removing from the outside of a window a for rent sign placed there by the landlord, but the words refer to the severance of things attached to the freehold as a part thereof, such as produce of the soil, timber, structures, or fixtures thereto. *Whipple v. Gorsuch*, 101 S. W. 735, 737, 82 Ark. 252, 10 L. R. A. (N. S.) 1133, 12 Ann. Cas. 38.

#### **MALICIOUS TRESPASS**

See Injury and Malicious Trespass to Property.

"Malicious trespass" or injury to property has been defined by the Legislature to mean a wrongful, intentional, and willful injury, and is not confined to cases where the offender is actuated by an evil animus against the owner of the property or the property itself (*Rev. St. 1899, § 1989, Ann. St. 1906, p. 1332*). *State v. McKee*, 104 S. W. 486, 487, 126 Mo. App. 524.

Crimes Act, § 107 (Gen. St. 1901, § 2100), defining "malicious trespass," reads: "Every person who shall willfully, unlawfully and maliciously break, destroy or injure the door or window of any dwelling house, shop, store or other house or building, or sever therefrom or from any gate, fence or inclosure, or any part thereof, any material of which it is formed, or sever from the freehold any produce thereof, or anything attached thereto, or shall pull down, injure or destroy any gate, post railing, or fence or any part thereof, or cut down, lop, girdle or otherwise injure or destroy any fruit or ornamental or shade trees, being the property of another, shall, on conviction, be adjudged guilty of a misdemeanor." *State v. Boles*, 74 Pac. 630, 68 Kan. 167, 1 Ann. Cas. 491.

#### **MALICIOUSLY**

"Maliciously" means and implies an intention to do an act which is wrongful, to the detriment of another. *State v. Van Pelt*, 49 S. E. 177, 187, 136 N. C. 633, 68 L. R. A. 760, 1 Ann. Cas. 495.

By the word "maliciously," as used in an indictment for slander by imputing to a woman a want of chastity, is meant that the words must have been so uttered as to imply by defendant an evil intent or legal malice, or without reasonable grounds for believing that the words uttered were true. *Rainwater v. State*, 81 S. W. 38, 39, 46 Tex. Cr. R. 496.

Where, soon after a strike was declared, the employer secured men to take the place of the strikers, and has ever since had an adequate force, and is not taking any new men, and of the eleven men who left the employment eight soon secured other employment in the same kind of work, and three have left the commonwealth, and the international organization with which the strikers' labor union was affiliated ceased to aid their efforts any further, the strike was ended so that thereafter driving a wagon through the streets, bearing a placard announcing the existence of a strike, was manifestly intended to injure the employer, and was done "maliciously" within the legal meaning of that word. *M. Steinert & Sons Co. v. Tagen*, 93 N. E. 584, 585, 207 Mass. 394, 32 L. R. A. (N. S.) 1013.

Rev. St. 1898, § 4053, defines "malice" and "maliciously" as importing a wish to vex, annoy, or injure another person, or an intent to do a wrongful act. Section 4427 provides that every person who willfully, unlawfully, and maliciously administers any poison to an animal, the property of another, is punishable. Under such sections, the fact that the owner of a dog poisoned by defendant was unknown to defendant did not preclude a finding that the poison was administered maliciously. *State v. Coleman*, 82 Pac. 465, 466, 29 Utah, 417.

Under a statute providing that every person who shall maliciously administer or cause to be administered or taken any destructive substance, with intent to cause death, shall be punished, etc., and who shall use or cause to be used any instrument with the intention to procure a miscarriage shall be imprisoned, etc., the word "maliciously" is not applicable to the offense of abortion as therein defined. *Johnson v. People*, 80 Pac. 133, 135, 33 Colo. 224, 108 Am. St. Rep. 85.

"Under Pen. Code, art. 4, § 7, defining the words 'malice' and 'maliciously' as importing a wish to vex, annoy, or injure another person, or an intent to do a wrongful act established either by proof or presumption of law," where a defendant was on trial for assault in the first degree, the crime involved a specific intent as the gist of the offense, and it was error for the court to instruct that, when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent, and the law presumes that a person intends the ordinary consequences of any voluntary act committed by him. *State v. Schaefer*, 88 Pac. 792, 793, 35 Mont. 217.

The term "maliciously injuring," within Wis. St. 1898, § 4466a, which imposes punishment or fine on any two or more persons who shall combine for the purpose of willfully or "maliciously injuring" another, etc., is intended to add something to the word

"willfully," and imports doing a harm malevolently for the sake of the harm, as an end in itself, and not as a means to some further end legitimately desired. *Aikens v. Wisconsin*, 25 Sup. Ct. 3, 5, 195 U. S. 194, 49 L. Ed. 154.

"The word 'maliciously' imports 'an intent to do a wrongful act,'" and its absence from an accusation under Pen. Code, § 415, for disturbing the peace, is fully supplied by the charge that defendant willfully and unlawfully disturbed the peace by fighting. *Larue v. Davies*, 97 Pac. 903, 904, 8 Cal. App. 750.

Where a statute provides that every person who shall willfully and maliciously kill, maim, or disfigure horses, etc., shall be punished, the word "maliciously" imports a criminal motive, intent, or purpose. *Roberts v. United States*, 126 Fed. 897, 903, 61 C. C. A. 427 (citing *Commonwealth v. Brooks*, 9 Gray [75 Mass.] 303).

"Maliciously," as used in Acts 1897, p. 257, c. 106, making it a felony for any one to "maliciously" cut and remove timber, for the purpose of marketing, from the lands of another without the owner's consent, does not mean actual malice toward the owner, but is used in the broad legal sense of criminal intention to define that state of mind of a person who does a wrongful act intentionally or willfully and without legal justification or excuse. The word "feloniously" fully covers the meaning of "maliciously" as so used, and "feloniously," as defined in the Century Dictionary, means "with deliberate intent to commit a wrongful act, the act being in law such as constitutes a crime of the class termed 'felonies,'" and in Webster's Dictionary, "In a legal sense, done with the intent to commit a crime." In comparing the judicial definitions of the words "felonious" and "feloniously" in Words and Phrases Judicially Defined, vol. 3, p. 2731 et seq., with the definition of the word "malicious," in volume 5 of the same work, at page 4307, it is found that the words are often construed to have the same meaning, namely, "with criminal intent," or "with intent to commit crime." *State v. Smith*, 105 S. W. 68, 69, 70, 119 Tenn. 521.

In an action by an employé against a third party for wrongfully causing plaintiff's discharge in violation of contract, the declaration must show that defendant knew of the existence of such contract, and such fact cannot be inferred from an allegation that he "maliciously" caused plaintiff's discharge, which means no more than he acted willfully and intentionally. *McGurk v. Cronenwett*, 85 N. E. 576, 577, 199 Mass. 457, 19 L. R. A. (N. S.) 561.

"Maliciously" in the law means "intentionally." It is not sufficient, to sustain an action for malicious prosecution, to prove that the affidavit upon which the arrest was

made was false. It must also appear that the affiant either knows it was false, or did not have reasonable and probable cause to believe it to be true. *Izzo v. Viscount*, 64 Atl. 953, 954, 74 N. J. Law, 95.

The words "willfully," "unlawfully," "feloniously," and "maliciously" import only that criminal intent which is the necessary part of every felony, or other crime, but they do not necessarily include the specific "purpose" to do the act which is an element of the crime charged. Whether the indictment is on a statute or at the common law, it is a rule universal and without exception that every intent, like everything else, which the law makes an element of the offense must be alleged, for otherwise no *prima facie* case appears. *Newby v. State*, 105 N. W. 1099, 1100, 75 Neb. 33.

Under 1 Mills' Ann. St. §§ 1424, 1425, providing that, if any person shall maliciously drive cattle from their usual range, he shall be guilty of a misdemeanor and shall be liable to the party injured, the word "maliciously" means wrongful act done intentionally, without just cause or excuse. *Richards v. Sanderson*, 89 Pac. 769, 771, 39 Colo. 270, 121 Am. St. Rep. 167.

Under Rev. St. 1899, providing that it shall not be necessary to show, in the trial of an offense for malicious injury to property specified in that article, that the offense was committed from malice conceived against the owner of the property or against the animal or property itself, but, if the act was wrongfully, intentionally, and willfully done, it may be inferred it was done maliciously, the state is relieved from proving that malice was held toward either the owner or the property, but in both sections 1988 and 1989 (Ann. St. 1906, pp. 1332, 1333) general malice is retained as an element, and, though it may be inferred from certain facts, it is not necessarily to be so inferred, and the prohibited offense is not "willfully and maliciously" committed unless the animal is maimed, beaten, or tortured from an evil impulse springing from a state of mind rendering the perpetrator indifferent to the sufferings of the animal and the wrongful quality of the act. *State v. Prater*, 109 S. W. 1047, 1049, 130 Mo. App. 348.

#### Ill will implied

Rev. Codes 1905, § 9315, provides that every person who maliciously injures, defaces, or destroys any real or personal property not his own is guilty of a misdemeanor. Held, that the word "maliciously," as so used, should have a restricted meaning, and imports actual ill will or revenge and an intent to annoy the owner of the property injured. *State v. Minor*, 117 N. W. 528, 17 N. D. 454, 19 L. R. A. (N. S.) 273.

#### As with malice aforethought

In a prosecution for mayhem, a request for a charge that, before the accused could be

convicted, the jury must be satisfied beyond a reasonable doubt that the act was done unlawfully, intentionally, and with malice aforethought, was properly refused, since the term "malice aforethought" is not necessarily synonymous with "maliciously," as used by the statute defining mayhem. *Green v. State*, 44 South. 194, 195, 151 Ala. 14, 125 Am. St. Rep. 17, 15 Ann. Cas. 81.

"Maliciously" and "malice aforethought" do not mean the same thing. Malice comprehends ill will, a wickedness of disposition, cruelty, recklessness, a mind regardless of social duty, etc., while "malice aforethought" or "premeditated" design has a more intense meaning. They comprehend, not only what is included within the term "malice," but in addition thereto mean "premeditated malice." *Brett v. State*, 47 South. 781, 783, 94 Miss. 699 (citing 5 Words and Phrases, p. 4304; 1 Blsh. Cr. Law [8th Ed.] p. 261; *Patterson v. State*, 66 Ind. 185; *Tutt v. Commonwealth*, 46 S. W. 675, 104 Ky. 299; *State v. Green*, 7 South. 793, 42 La. Ann. 644; *State v. Curtis*, 70 Mo. 594; *Cravey v. State*, 35 S. W. 658, 36 Tex. Cr. R. 90, 61 Am. St. Rep. 833).

## MALIGNANT PUSTULE

As disease, see Disease.

"Malignant pustule" is the result of an infection from coming in contact with poisonous animal matter. *Delaney v. Modern Accident Club*, 97 N. W. 91, 94, 121 Iowa, 528, 63 L. R. A. 603 (citing *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748).

## MALINGER

The term "malinger" means to feign or induce sickness, and a malingerer is one who feigns or induces illness to avoid service or shirk duty, especially a soldier or sailor. *Wells v. Missouri-Edison Electric Co.*, 84 S. W. 204, 207, 108 Mo. App. 607.

## MALPOSITION OF THE JAW

See Correction of Malposition of the Jaw.

## MALPRACTICE

### Attorney

Under Code Civ. Proc. § 67, providing that any attorney guilty of any deceit, malpractice, crime, or misdemeanor shall be disbarred, an attorney who, to secure his fee, settles with a party against whom he was retained to enforce claims, and assigns his contracts with his clients to enforce such claims, and notifies them to settle directly with the other party, agreeing to facilitate any settlement that such other party may desire to make, is guilty of "malpractice." *In re Clark*, 77 N. E. 1, 6, 184 N. Y. 222.

An attorney who persuades a client, who cannot understand English, to repudiate a settlement in an action and to verify a reply setting up the settlement, when the attorney had no reasonable expectation of supporting the pleading with proof, and before judgment is rendered against his client brings a garnishment suit against the client, who does not learn of the suit until judgment is taken against him, is guilty of "malpractice." *In re Thatcher*, 190 Fed. 969, 1010.

#### Physician

"Malpractice" is the bad, professional treatment of disease or bodily injuries, from reprehensible ignorance or carelessness or with criminal intent." Where a patient, before an operation, is not suffering from a dislocation of the hip, and the physician diagnoses the patient's trouble as a partial dislocation and treats her for such dislocation, thereby causing great pain and permanent injury, the physician is guilty of "malpractice." *Grainger v. Still*, 85 S. W. 1114, 1119, 187 Mo. 197, 70 L. R. A. 49.

## MALT

### MALT LIQUOR

See Fermented and Malt Liquors; Substitute for Malt Liquor.

See, also, Spirituous Liquors.

Where a beverage contained no alcohol, preservatives, or saccharine, and was nonintoxicating, but did contain 5.73 per cent. malt, it was a "malt liquor," within Acts 1908, c. 115, § 1, prohibiting the sale within the state of any vinous, alcoholic, malt, intoxicating, or spirituous liquors. *Purity Extract & Tonic Co. v. Lynch*, 56 South. 316, 100 Miss. 650.

Ky. St. 1909, § 2557, making it unlawful, after a local option election resulting in a vote against sale of "spirituous, vinous, or malt liquors," to sell any such liquors, is not, in view of prior judicial construction of the words in prior statutes on the subject, violated by sale of malt liquor containing less than 2 per cent. of alcohol, and nonintoxicating in the largest quantity in which it may be drunk. *City of Bowling Green v. McMullen*, 122 S. W. 823, 134 Ky. 742, 26 L. R. A. (N. S.) 895.

The words "malt liquor" are words in common and ordinary use and did not require definition in a prosecution for selling intoxicating liquors. It was not necessary, in prosecution under a statute forbidding sale of malt liquor, to prove that malt liquor was intoxicating. *State v. O'Connell*, 58 Atl. 59, 60, 99 Me. 61.

Under a statute imposing a tax upon the business of trafficking in spirituous, vinous, malt, or other intoxicating liquors, "malt liquors," whether intoxicating or not, are subject to the tax. *La Follette v. Murray*, 91 N. E. 294, 295, 81 Ohio St. 474.

"Malt liquors" include nonintoxicating, as well as intoxicating, liquors. *Commonwealth v. Goodwin*, 64 S. E. 54, 56, 109 Va. 828.

The generic term "malt liquors" includes liquor containing any percentage of alcohol as the product of malt brewing, whether the product is intoxicating or not. *La Follette v. Murray*, 91 N. E. 294, 295, 81 Ohio St. 474.

"Malt rose" is a beverage made to imitate lager beer, having the same general color, taste, and appearance, and containing from .74 to 1.18 per cent. of alcohol. It is a fermented or malt liquor within liquor tax law (Laws 1897, p. 207, c. 312), regulating the sale of fermented or malt liquors. *People v. Cox*, 94 N. Y. Supp. 526, 529, 106 App. Div. 299.

The term "malt liquors," as used in Acts 1910 (Ex. Sess.) No. 4, to define the meaning of the term "grog or tippling shop," in prohibition districts, includes only malt liquors that are intoxicating. *State v. Maroun*, 55 South. 472, 473, 128 La. 829.

"Malt liquors" are the product of a process by which grain is steeped in water to the point of germination, the starch being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and by a further process of brewing made into a beverage; porter, ale, beer, etc., being embraced within the expression. *Marks v. State*, 48 South. 864, 868, 159 Ala. 71, 133 Am. St. Rep. 20.

The term "malt liquors," as used in the provision of article 229 of the Constitution, which reads, "This restriction shall not apply to dealers in distilled, alcoholic or malt liquors," and whereby political corporations, throughout the state, are left free to impose license taxes upon the dealers thus mentioned, without regard to the action or nonaction of the state in such cases, must be regarded as applying to malt liquors which are, or may be, used as beverages, and which are intoxicating, and as having no application to malt liquors which are not, or may not be, so used, and are not intoxicating. *City of Shreveport v. Smith*, 57 South. 652, 653, 130 La. 126.

Act Sept. 5, 1906 (Acts 1906, p. 1112), providing a revenue for the development and conduct of the penitentiary system, and to buy farm lands and equipment as needed in the management, control, and employment of convicts by requiring a license of all persons manufacturing, selling, or distributing any imitation of beer, ale, wine, whiskey, or other spirituous or malt liquors, as used in that article providing that the tax on malt liquors shall be devoted to the support of the common schools, has reference to and is intended to include only such malt liquors as are intoxicating in their nature. *Carroll v. Wright*, 63 S. E. 260, 268, 131 Ga. 728.

St. 1898, c. 1565c, prohibiting the sale of any spirituous, malt, ardent, or intoxicating liquors or drinks in no-license territory, when considered in connection with section 1565, as amended by Laws 1905, p. 520, c. 341, providing that proof of the sale of any malt, spirituous, vinous, or distilled liquor shall be deemed proof of the sale of intoxicating liquors, etc., is violated by a sale of malt liquors or drinks which are the product where the alcohol, produced by fermentation, of which malting is a preliminary process, remains in the liquor drawn off from the malt, or by a sale of spirituous liquors or drinks which are the product where the alcohol is separated by distillation so that the liquor separated contains a percentage of alcohol, or by a sale of ardent liquors or drinks, or by a sale of intoxicating liquors or drinks, and hence a sale of malt liquor containing alcohol is an offense, though the beverage is a non-intoxicant. *Pennell v. State*, 123 N. W. 115, 116, 141 Wis. 35.

Under Ky. St. § 2557, prohibiting the sale of spirituous, vinous, and malt liquors in local option territory, a sale of malt liquor whether it intoxicates some people or not or is only a mild intoxicant, or whether accused believed that it was an innocent soft drink, is an offense. *Flanders v. Commonwealth*, 130 S. W. 809, 811, 140 Ky. 38.

Byrd Law (Acts 1908, pp. 275-287, c. 189) § 23½, defines "malt beverage" a nonintoxicating liquor, and requires the manufacturer to pay a special license tax and give a bond. Section 28 provides that the act shall not affect municipal charter provisions respecting licenses. *Manassas Charter* (Acts 1901-2, p. 216, c. 215; Acts 1906, p. 204, c. 128) § 14, requires the payment of license to sell "malt liquors." Held, that "malt beverage" is a malt liquor within the charter provision, and that compliance with the Byrd law does not avoid necessity for complying with the charter provision. *Commonwealth v. Goodwin*, 64 S. E. 54, 56, 109 Va. 828.

### Beer

The term "beer" being presumed to refer to a malt liquor, a charge of illegally selling malt liquors is supported by evidence of the sale of beer, although the specific kind of beer is not shown. *Wilson v. State*, 57 South. 503, 3 Ala. App. 158.

The courts will take judicial notice that lager beer is a "malt liquor," the sale of which is prohibited by statute. *Purcell v. State*, 55 South. 847, 848, 61 Fla. 43.

The term "malt liquor," as used in the liquor tax law (Laws 1897, p. 207, c. 312), regulating the sale of malt liquors, includes lager beer. *Cullinan v. McGovern*, 94 N. Y. Supp. 525, 526.

Common beer is a malt liquor within Ky. St. § 2557, prohibiting the sale of malt liq-

uors in local option territory, and its sale is prohibited irrespective of the label on the bottles or the name adopted. *Flanders v. Commonwealth*, 130 S. W. 809, 811, 140 Ky. 38.

An affidavit charging accused with the unlawful sale of a "pint of beer" sufficiently alleged a sale of malt liquor so as to render the affidavit sufficient; "beer" being a fermented liquor or a malt liquor made from malted grain or hops or other bitter flavors. *Turner v. State*, 93 N. E. 225, 226, 175 Ind. 1.

Under an indictment for the illegal sale of "malt liquor," where the testimony of a witness was that he bought "beer," it sufficiently appeared that the word was used by the witness in the sense of malt liquor. *Locke v. Commonwealth* (Ky.) 74 S. W. 654, 655; *State v. Gibbs*, 123 N. W. 810, 109 Minn. 247, 25 L. R. A. (N. S.) 449.

### Cider

Cider is not a "malt liquor." Malt liquors are intoxicating but cannot be classed as spirituous. *Donithan v. Commonwealth*, 64 S. E. 1050, 109 Va. 845.

### As intoxicating liquor

See Intoxicating Liquor.

### As liquor

See Liquor.

### MALT ROSE

As liquor, see Liquor; Malt Liquor.

### MALUM IN SE

Acts "malum in se" are generally regarded as absolutely void in the sense that no right or claim can be derived from them. In *re T. H. Bunch Co.*, 180 Fed. 519, 527.

### MAN

See Confidence Man; Reasonable Man; Signal Man.

Man in charge of train, see Conductor.

Men as meaning one, see Men.

"Man" is a term to designate a male person over 21 years of age. *Hartsell v. State*, 116 S. W. 1159, 55 Tex. Cr. R. 389; *White v. Same* (Tex.) 151 S. W. 826.

An instruction, on the trial of a man for murder, that to establish the defense of self-defense it must appear that the circumstances were sufficient to excite the fears of a reasonable "man" or one reasonably courageous and reasonably self-possessed, and not of a coward, is not erroneous for the use of the word "man," which is used in its generic sense. *Anderson v. State*, 43 S. E. 835, 836, 117 Ga. 255.

### Minor

Under Pub. St. 1901, c. 278, § 15, providing that, if any man shall unlawfully and carnally know any woman child under the



age of 16 years, he shall be imprisoned, etc., the word "man" includes persons of the male sex who are capable of committing rape, and is not limited to adult males. *State v. Burt*, 71 Atl. 30, 75 N. H. 64, Ann. Cas. 1912A, 232.

### MAN OF STRAW

See Straw Man.

### MANAGE

See Invest and Manage; Mismanage—Mismanagement.

The general power to "manage" their "real or personal estate as if sole," given to married women by Rev. St. c. 61, § 1, includes that of submitting to arbitration a question of damages for the flowage of their separate lands, and of covenanting to abide the award. *Duren v. Getchell*, 55 Me. 241, 248.

The phrase "managed and cared for by them" in a will whereby testator gave his residuary estate to his son to be held in trust by his executors and "managed and cared for by them" for his son's benefit, until he arrived at a designated age, etc., implies that the executors should receive the rents and profits. *Higgins v. Downs*, 91 N. Y. Supp. 987, 938, 101 App. Div. 119.

#### As conduct or carry on

The words "manage, control, invest, and reinvest," as used in a will whereby testator conferred on his executors power to "manage, control, invest, and reinvest" the residuary estate and the income thereof, and sell or convey all or any part thereof, with or without covenants, in their discretion, did not warrant the executors in carrying on the business of a corporation in which testator had invested, so that he owned nearly all of its stock and bonds, especially in view of a codicil commanding the executors to incur no debts except in liquidation of debts outstanding at testator's decease. In re Corbin's Will, 91 N. Y. Supp. 797, 799, 101 App. Div. 25.

#### As control

Under Civ. Code, § 857, subd. 1, authorizing a trust to sell realty and apply or dispose of the proceeds, in accordance with the trust instrument, where a trust deed, besides empowering the trustee to sell the property to obtain money for the payment of the indebtedness, also empowered him to manage the same, the word "manage" gave only such control of the property as was proper in the lawful execution of a trust created as security for an indebtedness. *Younger v. Moore*, 103 Pac. 221, 223, 155 Cal. 767.

The word "manage" means to direct, control, govern, administer, or oversee. Under Civ. Code, § 857, subd. 3, authorizing the creation of a trust to receive rents and profits of real property and pay them to or apply them to the use of any person, and section

863, providing that when a trust is created the whole estate is vested in the trustee, subject to the trust, a trust may be created to "manage" property and to collect the income, issues, and profits thereof and pay them to specific persons, though the word "manage" is not mentioned in the section authorizing the creation of the trust. In re Heywood's Estate, 82 Pac. 755, 757, 148 Cal. 184.

### MANAGEMENT

See Exclusive Management and Control; Fraud in Management; Sole Management; Under the Control, Management, or Operation.

Intrusted with management, see Intrust.

Since a conviction of a violation of Act April 26, 1909 (Laws 1909, c. 196), punishing one who shall engage or assist in operating or managing any house of prostitution, cannot be had unless it is shown that accused had control of and conducted or assisted in the management and operation of the affairs of the house in some manner, or that he was able to bring about or assist in bringing about prostitution, a charge that if accused in any manner aided or abetted a third person in the management of the house he is guilty is erroneous; the word "management" meaning the act of managing; the manner of treating, directing, carrying on, or using for a purpose. *Trozso v. People*, 117 Pac. 150, 154, 51 Colo. 323.

#### Management and control

The words "management and control," as used in Rev. St. 1887, § 2498, relating to the management and control by a husband of his wife's separate property, have a well-defined meaning, and under the provisions of section 15 must be construed according to the context and approved usage of the language. The power to manage implies the power to control. To manage money is to employ or invest it. The word "control" means to have authority over a particular matter or thing, and the phrase "management and control" implies the possession of the thing managed or controlled, or the right to the possession thereof. *Sencerbox v. First Nat. Bank of Idaho*, 93 Pac. 369, 371, 14 Idaho, 95 (citing 2 Words and Phrases, p. 1549; 5 Words and Phrases, p. 4317).

#### Management of vessel

The unloading of cargo in the port of discharge by stevedores has no relation to the "management of the vessel" within the meaning of the third section of the Harter Act (Act Feb. 13, 1893, c. 105, 26 St. 445), not being an act done with any view of such management, but relates to the care or delivery of cargo within the meaning of the first section. *The Germanic*, 124 Fed. 1, 4, 5, 59 C. C. A. 521.

The negligent failure of the master of a vessel to make proper use of the ventilating apparatus during the course of a five months'

voyage, by reason of which, and the presence in the cargo of a large quantity of coke, the wicker or straw coverings on a large number of wine bottles were sweated and ruined, was not a fault or error in the management of the vessel, within the meaning of Harter Act Feb. 13, 1893, c. 105, § 3, but "negligence, fault, or failure in proper \* \* \* care of \* \* \* merchandise or property" within section 1, for which the owner of the vessel is liable. *The Jean Bart*, 197 Fed. 1002, 1006.

Where a ship was at the commencement of a voyage in all respects seaworthy and properly manned and supplied, damage to a sugar cargo from fresh water which escaped into the hold where the sugar was stowed while the cargo was being discharged, by reason of a valve having been improperly left open while water from the river was being pumped into the engine tank, was due to a fault in the "management" of the vessel, for which she is exempt from liability by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445, providing that, if the owner of any vessel transporting merchandise or property to or from any port in the United States shall exercise due diligence to make the vessel seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall be responsible for the damage resulting in the management of the vessel. *The Wildcroft*, 130 Fed. 521, 527, 65 C. C. A. 145; *Id.*, 124 Fed. 631, 637.

The action of the master of a vessel in permitting whale oil, which leaked from barrels, to remain in the bilges, with the object of saving it at the end of the voyage, did not pertain to the "management of the vessel," within section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445); but injury to other cargo from such oil arose from "failure in proper care of the cargo," within section 1, for which the vessel was liable. *The Persiana*, 185 Fed. 396, 397, 107 C. C. A. 416.

The tipping of a vessel by the head by the master while discharging cargo for the purpose of examining her propeller, and having nothing to do with the discharge of the cargo, was an act of management of the ship within section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445), and, where the owner had complied with the requirements of said section at the commencement of the voyage neither he nor the vessel is liable for a resulting injury to the cargo. *The Indra-ni*, 177 Fed. 914, 915, 101 C. C. A. 194.

#### Operation and control synonymous

In an action against an abutting owner for injuries from defects in the cover of a coal hole, where the complaint predicates negligence of the defendant in the management, operation, and control of the sidewalk, and in keeping the coal hole in defective order, and in failing to provide proper warning

as to the defective state of the coal hole cover, there is no legal differentiation between the terms "management" "operation," and "control," and any one of them would be sufficient to justify the admission of testimony to sustain a delinquency intended to be charged. *Maldosky v. Germania Bank*, 127 N. Y. Supp. 292, 293.

#### MANAGER

See General Manager; Mine Manager.

Since a conviction of a violation of Act April 26, 1909 (Laws 1909, c. 196), punishing one who shall engage or assist in operating or managing any house of prostitution, cannot be had unless it is shown that accused had control of and conducted or assisted in the management and operation of the affairs of the house in some manner, or that he was able to bring about or assist in bringing about prostitution, a charge that if accused in any manner aided or abetted a third person in the management of the house he is guilty is erroneous; the word "management" meaning the act of managing; the manner of treating, directing, carrying on, or using for a purpose; and the word "operate" meaning to put into or to continue in operation or activity; the word "manager" meaning one who has the conduct or direction of anything; and the phrase "to carry on," when applied to business, meaning to prosecute, to help forward, to continue, etc. *Trozso v. People*, 117 Pac. 150, 154, 51 Colo. 323.

Sess. Acts 1901, p. 219, § 1, requires the owner, proprietor, lessee, or "keeper" of office buildings, etc., more than three stories high, to provide fire escapes. Section 5 makes the owner, proprietor, lessee, or "manager" of a building, required to be equipped with fire escapes, who neglects for 60 days after the act becomes effective to comply with the act guilty of a misdemeanor. Acts 1903, pp. 251, 252, repealed the first three sections of the act and enacted new sections in their place, but section 1 of the act as amended required the owner, proprietor, lessee or keeper of such buildings to provide escapes as in the original act. Section 2 provided that, if a fire escape was found upon inspection to be unsafe, the owner, proprietor, lessee, or keeper should repair it, and section 5 remained unchanged. Held, that the words "manager of a building" did not necessarily mean the same as "keeper of a building," or denote any particular duties in relation to the building, and one charged as manager of a building with violating the act could not be convicted, in the absence of evidence showing that his duties made him a keeper of the building. *State v. Cook* (Mo.) 128 S. W. 212, 213.

#### Conductor and manager

The words "conductor" and "manager," used in Ky. St. §§ 795-800, requiring segregation of white and negro passengers, and requiring the conductor or manager to see that

the statute is obeyed, mean the same person, except where one not designated as conductor is in charge of a train. *Louisville & N. R. Co. v. Renfro's Adm'r*, 135 S. W. 266, 268, 142 Ky. 590, 33 L. R. A. (N. S.) 133.

**As employé or laborer**

See *Employé; Laborer*.

**As managing agent**

See *Managing Agent*.

**As officer of corporation**

See *Officer (Of Corporation)*.

**As workman**

See *Workman*.

**Manager of corporation**

The word "manager" imports agency, control, and authority presumptively sufficient to bind a corporation on a bond given on certiorari to review a judgment of a justice of the peace. The term "manager," as applied to a private corporation, indicates one who has the general direction and control of its affairs, and, when used in connection with the seal, imports authority to sign in behalf of the corporation. *American Inv. Co. v. Cable Co.*, 60 S. E. 1037, 1039, 4 Ga. App. 106.

The president, treasurer, and secretary of a stock corporation governed by General Corporation Law (Consol. Laws 1909, c. 28) §§ 3, 34, 43, and Stock Corporation Law (Consol. Laws 1909, c. 59) § 30, vesting the management of such corporations in a board of directors with authority to appoint officers with defined powers and duties, are not in the absence of evidence of their powers and duties, within Pen. Code, § 246, making every manager of a corporation by which a libel is published chargeable with the publication thereof, though under sections 242 and 244 it may be conceded that the intent to publish a libelous article constitutes the criminal intent essential to constitute criminal liability, for the term "manager" does not embrace the officers of a corporation as such with authority to prevent a libelous publication and to publish a disavowal thereof. *People ex rel. Carvalho v. Warden of City Prison*, 128 N. Y. Supp. 837, 840, 144 App. Div. 24.

The term "manager" is defined as "a person appointed or elected to manage the affairs of another. The term is applied to those officers of a corporation who are authorized to manage its affairs." *State v. Eyermann*, 90 S. W. 1168, 1169, 115 Mo. App. 660.

Laws 1901, p. 73, provides that the manager, etc., of any building or establishment from which dense smoke is emitted shall be deemed guilty of a misdemeanor. Held, that one who was the secretary and purchasing agent of a company, and who had charge of its manufacturing department, and exercised supervision over the engine room, and who was regarded by other employes and officers

as a de facto president, was "manager" of the concern within the statute. *State v. Hemenover*, 87 S. W. 482, 188 Mo. 381, 483.

**Manager of theater**

A ticket taker at a theater is not a "person who manages the theater" in part within Pen. Code, § 290, declaring a person who permits to remain in any theater owned, kept, or managed by him in whole or in part any child under the age of 16 years, unless accompanied by its parent, guilty of a misdemeanor. *People ex rel. Jacques v. Flaherty*, 107 N. Y. Supp. 415, 416, 122 App. Div. 878; *Id.*, 84 N. E. 1118, 191 N. Y. 625.

**Publisher synonymous**

The fact that a person making an affidavit of publication of process in a newspaper signs himself "publisher" instead of "editor," "proprietor," or "manager," does not make proof of publication defective, though the statute requires that the proof shall be made by the "editor," "proprietor," or "manager" of the newspaper; the word "publisher" being used in the sense of proprietor or manager. *Stuart v. Cole*, 92 S. W. 1040, 1042, 42 Tex. Civ. App. 478.

**MANAGING**

See *Running, Conducting, or Managing*.

**MANAGING AGENT**

"Managing" means to have under control and direction; to guide; and employes in charge of the stopping and starting of a train are "managing" it, within *Mills' St.* § 1508. *Whittle v. Denver & R. G. R. Co.*, 118 Pac. 971, 972, 51 Colo. 382.

Where a domestic corporation has only one agent residing in this state, he will be held to be its "managing agent" within Rev. St. § 2637, subd. 10, providing that in an action against a domestic corporation the summons may be served on its managing agent. *Wickham v. South Shore Lumber Co.*, 61 N. W. 287, 288, 89 Wis. 23.

Service on one as managing agent of a corporation not authorized to receive service is void, regardless of whether he delivers the process to the corporation, and defendant may insist that it will not be bound thereby, especially where it promptly repudiates such service. *Kramer v. Buffalo Union Furnace Co.*, 116 N. Y. Supp. 1101, 1102, 132 App. Div. 415.

A "managing agent" of a foreign corporation for purpose of service of process must be some person vested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney who acts in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of his duties and the manner of executing it. *Ritchie v. Illinois Cent. R. Co.*, 128 N. W. 35, 37, 87 Neb. 631 (quoting 5 Words and Phrases, p. 4320).

Where a foreign corporation has an office in the state, in charge of the person who acts for the corporation, doing business for it, he is a "managing agent," within Code Civ. Proc. § 432, on whom service of process could be had. *Russell v. Pittsburgh Life & Trust Co.*, 115 N. Y. Supp. 950, 953, 62 Misc. Rep. 403.

One who succeeded to the business of a firm, and in its name corresponded and maintained business relations with a foreign corporation without its ever having heard of him, he renting and maintaining his own office, and merely, transferring to the corporation bucket shop business which he was unwilling or unable to handle, was not its managing agent, within Code Civ. Proc. Neb. §§ 73, 75, authorizing service of process on such an agent. *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338, 344.

The term "managing agent," as used in section 4144, Rev. Codes, relating to the service of process on domestic corporations, is a generic term, and does not refer to any particular person or officer, like the words "president," "secretary," etc. *Densel v. Atlanta Mercantile Co.*, 106 Pac. 2, 3, 17 Idaho, 432.

An employé of a foreign corporation engaged in the sale of merchandise under a mail order system, with the duty of delivering such orders to manufacturers and jobbers in New York City as are transmitted to him from the home office and who receives the mail of the corporation at its New York office and transmits it to the home office, and who has no supervision over the correspondence or over the business, and who is employed on a weekly salary paid by check from the home office, is not a "managing agent" of the corporation within Municipal Court Act (Laws 1902, c. 580) § 31, providing that service of a summons on a corporation may be made by delivering a copy to the president, secretary, cashier, or "managing agent." *Doykos v. Montgomery, Ward & Co.*, 127 N. Y. Supp. 227, 228.

A "managing agent" must be in charge, and have the management of some department of the corporation's business, the management of which requires the exercise of an independent judgment and discretion. While he may be under the general direction of the corporation, yet, in the management of his particular department, he should have authority to manage and conduct it as his judgment and discretion direct. He must be in the exclusive and immediate control and management of that department or of the entire works conducted at the place where he is in charge. *Federal Betterment Co. v. Reeves*, 84 Pac. 560, 562, 73 Kan. 107, 4 L. R. A. (N. S.) 460.

An agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in the business matters of his principal, and who has charge of the

business of his principal in the territory covered by his contract, is a "managing agent," within the meaning of sections 1074 and 1076, Cobbey's Ann. St. 1903, providing for the service of summons upon the "managing agent" of a foreign corporation. *Ord Hardware Co. v. J. I. Case Threshing Mach. Co.*, 110 N. W. 551, 553, 77 Neb. 847, 8 L. R. A. (N. S.) 770 (citing Words and Phrases, 4321).

To constitute a "managing or business agent" upon whom service of summons could be made, the agent must be one having in effect a representative capacity and derivative authority, and not one created by construction or implication contrary to the intention of the parties. *Karns v. State Bank & Trust Co.*, 101 Pac. 564, 565, 566, 31 Nev. 170 (quoting *Doe v. Springfield Boiler & Mfg. Co.*, 104 Fed. 687, 44 C. C. A. 130).

The term "managing agent," as used in Code Civ. Proc. § 411, providing for service of summons in a civil action against a foreign corporation doing business in the state and having a managing agent within the state, by delivering a copy to such agent, means the agent who is managing that business. While plaintiff was in Oregon, he received a letter from the S. Saw Co. written from San Francisco in the name of the company signed by J. S., who was president of that corporation, offering employment as a traveling salesman for goods carried by the company. The offer was accepted. The S. Saw Co. was a dealer in manufactured articles of various kinds, which it purchased from different manufacturers; the S. Saw Co. was one. Goods purchased by the Saw Co. from the manufacturing company became the Saw Company's property and was sold by it for its own account, and plaintiff was employed by it to sell them for its account, and he accounted to it for whatever sales he made. His salary, however, was paid by the S. Mfg. Co., because, as it was explained, the Saw Co. might to that extent be aided in meeting the expenses of pushing the S. Mfg. Co.'s goods. Letter heads of the S. Saw Co. bearing a list of articles of different manufacturers in which it dealt, and underneath the name of the S. Mfg. Co. was the word "agencies," beneath which there were several places of address in different states, the last of which was S. Saw Co., San Francisco, Cal. Held, that the facts stated did not constitute a doing business in the state by the S. Mfg. Co., for "while it might be held that a traveling salesman engaged in selling goods for a foreign corporation for its account would be regarded as a transaction of business by such corporation, the employment under a delegated authority from such corporation to act as such salesman would not of itself be regarded as doing business by the corporation." *Jameson v. Simonds Saw Co.*, 84 Pac. 289, 290, 2 Cal. App. 582.

#### General agent distinguished

See General Agency or Agent.

**Director**

A director, by or through the authority of his office, is not a "chief officer" or "managing agent" of a domestic corporation, within the meaning of section 5604, Comp. Laws 1909; hence service of summons on the corporation cannot be had by the delivery of a copy of the summons to such director. *Oklahoma Fire Ins. Co. v. Barber Asphalt Paving Co.*, 125 Pac. 734, 736, 34 Okl. 149.

**Financial correspondent**

Under the statute authorizing service on a foreign corporation by delivering a copy to one of its officers, or "a managing agent thereof, if within the state, doing business for defendant," held, that the term "managing agent" does not include a financial correspondent of an insurance company, whose business is strictly confined to soliciting and procuring applications for loans, drafting of mortgages and notes, etc., and collecting such notes and mortgage loans; the insurance commissioner of the state having also been appointed the agent of such company for service of process in the state. *Bauer v. Union Central Life Ins. Co.*, 133 N. W. 988, 990, 22 N. D. 435.

**Foreman**

A foreman acting under the direction of the superintendent of a corporation is neither an "officer" nor a "managing or local agent" of the corporation, and is not a person on whom service of summons on the corporation can be made. *Simmons v. Defiance Box Co.*, 62 S. E. 435, 436, 148 N. C. 344.

Where a foreman has charge of a local milk station or cheese factory owned by a corporation in the absence of any superior corporate authority, and is vested with powers of management, though he occasionally receives directions from the principal office and the corporate officers, but exercises discretion in transacting business, he is a "managing agent" within Code Civ. Proc. § 431, authorizing the service of process by delivery to the managing agent of a corporation. *Wesley v. Beakes Dairy Co.*, 131 N. Y. Supp. 212, 213, 72 Misc. Rep. 260.

**Manager**

Under Rev. Codes, § 4144, providing that summons must be served on a domestic corporation by delivering a copy to the president, or other head of the corporation, secretary, cashier, or managing agent, where proof of service recites that the summons was served on the "manager" of the corporation named, it was prima facie evidence of service on the corporation; it being presumed that the manager was the "managing agent" thereof. *Densel v. Atlanta Mercantile Co.*, 106 Pac. 2, 3, 17 Idaho, 432.

**Railroad company**

Code Civ. Proc. § 73, provides that summons against a corporation may be served upon its chief officer, or if he is not found

in the county then upon its managing agent, etc. Section 75 provides that, when defendant is a foreign corporation, having a managing agent in the state service may be upon him. Comp. St. 1909, c. 72, art. 1, § 4, provides that service upon railroad companies may be made as on other corporations, or by leaving a copy of the summons with a station agent, or other officer of the company, within the state, etc. Held, that a railroad company selling a coupon ticket in the usual form, authorizing the buyer to travel over the seller's line, from a point within the state to a point in an adjoining state, and thence over the line of another railroad, the connecting line having no part of its track within the state, nor any place of business, nor agency, the railroad selling the ticket was not a "managing agent" of such connecting line upon whom service of summons on such connecting line could be made. *Ritchie v. Illinois Cent. R. Co.*, 128 N. W. 35, 36, 87 Neb. 631.

**Salesman**

Municipal Court Act (Laws 1902, c. 580) § 31, provides that in actions against corporations the summons must be served on the president, etc., or "managing agent." Held, that a mere salesman, who solicited and received orders and sold merchandise on behalf of defendant, was not such "managing agent," within the meaning of such section. *Gleich v. Ontario Button Co.*, 129 N. Y. Supp. 407, 408.

**Solicitor**

A solicitor who had been, but at the time of service of process upon him had ceased to be, a solicitor of applications in a company which sold sick, accident, and funeral benefits, was not "a managing agent" of such company, within the meaning of the Ohio statute authorizing service of process upon the managing agent of a foreign corporation. *Spiker v. American Relief Soc.*, 103 N. W. 611, 612, 140 Mich. 225.

**Traveling agent**

Under the statute permitting service of process on a "managing agent," where a foreign corporation is doing business in the state, no fixed rule or criterion can be laid down for determining who are and who are not managing agents; but where a foreign corporation has appointed no agent on whom service may be made, has no fixed place of business in the state, and does no business in the state except that of selling machinery on orders received by mail, or such as may be taken by their traveling agent, the court should certainly hold, if possible, that such agent, being the only person in the state through whom the company does business, is, for the purpose of litigation growing out of such business transacted within the state, a proper agent for the service of papers. *Christlerson v. Hendrie & Bolthoff Mfg. Supply Co.*, 128 N. W. 603, 604, 609, 26 S. D. 519.

## MANDAMUS

Return to writ, see Return.

Writ, return, or demurrer as pleading, see Pleading.

The office of a writ of mandamus is to require a lower court or judge to act, and not to correct error or reverse judicial action, though it may be issued to enforce a clear right. *Ex parte Dickens*, 50 South. 218, 221, 162 Ala. 272.

To authorize the issuance of a writ of "mandamus," the petitioner must show: First, a legal right in himself to have the act done which is sought by the writ; and, second, that it is the plain legal duty of defendant to perform the act, without discretion to do or refuse. *State ex rel. Gibson v. Malheur County Court*, 81 Pac. 368, 369, 46 Or. 519.

The office of a "writ of mandamus" is to compel the performance of a duty resting upon the person to whom the writ is sent. The duty may have originated in many ways; but, no matter out of what facts or relations the duty has grown, what the law regards, and seeks to enforce, is the personal obligation of the individual to whom it addresses the writ. If he be an officer and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office and cannot be directed to it. It is therefore, in substance, a personal action and rests upon the averred and assumed fact that defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. *State ex rel. Stranahan v. Board of State Canvassers*, 79 Pac. 402, 32 Mont. 13, 4 Ann. Cas. 73.

The function of a "writ of mandamus" is to compel the performance of a plain ministerial duty. It is not the plain ministerial duty of the board of assessors to assess a tract of land as belonging to an individual, and as having a certain measurement and as having certain boundaries, when the title exhibited by him fails to show that he owns any property answering such description. *State ex rel. Burke v. Sewerage & Water Board*, 37 South. 878, 880, 113 La. 924.

The "writ of mandamus" does not supersede legal remedies, but rather supplies the want of a legal remedy. Hence two requisites must exist to warrant a court in granting this extraordinary remedy: First, it must appear that the relator has a clear, legal right to the performance of particular duties by the respondent; and, second, that the law affords no other adequate or specific remedy to secure the performance of the duty which it is sought to coerce. *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 44 South. 230, 231, 53 Fla. 711.

A "mandamus" proceeding is one in court, as contradistinguished from a proceeding before the judge at chambers, and it is so framed that an issue of fact therein may be tried by a jury, and a money judgment for damages awarded as a part of the relief. It is a judicial investigation, the object of which is a determination of civil rights, the same as any ordinary proceeding. *State ex rel. Billings v. Lamprey*, 106 Pac. 501, 502, 57 Wash. 84.

"Mandamus" is an appropriate remedy at the hands of superior courts to set in motion the machinery of inferior courts. It does not direct how such courts shall act or to what effect they shall exercise their powers, but merely compels action when they refuse to act at all, and have come to a standstill. *State ex rel. McDonald v. Steiner*, 87 Pac. 66, 67, 44 Wash. 150.

The word "mandamus" implies superior power, the power of a superior authority to compel an official or inferior judiciary to act. The writ issues only from a superior court to an inferior court to do those acts which clearly pertain to their duty. When duties are imposed on a judge of a superior court as an official, another judge of the superior court has no power to issue a mandamus compelling performance of such duties. *Shreve v. Pendleton*, 58 S. E. 880, 881, 129 Ga. 374, 12 Ann. Cas. 563.

"Mandamus" and certiorari rest on distinct and opposite principles. The former compels an unperformed ministerial duty, the latter reviews a performed judicial duty, while neither operates to control discretion. The former never goes to control judgment, while the latter never goes except to review and control judicial judgment. *State ex rel. Rawlinson v. Ansel*, 57 S. E. 185, 192, 76 S. C. 395, 11 Ann. Cas. 613.

The primary object of the writ of "mandamus" is to compel action. It neither creates nor confers power to act, but only commands the exercise of powers already existing, when it is the duty of the person or body proceeded against to act without its agency. While it may require the performance of a purely ministerial duty in a particular manner, its command is never given to compel the discharge of a duty involving the exercise of judgment or discretion in any specified way, for that would substitute the judgment or discretion of the court issuing the writ for that of the person or persons against whom the writ was issued. In such cases, the sole function is to set in motion without directing the manner of performance. *People ex rel. Besserer v. Collier*, 67 N. E. 309, 311, 175 N. Y. 196 (quoting *People ex rel. Harris v. Commissioners of Land Office*, 43 N. E. 418, 149 N. Y. 26).

The writ of "mandamus" is in the nature of a final writ issuing out of the court of law after a trial by the court, to an executive

officer commanding him to do an official act, which it is claimed he has wrongfully refused and neglected to do. *Hager v. New South Brewing Co. (Ky.)* 90 S. W. 608, 609.

"Mandamus" is a command issuing from a court of law, in the name of the state, directed to some inferior court, officer, corporation, or person, requiring the doing of a particular thing specified, which appertains to their office or duty. *Macholdt v. Pendergast*, 128 N. Y. Supp. 1069, 1071, 144 App. Div. 252.

A writ of "mandamus" to an inferior court issued by a court of appellate jurisdiction is in the nature of an exercise of appellate jurisdiction. "In England the writ of mandamus is defined to be a command issued in the king's name from the Court of King's Bench, and directed to any court or corporation or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right and justice." Blackstone adds: "That it issues to the judges of any inferior court commanding them to do justice according to the powers of their office whenever the same is delayed; for it is the peculiar business of the Court of King's Bench to superintend all other inferior tribunals, and therein to enforce the due exercise of the judicial or municipal powers with which the crown or Legislature have invested them, and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice." "A mandamus to an officer is held to be the exercise of original jurisdiction, but mandamus to an inferior court of the United States is in the nature of appellate jurisdiction." *State ex rel. Eubanks v. Cole*, 109 Pac. 736, 742, 4 Okl. Cr. 25 (quoting and adopting definition in *Re Crane*, 5 Pet. 190, 8 L. Ed. 92; 3 Black. Com. Jur.).

"The action of 'mandamus,' as well as every other civil action, should under the statutes of Kansas, where no special provision is otherwise made, be brought and prosecuted in the name of the real party in interest. \* \* \* At common law the proceeding by 'mandamus' was in no sense an action by the relator. Neither the writ nor the return was in any case nor in any sense a pleading. No issues of fact were raised by the writ and the return. No trial could be had in the case, and no final judgment could be rendered therein between the parties—the relator and the respondent. The writ, whether alternative or peremptory, was merely a writ, and nothing more. It was purely a prerogative writ solely within the discretion of the court (never a writ of right), and was issued in the king's name, or in the name of the sovereign authority, commanding some particular act to be done. The return was

merely an answer made by the respondent to the writ, stating that he had performed the act, or giving some excuse or justification why he had not performed it. It was never a pleading, and could never be traversed or controverted by the relator, or by any one else, but was always taken as absolutely true, however false it might be in its statements of fact. The only remedy that the relator had when he wished to controvert the truth of the return was to institute a separate and independent action on the case for a false return. In such an action the relator became the plaintiff, the respondent became the defendant, the proper pleadings were filed by the parties, the proper issues were made up, the proper trial was had, and the proper judgment was rendered in the action between the parties. If the judgment was for the plaintiff, he recovered his damages and costs, \* \* \* and the court then issued a peremptory writ of mandamus against the defendant. If the judgment was for the defendant, he recovered his costs. \* \* \* But this old common-law mode or procedure for mandamus has been materially changed by statute, not only in Kansas but in nearly every other state, and in England. The present action of mandamus is not only the old common-law proceeding of mandamus, but it is also the old common-law action on the case for the false return. It is the two proceedings combined. The alternative writ is now not merely a writ, as formerly, but it is also a pleading. The return is now not merely a response to the writ, as formerly (which return could not formerly be traversed or denied), but it is also a pleading; and the facts therein stated may now be controverted the same as they may on any other pleading. Issues are now made up by the writ and the return. A trial may be had on such issues, and judgment rendered for the plaintiff, or for the defendant, the same as in any other civil action; and the action is now considered almost an action of right as any other civil action. \* \* \* Our statutes everywhere seem to recognize the present proceeding by mandamus as a civil action, with the relator as the plaintiff, and the respondent as the defendant." *State ex rel. Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 11 Kan. 67, 68, 69 (citing and adopting *State ex rel. Wells v. Marston*, 6 Kan. 524, 532; *Napier v. Poe*, 12 Ga. 170, 178; *Harrington v. Berkshire County Com'rs*, 22 Pick. [39 Mass.] 263, 268, 33 Am. Dec. 741; *Kendall v. Stokes*, 3 How. U. S. 100; *Arberry v. Beavers*, 6 Tex. 457, 464, 55 Am. Dec. 791; *Tidd's Prac.* 949; *Bacon's Abr. Mandamus*; *Comyn's Dig. Mandamus*; *Stephen's Nisi Prius, Mandamus*; and *Jacob's Law Dict.*)

A "proceeding in mandamus" is a judicial investigation, the object of which is the determination of civil rights, the same as in ordinary proceeding—not only the determination of rights, but their determination in

such a way as to culminate in an effective judgment. In the Washington practice mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs, and the procedure has in it all the elements of a civil action. The right to sue out the writ is not made to depend on the character of the dispute, but on what answer is given to the question: Can the ordinary courts of law afford a plain, speedy, and adequate remedy? If such a remedy is furnished, the writ will not issue; otherwise, it will. It was to avoid circuitry of action, thus doing away with the necessity of resorting to more than one proceeding for the enforcement of a right, that the law was framed. *State ex rel. Brown v. McQuade*, 79 Pac. 207; 208, 36 Wash. 579.

#### As an ancillary proceeding

Mandamus is a legal proceeding, and a mandamus issued, after judgment against a county, to compel the levy of a tax to pay the same, is in the nature of an execution to enforce satisfaction. *Carter County v. Schmalstig*, 127 Fed. 126, 127, 62 C. C. A. 78 (citing *Riggs v. Johnson County*, 73 U. S. [6 Wall.] 166, 18 L. Ed. 768; *Helne v. Levee Com'rs*, 89 U. S. [19 Wall.] 655, 22 L. Ed. 223).

#### As a discretionary writ

"Mandamus" is a discretionary writ, issuing only in the exercise of a sound judicial discretion. *Automatic Weighing Mach. Co. v. Carter*, 128 S. W. 557, 558, 95 Ark. 118; *Drew v. School Township of Madison*, 125 N. W. 815, 817, 146 Iowa, 721; *State ex rel. Porter v. Hudson*, 126 S. W. 733, 740, 226 Mo. 239; *State ex rel. Mary Frances Realty Co. v. Homer*, 130 S. W. 510, 512, 150 Mo. App. 325.

"Mandamus" is a discretionary writ and will be allowed in furtherance of justice upon a proper case presented, but will not be allowed where the relator has instigated, authorized, approved, or brought about the very state of things of which he complains. *State ex rel. Donovan v. Barret*, 81 Pac. 349, 350, 30 Mont. 203.

"Mandamus" is not a writ of right, but the granting of it rests largely in the discretion of the court, and it will not be granted when it will work injustice, or introduce confusion and disorder, nor where, if issued, it would prove unavailing. *Bibb v. Gaston*, 40 South. 936, 937, 146 Ala. 434.

The writ of "mandamus" is a discretionary writ, and where an information for larceny was quashed after the jury on a trial had disagreed, and where it did not appear that a different result would be reached on another trial, "mandamus" to compel the court to set aside the order quashing the information would be denied. *Clute v. Ionia Circuit Judge*, 102 N. W. 843, 844, 139 Mich. 337.

Whether a writ of "mandamus" be regarded as a prerogative writ or a writ of right, it will only be granted in the exercise of sound legal discretion. *State ex rel. Crow v. Boonville Bridge Co.*, 103 S. W. 1052, 1068, 1067, 206 Mo. 74.

Mandamus lies, in the discretion of the court, to compel performance of a ministerial duty clearly imposed by law in behalf of one whose right to its performance is legally established and unquestioned, where there is no other adequate remedy. *Dennett v. Acme Mfg. Co.*, 76 Atl. 922, 923, 106 Me. 476.

#### As an extraordinary remedy

"Mandamus" is an extraordinary writ, and can be resorted to only when other remedies fail. *State v. Thompson*, 102 S. W. 849, 351, 118 Tenn. 571, 20 L. R. A. (N. S.) 1 (citing *Ex parte Connecticut Mut. Life Ins. Co.*, 181 U. S. cxxx, appx., 26 L. Ed. 561; 2 *Spelling, Inj. & Other Extra. Rem.* §§ 1368, 1869; *High, Extra. Leg. Rem.* [3d Ed.] § 39).

A writ of mandamus is an extraordinary writ, to be issued, not to vindicate a mere abstract right, but only when necessary to secure some substantial relief or benefit. *Edwards Mfg. Co. v. Farrington*, 66 Atl. 309, 310, 102 Me. 140.

Mandamus is one of the extraordinary remedies. The writ may issue in those cases only "to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust, or station," but "it cannot control judicial discretion." *Davis v. Jewett*, 77 Pac. 704, 705, 69 Kan. 651.

Mandamus is an emergency writ, and its purpose is to furnish a speedy remedy for some apparent wrong. It must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of the law. *State ex rel. Beach v. District Court, Department No. 1, Lewis and Clarke County*, 74 Pac. 498, 501, 29 Mont. 265.

"The writ of mandamus is an extraordinary remedy, to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits. It lies to compel the performance of a public duty, or one imposed by public authority, and for the nonperformance of which there is no other specific or adequate remedy at law, but not for the enforcement of merely private obligations, such as those arising from contracts." *Lahiff v. St. Joseph's Total Abstinence & Benevolent Society*, 57 Atl. 692, 693, 76 Conn. 648, 65 L. R. A. 92, 100 Am. St. Rep. 1012 (citing *Hartford v. Hartford St. R. Co.*, 50 Atl. 393, 74 Conn. 194; *Bassett v. Atwater*, 32 Atl. 937, 65 Conn. 355, 32 L. R. A. 575; *Tobey v. Hakes*, 7 Atl. 551, 54 Conn. 274, 1 Am. St. Rep. 114; *Parrott v. City of Bridgeport*, 44 Conn. 180, 28 Am. Rep. 439; *American Asylum for Education and Instruction of Deaf and Dumb v. President, etc., of Phoenix Bank*, 4 Conn. 172, 10 Am. Dec. 112).



"Mandamus" is a remedy only to be applied in extraordinary cases where there is no other adequate remedy, and, where the applicant has an adequate remedy by action, the writ will not be allowed. It lies to compel the performance of a public duty prescribed by statute and to keep subordinate and inferior bodies and tribunals, exercising public functions, within their jurisdiction, and to compel in proper cases the performance of specific duties imposed by law. The writ will not be issued to enforce the performance of a contract such as the contract of an educational institute to grant a diploma on fulfillment of certain conditions by a student for which an action for breach of contract will lie. *State ex rel. Burg v. Milwaukee Medical College*, 106 N. W. 116, 118, 128 Wis. 7, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 8 Ann. Cas. 407.

#### Injunction distinguished

"An 'injunction' is essentially a preventive remedy; 'mandamus,' a remedial one. The former is usually employed to prevent future injury; the latter, to redress past grievances. The functions of an injunction are to restrain motion and to enforce inaction; those of a mandamus, to set in motion and to compel action. In this sense an injunction may be regarded as a conservative remedy; mandamus, as an active one. The former preserves matters in statu quo, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is therefore a positive or remedial process; the other a negative or preventive one. And since mandamus is in no sense a preventive remedy, it cannot take the place of an injunction, and will not be employed to restrain or prevent an improper interference with the rights of relations. \* \* \* Mandamus and injunction should not be confounded. The latter is used to prevent action, to maintain affairs in statu quo. The former is compulsory, commanding something to be done. An injunction is preventive and protective merely, and not restorative. It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it cannot be corrective so as to remove it. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong. \* \* \* Mandamus is, however, compulsory, and requires doing the act." *Callaghan v. McGown* (Tex.) 90 S. W. 319, 324 (quoting and adopting definition in *High, Extraordinary Legal Remedies* [3d Ed.] § 6).

An injunction is a preventive writ which restrains motion and enforces inaction, while mandamus is a remedial writ which compels action and coerces the performance of a proper existing duty, and hence a writ whereby persons were restrained from intruding themselves on the county committee of the Demo-

cratic party, and members of the committee were restrained from attempting to include the intruders as members, is an injunction. *Ware v. Welch* (Tex.) 149 S. W. 263, 264.

#### As mandate

See Mandate.

#### As a prerogative writ

"The 'writ of mandamus' was originally a prerogative writ, which the Court of King's Bench was wont to issue to any part of the realm for the prevention of disorder, from failure of justice or defect of police." *Hamlin v. Higgins*, 67 Atl. 625, 628, 102 Me. 510.

"Mandamus" is not a prerogative writ running in the name of the sovereign, but is an ordinary process, available to any private citizen, to protect a private right when it is an appropriate remedy, and therefore the use of the name of the state in such cases is a mere form, and may be treated as surplusage. *State ex rel. Watts v. Cain*, 58 S. E. 937, 938, 78 S. C. 348.

The writ of "mandamus" is of most ancient origin. It issued from a common-law court to afford extraordinary legal relief in cases where the ordinary remedy at law was inadequate. Originally it was a prerogative writ, so called from the fact that it proceeded from the king himself, in his Court of King's Bench, and was granted where one was entitled to an office or function and there was no other remedy. It still preserves many of its prerogative features in England, but in this state it is a writ of right. *Southern Ry. Co. v. Atlanta Stove Works*, 57 S. E. 429, 433, 128 Ga. 207 (citing *High, Ex. Leg. Rem.* § 3).

"Mandamus" is a prerogative writ of a remedial nature, and it is issued in all cases where the party has a right to have anything done and has no other specific means of compelling performance, and it lies to restore one to the enjoyment of an office or position of trust of a public nature from which he has been wrongfully removed; but one cannot by mandamus litigate and determine title to an office. *State ex rel. Guion v. Miles*, 109 S. W. 595, 606, 210 Mo. 127.

"Mandamus" is no longer treated as a purely prerogative writ. In its use in an original proceeding in modern practice the writ has come to be considered as merely an action at law between the parties. The right to the writ, and the power to issue it, has ceased to depend upon any prerogative power. It is nothing more than the ordinary process of a court of justice to which every one is entitled where it is the appropriate process for asserting the right he claims. \* \* \* Mandamus, although it is an extraordinary legal remedy, is in the nature of an equitable interference, supplementing the deficiencies of the common law. It will ordinarily be issued where a legal duty is established and no other sufficient means exists for enforcing

it. \* \* \* Where one has a substantial right to protect or enforce, and there is no other adequate remedy at law, he is entitled, as a matter of right, to mandamus, or, at least, it is an abuse of discretion to refuse it. The courts of the state will entertain an action of mandamus by a foreign private corporation against one of its officers, resident of this state, of whom it cannot obtain jurisdiction in its own domicile, to compel such officer to turn over books, papers, etc., belonging to the corporation notwithstanding the title to the office may be incidentally involved. *Potomac Oil Co. v. Dye*, 102 Pac. 677, 678, 10 Cal. App. 534 (citing and adopting *Marbury v. Madison*, 1 Cranch. 137, 176, 2 L. Ed. 60; *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 615, 9 L. Ed. 1181; *Kentucky v. Dennison*, 24 How. 66, 98, 16 L. Ed. 717; *United States ex rel. Riggs v. Johnson County*, 6 Wall. 166, 198, 18 L. Ed. 768).

"Mandamus" is not a creative remedy, and does not call into existence any new liability or duty, and never commanded the performance of an act which was unauthorized in the absence of the writ. The origin of this ancient writ is very obscure. It has undergone many changes during the generations in which it has been in use. It was originally a high prerogative writ, and the king's prerogative was part of the common law of England. It was the aggregate of the king's special powers and privileges—what Bracton calls "*privilegia regis*," and Britton "*le droit le roy*"—the personal rights or powers of supreme character exercisable without question and without responsibility. In *re Lauritsen*, 109 N. W. 404, 408, 99 Minn. 313.

The ancient writ of "mandamus" was a writ prerogative of the king, and issued only at his pleasure. It was an attribute of sovereignty, and a citizen could not as a right invoke its aid; but even at common law its scope became enlarged, and it could be invoked by the private citizen to compel the performance of a legal duty on the part of the courts and other tribunals; but the definition of the ancient writ is inapplicable under the Code, which prescribes the use of the writ and makes it simply one of the methods of procedure for the enforcement of rights or the redress of wrongs. *State ex rel. Barto v. Board of Drainage Com'rs*, 90 Pac. 660, 46 Wash. 474.

Formerly "mandamus" was regarded as a prerogative right and issued, not as of right, but at the pleasure of the sovereign or state and in his or its name as an attribute of sovereignty; but we say the writ is not in any sense a prerogative writ or a writ to be issued at the discretion of the court. It is a procedure under the Code, and any person who has a cause that calls for its invocation has the same right to sue out the writ as he has to commence a civil action to redress a private wrong. *State ex rel. Chealand v. Carroll*, 106 Pac. 748, 750, 57 Wash.

202 (quoting and adopting definition in *State ex rel. Brown v. McQuade*, 79 Pac. 208, 36 Wash. 579).

"Originally the writ of mandamus was a prerogative of the English crown, and issued in its name from the Court of King's Bench, requiring the performance of some specified duty which that court had previously determined, or at least supposed, to be consonant to right and justice. In modern times it issues as a judicial process in actions, often between private parties, in which a court of competent jurisdiction has previously adjudged or commanded the performance by the defendant therein of some specified duty, which under the law he should perform, and is the means by which such judgment or command is enforced." A Circuit Court of the United States is without jurisdiction, either original or by removal from a state court, of an action for a writ of mandamus, which is not necessary for the exercise by it of a jurisdiction which it has otherwise previously acquired; the writ of mandamus not being a suit of a civil nature at law or in equity, within the meaning of the acts of Congress creating the Circuit Courts of the United States and defining their jurisdiction. *Mystic Milling Co. v. Chicago, M. & St. P. Ry. Co.*, 132 Fed. 289, 291.

#### As a civil action or proceeding

As suit of civil nature, see *Suit of Civil Nature*.

Mandamus is a "personal action" within Rev. Code 1852, amended to 1893, p. 787, c. 105, § 2, declaring that all personal actions with specified exceptions shall survive, and is a suit at law within Const. art. 4, § 26, providing that no suit at law shall abate at the death of a party where the cause of action survives. *State v. Jessup & Moore Paper Co. (Del.)* 80 Atl. 350, 351.

Mandamus is a common-law action. *People ex rel. Bauman v. Gest*, 148 Ill. App. 560, 565.

"Mandamus" proceedings are civil actions within Pub. Acts 1905, p. 483, No. 309, providing for changes of venue in such actions. *Woodworth v. Old Second Nat. Bank*, 107 N. W. 905, 144 Mich. 338, 8 Ann. Cas. 310.

A proceeding in mandamus is a civil proceeding which may be in the name of the state at the relation of an individual or simply in the name of an individual as plaintiff. *Rader v. Board of Education of Beaver Dist.*, 50 S. E. 240, 242, 57 W. Va. 220.

A "mandamus" proceeding is an action at law, and under the practice in this state the complaint takes the place of the alternative writ, the answer takes the place of the return, and subsequent pleadings will be had until an issue is joined for trial on the merits, and the complaint, answer, and subsequent pleadings are governed by the rules of

the common law and must contain in substance the essentials of good pleading in an ordinary action at law. *Clement v. Graham*, 63 Atl. 146, 150, 78 Vt. 290, Ann. Cas. 1913E, 1208.

"Statutes everywhere seem to recognize the present proceeding by 'mandamus' as a civil action with the relator as the plaintiff and the respondent as the defendant." *State ex rel. Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 11 Kan. 67, 68, 69.

**Prohibition compared**  
See Prohibition.

**As special proceeding**  
See Special Proceeding.

#### **Rights enforceable**

Mandamus lies to compel the performance of an act which the law specifically enjoins as a duty resulting from an office. *Bell v. Thomas*, 111 Pac. 76, 78, 49 Colo. 76, 31 L. R. A. (N. S.) 664.

A writ of "mandamus" is a "writ issued in the name of the state to an inferior tribunal, a corporation, board, or person commanding the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." *State ex rel. Irvine v. Brooks*, 84 Pac. 488, 491, 14 Wyo. 393, 6 L. R. A. (N. S.) 750, 7 Ann. Cas. 1108 (quoting *Rev. St. 1899*, § 4194).

The office of a writ of mandamus is to compel specific action in the exercise of purely ministerial functions. If the performance of an official act involves discretion, courts, although they have power to demand action, have no right to say that it must be in a particular way. *People ex rel. Quinn v. Voorhis*, 100 N. Y. Supp. 717, 721, 115 App. Div. 118.

Under the statute, "mandamus" is intended to compel performance of any act which the law specifically enjoins as a duty resulting from an office, trust, or station. It is intended as a speedy remedy, and may be granted by the court in term time or by the judge at chambers. *Beadles v. Fry*, 82 Pac. 1041, 1042, 15 Okl. 428, 2 L. R. A. (N. S.) 855.

At common law the writ of "mandamus" is a writ of right every day made use of to oblige inferior courts to do justice but it will not be made use of to control the exercise of discretion. In general, it lies where one has been refused admittance to or turned out wrongfully from any office or franchise. *Matney v. King*, 93 Pac. 737, 745, 20 Okl. 122.

The remedy by "mandamus," though appropriate to compel the performance of a legal duty, cannot be invoked to compel one to complete the making of a contract. *Putnam Foundry & Machine Co. v. Town Council of Town of Barrington*, 67 Atl. 738, 736, 28 R. I. 422.

To support the remedy of "mandamus" a plain and unambiguous duty which it is designed to enforce must already have been imposed by law. Where any person has a right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of the authority, and that authority is discretionary, no legal duty is imposed. *Caven v. Coleman*, 101 S. W. 199, 200, 100 Tex. 467 (citing *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342).

The writ of "mandamus" will not lie except to compel performance of an act which the law specifically enjoins as a duty, resulting from an office, trust, or station, and it will not lie to compel a district judge to enter of record in the district court of a certain county in his district an alleged order admitting defendant to bail, where it appears that the same is not there properly entitled to record. *State ex rel. Stevenson v. Russell*, 95 Pac. 463, 1 Okl. Cr. 165.

*Rev. St. 1899*, § 4194, defines "mandamus" as a writ issued in the name of the state to an inferior tribunal, corporations, boards, or persons, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. *State ex rel. Wyoming Agricultural College v. Irvine*, 84 Pac. 90, 91, 14 Wyo. 318.

The writ of "mandamus" is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and it is granted on the motion of the party aggrieved, or of the commonwealth when the public interest is affected. It is not a proper remedy to compel a telephone company to install an instrument. *Williams v. Maysville Tel. Co.*, 82 S. W. 995, 996, 119 Ky. 33 (quoting and adopting definition in *Civil Code of Prac.* § 477).

The object of a "mandamus" is to enforce specific relief, and it is the inadequacy, rather than the absence of, other legal remedies, coupled with the danger of a failure of justice without the aid of a mandamus, which usually determines the propriety of relief by mandamus. Mandamus is the proper remedy for enforcing performance by a traction company of its duty to pave a street pursuant to the terms of the ordinance granting to its predecessor the right to locate tracks in such street. *Borough of Rutherford v. Hudson River Traction Co.*, 63 Atl. 84, 90, 73 N. J. Law, 227.

Under the express provisions of *Code Civ. Proc.* § 1085, "mandamus" can only be issued to compel the performance of an act required by law, or to compel the admission

of a party to the enjoyment of a right or office to which he is entitled and from which he is unlawfully excluded. *Maxwell v. Board of Fire Com'rs of City and County of San Francisco*, 72 Pac. 996, 997, 139 Cal. 229.

Under Rev. St. 1899, § 4194, defining "mandamus" as a writ issued in the name of the state to an inferior tribunal, corporation, board, or persons, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, and section 4197, providing that the writ must not be issued where there is a plain and adequate remedy at law, "mandamus" to compel an officer of a private corporation to permit the inspection of books, papers, and effects in his possession and control, is the proper form of remedy to enforce the right of stockholders to inspect the books and records of the corporation, where the officer having the custody denies the stockholder access thereto. *Wyoming Coal Min. Co. v. State ex rel. Kennedy*, 87 Pac. 984, 985, 15 Wyo. 97.

Mandamus lies to compel an inferior board or person to do or not to do an act, the performance or omission of which the law enjoins as a duty from an office, trust, or station, and, when discretion is left to such board or person, mandamus may compel it to act in some way, but cannot control such discretion under the express provisions of Code, § 4341. *State v. Parker*, 125 N. W. 856, 864, 147 Iowa, 69.

"The province of a writ of mandamus is to afford redress where a party has a right to have anything done and has no other specific means of compelling its performance. The writ is also applicable in certain cases where a duty is imposed by statute for the benefit of an individual." *State ex rel. Guenther v. Charleston Light & Water Co.*, 47 S. E. 979, 983, 68 S. C. 540.

"The modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law." *Milster v. City Council of Spartanburg*, 47 S. E. 141, 68 S. C. 243 (quoting *High*, *Extr. Leg. Rem.* 4); *State ex rel. Huebler v. Board of Police Com'rs*, 82 S. W. 960, 962, 108 Mo. App. 98.

The statutory duty of the trial judge to settle and sign a bill of exceptions may be enforced by "mandamus," where he arbitrarily refuses to act, though he cannot be required to perform the duty in a particular manner by signing a particular bill. *State ex rel. Columbus St. Ry. & Light Co. v. Deupree*, 81 N. E. 678, 679, 40 Ind. App. 492.

Code, § 1417, provides that the board of supervisors shall direct the treasurer to refund any tax erroneously or illegally exacted or paid, with all interest actually paid thereon. Section 4341 defines "mandamus" as an action to compel an inferior board to do an act, the performance of which the law enjoins as a duty resulting from an office, and provides that mandamus cannot control discretion. Held, that there could be no recovery in mandamus to compel a board of supervisors to order the payment of interest on taxes erroneously exacted founded on section 1417; the section providing merely for the return of interest paid, and the word "refund" meaning to pay back, to restore. *Home Sav. Bank v. Morris*, 120 N. W. 100, 141 Iowa, 560.

"The function of 'mandamus' is to compel the performance of a legal duty, to command action, not to review action, to complete the unfinished. It is the remedy for nonfeasance. \* \* \* It does not lie to correct mistakes that have been made or to remedy wrongs that have been done." *Kenney v. State Board of Dentistry*, 59 Atl. 932, 933, 26 R. I. 538 (quoting *Corbett v. Naylor*, 57 Atl. 304, 25 R. I. 522).

X "Mandamus" will not enforce the performance of official duty, unless the duty sought to be enforced is clearly within the scope of such officer's duty." Where two petitions are pending asking for the sale of the same tract of school land, one of which requests that it be sold as leased land, and the other to an actual settler, and appraisers are appointed and qualified to appraise the land as leased land, they cannot be compelled by mandamus to act as appraisers under the other petition. *Wilson v. Winfrey*, 84 Pac. 123, 72 Kan. 468.

"Mandamus" is a writ issuing in the name of the people, originally instituted for the purpose of correcting official inaction and to compel the performance of some legal duty; and although it has been extended by the court from time to time, and has been held to lie where formerly it was thought not to apply, it has not been, nor should it be, extended to obtain property or to furnish evidence of title to property, that the owner may be more certainly possessed of it, or that it may be more conveniently transferred by him. *People ex rel. Rottenberg v. Utah Gold & Copper Mines Co.*, 119 N. Y. Supp. 852, 853, 135 App. Div. 418.

"Mandamus" does not lie against a private citizen. In other words, where the writ is sought to be invoked, the proper inquiry is: Does the duty sought to be enforced clearly result from an office, trust, or station? If so, the writ should run; otherwise not. This is the common law and is embodied in *Wilson's Rev. & Ann. St. 1903*, § (4884) 686, which is as follows: "The writ of mandamus may be issued by the Supreme Court or the district court, or any justice or

judge thereof, during term or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station. \* \* \* Eberle v. King, 98 Pac. 748, 753, 20 Okl. 49 (citing 26 Cyc. pp. 168, 164).

According to Rev. St. 1899, § 4194, "mandamus" is a writ issued in the name of the state to an inferior tribunal, a corporation, board, or persons, demanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station," and, according to section 4197, "the writ must not be issued in a case when there is a plain and adequate remedy in the ordinary course of the law." Wyoming Coal Mining Co. v. State ex rel. Kennedy, 87 Pac. 337, 338, 15 Wyo. 97, 123 Am. St. Rep. 1014.

It is the special office of the writ of "mandamus" to compel a ministerial officer to perform the duties of his office, and the writ will lie though the duties of the officer are of a quasi judicial character, and consist of a discretion which cannot be reviewed by the courts, where the object sought is to compel an exercise of the discretion. State ex rel. Howe v. Kendall, 87 Pac. 821, 822, 44 Wash. 542.

"Mandamus" is a legal remedy, and lies for the enforcement of legal rights only, and under Burns' Ann. St. 1908, § 1225, providing that writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust, or station, to justify the issuance of the writ it is essential that the relator have a clear legal right to the thing demanded, and that it be the imperative duty of the respondent to perform the required act. State ex rel. Hatfield v. Cummins, 85 N. E. 359, 360, 171 Ind. 112, 36 L. R. A. (N. S.) 945.

In Ohio "mandamus" is not used for the redress of private wrongs, but only in matters relating to the public. The writ is the proper remedy to restore a party to the possession of an office from which he has been illegally removed. State ex rel. Moyer v. Baldwin, 83 N. E. 907, 908, 77 Ohio St. 532, 19 L. R. A. (N. S.) 49, 12 Ann. Cas. 10.

Burns' Ann. St. 1901, § 1182, provides that "writs of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust or station." This statute is substantially declaratory of the common-law doctrine. "Mandamus" is in no sense an equitable proceeding, but is a common-law remedy to compel performance of a legal duty, and the relator must have a clear legal right to the thing demanded, and it must be the imperative duty of the

respondent to perform the act required. If either the right or the duty be doubtful, the writ will not be issued. A duty arising out of statute must not be merely permissive or discretionary, but the statute must require the act to be done, or it will not be enforced by mandamus. State v. Jackson, 81 N. E. 62, 63, 168 Ind. 384.

A "writ of mandamus" is a command issuing from a court of law of competent jurisdiction, in the name of the state, directing some inferior court, officer, corporation, or person to some particular thing therein specified which pertains to his office or duty. It will not lie against one who does not occupy an official or quasi official position, but it will lie not only against public officers, but against private officers in certain cases, and against public and private corporations. It will lie to enforce a public duty, and the officials of a railroad company can be compelled to perform certain duties by mandamus on the theory that they owe those duties to the state and are subject to its visitatorial powers. Gas, water, and telephone companies can also be compelled by mandamus to discharge their duties to the public. Rouse v. Thompson, 81 N. E. 1109, 1120, 228 Ill. 522 (citing Mechem, Public Officers & Agents, § 926; People ex rel. Hempstead v. Chicago & A. R. Co., 55 Ill. 95, 8 Am. Rep. 631; Chicago & A. R. Co. v. Suffern, 21 N. E. 824, 129 Ill. 274; People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co., 52 N. E. 292, 176 Ill. 512, 35 L. R. A. 656; Litchfield & M. Ry. Co. v. People, 78 N. E. 589, 222 Ill. 242; People v. Chicago, I. & L. Ry. Co., 79 N. E. 144, 223 Ill. 581, 7 Ann. Cas. 1; 2 Spelling, Injunctions & Other Extraordinary Remedies [2d Ed.] § 1592).

Though "mandamus" will not generally lie to compel performance of a power, the exercise of which is in the discretion of the officer against whom the writ is sought, the remedy is available if the action of the officer is capricious, arbitrary, unreasonable, or based on false information. People ex rel. Empire City Trotting Club v. State Racing Commission, 82 N. E. 723, 190 N. Y. 31.

"Mandamus" cannot be rightfully invoked to settle a doubtful claim to an office, or to have the title to an office adjudicated upon as between adverse claimants, but "information in the nature of a quo warranto" affords the proper remedy. Where the relator holds a prima facie and uncontested title to the office, or his title has been adjudicated upon and finally established by a competent tribunal, a writ of "mandamus" may be issued to put him in possession of the office as well as of the books, papers, and other property pertaining to it. Hoy v. State ex rel. Buchanan, 81 N. E. 509, 512, 168 Ind. 506, 11 Ann. Cas. 944 (citing Mannix v. State ex rel. Mitchell, 17 N. E. 585, 115 Ind. 245).

"Mandamus" does not lie to compel the payment of an unliquidated unadjudicated

claim that is disputed. *Howell v. State ex rel. Edwards*, 45 South. 453, 454, 54 Fla. 199 (citing *Whitesides v. Stuart*, 20 S. W. 245, 91 Tenn. 710; *Hicks v. Board of Auditors of Wayne County*, 57 N. W. 188, 97 Mich. 611; *State Board of Education v. West Point*, 50 Miss. 688).

"Mandamus," as defined by Civ. Code Prac. § 477, and the courts, is a writ commanding the performance of some duty, in the performance of which the applicant for the writ is interested, or by the nonperformance of which he is aggrieved or injured. *Louisville Home Telephone Co. v. City of Louisville*, 113 S. W. 855, 857, 130 Ky. 611.

Mandamus may not be invoked to review a judicial or quasi judicial decision. The primary object of the writ of mandamus is to compel action. It neither creates nor confers power to act, but only commands the exercise of powers already existing, when it is the duty of the person or body proceeded against to act without its agency. While it may require the performance of a purely ministerial duty in a particular manner, its command is never given to compel the discharge of a duty involving the exercise of judgment or discretion in any specified way, for that would substitute the judgment or discretion of the court issuing the writ for that of the person or persons against whom the writ was issued. *People ex rel. McCabe v. Matthies*, 87 N. Y. S. 196, 198, 92 App. Div. 16 (citing *People ex rel. Harris v. Commissioners of Land Office*, 43 N. E. 418, 149 N. Y. 26).

Ky. St. § 3855, requires a personal representative of a decedent's estate to return an inventory within a certain time after qualifying. Section 3857 provides that any personal representative failing to return an inventory within six months after qualifying shall be fined by the county court, and be required to make such inventory upon a day fixed by it, and upon failure to do so, shall be fined for each subsequent delinquency, and section 3858 requires every personal representative to have his accounts settled, and all settlements and vouchers returned to the county court within a certain time, and as often thereafter as the court requires. Civ. Code Prac. § 477, defines the "writ of mandamus" as an order of a court commanding an executive or ministerial officer to perform or omit an act, the performance or omission of which is enjoined by law, which shall be granted on the motion of the party aggrieved or of the commonwealth when the public interest is affected. Held, that the duty of a county judge to require executors and administrators to file inventories and make settlements was mandatory, and not a matter of judicial discretion which could not be enforced by mandamus. *Commonwealth v. Peter*, 124 S. W. 896, 897, 136 Ky. 689.

"The 'writ of mandamus' is in form a command in the name of the state, directed

to some tribunal, corporation, or public officer, requiring them to do some particular thing therein specified, and which the court has previously determined that it is the duty of such tribunals or other person to perform.

\* \* \* It does not lie to correct the errors of inferior tribunals by annulling what they have done erroneously, nor to guide their discretion, nor to refrain them from exercising power not delegated to them; but it is emphatically a writ requiring the tribunal or person to whom it is directed; to do some particular act appertaining to their public duty, and which the prosecutor has a legal right to have done. \* \* \* The 'writ of mandamus' is the counterpart of the writ of prohibition, and is so designated in some states by statute. 'Mandamus' is a legal remedy to compel action in accordance with legal duty, while 'prohibition' is a legal remedy to restrain action in excess of legal authority." *State ex rel. Pelton v. Ross*, 81 Pac. 865, 867, 39 Wash. 399 (quoting and adopting the definition in *Dunklin County v. Dunklin County District Court*, 23 Mo. 454).

"'Mandamus' is a command issued from a court of law of competent jurisdiction in name of the state directed to some inferior court, officer, corporation, or person requiring them to do some particular thing therein specified, which appertains to their office or duty." It lies in cases involving merely the performance by a county official of his plain, ministerial duty of payment of a warrant drawn by lawful and proper authority upon a fund in his custody, legally applicable to its payment, and requiring the exercise of no official discretion on his part. In view of Rev. St. 1899, c. 49, prescribing the pleading and procedure in mandamus, but not enlarging the scope or amplifying the application of the remedy, such a proceeding cannot be converted into an equitable suit by the respondent, a county treasurer, answering that he holds the fund subject to the conflicting claims of relator and others and an order of court requiring such other claimants to appear and answer. *State ex rel. Hixon v. Nerry*, 79 S. W. 993, 994, 995, 105 Mo. App. 458.

"The writ of 'mandamus' being justly regarded as one of the highest writs known to our system of jurisprudence, it issues only where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy. Since the object of a mandamus is not to supersede legal remedies, but rather to supply the want of them, two prerequisites must exist to warrant a court in granting this extraordinary remedy: First, it must be shown that the relator has a clear, legal right to the performance of a particular act or duty at the hands of the respondent; and, second, it must appear that the law affords no other adequate or specific remedy to secure the enforcement of the right and the

performance of the duty which it is sought to coerce. The test to be applied, therefore, in determining upon the right to relief by mandamus, is to inquire whether the party aggrieved has a clear, legal right, and whether he has any other adequate remedy, since the writ belongs only to those who have legal rights to enforce, who find themselves without an appropriate legal remedy." State ex rel. Gleeson v. Jumbo Extension Mining Co., 94 Pac. 74, 76, 30 Nev. 192, 133 Am. St. Rep. 715, 16 Ann. Cas. 896 (quoting and adopting definition in High, Extraordinary Legal Remedies, p. 9).

It is a fundamental principle that "mandamus" lies to compel the performance of a purely ministerial duty, involving no discretionary right and not requiring the exercise of judgment. It does not lie where performance of a trust is sought which is discretionary, or involves the exercise of judgment. It is also elementary that the writ cannot usurp the functions of a writ of error, or take the place of an appeal, nor will it lie against a court, unless it be clearly shown that such court has refused to perform some manifest duty. Under a statute providing that the writ of mandamus may be issued to an inferior tribunal to compel the performance of an act which the law specially enjoins as a duty resulting from an office, mandamus out of the district court would not lie to compel the county court to enter a judgment in a divorce proceeding different from the judgment which had been rendered; this being an attempt to review, annul, and modify the judgment, and being in this regard an attempt to usurp the functions of an appeal from or writ of error to such judgment, and also an attempt to control the discretion and judgment of the county court. Lindsey v. Carlton, 96 Pac. 997, 999, 44 Colo. 42.

"Mandamus" lies to compel an inferior court to hear and determine a cause or matter properly triable before it, which the lower court fails or refuses to try on the ground that it has no jurisdiction, or that the judge is incompetent, or for other reasons." Hence mandamus is the proper remedy to compel a county court to take jurisdiction of and hear a proceeding by the state revenue agent for the reassessment or back assessment of taxes on the property of a street railway. State v. Taylor, 104 S. W. 242, 246, 119 Tenn. 229.

The process of "mandamus" will not issue against a public officer, unless to compel the performance of an act clearly defined and enjoined by law, and which is therefore ministerial in its nature and neither involves the exercise of discretion, nor leaves any alternative. Caven v. Coleman (Tex.) 96 S. W. 774, 776 (citing Glasscock v. Commissioner of General Land Office, 3 Tex. 51; Arberry v. Beavers, 6 Tex. 457, 55 Am. Dec. 791; San-

som v. Mercer, 68 Tex. 492, 5 S. W. 62, 2 Am. St. Rep. 505).

While election inspectors cannot be compelled by mandamus to make their return in any particular manner, they may be compelled to make a true return of the result according to their count, if the return made was incorrect, irrespective of the provisions of the election law; "mandamus" being the proper remedy to compel a public official to perform his official duty, where he fails to do so. People ex rel. Henness v. Douglass, 126 N. Y. Supp. 908, 909, 142 App. Div. 224.

## MANDATARIES

A "mandatary" whose engagement is merely gratuitous is bound only to ordinary negligence, and liable only for gross neglect or breach of good faith. Marshall v. Nashville Ry. & Light Co., 101 S. W. 419, 420, 118 Tenn. 254, 9 L. R. A. (N. S.) 1246, 12 Ann. Cas. 675.

## MANDATE

See Special Mandate.

The word "mandate," in Civ. Code, art. 2985, relating to personal mandate, whereby one person appoints another his special agent, or whereby one person gives power to another to transact for him and in his name one or several affairs, does not refer to the business of agency carried on under a charter adopted under the act of 1888. State ex rel. Le Blanc & Ralley v. Michel, 36 South. 869, 870, 113 La. 4.

### MANDATE (In Practice)

#### Execution

An execution on a judgment is a "mandate," as provided by Code Civ. Proc. § 3343, and the only mandate by which a judgment creditor is entitled to enforce it. Belfer v. Ludlow, 126 N. Y. Supp. 180, 182, 69 Misc. Rep. 496.

#### Mandamus

The "writ of mandate," as defined by Rev. St. 1898, §§ 3640, 3641, denominating the writ of mandamus a writ of mandate, and authorizing its issuance to any inferior tribunal to compel the performance of an act specially enjoined by law, is designed to compel action where the law enjoins it, and the tribunal refuses to act in accordance therewith. Hoffman v. Lewis, 87 Pac. 167, 170, 31 Utah, 179.

By Code Civ. Proc. § 1085, the "writ of mandate" is issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station. Howe v. Southrey, 78 Pac. 259, 144 Cal. 767.

Under Code Civ. Proc. § 3343, subd. 2, defining the word "mandate" to include a writ issued out of a court, commanding an officer to do or to refrain from doing an act therein specified, and Greater New York Charter (Laws 1901, c. 466) § 1001, authorizing the court, on application of any person to whom an award has been made in proceedings to acquire land, to require the comptroller to pay the award, and to enforce the mandate as other mandates are enforced, the court may by mandamus compel the comptroller to pay an award, and the fact that costs are more than they would be if the applicant for mandamus had been content with an order is a matter which may not be considered, when he was denied the award, to which he was legally entitled. *Macholdt v. Prendergast*, 128 N. Y. Supp. 1069, 1070, 144 App. Div. 252.

The word "mandate," in *Wilson's Rev. & Ann. St.* 1903, § 1882, providing that in all cases in the probate court the probate judge shall have power to allow injunctions, "mandates," writs of prohibition, etc., is not synonymous with the word "mandamus" in the Organic Act of the territory conferring on the Supreme and district courts power to grant writs of mandamus and habeas corpus in all cases authorized by law, and in section 4884, providing that the writ of mandamus may be issued by the Supreme Court or the district court, or any justice or judge thereof, during term or at chambers, etc., and the probate courts of the territory are not authorized to hear and determine original proceedings in mandamus. *Starkweather v. Kemp*, 88 Pac. 1045, 1046, 18 Okl. 28.

#### Remittitur

The word "remittitur," used in Supreme Court rule 34 providing that, when a judgment of a District Court of Appeal becomes final therein, the remittitur shall not be issued until after the lapse of 30 days thereafter, unless otherwise ordered, designates the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken, and corresponds to "mandate," used in the practice of the United States Supreme Court. *Noel v. Smith*, 88 Pac. 167, 169, 2 Cal. App. 158.

#### Subpoena

Code Civ. Proc. § 8, authorizes a court to punish for criminal contempt one guilty of willful disobedience of its lawful mandate. Section 3343 provides that the word "mandate" includes a writ, process, etc., made pursuant to law by a judicial officer, and commanding the person named therein to do the act therein specified, and Code Cr. Proc. § 619, provides that disobedience of a subpoena may be punished as for a criminal contempt. Held, that a subpoena issued by the district attorney requiring a witness to appear before a grand jury was a "mandate," within section 8, so as to make one willfully advis-

ing disobedience guilty of criminal contempt. *People ex rel. Drake v. Andrews*, 90 N. E. 347, 348, 197 N. Y. 53, 18 Ann. Cas. 317.

## MANDATORY

Directory statute distinguished from mandatory statute, see Directory Statute.

A mandatory provision of a statute is one the omission to perform which renders proceedings void; while a directory provision is one the observance of which is not necessary to the validity of proceedings. *Bond v. City of Baltimore*, 84 Atl. 258, 260, 118 Md. 159.

A statute providing that appointment of a special administrator may be made at any time, and must be made by entry upon the minutes of the court specifying the powers to be exercised by him, was not "mandatory" as to entry of a minute order, and the appointment was complete when the order was signed, and failure of the clerk to enter it on the minutes would not invalidate it. *McNeil v. Morgan*, 108 Pac. 69, 71, 157 Cal. 373.

The term "mandatory" is applicable almost entirely to statutory requirements intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be, and generally would be, injuriously affected. It does not apply to statutory requirements intended for the guide of officers in the conduct of business devolved on them and designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of the parties cannot be injuriously affected. *French v. Edwards*, 13 Wall. 506, [80 U. S.] 511, 20 L. Ed. 702.

## MANDATORY INJUNCTION

Injunctions are "mandatory" or preventive, according as they command the defendant to do or refrain from doing a particular thing. The issuance of a "mandatory injunction" is exercised with extreme caution, and is confined to cases where courts of law are unable to afford adequate redress, or where the injury cannot be compensated in damages. In determining whether to grant relief by way of "mandatory injunction," courts of equity will take into consideration the relative convenience or inconvenience which would result to the parties from granting or withholding relief, and will be governed accordingly. *Mason v. Byrley* (Ky.) 84 S. W. 767, 770 (citing *High, Inj.* § 2).

A "mandatory injunction" is one which compels affirmative action by defendant. If an injunction compels one affirmatively to surrender a possession which under the facts alleged by him he is entitled to hold, it is a "mandatory." *Clute v. Superior Court of City and County of San Francisco*, 99 Pac. 362, 363, 155 Cal. 15, 182 Am. St. Rep. 54.



It is error, on an interlocutory hearing of an equitable petition seeking specific performance and injunction, to order the delivery by defendant of the personal property in controversy to the petitioner; such order being in legal effect a mandatory injunction. *Rudolph Wurlitzer Co. v. Jackson*, 67 S. E. 879, 880, 134 Ga. 333.

A "mandatory injunction" compels the affirmative performance, while a preventive injunction restrains the commission of an act. *Carver v. San Pedro, etc., R. Co.*, 151 Fed. 334, 338.

## MANGANESE

See Borate of Manganese.

## MANGANESE ALLOY

See Iron and Manganese Alloy.

## MANGE

"Mange" is a cattle disease, otherwise known as splenic or Spanish fever. *State v. Missouri Pac. R. Co.*, 81 Pac. 212, 213, 71 Kan. 613.

## MANGLE

As machine, see Machine.

A "mangle" is a large roller, used in a laundry, through which the clothes are run. *Ross-Paris Co. v. Brown*, 90 S. W. 568, 121 Ky. 821.

## MANHATTAN COCKTAIL

See Cocktail.

As intoxicating liquor, see Intoxicating Liquors.

## MANHOLES

A "manhole" is a round opening into a sewer large enough to permit a man to enter for the purpose of cleaning or repairing. *Comstock v. City of Eagle Grove*, 111 N. W. 51, 52, 133 Iowa, 589.

## MANIFEST

The word "evident" means "clear to the vision, especially clear to the understanding, and satisfactory to the judgment." Its synonyms are: "Manifest; plain; clear; obvious; visible; apparent; conclusive; indubitable; palpable; notorious." *State v. Kauffman*, 108 N. W. 246, 20 S. D. 620 (quoting with approval from Webster's Dict.).

## MANIFEST DANGER

Even if the claims of the plaintiff were of such a character that the property in controversy was either legally or equitably charged with their payment, the fact that the building is insured, and in the event of its destruction by fire the land could not be sold for a sum sufficient to pay the amount

claimed by the plaintiff, does not constitute such a "manifest danger of loss or destruction" of the property as would warrant the appointment of a receiver to take charge of the same and impound the rents therefrom. *Ray v. Carlisle*, 54 S. E. 119, 120, 125 Ga. 316.

## MANIFEST ERROR

A manifest clerical error in a liquidation made within one year after original entry cannot be corrected more than one year after such entry, because not within the provision in Customs Administrative Act June 10, 1890, c. 407, § 24, authorizing the Secretary of the Treasury to correct such errors "within one year from the date of such entry," as the term "entry," as there used, refers to the document filed by the importer on entry. Inasmuch as Customs Administrative Act June 10, 1890, c. 407, § 24, relating to the correction of "manifest clerical errors," is the latest deliverance on that subject and relates most specifically thereto, it controls over Act June 22, 1874, c. 391, § 21, relative to the "settlement of duties," and Act March 3, 1875, c. 136, § 1, relative to the "correction of errors in liquidation." Where, in liquidation, the clerk miscalculated the number of square yards in an imported fabric, this constituted a "manifest clerical error," within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 24. *United States v. F. B. Vandegrift & Co.*, 175 Fed. 772, 773, 99 C. C. A. 598.

Section 16 of the county law (Consol. Laws, c. 11), providing that the board of supervisors could correct any "manifest clerical or other error" in any assessment, and cause to be refunded taxes illegally or improperly assessed, refers to such errors as are manifest from an inspection of the assessment roll itself without argument or evidence. In re Trustees of Village of Delhi, 124 N. Y. Supp. 487, 489, 139 App. Div. 412.

## MANIFESTLY

The term "manifestly" is a common word which may be assumed to be understood in the common meaning by an ordinary jury without definition. *Commonwealth v. Buckley*, 86 N. E. 910, 911, 200 Mass. 346, 22 L. R. A. (N. S.) 225, 128 Am. St. Rep. 425.

## MANIFESTLY DANGEROUS

That one has committed homicide and been acquitted on the ground of insanity justifies the conclusion that he is "manifestly dangerous," within Ballinger's Ann. Codes & St. § 6959 (Pierce's Code, § 2208), providing for the commitment of persons who are deemed manifestly dangerous after having been acquitted of crime on the ground of insanity. *State ex rel. Thompson v. Snell*, 89 Pac. 931, 933, 46 Wash. 327, 9 L. R. A. (N. S.) 1191.

## MANIFESTLY INTEND

Section 70 of the Georgia Penal Code of 1895 justifies the killing, in defense of one's

person, of one who is "manifestly intending" or endeavoring by violence or surprise to commit a felony on the person of the slayer. "To 'manifestly intend' an act implies more than mental resolution to do the act. The mental resolution must find some form of expression before it becomes manifest. In cases involving force, the slightest manifestation of intent to do the act would be an attempt in the accomplishment of the act." *Taylor v. State*, 49 S. E. 303, 307, 121 Ga. 348.

## MANIPULATE

Where a petition in an action for injuries to a servant by defects in an elevator alleged that the cable would often catch and become fast so that it would not respond to the usual and proper force necessary to move it, that at the time of the injury plaintiff found the cable fast, and while attempting to "manipulate" it the cable, because of the elevator's defective condition, suddenly became loose, and caused the elevator to suddenly and violently start, etc., the term "manipulate" should be construed as including both the ordinary pull first applied by plaintiff in his effort to move the elevator and the more forcible one which followed, so that an instruction that if, when plaintiff undertook to use the elevator, the cable had become caught owing to its defective condition, so that it became necessary for him to pull on the cable, and while so pulling the cable suddenly loosened and moved, causing him to fall, etc., was not erroneous as presenting issues not specified in the petition. *Zongker v. People's Union Mercantile Co.*, 86 S. W. 486, 488, 110 Mo. App. 382.

## MANNER

See Best Manner; Due Manner; Forcible Manner; Good and Workmanlike Manner; In a Manner; In Due Manner; Same Manner.

Any manner, see Any.

In like manner, see Like Manner.

No general definition of the word "manner," as used in a contract or statute, can be framed. Its meaning must be determined in the light of the particular contract or statute in which it is used. "The 'manner' of doing a thing has reference to the way of doing—to the method of procedure—and the element of time does not seem to be involved." *Melshelmer v. McKnight*, 46 South. 827, 829, 92 Miss. 386 (quoting definition in *Bankers' Life Ins. Co. v. Robbins*, 80 N. W. 484, 59 Neb. 170).

"The word 'manner' is usually defined as meaning 'way of performing or executing, method, custom, habitual practice,' etc." *Livesley v. Litchfield*, 83 Pac. 142, 143, 47 Or. 248, 114 Am. St. Rep. 920 (quoting and

adopting *People ex rel. Ahrens v. English*, 29 N. E. 678, 139 Ill. 622, 15 L. R. A. 131).

Amendatory Act of 1872, No. 31, p. 79, prescribing the "manner" of adopting children, was intended to cover the whole subject-matter. It says so expressly in its title, "An act providing for the manner of adopting children." *Succession of Dupré*, 41 South. 324, 326, 116 La. 1090.

The use of the word "manner," in Laws 1907, p. 426, c. 267, § 1 (Gen. St. 1901, § 5974), empowering the board of railroad commissioners to determine whether there is any necessity for a railroad crossing by a street car line and, if so, the place thereof, and in other respects the "manner" of such crossing, fairly implies the right to make any reasonable requirement having relation to the safe crossing of both roads. *State v. Parsons St. Ry. & Electrical Co.*, 105 Pac. 704, 705, 81 Kan. 430, 28 L. R. A. (N. S.) 1082 (citing 33 Cyc. p. 296).

Under Rev. St. Ohio 1880, §§ 3270, 3281, 3283, which invest railroad companies directly with the right to appropriate and use the streets of a city for railroad purposes by condemnation proceedings, unless the company and the municipal authorities agree "upon the manner, terms, and conditions upon which the same may be used or occupied," construed in the light of the settled rule in Ohio that municipal corporations possess such powers only as are expressly granted by statute or are implied as essential to the exercise of granted powers, and of section 3375, authorizing railroad companies for hauls of less than 30 miles to receive such rates as may be from time to time fixed by the company or by law, the power given to a municipal corporation by section 3283 to agree upon the manner, terms, and conditions upon which streets may be used is limited to such agreement as relates directly to such use and occupation, and a provision in an ordinance prescribing rates to be charged by a belt line road for hauls over its entire line, less than 30 miles long, as a condition to granting right of way over the streets for a part of its line, is ultra vires and void. *T. B. Townsend Brick & Contracting Co. v. Central Trust Co. of New York*, 187 Fed. 63, 67, 109 C. C. A. 381.

### As extent

The term "extent" does not ordinarily mean "manner." Hence under Laws 1901, p. 294, c. 125, § 3, providing that, if any purchaser of public land shall fail to reside upon and improve it in good faith, he shall forfeit it and all payments to the same extent as for non payment of interest, the mere failure to reside on and improve the land does not work a forfeiture ipso facto, as was had under Laws 1895, c. 47, § 11, p. 67, providing that, if such purchaser shall fail to reside upon and improve in good faith public land purchased by him, he shall forfeit it in the

same manner as for nonpayment of interest. *Adams v. Terrell*, 107 S. W. 537, 538, 101 Tex. 381.

#### As method or way

The word "manner" in the Australian ballot law, regulating the "manner" of holding elections, has the ordinary meaning of mode, method, way of effecting a result. *Getty v. Holcomb*, 99 Pac. 218, 219, 79 Kan. 224.

In Const. art. 7, § 6, providing that each county may sell or dispose of its lands in whole or in part in manner to be provided by the commissioner's court of the county, "manner" is the controlling word in the phrase and designates what the commissioner's court might provide for. Webster defines "manner" as 'mode of action, way of performing or effecting anything, method'; and the courts have given to that word its signification as defined by Webster." *Logan v. Stephens County*, 83 S. W. 365, 367, 98 Tex. 283 (citing *People ex rel. Ahrens v. English*, 29 N. E. 678, 139 Ill. 629, 15 L. R. A. 131; *Wells v. Bain*, 75 Pa. 54, 15 Am. Rep. 563; *Brown v. O'Connell*, 36 Conn. 447, 4 Am. Rep. 89).

Rev. St. 1899, § 5498, provides that it is not permissible to question the correctness of the action of the grand jury in finding a bill of indictment, or of a petit jury in the trial of a case, or of any court or judge while acting within their legitimate province in a lawful manner, by habeas corpus. Held, that the word "manner" had reference to the method of acting, and not to the degree of perfection or correctness in the results arrived at, unless the judgment pronounced was absolutely void. *Hovey v. Sheffner*, 93 Pac. 305, 308, 18 Wyo. 254, 15 L. R. A. (N. S.) 227, 125 Am. St. Rep. 1037, 15 Ann. Cas. 318.

Webster defines "manner" as: "Mode of action; way of performing or effecting anything; method; style; form or fashion." The Century Dictionary, as: "The way in which an action is performed; method of doing anything; mode of proceeding in any case or situation; mode; way; method." In a statute the expression in permitting introduction of an instrument whether proved or acknowledged in such "manner" or not was intended to have the same force and effect as the same expression had in an old statute which was superseded, where it had been held to apply not only to the formality of certifying what was done by the officer but as well to the power of the officer to take the acknowledgment. *Bledsoe v. Haney*, 122 S. W. 455, 457, 57 Tex. Civ. App. 285.

The word "manner," in a will authorizing testator's daughter by her will to dispose of a fund to and among his grandchildren in such shares and in such manner as she shall think right and proper, does not imply a power of selecting, but has reference to

the way in which it shall be enjoyed, whether directly or in trust, immediately or at a postponed date, and other like matters, and hence the provision of her will excluding two grandchildren in a per capita distribution of the fund was invalid. *Cameron v. Crowley*, 65 Atl. 875, 877, 72 N. J. Eq. 681.

The word "manner" means the handling of a thing, and, as used in the constitutional provision which directs the allowance of appeals from justices "in such manner as may be prescribed by law," means that appeals from judgments of justices shall be allowed by such handling of the subject as may be prescribed by law. *Duncan v. Baltimore & O. R. Co.*, 69 S. E. 1004, 1006, 68 W. Va. 293, Ann. Cas. 1912B, 272.

The petition in an action for injuries to a servant by derailment of a train alleged that plaintiff's injuries were caused by defendant's negligence, in that the engine and train were old, worn, out of repair, and unsuited for the purposes for which they were being used, and also in the manner and way the engine and cars were being operated. Held, that the words "manner and way" imported either the speed of the train, or something connected with the management and operation thereof, and that the words "were being operated" necessarily referred to that which was being done by the employees on the engine and cars at the time of the accident, so that such allegations were insufficient to justify the submission of an issue of negligence on defendant's part in directing the train to be run over the road as fast as 10 miles an hour. *Missouri, K. & T. Ry. Co. of Texas v. Poole* (Tex.) 133 S. W. 239, 240.

The word "manner," in the specifications of an article sought to be patented that "in making brushes by my improved method above described, the brush-back or frame may be made of any desired material and in any known 'manner,'" refers to the form and shape of the brush-back or frame when completed, and not solely to the way in which it is made. *Universal Brush Co. v. Sonn*, 146 Fed. 517, 520.

An information charging that defendant unlawfully, in the presence and hearing of D., did curse and swear at him, and did abuse him "in a manner" reasonably calculated to provoke a breach of the peace, sufficiently charged an offense under Pen. Code 1895, art. 599, prohibiting any person from abusing another, "under circumstances" reasonably calculated to provoke a breach of the peace. *Trezevant v. State*, 84 S. W. 828, 47 Tex. Cr. R. 502.

#### Of appointment or expulsion

The legislative authority given by Const. Or. art. 6, § 7, to prescribe the time and "manner" in which municipal officers may be elected or appointed, does not include the power to determine the qualifications of a

legal voter authorized to vote for such officers. *Livesley v. Litchfield*, 83 Pac. 142, 144, 47 Or. 248, 114 Am. St. Rep. 920.

In insurance law, § 70, providing that the charter of an insurance company shall state the mode and "manner" in which its corporate powers are to be exercised, the "manner" of electing its directors, officers, etc., the word "manner," while more comprehensive in its meaning and uses than either the word "method" or "mode," may with much reason be held to mean in that connection the procedure of electing directors and officers, rather than a definition of the classes in whom the suffrage should lie. *Lord v. Equitable Life Assur. Soc.*, 96 N. Y. Supp. 10, 27, 109 App. Div. 252.

Gen. St. 1901, § 7502, provides that all property not expressly exempted shall be subject to taxation "in the manner provided in this act." Laws 1907, c. 408, § 1, defines the word "property" as used in the act relating to taxation to include every kind of property subject to ownership. Held, that the clause "in the manner provided in this act" relates to the method of imposing taxes upon property already declared to be subject to taxation, and does not limit the taxation to the kinds of property specially named in the act, and the finished product of manufacturers, not being exempted, is taxable though not mentioned in the act. *State v. Holcomb*, 106 Pac. 1030, 1033, 81 Kan. 879, 28 L. R. A. (N. S.) 251.

#### As applicable to time

The word "manner," in Court and Practice Act 1905, p. 139, § 490, providing that notice of the filing of bills of exceptions shall be given to the adverse part "in such manner" as the court shall by rule prescribe, is broad enough to include "time." Court and Practice Act 1905, p. 139, § 490, provides that notice of the filing of bills of exceptions shall be given to the adverse party "in such manner" as the court shall by rule prescribe, and section 34 authorizes the Supreme and superior court to promulgate rules regulating practice in matters not expressly provided for by law. Superior Court Rule 32 declares that notice in writing of the filing of a bill of exceptions shall be given by the party filing the same to the adverse party within two days thereafter, which shall be served on the adverse party's attorney of record in the manner specified. Held, that a failure to serve notice of the filing of a bill of exceptions within the time prescribed by rule 32 was a jurisdictional defect justifying a dismissal of the bill under section 491, p. 140, declaring that, in any case of default in taking such procedure, judgment shall be entered or sentence imposed as if notice of intention to prosecute a bill of exceptions had not been filed. *Smith v. William H. Haskell Mfg. Co.*, 65 Atl. 610, 611, 28 R. I. 91.

In Const. §§ 15, 16, art. 7 (Bunn's Ed. §§ 187, 188), providing that appeals shall be taken from the county court to the Supreme Court in the same "manner" as appeals from the district court, the word "manner" as so used, as well as in different provisions of the Constitution and the statutes, may mean "time" or would include "time." *Atchison, T. & S. F. Ry. Co. v. Love*, 99 Pac. 1081, 1086, 23 Okl. 192.

Whether the word "manner" or the phrase in the same manner may include the elements of time has been answered by the courts both in the affirmative and in the negative. The word as used in the phrase "in the same manner," in Act Cong. March 3, 1905, c. 1479, § 12, does not include the element of time. *Porter v. Brook*, 97 Pac. 645, 647, 648, 21 Okl. 885.

The phrase "manner of performance" as used in the labor law (Laws 1906, p. 1395, c. 506) § 3, limiting a day's work on public work by or for municipal corporations to eight hours, and prohibiting municipal officers from paying "for work done upon any contract, which in its form or manner of performance violates the provisions of" said section, refers among other things, to the number of hours per diem that laborers are allowed to work. *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 85 N. E. 1070, 1073, 193 N. Y. 148, 24 L. R. A. (N. S.) 201, order affirmed on rehearing (1909) 86 N. E. 986, 194 N. Y. 145.

Act Cong. Feb. 20, 1907, c. 1134, § 2, provides for the exclusion from the United States of various classes of persons, including idiots, insane persons, beggars, persons afflicted with dangerous contagious diseases, persons having been convicted of crime or misdemeanor involving moral turpitude, polygamists, anarchists, prostitutes, or persons coming into the United States for the purpose of prostitution, and persons who are supported by or receive part of the proceeds of prostitution. Section 3 in the original act, and as amended (Act March 26, 1910, c. 128, § 2), relates exclusively to the importation of aliens for the purposes of prostitution, or other immoral purposes, the holding of such persons for such purposes in pursuance of such importation, and aliens found inmates of houses of prostitution after they have entered the United States, or who derive benefit from the earnings of the same. Sections 20 and 21 provide that such persons shall be deported if proceedings therefor are begun within three years, and both sections 2 and 3 contain the remedy to be applied, viz., deportation "in the manner provided" in sections 20 and 21. Held, that the words "in the manner provided" did not include the three-year limitations contained in sections 20 and 21, and, Congress having eliminated such limitation from section 3, aliens within such section were subject to deportation,

though arrested after they had been in the country more than three years. *Chomal v. United States*, 192 Fed. 117, 118, 112 O. C. A. 461.

#### Of voting

The constitutional authority given the Legislature to prescribe the "time and manner" in which municipal officers may be elected or appointed does not include the power to determine what shall constitute a legal voter. *Livesley v. Litchfield*, 83 Pac. 142, 143, 47 Or. 248, 114 Am. St. Rep. 920.

#### MANNER DIRECTED OR PRESCRIBED BY LAW

Under Code 1904, art. 98, § 83, which declares that in granting administration with the will annexed the residuary legatee or legatees shall be preferred, and directs the orphans' court to proceed in the manner directed by law with respect to executors within the state before administration with the will annexed shall be granted to any other person, the phrase "in the manner directed by law" relates to the provisions of sections 32 and 33, relative to notice; and, where the executor named in the will declined to act, the residuary legatee was the person next entitled, and a person who, in addition to a bequest of the residue of the estate after the death of another, was given a remainder in a specific part of the estate, is a "residuary legatee," and hence on petitions by such legatee and by a creditor the court could not grant administration to the creditor. *McCaughy v. Byrne*, 80 Atl. 653, 654, 115 Md. 85.

The term "manner prescribed by law," as used in the Constitution of Washington, giving the owner of property sought to be condemned the right to have the amount of his compensation determined by a jury, unless a jury be waived, as in other civil cases, in the "manner prescribed by law," means that the law in force at the time the condemnation proceedings are instituted, and not that in force at the time of the adoption of the Constitution, is to be resorted to in determining whether a jury trial is waived or not. *Cheilan County v. Navarre*, 80 Pac. 845, 847, 38 Wash. 684.

## MANSLAUGHTER

See *Assault with Intent to Commit Manslaughter*; *Involuntary Manslaughter*; *Voluntary Manslaughter*.

*Willful manslaughter*, see *Willful—Willfully*.

See, also, under the *Immediate Influence of Sudden Passion*.

"Manslaughter" is the unlawful killing of a human being without malice, either express or implied. *State v. Emory* (Del.) 58 Atl. 1036, 1038, 5 Pennewill, 126; *State v. Ireland*, 83 Pac. 1066, 1068, 72 Kan. 265;

*State v. Reese* (Del.) 79 Atl. 217, 221, 2 Boyce, 434; *State v. Collins* (Del.) 62 Atl. 224, 226, 5 Pennewill, 263; *State v. Bell* (Del.) 62 Atl. 147, 148, 5 Pennewill, 192; *State v. Brown* (Del.) 61 Atl. 1077, 1079, 5 Pennewill, 339; *State v. Miele* (Del.) 74 Atl. 8, 10, 1 Boyce, 33; *State v. Tinkler*, 83 Pac. 880, 881, 72 Kan. 262; *State v. Phinney*, 89 Pac. 634, 13 Idaho, 307, 12 L. R. A. (N. S.) 935, 12 Ann. Cas. 1079; *State v. Uzzo* (Del.) 65 Atl. 775-777, 6 Pennewill, 212; *State v. Lance*, 63 S. E. 198, 200, 149 N. C. 551; *State v. Short* (Del.) 82 Atl. 230, 242, 2 Boyce, 491; *Mixon v. State*, 68 S. E. 315, 316, 7 Ga. App. 805.

"Manslaughter" is defined to be the unlawful killing of another without malice, either express or implied, and without premeditation. *State v. Brinte* (Del.) 58 Atl. 258, 262, 4 Pennewill, 551.

The term "manslaughter" has become a generic term, covering two specific offenses or degrees of homicide, punishable, the one under the statute by confinement in the penitentiary, and the other under the common law, by fine and imprisonment in jail. The common-law learning of the text-writers upon the offense of "manslaughter" can have no place in the definition of the two degrees of homicide which have been carved out of manslaughter by the effect of our statute, however apt such learning may have been under the ancient practice, when the punishment of both grades was a matter resting in the discretion of the judge. *Brown v. Commonwealth*, 92 S. W. 542, 544, 122 Ky. 626.

Rev. St. 1899, § 1825, declaring any one who shall administer drugs to, or shall employ an instrument on, a pregnant woman, with intent to destroy the fetus or child of said pregnant woman, guilty of manslaughter, is invalid in so far as it attempts to declare manslaughter, which necessarily imports a homicide to have been committed, when the death of neither the child nor the mother results from the act charged. *State v. Hartley*, 84 S. W. 910, 185 Mo. 669, 105 Am. St. Rep. 608.

#### As felonious homicide

See *Felonious Homicide*.

#### Voluntary killing

"Manslaughter" is the unlawful killing of a human being without malice either express or implied, and must be voluntary upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible. *Duckworth v. State*, 97 S. W. 280, 281, 80 Ark. 360; *State v. Primrose* (Del.) 77 Atl. 717, 719, 2 Boyce, 164; *State v. Brown*, 60 S. E. 945, 946, 79 S. C. 390; *State v. Borrelli* (Del.) 76 Atl. 605, 607, 1 Boyce, 349; *Commonwealth v. Curcio*, 65 Atl. 792-794, 216 Pa. 380; *State v. Foster*, 45 S. E. 1, 3, 66 S. C. 469.

"Manslaughter" is where one person kills another without malice, as in a sudden af-

fray, in the heat of blood, or in a transport of passion, without cooling time or time for reflection. *State v. Russo* (Del.) 77 Atl. 743, 746, 1 Boyce 538; *State v. Roberts* (Del.) 78 Atl. 305, 310, 2 Boyce, 140; *State v. Adams* (Del.) 65 Atl. 510, 511, 6 Pennewill, 178; *State v. Underhill* (Del.) 69 Atl. 880, 882, 6 Pennewill, 491; *State v. Jackson* (Del.) 82 Atl. 824, 825.

"Manslaughter" is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible. In "voluntary manslaughter" there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible. *People v. Bissett*, 92 N. E. 949, 951, 246 Ill. 516.

Where the act of killing another is done in sudden heat and passion, or sudden affray, and without previous malice and not in necessary self-defense, accused is guilty of manslaughter. *Combs v. Commonwealth* (Ky.) 112 S. W. 658, 659.

"Manslaughter" is voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law. *Sue v. State*, 105 S. W. 804, 809, 52 Tex. Cr. R. 122.

A homicide in sudden passion excited by sufficient provocation without malice is "manslaughter," not because the law supposes that the passion made the slayer unconscious of what he was about to do, but because it presumes that passion disturbs his reason. *McBryde v. State*, 47 South. 302, 305, 156 Ala. 44.

Every killing upon a rash and inconsiderate impulse is not "manslaughter"; an adequate cause rendering the mind incapable of cool reflection being essential to reduce an unlawful killing to manslaughter. *Potts v. State*, 118 S. W. 535, 538, 56 Tex. Cr. R. 39.

To reduce a killing which would otherwise be murder to manslaughter, there must, under the statute, have been both passion and adequate cause to produce it. *Hatchell v. State*, 84 S. W. 234, 236, 47 Tex. Cr. R. 150.

Under Pen. Code, § 254, homicide is "manslaughter," when perpetrated without a design to effect death, and in heat of passion. *State v. Stumbaugh*, 132 N. W. 666, 668, 28 S. D. 50.

A killing wholly the result of passion and without malice is manslaughter. *Brewer v. State*, 49 South. 336, 339, 100 Ala. 66.

If there was a sudden, impulsive killing, due to passion suddenly aroused—*furor brevis*—it was "manslaughter." *State v. Taylor*, 50 S. E. 247, 252, 57 W. Va. 228.

Manslaughter is where the homicide is willful and unlawful, but is committed under such circumstances of provocation or alleviation as to rebut the implication of malice. *State v. Harmon* (Del.) 60 Atl. 866-868, 4 Pennewill, 580.

"The distinguishing quality of 'manslaughter' is that the mind must be so agitated by reason of the conduct that it is incapable of cool reflection." *Venters v. State*, 83 S. W. 832, 836, 47 Tex. Cr. R. 280.

"Manslaughter" is defined by the statute in Indian Territory as a voluntary act upon a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible, and it is further described as a killing in the commission of an unlawful act without malice or in the prosecution of a lawful act without due caution and circumspection. *Carney v. United States*, 104 S. W. 606, 7 Ind. T. 247.

"Intentional killing is 'manslaughter' if it is committed under and by reason of a passion caused by what the law deems sufficient provocation. The law does not merely look to see if a man was provoked and enraged, and, if so, reduce his crime to manslaughter; but it also looks at the provocation, and does not excuse him at all if it was inadequate to excite his passion. The provocation must be sufficient, in the eye of the law, or it is murder." *State v. White*, 51 S. E. 44, 50, 138 N. C. 704 (quoting and adopting definition in *Clark, Cr. Law*, p. 198).

An instruction that "manslaughter" is the unlawful killing of another without malice, express or implied, and that the person committing the act must not be in fault, is not erroneous, where the judge further charged, in other words, that the killing must be on sufficient provocation. *State v. Reeder*, 51 S. E. 702, 703, 72 S. C. 223.

"Manslaughter" is the killing of another in the heat of passion without malice by the use of a dangerous weapon without authority of law and not a necessary self-defense. This was the definition given by the trial court and held not erroneous on appeal. *Moore v. State*, 38 South. 504, 505, 86 Miss. 160.

Where one, under the influence of sudden passion arising from some adequate cause, and not actuated by malice, while not acting in self-defense, and intending to kill another, kills a different person, the offense is manslaughter. *McCullough v. State*, 136 S. W. 1055, 1056, 62 Tex. Cr. R. 126.

Under Pen. Code 1911, art. 1128, defining "manslaughter" as voluntary homicide, committed under the immediate influence of sudden passion arising from adequate cause, if either sudden passion or adequate cause, is lacking, the homicide is not manslaughter. *Burns v. State* (Tex.) 145 S. W. 356, 364.

The true nature of "manslaughter" is that it is a homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection. If during that period he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood, and violence of anger and not through malice. The same rule applies to a homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. Where two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up, in which blows are given on both sides, it is a mutual combat, without much regard to who is the assailant; and if no unfair advantage be taken in the outset, and an occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in the heat of blood, and under our statute is manslaughter in the first degree. *Robinson v. Territory*, 85 Pac. 451, 456, 16 Okl. 241.

In a prosecution for homicide, where the court discussed at length the difference between murder and "manslaughter" resulting in defense of one's dwelling, and gave numerous illustrations so that the jury could not have been misled, an instruction that "it is 'manslaughter' if sudden heat and passion be aroused because of the wrongful trespass of another upon his home, and if he slays in sudden heat and passion that is 'manslaughter,'" if not technically correct, is harmless error. *State v. Kibler*, 60 S. E. 438, 440, 79 S. C. 170.

One who provokes a difficulty without any intention of killing or doing any serious bodily harm, and suddenly and without deliberation and under the immediate influence of sudden passion arising from an adequate cause kills another, is guilty of "manslaughter." *Cornelius v. State*, 112 S. W. 1050, 1055, 54 Tex. Cr. R. 173.

A charge defining "manslaughter" as voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law, defining the meaning of its phrases, and stating what was necessary to reduce voluntary homicide to the grade of manslaughter, is not erroneous. *Pratt v. State*, 127 S. W. 827, 831, 59 Tex. Cr. R. 167.

"Manslaughter" was properly defined as "the unlawful killing of a human being without malice, without that black condition of the heart, \* \* \* but in sudden heat of passion, on a legal provocation offered by deceased. That is to say, if deceased assaulted defendant, and defendant became hot and passionate, and in that condition of the heart he struck and killed deceased, in sudden heat and passion, the law denominates that sort of killing 'manslaughter.'" *State v. Hunter*, 63 S. E. 685, 687, 82 S. C. 153.

"Manslaughter" exists where one person unlawfully kills another without malice, as where one in a sudden affray, in the heat of blood, or in a transport of passion, without malice, inflicts a mortal wound, without time for reflection or for the passion to cool. *State v. Brelawski* (Del.) 84 Atl. 950, 952.

Where the evidence showed that accused struck decedent, riding in a wagon, with a six-foot binding pole, and that decedent was either knocked off the wagon or fell from it and was fatally injured by a wheel running over him, the court properly charged on manslaughter in the language of the statute, and that the jury could convict accused if they believed that he struck decedent and knocked him off the wagon, or caused decedent to fall from the wagon, and that a wheel ran over him, and that he died in consequence of such striking and being run over. *Gilmore v. State*, 122 S. W. 493, 494, 92 Ark. 205.

In the prosecution of an officer for killing deceased while resisting arrest, an instruction that if defendant in good faith believed that he had a right to execute a capias pro fine under which he was seeking to arrest deceased on Sunday, then they should find defendant guilty of manslaughter, was erroneous. *Kammerer v. Commonwealth*, 125 S. W. 723, 724, 137 Ky. 315.

An instruction that if accused was in such a state of excitement that his reason was dethroned, that he was driven by an uncontrollable impulse so that he was not morally or legally accountable for his conduct, so that he did not realize his crime or what he was doing or where he was, and had gone some distance from the scene before he was able to recover himself and his senses, then he would be guilty of no higher crime than manslaughter, was erroneous, as the degree of mental disturbance required was equivalent to insanity. *People v. Poole*, 123 N. W. 1093, 1094, 159 Mich. 350, 184 Am. St. Rep. 722.

Under Rev. St. U. S. § 5341, declaring that every person who unlawfully and willfully but without malice shoots at or otherwise injures another, of which shooting or other injury the person dies, is guilty of manslaughter, an instruction defining manslaughter and omitting the word "willfully"

was erroneous. *O'Barr v. United States*, 105 Pac. 988, 989, 3 Okl. Cr. 319, 139 Am. St. Rep. 959.

A charge on manslaughter in the language of the statute that every person who shall unlawfully kill any human being, without malice, express or implied, either voluntarily upon a sudden heat or involuntarily, but in the commission of some unlawful act, shall be guilty of manslaughter is sufficient; the statute containing no technical terms, and being plain and unambiguous, and easily understood by a juror of ordinary intelligence. *State v. Quinn*, 105 Pac. 818, 821, 56 Wash. 295.

Defendant, a frail feeble man 62 years of age, after having been severely beaten by deceased, went to his residence, obtained a pistol, and, returning, fired two shots, the second of which struck deceased while he was advancing. Deceased took the pistol away from defendant, and beat him with it into insensibility, after which deceased died from his wound. Held, that an instruction that if defendant with a deadly weapon or instrument reasonably calculated to produce death by the mode or manner of its use, in a sudden transport of passion aroused by adequate cause, and not in defense of himself against an unlawful attack reasonably producing a rational fear or expectation of death or serious bodily harm, shot deceased as charged, he was guilty of manslaughter, was proper and warranted by the evidence. *Sartin v. State*, 103 S. W. 875, 876, 51 Tex. Cr. R. 571.

Defendant, keeper of a bagnio, had trouble with a man therein, and he went out, being immediately followed by deceased and his party. The testimony for the state was that the defendant then called for a pistol, aimed it towards the party, and fired, saying, "Run you \* \* \* run," and that on her going inside, being asked if they ran, she said, "Yes." She and her witnesses testified that no shot was fired from the house. Held, that "negligent homicide" was not in the case, but "manslaughter," of which she was convicted, was the lowest grade of homicide of which she could be found guilty; so that any error in the instruction thereon was harmless. *Clifton v. State*, 84 S. W. 237, 239, 47 Tex. Cr. R. 472.

The mere belief by defendant that he was in danger of having some injury inflicted upon him, without any reasonable grounds for entertaining such belief, has never been recognized by the courts of this state or any other state to which our attention has been called as being sufficient to reduce the grade of the crime from "murder" in the first or second degree to "manslaughter." *State v. Clay*, 100 S. W. 439, 442, 201 Mo. 679.

"Manslaughter," as defined by the statutes of the United States, consists in the unlawful and willful killing of another by strik-

ing, stabbing, wounding, shooting, or otherwise injuring him, resulting in his death, without malice. *State v. Collingsworth*, 92 N. E. 22, 82 Ohio St. 154, 28 L. R. A. (N. S.) 770, 137 Am. St. Rep. 775; *Miller v. State*, 107 Pac. 948, 3 Okl. Cr. 575.

#### Same—Cooling time

"Manslaughter" is the unlawful killing of a human being without malice, either express or implied, and is committed when the death wound is given by accused without malice, on sudden provocation, in the heat of blood or in a transport of passion, on sufficient provocation without time for reflection and deliberation and for the blood to cool. *State v. Moore* (Del.) 74 Atl. 1112, 1114, 1 Boyce, 142.

If there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason to be heard, the killing shall be attributed to deliberate revenge, and punished as murder. *People v. Bissett*, 92 N. E. 949, 951, 246 Ill. 516.

In determining whether a homicide is reduced from murder to manslaughter, the question is not only whether accused's passion, engendered by a sufficient provocation, did in fact cool, but also whether the time intervening between the giving of the provocation and the killing was sufficient for the passion of a reasonable man to cool; an affirmative answer to either question precluding a reduction to manslaughter. A killing committed upon a provocation given 9 or 10 months before is not reduced to manslaughter by the passion engendered by such provocation. *Ex parte Fraley*, 109 Pac. 295, 296, 3 Okl. Cr. 719, 139 Am. St. Rep. 988.

To reduce homicide from the degree of murder to that of manslaughter it must have been committed upon a sudden quarrel or heat of passion, and, where a person who is sufficiently wronged by another to arouse in him that heat of passion which, if life were taken immediately, would make the crime manslaughter, after sufficient cooling time has intervened, kills deceased, the homicide will be deemed the result of deliberation; and where defendant was informed by his wife that she had committed adultery with deceased, the first time under violence, searched for deceased, took a journey by train to his home, and shot him 17 hours after he had been first informed, there had been a sufficient cooling time and his acts could not be said to have been committed in such "heat of passion" as would reduce the homicide to manslaughter. *People v. Ashland*, 128 Pac. 798, 801, 20 Cal. App. 168.

#### Same—Intent

To reduce homicide to manslaughter, it is not necessary that the intent to kill be formed in a sudden transport of passion, on adequate cause, but it is enough that the mind is excited and not capable of cool re-



section from some adequate cause. *Kannmacher v. State*, 101 S. W. 238, 242, 51 Tex. Cr. R. 118.

The rule is well settled that to constitute "manslaughter" it is not necessary that the perpetrator should have intended and willed the death of the person killed. One who willfully uses a deadly weapon upon another will be deemed to intend the necessary and probable consequences of his act. The text-writers divide manslaughter into two degrees, voluntary and involuntary. *Tyner v. United States*, 108 Pac. 1057, 1058, 2 Okl. Cr. 689.

Intent is not an essential element of the statutory definition of "manslaughter" when committed by culpable negligence, and charges predicated upon the theory that intent is in every case essential to the statutory crime of "manslaughter" are properly refused. *Kent v. State*, 43 South. 773, 774, 53 Fla. 51.

*Sand. & H. Dig. § 1660*, providing that the killing of a human being without design to effect death, in the heat of passion, but in a cruel and unusual manner, unless it be under circumstances that would constitute excusable or justifiable homicide, shall be adjudged manslaughter, is not applicable to a killing with a pistol; the statute being evidently intended to cover a case of homicide committed unintentionally, but with such wanton savagery and cruelty, and in such an unusual manner, as to imply recklessness of design. In one sense, it is true, all killing is cruel; but, in the sense of this statute, killing with such a common or effective instrument of death as a pistol cannot be regarded as cruel; still less is this manner of death unusual. *Tanks v. State*, 75 S. W. 851, 852, 71 Ark. 459.

In "manslaughter" there may be an intent to kill existing in the mind of the slayer at the time the fatal shot is fired. *Keigans v. State*, 41 South. 886, 887, 52 Fla. 57.

Where the intent was merely to inflict chastisement, and death results from some peculiarity in decedent's constitution or other unexpected incident, the killing is manslaughter only. *Rosemond v. State*, 110 S. W. 229, 230, 86 Ark. 160.

"Manslaughter" is the unlawful killing of another without malice, and under certain conditions this crime may be established, though the killing has been both unlawful and intentional. *State v. Baldwin*, 68 S. E. 148, 151, 152 N. C. 822.

If the intention to kill was formed in defendant's mind, through passion, with adequate cause, and the homicide occurred while the mind was in that condition, it was no higher offense than manslaughter. *Dixon v. State*, 103 S. W. 399, 401, 51 Tex. Cr. R. 555.

#### Same—Provocation

"Manslaughter" is voluntary homicide committed under the immediate influence of

sudden passion, arising from an adequate cause, but neither justified nor excused by law. By the expression under the immediate influence of sudden passion is meant: (1) That the provocation must arise at the same time of the commission of the offense, and that the passion is not the result of a former provocation. (2) That the act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by passion arising from some other provocation. (3) The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror rendering it incapable of cool reflection." *Sue v. State*, 105 S. W. 804, 809, 52 Tex. Cr. R. 122.

"Manslaughter" is where one person unlawfully kills another without malice. In order to reduce the crime to manslaughter, the provocation must be very great—so great as to produce such a transport of passion as to render the person for the time being deaf to the voice of reason." *State v. Powell* (Del.) 61 Atl. 966, 971, 5 Pennewill, 24; *State v. Thighman* (Del.) 63 Atl. 772, 773, 6 Pennewill, 54; *State v. Johns* (Del.) 65 Atl. 763, 766, 6 Pennewill, 174; *State v. Wiggins* (Del.) 76 Atl. 632, 635, 7 Pennewill, 127.

"To reduce unlawful killing from 'murder' to 'manslaughter,' two things must concur: First, conditions must be shown to exist which would be calculated to produce, in the mind of a person of ordinary prudence and self-control, such rage, fury, or terror as would render the mind of the defendant incapable of forming a premeditated design to effect the death of the person slain, or of any other human being; second, it must also be shown that the defendant was in fact, at the time of the homicide, laboring under such rage, fury, or terror." *Ex parte Smith*, 90 Pac. 893, 900, 2 Okl. Cr. 24.

To reduce a homicide from murder to "manslaughter," it must be committed in a heat of passion, on a reasonable provocation, without malice and without premeditation, and under circumstances that will not be justifiable or excusable homicide. The passion which will reduce homicide to the degree of manslaughter is an excited state of mind produced by some lawful provocation, such as a blow or an assault of any kind upon the person. "Manslaughter," in the fourth degree, includes every homicide not justifiable or excusable which was manslaughter at common law, and which is not excusable or justifiable, or declared by statute to be manslaughter in some other degree. *State v. Weakley*, 77 S. W. 525, 527, 178 Mo. 413 (quoting and adopting the definitions in Rev. St. 1899, § 3477).

Killing, the result of passion produced by fight, is "manslaughter" if the person upon whom an assault is made with violence resent it immediately by killing the aggressor.

sor, and act therein in heat of blood and not exclusively in his own defense. *State v. Quick*, 64 S. E. 168, 169, 170, 150 N. C. 820 (citing *State v. Miller*, 17 S. E. 167, 112 N. C. 878; *State v. Crane*, 95 N. C. 619; *State v. Tackett*, 8 N. C. 210).

The mere belief by defendant that he was in danger of having some injury inflicted upon him, without any reasonable grounds for entertaining such belief, has never been recognized by the courts of this state or any other state to which our attention has been called, as being sufficient to reduce the grade of the crime from "murder" in the first or second degree to "manslaughter." *State v. Clay*, 100 S. W. 439, 442, 201 Mo. 679.

A slight assault does not excuse the killing of an assailant with a deadly weapon, so as to reduce the offense from the grade of murder to that of manslaughter. *State v. Wiggins* (Del.) 76 Atl. 632, 635, 7 Pennewill, 127; *Same v. Borrelli* (Del.) 76 Atl. 605, 607, 1 Boyce, 349.

When words of decedent are accompanied by acts showing a purpose to commit violence on accused, as by raising and pointing at him a gun, accused is entitled to an instruction on manslaughter. *State v. Crawford*, 66 S. E. 110, 115, 66 W. Va. 114.

If the prisoner willingly engaged in a fight with the deceased, and the deceased threw his hand to his hip pocket, and advanced upon the prisoner in a threatening manner, and the prisoner, being willing to fight, seized a pistol, and shot the deceased, and the deceased died from the wound then inflicted by the prisoner, the prisoner would be guilty of "manslaughter," provided the appearance and manner of the deceased were such as to cause the prisoner to believe that the deceased was armed with a deadly weapon, and that the prisoner did believe he was armed with a deadly weapon and was about to harm him with it. *State v. Exum*, 50 S. E. 283, 289, 138 N. C. 599.

If a convict, while attempting to prevent his punishment by the warden, which amounted to an assault, slew a fellow convict aiding the warden, who was the warden's abettor in committing the assault, the homicide may be reduced to voluntary manslaughter; and it was error to omit to charge on that offense in a prosecution of the convict for murder. *Westbrook v. State*, 66 S. E. 788, 791, 133 Ga. 578, 26 L. R. A. (N. S.) 591, 18 Ann. Cas. 295.

Where decedent slapped accused, but did not accompany the act by angry or insulting words, a charge on manslaughter that, if accused killed decedent under the immediate influence of sudden passion arising from the act of decedent rendering the mind of accused incapable of cool reflection, he was guilty of manslaughter only, properly submitted the issue of manslaughter. *Best v. State*, 125 S. W. 909, 913, 58 Tex. Cr. R. 327.

Provocation caused by words only is not sufficient to reduce a homicide from murder to "manslaughter." *Petty v. State*, 89 S. W. 465, 467, 76 Ark. 515.

Testimony of a statement made by deceased to defendant and to some of defendant's sisters, who were present, that they were bitches, or damn bitches, does not raise the issue of insulting conduct toward a family relative of defendant. *Johnson v. State*, 84 S. W. 824, 826, 47 Tex. Cr. R. 523.

Where accused killed another under the immediate influence of passion arising in his mind from information given him by his wife to the effect that deceased had used insulting language to her, defendant believing and in good faith acting on the information, such information was to him an adequate cause, reducing the crime to manslaughter, whether the insults had been in fact offered or not. *Melton v. State*, 83 S. W. 822, 824, 47 Tex. Cr. R. 451.

In a prosecution for manslaughter, wherein it appeared accused killed deceased while endeavoring to gain possession of a house occupied by the deceased, there was evidence that accused, just before the killing, sent his wife to demand possession, and that when she did so deceased asked her if she was going to take the place of her husband, or if she was attending to his business, and said that there was no law that could put him out, and that then her husband called her, and deceased and his brother followed her, cursing accused and calling him vile names. Held not to raise the issue of manslaughter by reason of insulting conduct towards her, so as to require a charge thereon. *Gay v. State*, 125 S. W. 896, 901, 58 Tex. Cr. R. 472.

In a prosecution for homicide, an instruction was erroneous which required that, before defendant would be entitled to a reduction of his offense to manslaughter, the jury must believe both that he was led to commit the homicide from learning that decedent had insulted his wife, and also that the decedent had used violent language to and threatened him with bodily harm, since, where the law makes any given fact adequate cause for homicide, a defendant is entitled to an unequivocal instruction that, if such fact is proven, it is adequate cause, and where any one or more issues are raised by the evidence, either of which, if found to be true, would as a fact constitute adequate cause, the jury should be so instructed, and it is error to blend the two and require that the affirmative of both be proved. *Barbee v. State*, 124 S. W. 961, 967, 58 Tex. Cr. R. 129.

Where a person committing a homicide did so in the belief that decedent had insulted defendant's sisters, the homicide was "manslaughter," if committed upon the first meeting after defendant was apprised of the outrage, whether decedent actually committed

the insult or not, if the homicide was committed while defendant was acting under the belief that decedent was guilty and while laboring under a passion aroused by that belief which rendered his mind incapable of cool reflection. *Gillespie v. State*, 109 S. W. 158, 159, 53 Tex. Cr. R. 167.

If, when he killed decedent, accused was incapable of cool reflection because of decedent's insulting language and conduct toward accused's wife, knowledge of which had just come to him, or if the unwarranted ejection of accused from decedent's house, accompanied by kicks from decedent, infuriated accused beyond cool reflection, resulting in the killing, the killing was "manslaughter." *Holcomb v. State*, 113 S. W. 754, 756, 54 Tex. Cr. R. 486.

"If a husband finds his wife committing adultery and under the provocation instantly takes her life, the homicide is only 'manslaughter.'" *Thomas v. State*, 43 South. 371, 374, 150 Ala. 31 (citing *Hooks' Case*, 13 South. 767, 99 Ala. 166; *McNeill v. State*, 15 South. 352, 102 Ala. 121, 48 Am. St. Rep. 17; *Dabney v. State*, 21 South. 211, 113 Ala. 38, 59 Am. St. Rep. 92; *Williams v. State*, 30 South. 484, 130 Ala. 107, 112).

A charge that to reduce a killing to "manslaughter," where passions have been suddenly aroused on a sufficient provocation, it must have been done under the influence of passion promptly acted upon, is not erroneous. *Harrison v. State*, 40 South. 568, 570, 144 Ala. 20.

The unlawful killing of another without malice is "manslaughter," as where one kills another in a sudden quarrel, in the heat of blood, or in a transport of passion, without malice, inflicts a mortal wound, without time for reflection or for the passions to cool; but to reduce the offense to manslaughter the provocation must be very great, so great as to produce such a transport of passion as to render the person for the time being deaf to the voice of reason. *State v. Brooks* (Del.) 84 Atl. 225, 228.

#### Voluntary or involuntary killing

"Manslaughter" is the unlawful killing of another, without malice, upon a sudden heat, or inadvertently, but in the commission of some unlawful act. *Boche v. State*, 122 N. W. 72, 75, 84 Neb. 845.

"Manslaughter" is the unlawful killing of another without malice, either express or implied, and without premeditation, and is either voluntary or involuntary. *State v. Blackburn* (Del.) 75 Atl. 536, 589, 7 Pennewill, 479; *State v. Morahan* (Del.) 77 Atl. 488, 489, 7 Pennewill, 494; *State v. Woods* (Del.) 77 Atl. 490, 491, 7 Pennewill, 499.

"Manslaughter," as defined by Rev. St. § 5341, is the offense of unlawfully and willfully, but without malice, striking, stabbing,

wounding, or shooting at or otherwise injuring another person in any fort, arsenal, etc., of which striking, etc., such person dies. "Manslaughter" has been defined to be the killing of another without malice, express or implied, which may be voluntary upon sudden heat, or involuntary in the commission of some lawful act. Any unlawful and willful killing of a human being without malice is manslaughter, and thus defined it includes a negligent killing which is also willful. 'Manslaughter' occupies the middle ground between excusable, or justifiable, homicide on the one hand, and murder on the other." *United States v. Hart*, 162 Fed. 192, 194, 195.

Gross carelessness in the handling of firearms which results in killing a human being is at least "manslaughter." *State v. Clardy*, 53 S. E. 493, 500, 78 S. C. 340.

Under Pen. Code, defining "manslaughter" as the unlawful killing of a human being without malice and dividing it into two kinds: (1) Voluntary, upon a sudden quarrel or heat of passion; (2) involuntary in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution or circumspection—in a prosecution for assault in the first degree, it was error to instruct that, if the jury believed that defendant would have been guilty of manslaughter in case death had resulted, then they should find him guilty of assault in the first degree, since intent is not always a necessary element in the crime of manslaughter, but is the essence of the crime of assault in the first degree. *State v. Schaefer*, 88 Pac. 792, 793, 35 Mont. 217.

"Manslaughter" is the unlawful killing of a human being without malice, and is of two kinds—voluntary (that is, upon a sudden quarrel or heat of passion); involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act, which might produce death, in an unlawful manner, or without due caution and circumspection. The instruction was in the language of Pen. Code, § 192. *People v. Lee*, 108 Pac. 738, 739, 13 Cal. App. 48.

"Manslaughter," as defined by Pen. Code, § 192, is the unlawful killing of a human being without malice, first, voluntary, upon a sudden quarrel or heat of passion; second, involuntary, in the commission of an unlawful act which might produce death in an unlawful manner or without due care and circumspection. The causing of death while attempting to commit an abortion does not constitute manslaughter under the statute. *Huntington v. Superior Court of City and County of San Francisco*, 90 Pac. 141, 144, 5 Cal. App. 288.

The approved definition of "manslaughter" as the killing of another without malice, either express or implied, "either unlawfully upon a sudden quarrel, or unintentionally

while the slayer is in the unlawful commission of some act not amounting to a felony," authorizes an instruction that if defendant struck the blow that killed the deceased, and intended only to make an assault and battery upon his person, or to inflict great bodily injury thereon, but that, as a result of the assault, the deceased died without defendant having intended to kill him, defendant would be guilty of manslaughter. *State v. Walker*, 110 N. W. 925, 928, 133 Iowa, 489.

Where the violation of a penal ordinance of a municipality causes a death, the death is not an unlawful killing within a statute defining the crime of "manslaughter" and providing that if any person shall unlawfully kill another without malice he shall be guilty of "manslaughter." *State v. Collingsworth*, 92 N. E. 22, 23, 82 Ohio St. 154, 28 L. R. A. (N. S.) 770, 137 Am. St. Rep. 775.

"If the killing be in the commission of an unlawful act without malice and without means calculated to produce death or the prosecution of a lawful act done without due caution or circumspection, it shall be 'manslaughter.'" *Ackers v. State*, 83 S. W. 909, 73 Ark. 262 (quoting Sand. & H. Dig. § 1657).

Under Ballinger's Ann. Codes & St. § 6840, providing that an information shall contain a statement of the acts constituting the offense so as to enable a person of common understanding to know what is intended, an information charging that accused, representing himself as a physician, advised a mother employing him to give the child no food except water and the juices of fruit, and such other nourishment as he might direct, and that acting under such instruction the mother withheld all food and nourishment, except as directed by accused, and that the child died as a result of starvation, does not charge "manslaughter," defined by section 7042, punishing one who shall kill another without malice in the commission of some unlawful act, because it fails to show a connected chain of facts showing starvation as the necessary result of the directions. *State v. McFadden*, 93 Pac. 414, 415, 48 Wash. 259, 14 L. R. A. (N. S.) 1140.

Under Mansf. Dig. § 1532 (Ind. T. Ann. St. 1899, § 875), defining "manslaughter" as the unlawful killing of a human being, without malice or deliberation, section 1533, providing that it must be voluntary under a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, and section 1534, describing the killing to be manslaughter if it be in the commission of an unlawful act without due caution, there is no such thing as involuntary manslaughter. *Carney v. United States*, 104 S. W. 606, 7 Ind. T. 247.

An indictment for manslaughter charging, in the language of the statute, that de-

fendant did "feloniously kill and slay" the deceased cannot support a conviction for assault and battery. The formula did "feloniously kill and slay" charges manslaughter of either voluntary or involuntary character, and involuntary manslaughter may be committed without criminal assault and battery. *State v. Thomas*, 48 Atl. 1007, 1008, 65 N. J. Law, 598.

#### Murder distinguished

"Murder" and "manslaughter" are distinguished, in that malice is essential to the former offense, and by absence of premeditation or deliberation in the latter. *Reed v. State*, 145 S. W. 206, 208, 102 Ark. 525.

The unlawful killing of another with malice is "murder," as distinguished from "manslaughter," which is an unlawful killing without such malice. *State v. Lee*, 60 S. E. 524, 525, 79 S. C. 223.

If the slayer provoked the combat or produced the occasion in order to have a pretense for killing his adversary, or doing him great bodily harm, the killing will be "murder," no matter to what extremity he may have been reduced in the combat. But if he had no felonious intent, intending, for instance, an ordinary battery merely, the final killing in self-defense would be "manslaughter" only; the distinction being between the right of perfect and the right of imperfect self-defense. *State v. Kelleher*, 100 S. W. 470, 475, 201 Mo. 614 (citing *State v. Partlow*, 4 S. W. 14, 90 Mo. 608, 59 Am. Rep. 31).

"Homicide" is murder unless it be attended with extenuating circumstances, which must appear to the satisfaction of the jury. If A. assaults B., giving him a severe blow, or otherwise making the provocation great, and B. strikes him with a deadly weapon, and death ensues, the law, in deference to human passion, says this is 'manslaughter.' \* \* \* If the provocation be slight, and it can be collected from the weapon used or any other circumstances that the prisoner intended to kill or do great bodily harm, and death follows, it is 'murder.'" *State v. White*, 51 S. E. 44, 48, 138 N. C. 704 (quoting and adopting definition in *State v. Smith*, 77 N. C. 488).

While, in one sense, murder and manslaughter are separate crimes, yet, in a broader sense, they involve but one crime and are only degrees of felonious homicide. *Rhea v. Territory*, 105 Pac. 314, 316, 3 Okl. Cr. 230.

In an instruction correctly defining murder and manslaughter, the statement that, "You see by these definitions that in murder malice must exist, but that manslaughter is the killing of a human being without malice," made only to distinguish the two, is not reversible error. *Prince v. United States*, 109 Pac. 241, 242, 3 Okl. Cr. 700.

Manslaughter is distinguished from murder by the absence of malice as a contingent

element. If, under the influence of some violent emotion, a sudden intent was formed, which on adequate provocation overwhelmed the reason of the appellant, then the killing was not murder, but manslaughter only. *State v. Clark* 77 Pac. 287, 288, 69 Kan. 576.

The chief distinction between "murder" and "manslaughter" is deliberation and malice in murder and the want thereof in manslaughter, and, where the issue was whether accused or a third person inflicted the fatal wound, the error in an instruction that if accused killed decedent without authority of law and not in necessary self-defense he was guilty of manslaughter, arising from the omission of the words "without malice and in the heat of passion," was not prejudicial. *Guest v. State*, 52 South. 211, 212, 96 Miss. 871.

Generally it is not "murder," but "manslaughter," to kill an officer, or other person, to prevent an illegal arrest. Consequently, shooting at an officer without killing him, if done to prevent an illegal arrest, is *prima facie* not an assault with intent to murder, but the statutory crime of shooting at another, described in Code 1882, § 4370. *Jenkins v. State*, 59 S. E. 435, 436, 3 Ga. App. 146 (quoting, with approval, from *Thomas v. State*, 18 S. E. 305, 91 Ga. 206).

Under Pen. Code, §§ 187, 189, defining murder as the unlawful killing of a human being with malice aforethought, and defining murder in the first and second degrees, and section 192, defining manslaughter as the unlawful killing of a human being without malice, and dividing manslaughter into voluntary and involuntary manslaughter, and section 274, making it a felony to perform a criminal abortion, an unlawful killing with malice aforethought is "murder," and is also "manslaughter," because it is the unlawful killing of a human being, though it cannot be logically classed as voluntary or involuntary manslaughter, and under a charge of murder by attempting a criminal abortion, a verdict of manslaughter may be returned. *People v. Huntington*, 97 Pac. 760, 762, 8 Cal. App. 612.

"Manslaughter" is an unlawful killing, which becomes "murder in the second degree" when it has the added element of malice. *State v. Fowler*, 66 S. E. 567, 151 N. C. 731.

"Manslaughter" consists of the unlawful killing of a human being without malice, and so, in a prosecution for assault with intent to commit murder, the accused cannot be convicted if, had his victim died, his crime would have only been manslaughter. *State v. Stockley* (Del.) 82 Atl. 1078, 1080.

"Manslaughter" is a homicide distinguished from murder in that it is the unlawful killing of another with malice, as in sudden affray, in the heat of blood, or in a transport of passion, without time for delibera-

tion, reflection, or for the passions to cool. *State v. De Paolo* (Del.) 84 Atl. 213, 215.

"Manslaughter" is an unlawful killing in anger without malice. Proof of prior provocation may exclude the idea of malice in the homicide, but does not exclude the idea of unlawfulness. It merely substitutes the element of anger without malice for the element of malice, thus distinguishing manslaughter from murder. *Cole v. State*, 59 S. E. 24, 26, 2 Ga. App. 784.

Murder in the second degree consists of the killing of another without a formed design to take life, and without provocation to reduce the offense to "manslaughter," and under the influence of a wicked or depraved heart, or with cruel and wicked indifference to human life. "Manslaughter" is where one in a sudden affray, in the heat of blood, or in a transport of passion, without malice, inflicts a mortal wound, without time for reflection or for the passions to cool. It is where one person unlawfully kills another without malice. In order to reduce the crime to 'manslaughter,' the provocation must be very great, so great as to produce such a transport of passion as to render the person for the time being deaf to the voice of reason. While murder proceeds from a wicked and depraved heart and is characterized by malice, 'manslaughter' results, not from malice, but from unpremeditated and unreflecting passion." *State v. Cephus* (Del.) 67 Atl. 150, 151, 6 Pennewill, 160.

When a killing is intentional and is not lawful, it is generally "murder"; but, under circumstances of provocation, or of mutual combat, it may be reduced to "manslaughter." *State v. Goldsby*, 114 S. W. 500, 503, 215 Mo. 48 (citing 2 Bishop's Crim. Law [6th Ed.] § 695).

"Murder" is where a person of sound memory and discretion unlawfully kills any human being under the peace of the state, with malice aforethought, either express or implied. The chief characteristic of this crime distinguishing it from "manslaughter" and every other kind of homicide, and therefore indispensably necessary to be proved, is malice preconceived or aforethought. *State v. Brinte* (Del.) 58 Atl. 253, 262, 4 Pennewill, 551.

A charge that, where an officer is shot and killed by one whom he is seeking legally to arrest, the offense is "murder" and not "manslaughter," was not erroneous when taken in connection with the evidence which was sufficient to show that defendant was violating the law in the presence of the officer and that upon an effort to arrest him he drew a pistol and shot the officer. *Johnson v. State*, 160 S. E. 160, 161, 130 Ga. 27.

If two persons deliberately agree to fight with deadly weapons on a subsequent day at a definite time and place, and both, being

armed, meet by chance near the appointed place and near the appointed time, and without any fresh cause of a quarrel or other altercation one slays the other without justification, the crime is murder, and not voluntary "manslaughter." *Bundrick v. State*, 54 S. E. 683, 685, 125 Ga. 753.

### MANSLAUGHTER IN FIRST DEGREE

"Manslaughter in the first degree" is the unlawful killing of a human being without malice; that is, as the unpremeditated result of passion-heated blood caused by a sudden, sufficient provocation. *Thomas v. State*, 36 South. 734, 735, 139 Ala. 80.

To constitute "manslaughter in the first degree," there must be either an intent to kill or to do an act of violence from which ordinarily death or great bodily harm will result. *Reynolds v. State*, 45 South. 894, 895, 154 Ala. 14; *Fowler v. Same*, 49 South. 788, 789, 790, 161 Ala. 1.

Penal Code, § 189, defines "manslaughter in the first degree" as manslaughter committed without a design to effect death either (1) by a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another; or (2) in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon. *People v. Stacy*, 104 N. Y. Supp. 615, 619, 119 App. Div. 743; *Same v. Huson*, 79 N. E. 835, 187 N. Y. 97; *Same v. Darragh*, 126 N. Y. Supp. 522, 525, 141 App. Div. 408.

Rev. St. 1899, § 1822 (Ann. St. 1906, p. 1266), providing that one deliberately assisting another in the commission of self-murder shall be guilty of manslaughter in the first degree, changed the common-law rule that if one counsels another to commit suicide, and such other by reason of the advice kills himself, the adviser is guilty of murder as an aider and abettor, provided he is present when his advice is carried out. *State v. Webb*, 115 S. W. 998, 1000, 216 Mo. 378, 20 L. R. A. (N. S.) 1142, 129 Am. St. Rep. 518, 16 Ann. Cas. 518.

"Manslaughter in the first degree," under Crimes Acts, § 12 (Gen. St. 1901, § 1997), is defined as the killing of a human being without a design to effect death, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration or attempt to perpetrate any crime or misdemeanor, not amounting to a felony, in cases when such killing would be murder at the common law. It has been held that the act or offense which the accused commits or attempts to commit at the time of an unintentional killing includes an assault and battery, and that intentional violence to the person is not excluded. If one, without any design to effect death, assaults another with an intent only to commit assault and battery upon him, and with the use of a tin can he

unintentionally kills such person, the crime would fall within this definition and constitute "manslaughter in the first degree." *State v. McAnarney*, 79 Pac. 137, 139, 70 Kan. 679.

Under St. 1893, § 2086 (Wilson's Rev. & Ann. St. 1903, § 2175), defining homicide to be "manslaughter in the first degree" when perpetrated without a design to effect death, and in the heat of passion, in a cruel or unusual manner, or by means of a dangerous weapon, homicide is "manslaughter in the first degree" when perpetrated without a design to effect death and in a heat of passion, and in a cruel and unusual manner, and when committed without a design to effect death, but in a heat of passion, and by means of a dangerous weapon. *Barker v. Territory*, 78 P. 81, 83, 15 Okl. 22.

Wilson's Rev. & Ann. St. 1903, § 2175, defines "manslaughter in the first degree" as follows: "First, when perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor. Second, when perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide." Under such definition, the crime of manslaughter in the first degree could not exist where the crime was committed by lying in wait and shooting deceased, and the shooting was willful and deliberate, resulting in death, and the only defense was that of alibi. The language of the second subdivision of the statute, defining "manslaughter in the first degree" perpetrated without a design to effect death, would not authorize an instruction submitting defendant's guilt of manslaughter in such degree on such facts. *Regnier v. Territory*, 82 Pac. 509, 15 Okl. 652.

Rev. St. § 2276, defines "manslaughter in the first degree" as where a homicide is perpetrated without design to effect death by a person while engaged in the commission of a misdemeanor, and in the heat of passion, but in a cruel or unusual manner, or by means of a dangerous weapon, or perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime or after such attempt shall have failed. *Turner v. State*, 126 Pac. 452, 458, 8 Okl. Cr. 11; *Kent v. Same*, 126 Pac. 1040, 1042, 8 Okl. Cr. 188.

Pen. Code, § 2, declares that no act or omission shall be deemed criminal or punishable save as prescribed by the Code, by some statute which it continued, or by such laws as are not in conflict with the Code, and section 241 defines manslaughter in the first degree as a killing perpetrated without a design to effect death and in a heat of passion, but in a cruel and unusual manner or by means of a dangerous weapon, unless committed under such circumstances as to constitute ex-

cusable or justifiable homicide. Held, that the phrase "when perpetrated without a design to effect death and in a heat of passion" was employed to express the distinction between homicide in the first degree and murder, and where one kills another in a cruel or unusual manner, without excuse or justification, or by means of a dangerous weapon under circumstances which do not excuse or justify the killing, the crime is at least manslaughter in the first degree. *State v. Edmunds*, 104 N. W. 1115, 1116, 20 S. D. 135.

#### MANSLAUGHTER IN SECOND DEGREE

Manslaughter in the second degree is the unlawful, involuntary killing of a human being. *Neilson v. State*, 40 South. 221, 222, 146 Ala. 683.

"Manslaughter in the second degree" is the unnecessary killing of another either while resisting an attempt by such other person to commit any felony or to do any unlawful act after such attempt shall have failed. *State v. Stevenson*, 85 Pac. 797, 798, 74 Kan. 193.

Under St. 1893, § 2090, every killing of a human being by culpable negligence which under the chapter on homicide is not murder or manslaughter in the first degree, nor excusable or justifiable homicide, is manslaughter in the second degree. *Harker v. Territory*, 78 Pac. 81, 83, 15 Okl. 22.

St. 1898, § 4351, makes it manslaughter in the second degree to unnecessarily kill another while resisting an attempt of the other to commit an unlawful act. *Pollock v. State*, 116 N. W. 851, 854, 136 Wis. 136.

Rev. St. 1899, § 1826 (Ann. St. 1906, p. 1267), defines manslaughter in the second degree to be the killing of a human being without a design to effect death in a heat of passion in a cruel or unusual manner. *State v. Colvin*, 126 S. W. 448, 456, 226 Mo. 446.

Where there is a want of intention or willfulness in the doing of the unlawful act causing death, resulting from a mental status incapable of forming an intent or purpose to do the act, though produced by drunkenness, the homicide is reduced to manslaughter in the second degree. *Heninburg v. State*, 43 South. 959, 960, 151 Ala. 26.

Under Pen. Code, § 179, defining homicide as the killing of one human being by the act, procurement, or omission of "another," and section 180, providing that homicide is either murder or manslaughter, and section 193, subd. 3, making a homicide manslaughter in the second degree when due to the act, procurement, or culpable negligence of any "person" which does not constitute murder or manslaughter in the first degree, a corporation may not be indicted for manslaughter, since the word "another" means another human being, and since the word "person" does not include a corporation. *People v. Rochester Ry. & Light Co.*, 88 N. E. 22, 24,

195 N. Y. 102, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837.

Comp. Laws 1909, § 2280, defines "manslaughter in the second degree" as every killing of one human being by the act, procurement, or culpable negligence of another, which, under the provisions of the statute, is not murder or manslaughter in the first degree or excusable homicide. *Turner v. State*, 126 Pac. 452, 459, 8 Okl. Cr. 11; *Kent v. Same*, 126 Pac. 1540, 1043, 8 Okl. Cr. 188.

#### MANSLAUGHTER IN THIRD DEGREE

Under Rev. St. 1909, § 4462, defining manslaughter in the third degree as the killing of another with the design to effect death by a dangerous weapon, there can be no manslaughter in the third degree where the killing was with the design to effect death and was intentional, but one may be guilty of manslaughter in the third degree, when in the heat of passion he struck and killed the adversary with a dangerous weapon under circumstances authorizing a finding that he did not intend to kill the adversary by the blow. *State v. Hanson*, 132 S. W. 245, 248, 231 Mo. 14.

St. 1898, § 4354, declares that any person who shall kill another in the heat of passion without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is declared to be justifiable or excusable, shall be deemed guilty of manslaughter in the third degree. *Duthey v. State*, 111 N. W. 222, 224, 131 Wis. 178, 10 L. R. A. (N. S.) 1032; *Bradley v. Same*, 124 N. W. 1024, 1025, 142 Wis. 137.

#### MANSLAUGHTER IN FOURTH DEGREE

Where the killing is intentional, "manslaughter in the fourth degree" is defined as the intentional killing of a human being in the heat of passion on a reasonable provocation, without malice and without premeditation, and under circumstances which will not render the killing as justifiable or excusable homicide. *State v. Sebastian*, 114 S. W. 522, 528, 215 Mo. 58 (citing *State v. McKenzie*, 76 S. W. 1015, 177 Mo. loc. cit. 712; *State v. Hermann*, 23 S. W. 1071, 117 Mo. loc. cit. 637; *State v. Sumpter*, 55 S. W. 76, 153 Mo. 436; *State v. Meadows*, 56 S. W. 878, 156 Mo. 110; *State v. Brown*, 64 Mo. 367; *State v. Diller*, 70 S. W. 139, 170 Mo. 1; *State v. Ashcraft*, 70 S. W. 898, 170 Mo. 409; *State v. Kindred*, 49 S. W. 845, 148 Mo. 270; *State v. Gartrell*, 71 S. W. 1045, 171 Mo. 489); *State v. Darling*, 97 S. W. 592, 600, 199 Mo. 168; *State v. Greaves*, 147 S. W. 973, 975, 243 Mo. 540. As a general rule it takes an assault, with personal violence, to constitute such provocation. *State v. Todd*, 92 S. W. 674, 679, 194 Mo. 377 (quoting and adopting definition in *State v. McKenzie*, 76 S. W. 1015, 177 Mo. 699). "Manslaughter in the fourth degree," under the statutes of this state, is

the intentional killing of a human being in the heat of passion, on a reasonable provocation, without malice and without premeditation, and under circumstances which will not render the provocation justifiable or excusable homicide, and as a general rule it takes an assault with personal violence to constitute such provocation. *State v. Kelleher*, 100 S. W. 470, 475, 201 Mo. 614 (quoting and adopting definition in *State v. McKenzie*, 78 S. W. 1019, 177 Mo. 712). Where deceased pursued and attacked accused, who had fled after striking deceased with a stone, accused's act in killing deceased who had assaulted him and struck him was manslaughter in the fourth degree, the assault and battery being sufficient provocation to reduce the homicide to that offense. *State v. Wilson*, 147 S. W. 98, 104, 242 Mo. 481.

Gen. St. 1901, § 2011 (Crimes Act, § 16), defines "manslaughter in the fourth degree" as the involuntary killing of another in the heat of passion, by means neither cruel nor unusual. *State v. Knoll*, 83 Pac. 622, 623, 72 Kan. 237; *Same v. Moore*, 100 Pac. 629, 630, 79 Kan. 688.

"Manslaughter in the fourth degree" is the involuntary killing of another in the heat of passion, or any homicide which would be manslaughter at common law, and which is not excusable nor justifiable, or is not declared to be manslaughter in some other degree. *State v. Goldsby*, 114 S. W. 500, 503, 215 Mo. 48 (citing 2 Bishop's Crim. Law [6th Ed.] § 695).

An instruction that: "If the defendant shot and killed deceased while in the heat of passion aroused by the striking of him with a stick produced in evidence, and without malice or premeditation, \* \* \* and not in necessary self-defense, then he is guilty of 'manslaughter in the fourth degree' \* \* \*"—was faulty in that it did not require the jury to find that defendant intentionally shot and killed deceased. *State v. Elsey*, 100 S. W. 11, 14, 201 Mo. 561.

A killing resulting from an intentional shot, though without design to effect death, is not involuntary, within Rev. St. 1898, § 4362, declaring that involuntary killing in the heat of passion, etc., shall be deemed "manslaughter in the fourth degree." *Johnson v. State*, 108 N. W. 55, 58, 59, 129 Wis. 146, 5 L. R. A. (N. S.) 809, 9 Ann. Cas. 923.

Where accused shot his wife with a pistol in an alleged insane frenzy, resulting from her alleged misconduct, the case did not present a killing within St. 1898, § 4363, declaring that every other killing of a human being by the act, procurement, or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared to be murder or manslaughter in some other degree, shall be deemed manslaughter in the fourth degree. *Duthey v. State*, 111 N. W. 222, 224, 131 Wis. 178, 10 L. R. A. (N. S.) 1032.

## MANUAL DELIVERY

"Dominion," as applied to a conveyance, means "to pass the instrument of writing from one man to another, as symbolic of his transferring the land to the person to whom it is delivered. Now the delivery must be made. It must be had. If a man draws a deed, and intends to deliver it, but never does, it is never a deed, because it is not consummated by delivery, and that delivery must be an actual delivery; that is, the maker of the deed must intend to pass it over to the grantee, the person to whom it is made. His dominion and right to the control over the property as set out in the deed passes with the delivery. Sometimes it is called 'manual delivery,' handing it over to him." *Lancaster v. Lee*, 51 S. E. 139, 141, 71 S. C. 280.

## MANUAL GIFT

A "manual gift," which is defined by the Louisiana Code as the giving of corporeal, movable effects accompanied by real delivery, may be free, onerous, or remunerative, and, when the donor makes such a gift *omnium bonorum* on condition that the donation shall maintain him for the rest of his life, it will be dealt with as an onerous donation and not as a commutative contract. *Ackerman v. Larner*, 40 South. 581, 587, 116 La. 101.

## MANUAL LABOR

The term "manual labor," in its ordinary and usual meaning and acceptation, means labor performed by and with the hands or hand, and it implies the ability for such sustained exercise and use of the hands or hand at a labor as will enable a person thereby to earn or assist in earning a livelihood. Being able to temporarily use the hands or hand at and in some kind of labor, but without ability to sustain such ordinary exercise and use of the hands at some useful labor whereby money may be earned to substantially assist in earning a livelihood at some kind of manual labor, does not constitute ability to perform manual labor. *Grand Lodge Brotherhood of Locomotive Firemen v. Orrell*, 69 N. E. 68, 69, 206 Ill. 208.

When a person is employed to work with his hands, as well as to exercise superintendence, the line must be drawn somewhere between what are acts of superintendence and what acts of "manual labor," or all that he does must be regarded as superintendence or as manual labor, which manifestly would be unjust. Though the principal duty of an employé at a stone quarry was that of superintendence, his putting a can of powder on the edge of the pit, whence it was accidentally knocked into the pit, causing an explosion, is not an act of superintendence, so as to render the master liable for injury to a workman from the explosion. *Riou v. Rockport Granite Co.*, 50 N. E. 525, 171 Mass.



162 (citing *McCauley v. Norcross*, 80 N. E. 464, 155 Mass. 584; *Cashman v. Chase*, 31 N. E. 4, 156 Mass. 342; *O'Brien v. Rideout*, 36 N. E. 792, 161 Mass. 170; *Dowd v. Boston & A. R. Co.*, 38 N. E. 440, 162 Mass. 185; *O'Neill v. O'Leary*, 41 N. E. 662, 164 Mass. 387).

The owner of horses, who hires them to a contractor, the latter using the horses in aid of hauling and banking logs, and the owner performing no "manual labor or other services" in connection with the logs, is not entitled to a lien on such logs, under Rev. Laws 1905, § 3524. *McKinnon v. Red River Lumber Co.*, 138 N. W. 781, 782, 119 Minn. 479, 42 L. R. A. (N. S.) 872.

Any process by which crude opium is converted into a product fit for smoking constitutes a "manufacture" of smoking opium within the meaning of the Internal Revenue Act Oct. 1, 1890, c. 1244, §§ 38-40, which impose a tax upon all opium manufactured for smoking purposes in the United States, and prescribe regulations for such manufacture to be observed under penalty of criminal prosecution. *Marks v. United States*, 196 Fed. 476, 478, 116 C. C. A. 250.

## MANUAL TRAINING SCHOOL

See Maintenance of Manual Training School.

## MANUFACTORY

### Cutting and storing ice

A foreign corporation carried on a retail ice business in a town where it had its office and transacted all its business. It sold only such ice as it cut and stored. It owned several ice houses on the shores of a pond in another town, where it had a steam engine used for cutting and storing ice there. It transacted no business in the latter town, except what was essential for the cutting and storing of ice and the delivery under orders from its office. Held, that the corporation did not "hire or occupy a manufactory, store, or shop" in the latter town, within Rev. Laws 1902, c. 12, § 23, cl. 1, providing for the taxation of personal property in the municipality in which the owner hires or occupies manufactories, etc.; but the steam engine, boiler, and ice stored in the latter town were taxable under St. 1903, p. 448, c. 437, § 71, providing that every foreign corporation shall be subject to taxation on its machinery and merchandise by the municipality in which such property is situated. *Hilliard v. Fells Ice Co.*, 86 N. E. 773, 774, 200 Mass. 331.

### Steam and gas plants

Under Burns' Ann. St. 1901, § 7255 (Acts 1899, p. 539, c. 255), providing that contractors, etc., and all persons performing labor, etc., for the erection, altering, repairing, etc., any house, mill, manufactory, etc., may have a lien on the house, mill, manufactory, etc., a building equipped with machinery for the

generation of steam to be distributed under a municipal franchise through pipes laid in the streets, and supplied for heating purposes, is a "manufactory." A gas company is also a manufactory within such act. *Wells v. Christian*, 76 N. E. 518, 519, 165 Ind. 662 (citing *Bates Mach. Co. v. Trenton & N. B. R. Co.*, 58 Atl. 935, 70 N. J. Law, 684, 103 Am. St. Rep. 811; *Burke v. Mead*, 64 N. E. 880, 159 Ind. 252, 260; *Commonwealth v. Lowell Gas Light Co.*, 12 Allen [94 Mass.] 75).

## MANUFACTURE

See Building for Trade or Manufacture; Place of Manufacture.

Any trade manufacture or business, see Any.

As to specific industries which are engaged in manufacture, see Subtitle Manufacturer.

Contract of sale or manufacture, see Contract of Sale.

Manufacture or otherwise, see Otherwise.

What constitutes manufactured articles, see Manufactures and Manufactured Articles.

The word "manufacture" is not a technical word, but has a common, ordinary meaning. *Sharpe v. Hasey*, 114 N. W. 1118, 1119, 134 Wis. 618.

To manufacture is to modify or to change natural substances, so that they become articles of value or use. *Baltimore & O. S. W. R. Co. v. Cavanaugh*, 71 N. E. 239, 241, 35 Ind. App. 82.

The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material. The broad interpretation which the courts have always given the word "manufacture" must include the construction of buildings and bridges. In re *Niagara Contracting Co.*, 127 Fed. 782, 783.

The Century Dictionary defines "manufacture" as the production of articles for use from raw or unprepared materials by giving these materials new forms, qualities, properties, or combinations, whether by manual labor or machinery. *State v. G. H. Tichenor Antiseptic Co.*, 43 South. 277, 278, 118 La. 685.

### Rolling cigarettes

The word "manufacture," as used in the anti-cigarette law, is used in the sense of "to engage in and carry on the business of manufacturing." It is the manufacturing for traffic that is prohibited. The act of "rolling cigarettes" from one's own materials and for one's own use is so connected with the use as to be a part of such use, and this it was not intended to prohibit. *Dempsey v. Stout*, 107 N. W. 235, 76 Neb. 152.

### Baling cotton

The word "manufacture," as defined in Worcester's Dictionary, is a process of mak-

ing anything by art or reducing materials into a form fit for use, by hand or by machinery, and in the Standard Dictionary is "the making of wares or other products by hand or by machinery or by other agencies." Under these definitions, a cotton press, the effect of the operation of which is only to compress, rebind, re-cover original bales of cotton so as to change the form, size, and condition of the bales to make them more convenient for transportation, is not considered a "manufacture." *City of Memphis v. St. Louis, & S. F. R. Co.*, 183 Fed. 529, 538, 106 C. C. A. 75.

#### Liquor

The word "manufacture" as used in act March 2, 1909 (26 St. at Large, p. 60) § 1, prohibiting the manufacture of liquor, means the process of making by art, or reducing materials into form fit for use, by hand or machinery. *State v. Ravan*, 74 S. E. 500, 501, 91 S. C. 265.

#### MANUFACTURER

See Sole Manufacturer.

A "manufacturer" is one engaged in making materials, raw or partly finished, into wares suitable for use. *Chattanooga Plow Co. v. Hays*, 140 S. W. 1068, 1069, 125 Tenn. 148 (citing *And. Law Dict.*; *Webst. Dict.*).

A corporation which makes something for profit is a "manufacturer" of that something within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, and it makes no difference whether the thing so made or manufactured is affixed to the realty or a part of the realty or is a mere chattel. *In re Church Const. Co.*, 157 Fed. 298.

Code 1887, § 2485, provides that "all persons furnishing supplies to a mining or manufacturing company, necessary to the operation of the same, shall have a prior lien," etc. A corporation was empowered by its charter to acquire and operate "the works, property, franchise, stock and bonds, rights, privileges, and immunities of any individual, firm, or corporation, operating or owning a machine shop, dock, or shipyard, or manufacturing railroad or marine equipment, or machinery of any description." The corporation owned a large plant composed of various departments and shops, in which many kinds of machinery were used. The plant consisted of a machine shop, in which machinery and tools of different sorts were made and fitted for use; a punch shop, in which plates were sheared and punched for riveting; a pattern shop, in which all sorts of patterns were made from wood; a blacksmith shop, containing large steam hammers, and also a number of smiths' forges, for the forging of billets and the performance of all sorts of smith work; a furnace shop, for the bending and shaping of frames and plates; a carpenter shop, in which many kinds of woodwork was done; a joiner shop,

equipped with special machinery, in which furniture was manufactured and the finer woodwork done; a paint shop, in which paints were mixed; a copper shop, in which sheet copper was manufactured into pipe, steam connections, ventilators, brass and copper castings, and other forms, and where galvanizing was done; a boiler shop, for the manufacture of boilers; a foundry, in which iron and brass castings were made out of raw materials. Large quantities of raw materials of all sorts were purchased by the company and converted into finished products. The company manufactured ships of all sorts and sizes and all necessary fittings and furniture therefor, and it also did a considerable amount of original and repair work for other manufacturing concerns. The word "manufacture" is defined by Webster's Dictionary: "To make [wares or other products] by hand, by machinery, or by other agency. To work, as raw or partly wrought materials, into suitable forms for use." By the Standard Dictionary: "To make or fashion by working on or combining material. To form or produce by some industrial process; fashion by hand or machinery, especially when done in considerable quantities and regular business. To work or fashion by labor into useful or desirable forms." And the Century Dictionary: "To make or fabricate anything for use, especially in considerable quantities or numbers, or by the aid of many hands, or by machinery; work materials into the form of." Held, that the corporation was engaged in the manufacturing business, within the meaning of the statute. *First Nat. Bank of Richmond v. Wm. R. Trigg Co.*, 56 S. E. 158, 161, 106 Va. 327, 7 L. R. A. (N. S.) 744.

The term "manufacturing," as used in the bankruptcy act of 1898, authorizing involuntary bankruptcy against corporations engaged in manufacturing, embraces only such corporations as are engaged in manufacturing as a business and selling their wares on the market, doing those things usually done by those who not only manufacture their wares and goods, but place them on the market for sale either by wholesale or retail. *Walker Roofing & Heating Co. v. Merchant & Evans Co.*, 173 Fed. 771, 773, 97 C. C. A. 495.

Evidence held to show that a corporation was principally engaged in manufacturing, and hence was subject to adjudication as a bankrupt. *In re Georgia Mfg. & Public Service Co.*, 166 Fed. 964, 968.

Under Bankr. Act July 1, 1898, c. 541, providing that any corporation engaged principally in "manufacturing" or mercantile pursuits may be declared a bankrupt, a corporation organized for the purpose of manufacturing paper from wood pulp, which had purchased woodland and other property for the commencement of its business, was subject to bankruptcy proceedings, within the statute.

though it had never in fact started its factory; the intent being that "a corporation pursuing, through its formative stages, a business of the kind described by the statute should be subject to the operation of the law." In re White Mountain Paper Co., 127 Fed. 180, 182.

The term "engaged principally," as used in Bankrupt Act, providing that any corporation engaged principally in "manufacturing" pursuits may be adjudged an involuntary bankrupt, refers not to the objects of pursuit set out in the charter but to those in which the company was actually engaged. In re C. Moench & Sons Co., 130 Fed. 685, 686, 66 C. A. 37.

In the phrase "engaged in manufacturing," as used in Bankr. Act July 1, 1898, c. 541, § 4b, the word "engaged" means occupied, employed, busy, and the word "manufacturing" means the making of an article, either by hand or machinery, into a new form capable of being used in ordinary life, or the fashioning of raw materials into a change of form for use; and a corporation which although authorized to manufacture an article of commerce, has not the means for such manufacture, and has taken no step in the process of manufacturing, is not engaged in any proper sense in the manufacturing of such article, and is not subject to adjudication as an involuntary bankrupt under said section. In re Toledo Portland Cement Co., 156 Fed. 83, 85.

#### **Dealers and merchants distinguished**

The term "manufacturer," in its ordinary acceptance, denotes one who, through his skill and labor, shapes or combines material into a new product, the term, under various statutes, such as tax laws, being named to include others for the purpose of such laws, and where a firm merely ordered from a foreign manufacturer a given quantity of waists of a certain pattern, a sample of which had been previously furnished them by the manufacturer, the firm was merely a dealer and not a manufacturer. Remy, Schmidt & Pleissner v. Healy, 126 N. W. 202, 203, 161 Mich. 266, 29 L. R. A. (N. S.) 139, 21 Ann. Cas. 74.

A "manufacturer" is one engaged in making materials, raw or partly finished, into wares suitable for use. A "merchant" is distinguished from a manufacturer, in that he sells to earn a profit, and the manufacturer sells to take profit already earned. Chattanooga Plow Co. v. Hays, 140 S. W. 1068, 1069, 125 Tenn. 148.

The words "merchants" and "dealers," according to common understanding, mean something different from the word "manufacturers." The former are generally employed to designate persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade; the latter to designate those engaged in the business of making or producing arti-

cles for use or sale. Union County Nat. Bank, Liberty, Ind., v. Ozan Lumber Co., 179 Fed. 710, 715, 103 C. C. A. 584.

#### **Manufactures distinguished**

Laws 1912, c. 157, prohibiting any person, firm, or corporation, engaged "in manufacturing or repairing," to work employes more than 10 hours per day, is sufficiently definite; for "manufacturing" is the system of industry which produces manufactured articles, and "manufacture" is the production of articles for use from raw or prepared materials, by giving them new forms, qualities, and properties, or combinations, and "repairing" is the making or restoring of an article or thing to its completeness. State v. J. J. Newman Lumber Co. (Miss.) 59 South. 923, 926; 45 L. R. A. (N. S.) 851.

An information, charging accused with having in his possession nonalcoholic drinks bearing the names of "manufacturers" other than himself, is insufficient under Laws 1911, pp. 261, 262, §§ 1, 4, making it unlawful for any person to have nonalcoholic drinks bearing the name or brand of "manufacturers" other than himself; "manufactures" and "manufacturers" not being idem sonans, but separate and distinct terms with separate and distinct meanings. State v. Murphy, 147 S. W. 520, 521, 164 Mo. App. 204.

#### **Automobile repairing company**

The conducting by a corporation of a shop for the repairing of automobiles, which repairing consisted chiefly in the adjusting of parts purchased from other persons, was not a manufacturing pursuit, within the meaning of Bankr. Act 1898, c. 541, § 4b, which subjected the corporation to proceedings in bankruptcy. Cate v. Connell, 173 Fed. 445, 447, 97 C. C. A. 647.

#### **Bakery company**

A corporation organized to make bakers' goods and restaurant supplies, and sell same at wholesale and retail, was organized for "manufacturing and mercantile" purposes, as those terms are used in the revenue statute; and the act of the state board of equalization in assessing its capital stock and franchise in excess of the valuation of its tangible property, which had been assessed by the local assessors, was unauthorized. H. H. Kohlsaat & Co. v. O'Connell, 99 N. E. 689, 690, 255 Ill. 271.

#### **Brewing company**

A brewing company, which has done nothing except in preparation for its business by constructing a brewing plant, taking out a brewer's license, and hiring a brewmaster, although it has never made any beer nor bought materials therefor, is a "corporation engaged principally in manufacturing," and subject to proceedings in involuntary bankruptcy. In re Bloomsburg Brewing Co., 172 Fed. 174, 175.

The words "manufacturer," "such manufacturer," and "said manufacturer," as used in Acts 1908, p. 281, c. 189, § 15, providing that a licensed manufacturer may sell the products of his brewing at any place within the state, except where such manufactory is situated in no-license territory, but such manufacturer may sell the product of his brewing to be delivered to a common carrier to be transferred to any place where the same may be legally sold, and the said manufacturer may sell the products of his brewing in quantities not less than one gallon at the place of manufacture, except in no-license territory, mean any manufacturer, whether located in license or no-license territory; the only difference between the two classes of manufacturers intended by the statute being that the manufacturer located in license territory can sell and deliver not less than one gallon at the place of manufacture, while the manufacturer located in no-license territory can make no sale and delivery at such place. *Robert Portner Brewing Co. v. Southern Express Co.*, 63 S. E. 6, 7, 109 Va. 22.

A corporation which has taken active steps to engage in manufacturing, and in pursuit of such business has incurred debts and committed acts of bankruptcy, is "engaged in manufacturing," in the sense contemplated by Bankruptcy Act. A corporation organized to build and equip a brewery and to manufacture and sell beer was engaged principally in manufacturing pursuits and subject to adjudication as a bankrupt before its plant had been completed or any machinery purchased or installed, and before any beer had been made. *Bollinger v. Cent. Nat. Bank*, 177 Fed. 609, 610, 101 C. C. A. 235 (citing *In re White Mountain Paper Co.*, 127 Fed. 180, affirmed in *White Mountain Paper Co. v. Morse*, 127 Fed. 643, 62 C. C. A. 369, and *In re Bloomsburg Brewing Co.*, 172 Fed. 174).

#### **Building and construction companies**

The word "manufacture" is ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. It is hard to conceive of any human action more accurately corresponding to this description or definition than the building of a house; and one of the definitions of "build," found in the *Century Dictionary*, is to "form by uniting materials into a regular structure." An allegation in a petition in bankruptcy against a corporation that it "is engaged in the business and was incorporated for the purpose of building houses," as against a demurrer, is sufficient to bring the corporation within the scope of the Bankr. Act July 1, 1898, § 4b, c. 541, as one engaged in "manufacturing." *In re Rutland Realty Co.*, 157 Fed. 296.

A corporation engaged in constructing houses on its own land was not subject to adjudication as a bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, as amended by Act

Feb. 5, 1903, authorizing an adjudication against a corporation engaged principally in "manufacturing," the term "manufacturing" being used in its ordinary meaning, viz., the making of articles of commerce ordinarily the subject of bargain and sale, which does not include building or construction. *In re Kingston Realty Co.*, 160 Fed. 445, 446, 87 C. C. A. 406.

A construction company engaged in constructing bridges, wharves, bulkheads, and driving piles for foundations for buildings, etc., cannot be adjudged an involuntary bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, as a corporation engaged in "manufacturing, trading, or mercantile pursuits." *In re MacNichol Const. Co.*, 134 Fed. 979, 980.

A corporation whose principal business is making and constructing arches, walls, and abutments, bridges, buildings, etc., out of concrete, in carrying on which business it buys and combines together raw materials, and supplies the necessary labor, machinery, and appliances, is a "corporation engaged principally in manufacturing," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797, defining the persons or corporations which may be adjudged involuntary bankrupts, although such company makes its product, and gives it form and shape, at the place where it is to remain. *Friday v. Hall & Kaul Co.*, 30 Sup. Ct. 261, 216 U. S. 449, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475.

The word "manufacturing" is a generic term of broad significance, used to include many species of corporations, and, as used in section 4b of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 547, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 798), includes many species of corporations, and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed. Pin makers, pen makers, shoe makers, furniture makers, steel makers, boot makers, rail makers, engine makers, and cement makers are undoubtedly engaged in manufacturing, so also is a corporation which is principally engaged in building concrete arches and bridges, and dressing stone is a "manufacturing corporation," and may be adjudged a bankrupt under section 4b of the Bankruptcy Law. *In re First Nat. Bank*, 152 Fed. 64, 67, 81 C. C. A. 260, 11 Ann. Cas. 355 (citing *Columbia Iron Works v. National Lead Co.*, 127 Fed. 99, 102, 62 C. C. A. 99, 102, 64 L. R. A. 645; *In re Niagara Contracting Co.*, 127 Fed. 782; *In re Marine Const. & Dry Dock Co.*, 130 Fed. 446, 64 C. C. A. 648; *In re Matthews Consol. Slate Co.*, 144 Fed. 737, 738, 75 C. C. A. 603; *In re Quincy Granite Quarries Co.*, 147 Fed. 279; *In re H. R. Leigh*

ton & Co., 147 Fed. 311, 318; *In re Troy Steam Laundering Co.*, 132 Fed. 266; *White Mountain Paper Co. v. Morse & Co.*, 127 Fed. 643, 644, 62 C. C. A. 369, 370).

A construction company, whose business is the building by contract of piers and abutments for railroad bridges, made of concrete, which is mixed on the ground as the work progresses, with the necessary incidental work, is not a "corporation engaged principally in manufacturing," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, and is not subject to proceedings in involuntary bankruptcy. *In re T. E. Hill Co.*, 148 Fed. 832, 834, 78 C. C. A. 522 (citing *Columbia Iron Works v. National Lead Co.*, 62 C. C. A. 99, 127 Fed. 99, 102, 64 L. R. A. 645).

The word "manufacture" means "to make wares or other products by hand, by machinery, or by other agency, as to manufacture cloth, nails, glass, etc.; to work, as raw or partly wrought materials into suitable forms for use, as to manufacture wool, cotton, silk, or iron." A corporation engaged in the business of building bridges, wharves, bulkheads, and driving piles, under contract, which has no plant where it manufactures bridges for the market, but does all of its work on the ground after contracting therefor, is not engaged in manufacturing, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, and is not subject to be adjudged an involuntary bankrupt thereunder. *Butt v. C. F. MacNichol Const. Co.*, 140 Fed. 840, 841, 72 C. C. A. 252 (quoting and adopting the definition in *Webst. Int. Dict.*).

A corporation whose business as actually conducted consists of installing heat and power plants, constructing conduits, waterworks, and sewers, buying, selling, and erecting steam engines, and occasionally making reports with reference to the proposed construction of electric light and power plants is engaged principally in "manufacturing, trading, or mercantile pursuits," within Bankr. Act July 1, 1898, c. 541, § 4b, as amended by Act Feb. 5, 1903, c. 487, § 3, and may be adjudged an involuntary bankrupt. *United Surety Co. v. Iowa Mfg. Co.*, 179 Fed. 55, 57, 102 C. C. A. 623.

Making a paving compound is the production of a new and distinct substance, which constitutes "manufacturing," within the meaning of Laws 1896, p. 857, c. 908, § 183, as amended by Laws 1897, p. 817, c. 785, exempting from the franchise tax manufacturing corporations to the extent of the capital actually employed in this state in manufacturing; but the preparation of a street for the laying of the pavement, and placing the pavement thereon, is not "manufacturing," within the meaning of such section. *People ex rel. Fruin-Bambrick Pav. Co. v. Knight*, 90 N. Y. Supp. 537, 538, 99 App. Div. 62 (quoting and adopting *People ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan*, 70 N. Y. Supp. 516, 61 App. Div. 373; *People*

*ex rel. Syracuse Imp. Co. v. Morgan*, 69 N. Y. Supp. 263, 59 App. Div. 302).

A paving and construction company incorporated to do a manufacturing business and primarily engaged in making cement and asphalt floors, pavements, roadways and structural concrete, is engaged in a "manufacturing" business within Act June 8, 1893, exempting from the capital stock tax the capital stock of a manufacturing corporation. *Commonwealth v. Filbert Paving & Construction Co.*, 78 Atl. 104, 105, 229 Pa. 231.

A corporation engaged in constructing buildings and bridges by contract, furnishing the labor while others furnish the materials, is a manufacturing corporation, and subject to be adjudged an involuntary bankrupt under Bankruptcy Act. *In re Niagara Contracting Co.*, 127 Fed. 782, 783.

#### Canning company

One putting up apples in cans for sale is a "manufacturer," within the rule that where goods are sold by sample, and the seller is also the manufacturer, there is an implied warranty on his part that they are free from any latent defects that could not be discovered from examination. *Nixa Canning Co. v. Lehmann-Higginson Grocer Co.*, 79 Pac. 141, 142, 70 Kan. 664, 70 L. R. A. 653.

#### Chemical company

"A 'manufacturer' \* \* \* is one who gives new shapes, new qualities, new combinations, to matter which has already gone through some artificial process." "Nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes derived and directed by human skill, or by the employment of machinery, \* \* \* are now commonly designated as 'manufactured.'" The *Century Dictionary* defines "manufacture" as "the production of articles for use from raw or unprepared materials, by giving these materials new forms, qualities, properties, or combinations, whether by manual labor or machinery." Under these definitions one who, by extracting the medicinal properties from various drugs and making a chemical combination in which the ingredients lose their identity, creates a distinct product, which for years is offered to, and accepted by, the public for distinct uses, may be regarded as a "manufacturer." *State v. G. H. Tichenor Antiseptic Co.*, 43 South. 277, 278, 118 La. 685 (quoting and adopting definition in *City of New Orleans v. Le Blanc*, 34 La. Ann. 596; *City of New Orleans v. Ernst*, 35 La. Ann. 746; quoting *Carlin v. Western Assur. Co. of Toronto*, 57 Md. 526, 40 Am. Rep. 440).

#### Chicory company

A corporation organized to "plant, harvest, store, purchase, manufacture, market,

sell, and deal in chicory" is a "manufacturing corporation." *Bolton v. Nebraska Chicory Co.*, 96 N. W. 148, 69 Neb. 681.

#### **Cold storage company**

A corporation was chartered "for the purpose of conducting the business of a cold storage warehouse, \* \* \* furnishing cold storage for meats, produce, fruits, and other perishable merchandise." The business actually done by it was the conducting of a cold storage warehouse in which produce, etc., was preserved for others for hire, by means of brine circulated through pipes; and it also operated a pipe line running through the street and connected with storage rooms of others, which it refrigerated by means of the brine pumped through the pipes and circulated in such rooms, returning to the tank in its own plant. For this service it charged in proportion to the size of the rooms cooled, and it constituted the larger part of its business. The brine was made in its plant by mixing calcium chloride in water at a certain temperature to a certain consistency. The calcium chloride was a manufactured product sold in the market, which it purchased in cases, and the brine was made by ordinary workmen under direction of a superintendent. Held, that such corporation was not "engaged principally in manufacturing, trading, or mercantile pursuits," within the meaning of Bankruptcy Act, and was not subject to be adjudged an involuntary bankrupt. In re Philadelphia Freezing Co., 174 Fed. 702, 703.

#### **Coalyard**

A coalyard, wherein coal mined by its owner is cleaned, assorted, and stored and from which it is sold, is a "mercantile institution or establishment," within Child Labor Act (Hurd's Rev. St. 1911, c. 48), prohibiting the employment of a child under the age of 14 years in any mercantile institution or establishment, and is also a manufacturing establishment, factory, or workshop, since that phrase as used in the statute has the meaning given to it by the Child Labor Act of June 9, 1897 (Laws 1897, p. 90), defining the words "manufacturing establishment, factory, or workshop" to mean any place where goods or products are manufactured or repaired, dyed, cleaned or sorted, stored or packed for sale. *Purtell v. Philadelphia & R. Coal & Iron Co.*, 99 N. E. 899, 902, 256 Ill. 110, 43 L. R. A. (N. S.) 193, Ann. Cas. 1913E, 335.

#### **Creosoting company**

The process of creosoting railroad ties, which is done by pressing tar and other substances, which are formed into a concoction, two or three inches into such ties for the purpose of preservation, does not constitute a "manufacturing" of articles of wood, but is a mere process for the preservation of articles of wood already manufactured. *Shreveport Creosoting Co. v. City of Shreveport*, 44 South. 325, 827, 119 La. 687.

#### **Electric company**

"An electric light plant is a 'manufacturing establishment.'" *Lucas v. Ashland Light, Mill & Power Co.*, 138 N. W. 761, 763, 92 Neb. 550 (quoting *Lamborn v. Bell*, 32 Pac. 989, 18 Colo. 346, 20 L. R. A. 241).

One engaged in generating electricity for distribution and sale is engaged in "manufacturing," within Const. § 170, and Ky. St. § 2980a, authorizing municipalities to exempt manufacturing establishments from taxation. *Kentucky Electric Co. v. Buechel*, 143 S. W. 58, 59, 146 Ky. 660, 88 L. R. A. (N. S.) 907, Ann. Cas. 1913C, 714.

A corporation engaged in generating electricity, transmitting it, and selling power or light to consumers, is neither a "manufacturing" nor a "mercantile" corporation within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797, and is not subject to adjudication as an involuntary bankrupt. A gas and electric company, organized under the transportation laws of New York, having a franchise to maintain pipes and wires in the streets of a village and a contract for lighting its streets, which manufactures gas and purchases or generates electricity, both of which it transports or transmits and sells to its customers, its electrical business exceeding its gas business in volume and revenue, is not "engaged principally in manufacturing, etc., pursuits," within the meaning of Bankruptcy Act. In re Hudson River Electric Power Co., 173 Fed. 934, 940.

#### **Engraver**

In its business of engraving bank bills the government is a manufacturer and entitled to no more consideration than any other engraver and printer; but is entitled to no less. *Harley v. United States*, 39 Ct. Cl. 105, 114.

#### **Fertilizer company**

"The word 'manufacturer' has been defined substantially as the operation of making or producing an article for use from raw or prepared materials by giving these materials new form, qualities, properties, or combinations." The capital and other property employed in the manufacture of fertilizers and chemicals are exempt from parochial and municipal taxation under the Louisiana Constitution, whether at the establishment of the company or at its domicile. *Planters' Fertilizer & Chemical Co. v. Board of Assessors for Parish of Orleans*, 40 South. 1085, 116 La. 667.

#### **Fish company**

A corporation organized for carrying on the business of catching and preserving by salt and marketing salt water fish, and which owns and operates a plant for the preparing, preserving, and packing of such fish, is "principally engaged in manufacturing."

within the meaning of Bankr. Act July 1, 1898, § 4b, c. 541, and is subject to adjudication as an involuntary bankrupt. In re Alaska-American Fish Co., 162 Fed. 498.

#### Gas company

A "gas company" is a "manufacturing corporation" within the letter as well as the spirit of Burns' Ann. St. 1901, § 7255 (Acts 1899, p. 569, c. 255), providing that contractors, etc., and all persons performing labor, etc., for the erection, altering, repairing, etc., any house, mill, manufactory, etc., may have a lien on the house, mill, manufactory, etc. Wells v. Christian, 76 N. E. 518, 519, 165 Ind. 662 (citing Commonwealth v. Lowell Gas Light Co., 12 Allen [94 Mass.] 75).

#### Ice companies

A corporation organized to buy, gather, store, and preserve ice, to ship and vend the same, and which carried on its business by renting small bodies of water from which it cut the ice which it stored, shipped, and sold, only two or three times in a number of years buying small quantities of ice when its own supply ran short, is not engaged principally in "manufacturing, trading, or commercial pursuits," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, and is not subject to involuntary proceedings in bankruptcy. In re New York & New Jersey Ice Lines, 147 Fed. 214, 215, 77 C. C. A. 440 (citing In re Woodside Coal Co. [D. C.] 105 Fed. 56; In re Keystone Coal Co., 109 Fed. 872; In re H. J. Quimby Freight Co., 121 Fed. 141; First Nat. Bank v. Wyoming Valley Ice Co., 136 Fed. 466).

#### Laundry company

A corporation conducting a laundry, the largest part of its business being the washing, starching and ironing, and polishing of collars, cuffs, etc., for manufacturers before they are put on the market, is engaged principally in manufacturing, within the meaning of the national bankruptcy act, and is subject to proceedings in involuntary bankruptcy. In re Troy Steam Laundering Co., 132 Fed. 266, 268.

#### Milk dealers

The Pioneer Pasteurizing Company, authorized by its articles of incorporation to engage in the business of buying, manufacturing, and dealing in milk, cream, butter, cheese, and other dairy products, and pasteurizing and treating said milk, and packing, storing, handling, and selling said products so pasteurized and treated, is not exclusively a manufacturing or mechanical corporation, within Const. art. 10, § 38, and its stockholders are therefore liable for its debts. Meen v. Pioneer Pasteurizing Co., 97 N. W. 140, 141, 90 Minn. 501.

#### Milling

The term "manufacturing" is synonymous with "milling." Lucas v. Ashland Light, Mill, & Power Co., 138 N. W. 761, 763,

92 Neb. 550 (citing Lamborn v. Bell, 32 Pac. 989, 18 Colo. 346, 20 L. R. A. 241).

#### Mineral water company

A corporation organized to "manufacture" and sell mineral and other waters, owning a well from which mineral water was pumped, and machinery and appliances for carrying on the business of bottling the water and carbonating it so as to form ginger ale, root beer, etc., was a "manufacturing corporation," within a statute providing that the directors of a manufacturing corporation shall have no power to incur the plant or machinery until authorized by a majority of the stockholders. Carlsbad Water Co. v. New, 81 Pac. 34, 35, 38 Colo. 389 (citing definition in Carlin v. Western Assur. Co. of Toronto, 57 Md. 515, 40 Am. Rep. 440; Schriefer v. Wood, 5 Blatchf. 215, Fed. Cas. No. 12, 481; Lamborn v. Bell, 32 Pac. 989, 18 Colo. 346, 20 L. R. A. 241).

#### Oleomargarine dealers

Oleomargarine Act 1886 (Act Aug. 2, 1886, c. 840, § 3, 24 Stat. 209, as amended by Act May 9, 1902, § 2, 32 Stat. 194) defines a manufacturer of oleomargarine as any person who sells, vends, or furnishes oleomargarine for use or consumption by others who shall add to or mix any artificial coloration so as to make it resemble butter. Held, that the actual selling, vending, or furnishing of oleomargarine for use and consumption by others is not one of the necessary components of a manufacturer as contemplated by such act, so as to require proof of actual selling, vending, or furnishing of some of the product to constitute the offense; the term "manufacturer" as so used being construed to mean one engaged in the business of selling, vending, or furnishing oleomargarine for consumption of others. Vermont v. United States, 174 Fed. 792, 794, 98 C. C. A. 500.

Oleomargarine Act Aug. 2, 1886, c. 840, § 17, providing that any person engaged in carrying on the business of manufacturing oleomargarine, who defrauds, or attempts to defraud, the United States of the tax on oleomargarine produced by him, etc., shall be fined and imprisoned, was applicable to one who did not manufacture white oleomargarine and therefore was not a manufacturer within the definition contained in the original act, but who mixed white oleomargarine with artificial coloration so as to make it look like butter and thereby became a "manufacturer" within the definition as extended by Act Cong. May 9, 1902, c. 784. May v. United States, 199 Fed. 42, 44, 117 C. C. A. 420.

#### Paper company

A corporation organized for the purpose of manufacturing and dealing in paper and pulp, which had bought large tracts of timber land and expended some \$500,000 in the erection and equipment of buildings for paper and pulp mills, and which had hired cut

several thousand cords of wood in lengths suitable for the use in the manufacture of paper, was "engaged in manufacturing" within Bankruptcy Act, and subject to proceedings in involuntary bankruptcy, though it had never operated its mills nor completed the manufacture of either paper or pulp, where it had engaged in no other business. *White Mountain Paper Co. v. Morse & Co.*, 127 Fed. 643, 644.

#### **Printing and publishing company**

Within a law imposing a franchise or license tax upon certain corporations and exempting manufacturing companies, a company organized to carry on the business of printing and publishing a daily newspaper and general jobbing, printing, and publishing, whose capital is wholly employed in publishing a newspaper for circulation, is not a "manufacturing company"; but a company organized to conduct the business of book and job printing, engraving, electrotyping, and lithographing, whose capital is invested in the prosecution of that business, and which manufactures on orders only, is a "manufacturing company." *State v. State Board of Assessors*, 47 N. J. Law, 37, 42, 54 Am. Rep. 114 (citing and adopting *Nassau Gaslight Co. v. City of Brooklyn*, 89 N. Y. 409; *Dudley v. Jamaica Pond Aqueduct Co.*, 100 Mass. 183; *Byers v. Franklin Coal Co. of Lykens County*, 106 Mass. 181; *In re Chandler*, 1 Lowell, 478, 5 Fed. Cas. 443; *In re Kenyon & Fenton*, 6 N. B. R. 238, 30 Fed. Cas. 90; *In re Capitol Pub. Co.*, 18 Nat. Bank. Reg. 319; *Seeley v. Gwillim*, 40 Conn. 106).

#### **Refrigerator company**

Where a Massachusetts corporation was organized to deal in and manufacture refrigerators, refrigerator cars, and accessories, appliances, etc., but, at the time an involuntary bankruptcy petition was filed against it, it had never manufactured anything, or begun business, beyond authorizing its directors to make an endeavor to get contracts, it was not subject to adjudication as a corporation "engaged principally in manufacturing," within Bankruptcy Act, prior to its amendment by Act Cong. June 25, 1910, c. 412, 36 Stat. 838. *In re Coolidge Refrigerator & Car Co.*, 190 Fed. 908, 909.

#### **Restaurant company**

A corporation engaged in operating a restaurant is not subject to adjudication as a bankrupt, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, authorizing an adjudication against any corporation engaged principally in "manufacturing"; a cook not being regarded as a manufacturer within the meaning of the term as so used. *In re Wentworth Lunch Co.*, 159 Fed. 413, 414, 86 C. C. A. 393.

#### **Shingle company**

Under Sand. & H. Dig. § 6444, relating to taxation, and providing: "Every person who shall purchase, receive or hold personal prop-

erty of any description for the purpose of adding to the value thereof by process of manufacturing or by combination of different materials, with a view of making a gain or profit by so doing, shall be held to be a 'manufacturer,' etc.—a company engaged in making shingles is a "manufacturer." *Arkansas Cypress Shingle Co. v. Lonoke County*, 84 S. W. 1029, 1030, 74 Ark. 28.

#### **Ship construction company**

A corporation chartered to construct and repair vessels, carry on a general shipbuilding and ship repairing business, construct and operate a marine dry dock, etc., and whose main business consisted in the building of large steel vessels and in repairing others, is a corporation engaged principally in manufacturing and mercantile pursuits, within Bankruptcy Act, providing that such a corporation may be adjudged an involuntary bankrupt. *Columbia Iron Works v. National Lead Co.*, 127 Fed. 99, 102, 62 C. C. A. 99, 64 L. R. A. 645.

A corporation incorporated to do a general manufacturing business, and to manufacture, construct, repair, and equip, and buy and sell ships and vessels of all kinds, and parts and furniture therefor, and which since its organization has carried on the business of constructing completed boats, and parts and furniture for vessels, such as boilers, masts, tanks, desks, tables, etc., for the most part made from raw material in its own shops, is engaged principally in manufacturing pursuits within Bankruptcy Act, and subject to proceedings in involuntary bankruptcy. *In re Marine Const. & Dry Dock Co.*, 130 Fed. 446, 447, 64 C. C. A. 648.

#### **As subcontractor**

See Subcontractor.

#### **Theatrical company**

A corporation organized "to lease, produce, and exploit plays and other theatrical and dramatic productions, to produce and sell theatrical costumes and properties," and which, up to the time a petition was filed against it, had actually engaged only in producing a play, is not one "engaged principally in manufacturing, trading, \* \* \* or mercantile pursuits," within Bankr. Act July 1, 1898, c. 541, § 4b, and is not subject to bankruptcy proceedings. *In re J. J. Reisler Amusement Co.*, 171 Fed. 283.

#### **Tool polishing company**

A corporation engaged in "polishing" tools for those who make the tools for use or sale is as much engaged in manufacture as those who take the prior steps in forming and shaping the iron and wood into such tools. The fact that this final touch is called "polishing" does not take it out of the realm of "manufacturing." *In re Troy Steam Laundering Co.*, 132 Fed. 266, 268.



**Waterwork company**

Pipes and water mains belonging to a water company are not taxable as "machinery employed in manufactures," within Rev. Laws, c. 12, § 23, providing for the taxation of such machinery within the state, though belonging to a foreign corporation. *Coffin v. Artesian Water Co.*, 79 N. E. 262, 263, 193 Mass. 274 (citing *Dudley v. Jamaica Pond Aqueduct Corp.*, 100 Mass. 183; *Wellington v. Inhabitants of Belmont*, 41 N. W. 62, 164 Mass. 142).

**MANUFACTURES — MANUFACTURED ARTICLES**

See Completed Manufactured Article; Domestic Manufactures; Mining and Manufacturing; Principally Engaged. Other articles distinguished, see Other.

Whenever labor is performed upon an article which results in its assuming a new form, possessing new qualities or new combinations, the process of "manufacturing" has taken place, whether the thing produced be a small article of commerce or a structure, such as a house, road, or bridge. *Dolse & Shepard Co. v. O'Connell*, 100 N. E. 235, 236, 257 Ill. 43.

One definition of "manufacture" is to make or fabricate, especially in considerable quantities, or by the aid of many hands or machinery, though the primary meaning of the word is something made by hand, as distinguished from the natural growth; and a corporation organized to manufacture and sell bakers' goods was organized for manufacturing purposes, within the tax law. *H. H. Kohlsaat & Co. v. O'Connell*, 99 N. E. 689, 255 Ill. 271.

A "manufacture" is "anything made from raw materials by the hand, by machinery, or by art, as cloths, iron utensils, shoes, machinery, saddlery, etc. *United States v. F. W. Myers & Co.*, 139 Fed. 344, 348 (citing *Webst. Dict.*; see, also, *Worcest. Dict.*; *Brandes, Enc.*; *Tide Water Oil Co. v. United States*, 18 Sup. Ct. 837, 171 U. S. 210, 43 L. Ed. 139; *United States v. Schoverling*, 13 Sup. Ct. 24, 146 U. S. 76, 36 L. Ed. 893).

"Ordinarily, the fact that an article in the process of manufacture takes a new name is indicative of a distinct manufacture. \* \* \* A new manufacture is usually accompanied by a change of name, but a change of name does not always indicate a new manufacture. Where a manufactured article, such as sawed lumber, is usable for a dozen different purposes, it does not ordinarily become a new manufacture until reduced to a condition where it is used for one thing only." *United States v. Dudley*, 19 Sup. Ct. 801, 174 U. S. 672, 673, 43 L. Ed. 1129.

The term "manufactured articles" must be understood in its popular sense, and does not mean all articles produced from the raw

state by manual skill or labor, but those articles only which are made in what, in popular language, are called manufactories. To call a farmer who cultivates his land and reaps and markets his crops a manufacturer, as he is in the scientific signification of the term, would do violence to language in the construction of a statute. A farm building commonly called a tobacco shed, and used by a farmer to dry, cure, and fit for market tobacco grown on the farm, is not a building for trade or manufacture, within St. 1898, § 1263, providing that no public highway shall be laid out through any building other than a building used for the purpose of trade or manufacture. *Sharpe v. Hasey*, 114 N. W. 1118, 1119, 134 Wis. 618.

"Nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes derived and directed by human skill, or by the employment of machinery, \* \* \* are now commonly designated as 'manufactured.'" The *Century Dictionary* defines "manufacture" as "the production of articles for use from raw or unprepared materials, by giving these materials new forms, qualities, properties, or combinations, whether by manual labor or machinery." *State v. G. H. Tichenor Antiseptic Co.*, 48 South. 277, 278, 118 La. 685 (quoting from *Carlin v. Western Assur. Co. of Toronto*, 57 Md. 526, 4 Am. Rep. 440).

Held, that an article which has been advanced through one or more processes into a completed commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material from which it is made, and is put into a completed shape, designed and adapted for a particular use to which the material in its original form is not adapted, is to be deemed a manufacture, although its component materials are unchanged. *United States v. George Meier & Co.*, 136 F. 764, 765, 69 C. C. A. 421 (citing *Erhardt v. Hahn*, 55 Fed. 273, 5 C. C. A. 99; *Dejonge v. Magone*, 16 Sup. Ct. 119, 159 U. S. 562, 40 L. Ed. 260; *Grempler v. United States*, 107 Fed. 687, 46 C. C. A. 557; *United States v. Binney*, 82 Fed. 992, 27 C. C. A. 347; *Boker v. United States*, 97 Fed. 205, 38 C. C. A. 114; *United States v. Leonard*, 108 Fed. 42, 47 C. C. A. 181; *Marsching v. United States*, 118 Fed. 1006).

Small pieces of soapstone, cut in regular sizes for gas tips and burners, have been "manufactured," and are dutiable as unenumerated "manufactured" articles, under *Tariff Act July 24, 1897*, c. 11, § 6. *M. Kirschberger & Co. v. United States*, 166 Fed. 1012, 1013.

Where marble waste, a comparatively valueless material, has been converted into

a commodity of use and value by a special manufacturing process, whereby it has acquired a new name and a new use, it ceases to be a crude mineral and becomes a "manufactured" one. *United States v. Graser-Rothe*, 164 Fed. 205, 207.

Articles produced incidentally to the manufacture of other articles, and which are themselves ready to be used for various purposes without further treatment, are under the tariff laws subject to classification as "manufactured," rather than as "waste." *Shallus v. United States*, 155 Fed. 213, 215.

Soluble grease, a preparation of tallow used in the process of dyeing cotton cloth for softening the fabric after the application of the dye, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 32, 30 Stat. 153, as an alizarin assistant, but under section 6 (30 Stat. 205) as an "unenumerated manufactured article." *Abram De Ronde & Co. v. United States*, 140 Fed. 92, 93.

Orange flower water and rose water are not dutiable as medicinal preparations, under Tariff Act 1897, but as "unenumerated manufactured articles." *Euler v. United States*, 147 Fed. 765, 766.

Sweet crackers, known as wafers and biscuits, in which the proportion of the sweetened centers to the pastry envelopes is large, but in which flour is used to a substantial extent, are not dutiable as "confectionery," under Tariff Act 1897, but are dutiable as "unenumerated manufactured articles." *United States v. Thomas Meadows & Co.*, 147 Fed. 757.

A liquid extract of the coffee bean held not to be dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 283, 30 Stat. 172, relating to "articles used as coffee, or as substitutes for coffee," but under section 6, 30 Stat. 205, as an "unenumerated manufactured article." *E. C. Hazard & Co. v. United States*, 164 Fed. 907, 908.

Articles of hone stone, which are used in polishing marble and lithographic stones, and which are not shown to be known commercially as "hones," are not free of duty as "hones," under the Tariff Act, but are dutiable as "unenumerated manufactured articles." *R. J. Waddell & Co. v. United States*, 135 Fed. 211, 213.

Persian berry extract, which is used in staining food products, and also as a dyestuff for coloring fabrics, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 58, 30 Stat. 154, as a color, not belonging to the "paints, colors, pigments," etc., therein enumerated, nor, by similitude, under paragraph 20 or 22, 30 Stat. 152, relating respectively to berries advanced in value and to extracts of barks, etc., used for dyeing, but is dutiable as an "unenumerated manufactured article" under

section 6, 30 Stat. 205. *United States v. Berlin Aniline Works*, 154 Fed. 925, 926.

The Japanese alcoholic beverage known as saké is dutiable as an "unenumerated manufactured article," under section 6, Tariff Act July 24, 1897, c. 11, 30 Stat. 205. *United States v. Nishimiya*, 137 Fed. 396, 397, 69 C. C. A. 588.

Fruit in spirits, consisting of cherries in maraschino, is not dutiable as "fruits preserved in sirup," but as "unenumerated manufactured articles." *Reiss & Brady v. United States*, 135 Fed. 248, 249.

#### **As materials**

See Materials.

#### **In patents**

A house, or a room in a house, is not a "manufacture," within the meaning of Rev. St. § 4886, which authorizes the granting of patents for "any new and useful art, machine, manufacture, or composition of matter," and a particular form of construction of a room, or portion of a room, in a house, is not patentable. *American Disappearing Bed Co. v. Arnaelsteen*, 182 Fed. 324, 325, 105 C. C. A. 40.

A sarcophagus monument is a "manufacture" within the meaning of Rev. St. § 4929, and a proper subject for a design patent. *Crier v. Innes*, 170 Fed. 824, 326, 95 C. C. A. 508.

#### **Of agate**

Small pieces of agate, garnet, etc., advanced from their natural state by cutting process, for the purpose of fitting them for use as setting for jewelry, and known commercially as agates, garnets, etc., are more specifically provided for as "precious stones advanced," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, than as "manufactures of agate, garnet, etc.," under Schedule B, par. 115, 30 Stat. 159. *United States v. Albert Lorsch & Co.*, 172 Fed. 277.

Small pieces of agate, fitted for use as scale bearings by being cut, polished, and grooved, are dutiable as manufactures of agate, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 115, and not as "precious stones," under paragraph 435, Schedule N, 30 Stat. 192. *Smith v. Computing Scale Co.*, 147 Fed. 890, 891 (citing *Erhardt v. Hahn*, 55 Fed. 273, 5 C. C. A. 99; *Hahn v. United States*, 40 C. C. A. 622, 100 Fed. 635; *Hahn v. United States*, 121 Fed. 152).

The provision for precious stones cut, but not set, in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, is not limited to stones used otherwise than for industrial purposes; and cut pieces of agate used as scale bearings are dutiable under said provisions rather than as "manufactures of agate," under Schedule B, par. 115, 30 Stat. 159. *United States v. Albert Lorsch & Co.*, 152 Fed. 591, 592.

Where Congress, having provided in general terms for a group of articles, which includes many different species, as "precious stones," selects by name one of those species and prescribes that manufactures of that particular species shall be dutiable at a different rate, as "manufactures of agate, not specially provided for," it has so clearly indicated its intention to withdraw the article from the general group as soon as it becomes a completed manufacture that the absence of the limiting clause, "not specially provided for," from the group provision, is not particularly significant. *United States v. Albert Lorsch & Co.*, 158 Fed. 398, 399, 86 C. C. A. 34.

#### Of chalk

The article produced by the artificial precipitation of chalk, and bolting and packing it in bags, is not "manufactures" of chalk, within the meaning of *Tariff Act July 24, 1897*, c. 11, § 1, Schedule A, par. 13, but is chalk itself, and is dutiable under the provision in the same paragraph for "chalk artificially precipitated." While, in the provision in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule A, par. 13, for chalk "prepared for toilet purposes," the preparation referred to is not, perhaps, such as is necessary to make a completed toilet article, there must be advancement toward use for toilet purposes, by the admixture of flavoring or other ingredients, or otherwise; and chalk that has been merely precipitated artificially, bolted, and packed in bags is not within that provision. *United States v. P. E. Anderson & Co.*, 175 Fed. 961, 962, 99 C. C. A. 451.

#### Of chip

Baskets made of twisted hinoki wood shavings held dutiable as "manufactures of chip," under *Tariff Act July 24, 1897*, c. 11, § 1, Schedule N, par. 449. *Morimura Bros. v. United States*, 167 Fed. 687.

#### Of cork

Small pieces of cork, which have been produced by grinding the refuse of cork bark for convenience in handling, and which need further preparation before becoming fit for its ultimate use in the manufacture of linoleum, etc., is dutiable as "waste," and not as a "manufacture" of cork. *Gudewill & Bucknall v. United States*, 142 Fed. 214.

#### Of cotton

Goods composed in part of wool, but in chief value of cotton, are more specifically enumerated in *Tariff Act Oct. 1, 1890*, c. 1244, § 1, Schedule I, par. 355, as "manufactures of cotton" than in the provision in Schedule K, par. 392, for "manufactures of every description \* \* \* in part of wool." A provision for "all manufactures of cotton" and one for "all manufactures of every description \* \* \* in part of wool" are not equally applicable to cloth composed in part of wool but in chief value of cotton; the latter being less specific

than the former. Therefore they are not controlled by the provision in *Tariff Act Oct. 1, 1890*, c. 1244, § 5, that, "If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates." The provision for "manufactures of cotton," in *Tariff Act Oct. 1, 1890*, c. 1244, § 1, Schedule I, par. 355, held to include materials composed in chief value of cotton and in part of another substance. *Benoit v. United States*, 150 Fed. 687, 688.

The provision in the *Tariff Act* for "labels for garments or other articles, composed of cotton," does not include strips of cotton containing certain words woven therein in silk, which are intended, when properly cut, to be attached to the top of shoes. Such articles are dutiable as "manufactures of cotton," under said act. *Herzog v. United States*, 135 Fed. 919.

Cotton damask doilies, napkins, and table covers or cloths, in a completed condition, ready for use, are dutiable under *Tariff Act July 24, 1897*, c. 11, § 1, Schedule I, par. 322, as "manufactures of cotton not specially provided for," and not under paragraph 321 of said act as "cotton table damask." *Douglass & Berry v. United States*, 123 Fed. 993, 994.

#### Electricity

Electricity generated for the purpose of furnishing light, heat, and power is a product of "manufacture" and a commercial commodity. In re *Charles Town Light & Power Co.*, 183 Fed. 160, 163.

Conceding that *Flowage Act (Pub. St. 1901, c. 142)* § 12, was passed to encourage the establishment of manufactories operated by water power, the production of electricity by means of water power will be deemed a "manufactured product" within the meaning of the statute, though the use of electricity was not contemplated when the act was passed. *McMillan v. Noyes*, 72 Atl. 759, 762, 75 N. H. 258.

#### Of fur

So-called "beaver strips," which are in the form of rectangular strips or bands of various sizes, consisting of rabbit fur and woolen cloth, used in the making of hats, the fur being the component material of chief value, are dutiable as a "manufacture of fur," under paragraph 450 of the *Tariff Act of July 24, 1897*, c. 11, § 1, Schedule N, and not under paragraph 370, Schedule K, as articles of wearing apparel composed wholly or in part of wool, nor under paragraph 432, Schedule N, as "hats or bonnets or forms therefor composed in chief value of fur." *Herrmann v. United States*, 145 Fed. 843, 844.

#### Of gelatin

The provision in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule N, par. 408, for "articles \* \* \* composed \* \* \* in part of \* \* \* spangles made of \* \* \* gelatin,"

being more specific than that in paragraph 450, for "manufactures of gelatin," hat crowns composed chiefly of gelatin spangles are dutiable under the former provision. *Louis Metzger & Co. v. United States*, 146 Fed. 132, 76 C. C. A. 558.

#### Of glass

In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule B, par. 100, the term "blown glassware" includes articles blown in a mold as well as freehanded. Articles in chief value of blown glass, but in part of other glass or other material, are not within the provision for "blown glassware" in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule B, par. 100, but are dutiable as manufactures of glass under paragraph 112, 30 Stat. 158. In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule B, par. 100, the provision for "articles of glass \* \* \* ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers)," is not limited to articles in which the grinding is done for ornamental or decorative purposes, but includes plain goods ground for utility purposes only. In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule B, par. 99, the term "molded," as applied to glassware, is synonymous with "pressed." *United States v. Heil Chemical Co.*, 178 Fed. 537, 540, 102 C. C. A. 47.

Merchandise consisting of thermometers is dutiable under *Tariff Act July 24, 1897*, c. 11, § 1, par. 112, as "manufactures of glass." *United States v. D. S. Hesse & Bro.*, 141 Fed. 492, 493.

#### Of india rubber

Wearing apparel, consisting of dress shields, and composed in chief value of rubber, and in part of cotton, are dutiable as manufactures in chief value of india rubber, under paragraph 460, *Tariff Act Oct. 1, 1890*, c. 1244, § 1, Schedule N, and not under paragraph 349 of said act (section 1, Schedule I), relating to wearing apparel composed of cotton, or in chief value thereof, and to such wearing apparel "having india rubber as a component material." *Darlington, Runk & Co. v. United States*, 136 Fed. 716, 717.

In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule J, par. 339, the provision for braids "wholly or in chief value of \* \* \* cotton, \* \* \* whether composed in part of india rubber or otherwise," applies only to braids in which cotton is the chief or only component. Braids in part of cotton and in chief value of rubber are dutiable under Schedule N, par. 449, as "manufactures in chief value of india rubber." *Horrax v. United States*, 167 Fed. 526, 527, 93 C. C. A. 22.

#### Insurance

Insurance is not an article of merchandise, or "manufacture," or one of the necessities of life, within the laws against engrossing prohibiting combinations among dealers in merchandise, or manufacture, or

necessaries of life. *Harris v. Commonwealth*, 73 S. E. 561, 563, 113 Va. 746, 38 L. R. A. (N. S.) 458, Ann. Cas. 1913E, 597.

#### Of iron

So-called "iron sand," a completed article produced by a series of manufacturing processes from cast iron and steel scrap, is not within the provision for "all iron in \* \* \* forms less finished than iron in bars, and more advanced than pig iron," in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule C, par. 124, but is dutiable as "iron manufactured," under paragraph 193. *Harrison Supply Co. v. United States*, 164 Fed. 155, 156.

In construing the provision in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule C, par. 124, for "all iron in \* \* \* forms less finished than iron in bars, and more advanced than pig iron," held, that the test is the degree of advancement in manufacture, rather than in refinement or quality, and that iron sand, a finished manufactured article, is not within said provision, but is dutiable as "manufactures of iron," under paragraph 193. *Harrison Supply Co. v. United States*, 171 Fed. 406, 407, 96 C. C. A. 362.

#### Of lumber

As lumber, see Lumber.

#### Of metal

The article commercially known as "fitters," produced from the thin sheets which constitute the composition metal of commerce, by a process of manufacture that makes it no longer available for the uses to which composition metal of trade is put, but adapts it for other uses, is not free of duty as "composition metal," under *Tariff Act July 24, 1897*, c. 11, § 2, Free List, par. 533, but is dutiable as manufactures of metal under paragraph 193, § 1, Schedule C, of said act. *United States v. George Meter & Co.*, 136 Fed. 764, 765, 69 C. C. A. 421 (citing *Erhardt v. Hahn*, 55 Fed. 273, 5 C. C. A. 99; *Dejonge v. Magone*, 16 Sup. Ct. 119, 159 U. S. 562, 40 L. Ed. 260; *Grempler v. United States*, 107 Fed. 687, 46 C. C. A. 557; *United States v. Binney*, 82 Fed. 992, 27 C. C. A. 347; *Boker v. United States*, 97 Fed. 205, 38 C. C. A. 114; *United States v. Leonard*, 108 Fed. 42, 47 C. C. A. 181; *Marsching v. United States*, 113 Fed. 1006).

Slides or buckles, made of steel or a base metal, some ornamented with rhinestones and some colored in imitation of precious metals, and used in ornamenting slippers, are not dutiable, under the *Tariff Act* as "articles commonly known as jewelry," but are dutiable as manufactures of metal, not specially provided for. *E. H. Bailey & Co. v. United States*, 135 Fed. 917, 918.

"Manufactures of metal," under paragraph 107, Schedule C, § 1, c. 349, *Tariff Act Aug. 27, 1894*, would include bronze candelabra and bronze statues, and they were not free under paragraph 452, Free List, § 2, of

said act relating to old copper fit only for manufacture, clipping from new copper, etc. *Tiffany v. United States*, 142 Fed. 282, 283.

Where steel parts have been assembled and united into complete window sashes, they have been too far advanced in manufacture to permit their inclusion within the provision of the Tariff Act, relating to "structural shapes" of iron or steel fitted for use, but must be rated as "manufactures of metal." *Ackerson v. United States*, 172 Fed. 303.

#### Of mother-of-pearl

Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 450, covering "manufactures" of mother-of-pearl held to include mother-of-pearl made into slabs by cutting or grinding, which are designed for use in the manufacture of knife handles and similar articles. *Morris European & American Express Co. v. United States*, 150 Fed. 608.

#### Of needles

Needle cases, in which steel needles constitute the element of chief value, should be considered as "manufactures in chief value of needles," rather than as "articles composed in part of steel," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, and as needles are on the free list, and there is no tariff provision for manufactures of needles, such articles are dutiable as unenumerated manufactured articles under section 6. *Dieckerhoff, Rafloer & Co. v. United States*, 151 Fed. 957.

#### Of nickel

In construing Tariff Act July 24, 1897, c. 11, § 1, Schedule O, par. 185, relating to nickel, nickel oxide, and nickel alloy, "in pigs, ingots, bars, or sheets," held (1) that only nickel in one of the forms enumerated is included; (2) that the provision for "sheets," therefore, does not include anodes consisting of nickel plates about 12 inches long, 6½ inches wide, and less than a half inch thick, a "sheet" being broad, thin, and expanded; and (3) that such anodes are dutiable as manufactures of nickel under paragraph 193. *Hermann Boker & Co. v. United States*, 152 Fed. 589.

#### Of oil

The refining process which constitutes what is called the "manufacture of oil," relating to coconut oil of commerce, merely removes from it the impurities due to the manner in which the kernel is handled and dried and to its partial decay. *United States v. Oriental American Co.*, 129 Fed. 249, 251.

#### Of opium

The mere mixing of smoking opium with the residue of opium that has been smoked, and heating the same, is not a "manufacture of opium for smoking purposes" within the meaning of Internal Revenue Act Oct. 1, 1890, c. 1244, §§ 36, 37, 26 Stat. 620, 621, imposing a tax on smoking opium and regulating the

business of its manufacture. *Shelley v. United States*, 198 Fed. 88, 89, 117 C. C. A. 294.

#### Of palm leaf

As to palm leaves which have been subjected to processes that restore their natural appearance and prevent decay, and some of which have been arranged in wreaths on wire frames held that, as there had been no advance in manufacture that destroyed the original articles or made them useful for other purposes or altered their trade designation, they still remained dutiable as "leaves," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, rather than as "manufactures" of palm leaf, provided for in paragraph 450. *Kreshower v. United States*, 152 Fed. 485.

#### Of paper

Paper bags with incidental printing thereon are "manufactures of paper," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 407. *Kraut v. United States*, 130 Fed. 392.

Articles composed of cardboard on which lithographic prints have been pasted, and which is cut into forms adapted to be folded into pockets to hang on walls, some of them having pincushions or calendars attached, are not dutiable as "lithographic prints," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, but as "manufactures of paper," under paragraph 407. *Knauth, Nachod & Kuhne v. United States*, 155 Fed. 144, 146.

So-called lace paper dollies, covers, tops, etc., used in packing confectionery, etc., which are composed of paper perforated with ornamental designs and printed with the names and addresses of merchants, are not dutiable as paper, under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 402, but as "manufactures of paper," under paragraph 407. *United States v. Hensel, Bruckmann & Lorbacher*, 152 Fed. 578, 579.

So-called duplex lithographic transfer paper, which is used in transferring decalcomania designs to pottery, and is produced by pasting together two sheets of paper, one coated with a gummy substance and the other uncoated, is "paper," rather than "manufactures of paper," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, pars. 403, 407. *B. F. Drakenfeld & Co. v. United States*, 167 Fed. 798, 799, 93 C. C. A. 188.

Plain paper was stamped by a single operation into shapes with lacelike effects, which are known as tops or dollies, and are used for placing on the tops of packages of candy, fruit, etc., or under finger bowls. Plain paper might have been used for the same purpose, except that it would not have been so pleasing. Held that, as the improvement of the original material had not interfered with its distinguishing characteristics, it was dutiable as "paper," rather than as "manufactures of paper," under Tariff Act July 24,

1897, c. 11, § 1, Schedule M, pars. 403, 407. *Hamilton v. United States*, 167 Fed. 796, 798, 93 C. C. A. 186.

#### Of paste

So-called rhinestones, articles composed of metal and paste, the latter being the more valuable component, which are merely used to decorate and ornament women's outer apparel, are dutiable as manufactures of paste, not specially provided for, under the Tariff Act. *B. Blumenthal & Co. v. United States*, 135 Fed. 254.

Tariff legislation having distinguished between glass and form of it known as paste, articles in chief value of paste, cut, are not within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, for goods in chief value of cut "glass," but are dutiable as manufactures of "paste," under paragraph 112. *United States v. New York Merchandise Co.*, 167 Fed. 684.

#### Of rock crystal

In construing the provision in the Tariff Act for "precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process," in reference to intaglios incised in rock crystal (a precious stone), which have been attractively and skillfully painted, the value and salability of the articles being chiefly attributable to the painting, the words "or other process" include such process of painting, and such intaglios are dutiable under said provision, rather than as "manufactures of rock crystal," not specially provided for. *Benedict & Warner v. United States*, 135 Fed. 242.

#### Of sand

Under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 671, relating to "sand, crude or manufactured," "crude sand" is such as is found in nature, and "manufactured sand" is, though manufactured, substantially the same as crude sand; and pulverized corundum, which is not produced from crude sand, is therefore not sand of either kind within the meaning of the act. *F. W. Myers & Co. v. United States*, 155 Fed. 502, 503.

Ground corundum ore, that has been advanced in value by processes of manufacture for a specific use, is not a "crude mineral," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 614, nor "manufactured sand," within the meaning of paragraph 671, but is dutiable as emery by similitude, under section 1, Schedule N, par. 419. *F. W. Myers & Co. v. United States*, 178 Fed. 462, 463.

#### Of silk

A powder made from raw silk, which is used in the manufacture of wall paper and artificial flowers, is dutiable under paragraph 391, Schedule L, § 1, Tariff Act July 24, 1897, c. 11, as "manufactures of silk," or is at least so dutiable by similitude, under

section 7 of said act. *W. W. Thomas & Co. v. United States*, 145 Fed. 1023, 74 C. C. A. 682.

So-called remanit, in the form of ropes, braids, and mats, which has been manufactured from silk produced by carbonizing rags containing silk, held to be a "manufacture of silk," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, par. 391, Schedule L. *Frank v. United States*, 149 Fed. 1022, 79 C. C. A. 360.

Silk ribbons, of which some were, and others were not, in the nature of trimmings, but which, however used for trimmings, are required to be further fashioned for such use, and which are not in fact or commercially within the class of goods known as "trimmings," are not dutiable as "silk trimmings," under paragraph 390, Tariff Act 1897, c. 11, § 1, Schedule L, but as "manufactures of silk" not specially provided for, under paragraph 391, of said act. *Gartner & Friedenheft v. United States*, 131 Fed. 574, 575.

Ribbons composed chiefly of silk, but in part of cotton, are not "ribbons \* \* \* of cotton, \* \* \* whether composed in part of India rubber or otherwise," under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, for the word "otherwise" is there used with the meaning of "not," and not as relating to other materials than India rubber. Such ribbons are properly assessed as "manufactures of silk," under paragraph 391 of Schedule L. *Gartner, Sons & Co. v. United States*, 154 Fed. 957, 958.

In construing the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 660, for "silk, raw, or as reeled from the cocoon, but not \* \* \* advanced in manufacture in any way," held: (1) That the provision does not cover any form of raw silk advanced beyond the condition of skeins; (2) that silk known as "singles" or "silk on tubes," which has been wound from the skeins onto tubes, the effect of this process being to advance the silk a stage in preparation for its ultimate use, has been "advanced in manufacture"; and (3) that silk in this form is not free of duty under this provision, but dutiable, under paragraph 384 (section 1, Schedule L, of said act), as "silk \* \* \* not further advanced or manufactured than carded or combed silk." *Klots v. United States*, 139 Fed. 606, 607, 71 C. C. A. 590.

Raw tussah silk, in the same condition as when reeled from cocoons, except that it has been transferred from the large reels on which it was taken from the cocoons to small reels, the result of this process not being any change in the condition of the silk other than to adapt the skeins thus produced to American spinning machines, is held not to be dutiable as "silk partially manufactured from cocoons," under paragraph 384, Tariff Act July 24, 1897, c. 11, § 1, Schedule L, but to be free of duty under paragraph 660, as

"silk, raw, or as reeled from the cocoon, but not \* \* \* advanced in any way" (chapter 11, § 2, Free List). "By the very language of paragraph 660 it will be observed that 'manufactured' silk does not refer to the method or form of putting up the raw silk, but refers to doubling or twisting, or some other process of manufacture which changes the character of the silk itself." *United States v. Stewart*, 133 Fed. 811, 812 (quoting from *G. A. 5,432*).

#### Of straw

Straw lace sewed with thread which constitutes a substantial element of its cost, and without which the material could not be held together or be a merchantable article, is not within the provision in paragraph 409, *Tariff Act July 24, 1897*, c. 11, § 1, Schedule N, for lace composed "wholly" of straw, but is dutiable as a "manufacture in chief value of straw," under paragraph 449 of said act. *Kurtz, Stuboeck & Co. v. United States*, 136 Fed. 268, 269.

#### From tin plate

Disks cut as a by-product from tin plate, which are reduced by the process to only about one-fifth of the value of the plate from which they were made, are not "manufactured from tin plate," within the meaning of *Tariff Act July 24, 1897*, c. 11, § 1, Schedule C, par. 193. "Manufacture" implies addition to, and not subtraction from, and an article cannot be said to have been manufactured which results from a process that reduces its value. *Shallus v. United States*, 162 Fed. 653, 656, 89 C. C. A. 445.

#### Of willow

Under *Tariff Act July 24, 1897*, c. 11, § 1, Schedule D, par. 206, relating to "willow prepared for basket makers' use, \* \* \* manufactures of \* \* \* willow," it was the intention for the final clause to cover completed manufactures from the "prepared" willow enumerated in the preceding clause; and baskets made from willow chip would be dutiable thereunder rather than as "manufactures of chip" under Schedule N, par. 449. *Theodore Olleshelmer & Bro. v. United States*, 158 Fed. 977, 978, 86 C. C. A. 181.

#### Of wire

In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule C, p. 137, the provision for "articles manufactured from \* \* \* wire" cannot be restricted to manufactured articles which contain the round wire in its integrity; and "steel wool" consisting of filaments shaved from steel wire, and constituting a finished commercial article, is embraced in said provision. *Buehne Steel Wool Co. v. United States*, 159 Fed. 107, 108, 86 C. C. A. 297.

#### Of wood

"Fireproofed lumber" is produced by subjecting ordinary "sawed lumber" to a fireproofing process which changes its chemical construction and fits it for purposes for

which it would not otherwise be suitable, but does not produce a particularly noticeable change in its appearance. Such lumber is not, however, "sawed lumber," within the *Tariff Act July 24, 1897*, c. 11, § 1, Schedule D, par. 195, but is a "manufacture of wood," as enumerated in paragraph 208. *United States v. F. W. Myers & Co.*, 139 Fed. 344, 345, 347.

Manicure sticks, being completed articles of wood, several inches long, pointed at one end and beveled off at the other to form a cutting edge, are "manufactures of wood," and dutiable as such under *Tariff Act July 24, 1897*, c. 11, § 1, Schedule D, par. 208. *E. B. Estes & Sons v. United States*, 176 Fed. 932.

Lumber which has been subjected to a fireproofing process that largely increases its value, but which can still be applied to the ordinary uses of sawed lumber, is not dutiable as "manufactures of wood," not specially provided for, under paragraph 208, *Tariff Act July 24, 1897*, c. 11, § 1, Schedule D, but as "sawed lumber," under paragraph 195. *F. W. Myers & Co. v. United States*, 147 Fed. 204, 205, 77 C. C. A. 430.

Dyers' sticks of hard wood, which have been trimmed and peeled, and had the rough edges removed, and the ends rounded, are not dutiable as "manufactures of wood," under *Tariff Act July 24, 1897*, c. 11, § 1, Schedule D, par. 208, but as wood, unmanufactured, under paragraph 198. *United States v. Knipscher & Maas Silk Dyeing Co.*, 152 Fed. 590, 591.

Under *Tariff Act July 24, 1897*, c. 11, § 1, Schedule L, par. 387, providing for silk fabrics when "in the gum" and when "boiled off," held, that fabrics which on boiling lost from 18 to 27 per cent. in weight were classifiable under the former, rather than the latter, clause. *H. Mendelson & Co. v. United States*, 154 Fed. 33, 34, 83 C. C. A. 145.

The provision for "house or cabinet furniture, of wood, wholly or partly finished, and manufactures of wood," in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule D, par. 208, is intended to cover all finished manufactured wooden articles, however different they may be in nature or appearance from "house or cabinet furniture"; and wood flour, a completed product, already prepared for use, is therefore not to be excluded under the rule of ejusdem generis. *Nairn Linoleum Co. v. United States*, 151 Fed. 955, 956.

#### Of wool

Goods of silk and wool, the latter being the minor component, are within the purview of *Tariff Act August 27, 1894*, c. 349, § 1, Schedule K, par. 297, deferring until January 1, 1895, the reduction in duties provided in said act on "manufactures of wool." *Robinson v. United States*, 143 Fed. 919.

The provision in the silk schedule in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, "that all manufactures, of which wool is a component material, shall be classified, and assessed for duty as 'manufactures of wool,'" is limited to goods of which silk is a component, and does not include flax-wool fabrics. *United States v. Charles A. Johnson & Co.*, 157 Fed. 754, 755, 85 C. C. A. 147; *Same v. Walsh*, 154 Fed. 749 (citing *Hartman v. Meyer*, 10 Sup. Ct. 751, 135 U. S. 237, 34 L. Ed. 110).

Camel's-hair press cloth is dutiable as "manufactures of wool" under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, pars. 366, 383, rather than as "hair press cloth" under Schedule N, par. 431. *Oberle & Henry v. United States*, 165 Fed. 53, 91 C. C. A. 139.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, "that all 'manufactures of which wool is a component material' shall be classified and assessed for duty as manufactures of wool" is limited to said schedule, which relates to goods containing silk, and the classification of fabrics of flax and wool should be determined without regard to said provision. *United States v. E. De F. Wilkinson Co.*, 154 Fed. 751, 752 (citing *United States v. Walsh*, 154 Fed. 749; *United States v. Slazenger*, 113 Fed. 524).

In construing Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, relating to "all manufactures \* \* \* of which silk is the component material of chief value," and containing a proviso that "all manufactures of which wool is a component material shall be classified and assessed for duty as manufactures of wool," held, that the ordinary rule should be applied that a proviso at the close of an independent paragraph like this should be construed as limiting only what precedes it, and that the words "all manufactures" in the proviso have no broader relation than the same words in the beginning of the paragraph. *United States v. Walsh*, 154 Fed. 770, 83 C. C. A. 472 (citing *United States v. G. Falk & Bros.*, 27 Sup. Ct. 191, 204 U. S. 143, 149, 150, 51 L. Ed. 411).

Cattle-hair goods are dutiable by similitude as "manufactures of wool," under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 366, being similar in quality, use, and texture. *F. Rosenstern & Co. v. United States*, 171 Fed. 71, 72, 96 C. C. A. 175.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, the proviso that "all manufactures, of which wool is a component material, shall be classified and assessed for duty as 'manufactures of wool'" is not limited to the goods containing silk which are the subject of said paragraph, but extends to all silk and wool goods; and dress goods in chief value of silk, but in part of wool, become, by virtue of this proviso, subject to the duty on wool goods, rather than

that on silks. *United States v. Scruggs, Vandervoort & Barney Dry Goods Co.*, 156 Fed. 940, 942, 84 C. C. A. 440.

## MANUFACTURING AND MECHANICAL BUSINESS

A domestic corporation, formed for the purchase of the capital stock, evidences of indebtedness, and assets of another domestic corporation, and for the further purpose of manufacturing and selling implements and machinery, is one organized for a purpose other than that of carrying on any kind of "manufacturing or mechanical business," and is therefore not within the exception as to the liability of stockholders made by Const. Minn. art. 10, § 3, in favor of corporations of that kind. *Bernheimer v. Converse*, 27 Sup. Ct. 755, 757, 206 U. S. 516, 51 L. Ed. 1163.

## MANUFACTURING CORPORATION

See Manufacturer.

See, also, Mechanical Corporation.

## MANUFACTURING ESTABLISHMENT

A sawmill at which lumber is sawed for sale on the market is a "manufacturing establishment," within Ky. St. 1903, §§ 2487, 2488, giving laborers in manufacturing establishments a lien for wages superior to that of mortgages. *Graham v. Magann, Fawke Lumber Co.*, 80 S. W. 799, 800, 118 Ky. 192, 4 Ann. Cas. 1026 (citing *Bogard v. Tyler's Adm'r*, 55 S. W. 709, 119 Ky. 637).

The furnishing of electric light and power and distributing it is not manufacturing, within Pub. St. 1901, c. 55, § 11, providing that towns may, by vote, exempt for certain time from taxation any "manufacturing establishment" proposed to be erected or put in operation. *Williams v. Park*, 56 Atl. 463, 464, 72 N. H. 305, 64 L. R. A. 33.

Act March 2, 1899 (Acts 1899, p. 234: *Burns' Ann. St. 1901*, § 7087i; *Horne's Ann. St. 1901*, § 5169k), declaring that the words "manufacturing and mercantile establishments" mean any mill, factory, place of trade, or other establishment where goods are manufactured, or offered for sale, is not confined in its operation to places where goods are manufactured for or offered to the public market, and a machine shop maintained by a railway company for its own repairs and the making of materials for its own use is within the statute. *Baltimore & O. S. W. R. Co. v. Cavanaugh*, 71 N. E. 239, 241, 35 Ind. App. 32.

A plant for the generation of electricity is a "manufacturing establishment," as affecting the owner's liability for death of an employé resulting from his failure to guard machinery, as required by *Burns' Ann. St. 1908*, §§ 8021, 8029. *Angola Ry. & Power Co. v. Butz (Ind.)* 98 N. E. 818, 820.

A flouring mill is a "manufacturing establishment," within Ky. St. 1903, § 2487, giv-



ing a lien upon property of owners or operators of any rolling mill, foundry, or other manufacturing establishment assigned for the benefit of creditors, to one furnishing materials or supplies to run such business. *W. H. Hall & Son v. J. T. Guthrie's Sons* (Ky.) 103 S. W. 721, 722.

A concern engaged in the business of manufacturing engines, pumps, fans, and the like is a "manufacturing establishment," within the factory act (Acts 1899, p. 284, c. 142, § 9; *Burns' Ann. St. 1901*, § 70871), requiring operators of "manufacturing establishments" to guard machinery. *Crawford & McCrimmon Co. v. Gose* (Ind.) 82 N. E. 984, 985.

In an action for injuries to a servant, where the complaint alleged that defendant was engaged in manufacturing brushes, and had a machine saw, which was connected with the steam power and revolved with great speed when in use, and that plaintiff was injured while operating the saw, etc., it directly averred that the saw was operated in a "manufacturing establishment within the state," and that plaintiff was engaged at work in a "manufacturing establishment" owned and operated by defendant when the injury was received, within the factory act, which requires a saw used in a manufacturing plant to be guarded. *Holcomb v. Norman*, 91 N. E. 625, 629, 47 Ind. App. 87.

In a statute making a place where articles in a raw, unfinished, or incomplete state are converted into a new, improved, or different form a "manufacturing establishment," the word "raw" is a relative term, and means not yet changed by some process of treatment or fabrication. The words "unfinished" and "incomplete" likewise refer to a state or condition not yet attained and mean not fully fashioned to meet some design. *Factory Act* (Laws 1903, c. 356) § 7, provides that an establishment wherein any natural products or other articles, in a raw, incomplete, or unfinished condition, are converted into a new improved or different form, is a manufacturing establishment, within the act. Held, that an establishment wherein railroad iron, old stoves, waste and scrap iron of every description, is cut into lengths, known as grade No. 1, grade No. 2 and busheling scrap, by machines known as alligator shears, operated by power, to meet standing specifications of mills which purchase the product, is a manufacturing establishment within the act. *Caspar v. Lewin*, 109 Pac. 657, 659, 82 Kan. 604.

A gasoline engine, used, in connection with machinery consisting of belts, pulleys, and cog-wheels, to pump water through pipes to supply the inhabitants of a city, is not a "manufacturing establishment" or a "mill," within the meaning of these terms in section 4682, Gen. St. 1909. *Ward v. City of Norton*, 122 Pac. 881, 86 Kan. 906.

Pub. Laws 1909, No. 285, § 12, which requires the owner, agent, or lessee of any manufacturing establishment to provide automatic gates for elevator shafts, imposes the duty upon an owner of a building who leases a floor of the building; the term "manufacturing establishment" as used in the section meaning premises on which a manufacturing business is conducted. *Barfoot v. White Star Line*, 136 N. W. 437, 441, 170 Mich. 349.

Under a statute providing that towns may, by vote, exempt from taxation any "manufacturing establishment" proposed to be erected therein and the capital to be used, the term "manufacturing establishment" refers to the property of the proprietors of the industry who receive the benefit conferred by the statute, and not the property of others having no interest in the prosecution of the business, and therefore the statute does not confer authority to exempt an owner of property who is not entitled to such exemption from taxation on the same because it is leased to another who is so entitled. *Portsmouth Shoe Co. v. City of Portsmouth*, 66 Atl. 1045, 74 N. H. 222.

St. 1902, c. 435, § 1, as amended by St. 1909, c. 514, § 48, prohibits the employment of women and children, except as permitted, and declares that every employer shall post in a conspicuous place in every room in which such persons are employed a printed notice stating the hours of labor, etc. The act applies only to "manufacturing and mechanical establishments," which are defined by section 17 to include those places popularly known as "mills" and "shops," where continuously operating machinery and constant service by attendants throughout the whole day are not essential to economical manufacture, and where ordinary machinery is stopped for the noon hour. Held, that such act does not extend in that respect to stores, or to branches of industry, where continuity of labor by some person is necessary from the beginning to the end of the workday; other provisions having been made for those classes of employment by chapter 514, §§ 47, 68-70. *Commonwealth v. Riley*, 97 N. E. 367, 370, 210 Mass. 387, Ann. Cas. 1912D, 388.

#### MANUFACTURING PLANT

Acts Tenn. 1903, c. 110, § 1, granting authority to any company operating a railroad in the state to build lateral roads not exceeding 15 miles in length, extending from the main stem or any branch of its line "to any mill, quarry, mine, manufacturing plant or to the bank of any navigable stream, without the making of any amendment to the charter of said railroad," does not confer the right on a railroad company to the exclusion of the municipal authorities to build a branch track within the limits of a city to a connection with the private tracks of a cotton compress company a quarter of a mile from a river, the compress being 500 feet from the river

and having no track connection therewith, on the ground that it is a lateral road to the bank of a "navigable stream," nor on the ground that the compress is a "manufacturing plant," within the meaning of the statute; it not being such a plant within any just or recognized definition of the term. *City of Memphis v. St. Louis & S. F. R. Co.*, 183 Fed. 529, 536, 106 C. C. A. 75.

### MANUFACTURING PURPOSES

See Water Furnished for Manufacturing Purposes.

The production and control of electric power by mechanical means, and its adaptation for use upon a trolley system, is a "manufacturing purpose," within the meaning of section 8 of the mechanic's lien law. *Bates Mach. Co. v. Trenton & N. B. R. Co.*, 58 Atl. 935, 936, 70 N. J. Law, 684, 103 Am. St. Rep. 811.

Where a corporation was organized for "manufacturing purposes," such term could not be extended so as to include the power of the corporation to acquire and convey its own stock. *Maryland Trust Co. v. National Mechanics' Bank*, 63 Atl. 70, 74, 102 Md. 608.

### MANUFACTURING PURSUITS

See Manufacturer.

### MANURE

The word "manure" has no technical meaning, nor has it acquired a commercial one differing from its ordinary one. Manure is a common article, well known to all mankind, and hence an ambiguity cannot arise from the use of the term. Where defendant contracted in writing to remove all the manure that might accumulate at plaintiff's stable every day for a year, it was no defense, to an action for breach of such contract, that plaintiff changed the character of the bedding during the continuance thereof, by reason of which the manure was less valuable to defendant. *Keyes & Watkins Livery Co. v. Freber*, 76 S. W. 698, 699, 102 Mo. App. 315.

### MANY

Four persons are sufficient to constitute "many persons," under Code Civ. Proc. § 448, providing that, "where the question is one of a common or general interest of many persons, \* \* \* one or more may sue \* \* \* for the benefit of all." *Climax Specialty Co. v. Seneca Button Co.*, 103 N. Y. Supp. 822, 824, 54 Misc. Rep. 152.

#### As much

The word "many," in a provision of a city charter that notice of the introduction of an ordinance shall be published at least as many as ten days before the adoption of such ordinance, meant the same as though the word "much" had been used and required

merely that the notice be published ten days before the action was taken, but did not require that it be published every day for ten days. *Smith v. Atlanta*, 51 S. E. 741, 742, 123 Ga. 877.

### MANY PERSONS

See, Great Many Persons.

### MAP

"A 'map' means not only a delineation giving a general idea of the land taken, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part, with courses and distances, so that every part can be found." *Hollister v. State*, 77 Pac. 339, 345, 9 Idaho, 651 (quoting Mill. Em. Dom. § 117).

### MAPLE SUGAR

See Imitation Maple Sugar.

### MAPLE SYRUP

The popular recognized definition of "maple syrup" is, that it is the syrup produced from boiling down the sap that flows, in the spring of the year, from live maple trees. *United States v. Scanlon*, 180 Fed. 485, 486.

### MARASCHINO

Fruit in maraschino as edible fruit, see Edible Fruit.

### MARASQUE WATER

The article known as "marasque water" or "eau de marasque," which is produced by distilling the juice of crushed cherries, diluted somewhat with water used in the distilling process, is not dutiable as cherry juice, under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 299, 30 Stat. 174, but as an unenumerated manufactured article under section 6, 30 Stat. 205. *Leerburger Bros. v. United States*, 141 Fed. 1023.

### MARBLE

Hauteville stone, and various other stones of substantially the same character, which are susceptible of a high polish and are used as an interior decorative stone, are not the kind of limestone that is "marble," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 114, but are dutiable as "limestone," under paragraph 117. *United States v. C. D. Jackson & Co.*, 175 Fed. 884, 885; *Bockmann v. United States*, 158 Fed. 807, 86 C. C. A. 67.

So-called Mexican onyx is dutiable as "onyx" rather than as "marble," under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 114. *Blochman Banking Co. v. Blake*, 168 Fed. 572.

## MARE

Under a statute making it grand larceny to steal a "mare," the stealing of a female colt is grand larceny. *Miller v. Territory*, 80 Pac. 321, 322, 9 Ariz. 123.

"It is a matter of common knowledge and observation that among our people the word 'mare,' when used without a word of qualification, is understood to mean a female of the horse species. We apprehend that one rarely, if ever, hears the expression 'a mare horse' employed to describe a female of the species horse, but that the term universally used in this state for this purpose is the single word 'mare.' On the other hand, when a female of the species mule is intended, the expression used is 'a mare mule,' and, when a female of the species ass is intended, the word 'jenny' is used." *McLamb & Co. v. Lamberton*, 62 S. E. 107, 109, 4 Ga. App. 695 (quoting *Teal v. State*, 45 S. E. 964, 119 Ga. 104).

**As horse**

See *Horse*.

## MARGIN

"Margin," as a brokerage term, signifies a sum of money or its value in securities deposited with the broker to protect him against loss in buying or selling for his principal. Where a broker was instructed to "hedge when margin about exhausted," the instructions covered, not only the particular margin at the time, but any margin in the hands of the broker at any time before the close of the trades. *Winston v. F. A. Longshore & Co.*, 40 South. 517, 518, 116 La. 21 (quoting and adopting definition in *Stand. Dict.*).

"The meaning of the word 'margins,' as ordinarily used in connection with stock sales, has long been well understood. As most frequently employed in this state at the time of, and for many years prior to, the adoption of the Constitution, it meant the sum deposited by the purchaser of stock with his broker, being a certain percentage of the purchase price of the stock, the broker agreeing to advance the balance of the purchase price upon condition that he should hold the stock as security for his advance, with the right to sell it, in case of depreciation and failure of the purchaser to keep the 'margin' good; \* \* \* but it was also employed to describe deposits made by sellers and purchasers of stock for future delivery in various ways." *Conradt v. Lepper*, 81 Pac. 307, 311, 13 Wyo. 473 (quoting and adopting the definition in *Sheehy v. Shinn*, 37 Pac. 393, 103 Cal. 373).

## MARGIN OF RAILROAD

A deed calling for "the margin of the railroad" at a point where there is a cut means the top of the cut, and not the base

or a point midway up it; and the margin of a railroad where there is cut or a fill is the top of the cut or the base of the fill. *Louisville & N. R. Co. v. Elliston (Ky.)* 108 S. W. 858, 860.

## MARINE

**Mercantile Marine.**

## MARINE INSURANCE

A "marine insurance" is an insurance against risks connected with navigation to which a ship, cargo, freight, or other insurable interest in such property may be exposed during a certain voyage or a fixed period of time. *Soelberg v. Western Assur. Co. of Toronto, Can.*, 119 Fed. 23, 28, 55 C. C. A. 601.

A contract for the insurance against fire of a vessel while lying moored and in use as a hospital is not maritime, and the measure of liability for a loss by fire, which partially destroyed the vessel, is not governed by the rules of "marine insurance," but by those of fire insurance, and is limited to the amount which the value of the property was depreciated by the fire, not exceeding the sum sued for. *City of Detroit v. Grummond*, 121 Fed. 903, 971, 58 C. C. A. 301.

## MARINE INSURANCE BUSINESS

The business of issuing ordinary fire insurance policies upon boats navigating the Great Lakes and the high seas is "marine insurance business," within Laws 1895, p. 392, c. 175, relating to the organization of marine insurance companies. *Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co.*, 97 N. W. 110, 111, 90 Minn. 383.

## MARINE MILES

"The log was invented about the same time which inaugurated measuring of the sea or marine miles, known as 'English geographical' miles. The sea mile, knot, geographical, or marine mile measures 6,086.7 feet on the sea, on the scale of 60 geographical or sea miles to a degree." In the *Musconogus Grant* by the council of Plymouth in Devon, Eng., made between 1620 and 1635, after the inauguration of the geographical or "marine mile," granting certain land, etc., within three miles of the main land, the three-mile limit is to be measured by the geographical or marine mile or knot, and not by the statute mile. *Lazell v. Boardman*, 69 Atl. 97, 99, 103 Me. 292, 18 Ann. Cas. 673 (citing *Rockland, Mt. D. & S. S. Co. v. Fessenden*, 8 Atl. 550, 79 Me. 140).

## MARINER'S SERVICE

See *Maritime Service*.

Services rendered to a domestic vessel after it has been laid up at a wharf for the winter, in pumping it out, attending to its lines, etc., are not "mariner's services" and

cannot be made the basis of a maritime lien. *The James T. Furber*, 157 Fed. 124, 125.

## MARITAL

### MARITAL COMPANIONSHIP

As property, see Property.

### MARITAL RIGHTS

See, also, Right Acquired by Marriage.

The rights acquired by marriage of the guilty party under a divorce decree, which are forfeited by Code, § 3181, are not limited to rights and obligations owed to the guilty party by his spouse, forfeiture of which would inure to the benefit of such spouse alone, and the section has no bearing on alimony. *Hamilton v. McNeill*, 129 N. W. 480, 485, 150 Iowa, 470, Ann. Cas. 1912D, 604.

## MARITIME

### MARITIME BELT

"The 'maritime belt' is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea." *State of Louisiana v. Mississippi*, 26 Sup. Ct. 408, 422, 202 U. S. 1, 50 L. Ed. 913.

### MARITIME CASE

See Civil Maritime Case.

### MARITIME CONTRACT

Where a storage contract is incidental to the transportation by water of the goods stored, as where they were stored by the carrier for delivery to the consignee, it is "maritime." *Evans v. New York & P. S. S. Co.*, 145 Fed. 841, 842.

A "maritime contract" must concern transportation by sea, and relate to navigation and to maritime employment. It must be one of navigation and commerce on navigable waters. Not every contract having reference to a ship is within the admiralty jurisdiction, but only such as relate to maritime employment, such as pertain to the navigation of a ship or assist the vessel in the discharge of a maritime obligation. It is not enough that the service is to be done upon the sea or with respect to the ship. *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, 148 Fed. 290, 293 (citing *The Richard Winslow*, 71 Fed. 426, 18 C. C. A. 344; *In re Hydraulic Steam Dredge No. 1*, 80 Fed. 545, 25 C. C. A. 628).

To give the court jurisdiction over a contract as "maritime," it must relate to the trade or business of the sea, or must be essentially maritime in its character. The most enlarged interpretation of the term

"maritime," as applied to jurisdiction, has not been extended beyond subjects or engagements which are necessarily connected with services to be rendered on tide waters, or supplies furnished to vessels in aid of a voyage, or labor, or materials, or cash advanced to obtain such supplies. *The Mary F. Chisholm*, 129 Fed. 814, 817 (citing *Scott v. The Morning Glory*, 21 Fed. Cas. 845; *The Perseverance*, 19 Fed. Cas. 907).

### Charter party

A bond given by the charterer of a vessel to secure his performance of the conditions of the charter party, which neither requires nor authorizes the surety to perform such contract in case of the default of the principal, but merely to respond in damages for its breach, is not a "maritime contract." *Pacific Surety Co. v. Leatham & Smith T. & W. Co.*, 151 Fed. 440, 444, 80 C. C. A. 670.

### Repairs to vessel

A contract for repairs to be furnished to a canal boat engaged in navigating the Erie Canal and Hudson river is a "maritime contract," and proceedings to enforce a lien for the repairs furnished are within the exclusive admiralty jurisdiction of the federal courts, though such repairs were made in dry dock. *Perry v. Haines*, 24 Sup. Ct. 8, 10, 191 U. S. 17, 48 L. Ed. 73.

### Wharfage contract

A contract relating to wharfage, as understood in the laws and usages of maritime affairs, is clearly a "maritime contract." *The James T. Furber*, 129 Fed. 808, 810.

### MARITIME LIEN

A "maritime lien" enables a creditor, without notice to the debtor and without giving him the protection of the bond for illegal proceedings, to attach and seize a vessel, though she is loaded with freight and passengers and about to proceed on a voyage. One who makes repairs on a vessel in a foreign port under a contract with the known owner then present is not entitled to a maritime lien therefor, in the absence of a contract for a lien, express or implied, or a mutual understanding that the repairs were furnished on the credit of the vessel, and the burden of proving such contract of understanding rests on the party asserting the lien. *The Clinton*, 160 Fed. 421, 422, 87 C. C. A. 373.

A provision of a bill of lading issued by a steamship company that "the carrier shall have a lien on the goods for all freights, primages, and charges" does not affect or change the nature of the lien, which is simply the "maritime lien," as understood in the jurisprudence of the United States, to preserve which the retaining of possession is essential, although such provision may in some cases preserve the lien where it would otherwise be deemed waived by other provisions to the time and manner of paying the

freight. *Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co.*, 145 Fed. 687, 692.

"Upon an ordinary contract of affreightment, the lien of the shipper is a 'maritime lien,' and a proceeding in rem to enforce it is within the exclusive original cognizance of courts of admiralty." *John Meunier Gun Co. v. Lehigh Valley Transp. Co.*, 101 N. W. 386, 388, 123 Wis. 143 (quoting and adopting definition in *The Belfast*, 7 Wall. 624, 19 L. Ed. 286).

#### Credit of vessel

"Owing to the underlying necessities of commerce, and to the wandering character of a ship, courts of admiralty will infer, in the absence of proof to the contrary, that, where supplies necessary for the accomplishment of the ship's voyage are furnished in a foreign port on the order of the captain of a ship, or the ship's agent, and even under some circumstances by the owner, they are furnished on the credit of the ship. \* \* \* These facts and conditions being proved, are held ground for the reasonable presumption of credit to the ship and a consequent lien. The same presumption is held to arise as to certain maritime services rendered to a ship, independently of its character as domestic or foreign. The lien to which the ship is thus subjected is created, not so much for the benefit of the creditor, but for the benefit of commerce. \* \* \* It would be an abuse of the administration of the law of maritime lien to decree a lien for services not clearly proved to have been entirely maritime and rendered to the particular res upon which the lien is claimed. A lien does not, and should not, attach for a supposed credit given to a vessel, unless the service or supplies are clearly shown to have been rendered or furnished to the particular vessel to which the credit is given." The owner of a tug which was verbally hired by the day by the owner of three dredges to "wait upon" such dredges while engaged on certain work, the services rendered being the carrying of coal and water to the dredges, the towing of scows, and of the dredges themselves when necessary, is not entitled to a "maritime lien" on all or any of such dredges for a balance due on the contract which was not one for ordinary towage services to the vessels themselves. *The Allegator*, 161 Fed. 37, 39, 40, 41, 42, 88 C. C. A. 201.

#### Possession

In a suit to enforce a lien against a tug, the trial court in its opinion, in stating that a party could not authorize the repair of the tug in such manner as to give the person repairing it a maritime lien thereon, used the words "maritime lien" in a general or non-technical sense as being a lien, the subject-matter of which was a vessel, and not in its technical sense, as distinguished from a common-law or possessory lien. *The Robert R. Kirkland*, 153 Fed. 863, 865, 83 C. C. A. 45.

### MARITIME SERVICE

See *Mariners' Service*.

Services in making repairs on a ship or vessel, whether in or out of the water, are "maritime services." *Simmons v. The Jefferson*, 30 Sup. Ct. 54, 58, 215 U. S. 130, 54 L. Ed. 125, 17 Ann. Cas. 907 (citing *Peyroux v. Howard*, 7 Pet. [32 U. S.] 324, 8 L. Ed. 700).

### MARK

See *Distinguishing Mark*; *High-Water Mark*; *Invoiced as Per Cost Mark*; *Low-Water Mark*; *Trade-Mark*; *Valid Voting Mark*; *Visible Mark*.

#### As signature

See *Sign—Signature*.

#### As subscription

See *Subscribe—Subscription*.

#### Stock

Under Pen. Code Cal. § 357, making any one guilty of a criminal offense who marks or brands, or alters or defaces the mark or brand, of horses or cattle, with intent thereby to steal the same or to prevent identification thereof by the true owner, one who slit the ears of a colt owned by another thereby "marked" the same if the act is done with intent to prevent its identification by the owner, although the mark so placed upon the animal may not be a conventional one, indicative of ownership. *People v. Strombeck*, 78 Pac. 472, 473, 145 Cal. 110.

### MARK OF PUNCTUATION

See *Punctuation*.

As word, see *Word*.

### MARKED BALLOT

See *Distinguishing Marks*.

### MARKED CORNERS

"Marked corners" (i. e., those clearly identified, and which are notorious objects) are the most satisfactory evidence of the location of a patent. *Morgan v. Renfro*, 90 S. W. 311, 313, 124 Ky. 314.

### MARKED LINE

Where bearing trees are called for at the eastern end of a northern boundary line of a survey and a stake at the western terminus, there is a presumption that the line was actually surveyed, and the corners identified by the bearing trees and the stake making the line a "marked line." *Goodson v. Fitzgerald (Tex.)* 135 S. W. 696, 698.

### MARKED OFF

When a case is "marked off," it is meant that it would again appear on the call calendar after causes on that calendar had been disposed of. *Hoberman v. Diamond*, 130 N. Y. Supp. 139.

### MARKERS

Side lights on a caboose, showing green in front and red behind, are designed as

"markers" for the engineer and front brakeman, so that, if the train parts at night, it can be readily discovered. *Texas & N. O. R. Co. v. Stewart*, 71 S. W. 330, 331, 30 Tex. Civ. App. 408.

## MARKET

See Free Market; Open Market; Principal Market.

### As public place for sale

The term "market" as used in Sanitary Code, City of New York, § 82, providing that no person shall kill or dress any animal or meat in any market, includes and applies to any premises exclusively devoted to market purposes, and hence applies to premises conveyed to the city of Brooklyn and known as the wallabout market lands. *Bird v. Grout*, 94 N. Y. Supp. 127, 128, 106 App. Div. 159.

A space under the approach of a bridge, occupied by fish peddlers pursuant to the permission of the commissioner of bridges, in consideration of payments made by them to the city of New York, is a "market," though not formally so declared, as authorized by Greater New York Charter, § 47, and it is under the control of the comptroller and his department, as authorized by section 151, and not under the management of the bridge commissioner, under sections 595 and 596. *Sorgen v. Prendergast*, 123 N. Y. Supp. 765, 766, 68 Misc. Rep. 189.

## MARKET PRICE

See Current Market Price.

The measure of damages for breach of contract to deliver bonds of a corporation, the consideration for which has been paid, is the value of the bonds at the time they should have been delivered under the contract with interest, and such value is *prima facie* their face value, but "market price" stands as a criterion of value, and in such cases what is called the "market price" or the quotation of the articles for a given day is not the only evidence of value, and the true value may be drawn from other sources. *Henry v. North American Ry. Const. Co.*, 158 Fed. 79, 81, 85 C. C. A. 409.

In the absence of a definite agreement in a contract of sale, the "market price" of goods to be delivered is the price prevailing at the time and place of delivery, but, if there is no market price at the place of delivery, the value of the goods should be determined at the nearest place where they have a market value by the addition or deduction of the difference in the cost of delivery. *South Gardiner Lumber Co. v. Bradstreet*, 53 Atl. 1110, 1111, 97 Me. 165.

The measure of damages for failure to deliver coal sold by a wholesaler to a retailer is the excess, if any, of the wholesale "market price" of the coal at the place of delivery at the date fixed for delivery, and

the price agreed on between the parties, when there is a wholesale market price at the place of delivery, which market price is the wholesale price. *Righter v. Clark*, 60 Atl. 741, 742, 78 Conn. 9, 112 Am. St. Rep. 84.

Where plaintiff purchased coal of defendant, and defendant failed to furnish it, the "market price" was the price at which plaintiff could have obtained other coal of like kind in that region, and the measure of damages was the difference between the contract price and this market price of the coal at the time it should have been delivered, but, if there was no available market in which plaintiff could purchase coal of the same description, on defendant's refusal to perform plaintiff was entitled to recover the difference between the price at which he had contracted to buy the coal and what he was to receive therefor from his vendee. *Wilmoth v. Hamilton*, 127 Fed. 48, 53, 61 C. C. A. 584.

### As fixed by buying and selling

The "market price" of an article is the usual standard for measuring its value: it being worth what it may be reasonably sold for. *Burke Hollow Coal Co. v. Lawson*, 151 S. W. 657, 151 Ky. 305.

The market price of an article commonly dealt in is the sum fixed by the consensus of buyers and sellers dealing in the article, and proof of the price obtained at an actual bona fide auction sale, though there is but one bidder, is competent on the question of market value; for the term "market" assumes the existence of trade, and price is fixed in trade by the highest bidder and the lowest offerer. *Carey Lithograph Co. v. Magazine & Book Co.*, 127 N. Y. Supp. 300, 302, 70 Misc. Rep. 541.

### As price in market with open competition

One suing for breach of contract to let to him a contract to print advertising lithographs, provided it met the market price, must show affirmatively that it met the "market price," which is the price fixed by buyer and seller in an open market in the usual and ordinary course of lawful trade and competition. *Carey Lithograph Co. v. Magazine & Book Co.*, 127 N. Y. Supp. 300, 302, 70 Misc. Rep. 541.

## MARKET PURPOSE

The erection and maintenance of a slaughter house is not a "market purpose" within the meaning of a conveyance to a city of land "for market purposes, and for ships, canals, and piers and other public works, in connection with such market purposes." *Bird v. Grout*, 94 N. Y. Supp. 127, 128, 106 App. Div. 159.

## MARKET VALUE

See Actual Market Value; Cash Market Value; Current Market Value; Fair Market Value; Highest Market Value.

"The words 'market value' have a plain, definite, and well-understood meaning, as intelligible to the jury as to the court." Hence an attempt by the court to make them clearer by definition would tend to confuse rather than to enlighten. *Atlantic Baggage Co. v. Mizo*, 61 S. E. 844, 847, 4 Ga. App. 407.

"Market value" is no other than the fair value of property as between one desiring to purchase and another desiring to sell. *Hetland v. Bilstad*, 118 N. W. 422, 428, 140 Iowa, 411.

"Market value" is said to be such sum of money as the property is worth in the market generally to the persons who would pay the just and full value for what the property would bring at a fair sale, where one party wants to sell and the other to buy. *Redhead Bros. v. Wyoming Cattle Inv. Co.*, 102 N. W. 144, 147, 126 Iowa, 410 (quoting and adopting definition in *Little Rock Junction Ry. v. Woodruff*, 5 S. W. 792, 49 Ark. 390, 4 Am. St. Rep. 51; *Low v. Railroad*, 3 Atl. 739, 63 N. H. 557; *Esch v. Chicago, M. & St. P. Ry. Co.*, 89 N. W. 129, 72 Wis. 231; *Kansas City, W. & N. W. R. Co. v. Fisher*, 30 Pac. 111, 49 Kan. 17; *Lawrence v. City of Boston*, 119 Mass. 128).

In view of the difficulty of forming a proper conception of the word "value" and of ascertaining what is called "market value," where there is no open market recording numerous transactions, courts have adopted as the equivalent of "market value" the phrase "what the property is worth or will sell for as between one who wants to purchase and one who wants to sell." *Milwaukee Trust Co. v. City of Milwaukee*, 138 N. W. 707, 710, 151 Wis. 224.

Since the word "market" conveys the idea of selling, the term "market value" would seem to mean the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and occasion to buy are willing to pay. *Brown v. W. T. Weaver Power Co.*, 52 S. E. 954, 955, 140 N. C. 333 (citing *Little Rock Junction Ry. v. Woodruff*, 5 S. W. 792, 49 Ark. 381, 4 Am. St. Rep. 51).

The "market value" of land is the price that would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy. *Maxon v. Gates*, 116 N. W. 758, 765, 136 Wis. 270.

The term "market value," as applied to goods is the price at which the goods can be replaced for money in the market. *Rosenkranz v. Jacobowitz*, 99 N. Y. Supp. 469, 470, 50 Misc. Rep. 580 (citing *Wehle v. Haviland*, 69 N. Y. 448).

"Bouvier defines 'market value' as a price established by public sales in the way of ordinary business, and in *Sloan v. Baird*, 56 N. E. 753, 162 N. Y. 330, the Court of

Appeals said that the market value of property is established when other property of the same kind has been the subject of purchase or sale to so great an extent and in so many instances that the value becomes fixed." *Rau v. Seidenberg*, 104 N. Y. Supp. 798, 799, 53 Misc. Rep. 386.

The "market value" of an article of merchandise is the price at which its owner or producer holds it for sale; the price at which it is freely offered in the market to all the world; such price as dealers in the article are willing to receive and purchasers are required to pay, when the goods are bought and sold in the ordinary course of trade. Under a clause of a charter party for a steamer, which required the charterer to pay for the coal in the vessel's bunkers at the time of her delivery at the current "market price," the price actually paid by the charterer in the port of delivery for coal bought in the open market to fill the bunkers, and also for other vessels at the same time, will be accepted as fixing the market price rather than the price given the owners on mere inquiries without any attempt to purchase. *Glasgow Steam Shipping Co. v. Tweedie Trading Co.*, 154 Fed. 84, 85 (citing *Cluquot's Champagne*, 3 Wall. [70 U. S.] 114, 125, 18 L. Ed. 116).

The "market value" of goods is the price at which the owner or producer holds them for sale; the price at which they are freely offered in the market; such prices as dealers in the goods are willing to receive and purchasers are made to pay when the goods are bought in the ordinary course of trade. *British & Foreign Marine Ins. Co. v. Maldonado & Co.*, 182 F. 744, 748, 106 C. C. A. 122.

In an action against a railroad company for burning plaintiff's grass, a witness testified that the grass had a "market value" and that the witness had a "pretty good idea" thereof. He was then asked what the market value was, and answered that, considering the number of cattle on the land at the time and what it was used for and was going to be used for, the grass was worth from \$1.50 to \$2 per acre. He then stated, after objection, that he wanted to state what kind of cattle plaintiff had there, and what he was using it for, and again stated that under such conditions the grass was worth from \$1.50 to \$2 per acre. Held, that such evidence was inadmissible as not showing "market value." *Texas & P. R. Co. v. Pemberton*, 95 S. W. 1089, 43 Tex. Civ. App. 291.

In an action against a railroad company for damages to a shipment of cattle, where it appeared that cattle of that kind were not, during the season of shipment, bought or sold at the point of delivery, evidence of the price paid for the cattle at the point of shipment is admissible on the question of their actual value, there being no competent evidence of their "market value," which can

be established only by showing that cattle of like quality had been bought and sold at that place during the season in sufficient quantities, and often enough to establish a market price. *Houston & T. C. R. Co. v. Crowder* (Tex.) 152 S. W. 183, 184.

In an action for the destruction of a house by fire from a railroad engine, the court instructed that, as to the dwelling house, plaintiff's measure of damages was the "reasonable cash value" of the dwelling when destroyed, and the measure of damages for destruction of the household goods was the "reasonable value" of said goods at the time of the destruction. Held, that the instruction was not erroneous for using the words "cash value" instead of "market cash value"; "market value" being the cash value for which an article will sell for in cash on the market, and reasonable "cash value" being equivalent to reasonable "market cash value." *Missouri, K. & T. Ry. Co. of Texas v. Murray* (Tex.) 150 S. W. 217, 218.

Where a wholesaler bought coal not for sale in the retail market, but to dealers only, the market value was the wholesale price and not the retail one, as between the parties to the sale. *Tuttle-Chapman Coal Co. v. Coaldale Fuel Co.*, 113 N. W. 827, 830, 136 Iowa, 382.

The "market value" of an advertising contract probably means the net value, or the difference between the stipulated price and the cost of doing the work. In an action against a newspaper for breach of contract for the insertion of advertising matter to be used in the year as the advertiser might require, rate cards showing the rates for advertisements of a given length for a given number of times, but not showing rates for such a contract as the one in question, are inadmissible. *Boston Outfitting Co. v. People & Patriot Co.*, 63 Atl. 229, 230, 73 N. H. 506.

Since the market value of the land condemned should be determined from sales actually made so as to necessitate a demand, it was proper for an instruction defining "market value" to include a demand for the land as a requisite to the existence of a market value. *Denver N. W. & P. Ry. Co. v. Howe*, 112 Pac. 779, 781, 49 Colo. 256 (citing 5 Words and Phrases, p. 4383).

The "market value of land" is generally based upon its extent, the character of the improvements, its productive qualities, and upon sales of property in the vicinity. *Reed v. Pittsburg, C. & W. R. Co.*, 59 Atl. 1067, 1068, 210 Pa. 211 (citing *Pittsburgh, V. & C. R. Co. v. Vance*, 8 Atl. 764, 115 Pa. 325).

"Market value," as defined by section 19 of the customs administrative act, shall be construed to mean the export price whenever goods, wares, and merchandise are sold wholly for export, or sold in the home mar-

kets only in limited quantities, by reason of which facts there cannot be established a market value based upon the sale of such goods, wares, and merchandise in usual wholesale quantities, packed ready for shipment to the United States." *United States v. Haviland & Co.*, 167 Fed. 414, 417.

The "market value" of merchandise imported from France, as defined in Customs Administrative Act June 10, 1890, c. 407, § 19, does not include the amount of certain internal revenue imposts of that country known as the "octroi tax" and the "droit de ville," which are not general in their application, but vary with the locality, and which are not collected if the merchandise is exported. *United States v. R. F. Downing & Co.*, 131 Fed. 653, 654.

The "market value" of logs was the amount which buyers generally agreed to pay at the time and place in question, though all logs then being sold at that place were sold on 30, 60, and 90 days' time and not for cash. *Burr's Ferry, B. & C. Ry. Co. v. Allen* (Tex.) 149 S. W. 358, 361.

While dogs are regarded as property in this state, they are not generally placed on the market for sale, and ordinarily have no "market value," though they may be in some instances of value to the owner. *Gulf, C. & S. F. Ry. Co. v. Blake*, 95 S. W. 593, 594, 43 Tex. Civ. App. 180.

#### As price at or near time or place

"Market value" is said to mean the price or sum for which an equivalent could be reasonably and fairly purchased at or near the place where the property should have been delivered and within a reasonable time after a refusal to deliver." *Redhead Bros. v. Wyoming Cattle Inv. Co.*, 102 N. W. 144, 147, 126 Iowa, 410 (quoting and adopting definition in *Bullard v. Stone*, 8 Pac. 17, 67 Cal. 480; *Little Rock Junction Ry. v. Woodruff*, 5 S. W. 792, 49 Ark. 390, 4 Am. St. Rep. 51).

The market value of an article at any given time is fixed by sales made at or about that time, and the price as fixed by specific contracts previously entered into is inadmissible. *Carle v. Nelson*, 130 N. W. 467, 468, 145 Wis. 593.

#### Intrinsic value distinguished

While the term "market value" is not synonymous with "intrinsic value"—the one meaning the actual price at which the commodity is commonly sold and the other its true, inherent, and essential value, independent of accident, place or person, the same everywhere and to every one—yet the latter is so generally a factor in the former that a thing which has no intrinsic value is generally without market value, and therefore, where a party was prepared to meet an issue as to the market value of animals, the refusal of a continuance to procure evidence



to meet an issue as to their intrinsic value presented by a trial amendment was not prejudicial. *Chicago, R. I. & P. Ry. Co. v. Clements & Carroll*, 115 S. W. 664, 665, 53 Tex. Civ. App. 143.

#### Price at forced sale

"The 'market value' of land is usually declared to be, not what the land would bring at a forced sale, but what it would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale. What property would bring at a fair public sale where one party wanted to sell and another wanted to buy may be taken as a criterion of its market value." *Madisonville, H. & E. R. Co. v. Ross*, 103 S. W. 330, 331, 126 Ky. 138, 13 L. R. A. (N. S.) 420.

The "market value" of land is not the price it would bring at public auction and forced sale for cash, but such price as could be obtained for it from the usual and ordinary terms of private sale. *Metropolitan St. Ry. Co. v. Walsh*, 94 S. W. 860, 868, 197 Mo. 392 (citing and approving the definition in *Missouri Pac. Ry. Co. v. Porter*, 20 S. W. 563, 112 Mo. 369).

#### Price at free sales

"'Market value' means the fair value as between one who wants to purchase and one who wants to sell; not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained, nor its speculative value, nor a value obtained from necessity of another, but its present value at a sale which a prudent owner would make if he had the power of election as to the time and terms." *Madisonville, H. & E. R. Co. v. Ross*, 103 S. W. 330, 126 Ky. 138, 13 L. R. A. (N. S.) 420 (quoting and adopting the definition in 15 Cyc. p. 685).

The "market value" of property is defined as "the price which it will bring when it is offered by sale by one who desires but is not obliged to sell and is bought by one who is under no necessity of having it." *Guyandotte Valley Ry. Co. v. Buskirk*, 50 S. E. 521, 526, 57 W. Va. 417, 110 Am. St. Rep. 785 (citing *Stewart v. Ohio River R. Co.*, 18 S. E. 604, 38 W. Va. 438; *Lewis, Em. Dom.* 478; *Pittsburgh, V. & C. Ry. Co. v. Vance*, 8 Atl. 764, 115 Pa. 325; *Lawrence v. City of Boston*, 119 Mass. 126; *Little Rock Junction Ry. v. Woodruff*, 5 S. W. 792, 49 Ark. 381, 4 Am. St. Rep. 51; 5 Words and Phrases, p. 4383); *Seaboard Air Line Ry. v. Chamblin*, 60 S. E. 727, 729, 108 Va. 42; *Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 Pac. 60, 62, 20 Idaho, 568, 38 L. R. A. (N. S.) 497; *In re New York, W. & B. Ry. Co.*, 135 N. Y. Supp. 234, 239, 151 App. Div. 50; *In re Block Bounded by Avenue A & First Ave.*, 122 N. Y. Supp. 321, 338, 66 Misc. Rep. 488; *Calor Oil & Gas Co. v. Franzell*, 109 S. W. 323, 332, 128 Ky. 715, 36 L. R. A. (N. S.) 456.

The value which the law gives in fixing damages for the destruction of property is "market value," which is that reasonable sum which the property will bring on a fair sale when sold by a man willing, but not obliged, to sell, to a man willing, but not compelled, to buy. *Allen v. Chicago & N. W. Ry. Co.*, 129 N. W. 1094, 1095, 145 Wis. 263.

In the absence of proof that articles in controversy furnished by claimant for decedent's funeral were not sold under fair trade conditions, or that competition had been stifled or prices otherwise inflated, their reasonable value was their "market value" at the place where they were sold, by which is meant the prices which the articles customarily brought at the time. *Wagoner Undertaking Co. v. Jones*, 114 S. W. 1049, 1051, 184 Mo. App. 101.

Our general tax act practically defines the "market value of land" as "the price it would sell for at a fair and bona fide sale by private contractor." *Long Dock Co. v. State Board of Assessors*, 73 Atl. 53, 57, 78 N. J. Law, 44.

#### Price in open market

The "market value" of secondhand goods is what it will cost one to purchase them in the open market, and the testimony of a secondhand dealer that he had examined secondhand furniture, and that it was worth a specified sum, when new, and a specified sum in the condition it was in, without stating whether he meant what he would give, or what he would ask for it, does not prove market value. *Souther v. Hunt (Tex.)* 141 S. W. 359, 361.

Code, § 1305, provides that all property subject to taxation shall be valued at its actual value, which means its value in the market in the ordinary course of trade. Held, that the market value in "ordinary course of trade" can have reference to nothing but the selling value; that is, the sum which in all probability can be realized therefrom if exposed for sale on the open market. *First Nat. Bank of Estherville v. City Council of Estherville*, 112 N. W. 829, 832, 136 Iowa, 203.

In the statement of the rule that, where a common carrier fails to deliver merchandise within a reasonable time, the measure of damages is the depreciation in the market value between the date on which the delivery should have been made and the date on which it was made, the term "market value" means the value at which the article would be sold in the open market in the quantities as carried, and where the articles shipped are merchandise in large quantities, it is improper to measure the damages by the market value of such merchandise when sold at retail. *Chicago, R. I. & P. Ry. Co. v. Broe*, 86 Pac. 441, 443, 16 Okl. 25.

"Market value" is the highest price obtainable in the open market for cash, and an

instruction that the market value of land is the highest price which the land will bring in the market regardless of the causes that contribute to its value is incorrect. Lands may bring in the market under peculiar circumstances and on very favorable terms much more than a fair cash value. *Dady v. Condit*, 70 N. E. 1088, 1092, 209 Ill. 488.

#### Value synonymous

Value as importing market value, see Value.

The words "value" and "market value" are often used interchangeably, and both as being the equivalent of "actual value" and "salable value." *Hetland v. Bilstad*, 118 N. W. 422, 423, 140 Iowa, 411.

The words "market value," as used in Pol. Code, § 3627, providing that the proportionate value of the stock of domestic corporations for purposes of assessment or taxation should be its "market value," are synonymous with the terms "value" and "full cash value" as used in section 3617. *Crocker v. Scott*, 87 Pac. 102, 106, 149 Cal. 575.

"Market value" is synonymous with the terms "value" and "full cash value," defined by Pol. Code, § 3617, as the amount at which the property would be taken in payment of a just debt from a solvent debtor, and the market value of stock, fairly represents its full cash value in absence of exceptional circumstances giving it an abnormal value, so that any inference of fraud by the placing of an excessive valuation on stock, taken as a basis for assessing a corporate franchise, is rebutted by a showing that the value of the franchise was ascertained by the approved method of deducting from the aggregate market value of its stock, the value of its tangible property, and taking the difference as the franchise value. *City of Los Angeles v. Western Union Oil Co.*, 118 Pac. 720, 721, 161 Cal. 204.

The expressions "reasonable worth" or "reasonable value" are not so broad as "market value." *Alcon v. Koons*, 82 N. E. 92, 95, 84 N. E. 1104, 42 Ind. App. 537.

The two expressions "reasonable selling value" and "market value" are in some measure synonymous, but the usage of trade has affixed a technical meaning to "market value." The selling value of an article is often equivalent to its actual value, and should be so regarded in the case of a seller suing to recover for stoves specially made for a buyer, and which the latter refused to accept; that being necessary in order that the seller may be reimbursed fully. *St. Louis Range Co. v. Kline-Drummond Mercantile Co.*, 96 S. W. 1040, 1043, 120 Mo. App. 438.

When applied to property, and no qualification is expressed or implied, "value" means the price which the property could command in the market. By the term "value of stock" is usually meant market value.

Text-writers use the terms "value" and "market value" as interchangeable, and both as being equivalents of actual value, salable value, and, in proper cases, rental value. In an action against a railroad company for killing horses, plaintiff alleged that at the time they were killed "they were then and there each respectively of the reasonable value as follows, viz.: One \* \* \* was of the value of \$375, and the other \* \* \* was of the value of \$175." Held that, in the absence of an exception thereto, proof either of the market value of the horses or of the intrinsic value was admissible, but that in the absence of any showing that they had no market value nor real value, and that they cannot be reproduced or replaced, it was error to admit evidence as to the value of the horses to plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Crews*, 120 S. W. 1110, 1111, 54 Tex. Civ. App. 548 (quoting and adopting definitions in 8 Words and Phrases, pp. 7278, 7279).

"Market value" is synonymous with the actual money value of property. All articles of personal property, however, do not have an established "market value" fixed by current sales of such property in the ordinary course of business, so that the price currently realized can be looked to in ascertainment of the actual value. The "market value" of property is established when other property of the same kind has been the subject of purchase or sale to so great an extent, and in so many instances, that the value becomes fixed. The damages for wrongful attachment of a stock of goods, so far as they are concerned, is not what they brought at the sale under the attachment, or what they would have sold at retail, but their actual value at the time and place of seizure, which to the extent that the goods were new, is the cost of replacing them (that is, their wholesale price, plus freight); such cost, however, being only a relevant circumstance as to the value of old and shopworn goods, which have no "market value," so that an instruction fixing the damages at the "market value," and defining this as the value of the goods when sold in the way of ordinary business for cash in the city of the seizure, is erroneous. *State ex rel. Clark v. Parsons*, 84 S. W. 1019, 1021, 109 Mo. App. 432 (citing *State, to Use of Hayden, v. Smith*, 31 Mo. 566; *Walker v. Borland*, 21 Mo. 289; *Spencer v. Vance*, 57 Mo. 427; *Watson v. Harmon*, 85 Mo. 443; *State ex rel. Rogers v. Gage*, 52 Mo. App. 464; *State ex rel. Copeney v. Ryley*, 76 Mo. App. 412, 416; *Simpson v. Alexander*, 11 Pac. 171, 35 Kan. 225; 2 Joyce, Damages, § 1085; *Gray v. Central R. Co.*, 52 N. E. 555, 157 N. Y. 483; *Sloan v. Baird*, 56 N. E. 752, 162 N. Y. 327).

In an action against a carrier to recover for damages to a car load of cattle, an instruction was given that the measure of damages proper to be applied was the difference between the market value of the cattle, had

they been delivered in proper condition, and the market value in the condition in which they were delivered. Held, that the instruction was not erroneous as using the term "market value," for, as applied to cattle, the market value is the actual value; neither was it erroneous because it did not limit the right of recovery to such damages as were due to defendant's fault, where there was no proof that the damages were not all due to defendant's fault. *Colsch v. Chicago, M. & St. P. Ry. Co.* (Iowa) 117 N. W. 281, 284.

An instruction that the damages for land not taken should be determined by ascertaining the "market value" of the part not taken as it was when the remainder was taken, and deducting therefrom its market value after the taking, which was pursuant to Code Civ. Proc. § 1249, except that the quoted words were substituted for "actual value" used in the statute, was not objectionable for using the substituted words; the law holding the market value as equivalent to the actual value. *Sacramento Southern R. Co. v. Heilbron*, 104 Pac. 979, 982, 156 Cal. 408.

In condemnation proceedings to obtain property for a bridge, an instruction—that the "market value" of the property means its actual value, independent of the location of plaintiff's bridge and approaches thereon; that is, the fair value of the property as between one who wants to purchase and the one who wants to sell it; not what it could be obtained for in peculiar circumstances, when greater than its fair price could be obtained, not its speculative value; not the value obtained through the necessities of another, nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer—is correct. *Southern Illinois & M. Bridge Co. v. Stone*, 92 S. W. 475, 477, 194 Mo. 175.

Act May 20, 1890 (Ky. St. 1903, § 3915), prohibiting trusts to regulate the price of any article or to limit the amount of any article, and Acts 1906, p. 429, c. 117, legalizing the pooling of farm products, when construed in connection with Const. § 198, requiring the Legislature to pass laws to prevent trusts, pools, etc., to depreciate any article below its "real value," or to enhance its cost above its real value, are not invalid because uncertain, for the standard fixed is "real value," which is "market value," at a sale under normal conditions, unaffected by any combination or producers or dealers whose object is to create an abnormal condition in the market, and is susceptible of proof by proof of pre-existing facts. The court in distinguishing this holding from a previous decision declaring a statute prohibiting railroads from charging "more than a just and reasonable rate of toll" unconstitutional, because of uncertainty in determining what would be a just and reasonable rate

of toll. "There is a marked difference between the qualities of the 'real value' of an article, and 'reasonable compensation' for a service. The latter may depend alone upon the opinion of the trier of the fact; the former is itself a fact susceptible of proof and exact ascertainment." *Commonwealth v. International Harvester Co.*, 115 S. W. 703, 711, 712, 131 Ky. 551, 138 Am. St. Rep. 256.

#### Value for any use

In estimating the market value of property, all capabilities of the property and all uses to which it may be applied are to be considered. *Seaboard Air Line Ry. v. Chamblin*, 60 S. E. 727, 729, 108 Va. 42.

"The 'market value of property' is its value for any use to which it may be adapted, and in estimating its value all the uses of which the property is susceptible should be considered, and not merely the condition in which it may be at the time and the use to which it may have been put by the owner." *In re Westlake Ave.*, 82 Pac. 279, 281, 40 Wash. 144 (quoting and adopting the definition in *Seattle & M. R. Co. v. Murphine*, 30 Pac. 720, 4 Wash. 448).

"Market value," within the meaning of the rule in expropriation proceedings by a railway company that the criterion of value is the fair market value of the property at the date of the institution of the suit, in view of any and all uses to which it may be applied or adapted, exclusive of any increase in value caused by the construction of the proposed railroad through the property, does not mean speculative value, but the fair value of the property as it stands, between one willing to purchase and one willing to sell. *Opelousas, G. & N. E. R. Co. v. Bradford*, 43 South. 79, 80, 118 La. 506 (citing *Orleans & J. R. Co. v. Jefferson & L. P. R. Co.*, 26 South. 278, 51 La. Ann. 1616; *Louisiana Ry. & Nav. Co. v. Xavier Realty Co.*, 39 South. 1, 115 La. 328).

#### Value determined by situation, condition, etc.

While the "market value" of property is the price for which it may be sold in the market, it is often difficult to determine "market value," because there may be no general demand for the property, or it may be such as is only valuable for a specified purpose because of its formation, location, or other specific, natural or artificial adaptability to a particular use, so that, where no general market value can be ascertained, such elements may be considered in arriving at its general value. *Portneuf-Marsh Valley Irr. Co. v. Portneuf Irrigating Co.*, 114 Pac. 19, 20, 19 Idaho, 483.

#### MARKETABLE

"Marketable" and "merchantable" are practically synonymous. In an action for breach of contract to purchase hay, defendants alleged that plaintiff agreed to sell them

merchantable hay, and that the hay shipped was not as represented. Held, that a request by plaintiff to an expert witness: "State whether or not this hay you saw there is considered as marketable hay here in Baker City, compared with other kind that is sold here"—was not objectionable; the persons who "considered" the hay merchantable being himself and those who, according to his previous testimony, he had seen purchasing such hay at Baker City. *Eaton v. Blackburn*, 88 Pac. 303, 304, 49 Or. 22 (citing *Webst. Int. Dict.*).

### MARKETABLE TIME

See Good and Marketable Title.

A "marketable title" is one free from reasonable doubt. *Connely v. Putnam*, 111 S. W. 164, 165, 51 Tex. Civ. App. 233; *Cummings v. Dolan*, 100 Pac. 989, 991, 52 Wash. 496, 132 Am. St. Rep. 986; *Wadick v. Mace*, 103 N. Y. Supp. 889, 893, 118 App. Div. 777; *Sprickerhoff v. Gordon*, 105 N. Y. Supp. 586, 588, 120 App. Div. 748; *Russell v. Wales*, 100 N. Y. Supp. 785, 788; *Howe v. Coates*, 107 N. W. 397, 403, 97 Minn. 385, 4 L. R. A. (N. S.) 1170, 114 Am. St. Rep. 723; *Wanser v. De Nyse*, 80 N. E. 1088, 188 N. Y. 378, 117 Am. St. Rep. 871 (quoting and adopting definition in *Fleming v. Burnham*, 2 N. E. 905, 100 N. Y. 1, 10).

A "marketable title" is one that is free from reasonable doubt; one that a prudent person with full knowledge of all the facts would be willing to accept: *Hubachek v. Maxbass Security Bank*, 134 N. W. 640, 642, 117 Minn. 163, Ann. Cas. 1913D, 187.

A "marketable title" is a title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent, and intelligent person; one that a person of reasonable prudence and intelligence, guided by competent legal advice, would be willing to take and pay the fair value of the land for. *Summy v. Ramsey*, 101 Pac. 506, 507, 53 Wash. 93 (quoting *Eggers v. Busch*, 39 N. E. 619, 154 Ill. 604).

A "marketable title" is one that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some defects appearing in the course of its deduction, and the doubt be such as affects the value of the land, or will interfere with its sale. *Griffith v. Maxfield*, 39 S. W. 852, 63 Ark. 551.

The books define a marketable title, as one that is not only good, but indubitable. *Ormsby v. Graham*, 98 N. W. 724, 727, 123 Iowa, 202 (citing *Swayne v. Lyon*, 67 Pa. [17 P. F. Smith] 436; *Vought v. Williams*, 24 N. E. 195, 120 N. Y. 253, 8 L. R. A. 591, 17 Am. St. Rep. 634; *Tomlin v. McChord's Representatives*, 28 Ky. [5 J. J. Marsh.] 135).

Promise to convey a "marketable title" in an executory land contract contemplates

a title free from reasonable doubt, which is not only valid in fact, but which can be again sold to a reasonable purchaser or mortgaged to a person of reasonable prudence. A title will not be considered unmarketable unless the danger of litigation is real or apparent and to be apprehended because of some irregularity in legal proceedings or sale thereof, or because of some matter of fact the real truth as to which cannot be ascertained with reasonable certainty. *Cowdery v. Greenlee*, 55 S. E. 918, 920, 126 Ga. 786, 8 L. R. A. (N. S.) 187 (citing *Swayne v. Lyon*, 67 Pa. 436; *Vought v. Williams*, 24 N. E. 195, 120 N. Y. 253, 8 L. R. A. 591, 17 Am. St. Rep. 634).

A "marketable title" in equity is one in which there is no doubt involved either as a matter of law or fact. A title need not in fact be bad in order to make it unmarketable, and it is unmarketable if a reasonably prudent man, familiar with the facts and apprised of the question of law involved, would not accept the title in the ordinary course of business; it being sufficient that there was a doubt or uncertainty sufficient to form the basis of litigation. In an action to recover back purchase money for failure of the vendor to furnish a marketable title, where the parties whose possible claims may affect the title are not before the court, the question of law on which the title turns will not be determined, but the title will be deemed unmarketable if the question is one on which it is apparent that other courts might entertain a different opinion. *Williams v. Bricker*, 109 Pac. 998, 999, 83 Kan. 53, 30 L. R. A. (N. S.) 343.

"A 'marketable title' is one that is free from reasonable doubt. The purchaser is not compelled to take property the possession of which he may be compelled to defend by litigation. He should have title that will enable him to hold his land in peace, and, if he wishes to sell, be reasonably sure that no flaw or doubt will arise to disturb its market value." Hence a title which depends upon the part payment of interest on a mortgage and the bar of limitations is not free from reasonable doubt. *Godfrey v. Rosenthal*, 97 N. W. 365, 366, 17 S. D. 452 (citing *Vought v. Williams*, 24 N. E. 195, 120 N. Y. 253, 8 L. R. A. 591, 17 Am. St. Rep. 634).

A title is not "marketable," when it exposes the party holding it to litigation. *Russell v. Wales*, 100 N. Y. Supp. 785, 788 (quoting *Salisbury v. Ryon*, 94 N. Y. Supp. 352, 105 App. Div. 448).

As "marketable title" is one about which there can be no fair and reasonable doubt, a title in litigation is not a "marketable" one. *Corbett v. McGregor* (Tex.) 84 S. W. 278, 279.

To constitute "marketable title," the title should put the purchaser in all reasonable security and protect him against annoying

though unsuccessful suits, and such title as will enable him not only to hold his land but to sell it and to be reasonably sure that no flaw will come up to disturb its marketable value. *Hewitt v. Parsley*, 60 Atl. 619, 620, 101 Md. 206.

A "marketable title" is one appearing to be such by the record of conveyances or other public memorial, and not one resting in parol. *Lockhart v. Ferrey*, 115 Pac. 431, 433, 59 Or. 179.

"A 'marketable title' in equity is one in which there is no doubt involved, either as to matter of law or fact." Where the vendor's title rested upon a deed executed by a foreign assignee solely by virtue of an order of a court in the state of Iowa, and before the action was tried the vendor obtained a judgment quieting his title upon service by publication against the foreign assignor, the assignee, and the party to whom the assignee had conveyed, and asked for specific performance against the purchaser, the title tendered is not a "marketable title." *McNutt v. Neilans*, 108 Pac. 834, 836, 82 Kan. 424.

A title is not "marketable" where error in the name of a grantee in the vendor's chain of title can be proven by parol. *Walters v. Mitchell*, 92 Pac. 315, 317, 6 Cal. App. 410.

Where a corporation's deed of real estate, though only prima facie evidence of title, has remained unquestioned for more than seven years, it is sufficient to evidence a "marketable title," since, to render a title marketable, it is only necessary that it shall be free from reasonable doubt, and the purchaser is not entitled to demand a title absolutely free from every technical suspicion, but can only demand such title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept. *Milton v. Crawford*, 118 Pac. 32, 36, 65 Wash. 145.

A vendor whose lands were subject to an easement to another to enter on the land and construct water ditches or water pipes from or across the land, under which a water pipe was maintained across the land, did not possess a marketable title; "marketable title" being defined as a term which, when applied to real estate, is used to designate a title free from reasonable doubt. Where a vendor agreed to convey "full fee-simple title to the land," which he could not do because of the existence of an easement, the question of "marketable title" was not involved. *Wingard v. Copeland*, 116 Pac. 670, 672, 64 Wash. 214.

A vendor agreed to give a "marketable title." The premises consisted of a corner lot in a city on which a building stood. The lower portion of the building was of stone. The outer surface of the stonework projected two inches over the street line and within

that of the sidewalk, which might be withdrawn from the use of the public. The encroachment did not affect easements of light, air, and access possessed by adjoining property owners. The building had been standing for about five years without objection from the city. Held, that the possibility of action by the city to remove the encroachment was so remote that it should be disregarded in determining the marketability of the title. *Empire Realty Corp. v. Sayre*, 95 N. Y. Supp. 871, 374, 107 App. Div. 415.

Where one having a leasehold estate mortgaged the land and thereafter acquired the fee, and on foreclosure all persons who could claim under him were made parties and the surplus was distributed to all entitled to it as representing the mortgagor's interest, the foreclosure title was a "marketable" one. *Hirth v. Zeller*, 95 N. Y. Supp. 747, 748, 108 App. Div. 198.

A contract of sale of land, requiring a conveyance by "a good and sufficient general warranty deed, in fee simple," is satisfied by the giving of a good and "marketable title," which is a title not open to reasonable doubt; and such is a title by prescription, with irregularities in the title only prior to the commencement of the period of limitations; and an "indubitable title"—that is, one open to no possible objection, however trivial—is not required. *Jackson v. Creek*, 94 N. E. 416, 421, 47 Ind. App. 541.

Where a vendor tendered title under the foreclosure of a first mortgage, leaving outstanding a sheriff's deed to a third person, executed on foreclosure of the second mortgage, such deed, being a claim under judicial sale and not showing its invalidity on its face, or in connection with its first foreclosure, constituted a cloud, and rendered the vendor's title unmarketable. *Stack v. Hickey*, 138 N. W. 1011, 1012, 151 Wis. 347.

The pendency of an action for partition against vendors under contract to convey real estate, commenced by service of summons on them, in which a lis pendens was filed with a verified complaint, averring that the deed and will of a former owner through which the vendors derived title were induced by fraud and undue influence, is a cloud on the title of the vendors, continuing until the time has expired within which an appeal may be taken from a judgment dismissing the action or until a second action begun before the expiration of that time has been disposed of, and the purchaser is not bound to accept title from them at his peril or to seek out the evidence of the validity or invalidity of the title. *Whalen v. Stuart*, 108 N. Y. Supp. 355, 357, 123 App. Div. 446.

Under Acts 1896, c. 310, relative to taxation and sales for taxes by a municipal corporation, and requiring that after the sale and payment of taxes, penalties, and costs, the treasurer shall deliver to the purchaser

a certificate of purchase and the mayor give a deed unless the property shall be redeemed within one year from the day of sale and there is no record of the proceedings of such sale save the certificate and deed, a title based alone on such certificate and deed is not such "marketable title" as a purchaser can be compelled to accept in a suit for specific performance. A mere possibility that notice of the sale of land for taxes was not given the owner as expressly required by Laws 1885, p. 699, c. 405, § 7, is not sufficient to render the marketability of the title doubtful. *Rosenblum v. Elsenberg*, 108 N. Y. Supp. 350, 352, 123 App. Div. 896 (citing Maupin, Marketability of Title, p. 707).

A notice of lis pendens reciting that an action had been commenced to foreclose a mortgage on certain land did not render the owner's title unmarketable, where the contract provided that the property was to be taken subject to the mortgage sought to be foreclosed, and where consent to the discontinuance of the foreclosure suit had been delivered to the vendor and an order of discontinuance entered. *Weissberger v. Wallach*, 108 N. Y. Supp. 887, 888, 124 App. Div. 382.

The boundary lines of a city lot were located as early as 1822, and have since been acquiesced in by the owners of the adjacent lots on both sides. For over 50 years the owners and their predecessors in title have been in actual peaceable possession of the entire premises, and during that time nobody else has claimed any interest to any part thereof, nor, to the knowledge of the owners or of a contract purchaser, is there any person who can have any claim of title against the owners. Held, that the owners have a good and marketable title to the premises, though a deed in 1822 erroneously described the lot as one foot narrower than it really was, and the mistake was repeated in subsequent conveyances. *Taub v. Spector*, 108 N. Y. Supp. 723, 124 App. Div. 158 (citing *Wentworth v. Braun*, 79 N. Y. Supp. 489, 78 App. Div. 634, affirmed 67 N. E. 1091, 175 N. Y. 515; *Well v. Radley*, 52 N. Y. Supp. 398, 31 App. Div. 25, affirmed 57 N. E. 1128, 163 N. Y. 582; *Katz v. Kaiser*, 48 N. E. 532, 154 N. Y. 294; *Meyer v. Boyd*, 4 N. Y. Supp. 328, 51 Hun, 291).

Where a title depended on foreclosure proceedings, in which jurisdiction of the owners of the equity was not obtained because of failure to comply with Code Civ. Proc. § 442, prescribing the requisites of an order for publication of summons, it was unmarketable. *Fink v. Wallach*, 95 N. Y. Supp. 872, 873, 47 Misc. Rep. 247.

#### As perfect title

See Perfect Title.

### MARKETERS

The term "marketers," as used in an order for goods, reading, "If reasonable ship

to-morrow Thursday four to six loads 'marketers,'" is to be construed as meaning cattle such as the person sending the order would want to sell to the retail trade. The term distinguishes the cattle for that trade from those which are to be exported. "Marketers" are supposed to weigh about 1,200 pounds and "exporters" about 1,400 pounds. *Western Union Telegraph Co. v. N. Lehman & Bro.*, 67 Atl. 241, 242, 106 Md. 318, 14 Ann. Cas. 736.

### MARRIED PHYSICALLY

The words "married physically" mean the same as the word "disfigurement." *Cullen v. Higgins*, 74 N. E. 698-700, 216 Ill. 78.

### MARRIAGE

See Celestial Marriage; Common-Law Marriage; Contract of Marriage; During Marriage; Moral Marriage; Patriarchal Marriage; Plural Marriage; Polygamous Marriage; Prohibited Marriage; Putative Marriage; Right Acquired by Marriage.

See, also, Bonds of Matrimony; Matrimony.

"Marriage" is the union of opposite sexes, and sexual intercourse is the distinguishing feature of the union. *Williams v. Williams*, 99 S. W. 42, 44, 121 Mo. App. 349 (quoting and adopting definition in *Nelson, Div. & Sep.*).

"'Marriage' being in its nature permanent and the most important of all civil relations, the law will not lightly allow the inducements which have led up to it to be disturbed." *Welch v. Mann*, 92 S. W. 98, 101, 193 Mo. 304 (quoting and adopting definition in *Cohen v. Knox*, 27 Pac. 215, 90 Cal. 266, 13 L. R. A. 711).

When a man and woman intend to marry and live together as husband and wife, but their intention is frustrated by the existence of some unknown impediment, and after the impediment is removed the same intent continues and the parties continue to live together as husband and wife, an actual "marriage" results. *Chamberlain v. Chamberlain*, 62 Atl. 680, 681, 68 N. J. Eq. 736, 3 L. R. A. (N. S.) 244, 111 Am. St. Rep. 658, 6 Ann. Cas. 483.

#### As a civil contract

"Marriage" is a formal declaration or contract by which act a man and woman join in wedlock. *Lynch v. Knoop*, 43 South. 252, 253, 118 La. 611, 8 L. R. A. (N. S.) 480, 118 Am. St. Rep. 391, 10 Ann. Cas. 897.

"'Marriage' in this state is a civil contract by one man and one woman competent to contract, whereby they are mutually bound to each other so long as they both shall live for the discharge to each other and to the public of the duties and obligations which

by the law flow from said contract." In re Imboden's Estate, 86 S. W. 263, 265, 111 Mo. App. 220 (citing Banks v. Galbraith, 51 S. W. 105, 149 Mo. 536; State v. Bittick, 15 S. W. 325, 103 Mo. 183, 11 L. R. A. 587, 23 Am. St. Rep. 869; Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359).

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations, and social obligations and duties, with which government is necessarily required to deal. In re De Laveaga's Estate, 75 Pac. 790, 795, 142 Cal. 158 (citing Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244).

Marriage is a civil contract, and the wife owes to the husband the same full performance of marital duties that he owes to her. Richardson v. Richardson, 114 N. Y. Supp. 912, 914.

As between the immediate parties, "marriage" is, in law, a civil contract. Nelson v. Brown, 51 South. 360, 363, 164 Ala. 397, 137 Am. St. Rep. 61.

Code, § 3139, defines "marriage" as a civil contract. Pegg v. Pegg, 115 N. W. 1027, 1028, 138 Iowa, 572.

#### As a civil institution

Marriage is a social institution or status, in which, because the foundations of the family and the domestic relations rest upon it, the commonwealth has a deep interest to see that its integrity is not jeopardized. Coe v. Hill, 86 N. E. 949, 950, 201 Mass. 15.

"Marriage" is an institution in which the public have an interest." This is shown by the safeguard which the statute has thrown around the contract and its dissolution. Bacon v. Bacon, 86 N. E. 1080, 43 Ind. App. 218.

#### As a civil relation

"The 'marriage contract' once entered into becomes a relation rather than a contract, and invests each party with a status toward the other and society at large, involving duties and responsibilities, which are no longer matter for private regulation but concern the commonwealth." Coy v. Humphreys, 125 S. W. 877, 879, 142 Mo. App. 92.

#### As a civil status

In Christian nations marriage is not treated as a mere contract to be suspended or dissolved, at pleasure, but rather as a status based on public necessity, and controlled by law for the benefit of society at large. People v. Case, 89 N. E. 638, 640, 241 Ill. 279, 25 L. R. A. (N. S.) 578.

Marriage is a status resulting from a contract to marry entered into by a man and woman capable of making such a contract,

and cohabitation does not of itself constitute marriage. Compton v. Benham (Ind.) 85 N. E. 365, 367.

Under Const. art. 16, § 51, and Rev. St. 1895, art. 2396, defining a homestead, the homestead right of a married woman rests upon the fact that she has the status of a wife, and that as such she actually used and occupied the 200-acre homestead for the purpose of a home, at the time of its attempted alienation, and did not join in the execution of the conveyance or in any way assent thereto; the term "marriage" meaning the civil status of a man and woman lawfully united in the relation of husband and wife, and "wifehood" being defined as the state of being a wife. McCracken v. Taylor (Tex.) 146 S. W. 693, 695.

#### Contract distinguished

Wilson's Rev. & Ann. St. 1903, c. 51, art. 1, § 1, par. 3482, provides that marriage is a personal relation arising out of a civil contract, differing from all other contracts to such an extent that the rule that prohibited contracts are void does not apply thereto. Hunt v. Hunt, 100 Pac. 541, 543, 23 Okl. 490, 22 L. R. A. (N. S.) 1202.

Wilson's Rev. & Ann. St. 1903, c. 51, art. 1, § 3, par. 3484, prohibits any male under the age of 18 years, and any female under the age of 15 years, to marry. Chapter 51, art. 1, § 16, par. 3497, makes it criminal to solemnize or enter into a marriage contrary to foregoing provisions. Held, that while a marriage of a youth of 16 and a girl of 14 was illegal, it was voidable only, and not void. Hunt v. Hunt, 100 Pac. 541, 543, 23 Okl. 490, 22 L. R. A. (N. S.) 1202.

#### Same—Capacity of parties

"Marriage is not a civil contract, except in so far as the relation is based on the agreement of the parties. It is true the statute (section 7289, Burns' Ann. St. 1901) declares marriage to be a civil contract, but the statute itself takes it out of the class of simple contracts by providing that it may be entered into by persons under age." Eikenbury v. Burns, 70 N. E. 837, 838, 33 Ind. App. 69.

In an action by parents to recover for the death of a child 13 years old, it is unnecessary to allege that the child was unmarried; Rev. St. 1899, § 4311, providing that marriage is in law a civil contract to which the consent of parties capable in law of contracting is essential, not giving the right to parents or guardians to contract marriages between males under the age of 14 years and females under the age of 12 years. Belamy v. Whitsell, 100 S. W. 514, 515, 123 Mo. App. 610.

#### Same—Interest of state

Marriage is more than a mere civil contract for the establishment and maintenance by the parties to it of certain relations to

each other. It involves, except as modified by statute, an intimate personal union of those participating in it of a character unknown to any other human relation, and creates a civil status, the maintenance of which in its integrity is vital to the moral welfare of society. *Taylor v. Taylor*, 69 Atl. 632, 634, 108 Md. 129.

While our law defines marriage as a civil contract, it differs from all other contracts in its consequences to the body politic, and for that reason, in dealing with it, or with the status resulting therefrom, the state never stands indifferent, but is always a party whose interest must be taken into account. *Willits v. Willits*, 107 N. W. 379, 380, 76 Neb. 228, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883.

"Marriage" is more than a civil contract, for it can only be entered into in a manner recognized by law, and can only be dissolved in a like manner. The state is the third party to the contract and has a direct interest therein. *Grover v. Zook*, 87 Pac. 638, 642, 44 Wash. 489, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192 (citing *Blank v. Nohl*, 20 S. W. 477, 112 Mo. 167, 18 L. R. A. 350; *State v. Bittick*, 15 S. W. 325, 103 Mo. 183, 11 L. R. A. 587, 23 Am. St. Rep. 869).

The "marriage" contract, once entered into, becomes a relation, rather than a contract, and invests each party with a status towards the other, and society at large, involving duties and responsibilities which are no longer matter for private regulation, but concern the commonwealth, and in this aspect is a civil or social institution, being the foundation of the family and the origin of domestic relations of the utmost importance to civilization and social progress; hence the state is deeply concerned in its maintenance in purity and integrity. *Coy v. Humphreys*, 125 S. W. 877, 879, 142 Mo. App. 92.

#### Creation of relation—Capacity of parties

"Marriage" is a contract and nothing else, which presupposes the meeting of two minds on the subject-matter of it. If one of the parties when the ceremony was performed was so far under the influence of liquor as to be unable to understand the contracting of such marital relation, then in law the proceeding amounted to nothing, because the meeting of minds presupposes sufficient intelligence to determine whether the contract shall be made. Unless there shall be present this degree of intelligence at the time the marital relation is entered into, then there is no contract. *Allen v. Allen*, 110 N. Y. Supp. 303, 305, 125 App. Div. 838.

Under the express provisions of Code, § 3139, marriage is a civil contract, requiring the consent of parties capable of entering into other civil contracts, and hence without such consent no marital rights are acquired

nor marital duties imposed, and, if one or both of the parties be insane and therefore incapable of giving consent, there is no marriage, but in the interest of good order the courts will assume jurisdiction to decree the annulment of the union though annulment is not necessary to clothe the parties with all the rights of unmarried persons. *Floyd County v. Wolfe*, 117 N. W. 32, 34, 138 Iowa, 749.

Under the statutory definition of marriage in Missouri as a civil contract to which the consent of parties capable in law of contracting is essential, there could be no marriage in legal contemplation between slaves in that state, who had no capacity to contract; and hence, where a man and woman, slaves, "took up with each other" in Missouri, with their mistress' consent, according to the custom of slaves, the relation being merely temporary and subject to termination at any time, either by their own act or that of their mistress, there was no such marriage as would permit their children to inherit from their father. In *re Campbell's Estate*, 108 P. 669, 673, 12 Cal. App. 707.

#### Same—Consent of state

"A 'marriage' is a civil contract made in due form, by which a man and woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge towards each other the duties imposed by law upon such relation. Each must be capable of assenting, and must in fact consent to form this new relation. If a statute forbids the solemnization of marriage without a license, still, in the absence of a clause of nullity, the marriage will be good, though no license was had. No particular form of words is necessary to constitute a common-law marriage. If what is done and said evidences an intention by the parties to assume the marriage status, and the parties thereupon enter into the relation of husband and wife, that is sufficient, whatever may be the form of expression used." *Heymann v. Heymann*, 75 N. E. 1079, 1080, 218 Ill. 636.

#### Same—Solemnization

Marriage is a civil contract, the consent of the parties to it being all that is required by natural public law. It is true that in most, if not all, of the states of the Union, there are statutes regulating the manner of forming the marriage contract, providing for the performance of ceremonies, and naming those persons who can perform the ceremonies or celebrate the rites of matrimony; but it is held in a number of the states that, in the absence of positive statutes declaring all marriages void that are not performed as directed by law, any marriage made according to the common law would be a valid marriage. Such marriage may be proved by reputation, declarations, and conduct of the parties, and other circumstances usually ac-



companying that relation. *Edelstein v. Brown*, 80 S. W. 1027, 35 Tex. Civ. App. 625.

"Two essentials to a valid 'marriage' are capacity and consent. Marriage is a civil contract, and no ceremonial is indispensably requisite to its creation. A contract of marriage made per verba de presenti amounts to an actual marriage and is valid." *Travers v. Reinhardt*, 27 Sup. Ct. 563, 568, 205 U. S. 423, 438, 51 L. Ed. 865 (quoting *Voorhees v. Voorhees*, 19 Atl. 172, 173, 46 N. J. Eq. 411, 413, 414, 19 Am. St. Rep. 404, 406).

"Marriage" in a legal sense is a civil contract. It is not indispensable that a clergyman should be present to authorize and confirm the contract to give validity to the marriage. Statutes which direct that a license must be issued, that only certain persons shall perform the ceremony, that a certain number of witnesses shall be present, that a certificate of marriage shall be returned and recorded and the person violating the conditions shall be guilty of a criminal offense, are directory merely, and in no wise affect the validity of the marriage contract, unless they contain an express provision to that effect. *Reaves v. Reaves*, 82 Pac. 490, 492, 493, 494, 15 Okl. 240, 2 L. R. A. (N. S.) 353 (citing *Gibson v. Gibson*, 39 N. W. 450, 24 Neb. 394).

A present agreement between competent persons to take each other for husband and wife constitutes a valid "marriage," though there be no witnesses. *Dietrich v. Dietrich*, 112 N. Y. Supp. 968, 970, 128 App. Div. 564.

"That there may be a valid 'marriage' without solemnization by minister, priest, or officer is not questioned in this country except where the statute forbids, and it once was so understood in England. \* \* \* Marriage is recognized as a status brought about by civil contract, and it may be contracted by the parties themselves, as any other contract, without even the presence of witnesses. \* \* \* We have already shown \* \* \* that it need not be followed by cohabitation, either in the sense of living together or of sexual intercourse. Mutual consent, expressed, is the requisite." "Marriage," as distinguished from an agreement to marry and from the act of becoming married, is the civil status of one man and one woman, legally united for life. "The contract makes the marriage, and the status is the marriage. Hence it is said that marriage is a status which arises out of the contract. \* \* \* That a contract of marriage in presenti is itself a marriage—that is, produces the marriage status without anything more—is stated by all commentators on the common law and by all adjudications thereof in this country." *Davis v. Stouffer*, 112 S. W. 282, 285, 286, 132 Mo. App. 555 (quoting and adopting *Yardley's Estate*, 75 Pa. 207; 1 Bishop, *Marriage & Divorce*, § 11, and

note; and citing and adopting *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359).

An instruction that "marriage" is a civil contract entered into between a man and a woman, both of whom are equally competent to enter into the relationship, and that it may be consummated by a form prescribed by statute, or by some other formal method, or by a formal agreement between the parties, and that some of these methods are necessary to constitute "marriage," is incorrect, since whatever be the form of the ceremony or if there be no ceremony, if the parties agree presently to take each other for husband and wife, and from that time on live professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding on the parties, which would subject them to legal penalties for a disregard of the obligation. *Darling v. Dent*, 100 S. W. 747, 748, 82 Ark. 76 (citing *Hutchins v. Kimmell*, 31 Mich. 130, 18 Am. Rep. 164).

#### Evidence of

"Where parties have cohabited together, and held themselves out as man and wife, and there are circumstances from which a present contract may be inferred, the law out of charity, and in favor of innocence and good morals, will presume matrimony. The law in general presumes against vice and immorality, and on this ground holds acknowledgment, cohabitation, and reputation presumptive evidence of marriage. Mere cohabitation is not usually considered sufficient." Bishop lays down the doctrine that 'cohabitation and the reputation of being husband and wife are usually considered together in questions concerning the proof of marriage; the one being in a certain sense the shadow of the other. Some of the authorities favor the idea that reputation of itself may be received as sufficient proof prima facie, but it must be uniform and general; if there is a conflict in the repute, it will not establish the marriage. On the other hand, its sufficiency in any case has been denied, unless there be accompanying proof of cohabitation.' 1 Bishop, *Marriage & Divorce* (5th Ed.) 483. 'Cohabitation and reputation are at best only presumptive proofs, and, when one of these foundations is withdrawn, what remains is too weak to build a presumption on. There is good sense in the Scotch law, by which cohabitation alone is considered insufficient, and which requires in addition habit and repute, because it is said that the parties may eat, live, and sleep together as mistress and keeper without any intention of entering into marriage.' It is well established in this state that a marriage without observing the statutory regulations, if made according to the common law, is a valid marriage, and that by the common law, if the contract be made per verba de presenti it is sufficient evidence of a marriage, or if it be made per verba de futuro cum copula, the

cohabitation is presumed to be on the faith of the marriage promise. That is, however, merely a rule of evidence, and it is always competent, in such cases, to show by proof that the facts are otherwise. Under our law, 'marriage' is a civil contract by which a man and a woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge towards each other the duties imposed by law upon such relation. Each must be capable of assenting and must, in fact, consent, to form this new relation. When the consent to marry is manifested by words de presenti, a present assumption of the marriage status is necessary." On the issue as to a common-law marriage, the woman testified that while she and the man were riding together he said she was his wife, and that a marriage ceremony was unnecessary, if they should hold marriage relations, and that she agreed to hold such relations, and that afterwards he acknowledged her as his wife, but that they did not live openly together until five months thereafter. It appeared that subsequently their neighbors and the woman insisted that a ceremony be performed, and that, because of the man's refusal to have a ceremony, a difficulty arose between the man and the woman's son, in which the latter killed the former. Held that the facts were insufficient to show a marriage. *Topper v. Perry*, 95 S. W. 203, 207, 197 Mo. 531, 114 Am. St. Rep. 777 (citing *Cargile v. Wood*, 63 Mo. loc. cit. 512; *State v. Bittick*, 15 S. W. 325, 103 Mo. loc. cit. 191, 11 L. R. A. 587, 23 Am. St. Rep. 869; *State v. Cooper*, 15 S. W. 327, 103 Mo. 271; *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359; *Cartwright v. McGown*, 12 N. E. 737, 121 Ill. 388, 2 Am. St. Rep. 105; *Hantz v. Sealy* [Pa.] 6 Bin. 405; *Elzas v. Elzas*, 49 N. E. 717, 171 Ill. 635).

As used in Rev. Code, § 2611, defining it as a personal relation arising out of a civil contract to which the consent of the parties is necessary, and that consent alone will not constitute it, but it must be followed by a solemnization or by mutual assumption of marital rights, duties, and obligations, was fully proven by evidence that the parties in this case had been married by a minister on authority of a certificate issued by law and had lived together for 28 years as man and wife, though at the time of the ceremony a prior spouse of one of the parties was alive; there being a presumption of divorce. *Huff v. Huff*, 118 Pac. 1080, 1083, 20 Idaho, 450.

Civ. Code, § 55, declaring that marriage is a personal relation arising out of a civil contract, but consent alone will not constitute a marriage, and it must be followed by a mutual admission of marital rights, does not modify the requirements of the common-law rule that the repute and cohabitation necessary to create a presumption of marriage must be uniform, general, and open, and

there must be evidence that the parties assumed the relation of husband and wife, treating each other as married, and so conducting themselves as to have full repute among their friends and associates to be married. In *re Baldwin's Estate*, 123 Pac. 267, 275, 162 Cal. 471.

#### As matter or thing

See Matter or Thing.

#### One person created

"Marriage" is a contract by which a social union is established; and the status of each spouse, and his or her rights in the common property, are fixed by special provisions of law applicable to that relation alone. It will not be just to say that, because the personal identity of the husband or wife is the same after as before marriage, there has been no loss or surrender of those legal characteristics affected by the assumption of the relation. There is in many respects a complete merger of identities and a total loss of the separate individual rights that formerly existed. *Clark v. Brown* (Tex.) 108 S. W. 421, 443.

#### As valuable consideration

See Valuable Consideration.

### MARRIAGE BOND RECORD

A book known as the "Marriage Bond Record" is a book kept in the county clerks' offices in Kentucky, containing the names of persons who obtained licenses to marry and other evidence touching their age and residence. *Pace v. Cawood* (Ky.) 110 S. W. 414, 415.

### MARRIAGE BROKERAGE

A contract based on a money consideration to aid a woman in securing a husband, the services contracted for being in connection with efforts already being made by her to secure such man, was nothing less than that known as "marriage brokerage" and was invalid by common law as against public policy. *Wenninger v. Mitchell*, 122 S. W. 1130, 1132, 139 Mo. App. 420.

### MARRIAGE PER VERBA DE FUTURA CUM COPULA

See, also, Common-Law Marriage.

"Marriage per verba de futuro cum copula" is not consummated, unless the copula is had in fulfillment of the future agreement. An existing agreement between a man and a woman to marry at a future day conclusively negatives the claim of a marriage per verba de presenti between the same parties. *Sorensen v. Sorensen*, 100 N. W. 930, 933, 68 Neb. 483.

### MARRIAGE PROMISE

Breach of as personal injury, see Personal Injury.

Seduction induced by, see Seduce—Seduction.

**MARRIAGE RELATION**

See Property Growing Out of Marriage Relation.

**MARRIAGEABLE WOMAN**

A woman, to be "marriageable," must at the time be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. *Baker v. Baker*, 13 Cal. 87, 103.

**MARRIED WOMAN**

As public merchant, see Public Merchant.  
As stockholder, see Stockholder.

In Domestic Relations Law (Consol. Laws 1909, c. 14) § 81, providing that a married woman is a joint guardian of her children with her husband, the term "married woman" does not refer to one married to another than the living father of the child after divorce from him, but only to the mother married to the father of the infant. In *re Wagner*, 135 N. Y. Supp. 678, 683, 75 Misc. Rep. 419.

**MARRIED WOMAN'S SEPARATE ESTATE**

See Separate Estate.

**MARRY**

As used in Rev. St. 1899, § 2169, declaring that every person, having a husband or wife living, who "shall marry another person" without this state in any case where such marriage would be punishable, is contracted or solemnized within the state, or shall thereafter cohabit with such person within the state, shall be adjudged guilty of bigamy, should be taken to mean the going "through" the form and ceremony of marriage with another person, regardless as to the validity of the second marriage as a matter of law. *State v. Stuart*, 92 S. W. 878, 882, 194 Mo. 345, 112 Am. St. Rep. 529, 5 Ann. Cas. 963.

**MARRYING AGAIN**

Testator devised real estate described to his wife, and gave to another woman named other described real estate, to be held by her for the support of herself and testator's children by her, and provided that, in the event of her "marrying again," the gift to her should become void, and the property should go to such children. A provision in similar language was made in favor of a third woman. The woman so named was testator's polygamous wife. Testator and she were members of the Mormon Church and believed in its doctrines, including the doctrine of polygamy. Held, that the words "marrying again" included the entering into a polygamous marriage, and the gift to such woman was within Comp. Laws 1907, § 2795, providing that a conditional disposition is one which depends on the occurrence of some uncertain event by which it is either to take effect or be de-

feated, and on her entering into a polygamous marriage the gift to her terminated. In *re Poppleton's Estate*, 97 Pac. 138, 140, 34 Utah, 285.

**MARSH LAND**

The drainage act of 1881 (Laws 1881, p. 236, c. 51) confers the power upon county authorities to create drainage districts for the purpose of draining "marsh or swamp lands" alone, and does not confer power to change the channel or divert surface water drains for the purpose of relieving the lands of riparian proprietors lower down the stream from periodical overflows in seasons of freshet. The term "marsh or swamp lands," as used in said act, has a wider significance than the terms "marshes" or "swamps." The power is conferred by this act to drain lands which are not, strictly speaking, "marshes" or "swamps," but which are "marsh or swamp lands," meaning thereby lands which are so situated as to be rendered difficult or incapable of successful cultivation by reason of retaining in the soil or carrying on the surface an excessive quantity of water during certain portions of the year, even though at other times they may be as solid, dry, and firm as lands in general. *Campbell v. Youngson*, 114 N. W. 415, 417, 418, 80 Neb. 822.

**MARSHAL**

**As city officer**

See City Officer.

**As peace officer**

See Peace Officer.

**As person**

See Person.

**MARSHALING ASSETS**

The doctrine of "marshaling assets" is defined as follows: "It is a settled principle that when there are two classes of creditors and two funds, and one class of creditors can only go against one fund while the other can go against both, the court will marshal the assets, restricting the creditors who have a double security from touching the fund applicable to the first class of creditors until they are paid in full." In *re Terens*, 175 Fed. 495, 497.

The rule that he who has two funds for the satisfaction of his claim shall not, by electing to resort to the doubly charged fund, disappoint him who has that fund only to resort to, is subject to qualifications, and among them is the qualification that both funds must be within the jurisdiction and control of the court, except in the rare cases in which it is clear that the creditor of the two funds will sustain no loss, delay, or additional expense if required to resort first to the fund without the jurisdiction. Stern-

berger v. Sussman, 60 Atl. 195, 196, 69 N. J. Eq. 199.

Where a creditor of A. has a right to satisfy his debt out of two funds, X and Y, to but one of which, Y, another creditor, can resort, the first creditor must be compelled to exhaust X before resorting to Y. Where a mortgagor, as further security, assigned a claim for money due under insurance policies, and the mortgagee, without knowledge of a subsequent mortgagor, and pursuant to a supplemental agreement with the mortgagor, applied the money collected on the policies to a general and unsecured indebtedness of the mortgagor, the subsequent mortgagee was not entitled to have the money applied in satisfaction of the mortgage. *Weidemann v. Springfield Breweries Co.*, 63 Atl. 162, 164, 78 Conn. 660.

The doctrine of marshaling assets will not be applied in favor of one having an adequate remedy at law. *Farmers' Loan & Trust Co. v. Kip*, 85 N. E. 59, 64, 192 N. Y. 266.

## MASON

### MASONIC SOCIETY

As charity, see Charity.

### MASONRY

See Inspector of Masonry.

A contract sufficiently fixes the date for the completion of the work where such contract includes excavating, concrete foundations, rubble stone work, pressed brick and cut stone work, etc., and provides the date for completing the "entire masonry," inasmuch as the term "masonry" is generic and includes all the prior specifications of the contract as recited. *Joseph N. Eisendrath Co. v. Gebhardt*, 124 Ill. App. 325, 331.

## MASS

As public charity, see Public Charity.

As superstitious use, see Superstitious Use.

"A 'mass' is not peculiarly a part of a funeral service, like unto the office for the dead. It is the sacrament of the Eucharist, and a low mass is one said and not sung. In the religion of the Holy Roman Church 'masses' are celebrated for the good of those who are dead, but in no sense is a mass so celebrated necessarily a part of the funeral service." *In re McAvoy's Estate*, 98 N. Y. Supp. 437, 438, 112 App. Div. 377 (citing Cent. Dict.).

## MASSAGE

As practicing medicine, see Practice of Medicine.

## MASSES OF MEN

The words "masses of men," in a pleading alleging that the letters "Inc." are an abbreviation and are so understood by the "masses of men," mean the principal or main body, and is an admission that there are some men or a portion of the public who do not so understand it. *Commonwealth v. American Snuff Co.*, 101 S. W. 364, 365, 125 Ky. 350.

## MASSEUR

As physician, see Physician.

As practicing medicine, see Practice of Medicine.

## MASTER

The master is the one who has the direction and control of the servant, and the test is whether in the particular service the servant continues liable to the direction and control of his master, or becomes subject to the party to whom he is loaned or hired. *Grace & Hyde Co. v. Probst*, 70 N. E. 12, 14, 208 Ill. 147 (citing *Consolidated Fireworks Co. v. Koehl*, 60 N. E. 87, 190 Ill. 145).

A "master" is one who stands to another in such relation that he not only controls the result of the work of that other, but also may direct the manner in which it shall be done. *McColligan v. Pennsylvania R. Co.*, 63 Atl. 792, 793, 214 Pa. 229, 3 L. R. A. (N. S.) 544, 112 Am. St. Rep. 739.

"The fact that the party to whose wrongful or negligent act an injury may be traced was at the time in the general employment and pay of another person does not necessarily make the latter the 'master,' and responsible for his acts. The 'master' is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct." *Wieber v. New York Cent. & H. R. R. Co.*, 96 N. Y. Supp. 28, 30, 109 App. Div. 81 (quoting *Higgins v. Western Union Tel. Co.*, 50 N. E. 500, 156 N. Y. 75, 66 Am. St. Rep. 537).

A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called the "master." *Giacomini v. Pacific Lumber Co.*, 89 Pac. 1059, 1060, 5 Cal. App. 218 (citing Civ. Code, § 2009).

A "master" is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, retains the power of controlling the work. *Kellog v. Church Charity Foundation* 112 N. Y. Supp. 566, 569, 128 App. Div. 214 (citing *Po. Torts* [4th Ed.] p. 72).

**MASTER AND SERVANT**

The common understanding of the words "master and servant" and the legal understanding are not the same. The latter is broader, and comprehends some cases in which the parties are master and servant only in a peculiar sense, and for certain purposes—perhaps only for a single purpose. In strictness, a "servant" is one who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business.

\* \* \* It could not all depend on whether the master was to pay anything, nor whether the service was permanent or temporary. His control of the action of the other is the important circumstance, and the particulars of his arrangement are immaterial. The plaintiff not being employed, controlled, or paid by the defendant, would seem not to be their servant, so that they would be liable for his acts, or their liability to him be governed by the rules applicable as between master and servant. Where defendant engaged J. to sink a shaft, paying him so much per foot, and J. hired plaintiff to help him, and agreed to pay him one-third of the compensation received from defendant, J. having the exclusive right to employ, control, and discharge his helpers, plaintiff was not defendant's servant. *Kiser v. Suppe*, 112 S. W. 1005, 1007, 133 Mo. App. 19 (quoting and adopting *Cooley, Torts*, pp. 531, 532).

The relation of master and servant exists where the employer has power to direct the nature of the work and the manner of doing it, with power to employ and discharge, and a switch tender, employed and controlled by defendant, but one-third of whose wages was paid by plaintiff's company, which ran over defendant's tracks at the switches, was not a servant of plaintiff's company, nor was defendant its servant; the latter only having the right to complain to defendant as to the manner of performing his duties. *Yeates v. Illinois Cent. R. Co.*, 89 N. E. 338, 341, 241 Ill. 205.

The doctrine of respondeat superior applies only where the relation of master and servant exists between the wrongdoer and the person sought to be held liable for the injury, and the master is he in whose business the servant is engaged at the time, and who has the right to control and direct the servant's conduct. *Harding v. St. Louis Nat. Stockyards*, 90 N. E. 205, 207, 242 Ill. 444.

"The relation of 'master and servant' exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done." *Atchison, T. & S. F. Ry. Co. v. Dickens*, 103 S. W. 750, 753, 7 Ind. T. 16 (citing *Singer Mfg. Co. v. Rahn*, 10 Sup. Ct. 175, 132 U. S. 518, 83 L. Ed. 440; *Uppington v. City of New York*, 59 N. E. 91, 165 N. Y. 222,

53 L. R. A. 550; *Powell v. Virginia Const. Co.*, 13 S. W. 691, 88 Tenn. 692, 17 Am. St. Rep. 925; *Carlson v. Stocking*, 65 N. W. 58, 91 Wis. 432; *Robinson v. Webb*, 11 Bush [74 Ky.] 464; *Harrison v. Collins*, 86 Pa. 153, 27 Am. Rep. 699).

The relation of "master and servant" subsists between an accident insurance company and its medical officer empowered to examine the person or body of insured in respect to any injury or cause of death, in such manner and at such times as he may require, in the exercise of such right of examination, and the company is answerable for injuries resulting from the negligence or misconduct of the medical officer, and, between the medical officer and insured, the law governing the relations of physician and patient does not apply. *Tompkins v. Pacific Mut. Life Ins. Co.*, 44 S. E. 439, 444, 53 W. Va. 479, 62 L. R. A. 489, 97 Am. St. Rep. 1006.

**MASTER IN CHANCERY**

"A 'master in chancery' is an officer appointed by the court to assist in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens on property involved, and similar services. The information which he may communicate by his findings on such cases on the evidence presented to him is merely advisory to the court which it may accept and act upon or disregard in whole or in part according to its own judgment as to the weight of the evidence. In practice it is not usual for the court to reject the report of a master with his findings, where the matters refer to him unless exceptions are taken to them and brought to its attention and on examination the findings are found unsupported or defective in some essential particular. *Metzker v. Bonebrake*, 2 Sup. Ct. 351, 108 U. S. 66, 27 L. Ed. 654; *Tilghman v. Proctor*, 8 Sup. Ct. 894, 125 U. S. 136, 149, 31 L. Ed. 664; *Callaghan v. Myers*, 9 Sup. Ct. 177, 128 U. S. 617, 666, 32 L. Ed. 547. It is not within the general province of the master to pass on all the issues in an equity case, nor is it competent for the court to refer the entire decision of the case to him without the consent of the parties. It cannot of its own motion, or upon the request of one party, delegate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers; but when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein and report his findings both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary reference without such

consent, and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of the parties of the entire case for a determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection to be governed in its conduct by the ordinary rules applicable to the administration of justice in controversies established by law. Its findings, like those of an independent tribunal, are to be taken as correct, subject indeed to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or the application of the law, but not otherwise. The reference of a whole case to a master \* \* \* has become, in late years, a matter of more common occurrence than formerly, though it has always been within the power of the court of chancery, with the consent of the parties, to order a reference." *Locust v. Caruthers*, 100 Pac. 520, 522, 23 Okl. 373 (quoting *Kimberly v. Arms*, 9 Sup. Ct. 355, 129 U. S. 355, 32 L. Ed. 764; citing *Basey v. Gallagher*, 20 Wall. [87 U. S.] 670, 22 L. Ed. 452; *Quimly v. Conlan*, 104 U. S. 420, 424, 26 L. Ed. 800).

#### MASTER OF A SHIP

As laborer, see Laborer.

#### MASTER PLUMBER

Laws N. Y. 1896, c. 803, after making it unlawful for any person to carry on the business of an employing or "master plumber" unless the name and address of such person shall have been registered as provided in section 6, provides that a master or employing plumber within the meaning of the act is any person who hires a person or persons to do the plumbing work. *Schnaler & Co. v. Grigsby*, 113 N. Y. Supp. 548, 549, 61 Misc. Rep. 325.

"Master plumbers" and "employing plumbers" are one and the same—those who do not hold themselves out as personally doing the work, but as contracting to furnish the materials and to do the work through others, while "journeyman plumbers" are those skilled in the calling and holding themselves out as able and willing to do the work themselves. *Felton v. Atlanta*, 61 S. E. 27, 28, 4 Ga. App. 183.

#### MATE

As laborer, see Laborer.

#### MATERIA

See In Pari Materia.

#### MATERIAL

"Material" is defined by Webster to mean something essential. *Faulkner v. Bridget*, 86 S. W. 483, 110 Mo. App. 377.

Webster defines "material" to be something "of solid or weighty character; substantial; of consequence; not to be dispensed with; important; specific; especially law, such as does or would affect the determination of a case, the effect of an instrument, or the like; constituting a matter that is entitled to consideration; such as must be considered in deciding a case on its merits." *Thompson v. State*, 117 Pac. 216, 223, 6 Okl. Cr. 50.

Code Supp. 1907, § 3060a14, provides that, where a negotiable instrument is wanting in any "material particular," the person in possession has prima facie authority to complete it by filling up the blank therein, etc. Held, that the word "material" was not there used as synonymous with "necessary," so as to restrict the right to filling in an omission essential to the completion of a negotiable instrument, but included all omitted matter usually found in such instruments. *Johnston v. Hoover*, 117 N. W. 277, 278, 139 Iowa, 143.

To justify a reversal of a conviction on the ground of error, the error must have been of a material character, and must have deprived accused of a substantial right, the word "material" meaning something of weighty character, substantial, of consequence, not to be dispensed with. *Campbell v. Territory (Ariz.)* 125 Pac. 717, 721.

The words "material" and "not material" are absolutely contradictory, in that they exclude all middle ground, and together include everything thinkable. *Behnett v. Ware*, 61 S. E. 546, 550, 4 Ga. App. 293 (dissenting opinion by Powell, J.).

#### MATERIAL ALLEGATION

Under Civ. Code Prac. § 126, providing that material allegations against infants must be proved, though not denied, and section 127, defining a material allegation to be one necessary to support the action, and section 429, requiring a petition in a suit to settle a decedent's estate to state the amount of debts, the nature and value of the property of decedent, and providing that, if the personal property is insufficient to pay debts, so much of the real property as may be necessary may be sold, a sale of an entire tract before the value of the personal property had been ascertained, and before it had been ascertained, at least approximately, what the claims against decedent's estate amounted to, and without any showing that the land was indivisible, was, as to infant heirs, void. *Carter v. Crow's Adm'r*, 112 S. W. 1098, 1099, 130 Ky. 41.

A "material allegation" is one which is necessary for the statement or support of a cause of action or defense. *Louisville & N. R. Co. v. Paynter's Adm'r* (Ky.) 82 S. W. 412, 413 (quoting and adopting definitions in Civ. Code Prac. § 127).

### MATERIAL ALTERATION

Any alteration of a written instrument is "material," if it affects the identity of the instrument, or the rights and obligations of the parties to it. *Wicker v. Jones*, 74 S. E. 801, 803, 159 N. C. 102, 40 L. R. A. (N. S.) 69.

The test whether an instrument has been materially altered is whether the change or addition injuriously affected the complaining parties or could have under any probable circumstances enlarged their burden. *Holthouse v. State*, 97 N. E. 180, 182, 49 Ind. App. 178.

Whatever changes the legal effect of an instrument is a material alteration. "The test is, not whether an alteration increases or reduces a party's liability, but whether the instrument expresses the same contract—whether it will have the same legal effect and operation after the alteration as before." *White v. Harris*, 48 S. E. 41, 43, 69 S. C. 65, 104 Am. St. Rep. 791.

A material alteration of a written instrument is an intentional act, after it has been fully executed by one party without the consent of the other, which changes the legal effect of the instrument in any way. The cross-marking of a material provision of a written instrument, after its execution by one of the parties, without the consent of the other, with intent of erasing it, is a material alteration. *O. N. Bull Remedy Co. v. Boyer*, 124 N. W. 20, 21, 109 Minn. 398, 32 L. R. A. (N. S.) 519, 18 Ann. Cas. 413.

Under Rem. & Bal. Code, § 3514, providing that, where a negotiable instrument is materially altered without the assent of all persons liable thereon, it is avoided, except as against a party who made, authorized, or assented to the alteration and subsequent indorsers, and section 3515, providing that an alteration which changes the number or relations of the parties is a "material alteration," where, after the indorsement of a note by an accommodation party, and before it was negotiated, without his knowledge or consent, other parties signed it as maker, he was discharged of liability thereon. *Handaker v. Pedersen*, 128 Pac. 230, 231, 71 Wash. 218.

As a rule, any change in the personality, number, or relation of the parties to a written contract is a material alteration thereof, so as to avoid it as to the nonconsenting parties, so that the erasure of the name of one of the obligors in a contract is a material alteration. *Matson v. Jarvis* (Tex.) 133 S. W. 941, 943.

The addition to a note by the payee without the knowledge of the maker of the words "with interest 6 per cent." is a material alteration of the note within Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 206, subd. 2, declaring that any alteration changing the sum payable either for interest or principal is material. *Columbia Distilling Co. v. Rech*, 135 N. Y. Supp. 206, 207, 151 App. Div. 128.

It is a material alteration of an instrument to change the time from which the interest is to run, either by the insertion, alteration, or erasure of words, whether the time is thereby accelerated or delayed. *Baldwin v. Haskell Nat. Bank*, 133 S. W. 864, 865, 104 Tex. 122.

Where, after the delivery of a note containing an unfilled blank for the place of payment, the payee filled the blank as authorized by Code Supp. 1907, § 3060a14, such note was not within sections 3060a124 and 3060a125, providing that any alteration in the time or place of payment shall constitute a material alteration and that a material alteration will avoid the note. *Johnston v. Hoover*, 117 N. W. 277, 278, 189 Iowa, 143.

Whether an alteration of a note is material does not depend upon whether it increases or reduces the maker's liability, but upon whether the instrument after alteration expresses the same contract, and, if the change enlarges or lessens the liability, it is material. *Commonwealth Nat. Bank of Dallas, Tex. v. Baughman*, 111 Pac. 332, 333, 27 Okl. 175.

The altering of the figures in two places in an order for money, to make it read \$38 instead of \$30, but leaving the written amount as it originally was, was a "material alteration," tending to indicate that it was the maker's intention to pay \$38, and was therefore apparently capable of effecting a fraud. *White v. State*, 102 S. W. 715, 716, 83 Ark. 36.

Under a statute providing that a material alteration of a negotiable instrument is one which changes the date, the sum payable, the time or place of payment, the number or relations of the parties, or the medium or currency in which payment is to be made, a valid agreement between the holder and principal debtor for an extension of time of payment is not a "material alteration" discharging an accommodation maker of a note; the statute referring to changes in the instrument itself and not the contract. *Richards v. Market Exch. Bank Co.*, 90 N. E. 1000, 1005, 81 Ohio St. 348, 26 L. R. A. (N. S.) 99.

Under a statute providing that any alteration changing the date or any change which alters the effect of a negotiable instrument is a "material alteration," the drawing of a hand through the figures "1-

8-9" in a note written on a blank form, dated October 24, 1892, payable one year from date, reciting that it was due October 24, 1903, and writing above the figures "1-9-0" so as to make the date October 24, 1902, was not a "material alteration," since, as the written figures control the printed ones, the alteration did not change the date. *Lombardo v. Lombardini*, 106 Pac. 907, 908, 57 Wash. 352, 32 L. R. A. (N. S.) 515.

Under Rev. St. § 3175p, declaring that a "material alteration" of a negotiable instrument consists in an alteration which changes the date, the sum payable, either for principal or interest, the time or place of payment, the number or the relation of the parties, the medium or currency in which payment is to be made, or which adds a place of payment where no place of payment was specified, or any other change or addition which alters the effect of the instrument in any respect, the term is limited to the alteration of the instrument itself and was not fulfilled by an extraneous contract between the holder and the principal maker extending the time of payment. *Richards v. Market Exch. Bank Co.*, 90 N. E. 1000, 1005, 81 Ohio St. 348, 26 L. R. A. (N. S.) 99.

#### MATERIAL DEFENDANT

Under Code 1907, §§ 3093, 6110, providing that bills must be filed in the district in which the defendants or a material defendant reside, a material defendant being a necessary or indispensable party, the husband is the only material defendant to a suit by a wife for divorce and alimony, and hence a bill for divorce and alimony cannot be filed in a district other than that in which he resides. *Puckett v. Puckett*, 56 South. 585, 587, 174 Ala. 315.

A "material defendant," within the meaning of the statute, requiring that an original bill be filed in the district in which the defendants or a "material defendant" reside, has been held to be a defendant who is a necessary party, really interested in the result of the suit and against whom a decree is sought; one whose interest is antagonistic to the complainants and against whom relief is prayed. *Railroad Commission of Georgia v. Palmer Hardware Co.*, 53 S. E. 193, 197, 124 Ga. 788 (citing *Gay v. Brierfield Coal & Iron Co.*, 17 South. 618, 106 Ala. 615; *Waddell v. Lanier*, 54 Ala. 440).

#### MATERIAL DEGREE

One of the meanings of the term material is "in an important degree" (Webster, Dict.), and this is the meaning which would properly be attached to it as used in an instruction that a passenger on a street car could not recover if she contributed to her injury in a material degree, and hence the instruction was erroneous, because importing that there might be a degree of negligence on the part of plaintiff, contributing

to the injury, which would not defeat a recovery. *Root v. Des Moines Ry. Co.*, 98 N. W. 291, 293, 122 Iowa, 469.

The words "material degree," in an instruction, in an action for injuries, to the effect that if the plaintiff was injured as the direct result of defendant's negligence, and was "in no manner or to any material degree negligent himself, or in no manner or to any extent contributed to his own injury," he was entitled to recover, related to the amount of care required, and not to the extent of contribution to the injury by reason of failure to exercise such care, and hence the instruction was not erroneous. *Camp v. Chicago Great Western Ry. Co.*, 99 N. W. 735, 738, 124 Iowa, 238.

#### MATERIAL DEPARTURE

On September 25th the court ordered the issuance of a venire of 150 names, returnable on October 5th, and names to that number were regularly drawn and the venire issued. On September 30th, the court vacated the order of September 25th, and directed that the names in the venire then in process of being served be restored to the trial jury box, and that 150 names be drawn from the trial jury box, and a venire issued for those persons to attend October 7th to complete the panel in the case; seven jurors having been passed. Thereafter on the same date the 150 names were returned to the box, and the judge and clerk of court drew therefrom 150 names to complete the panel, and a venire was issued to serve the names so drawn. Held that, conceding irregularity, there was not a "material departure" from the forms provided by statute, expressly made ground for challenge to the panel by Comp. Laws Nev. § 4288; "material departures" being only such as affect the substantial rights of a defendant in securing an impartial jury. *State v. Jackman*, 104 Pac. 13, 14, 16, 31 Nev. 511.

#### MATERIAL EVIDENCE OR TESTIMONY

Testimony of the accused, in a bastardy proceeding, that he had not had sexual intercourse with the complainant, held, to be "material" on his indictment for perjury, although he had also sworn that he was not the father of the child. *State v. Brown*, 79 N. C. 642, 643.

False testimony is "material," so as to be the subject of an assignment for perjury, when it is such as to be substantially important and to have influence on the issues, especially as distinguished from a mere formal requirement, and capable of properly influencing the result of the trial. *People v. Schweichler*, 117 Pac. 939, 940, 16 Cal. App. 738.

In Code Civ. Proc. § 870 et seq., and general rule of practice 82, requiring, for the examination of an adverse party before



trial, a showing by affidavit that the testimony is material and necessary, the words "material" and "necessary" are not used synonymously, even if the word "necessary" does not mean indispensable to the making of an issue. *Koplin v. Hoe*, 108 N. Y. Supp. 602, 603, 123 App. Div. 827.

An instruction that the burden of proof was on plaintiff, and that she could not recover until she showed the facts by a preponderance or a material part of the evidence, was error because not the equivalent of a "preponderance." *St. Louis, I. M. & S. Ry. Co. v. Woodruff*, 115 S. W. 953, 956, 89 Ark. 9.

### MATERIAL FACT

A fact is "material" to the risk assumed by an underwriter when it would have caused him to have refused the risk if known or would have been a reason for his demanding a higher premium. Where an affidavit of defense, in an action on a policy of insurance issued by a company which insured married women, alleged that the fact that insured was pregnant was material but did not allege in what way it was material nor that the insurer would have refused the risk or increased the premium if that fact had been known, the affidavit was insufficient. *McCaffrey v. Knights & Ladies of Columbia*, 63 Atl. 189, 213 Pa. 609.

The law of England, as of other countries, requires an applicant for marine insurance to make a full disclosure of all the material facts known to him at the time affecting the risk which the insurer is to assume, but he is not required to disclose facts unknown to him at the time, nor immaterial facts, nor matters of common and general knowledge among those engaged in the insurance business at the place of the contract. "Material facts" are only such as are likely to influence the mind of a reasonable underwriter in deciding whether to accept the risk and in fixing the rate of premium to be charged, and the question of materiality is one of fact to be decided upon consideration of all the circumstances and conditions affecting the transaction. *Northwestern S. S. Co. v. Maritime Ins. Co.*, 161 Fed. 166, 178.

The existence of an unfiled chattel mortgage on a stock of goods as security for a guaranty of a debt of the mortgagor is a fact material to the risk in a contract to insure goods, though the instrument contains a clause that it shall not be valid until filed. Where an unfiled chattel mortgage on the stock of goods exists, and the applicant for insurance, when asked whether the property is mortgaged or incumbered, answers in the negative, it is a concealment of a material fact, within a policy providing that it shall be void if insured had concealed or misrepresented any material fact concerning the insurance, and avoids the contract. *Madsen v.*

*Farmers' & Merchants' Ins. Co.*, 126 N. W. 1086, 1088, 87 Neb. 107, 29 L. R. A. (N. S.) 97, Ann. Cas. 1912A, 985.

As used in the law relating to fraud, requiring that false representations, in order to be actionable must relate to "material facts," means a fact or facts necessarily having some bearing on the value of the subject of the negotiation. *Champion Funding & Foundry Co. v. Heskett*, 102 S. W. 1050, 1054, 125 Mo. App. 516.

Under the rule that the jury may reject the whole or any part of a witness' testimony if they believe such witness has sworn falsely as to any material fact, by the term "material fact" is meant any fact which tends to prove or disprove the defendant's guilt or innocence. *State v. McCarver*, 92 S. W. 684, 687, 194 Mo. 717.

During a trial to a jury the legal sufficiency of the "material facts"—i. e., the facts constituting a part of plaintiff's case as he presents it—put in issue by allegations of the complaint and denials of the answer, cannot be questioned. *Elie v. O. Cowles & Co.*, 73 Atl. 258, 259, 82 Conn. 236.

Where a person conducting a business requiring a license, but who is not alleged to be the owner of one, pays money to a person not shown to have any official relation to the bureau of licenses of New York, or to any person employed in such bureau, such fact is not "material" within Pen. Code N. Y. § 96, relating to perjury on an investigation under Greater New York Charter, § 119 (Laws 1901, p. 46, c. 466), by the commissioner of accounts, into the methods of the office of said bureau. *People v. Tillman*, 118 N. Y. Supp. 442, 63 Misc. Rep. 461.

### MATERIAL FRAUD

The term "material," in the phrase "that fraud to be actionable must be material," means that without the fraud the transaction would not have been made, and means a statement of an alleged existing fact or facts, and not merely of some future or contingent event, or an expression of opinion, and the person to whom the statement is made must rely on its truth and must have the right as a person of ordinary business prudence to rely on it. *Boulden v. Stilwell*, 60 Atl. 609, 610, 100 Md. 543, 1 L. R. A. (N. S.) 258.

### MATERIAL MATTER

Only contradictory statements as to "material matters" can be used for the purpose of impeachment, and by "material matters" are meant matters competent to prove one side or the other of the issue, and admissible for that purpose. *Luke v. Cannon*, 62 S. E. 110, 112, 4 Ga. App. 538.

False testimony by defendant, in a civil suit in support of a set-off for money loaned, that no negotiable note was given or accepted

therefor, is testimony "to a material matter," within Rev. St. c. 123, § 1, and is perjury. Where a person charged with perjury because he set up a claim for money loaned in defense to an action by way of set-off, and testified in support of it, and the testimony was false, the fact that he need not have done so, because of another available defense, did not make the claim immaterial matter. *State v. Berilawsky*, 76 Atl. 938, 939, 106 Me. 506.

The words "material matter," as used in Rev. St. § 5392, which denounces as perjury the stating or subscribing to any material matter which the person does not believe to be true after he has taken oath, etc., apply to nonjudicial matters in the same general sense as to judicial matters and import some issue or right to which the oath relates rather than to a mere inquiry or investigation to be made for the detection of violations of law by third persons, and as the requirement of Oleomargarine Act May 2, 1902, § 6, that wholesale dealers shall keep such books and render such returns as the commissioner of internal revenue may, by regulation, require under prescribed penalties for its violation, has no relation to the tax to be assessed on such dealer, it is not such a "material matter" that a false return will support a prosecution for perjury though an oath is required thereto. *United States v. Lamson*, 165 Fed. 80, 84.

#### MATERIAL MISREPRESENTATION

A misrepresentation, as the basis of rescission, must be material; but it can be material only when it is of such a character that, if it had not been made, the contract would not have been entered into. The misrepresentation, it is true, need not be the sole cause of the contract; but it must be of such nature, weight, and force that the court can say, "Without it the contract would not have been made." *Oppenheimer v. Clunie*, 75 Pac. 899, 901, 142 Cal. 313 (citing *Colton v. Stanford*, 23 Pac. 16, 28, 82 Cal. 351, 399, 16 Am. St. Rep. 137).

Whether a misrepresentation is material to the risk essential to make the same available as a defense to a policy, as provided by Act Pa. June 23, 1885 (P. L. 134), depends on whether it was of such substantial importance that the insurer, but for the misrepresentation, would not have made the contract. *Miller v. Maryland Casualty Co.*, 193 Fed. 343, 349, 113 C. C. A. 267.

#### MATERIAL PARTICULAR

In Code Supp. 1907, § 3060a14, providing that, where a negotiable instrument is wanting in any "material particular," the person in possession has prima facie authority to complete it by filling up the blank therein, etc., the word "material" was not used as synonymous with "necessary" so as to restrict the right to filling in an omission

essential to the completion of a negotiable instrument, but included all omitted matter usually found in such instruments, and where a negotiable note was delivered to the payee complete, except for the filling of a blank left for the place of payment, the payee had prima facie authority, before indorsing it to a bona fide holder for value before maturity, to fill the blank so as to make the note payable at a place other than that where the maker resided. *Johnston v. Hoover*, 117 N. W. 277, 278, 139 Iowa, 143.

#### MATERIAL PORTION OF WILL

In Civ. Code 1910, § 3919, providing that the intention to cancel a will will be presumed from the obliteration or canceling of a material portion of the will, "material" does not mean essential, but means important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. *Hartz v. Sobel*, 71 S. E. 995, 1001, 136 Ga. 565, 38 L. R. A. (N. S.) 797, Ann. Cas. 1912D, 165.

#### MATERIAL REPRESENTATION

The word "material," as used in 2 Revised, § 4646, providing that no representation, unless "material," shall prevent a recovery on an insurance policy, is not restricted to a misrepresentation as to a defect which contributes in some way to the loss or damage for which the indemnity is claimed, but a representation is "material" where it would naturally affect the judgment of the insurer in accepting the risk. "Every fact untruly asserted or wrongfully suppressed must be regarded as 'material' if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premium." *Fishblate v. Fidelity & Casualty Co.*, 53 S. E. 354, 356, 140 N. C. 589.

Within the meaning of Ky. St. § 639, providing that no representations in an application for an insurance policy, unless "material" or fraudulent, shall prevent recovery, a representation is material when the policy would not have been issued if the truth had been known. *United States Casualty Co. v. Campbell*, 146 S. W. 1121, 1123, 148 Ky. 554.

A statement in an application for life insurance that applicant had never had any disease of the kidneys is a "material representation" within Rev. N. C. 1905, § 4808, as such representation undoubtedly influenced the action of the company in accepting the risk. *Alexander v. Metropolitan Life Ins. Co.*, 64 S. E. 432, 433, 150 N. C. 536.

The assured's statement of his age, even though not a warranty, is, as a matter of law, a material representation in an application for an accident insurance policy. Cen-

tral Acc. Ins. Co. v. Spence, 126 Ill. App. 32, 45.

A statement that insured had never had cancer is a statement material to the risk, and its falsity a good defense to the policy. *Brisou v. Metropolitan Life Ins. Co. (Ky.)* 115 S. W. 785, 786.

"Representations" of the seller of a cash register that the same will save the expense of a bookkeeper, and that books can be kept thereupon in half the time that the books could otherwise be kept, and that the machine can be operated by any one of ordinary intelligence, are not "representations as to material facts," and, though false, are not ground for a rescission by the buyer of the contract of sale. *National Cash Register Co. v. Townsend Grocery Store*, 50 S. E. 306, 307, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349.

### MATERIAL RIGHT

The right of a defendant to challenge peremptorily is a "material right." *Betts v. United States*, 132 Fed. 223, 229, 235, 65 C. C. A. 452.

### MATERIAL VARIANCE

A variance is not "material" unless it is so misleading as to prejudice the party in maintaining his action or defense on the merits. *Ostrom v. Woodbury*, 122 Pac. 825, 827.

A complaint by an injured brakeman alleged that the engineer negligently, and without any warning, applied the steam, and violently jerked the slack out of the train, causing plaintiff to miss his footing, whereby he was thrown between the cars, etc., and that when the engineer started the train he was working on top in the act of stepping from one car to another, and that as the train was started and the cars were jerked apart he fell between them and was injured. Held, that there was no variance between the complaint and evidence that the engineer started the train at a high rate of speed, and that if there was it was immaterial, in view of *Revisal 1905*, § 515, providing no variance shall be deemed material unless the adverse party is actually misled to his prejudice in suing on the merits. *Coore v. Seaboard Air Line Ry. Co.*, 68 S. E. 210, 152 N. C. 702.

The variance between an indictment charging the forgery of a deed of trust set out according to its tenor, and the deed of trust offered in evidence, consisting of clerical inaccuracies, such as describing the land in one instrument as "eighty (80) acres" and in the other as "80 acres," the use of the words "party of the first part" in one instrument and the words "first party" in the other, and the word "falls" in one instrument and the word "failed" in the other, is immaterial within *Rev. St. 1909*, § 5114, providing that variance between the indictment and the evidence in specified cases shall not be ground for an acquittal unless the court shall

find that the variance is material and prejudicial to the defense. *State v. Witherspoon*, 133 S. W. 323, 326, 231 Mo. 706.

The variance between an information alleging a sale to "F. H. Leslie" and the evidence of a sale to "Frank W. Leslie" is not material or prejudicial, within *Comp. St. 1910*, § 6166, forbidding an acquittal for a variance, unless found by the court to be "material" to the merits or "prejudicial" to defendant. *Eggart v. State*, 116 Pac. 454, 455, 19 Wyo. 285.

Plaintiff alleged that while she was a passenger in defendant's cab defendant negligently so managed its team and cab that the team took fright and ran with the cab, and, on account thereof, she was thrown down in the cab, and was injured in her ankle, back, etc. The answer was a general denial, with the plea of contributory negligence. Plaintiff introduced evidence without objection showing that, after she entered the cab, the team became frightened and started to run with the cab, but the testimony did not show whether the injury was caused by being thrown from her seat to the floor of the cab or while trying to get out of the cab while the team was running away, her testimony showing that she made an attempt to get out of the cab while the team was running, and that her injury might have been caused thereby. *Rev. St. 1899*, § 656 (*Ann. St. 1906*, p. 674), provides that, when the variance between pleading and the proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs. Held, that the variance between the allegation that she was injured by being thrown down in the cab and the evidence that she was injured while attempting to get out of the cab was immaterial, and that defendant by failing to object to the testimony waived his objection to it, so that a charge forbidding recovery if plaintiff was injured while attempting to get out of the cab while the team was running away was error. *Daley v. Redburn*, 127 S. W. 924, 925, 143 Mo. App. 653.

In an action against a carrier to recover for the death of one alleged to have been a passenger, there can be no recovery on the ground of ordinary negligence of defendant in injuring a person not a passenger. Where a complaint alleged that plaintiff's decedent at the time of his negligent killing by defendant carrier was in the discharge of his duties as a railway mail clerk, a recovery may be had, though the evidence establishes that decedent at the time of the fatal accident was not in the discharge of his duties as a mail clerk, but was a gratuitous passenger, as a carrier owes the same degree of care in the transportation of a gratuitous passenger as in the case of a passenger for hire; and hence the variance was not material within the meaning of *Comp. Laws 1907*, §§ 3001-3003, providing that no vari-

ance between the allegations and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice. *Schuyler v. Southern Pac. Co.*, 109 Pac. 458, 465, 37 Utah, 581.

The variance between a complaint setting forth a cause of action on an open, current, and mutual account, and the proof of a stated account, was immaterial within Code Civ. Proc. § 469, providing that no variance between the pleading and the proof shall be deemed material unless it has actually misled the adverse party, where defendant was not misled as disclosed by his answer in denying the existence of the account made a part of the complaint, but merely tendering an issue on the question whether the account was mutual, open, and current between himself and plaintiff's assignor. *Culver v. Newhart*, 128 Pac. 975, 978, 18 Cal. App. 614.

### MATERIALITY

The test of "materiality" is whether the statement made could have influenced the tribunal upon the question at issue before it. Any statements made in a judicial proceeding for the purpose of affecting the decision, and upon which the judge acts, are material. *McLaren v. State*, 62 S. E. 138, 139, 4 Ga. App. 643 (citing 6 Words and Phrases, pp. 5309, 5310).

### MATERIALLY

"Materially" is defined in Black's Law Dictionary as "immediately; more or less necessary; having influence or effect; going to the merits; having to do with matter as distinguished from form." An instruction that one may recover for injury, the proximate result of the negligence of another, providing he himself did not contribute thereto materially by negligence, is not erroneous because of the use of the word "materially." *Indianapolis & M. Rapid Transit Co. v. Edwards*, 74 N. E. 533, 534, 36 Ind. App. 202.

A court may at any time correct a judgment as to immaterial matters occasioned by inadvertence; but this right does not exist where such amendment materially affects the rights of litigants objecting thereto, using the word "materially" to mean affecting the rights of objecting litigants. *Calkins v. Monroe*, 119 Pac. 680, 17 Cal. App. 324.

In instructing upon a city's liability for damage to property by the overflow of a stream by changing the grade of a street, it is usual to instruct that the volume of water must have been "materially and unduly" increased; "unduly" meaning disproportionately, and not being synonymous with "materially." *Walters v. City of Marshalltown*, 120 N. W. 1046, 1048, 145 Iowa, 457, 26 L. R. A. (N. S.) 199.

The error, if any, in the admission of a deposition, on the ground that the party offering it had failed to show the nonresidence of

the witness, was harmless, where his testimony only tended to prove a fact otherwise established by competent and uncontroverted evidence, and the error did not "materially" affect the merits of the action, and the court could not, under Rev. St. 1899, § 865, reverse the judgment on that ground. *O'Keefe v. United Rys. Co. of St. Louis*, 101 S. W. 1144, 1147, 124 Mo. App. 618.

### MATERIALLY FALSE STATEMENT

A bankrupt, who obtained credit for additional goods on a materially false statement of his financial condition, and who subsequently to the purchase of the additional goods on credit made payments on earlier purchases, so that the amount owed by him at the time he went into bankruptcy was less than the amount of his indebtedness at the time of the making of the false statement, was guilty of making a materially false statement, defeating his right to a discharge in bankruptcy, under Bankruptcy Act July 1, 1898, c. 541, § 14b, as amended by Act Feb. 5, 1903, c. 487, § 4. In *re Arenson*, 195 Fed. 600, 610.

A "materially false statement," within the meaning of Bankr. Act 1898, § 14b (3) (Act July 1, 1898, c. 541, 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797), which makes it a ground for denying a discharge to a bankrupt that he has obtained property on credit from any person on a materially false statement in writing made to such person for the purpose of obtaining such property on credit, must have been made with knowledge that it was untrue and with fraudulent intent; and a statement made by one partner from facts stated to him by his copartner, who was to furnish the entire capital for the business, although in fact untrue, will not defeat the right of the partner making it to a discharge, where the untruthfulness of the material statements so made was not known to him. *W. S. Peck Co. v. Lowenbein*, 178 Fed. 178, 180, 101 C. C. A. 498.

The term "materially false statements in writing," as used in Bankr. Act July 1, 1898, c. 541, § 14b, subd. 3, as amended by Act Feb. 5, 1903, c. 487, § 4, which bars a discharge where the bankrupt obtained property on credit from any person on "a materially false statement in writing" made for the purpose of obtaining such property on credit, implies a statement knowingly false or made recklessly without an honest belief in its truth, and with a purpose to mislead or deceive and thereby obtain property upon credit from the person to whom it is made. Drafts drawn by the assistant cashier of a bankrupt, operating a private bank, after he was insolvent and without his knowledge, and which were not paid in accord with the bankrupt's custom to exchange drafts with another bank on daily settlements, do not constitute a "materially" false statement in writing with-

in the bankruptcy act. *Firestone v. Harvey*, 174 Fed. 574, 577.

## MATERIALMAN

The mechanic's lien act of 1888 (Acts 1883, p. 140, c. 115) and amendments thereto (Burns' Ann. St. 1908, §§ 8295-8307; Burns' Ann. St. 1901, §§ 7255-7287), giving a lien to "mechanics, laborers, and materialmen," does not give a lien to contractors or subcontractors. *Fleming v. Greener*, 87 N. E. 719, 90 N. E. 73, 75, 178 Ind. 260, 140 Am. St. Rep. 254, 21 Ann. Cas. 959.

The term "materialman" does include a subcontractor who excavated the cellar of a building with his teams and laborers at a specified price per cubic yard. *McNab & Harlin Mfg. Co. v. Paterson Bldg. Co. (N. J.)* 63 Atl. 709, 717.

Lien Law (Laws 1897, p. 516, c. 418) § 2, defines a "subcontractor" as one who enters into a contract for the improvement of real property with a contractor, and defines a "materialman" as any person other than a contractor who furnishes material for the improvement. Held, that one agreeing with contractor to install a system of temperature regulation in a building, involving both the performance of labor and furnishing of materials, was a subcontractor within the statute. A company which merely sold steam radiators to the contractors, but performed no work on the building, was a "materialman," and not a "subcontractor," within Lien Law (Laws 1897, p. 516, c. 418) § 2, defining those terms. *Herman & Grace v. City of New York*, 114 N. Y. Supp. 1107, 1112, 130 App. Div. 531.

A written order for oak flooring, placed with defendant by the general contractor, contained the words "Charge contract 1,981—C-5," and another order to defendant recited that it covered the furnishing and delivery at the owner's switch of oak flooring for a contract known in the contractor's office as "1,981," which was the contract between the general contractor and the owner. Lien Law (Laws 1897, p. 515, c. 418) § 2, defines a "subcontractor" as one who enters into a contract with a contractor for the improvement of real property, and defines a "materialman" as any person other than a contractor who furnishes material for such improvement. Held, that defendant was a materialman, and not a subcontractor; the mere knowledge that the material was used by the contractor in the performance of a certain contract being insufficient to make him a subcontractor. *Hedden Const. Co. v. Proctor & Gamble Co.*, 114 N. Y. Supp. 1103, 1106, 62 Misc. Rep. 129.

Where complainant contracted with defendant, the owner of certain premises, to furnish mining machinery, appliances, and materials, and install the same in a mill to

be erected at defendant's mines and constructed by defendant, without any other contractor, he was an original contractor, and not a "materialman," within Cutting's Comp. Laws Neb., § 3885, and therefore was entitled to 60 days within which to file his claim for a lien. *Salt Lake Hardware Co. v. Chalmers Mining & Electric Co.*, 128 Fed. 509, 510.

Under Laws N. Y. 1897, p. 514, c. 418, § 8, giving a lien to a "contractor, subcontractor, laborer, or materialman, who performs labor or furnishes material for the improvement of real property," the terms "contractor," "subcontractor," "laborer," and "materialman," while they refer primarily to the man who has a formal contract with the owner, or a subcontractor, with the contractor, or who performs manual labor or furnished material, also embrace the man who buys the labor and material which enter into the improvement. *Kerwin v. Post*, 104 N. Y. Supp. 1006, 1007, 120 App. Div. 179.

A contract for the carpenter work of a building required "Davis or other equal steel stiffeners" for window frames. The contractor sublet the contract for the installation of the window frames, and relator agreed to furnish, but not to install, the stiffeners in accordance with measurements furnished him by the subcontractor, and not in accordance with the specifications of the original contract. Held, that relator was a "materialman," and not a subcontractor, and was therefore entitled to recover on the contractor's bond given under Comp. Laws, §§ 10743-10745, requiring contractors of public buildings to give security for the payment of material furnished therefor. *People, for Use of Davis, v. Campfield*, 114 N. W. 659, 660, 150 Mich. 675.

Code Civ. Proc. § 1183, provides that contracts between the owner and the contractor for improvements exceeding \$1,000 in cost shall be in writing and filed in the office of the county recorder, otherwise the contract shall be void, and no recovery shall be had thereon by either party. Plaintiff contracted with a lessee to raise a number of old buildings above the street level and remodel them, and "furnish all of the necessary labor and material to be used to fully complete the work," plaintiff to receive the actual cost of the materials and labor, plus 10 per cent. and the reasonable value of the work, to be determined by the amount of work and labor done when it was completed. Held, that the labor to be performed was not merely incidental to the furnishing of the materials, and hence plaintiff was an original contractor within the meaning of the statute, and not a materialman, and was not entitled to a mechanic's lien where the contract was not in writing and filed with the county recorder; the fact that the contract did not specify the price or total value of the labor and materials not excusing the parties from reducing

it to writing, it being apparent that the cost of the work would exceed \$1,000. *Peterson v. Freiermuth*, 121 Pac. 299, 300, 17 Cal. App. 609.

One contracting with the agent of the owner erecting a building for decorative plaster work, supplying both labor and material, is not a materialman within Rem. & Bal. Code, § 1133, requiring a materialman to send to the owner a duplicate statement of the materials furnished to the contractor, which only covers a situation where three persons are involved, and where the owner has no contractual relation with the one furnishing materials.

A materialman who delivers materials to the owner under a contract with him through his agent need not send to the owner the duplicate statement required by Rem. & Bal. Code, § 1133. *Architectural Decorating Co. v. Nicklason*, 119 Pac. 177, 66 Wash. 198.

Under Lien Law (Consol. Laws, c. 33) § 2, defining a contractor as one entering into a contract with the owner of real property for the improvement thereof, and defining a materialman as any person other than the contractor furnishing materials for such improvement, and defining the term "improvement" as including the erection, alteration, or repair of any structure on real estate, and any work done on the property or materials furnished for its improvement, a contract requiring one to furnish all the window frames, sash, glass, and trim in and to buildings in course of construction for a lump sum, payable in installments as the work progressed, and requiring him to make a large part of the materials according to plans, is a contract for the permanent improvement of real estate within the lien law, and he is entitled to a lien for the materials furnished and work done. *Western Sash, Door & Lumber Co. v. Gaul Const. Co.*, 126 N. Y. Supp. 1110, 1111.

One furnishing to a contractor sashes, doors, and glass for a building is not a subcontractor, but is a "materialman," within Laws 1909, c. 45, requiring persons furnishing materials to a contractor to deliver to the owner a duplicate statement of such materials. *Finlay v. Tagholm*, 113 Pac. 1083, 1084, 62 Wash. 341.

Code Civ. Proc. § 3414, makes a laborer's or materialman's lien prior to a contractor's. Lien Law (Consol. Laws, c. 33) § 2, defines a "contractor" as one who contracts with an owner of land to improve it, a "materialman" as one, other than a contractor, who furnishes material for such improvement, and an "improvement" as including work done on property or "materials furnished for its permanent improvement." Held, that the lien of one who installed plumbing, of one who furnished trim for the building under contract with the owner, and of one who sold brick and mason's building materials to the owner

for use in the building, are all on equality, being entitled to preference in the order of time. *Jackson v. Egan*, 94 N. E. 211, 200 N. Y. 496.

Laws 1909, c. 207, § 1, requires any municipal council contracting for city work to take from the contractor a bond with sureties for the performance of the contract, and for the payment of all subcontractors and materialmen. Section 2 provides that a failure to require such bond shall make the city liable to the persons mentioned in section 1. Held, that the statute requiring municipal corporations to take such bonds from its contractors is an independent enactment, and that Mechanic's Lien Law (Laws 1909, c. 45) § 1, providing that the materialman should deliver or mail to the owner of property a duplicate statement of the material furnished or contracted for, had no application. *Gate City Lumber Co. v. City of Montezano*, 111 Pac. 799, 800, 60 Wash. 586.

One who furnished galvanized iron and solder to a manufacturer, which was made by the latter into guttering and spouting, and delivered to a contractor, for a building, was not a "materialman" within the meaning of a condition of the contractor's contract and bond requiring him to satisfy the claims of laborers and "materialmen." *Berger Mfg. Co. v. Lloyd*, 91 S. W. 468, 469, 113 Mo. App. 205.

Under Lien Law, Laws 1897, p. 515, c. 418, § 2, defining a materialman to be one other than a contractor who furnishes materials for an improvement, persons who contracted directly with the owner, though solely to furnish materials, are original independent contractors, and not "materialmen," entitled to a preference under section 13. *Hall v. Thomas*, 111 N. Y. Supp. 979, 982.

Materialman, as used in Mechanics' Lien Law (P. L. 1898, p. 538), is not limited to one who has furnished materials only, that is, who simply supplies to the building materials which some one else is to incorporate by his labor, but includes as well one who furnishes both labor and materials combined, or who furnishes materials installed in the building, including the labor of installation. *Beckhard v. Rudolph*, 68 Atl. 705, 706, 68 N. J. Eq. 740.

Subcontractors, such as plumbers, plasterers, and painters, who supply the material and put it into the building, are not "materialmen" within the meaning of Laws 1898, p. 538, c. 226, § 3, providing that when a contractor shall refuse to pay any person who has furnished materials for the erection of a building, for which contract has been filed, it shall be the duty of such "materialman" to give written notice, etc., in order to procure a lien. *Beckhard v. Rudolph*, 59 Atl. 253, 255, 68 N. J. Eq. 315.

#### As contractor

See Contractor; Subcontractor.

## MATERIALS

See Borate Material; Building Material; Claim for Labor or Material; Forest Material; Labor and Material; Lighter Material; Single Component Material.

Furnishing materials, see Furnish.

Kind of material, see Kind.

Other good material, see Other.

Other material, see Other.

Raw material, see Raw.

Similar material, see Similar.

Under the lien laws, generally, "material" is deemed to be something that goes into, and becomes a part of the finished structure, such as lumber, nails, glass, hardware, etc., which are necessary to the completion of a building. *Gilbert Hunt Co. v. Parry*, 110 Pac. 541, 543, 59 Wash. 646, Ann. Cas. 1912B, 225.

The word "material," as used in a statute declaring that every person furnishing materials has a lien thereon for the same, has a well defined and understood legal significance. It is deemed to be something that goes into and becomes a part of the finished structure, such as lumber, nails, glass, hardware, and a thousand other things that might be meant, which are necessary to the completed erection of a building or structure. Webster defines the word as the substance or matter of which anything is made or may be made. The word supplied is broader than the word "materials," but it cannot by any fair construction be construed so as to include materials furnished. *Tsutakawa v. Kumamoto*, 101 Pac. 869, 870, 871, 53 Wash. 231.

"Materials," within Lien Law (Consol. Laws 1909, c. 33) § 5, giving a lien for materials furnished to a municipal contractor, means matter intended to be used in the creation of a mechanical structure; the substance of which anything is made (citing Words and Phrases Judicially Defined). *People ex rel. Troy Public Works Co. v. City of Yonkers*, 129 N. Y. Supp. 920, 921, 145 App. Div. 527.

The word "materials," in a bond of a government contractor under a contract for the construction of a sewer, conditioned, as required by act of Congress, on his making payment to all persons supplying him "labor and materials" in the prosecution of the work, does not include posts, lumber, and gravel furnished him; the same being equipments used in the performance of the contract. *United States to Use of Lanham v. Jacoby* (Del.) 61 Atl. 871, 5 Pennewill, 576.

"Material" is the substance or matter of which anything is made or to be made. The enumeration in paragraph 11, *Tariff Act* July 24, 1897, c. 11, of "other borate material," refers only to borate materials found in nature in a raw condition, such as the "borates of lime or soda" included in the same provision, and does not embrace borate of man-

ganese, or bormangan, which is a manufactured article made from manganese and borates of lime or soda, and which is held to be dutiable as a chemical compound or salt under paragraph 3 of said act. *Hempstead v. Thomas*, 129 Fed. 907, 908, 64 C. C. A. 339.

The word "material" has a well defined and understood legal significance. Under the lien laws generally "material" is deemed to be something that goes into and becomes a part of the finished structure, such as lumber, nails, glass, hardware, and a thousand other things that might be mentioned, which are necessary to the complete creation of a building. Webster's definition of "material" is "the substance or matter of which anything is made or may be made." Material has not the same significance as provisions, which is defined by Webster as a stock of food collected or stored, and *Laws* 1893, p. 32, c. 24, § 1, entitled "An act creating and providing for the enforcement of liens for labor and material," whereby a lien is given for provisions furnished to a contractor on a railroad, etc., is void, under Const. art. 2, § 19, providing that no bill shall embrace more than one subject, which shall be expressed in the title. *Armour & Co. v. Western Construction Co.*, 78 Pac. 1106, 1107, 36 Wash. 529.

Act Aug. 13, 1894, c. 280, 28 Stat. 278, requires a contractor for a public building to give bond to promptly pay for all labor and materials supplied to him for the work. A contract provided that the contractor should furnish "materials for the construction of" certain buildings for the United States government, "all in accordance with the plans and specifications" made a part of the agreement. The condition of the contractor's bond was for performance of the covenants and agreements in the contract and for the prompt payment for all labor or materials supplied to the contractor for the work. Held, that the bond contained two distinct covenants, one for the performance of the contract and the other for the protection of persons supplying labor and materials, and the latter should be interpreted in the light of the former, and the meaning of the "materials" in the bond should be ascertained from the contract, including the specifications, construed in view of the work to be performed and in the light of the circumstances surrounding the transaction. *United States, to Use of Elias Lyman Coal Co., v. United States Fidelity & Guaranty Co.*, 71 Atl. 1106, 1107, 82 Vt. 94.

Rev. Laws, c. 104, § 1, authorizing certain cities, for the prevention of fire, to regulate the inspection, materials, construction, alteration, and use of buildings, does not authorize an ordinance prohibiting reshingling of a roof, since the section does not comprehend repairs; the word "construction" being used to mean the erection of a new building or an

addition to an old one, the word "alteration," to denote a change or substitution in a particular of one part of a building for a building different in that particular, the word "use" indicating the purpose for which the building may be occupied, and the word "materials" being a word of general signification, and necessarily ancillary to the other more definite terms employed in the statute. *Commonwealth v. Hayden*, 97 N. E. 783, 784, 211 Mass. 296.

#### Appliances

There is a wide distinction between "material" and "appliance." The term "appliance" refers to machinery and all the instruments used in operating it. "Materials" include everything of which anything is made. A master must use ordinary care in instructing a servant as to the use of materials furnished and is only required to use ordinary care in furnishing materials to be manufactured. *Gallman v. Union Hardware Mfg. Co.*, 43 S. E. 524, 525, 65 S. C. 192 (citing in support of definition *Bodie v. Charleston & W. C. Ry. Co.*, 39 S. E. 715, 61 S. C. 480).

Electrical appliances furnished to a light and power plant are not "materials," within Revisal 1905, § 2016, giving a lien for materials furnished in the erection and repair of buildings, where none of the appliances ever became any part of the plant, and where transformers and wires supplied were merely strung on electric light poles. *Fulp & Linville v. Kernersville Light & Power Co.*, 72 S. E. 869, 157 N. C. 157.

#### Architect's plans and specifications

Plans and specifications drawn by an architect for the erection of a building are not "materials," within the purview of Revisal 1905, § 2016, giving a mechanic's lien upon buildings for materials furnished. *Stephens v. Hicks*, 72 S. E. 313, 315, 156 N. C. 239, 36 L. R. A. (N. S.) 354, Ann. Cas. 1913A, 272.

#### Castings

Iron castings from 10 to 24 feet in length, known as "sill castings or channels," were furnished to a tobacco company with the necessary bolts for use in its factories, to support tobacco presses. Most of them were used for supporting presses or tables connected therewith, without being fastened to the floor and without being put under all the presses. Some were used for other purposes, such as skids, and "dunnage"; that is, were put under goods to raise them above the floor. Those under presses and tables could be readily removed, and were in fact taken from one building to another. There was no proof that they were customarily thus placed in tobacco factories, or were in any way necessary to carry on the work, or that it could not be done as well without them. Held, that the castings were not "material" or "machinery," within Rev. St. 1899, § 4203 (Ann. St. 1906, p. 2277), giv-

ing a lien to a person furnishing the same for a building. *Banner Iron Works v. Etna Iron Works*, 122 S. W. 762, 763, 143 Mo. App. 1.

#### Coal and oil

Coal used by a building contractor to heat buildings, covered by specifications requiring him to provide fuel for heating while the work is going on, is "material," within the implied terms of the contract, which he is bound to furnish, and hence within the scope of his bond, required by the federal statute (Act Aug. 13, 1894, c. 280, 28 Stat. 278), for the protection of persons supplying materials. *United States, for Use of Elias Lyman Coal Co., v. United States Fidelity & Guaranty Co.*, 75 Atl. 280, 281, 83 Vt. 278.

A contract with the United States government to furnish all labor and materials necessary for buildings at a fort provided that all materials should be subject to the acceptance or rejection of an officer in charge, and any material rejected should be at once removed and replaced by the contractor. The contractor gave bond for performance of the contract and for the prompt payment for all labor or materials supplied to him for the work, as expressly required by Act Aug. 13, 1894, c. 280, 28 Stat. 278. Held, that coal furnished for use in the heating plants and in certain of the buildings for heating purposes while work of plastering, laying floors, painting, and varnishing was being done was not "materials" within the bond or the statute. *United States, for Use of Elias Lyman Coal Co., v. United States Fidelity & Guaranty Co.*, 71 Atl. 1106, 1108, 82 Vt. 94.

Where a contractor for the construction of a water reservoir for a city entered into a bond conditioned that all claims for labor and materials furnished and supplied or performed in and about the work should be promptly paid, the signers of the bond were not liable on a claim for coal furnished to a subcontractor and used in generating steam to run a steam shovel and locomotive used in making excavations. *City of Philadelphia v. Malone*, 63 Atl. 539, 541, 214 Pa. 90.

Consumable supplies furnished to a vessel, such as gasoline for a motor boat, are not within Code Pub. Gen. Laws Md. 1904, art. 63, § 43, giving a lien on domestic vessels "for materials furnished or work done in the building, repairing or equipping the same." *The Princess*, 185 Fed. 218, 219.

A claim against a railroad for furnishing coal and oil and tools was not within *Sayles' Rev. Civ. St. art. 3294*, giving a lien to the furnisher of "material" for the construction or repair of a railroad. *Waters-Pierce Oil Co. v. United States & Mexican Trust Co.*, 99 S. W. 212, 214, 44 Tex. Civ. App. 397.

A person furnishing coal consumed in the operation of a steam shovel used by a contractor in the construction of a railroad



is not entitled to a lien on the right of way and franchises of the railroad company, under Burns' Ann. St. 1901, § 7265, giving such lien for labor or "materials" used in the construction or repair of any railroad. *Cincinnati, R. & M. R. R. v. Shera*, 73 N. E. 293, 36 Ind. App. 315.

"Materials," as used in a statute giving a lien on the property of railroads for materials furnished in the construction of the road, does not include gasoline, gasoline torches, and coal oil used for lighting a railroad tunnel while in process of construction, packing, cotton waste, electric light supplies, carts, tools, shovels, spades, blacksmith tools, wagons, scrapers, plows, machines, machinery, derricks, derrick crabs, cables, and repairs for all these. The test is not whether the article furnished was consumed in its use, either instantly, as in case of explosives, or by degrees from long and hard use. If lien is allowed for tools and machinery, and horses and mules, for complete destruction, on the same principal it should be allowed for deterioration in value pro tanto, when not completely destroyed. *S. B. Luttrell & Co. v. Knoxville, L. & J. R. Co.*, 105 S. W. 565, 571, 119 Tenn. 492.

#### Dump cars and derricks

Dump cars and derricks are in the nature of tools and appliances used by a contractor for his own convenience in executing the contract and are not "materials" within the provision of a contractor's bond. *City of Philadelphia v. Malone*, 63 Atl. 539, 540, 214 Pa. 90 (citing *United States v. Morgan*, 111 Fed. 474).

A claim for rental of scrapers is neither for "labor performed" nor "material furnished," within Ballinger's Ann. Codes & St. § 5902, giving one who, at the owner's request, grades, etc., land or a street in front thereof, a lien for the labor performed and the materials furnished. *Hall v. Cowen*, 98 Pac. 670, 671, 51 Wash. 295.

#### Engine

Under Revisal N. C. 1905, § 2016, which gives a lien on a vessel for all debts contracted "for work done on the same or material furnished," one who furnished an engine to be installed in a gas boat, relying on the credit of the vessel, is entitled to a lien therefor as "material," on compliance with the statute as to recording; and it is immaterial that by the contract it reserved title to the engine until paid for. *The Pearl*, 189 Fed. 540, 542.

#### Explosives

A municipal waterworks contractor's bond to secure payment for "material" under St. 1904, c. 349, covers dynamite used in the work and fuses used to explode it. *E. I. DuPont De Nemours Powder Co. v. Cugin-Pace Contracting Co.*, 92 N. E. 1023, 1025, 206 Mass. 585.

Explosives used in blasting rock in grading and tunneling for a railroad are "materials" for which the furnisher is entitled to a lien under Acts 1883, p. 296, c. 220, as amended by Acts 1891, p. 215, c. 98. *Hercules Powder Co. v. Knoxville L. & J. R. Co.*, 83 S. W. 354, 357, 113 Tenn. 382, 67 L. R. A. 487, 106 Am. St. Rep. 836 (citing *Rapauno Chemical Co. v. Greenfield & N. R. Co.*, 59 Mo. App. 6; *Simmons v. Carrier*, 60 Mo. 581; *Hazard Powder Co. v. Byrnes* [N. Y.] 21 How. Prac. 189; *Wood v. Donaldson* [N. Y.] 17 Wend. 550; *McDermott v. Palmer*, 8 N. Y. 383; *Keystone Mining Co. v. Gallagher*, 5 Colo. 23; *Elliott, Railroads*, p. 1597, § 1068; *Giant Powder Co. v. Oregon Pac. Ry. Co.*, 42 Fed. 474, 8 L. R. A. 700).

Under Laws 1897, p. 516, c. 418 (Gen. Laws, c. 49), providing that "a contractor, subcontractor, laborer, or materialman who performs labor or furnishes material for improvement of real property with the consent or at the request of the owner thereof \* \* \* shall have a lien. \* \* \*" A lien is authorized for dynamite furnished to and used by a subcontractor for blasting rock for the excavation and building of a roadbed of a railway, as that is included in the term "materials." Explosives used for such purpose enter into and form a part of the permanent structure, as well as the earth, rails, ties, culverts, and bridges. *Schaghticoke Powder Co. v. Greenwich & J. Ry. Co.*, 76 N. E. 153, 154, 155, 183 N. Y. 306, 2 L. R. A. (N. S.) 288, 111 Am. St. Rep. 751, 5 Ann. Cas. 443.

Blasting powder, dynamite, fuse, and caps, necessarily used by contractors in building a sewer, are "materials," within the meaning of a guaranty that the contractors would pay for material used in the work. *Kansas City, to Use of Kansas City Hydraulic Press Brick Co. v. Youmans*, 112 S. W. 225, 232, 213 Mo. 151.

The word "materials," in Pub. St. 1882, c. 16, § 64, requiring the contractor for a public work, on which liens might attach for materials if it was for a private owner, to give bond for payment for such materials, and chapter 191, § 1, giving a lien for materials used in the erection of a structure, etc., includes gunpowder used by a contractor for an aqueduct for a water supply in blasting for the trench, where the greater part of the material excavated was used in the construction of the aqueduct, but does not include coal burned in engines used on the work. *George H. Sampson Co. v. Commonwealth*, 88 N. E. 911, 912, 202 Mass. 326.

Explosives used in grading a tunnel for a railroad are materials for which the furnisher is entitled to a lien, under the act conferring a lien for work and materials furnished in the construction and repair of railroads (Acts 1883, p. 297, c. 220, § 8, as amended by Acts 1891, p. 215, c. 98, § 1), giving such lien to materialmen "for the delivery of ma-

terial" to a subcontractor "who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repairs of its culverts or bridges, \* \* \* or who aids in the laying of its track." *S. B. Luttrell & Co. v. Knoxville, L. & J. R. Co.*, 105 S. W. 565, 570, 119 Tenn. 492.

#### Feed

Neither an article of necessity furnished for the use of the family, nor feed for horses set apart as a part of the homestead, is "material furnished for the benefit of the homestead" within the constitutional provision that homestead property may be sold for material furnished therefor. *McLamb & Co. v. Lambertson*, 62 S. E. 107, 109, 4 Ga. App. 553.

Under Rev. St. 1906, § 3208, providing that a person furnishing materials for the construction of a railroad shall have a lien for the payment of the same on such railroad, the term "materials," as therein used, includes such articles only as are furnished for the construction of the road, and a person who furnishes feed to a contractor for the keep of teams employed in working on such railroad is not, within the meaning of the section, furnishing materials. *Pennsylvania Co. v. Mehaffey*, 80 N. E. 177, 179, 75 Ohio St. 432, 116 Am. St. Rep. 746, 9 Ann. Cas. 305.

#### Gravel

The charter of Lowell created a department of supplies, with a chief elected annually, and section 3 requires all materials and supplies for the city to be purchased by the head of such department, subject to the mayor's approval, and provides that, so far as practicable, such purchases shall be made after public advertisement and under contract approved by the mayor. Section 6 provides that heads of departments shall have general charge of matters relating thereto, and shall execute all contracts, except for purchase of material and supplies; and section 7 forbids the city council, or any committee or member, from making contracts, purchasing material, etc., or expending public money, except to defray incidental expenses of the council. Held, that the provision relating to purchase of supplies and material in section 3 could not be construed so as to limit the word "purchase" to a purchase for money, the word "supplies" to articles of food, or the word "material" to that which the city has on hand for manufacture of other things, so that purchase of gravel, to be removed by the city and used on the streets and paid for by other filling deposited on the lot from which it was taken, was a purchase of material, which, under section 6, the superintendent of streets had no authority to make. *Bartlett v. City of Lowell*, 87 N. E. 195, 196, 201 Mass. 151.

#### Hay and grain

Rev. St. 1906, § 3211, while it, in terms, extends the provisions of the above section 3208, to such persons as furnish hay, grain, etc., on the order of a contractor or subcontractor, for their use or for use of persons employed by them, or either of them, while furnishing material and labor for or in the construction of such railroad, does not extend or enlarge the meaning of the word "materials"; nor does it impose upon the railroad company a personal liability for the articles thus furnished, if no lien therefor be taken and perfected. *Pennsylvania Co. v. Mehaffey*, 80 N. E. 177, 180, 75 Ohio St. 432, 116 Am. St. Rep. 746, 9 Ann. Cas. 305.

The lighting of a candle wrapped with paper and corn husks, and placing it in some hay in a barn with intent to set fire to the hay and burn the barn, but which never set fire to the barn itself or anything in the barn, was a setting fire to "material" within Rev. St. 1860, § 4227, declaring that if any person set fire to any building, etc., or to any material with intention to burn any such building, he shall be punished. Hence a count so alleging charged a crime. *State v. Johnson*, 19 Iowa, 231, 232.

#### Hire of teams

The hire of teams furnished a subcontractor for use in repairing a railroad is not within Kirby's Dig. § 6661, giving a person who furnishes any "material, machinery, fixtures, or other things" towards the construction or equipment of a railroad a lien. *St. Louis, I. M. & S. Ry. Co. v. Love*, 86 S. W. 395, 397, 74 Ark. 528.

#### Manufactured goods

Ky. St. § 2487, provides that, when the property of the operator of a manufacturing establishment shall be assigned for the benefit of creditors, persons who shall furnish material and supplies to carry on the business shall have a lien on the assets therefor. The bankrupt was a leather manufacturer, and also conducted a jobbing business in the same line as another department, in which it bought and sold leather goods. Held, that manufactured goods so purchased for resale were not "materials and supplies" for carrying on the bankrupt's manufacturing business, and hence the creditors furnishing the same were not entitled to a lien therefor. *In re Starks-Ullman Saddlery Co.*, 171 Fed. 834, 835, 96 C. C. A. 506.

#### Stationery and printing

A claim for stationery and printing is not a claim for "materials," within V. S. 3903 (P. S. 4388), relating to preferred creditors. *Bell v. St. Johnsbury & L. C. R. Co.*, 56 Atl. 105, 76 Vt. 42.

#### Steam shovel

Lien Law (Consol. Laws 1909, c. 33) § 5, giving a lien for labor or "materials" furnished a municipal contractor, does not give a

llen for the charge for a steam shovel. *Troy Public Works Co. v. City of Yonkers*, 129 N. Y. Supp. 920, 921, 145 App. Div. 527.

## MATHEMATICAL DEMONSTRATION

A "mathematical demonstration" is wholly different from a "moral certainty." Evidence of demonstration relates to necessary truths, truths as to which the supposition of the contrary involves not merely what is not and cannot be true, but what is also absurd, whereas moral evidence is the basis of contingent truth. It follows obviously that the convictions which these distinct and dissimilar classes of evidence are capable of producing are necessarily of very different natures. In the one absolute certitude is the result, to which moral certainty, the highest degree of assurance of which truths of the latter class admit, is necessarily inferior. *Wills*, Cir. Ev. 5. Moral certainty is that full and complete assurance which admits of no degrees, and induces a sound mind to act without doubt upon the conclusions to which it naturally and reasonably leads. 2 *Stewart's Elements*, c. ii, § 4. It is apparent, then, that the precision attainable in the one case is of a nature of which the other does not admit. *Bowman v. Little*, 61 Atl. 1084, 1086, 101 Md. 273.

## MATRIMONY

See Bonds of Matrimony.  
See, also, Marriage.

"Matrimony" contemplates a mutual performance of the correlate duties which the law superinduces upon the marriage, and, while one does his part, the other is not authorized to withdraw and live in separation. *Massey v. Massey*, 81 N. E. 732, 733, 40 Ind. App. 407 (citing *Bishop, Marriage & Divorce*).

## MATRON

As officer, see Officer.

## MATTER

See Collateral Matter; County Matters; Immaterial Matter; Mail Matter; Material Matter; Printed Matter.  
All probate matters, see All.  
Any other matter, see Any Other.  
Other matter, see Other.

Code Civ. Proc. § 46, forbidding a judge to sit or take part in the decision of a "cause or matter" in which he has been an attorney or counsel, refers only to actions or special proceedings in which a judge might take part; the word "cause" meaning a cause of action, and the word "matter" referring to some judicial proceeding which, under the Code, is included in special proceedings for the enforcement of civil rights. *Keeffe v. Third Nat. Bank of Syracuse*, 69 N. E. 593, 594, 177 N. Y. 305.

## MATTERS ARISING SUBSEQUENT TO DECREE

Within the rule that *Mills' Ann. St. § 2434*, authorizing a claimant of an irrigation priority at any time within four years from a final decree in a statutory adjudication proceeding to bring a suit hitherto allowed by the proper court to determine the priority, authorizes such an action by parties to that proceeding only when their right of action accrues out of "matters arising subsequent to the decree," the quoted phrase means claims of priority for an appropriation made subsequent to the lowest appropriation included in the decree. *Broad Run Inv. Co. v. Deuel O. Snyder Imp. Co.*, 108 Pac. 755, 758, 47 Colo. 573.

## MATTER IN ABATEMENT

The defense that plaintiff, a foreign corporation, has not complied with Gen. Laws 1896, c. 253, § 37, by appointing, by written power of attorney, a competent person residing in the state as its attorney on whom to serve process, is strictly "matter in abatement," and, having been pleaded in bar, cannot be considered. *Russia Cement Co. v. Whitmarsh & Brown (R. I.)* 67 Atl. 450 (citing *Weaver Coal & Coke Co. v. Rhode Island Co-operative Coal Co.*, 61 Atl. 426, 27 R. I. 194).

## MATTER IN CONTROVERSY

The words "matter in controversy," as used in *Hurd's Rev. St. 1905*, c. 110, § 88, authorizing the appellate court to recite in its final decree the facts as found by it, where the final determination of a cause "shall be made by the appellate court, as the result wholly or in part of the finding of the facts concerning the 'matter in controversy,' different from the finding of the court from which such cause was brought by appeal, or writ of error," means the matters of fact in controversy. *Gilmore v. City of Chicago*, 79 N. E. 596, 598, 224 Ill. 490.

## MATTER IN DISPUTE

"By 'matter in dispute' is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined." Or, "the 'matter in dispute,' within the meaning of the statute, is not the principle involved, but the pecuniary consequence to the individual party, dependent on the litigation." *Shewalter v. Lexington*, 143 Fed. 161, 163 (quoting *Lee v. Watson*, 1 Wall. [68 U. S.] 339, 17 L. Ed. 557; *Wheless v. St. Louis*, 21 Sup. Ct. 402, 403, 180 U. S. 379, 382, 45 L. Ed. 583); *McDaniel v. Traylor*, 123 Fed. 338, 339 (quoting and adopting definition in *Lee v. Watson*, 1 Wall. [68 U. S.] 337, 17 L. Ed. 557); *Gallagher v. Asphalt Co. of America*, 55 Atl. 259, 260, 65 N. J. Eq. 258 (quoting *Lee v. Watson*, 1 Wall. [68 U. S.] 337, 17 L. Ed. 557); *Baltimore &*

*O. R. Co. v. Ryan*, 68 N. E. 923, 924, 31 Ind. App. 597 (quoting *Lee v. Watson*, 1 Wall. 337, 17 L. Ed. 557).

In a suit to enjoin railroad companies from establishing a new schedule of rates, the matter in dispute is the right of the defendants to enforce such proposed rates, and, where the value of such right exceeds \$2,000, a federal court has jurisdiction. *Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n*, 165 Fed. 1, 11, 91 C. C. A. 39.

The right to remove an action, wherein a money judgment is demanded, to the federal court is determined by the sum demanded as appears by the record at the time the petition for removal is filed; and, where an amendment is made, the sum last demanded is "the matter in dispute." *McCulloch v. Southern Ry. Co.*, 62 S. E. 1096, 1097, 149 N. C. 305.

"By 'matter in dispute' is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment. Thus a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by value of the property affected." *Way v. Clay*, 140 Fed. 352, 353 (quoting and adopting the definition of Justice Field in *Smith v. Adams*, 9 Sup. Ct. 566, 130 U. S. 167, 32 L. Ed. 898).

"By 'matter in dispute' is meant the subject of litigation, and the matter upon which the action is brought and issue is joined and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment." In an action to recover a piece of land on which a railroad had located its depot, the value of the land to the railroad company, according to its present situation and use, is the value to be considered in determining whether the amount involved in the litigation is sufficient to confer jurisdiction on the federal courts. *King v. Southern R. Co.*, 119 Fed. 1016, 1017 (quoting definition in *Smith v. Adams*, 9 Sup. Ct. 566, 130 U. S. 167, 32 L. Ed. 895).

The phrase "matter in dispute," as used in the Code of the District of Columbia (Act March 3, 1901, c. 854, § 233 (31 Stat. 1227), providing that any final judgment of the Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, on writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of \$5,000, means money, or some right the value of which can be estimated and ascertained in money, and which appears by the record to be of the requisite pecuniary value; and, assuming that the term "matter in dispute" may embrace a right to have a claim against a foreign government presented through the political department of the United States, and that the value of such a right may be gauged by the possible pecuniary injury which may be sustained if no such action is taken, it is evident that a claim for damages from the German Empire in redress of an alleged wrongful imprisonment in that country is one having a merely conjectural value. Hence the value of the matter in dispute in a proceeding to compel by mandamus the Secretary of State to seek to obtain \$500,000 damages from the German Empire in redress of petitioner's alleged wrongful imprisonment while on a visit to that country does not exceed the sum of \$5,000. *United States ex rel. Holzendorf v. Hay*, 24 Sup. Ct. 681, 682, 194 U. S. 373, 43 L. Ed. 1025.

#### MATTER IN ISSUE

The "matter in issue" in a former action is that on which plaintiffs' cause of action is based, and which defendant denies by his pleadings. *Kerr v. Blair*, 118 S. W. 791, 793, 55 Tex. Civ. App. 349.

The issues in a cause are the points in dispute between the parties on which they put their cause to trial, and the matter in issue is that matter on which plaintiff proceeds by his action, and which defendant controverts by his pleading. *Bowen v. W. O. Eaton & Co.*, 89 N. E. 961, 964, 46 Ind. App. 65.

The first essential of the rule of *res judicata* is the identity of the "matter in issue," which is defined to be that matter on which plaintiff proceeds by his action, and which defendant controverts by his pleadings. *Leroy v. Collins*, 130 N. W. 635, 636, 165 Mich. 380.

The matters which plaintiff must allege in his declaration and the defendant deny in his plea are necessary "matters in issue." In an action on a liquor dealer's bond, whether the dealer's failure to comply with the provisions of the statute in applying for a license was a "matter in issue" is to be determined by deciding whether the licensee's failure to comply with the provisions is a matter the state must allege and the licensee

deny. *State v. Corron*, 62 Atl. 1044, 1052, 73 N. H. 434, 6 Ann. Cas. 486.

#### MATTERS IN STATUTE

As used in Const. art. 4, § 19, providing that every act shall "embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title," the word "subject" indicates the thing about which the legislation is had, and the word "matters" the incident or secondary things necessary to provide for its complete enforcement. *Board of Com'rs of Marion County v. Scanlan*, 98 N. E. 801, 802, 178 Ind. 142.

As used in a constitutional requirement that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, the word "subject" refers to the thing about which the legislation is had, and the word "matters" includes subordinate and incidental things relating to the same general subject. The title of an act was "An act to amend sections 1, 4, and 5, of an act entitled 'An act concerning street railroad companies, granting additional rights and powers therein specified and matters relating thereto, and declaring an emergency.' \* \* \*" It embraces the general subject of street railroad companies and gave power to acquire ground for the construction of lines for the transmission of electricity for light, heat, and power, and was not violative of the constitutional provision. *Mull v. Indianapolis & C. Traction Co.*, 81 N. E. 657, 659, 169 Ind. 214 (citing *State v. Gerhardt*, 44 N. E. 469, 145 Ind. 439, 33 L. R. A. 313; *Maule Coal Co. v. Partenhelmer*, 55 N. E. 751, 57 N. E. 710, 155 Ind. 101; *Parks v. State*, 64 N. E. 862, 159 Ind. 211, 59 L. R. A. 190).

#### MATTER OF ADMINISTRATION

The power to compel an administrator to fulfill a contract of conveyance of real estate of his intestate is a "matter of administration," within the Constitution, defining the jurisdiction of the probate court. *Servis v. Beatty*, 82 Miss. 52, 87.

New York Charter (Laws 1897, p. 1, c. 378), creating a number of departments, among which was the department of highways, by section 458 (page 160) provides that the commissioner at the head of each department "may organize such bureaus as he shall from time to time deem necessary." Greater New York Charter (Laws 1901, p. 166, c. 466) § 388, vested in the city of New York all the powers and duties conferred on the commissioner of highways of the city of New York by the charter of 1897, and devolved upon the president of the borough as "matter of administration" certain powers and duties to be executed pursuant to the provisions of the act. Laws 1901, p. 636, c. 466, § 1543, provides that no head of a bureau, holding a position in the classified municipal civil

service subject to competitive examination, shall be removed, unless he has been allowed an opportunity of making an explanation. Held, that the charter of 1901 conferred on the president of the borough of Manhattan the same powers possessed by the commissioner of highways under the charter of 1897; that the organization of bureaus is "matter of administration" within the meaning of the charter of 1901, and under such charter the president of the borough of Manhattan had power to organize a bureau of highways, and to appoint a head therefor; and that one appointed as head of such bureau was not subject to removal, except under the restrictions of section 1543. *People ex rel. Collins v. Ahearn*, 86 N. E. 474, 475, 193 N. Y. 441.

#### MATTER OF CONTRACT

The term "matters of contract," as used in Const. art. 7, § 40, which declares that justices of the peace shall have jurisdiction exclusive of the circuit court, in all matters of contract where the amount in controversy does not exceed \$100, embraces an action for unliquidated damages for a breach of contract. *Smith v. Taylor*, 134 S. W. 634, 97 Ark. 424.

#### MATTER OF COUNTERCLAIM

Under a plea of payment in an action for price of printing defendant cannot show what, under a lease, was due him from plaintiff for excess power furnished; this, under Code Civ. Proc. §§ 500, 501, being "matter of counterclaim," to be pleaded as such. *T. J. Hayes Printing Co. v. Springer*, 123 N. Y. Supp. 240, 242.

#### MATTER OF FACT

The word "fact," as used in the proposition that representations must consist of "matters of fact," distinguishes "fact" from mere matters of opinion. *Brown v. South Joplin Lead & Zinc Min. Co.*, 92 S. W. 699, 704, 194 Mo. 681.

#### MATTER OF FORM

The delivery of an indictment to the court by the foreman of the grand jury in the absence of the other jurors, if a defect at all, is "in matter of form only," within the meaning of U. S. Rev. Stat. § 1025, providing that no indictment presented by a grand jury shall be deemed insufficient nor the trial, judgment, or other proceeding thereon be affected by any such defect which shall not tend to the prejudice of the defendant, it not being disputed but that the indictment was found and returned into court as a true bill. *Breese v. United States*, 33 S. Ct. 1, 8, 226 U. S. 1, 57 L. Ed. 97.

The omission of the signs for dollars and cents, in the recitals of alleged false entries in reports, and misnomer of the reports in an indictment charging directors of a national banking association with making false entries in a report to the Comptroller of the

Currency, within the denunciation of Rev. St. § 5209, are matters of form within the meaning of Rev. St. § 1025, for which the indictment is not to "be deemed insufficient." *United States v. Potter*, 56 Fed. 83, 95.

### **MATTER OF IMPRESSION OR OPINION**

"Evidence which is characterized as 'matter of opinion' is predicated upon the existence or nonexistence of a fact, while 'matter of impression' or 'understanding' is only a deduction drawn from the assumption of that fact, so that, while the former may rise to the standard of evidence, the latter is universally rejected as such." *Cross v. Aby*, 45 South. 820, 822, 55 Fla. 311 (quoting and adopting the definition in *Chaires v. Brady*, 10 Fla. 308; citing 1 *Wigmore, Ev.* §§ 658, 726-728; 4 *Words and Phrases*, p. 3444; *Tait v. Hall*, 12 Pac. 391, 71 Cal. 149).

### **MATTER OF INDUCEMENT**

See Inducement.

### **MATTER OF LAW**

Refusal of a judge sitting in bankruptcy to sanction an arrangement between the bankrupts and certain of their creditors and persons who had received preferential transfers of the bankrupts' property, in the legitimate exercise of discretion, did not present a "matter of law" reviewable on a petition for review authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553. *Mulford v. Fourth Street Nat. Bank*, 157 Fed. 897, 85 C. C. A. 225.

### **MATTER OF LEGAL AVOIDANCE**

The term "matters of legal avoidance," as used in the statement that a recognizance is in the nature of a conditional judgment, subject only to such matters of legal avoidance as may be shown by plea, or to such matters of relief as may induce the court to remit or mitigate a forfeiture, refers to such matters as are entirely consistent with the truth of the facts stated in the record and furnish a legal excuse for the failure of the defendant to appear according to the condition of his recognizance. The sureties, for example, show, in answer to the *scire facias*, the death of the principal before the time for his appearance had arrived, or that he had been arrested under other process issued at the instance of the state, or that he had become insane. All pleas of this kind are not only consistent with the truth of what is averred in the record, but they are predicated on the assumption of such truth. *State v. Morgan*, 48 S. E. 604, 606, 136 N. C. 593.

### **MATTER OF PROBATE**

"The proceeding to establish or prove the claim against the executors is essentially an independent suit *inter partes* and not a 'matter of pure probate jurisdiction.'" *Farmers' Bank of Cuba City, Wis., v. Wright*,

158 Fed. 841, 850, (citing and adopting *Broderick's Will*, 21 Wall. [88 U. S.] 503, 22 L. Ed. 599; *Farrell v. O'Brien*, 25 Sup. Ct. 727, 199 U. S. 89, 110, 50 L. Ed. 101).

Code Civ. Proc. § 1678, authorizing a court of probate to order distribution of a decedent's estate, though some of the heirs, legatees, or devisees had conveyed their shares, applies only where no question arises on the distribution as to the conveyances having been made; and, where the fact of conveyance is disputed or its validity is in issue, the question is not within probate jurisdiction; "matters of probate" including the determination of the persons succeeding to the estate of a decedent, either as heir, devisee, or legatee, the amount to which each is entitled, and the construction of the will, but not including a determination of claims against heirs or devisees for their portion arising subsequent to decedent's death. In *re Howe's Estate*, 118 Pac. 515, 517, 161 Cal. 152.

Code Civ. Proc. § 1639, providing that on the death of an executor his accounts may be presented to and settled by the court in which the estate of which he was executor is being administered, and that upon petition of his successor such court may compel the personal representatives of the deceased executor to render an account of the administrator of their testator, and to settle such account as in other cases, is a "matter of probate," jurisdiction of which may, under Const. art. 6, § 5, be conferred upon the superior court, sitting in probate. *King v. Chase*, 115 Pac. 207, 209, 159 Cal. 420.

### **MATTER OF PUBLIC CONCERN**

See Public Concern.

### **MATTER OR THING**

Within the rule that a court has no power to acquire jurisdiction of a party by service of notice outside its territorial limits except where the court is dealing with some "matter or thing" within its territorial jurisdiction, it has been held that marriage is such a "matter or thing," so that, if a spouse is a bona fide resident and the other spouse is absent, the court may require jurisdiction by extraterritorial service. *Watkinson v. Watkinson*, 58 Atl. 384, 389, 67 N. J. Eq. 142.

## **MATURED**

### **MATURING**

See Debt Maturing in the Year.

### **MATURITY**

See Prior to Maturity.

Defendants, in payment of property bought of plaintiff, transferred bonds maturing November 27, 1913, and secured by a trust deed of Iowa property, and by a contract of guaranty agreed "if said bonds were not paid at maturity," and the trust deed was

foreclosed, to be present at the sale and bid a specified amount for the property. In the bonds was a reservation of the right to pay them before maturity, and in the trust deed it was provided that, if default was made in the payment of interest, the principal, as well as the interest, should become due at the election of the trustee. On the back of the bonds was a trustee's certificate that the bonds were issued in conformity with the trust deed. The word "maturity," as used in the agreement, was the maturity as fixed by the trust deed, and not the one specified in the bonds. *Binz v. Hyatt*, 98 S. W. 837, 200 Mo. 299.

A note payable with interest from maturity contained a blank space after the word "maturity," and the payee after execution filled up such space by writing therein the word "date," so that the note called for interest after "maturity date." Held, that the alteration was not a material change which would prevent recovery on the note. "Maturity" and "maturity date" mean the same thing. *Baldwin v. Haskell Nat. Bank (Tex.)* 124 S. W. 443.

Where a note bearing a given date was payable four months after, it reached its "maturity" four months after date. *Seabury v. Sibley*, 66 N. E. 603, 183 Mass. 105.

#### MATURITY DATE

See Maturity.

#### MAUSOLEUM

As improvement of real estate, see Improvement.

#### MAXIM

A "maxim," says Coke, "is so called because its dignity is chiefest, and its authority the most certain, and because it is universally approved by all." Coke, *Litt.* 11a. Again he says: "A maxim is a proposition to be of all men confessed and granted without proof, argument, or discourse." *Id.* 67a. "Maxims," says Sir James Mackintosh, "are the condensed good sense of nations." *Chrisman v. Linderman*, 100 S. W. 1090, 1092, 202 Mo. 605, 10 L. R. A. (N. S.) 1205, 119 Am. St. Rep. 822.

"A 'maxim' is a proposition to be of all men confessed and granted without proof, argument, or discourse." *Felver v. Central Electric Ry. Co.*, 115 S. W. 980, 983, 216 Mo. 195 (quoting Lord Coke).

Justinian said that the "maxims of the law" are these: "To live honestly, to hurt no man, and to give every one his due." *City Trust, Safe-Deposit & Surety Co. of Philadelphia v. American Brewing Co.*, 67 N. E. 62, 174 N. Y. 493.

#### MAXIMUM

The word "maximum" is defined as meaning the greatest, superlative of great; the greatest quantity or value attainable in a given case. *Manaca v. Ionia Circuit Judge*, 110 N. W. 75, 77, 146 Mich. 697.

#### MAXIMUM RATE

The term "maximum rate," as used in a statute authorizing the fixing of a "maximum rate" to be charged for gas and electricity, means a "reasonable rate with permission to the party furnishing the service to do business at an inadequate profit or at a loss, if he desires." *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 107 N. Y. Supp. 341, 361, 122 App. Div. 203 (dissenting opinion of Judge Kellogg).

#### MAY

Must construed as may, see Must.  
Shall construed as may, see Shall.

#### As permissive or mandatory

The word "may" is usually only permissive or discretionary. *State v. Stepp*, 59 S. E. 1068, 1070, 63 W. Va. 254.

The word "may" means "must" whenever third persons or the public have an interest in having the act done or have a claim *de jure* that the power shall be exercised. *Smalley v. Paine*, 116 S. W. 38, 39, 102 Tex. 304.

"The word 'may' is construed to mean 'shall,' whenever the right of the public or third persons depends upon the exercise of the power or performance of the duty to which it refers." *Montgomery v. Henry*, 39 South. 507, 509, 144 Ala. 629, 1 L. R. A. (N. S.) 656, 6 Ann. Cas. 965 (quoting and adopting definition in *Wheeler v. Chicago*, 24 Ill. 105, 76 Am. Dec. 736).

"May" does not mean "shall," and is not so construed in private contracts. It is only in the case of statutes by which public rights are involved that this construction is sometimes adopted *ex debito justitiæ*. *Northwestern Traveling Men's Ass'n v. Crawford*, 126 Ill. App. 468, 480.

It is true that "may" oftentimes means "must," but it always retains its primitive meaning unless common fairness and the rights of the parties litigant demand that it be supplanted by "must," or unless it is used in a sentence which creates an exception in favor of the public. *Chicago, W. & V. Coal Co. v. People*, 114 Ill. App. 75, 112; *Id.*, 73 N. E. 770, 214 Ill. 421.

In a contract for the construction of part of a sewer, a clause provided that "if an emergency demands \* \* \* he [the engineer in charge] may make alterations in any part of the work." Held, that this clause was for the benefit of the commonwealth alone,

and that the word "may" was to be construed according to its usual meaning, and not to mean "shall." *National Contracting Co. v. Commonwealth*, 66 N. E. 639, 640, 641, 183 Mass. 89.

#### Same—Deed

A bargain and sale deed to a half interest in a mine in consideration of \$1 and the doing of necessary assessment work to hold the claim at the grantees' expense also provided that the grantees might work and develop the mine at their own cost, and that all gold or proceeds taken therefrom for 20 years should be divided equally among the parties; that is, each to have one-third thereof. Held, that the provision for working the mine apart from the doing of the assessment work was a mere license to be exercised by the grantees, or not, at their election; the word "may" not being construed to mean "must." *Shaw v. Caldwell*, 115 Pac. 941, 942, 16 Cal. App. 1.

On the same day that a testator executed his will he made a deed to a trust company, executor under the will, conveying all of his real estate on certain trusts. The ninth clause of the deed provided that after the testator's death the trustee "may" use as much of the income from the property, or the proceeds of its sale, as may be necessary in defending any proceedings brought to invalidate the trust. The will was made subject to the provisions of the deed, with a scheme for the disposition of the property conveyed by the deed if it should be set aside. Testator had a substantial amount of personal property which was disposed of by the will. No proceedings were brought to set aside the deed, except so far as its validity was involved in the controversy as to the validity of the will. Held, that a contention that items in the executor's account for payments made by the executor for expenses of defending the estate from claims which were deemed unjust, of proving the will, and resisting an attack on it, should not be allowed out of the personalty, because the word "may" in the ninth clause of the deed means "must," requiring such expenses to be paid from the trust estate, is untenable, in view of other clauses of the deed, in which the grantor drew distinctions between "may" and "shall." *Hampden Trust Co. v. Leary*, 72 N. E. 88, 89, 186 Mass. 577.

#### Same—Insurance

A provision in the constitution and laws of a mutual benefit association that a certain amount shall be paid on the death of a member of a certain grade, and one-half of the amount "may" be paid to a member of that grade who shall become permanently disabled from attending to his business or gaining a livelihood, and is destitute of means of support when he shall arrive at the age of expectancy, is mandatory as to the payment of the permanent disability benefit; the word "may" to be read as "shall." *Supreme Coun-*

*cil Catholic Benevolent Legion v. Grove*, 96 N. E. 159, 162, 176 Ind. 356, 36 L. R. A. (N. S.) 913.

#### Same—Instructions

An instruction, in an action to recover an accident benefit, that an accidental cause is such as "may" happen by chance is erroneous, as suggesting that chance is not always necessary. *Smouse v. Iowa State Traveling Men's Ass'n*, 92 N. W. 53, 54, 118 Iowa, 436.

The word "may," in an instruction in a personal injury case that the jury may allow plaintiff for pain, inconvenience, or impairment of enjoyment for such time as the same may continue in the future as shown by the evidence, is capable of being construed by the jury to mean "might," and therefore authorized them to allow plaintiff for pain, inconvenience, and impairment of the enjoyment which the evidence showed might continue in the future, which was merely possible, not for what the evidence showed was reasonably certain to continue. Such an instruction is erroneous. *Haas v. St. Louis & S. Ry. Co.*, 90 S. W. 1155, 1157, 111 Mo. App. 706 (following *Ford v. City of Des Moines*, 75 N. W. 630, 106 Iowa, 94).

The word "may," in an instruction on the measure of damages for personal injuries that the jury will award plaintiff such sum as shall compensate him for the mental and bodily pain and suffering endured by him consequent on the injury and for the mental and bodily pain which "may" be suffered by him in the future by reason of such injuries, if any, and for any permanent injuries suffered by plaintiff, if he has suffered any such permanent injury, means "must," and the instruction does not permit the jury to award compensation for future pain and permanent injury, unless the same is reasonably certain to follow as a result of the injury. *O'Keefe v. United Rys. Co. of St. Louis*, 101 S. W. 1144, 1147, 124 Mo. App. 618.

Where, in a personal injury case, the evidence shows that plaintiff will be wholly disabled from performing the work in the business in which he was engaged at the time of the accident, an instruction that plaintiff, if entitled to recover, is entitled to compensation for loss of time in his business which "he may hereafter lose, if any, by reason of" the injuries, is proper, for the word "may" means "shall." *Caplin v. St. Louis Transit Co.*, 89 S. W. 338, 339, 114 Mo. App. 256.

#### Possibility Indicated

"May" comprehends the idea of probability, and also the thought of what is, with more or less certainty, to be expected." It also comprehends, in one of its usable senses, the idea of possibility, and, so used, becomes equivalent to the expression "might possibly"; hence an instruction authorizing a recovery for suffering "which plaintiff may hereafter suffer and endure," if any, "as



shown by the evidence on account of his said injuries," was not objectionable on the ground that the word "may" based the recovery on possible instead of probable suffering. *Dean v. Kansas City, St. L. & C. R. Co.*, 97 S. W. 910, 913, 199 Mo. 386 (quoting *Reynolds v. St. Louis Transit Co.*, 88 S. W. 50, 189 Mo. loc. cit. 421, 107 Am. St. Rep. 360).

In an action for injuries, an instruction authorizing the jury to award damages resulting from such suffering as the injuries "may" cause plaintiff was not erroneous by the use of the word "may"; the same being definitive of the proper rule that such damages may be allowed as are reasonably certain to follow the injury. *Halley v. St. Joseph Light, Heat & Power Co.*, 91 S. W. 163, 115 Mo. App. 652.

In an action for injuries, an instruction allowing damages for such pain and anguish as plaintiff had already suffered, and which "he may hereafter suffer," was not erroneous by reason of the use of the word "may," on the ground that it gave room for speculation and conjecture. *Robertson v. Hammond Packing Co.*, 91 S. W. 161, 162, 115 Mo. App. 520.

An instruction that plaintiff, if she establishes her right to recover, will be entitled to recover such damages "as she may have received," is not erroneous in the use of the word "may"; it being used by the judge to express the possibility of the existence of such damages, not including any element of probability. *Henry v. Omaha Packing Co.*, 115 N. W. 777, 780, 81 Neb. 287.

The word "may," used as an auxiliary verb, has a wide scope of meaning, into which the idea of mere possibility enters; but it also comprehends the idea of probability, and also the thought of what is with more or less certainty to be expected, and whether it is to carry the one thought or the other often depends on the context. In an action for injuries, an instruction that in estimating the damages the jury may consider plaintiff's diminished capacity for earning money, if any, and on account thereof make such allowance as may be fair and just for any loss they may believe from the evidence he has sustained in the past by reason thereof, and for any loss they may believe he may sustain in his future earnings by reason of such diminished earning capacity, is not erroneous, for the reason that "may" means "possibly might," so as to authorize a recovery for loss of time, and also for diminished earning capacity during the same period, and for loss of what he "may" sustain in the future. *Reynolds v. St. Louis Transit Co.*, 88 S. W. 50, 53, 189 Mo. 408, 107 Am. St. Rep. 360.

An instruction in a personal injury action that the jury, in assessing the damages, may consider the character of the injury, if any, sustained by plaintiff, the pain and suffering, if any, endured, and "which will be

endured," if any, as the result of the injuries, if any, etc., properly limits a recovery for the suffering endured, and for such suffering as the evidence discloses he will endure in the future, since the word "will," as employed in the instruction, must have been understood in its proper sense as referring to the unconditional existence of the fact, and not in the sense of "may," which imports a mere possibility. *Scally v. W. T. Garrett & Co.*, 104 Pac. 325, 326, 332, 11 Cal. App. 138.

#### **MAY (In Constitutions as Permissive or Mandatory)**

In constitutional provisions, "may" should be read "must" when the intention so requires, and should be interpreted as mandatory and not directory. *Henry v. State*, 39 South. 856, 893, 87 Miss. 1.

The word "may," as used in Const. S. D. art. 5, § 18, providing that writs of error and appeals may be allowed under such regulations as may be prescribed by law, was evidently used, in its proper sense, as permissive, and not in the sense of must or shall. *Mau v. Stoner*, 83 Pac. 218, 220, 14 Wyo. 183 (citing *McClain v. Williams*, 73 N. W. 72, 10 S. D. 332, 43 L. R. A. 287, 289).

Const. art. 4, § 25½, providing that the Legislature "may" provide for the division of the state into fish and game districts and "may" enact appropriate legislation for the protection of fish and game therein, is mandatory, and commands the Legislature to enact necessary legislation touching the care and custody of game with reference to local conditions, which require special legislation for particular localities. *Ex parte Prindle*, 94 Pac. 871, 873, 7 Cal. Unrep. Cas. 223.

Const. § 138, provides that each county having a city of 20,000 and a population, including the city, of 40,000 or more may constitute a judicial district; and when its population reaches 75,000 the General Assembly may provide that it shall have an additional judge, and such district may have a judge for each additional 50,000 above 100,000. Held, that the word "may," as used in such section, was not to be construed "must," so as to make the section mandatory; the Legislature being required, in creating a new district under such section, to have due regard to the business, as well as the territory and population. *Scott v. McCreary*, 147 S. W. 903, 904, 148 Ky. 791.

The words "shall" and "may," as used in the Utah Constitution, providing that certain officers "shall be conservators of the peace, and may hold preliminary examinations," are used advisedly, and each is to be understood in its usual and ordinary sense, and a statute conferring jurisdiction on other officers to act as committing magistrates is not in conflict with the Constitution. *State v. Shockley*, 80 Pac. 865, 868, 29 Utah, 25, 110

Am. St. Rep. 639 (quoting and adopting 8 Cyc. p. 586).

The word "may," where it appears in the Const. art. 10; §§ 223-226, relative to the penitentiary and prisons, forbidding the leasing or hiring of convicts, authorizing the employment of convicts on public works, and providing that the Legislature "may place the convicts on a state farm or farms and have them work, thereon under state supervision exclusively \* \* \* and may buy farms for that purpose," is not mandatory, and the Legislature is not required to place convicts on a state farm nor to buy a farm for that purpose, and it is within its power to work the convicts on leased lands. *State v. Henry*, 40 South. 152, 154, 158, 87 Miss. 125, 5 L. R. A. (N. S.) 340.

#### **MAY (In Statutes as Permissive or Mandatory)**

The word "may," when used in a statute, is sometimes construed as mandatory, but more frequently as directory. *State ex rel. Coleman v. Blair*, 151 S. W. 148, 151, 245 Mo. 680.

When the word "may" is in a statute made for the benefit of persons, it is not simply permissive but mandatory or compulsory. *Trail v. Trail*, 49 S. E. 431, 434, 56 W. Va. 594.

The word "may" in statutes usually indicates that the act to which it refers is discretionary, rather than mandatory, and will be so construed, unless the context indicates a different meaning. *Halfacre v. State*, 79 S. W. 132, 133, 112 Tenn. 609.

Whenever third persons or the public have an interest in having done that which is prescribed by the Legislature, then the act is mandatory, even though words permissive, as "may," are used, instead of words mandatory; as "shall." *Lapsley v. Merchants' Bank of Jefferson City*, 78 S. W. 1095, 1096, 105 Mo. App. 98.

The word "may" when used in a statute means "must," whenever third persons or the public have an interest in having the act done, or have a claim de jure that the power shall be exercised. *Smalley v. Paine*, 116 S. W. 38, 39, 102 Tex. 304.

Where permissive words, such as "it shall be lawful," or "may," are used in a statute in respect to courts and officers, such words will be regarded as imperative, in cases where the public or individuals have a right to demand the exercise of the power conferred. *Ex parte Young*, 95 S. W. 98, 102, 49 Tex. Cr. R. 536 (citing *Lewis' Sutherland*, Stat. Const. § 636; *Tarver v. Commissioners' Court of Tallapoosa County*, 17 Ala. 527; *Mitchell v. Duncan*, 7 Fla. 13; *David v. Levy*, 24 South. 589, 119 Ala. 241; *Smith's Petition*, 5 Pa. Dist. R. 465).

The word "may" is peremptory, when used in a statute, where the public or an individual has a right de jure, that the powers conferred by the act should be exercised. *Graham v. City of Tusculumbia*, 42 South. 400, 401, 402, 146 Ala. 449 (quoting and adopting *Tarver v. Commissioners' Court of Tallapoosa County*, 17 Ala. 527).

Ordinarily the word "may" is employed in a statute to express the idea that a discretion may be exercised, and that the performance of the act is not imperative, or that the power or authority conferred is not exclusive, but cumulative and permissive; and whether it is to be construed as mandatory is to be determined from the apparent intention; but the word "may" will be construed to mean "shall" whenever the rights of the public or third persons depend on the exercise of the power or the performance of the duty to which it refers, and such is its meaning in all cases where the public interests and rights are concerned, or a duty is imposed on public officers and the public or third persons have a claim de jure that the power shall be exercised. *Deming v. Metropolitan Engineering & Construction Co.*, 136 S. W. 740, 742, 154 Mo. App. 540 (citing 5 Words and Phrases, p. 4421).

"May" sometimes is equivalent to "must" or "shall," and is then mandatory, but it usually denotes permission or discretion. To decide between these meanings in any given case, the context and whole legislative scheme must be taken into consideration. *Bass v. Doughty*, 63 S. E. 516, 517, 5 Ga. App. 458 (citing 5 Words and Phrases, p. 4420, et seq.).

The words "authorize" or "may," as used in a statute, are sometimes construed as mandatory in effect, though permissive in form, as where a statute provides for the doing of some act required by justice or public duty; but, where they confer or recognize a discretionary power, a mandatory construction will not be given to them. *Whitley v. State*, 68 S. E. 716, 723, 134 Ga. 758.

The word "may" should primarily be taken in its ordinary meaning and be regarded as permissive only, but its meaning is to be determined in each case from the apparent intent of the statute in which it is employed, so that in all remedial statutes, or whenever the rights of the public or of third persons depend on the exercise of the power of a court or public officer or the performance of a duty and a claim de jure that the power may be exercised exists, it should be construed to mean "shall." *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 103 Pac. 426, 429, 55 Wash. 1 (citing 5 Words and Phrases, pp. 4420-4447).

"May," as primarily and ordinarily used in a statute, is permissive, and not peremptory; but it may be given the imperative

meaning if that was the obvious intention. *State v. School Dist. No. 1, Edwards County*, 103 Pac. 136, 80 Kan. 667.

While the courts have never hesitated to construe "may" as "must," or "shall," when the context and policy of the law demanded that interpretation, the legislative intention must plainly appear before such judicial correction will be made. *Ostrander v. City of Richmond*, 101 Pac. 452, 453, 155 Cal. 468.

Ordinarily the word "may," in construing the statute, is permissive, but it is often construed to be mandatory, and generally so when it is employed to delegate a power, the exercise of which is important for the protection of public or private interests. *Queeney v. Higgins*, 114 N. W. 51, 136 Iowa, 573.

The word "may" in a statute will be construed to mean "shall," whenever the rights of the public or third parties depend on the exercise of the power or duty to which it refers, and such is its meaning in all cases where public interests and rights are concerned, or a public duty is imposed on public officers, and the public or third persons have a claim *de jure* that the power shall be exercised. *Binder v. Langhorst*, 85 N. E. 400, 402, 234 Ill. 583.

Where neither the clear intent of the Legislature nor public policy requires that the language of a statute shall be given a mandatory construction, the word "may" therein is not equivalent to "must." *Town of Hempstead v. Lawrence*, 122 N. Y. Supp. 1037, 1040, 138 App. Div. 473.

Words like "may," "must," "shall," etc., are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed. *Fields v. United States*, 27 App. D. C. 433, 440.

The word "may" ordinarily denotes permission and not command. But where used in a statute concerning the public interest, or affecting the rights of three persons, it will be construed to mean "must" or "shall." *Georgia, F. & A. R. Co. v. Sasser*, 60 S. E. 997, 130 Ga. 394 (citing *Birdsong v. Brooks*, 7 Ga. 88; *Weems v. Farrell*, 33 Ga. 419).

In construing statutes, the term, "may" may be considered as mandatory and as meaning "shall" or "must," and "shall" or "must" may be construed as directory only, in order to effectuate the legislative intent. *In re Chadbourne's Estate*, 114 Pac. 1012, 1014, 15 Cal. App. 363 (citing *Estate of Balentine*, 45 Cal. 699; *Hayes v. County of Los Angeles*, 33 Pac. 766, 99 Cal. 74; *Suth. St. Const.* 634; *Wallace v. Feeley* [N. Y.] 61 *How. Prac.* 225; *Merrill v. Shaw*, 5 *Minn.* 148 [Gil. 113]; *In re Thurber's Estate*, 56 N. E. 631, 162 N. Y. 244; *Stone v. Pratt*, 35 N. Y. Supp. 519, 90 *Hun*, 39; *First Nat. Bank*

of *Seneca v. Lyman*, 53 Pac. 125, 59 Kan. 410; *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348; *People ex rel. Chipperfield v. Sanitary Dist. of Chicago*, 56 N. E. 953, 184 Ill. 597).

In a statute the word "may" may be construed in a mandatory sense only where such construction is necessary to give effect to the clear policy and intention of the Legislature; and, where there is nothing in the connection of the language or in the sense or policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary. Where, by the use in other provisions of the statute of the word "shall" or "must," it appears that the Legislature intended to distinguish between these words and "may," "may" will not be construed as imperative. *Carlin v. Freeman*, 75 Pac. 26, 27, 19 Colo. App. 334.

#### Adoption of by-laws

The word "may," as used in *Hurd's Rev. Stat.* 1903, p. 473, § 6, providing that the directors or managers of a corporation "may adopt by-laws for the government of the officers and affairs of the company," means "must"; the words "may" and "shall" are frequently used interchangeably in order to express the legislative intent; and one may be used for the other, if, by so doing, the legislative intention can be determined. *Manufacturers' Exhibition Bldg. Co. v. Landay*, 76 N. E. 146, 148, 219 Ill. 168 (citing *Wabash, St. L. & P. Ry. Co. v. Binkert*, 106 Ill. 298).

#### Appointment to office

As used in *Laws* 1903, p. 202, c. 113, § 4, providing that city government shall be vested in a mayor and council, to consist of five members, a clerk, treasurer, marshal, and police judge, who "may" be one of the justices of the peace of the precinct in which the town is situated, the word "may" should not be construed to mean "shall" or "must." Hence the mayor of a city of the third class was not limited to the elected justices of the peace for his selection of a police justice. *State ex rel. Purdin v. Gault*, 105 Pac. 242, 243, 56 Wash. 140 (citing 5 *Words and Phrases*, p. 4420).

The word "may," as used in *Bankr. Act* July 1, 1898, c. 541, § 45, providing that trustees may be (1) individuals who are respectively competent \* \* \* and reside in or have an office in the judicial district within which they are appointed, or (2) corporations \* \* \* having an office in the judicial district, etc., is equivalent to "shall," in the sense that the section allows a trustee to be chosen from but two classes, viz., persons of a certain sort or corporations, making the provisions mandatory. *In re Seider*, 163 Fed. 138.

*Ky. St.* § 4313, providing that the fiscal court of any county wherein the roads are worked by taxation "may," at its first regu-

lar term after the act takes effect, and every two years thereafter, appoint a supervisor of roads, does not make the appointment of the supervisor mandatory, but leaves the matter to the discretion of the fiscal court, which discretion cannot be controlled by mandamus. *O'Connor v. Weissinger*, 134 S. W. 1127, 1129, 142 Ky. 452.

The word "may," as used in Civ. Code Prac. § 298, providing that the appointment of a receiver "may" be done on motion of a party to an action who shows a right to the property involved, and that it is in danger of being lost or removed, is not equivalent to "must." *McClure v. McGee*, 108 S. W. 341, 342, 128 Ky. 464.

Richards Primary Bill (Laws 1911, c. 201) § 112, provides that any party elector wishing to become a candidate for an appointive government position may file his written application for the official party indorsement with the secretary of state after any primary election date and before the following general election date. Section 113 requires the secretary of state to keep a record of such applications, and prepare and mail lists thereof, within 10 days after the general election date, to each member of the party state central committee. Section 114 requires the party state central committee to meet on the second Tuesday of December to determine who shall receive the official party indorsement for appointive positions, and certify such indorsement to the appointing officer and the secretary of state. Held, that the provision of section 112 that any candidate may file his application before the general election date is mandatory, and a party committee cannot give the official party indorsement to a candidate filing his application after the general election, or who files no application, since the provisions of the law are not for the benefit of candidates, but to promote and protect the public welfare; and "may" means "must" when third parties or the public have an interest in having the act done authorized by the permissive language. *State ex rel. Cook v. Polley*, 139 N. W. 118, 121, 30 S. D. 528.

#### Assessments on stock

The word "may," as used in Rev. Code, § 2750, providing that the directors of any corporation formed or existing under the laws of the state, after one-fourth its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, etc., does not mean "must." *Wall v. Basin Min. Co.*, 101 Pac. 733, 738, 16 Idaho, 313, 22 L. R. A. (N. S.) 1013.

#### Assignment of mortgage

"In a statute the word 'may' can be construed only in a mandatory sense, where such construction is necessary to give effect to the policy and intention of the Legislature; and,

where there is nothing in connection with the language nor in the sense or policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary." B. & C. Comp. § 5362, provides that mortgages "may" be assigned by an instrument in writing, and recorded, etc. Section 5367 provides that a note secured by a mortgage on real property can be transferred by indorsement, and, if the mortgage was recorded, the same, on payment of the note, may be transferred of record by the owner of the note by proving the fact to the satisfaction of the recorder, and delivering the note to such officer. Section 5368 provides that no mortgage shall be satisfied except by the person appearing on the records to be the owner thereof. Held, that the use of the word "may," in section 5362, showed a design not to repeal section 5367; the action simply prescribing, in section 5368, the method for recording assignments by separate writings. *Barringer v. Loder*, 81 Pac. 778, 780, 47 Or. 223.

#### Authorizing suit

The word "may," used in Code Civ. Proc. § 732, providing that any person aggrieved by waste may bring an action therefor, is not a mandatory term, except when it is construed to mean "must"; and it is never thus construed where there is nothing in the connection of the language or in the sense or policy of the provision to require an unusual interpretation. *Isom v. Rex Crude Oil Co.*, 74 Pac. 294, 140 Cal. 678.

In Act April 10, 1879 (P. L. 17) § 5, providing that in case of nonpayment of installments of stock, premiums, dues, or interest by borrowing stockholders for six months, their payment may be enforced by proceeding on their securities according to law, the word "may" should be construed as a word of permission. *Workingman's Loan & Building Ass'n of Altoona v. Heaton*, 82 Atl. 78, 80, 238 Pa. 173.

#### Appeal

"May" should be construed in a mandatory sense in a statute providing that any person aggrieved by a decision or order of the board of school directors may, within 30 days after the rendition of the decision or order, appeal to the county superintendent, and such appeal is a condition precedent to the right of a teacher to sue for breach of his contract by the board of directors. *Van Dyke v. School Dist. No. 77 of Lewis County*, 86 Pac. 402, 403, 43 Wash. 235.

The word "may," in Code, § 254, providing that the judge, on accused showing his inability to pay for a transcript on appeal, "may" order the same at the expense of the county, should be read "must," in view of the change made in the former statute as embodied in Code 1888, § 5029, by omitting the words "if in the opinion of the judge justice will be thereby promoted," and the judge

must order the transcript at the expense of the county on accused showing his inability. *State v. Goodsell*, 113 N. W. 826, 827, 136 Iowa, 445.

#### Calling family meeting

Under article 1341 of the Civil Code, referring to the family meeting to be held to fix on behalf of minors the terms of sale, and providing that, at the instance of the tutors and curators of such minors, the judge may call a family meeting, the fact that the judge "may" at the instance of the tutors and curators, call the meeting was not intended as excluding authority in the judge to do so at the instance of other parties in interest or of his own motion. *Tobin v. United States Safe Deposit & Savings Bank*, 89 South. 33, 35, 115 La. 366.

#### Compensation for services and expenditures

Under a statute providing that the guardian ad litem for an infant party "may" be allowed compensation for his services and necessary expenditures in litigation, to be fixed by the court, and to be paid out of the body of the estate or property in controversy, if the infant has no available property out of which such payment can be directed by the court, the word "may" should not be construed as "must," but should be held to confer on the court a broad discretion as to whether an allowance should be made and to what extent. In *re McNaughton's Will*, 118 N. W. 997, 1004, 138 Wis. 179.

The general rule that, where public authorities are authorized to perform an act for the benefit of the public, or for an individual who has a right to its performance, the word "may" is interpreted as meaning "must" has no application to Gen. Laws 1901, § 8024, providing that county treasurers shall be allowed by the board of county commissioners of their respective counties, as full compensation for their services for the county, the following salaries, etc., provided, that the county commissioners "may" allow the following sum or as much as they deem necessary for clerk hire, where a county treasurer employed a deputy to assist him, as the question of public benefit through an appropriation for clerk hire can be determined by nobody but the board of county commissioners. *Roth v. Board of Com'rs of Ness County*, 77 Pac. 694, 69 Kan. 687 (citing *Phelps v. Lodge*, 55 Pac. 840, 60 Kan. 122).

#### Costs

The word "may," as used in New York Code Civ. Proc. § 3247, making the person beneficially interested, in an action brought, liable for costs to the same extent as if plaintiff, and providing that, where costs are awarded against plaintiff, the court may by order direct the person so liable to pay them, means the same thing as the word "shall," and the liability of the person beneficially interested for costs is absolute. *Nelligan v.*

*Groth*, 110 N. Y. Supp. 619, 620, 126 App. Div. 444 (citing *People v. Board of Sup'rs of Otsego County*, 51 N. Y. 401).

#### Detachment of municipal territory

A statute providing for detaching unplatted land from the corporate limits of a city, which provides that, if the court shall find the existence of the necessary facts and conditions, it "may" grant the decree, "falls within the rule that, whenever public interests or individual rights call for the exercise of a power given to courts or other public officers, the language used in conferring the power, although permissive in form, is in effect mandatory." *Hunter v. City of Tracy*, 116 N. W. 922, 924, 104 Minn. 373.

#### Dismissal of action

"The word 'may' is sometimes permissive only; sometimes it is imperative. Legislative intent determines whether it is directory or mandatory. According to its natural and usual signification, the word 'may' is enabling and permissive only, and so it must be interpreted where no right of or benefit to the public, nor right of persons other than the one upon whom the permission is conferred, depends upon giving to it the obligatory meaning; but the word is interpreted to mean 'shall' or 'must' whenever the rights of the public or of third persons depend upon the exercise of the power or performance of the duty to which it refers. In those cases where the public or persons possess the right to require that the power conferred by the word 'may' be exercised, the word is imperative and mandatory, being the equivalent of 'shall' or 'must.'" Code Civ. Proc. Mont. 1895, § 1004, subd. 6, providing that an action "may" be dismissed by the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have it entered for more than six months, is mandatory. *State ex rel. Stiefel v. District Court*, 96 Pac. 337, 338, 340, 37 Mont. 298 (quoting and adopting definition in *Montana Ore Purchasing Co. v. Lindsay*, 63 Pac. 715, 25 Mont. 24).

#### Divorce

The word "may," as used in section 13, c. 64, Code 1906, providing that in certain cases, where divorce from bed and board is decreed, an absolute divorce "may" be granted after certain requirements are fulfilled, means "shall." *Chapman v. Chapman*, 74 S. E. 661, 664, 70 W. Va. 522 (citing 5 Words and Phrases, 4420).

#### Enforcing orders of commission

In a statute providing that the orders of a commission "may" be enforced by mandamus, and that, upon proof that an order has been made and has not been complied with after notice thereof, the court "may" issue a mandamus to enforce it, the word "may" means "must." *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 107 N. Y. Supp. 341, 366, 122

App. Div. 208 (dissenting opinion of Judge Kellogg).

#### **Innholder's license**

An innholder's license, granted in May instead of the month of April, is valid; the provisions of Rev. Laws 1902, c. 100, § 12, and chapter 102, § 4, providing that licenses "may" be granted in April, to take effect on the 1st of May, being directory. *Cheney v. Coughlin*, 87 N. E. 744, 745, 747, 201 Mass. 204.

#### **Insurance**

Rev. St. 1898, § 1952, provides that life insurance companies whose members are entitled to share in the surplus cumulations "may" make distribution thereof annually or once in two, three, four, or five years, and in determining the amount of surplus to be distributed there "shall" be reserved an amount equal to the net value of the outstanding policies. The section is the same as Laws 1870, p. 107, c. 59, § 14, the purpose of which, as appears from instructions to the legislative committee which reported the bill, was to afford proper "protection to policy holders" by safeguard against insolvency of insurance companies by requiring the cumulation of the reserve fund. Held, that the use of the word "shall" in the section in relation to the reserve fund is imperative, while "may" in relation to distribution of the surplus is permissive, and having been so construed by the state officials and insurance companies for more than 30 years, the license of an insurance company will not be revoked for deferring the distribution of the surplus more than five years. *Equitable Life Assur. Soc. v. Host*, 102 N. W. 579-584, 124 Wis. 657, 4 Ann. Cas. 413.

#### **Jury trial**

Rev. Laws, c. 189, § 16, in its literal wording plainly leaves the option of a jury trial to the discretion of the court. But when read in connection with its legislative origin, supplemented by the practice that prevailed under the original statute, if a jury trial is seasonably claimed, "may" should be construed to mean "shall." *Hubbard v. Lam-burn*, 75 N. E. 707, 709, 189 Mass. 298.

The word "may," in the borough act of April 24, 1897 (P. L. p. 291), providing that in all cases where a fine or penalty shall exceed \$20, etc., there may be a trial by jury, is mandatory in effect, and not permissive only. *Borough of Vineland v. Denofio*, 65 Atl. 837, 838, 74 N. J. Law, 328.

#### **License to practice profession**

The right to practice law given by Code 1906, c. 119, is not a de jure right, and the word "may" employed therein, in the provision that the Supreme Court "may on production of a duly certified copy of the order of the county court grant a license," will not be construed as synonymous with "shall," and, where on application it is shown on ob-

jection thereto that applicant is not of good moral character, his application will be denied. In re Application for License to Practice Law, 87 S. E. 597, 601, 67 W. Va. 213.

In Rev. Codes, § 1342, as amended by Laws 1909, p. 192, providing that the board of medical examiners may, either with or without examination, grant a license to any physician licensed to practice by a similar board of any other state, who holds a certificate of registration showing that an examination has been made by the proper board of any state in which an average grade of not less than 80 per cent. was awarded, and who is the holder of a diploma from a medical college in good standing, the word "may" is not to be construed as equivalent to "must." *Barton v. Schmershall*, 122 Pac. 385, 389, 21 Idaho, 562.

The word "may," as used in Revised Amended Greater New York Charter, § 1089 (Laws 1901, p. 1774, c. 718), providing that at the close of a teacher's third year of continuous successful service the city superintendent "may" make a license permanent, is not used in the sense of "must." It is used in a permissive and not a mandatory sense. *People ex rel. Finigan v. Board of Education of City of New York*, 94 N. Y. Supp. 61, 62, 108 App. Div. 101.

The word "may" in P. L. 1898, p. 122, § 6, as amended by P. L. p. 396, § 2, providing that the State Board of Registration and Examination in Dentistry shall register as licensed dentists all persons who shall successfully pass the examination, and that the board "may" also without examination issue its license to any applicant furnishing satisfactory proof that he has been duly licensed in any state after full compliance with its dental laws, is not synonymous with the word "shall," but is permissive, and whether the board will license an applicant without an examination is discretionary. *Saxenmeyer v. State Board of Registration and Examination in Dentistry*, 75 Atl. 175, 176, 79 N. J. Law, 427.

#### **Limitations**

Comp. Laws 1897, § 2921, provides that if, at any time after the incurring of an indebtedness or liability or the accrual of a cause of action against him or the entry of judgment against him, the debtor shall have been or shall be absent from or out of the territory, the time during which he "may" have been or may be out of the territory shall not be included in computing limitations. Held, that the use of "may" in connection with "have been" precludes the application of the terms to anything future. "They are the equivalent of has been; the only difference being that in one case the expression is in the certain or indicative form, and in the other in the contingent or potential form. They both refer to a condition completed in present time," and the

statute is retrospective in operation. *Orman v. Van Arsdell*, 78 Pac. 48, 49, 12 N. M. 344, 67 L. R. A. 438.

Gen. St. 1902, § 1131, providing that, in case of the death of plaintiff, his executor and administrator "may enter" within six months and prosecute a suit, is not an absolute limitation on the discretionary power of the court to permit an entry to be made after that time upon good cause shown. *Hatch v. Bushy*, 59 Atl. 422, 423, 77 Conn. 347.

#### Luggage

Under Wilson's Rev. & Ann. St. 1903, § 709, providing that luggage may consist of any articles intended for the use of a passenger while traveling or for his personal equipment, the term "may" is used in the sense of "must" or "shall." *Choctaw, O. & G. R. Co. v. Zwirtz*, 73 Pac. 941, 942, 13 Okl. 411.

#### Marking ballot

Act June 10, 1893 (P. L. 430) § 22, provides that the elector "shall" prepare his ballot by marking a cross above the name of a party if he desires to vote for every candidate of that party, otherwise by a mark opposite the party named. As amended by Act April 29, 1903 (P. L. 345), the section now reads: "If he desires to vote for every candidate of a political party, he may make a cross," etc. Held, that the employment of the word "may" in the amending clause gives no larger privilege as to the way of marking the ballot than the word "shall" in the original clause. *Appeal of Dailey*, 81 Atl. 655, 656, 232 Pa. 540.

#### Marriage ceremony

In Comp. St. 1907, c. 52, § 8, providing that every judge and justice of peace, and every preacher, authorized by the usages of the church to which he belongs to solemnize marriages, may perform marriage ceremonies, the word "may" is mandatory as to justices of the peace who are given a fee therefore by section 11, c. 28, but is permissive as to clergymen and judges of the higher courts. The ordinary meaning of the word "may" is permissive, and it should receive that interpretation, unless the rights of the public or third persons depend upon the power conferred, or it is necessary, to give effect to the clear intention of the Legislature, that it should be construed as mandatory. *Douglas County v. Vinsonhaler*, 118 N. W. 1058, 1062, 1063, 82 Neb. 810.

#### Meetings of board

The word "may," in Gen. St. 1901, § 6122, providing for calling special meetings by a district board or on petition of 10 resident taxpayers, is permissive. *State v. School Dist. No. 1, Edwards County*, 108 P. 136, 80 Kan. 667.

#### Mining

The word "may" is used in a permissive, not a mandatory, sense in *Mills' Ann. St. § 8162*, providing that the relocater of an abandoned lode claim may sink the original shaft deeper than it was at the time of abandonment. *Carlin v. Freeman*, 75 Pac. 26, 27, 19 Colo. App. 334.

#### Mortgage foreclosure

Under the statute (Code Civ. Proc. § 2396), providing that the affidavit of service on the mortgagor of notice of foreclosure sale by advertisement "may" be made by the person making the service, such person alone can make the affidavit. *Deutsch v. Haab*, 119 N. Y. Supp. 911, 912, 135 App. Div. 756.

#### Municipal expenditures

It is a familiar doctrine that, where a statute confers a power to be exercised for the benefit of the public or of a private person, the word "may" is often treated as imposing a duty, rather than conferring a discretion. The word, as used in *Extra Sess. Acts La. 1877, p. 47*, providing that all the revenues of a city of each year shall be devoted to the expenditures of that year, provided that any surplus of said revenues "may" be applied to the indebtedness of former years, is merely permissive as to the surplus, and does not contractually dedicate the surplus of any year to payment of claims of years prior to that year but subsequent to 1877. The word, in such act, is used in special contradistinction to the word "shall." *United States v. Thoman*, 15 Sup. Ct. 378, 380, 156 U. S. 353, 39 L. Ed. 450.

#### Notice of dishonor of note

L. O. L. § 5929, provides that the notice of dishonor of a note may be in writing or oral, and section 5936 requires such notice, where the person giving and the person to receive reside in the same place, to be sent the day following dishonor, while section 5946 provides that delay in giving notice is excused when caused by circumstances beyond the control of the holder. Held, that the word "may" in the first section should be construed as "must," and that the person giving the notice must give it in writing or orally, and hence the impossibility of giving oral notice does not under the last section excuse delay; notice by mail being practicable. *Price v. Warner*, 118 Pac. 173, 174, 60 Or. 7.

#### Powers of trustee

Laws 1896, p. 573, c. 547, § 86, provides that a trustee of property during the life of the beneficiary "may" execute a lease of real property for a term not exceeding five years, without application to the court. It is also declared that, if any such trustee has leased property before June 4, 1895, for a longer period than five years, the Supreme Court on the trustee's application "may" confirm the lease by an order binding on all

persons interested in the trust estate. Held, that the legislative intent in the first provision was to extend rather than restrict the powers of the trustee, so that a five-year lease executed in 1900 by a trustee of the life beneficiary containing an option for renewal was enforceable against the trustee and could not be construed as though it read: "A trustee shall not execute and deliver a lease of such real property for a term exceeding five years without application to the court." *Weir v. Barker*, 93 N. Y. Supp. 732, 734, 104 App. Div. 112.

#### Private way

Pub. St. 1882, c. 189, § 20, provides that a party desiring to have a private way laid out shall file a petition with the county commissioners. Section 25 provides that, when the premises are situated entirely in one town, the petition may be made to the selectmen, or mayor and aldermen, thereof. The word "may," in the last section, does not mean "must." *Eldredge v. Norfolk County Com'rs*, 70 N. E. 36, 37, 185 Mass. 186.

#### Probate proceedings

Code, § 141, providing that any person interested under any will filed in the office of the register of wills prior to June 8, 1898, "may offer the same for probate as a will of real estate," is permissive, and not mandatory. *Young v. Norris Peters Co.*, 27 App. D. C. 140, 145.

The power of modification or revocation conferred by Gen. St. 1902, § 203, providing that any court of probate "may" modify or revoke any order or decree made by it ex parte, before any appeal therefrom, and, if made before the final settlement thereof, upon the written application of any person interested therein, etc., is one that, on an application in a prescribed manner, "may," not must, be exercised. *Appeal of Murdoch*, 72 Atl. 290, 291, 294, 81 Conn. 681, 129 Am. St. Rep. 231.

The word "may," as used in West Virginia Code 1906, § 3259, providing that if, after administration is granted to a creditor or other person than a distributee, any distributee, who shall not have before refused, shall apply for administration, there may be a grant of probate or administration in like manner as if the former grant had not been made, means "must." *Butcher v. Kunst*, 64 S. E. 967, 971, 65 W. Va. 384 (quoting *Hutcherson v. Priddy*, 12 Grat. [53 Va.] 85).

Comp. Laws 1897, § 9310, provides that, when a will shall have been duly proved and allowed, the probate court shall issue letters testamentary to the person named executor therein, if he is legally competent, and shall accept the trust and give bond. Section 9317 provides that if an executor shall reside out of the state, or shall neglect to render his account or perform any decree of the court, or abscond, etc., the probate court "may" remove such executor. Section 50, subd. 1,

requires words and phrases used in statutes to be construed and understood according to the common and approved use of language. Held, that a nonresident alien is not absolutely disqualified from serving as executor, but his nonresidence is ground for the exercise of a discretion in the probate judge in the matters of appointing him or revoking his letters, and the word "may" should not be held to mean "shall." *Breen v. Kehoe*, 105 N. W. 28, 29, 142 Mich. 58, 1 L. R. A. (N. S.) 349, 113 Am. St. Rep. 558.

#### Proceedings against insolvent debtor

The word "may" is used ordinarily as a word of permission, rather than of command. Bankruptcy Act (Act U. S. 1898, c. 541, § 11), providing that a suit founded on a claim from which a discharge would be a release, pending against a person when a petition is filed against him, shall be stayed until after an adjudication or dismissal of the petition, and, if he is adjudged a bankrupt, such action may be further stayed until 12 months after the adjudication or until the question of discharge is determined, effects a peremptory stay only until the adjudication is made, and leaves the further stay within the discretion of the court in which the action is pending. If Congress had intended that a further stay in case of an adjudication should be peremptory, the use of the word "shall" instead of "may" would have made its meaning clear. *Rosenthal v. Nove*, 56 N. E. 884, 885, 175 Mass. 559, 78 Am. St. Rep. 512.

The clause in 2 Gen. St. 1895, p. 1728, § 11, providing that the court "may" direct the discharge of an insolvent debtor on making and filing an assignment of his property as therein provided, is regarded as mandatory. *Compton v. Calvert*, 72 Atl. 29, 30, 77 N. J. Law, 358 (citing *Weeks v. Buderus*, 39 N. J. Law, 448).

#### Proceedings relating to school districts

Acts 31st Leg. c. 12, § 50, requires county commissioners, in organized counties not subdivided, to divide their counties into convenient school districts, so that no district shall be thereafter created having an area of less than 16 square miles or more than one school for white children and one for colored children for each 16 square miles of territory or major fraction thereof, except that the commissioners "may" reduce the area of any common school district and create such additional districts as may be necessary, provided that no district shall be reduced to contain less than 9 square miles of territory, and that no new district shall thereafter be created having a less area than 9 square miles, and that the area of school districts having an outstanding bonded indebtedness shall not be reduced until after such indebtedness has been fully discharged. Held, that the word "may," as so used, did not confer a mere discretion, but imported an imper-



ative obligation, and hence a division of a county in such a manner as to place in the district containing the county seat 200 sections of land, making that district 20 miles long, and including the best of the lands in the county, when the territory did not exceed 60 scholastics in number, and giving to no other district more than 35 sections of land, constituted an illegal exercise of power which was subject to review by the courts. *McLaughlin v. Smith*, 148 S. W. 288, 289, 105 Tex. 330.

Primarily and as ordinarily used in a statute, the word "may" is permissive rather than peremptory, but it is sometimes regarded as synonymous with "must," as, for instance, where public officers are authorized to perform an act for the benefit of the public or for an individual who has a right to its performance. In the statute relating to school district meetings, which provides special meeting may be called by the district board or upon a petition signed by ten resident taxpayers of the district, the word "may" is used in its permissive sense. The word should always be given its ordinary meaning, unless the other terms and provisions of the statute compel the other view. *State v. School Dist. No. 1, Edwards County*, 103 Pac. 136, 80 Kan. 667 (quoting *Phelps v. Lodge*, 55 Pac. 840, 60 Kan. 122).

#### Proving ownership of estray

In Rev. Codes 1899, § 1575, providing that the person taking up an estray and the claimant of the property may go before a justice of the peace to have determined the rights of the parties, the use of the word "may" is not decisive of the meaning of the statute, and the word "may" will be construed to mean "shall," when the context or purpose of the statute requires it. It was the object of the section to provide a convenient and speedy method of proving ownership and at the same time protect the person holding the estray from liability for erroneous decision as to ownership. *Mills v. Fortune*, 105 N. W. 235, 236, 14 N. D. 460.

#### Public improvements

The word "may," as used in 1 Starr. & C. Am. St. (2d Ed.) p. 858, c. 24, par. 430, providing that a sidewalk ordinance may require all owners of abutting lots to construct a sidewalk in front of their respective lots, etc., should be read "shall." *Pierson v. People*, 68 N. E. 383, 386, 204 Ill. 456.

"Words which, in their ordinary acceptance, and when interpreted exclusive of the context and the subject-matter, imply a discretion or power, such as 'may,' 'it shall be lawful,' and the like, become, in the construction of statutes, mandatory, where such is the legislative intent." Under a statute providing that, on making changes of a street, it shall be lawful for the municipal authorities in any such city to make or cause to be made a proper award for damages,

etc., the duty of the city to make the award in such case is mandatory. *Clark v. City of Elizabeth*, 40 Atl. 616, 622, 61 N. J. Law, 565 (citing and adopting *Maxwell, Interp. of St. 218, 219, Board of Sup'rs of Rock Island County v. United States ex rel. State Bank*, 4 Wall. 435, 446, 18 L. Ed. 419).

Civ. Code 1902, § 1381, provides that the county supervisor "may" advertise for "bids for working highways by contract." Held to give such officer discretion, and the city council of a city under a general charter giving it the same powers over streets as county officers have over highways is not required to advertise for bids in county newspapers for the paving of streets. *Dillingham v. City of Spartanburg*, 56 S. E. 381, 382, 75 S. C. 549, 8 L. R. A. (N. S.) 412, 117 Am. St. Rep. 917, 9 Ann. Cas. 829 (citing *Minor v. Mechanics' Bank*, 1 Pet. [26 U. S.] 46, 7 L. Ed. 47).

The Vrooman Act (St. 1885, p. 147, c. 153), as amended by St. 1905, p. 63, c. 67, provides that whenever a contemplated improvement in the opinion of the city council is of more than local or ordinary public benefit, or whenever the total estimated costs exceed one-half the total assessed value of the lots fronting on such proposed work, the city council "may" make the expense chargeable on a district. As originally drawn, the act required the trustees of the city to order payment of a portion of the expense from the city treasury if the estimated cost of the improvement exceeded one-half the assessed value of the property. St. 1889, pp. 159, 160, 170, c. 151, amended the act so as to confer discretionary power on city councils. The amendments of 1891 (St. 1891, p. 196 et seq., c. 147) are similar in this respect. Held, that the Legislature intended to confer a wide discretionary power, and that the word "may" would not be construed to mean "shall," so as to require the expense of a street improvement to be made chargeable on a district where the estimated cost exceeds one-half the assessed value of the lots fronting on the proposed work. *Ostrander v. City of Richmond*, 101 Pac. 452, 453, 155 Cal. 468.

St. 1898, c. 40a, subc. 42, § 925—223, provides that when a city council shall order paving or repaving of a street in which gas, water mains, or sewers have been previously laid, the council "may" require service pipes to be first laid to the curb line, and that no street shall be paved or repaved by order of the council unless the water, gas mains, service pipes, necessary sewers, and connections shall, as required by the council, be first laid in that portion of the street so to be paved or repaved. Held, that the word "may" should be treated as permissive and not mandatory, and that a city council therefore had power to order the paving of a street without requiring water, gas, service pipes, and sewer connections to be laid before the pave-

ment. *Barber Asphalt Co. v. City of Oshkosh*, 121 N. W. 603, 140 Wis. 58.

"Whether the word 'may,' in a statute, is permissive or obligatory depends in a great measure on the true intent and object of the Legislature in making the enactment. It means 'must' whenever third persons or the public have an interest in having the act done or have a claim de jure that the power shall be exercised." The provisions of Acts 24th Leg. Sess. (Laws 1895, p. 213, c. 132), constituting a special road law for certain counties, that the commissioners' court "may" condemn land in the same manner that a railroad company can condemn land for a right of way is mandatory, and does not merely confer on the commissioners' court a discretionary power to proceed under the railroad law. *Plowman v. Dallas County (Tex.)* 88 S. W. 252, 256 (quoting and adopting definition in *Rains v. Herring*, 68 Tex. 468, 5 S. W. 369).

The word "may" is not to be construed as "must" or "shall," but merely as permissive and discretionary with the city, in an ordinance providing that the grade of alleys, not otherwise fixed, at the points of intersection with streets whose grades are established by the ordinance, shall be the same as said streets, and continuous from one street to the next, but between any two adjacent streets along the line of the alley vertical curves of grade "may" be used, when necessary to facilitate drainage or afford better access to property along the line of said alley, etc., for in interpreting statutes and ordinances the word "may" should not be construed to mean "must" or "shall," for the purpose of creating or determining the character of private rights. *Kelley v. City of Cedar Falls*, 99 N. W. 556, 557, 123 Iowa, 660.

Under Acts 1891, p. 323, c. 118 (Burns' Ann. St. 1901, § 4291), providing that after receiving bids for the improvement of a street, in case all bids are rejected as unsatisfactory, then the common council "may" order work to be done by the street commissioner, the total cost of the work not to be in excess of the lowest bid or that the common council "may" readvertise for bids for the work, the council must either order the work done by the commissioner, or readvertise for bids for the work, and they are not at liberty, after accepting one of the number of bids submitted, for street work, on subsequent reconsideration and rejection of the bid, to accept the proposal of another bidder submitted at the same time as the bid rejected, but with a change of material, all of which was done without readvertisement for bids. Where power is given to public officers, and the public interest or individual rights called for its exercise, the language used, though permissive in form, is in fact peremptory, and the intent of the Legislature in such cases is not to declare a mere direction, but to impose a positive and absolute duty. *Zorn*

*v. Warren-Scharf Asphalt Paving Co. (Ind.)* 81 N. E. 672, 675 (citing *Rock Island County v. United States ex rel. State Bank*, 4 Wall. 435, 18 L. Ed. 419).

A waterworks system in a village of the fourth class was extended to supply all the inhabitants except four. Relator was the only one of the four to insist that it be extended to supply him, and he sued for mandamus. The cost of the extension would be less than \$500. Village Law (Laws 1897, p. 434, c. 414) art. 9, § 224, as amended by Laws 1903, p. 307, c. 131, § 1, provided that a system of waterworks established under the article shall be under the control of the board of water commissioners, and that the board shall keep it in repair, and "may" extend the mains within the village, if the expense in any one year, in a village of the fourth class, shall not exceed \$500, and that a board "may," in lieu of extending the mains, etc., use the amount specified in improving the existing system. The original cost of the system, which was met by an issue of bonds, relator being taxed for interest thereon, was \$20,000, and there were 150 residences or places of business. The board had no money on hand to make the extension. Held, that the word "may," as used in the phrase "may extend" in any one year, etc., though permissive, would be construed "must," especially in view of the permissive character of "may" used in the last sentence of the statute, giving an alternative use of the money. *People ex rel. Hilliker v. Pierce*, 119 N. Y. Supp. 21, 23, 64 Misc. Rep. 627.

The term "may," as used in Laws 1900, p. 1302, c. 571, providing that the city of Buffalo "may" enlarge and embank the Buffalo river, implies a discretion in the city and places no absolute duty on it of improving such river. *White v. City of Buffalo*, 115 N. Y. Supp. 1021, 1023, 131 App. Div. 531.

The word "may" must be construed as "shall," when an act of the Legislature can be thereby upheld, if a contrary construction would render it obnoxious to a constitutional inhibition. The converse of this must be likewise true, and *Denver City Charter*, art. 7, § 31, providing that the city council shall pass an assessing ordinance after recommendations of the council for improvements have been reviewed by the board of public works, is to be construed as meaning that the council may pass such an ordinance. *City of Denver v. Londoner*, 80 Pac. 117, 121, 33 Colo. 104 (citing *Board of County Com'rs of Pueblo County v. Smith*, 45 Pac. 357, 22 Colo. 534).

The words "may" and "shall," when used in a statute, will sometimes be read interchangeably, as will best express the legislative intent. The word "may" will be construed to mean "shall," when the public or third person have a claim that the power ought to be exercised; but, when the word "shall" is used where no right or benefit to

any one depends on its imperative use, that word may be held directory merely, and by legislative intention to be used synonymously with the word "may." Act May 29, 1889, entitled "An act to create sanitary districts and to remove obstructions in the Des Plaines and Illinois rivers" (section 23), provides that the sanitary district constructing a channel to carry water from Lake Michigan may correct, modify, and remove obstructions in the Des Plaines and Illinois rivers, wherever it shall be necessary so to do to prevent overflow or damage along such rivers, and "shall" remove the dams at Henry and Copperas creek, in the Illinois river, before any water shall be turned into the said canal; also that if the canal commissioners "find at any time that an additional supply of water has been added to either of said rivers, by any drainage district or districts, to maintain a depth of not less than six feet from and dam owned by the state, to and into the first lock of the Illinois and Michigan Canal at LaSalle, without the aid of any such dam, at low water, then it shall be the duty of said canal commissioners to cause such dam or dams to be removed." The dams were constructed by the canal commissioners at a great expense, and their destruction would greatly injure navigation. It was held that the word "shall" should be construed as "may," so that the removal of the dams at Henry and Copperas creek by the sanitary district is not mandatory, but depends on the question of necessity, and that it is the duty of the canal commissioners to preserve and protect the dams until the conditions stated result. *Canal Com'rs v. Sanitary Dist. of Chicago*, 56 N. E. 953, 956, 184 Ill. 597.

#### Punishment of criminals

Reformatory Act (Hurd's Rev. St. 1909, c. 118) § 10, divides persons who may be sentenced thereunder into two classes, viz., males between 10 and 16 years of age, and males between 16 and 21. Section 11 provides that a boy between 10 and 16 years of age "shall be committed" to the reformatory; while section 9 provides that both classes "may be sentenced" to the reformatory. Section 10 declares that in all criminal cases tried by a jury, where it is found that the defendant is between 10 and 21 years of age, the jury shall not fix the punishment, unless it shall also appear that defendant has been previously sentenced to the penitentiary, or that the offense is a capital one, and Parole Law, § 1 (Hurd's Rev. St. 1909, c. 38, § 498), excepts from its application treason, murder, rape, and kidnapping. Held, that the parole law was not intended to destroy by implication the application of the reformatory act to males between the ages of 10 and 21, convicted of rape; but that the word "may," in section 9 of the reformatory act, should be construed to mean "must"; and hence a boy of 19, on being convicted of rape, could not be properly sentenced to the

penitentiary. *People v. Smith*, 97 N. E. 649, 650, 253 Ill. 288.

Code 1899, c. 160, § 2, providing that in any other criminal cases than in cases of sentence to death or to the penitentiary the court "may postpone" the execution of the judgment, where a writ of error lies, the word "may" means "shall," and a person convicted of misdemeanor is entitled as matter of right to suspension of the execution of the judgment pending application for a writ of error. *Ex parte Doyle*, 57 S. E. 824, 62 W. Va. 280.

The word "may," in Rev. Codes 1899, § 8246, providing that, where the punishment imposed by the jury in the verdict is under the limit prescribed by law for the offense of which defendant is found guilty, the court "may" receive the verdict and render judgment for the lowest limit prescribed by law, is mandatory, and it is the duty of trial judges to receive such a verdict and enter judgment thereon. *State v. Barry*, 103 N. W. 637, 639, 640, 14 N. D. 316.

The word "may," as used in Acts 1897, p. 73, c. 53, § 8, providing that the board of managers of the Indiana reformatory may terminate the imprisonment of certain inmates when the rules and requirements of such reformatory have been obeyed and performed according to the provisions of the act, must be understood in its usual acceptance and as granting to such board permission, liberty, or discretion to terminate such imprisonment, and not as imposing on the board a duty to be performed in all cases, whether such board believes the person imprisoned entitled to his discharge or otherwise. Should the clause of the act be construed as mandatory, all discipline in the institution would inevitably be overthrown, and the board be exposed to innumerable and constantly recurring legal controversies with the inmates over the question of the right to a discharge. *Terry v. Byers*, 68 N. E. 596, 598, 161 Ind. 360.

#### Receivership

In Rev. Codes, § 4831, providing that the court may require an undertaking from an applicant for a receivership, "may" does not mean "must." *Lee v. Stevens*, 127 Pac. 680, 681, 22 Idaho, 670.

#### Reference

The word "may," as used in Rev. St. 1898, § 2864, providing that all or any of the issues in an action may be referred, is not used with reference to public rights or interests, or where the public or a third person have a claim *de jure* that the power shall be exercised. So it is not an instance where by the rules of statutory construction a permissive word shall be given the mandatory significance of "must" or "shall." When a permissive word is not so used in the statute, it must be taken in its literal sense. The privilege of the statute in question is design-

ed for the convenience of both the court and parties. Hence the statute authorizes a reference in the discretion of the court, and does not entitle a party to a reference as a matter of right. *Hart v. Godkin*, 100 N. W. 1057, 1058, 122 Wis. 646.

#### Regulation of freight rates

Under a railroad charter providing that, when the aggregate amount of dividends declared shall amount to the full sum invested and 10 per centum per annum thereon, the Legislature "may" so regulate the tolls and freights that not more than 15 per centum per annum shall be divided on the capital employed, and the surplus profits, if any, etc., the word "may" is permissive. *Terre Haute & I. R. Co. v. Indiana ex rel. Ketcham*, 24 Sup. Ct. 767, 769, 194 U. S. 579, 48 L. Ed. 1124.

Under Loc. Laws 1847, p. 77, creating a corporation with power to construct a railroad between certain points, and with the right to fix its transportation rates until the stockholders had received in dividends an amount equal to the sum invested and 10 per cent. per annum thereon, when the Legislature may regulate the rates, the word "may" cannot be construed to mean "shall." *Terre Haute & I. R. Co. v. State ex rel. Ketcham*, 65 N. E. 401, 406, 159 Ind. 438.

#### Specific performance

Under Civ. Code, art. 1926, the obligee in a contract for the sale of land is entitled to damages, or specific performance, at his option, and by article 1927 he is entitled only to damages in ordinary cases, but "may" be awarded specific performance in cases where damages would be inadequate relief. Construing these two articles together and reading the word "may" in conjunction with the word "entitled," to which it stands in correlation, the word "may" must be given the meaning of "shall." *Girault v. Feucht*, 41 South. 572, 573, 117 La. 276.

#### Taxation

In Pol. Code, § 3804, requiring that any taxes paid more than once, or erroneously or illegally collected, may by order of the board of supervisors be refunded by the county treasurer, the word "may" means "shall." *Stewart Law & Collection Co. v. Alameda County*, 76 Pac. 481, 482, 142 Cal. 660.

Pol. Code, § 3804, provides that any taxes, penalties, and costs paid more than once, or erroneously or illegally collected, may, by order of the supervisors, be refunded. Held, that the duty to refund was mandatory; the word "may" being construed to mean "must," under the rule that, where persons or the public have an interest in having an act done by a public body, the word "may" is to be so construed. *Brenner v. City of Los Angeles*, 116 Pac. 397, 400, 160 Cal. 72.

L. O. L. § 937, gives the county court the authority and powers of county commissioners to transact county business. It is authorized by subsections 3 and 4 to establish, vacate, or alter highways, and provide for the erection of bridges. By subsection 7, to determine the amount of revenue to be raised for county purposes, and to levy the rate necessary therefor; and by subsection 9 it is given the general management of county property, funds, and business, where the law does not otherwise provide. Acts 1903, p. 262, which remodeled the entire road system of the state, repealing all previous legislation on the subject, did not in terms repeal section 937; but it was amended by Acts 1909, p. 296, so as to provide, in section 34 (L. O. L. §§ 6320, 6321), that the county court "may" levy a tax, not to exceed 10 mills on the dollar, which shall be set apart as a general road fund. Held that, while the word "may," when referring to a ministerial public duty, is often construed as "shall" or "must," the ordinary import of the word is directory, and as the later legislation does not in terms attempt to infringe on the authority of the county court its provisions must be regarded as merely cumulative, and it rests within the discretion of the county court to make the levy provided for in section 34. *Kime v. Thompson*, 118 Pac. 174, 175, 60 Or. 183.

The word "may," as used in a statute providing that a tax collector "may" notify a nonresident taxpayer of the time and place at which he will receive payment of the tax, and that the time shall not be less than 20 or more than 40 days from the time when the notice is mailed, in view of the summary method of proceeding against property for taxes, is used in the mandatory sense of "must." *Brush v. Watson*, 69 Atl. 141, 142, 81 Vt. 43.

It is well settled that the word "may" or the words "it shall be lawful" are peremptory when used in a statute conferring authority to do certain acts, where the public or an individual has a right de jure that the powers conferred by the act should be exercised. Where a judgment was obtained against a city on a debt which arose prior to the Constitution of 1875, pursuant to a statute authorizing the city to levy taxes to pay the debt, the city must levy a tax to pay a judgment within the limitation as to the amount of levy provided by Const. 1901, § 216, and on its refusal the judgment creditor is entitled to compel the levy by mandamus. *Graham v. City of Tusculum*, 42 South. 400, 402, 146 Ala. 449 (quoting and adopting definition in *Tarver v. Commissioners' Court of Tallapoosa County*, 17 Ala. 527).

In a statute which provided that a board of supervisors "may, if deemed advisable," levy a special tax to pay a certain indebtedness, the language was peremptory. Where power is given to public officers in such lan-

guage, if the public interest or individual rights call for its exercise, the language, though permissive in form, is in fact peremptory, and what they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid who would be otherwise remediless in all such cases. The intent of the Legislature which is the test is not to devolve a mere discretion but to impose a positive and absolute duty. *United States v. Cornell Steamboat Co.*, 137 Fed. 455, 458, 69 C. C. A. 603 (quoting and adopting definition given in *Rock Island County v. United States ex rel. State Bank*, 4 Wall. [71 U. S.] 435, 18 L. Ed. 419).

The word "may," in a statute, will be construed to mean "shall," where the subject-matter is one in which the public have an interest to be protected or promoted by the exercise of a power or the performance of a prescribed duty by a public officer, unless the context shows that the word was used in its primary signification. However, as used in Galveston city charter, section 56, providing that suit may be brought to collect taxes, is not mandatory. *Brummer v. City of Galveston*, 76 S. W. 428, 429, 97 Tex. 93 (citing *Smisson v. State*, 9 S. W. 112, 71 Tex. 222).

#### **Trial**

The word "may," in Rev. St. 1899, § 748, providing that upon the conclusion of the evidence either party "may" move the court to instruct and the court "may" of its own motion give instructions, is not used in a mandatory sense, and the court is not required to give instructions in a civil action, where no instructions are requested. *Hall v. St. Louis & S. Ry. Co.*, 101 S. W. 1137, 1140, 124 Mo. App. 661.

The word "may," as used in Rev. St. 1899, § 748, providing that the court "may" of its own motion give instructions on any point of law arising in the cause, is permissive and not mandatory. *Wilson v. Kansas City Southern Ry. Co.*, 99 S. W. 465, 466, 122 Mo. App. 667.

Where the statute provided that the court of chancery "may," in will contest suits, direct an issue of fact as in other cases, the word "may" is equivalent to "must" and the court is required to direct an issue of *devisavit vel non* whenever demanded; the word "may," in a statute, when it concerns the public interest or the rights of individuals, being mandatory and equivalent to "must" or "shall." *Hill v. Barge*, 12 Ala. 687, 693.

"May," as used in a statute providing that a trial court "may order a view," etc., implies a discretion. *Commonwealth v. Chance*, 54 N. E. 551, 552, 174 Mass. 245, 75 Am. St. Rep. 306 (citing and adopting *Com-*

*monwealth v. Webster*, 5 Cush. [59 Mass.] 295, 298, 299, 52 Am. Dec. 711).

#### **Trying title to office**

Where an individual seeks relief of a private nature under Hurd's Rev. St. 1905, c. 112, § 1, providing that, when a person unlawfully holds an office in a corporation created by the state, "the Attorney General or state's attorney, either of his own accord or at the instance of an individual, 'may' present a petition to any court of record of competent jurisdiction" for leave to file an information in the nature of a quo warranto, it was held that the only discretion vested in the prosecuting officer is to determine whether the documents presented to him are in proper legal form, and whether evidence is presented sufficient to establish the person's *prima facie* right to the relief. It was urged that any such construction would result in holding that the word "may," in the language quoted, means "may" in cases where only the public interest is at stake, and means "shall" where private interests are involved, and that it would be an anomaly to hold that the same word in the same sentence of a statute may mean one thing when applied to one class of cases and another thing when applied to another class, but the court was of the opinion that this presented no serious difficulty, stating that, when the Legislature extended the right to private individuals to assert private rights by this proceeding, it is apparent that it was intended that they should have an opportunity to seek redress for their wrongs by making application to a court, or judge thereof, for leave to file an information; that the duty resting on the state's attorney to sign and present a petition for leave to file an information in the nature of a quo warranto, where evidence of facts is properly presented to him by a proposed relator, which shows *prima facie* that the relator is legally entitled to the relief, in reference to a private right, which would be afforded him by a judgment in his favor in a quo warranto proceeding, is an absolute one, and it followed, therefore, that, where he declines to act for any reason other than that the facts, evidence of the existence of which is presented to him, do not warrant the relief which the proposed relator seeks, or that the petition and affidavit or affidavits presented to him are not in proper legal form, his declaration is an abuse of his discretion, conceding that his construction of the statute be correct, and such an abuse of discretion as amounts to a refusal on his part to exercise his discretion at all and to a refusal to perform the duty enjoined upon him by the law. *People v. Healy*, 82 N. E. 599, 602, 230 Ill. 280, 15 L. R. A. (N. S.) 608.

#### **Venue**

The word "may," as used in Gen. St. 1894, § 5186, which provides that, where defendant is a nonresident and plaintiff proceeds by attaching his property, the action

may be brought in any county where defendant has property liable to attachment, is not mandatory, and cannot be construed as meaning "must." *Clements v. Utley*, 98 N. W. 188, 189, 91 Minn. 352.

The words "may be brought," as used in Kirby's Dig. § 6067, providing that an action against a corporation "may be brought" in certain counties, have the meaning of "shall be brought," and are mandatory. *Spratley v. Louisiana & A. Ry. Co.*, 95 S. W. 776, 777, 77 Ark. 412.

The words "may be brought," as used in Kirby's Dig. § 6068, providing that an action against a railroad company or an owner of a line of mail coaches or other coaches, for injury to person or property, may be brought in any county through or into which the road or line passes, have the meaning of "shall be brought," and are mandatory. *Chicago, R. I. & P. R. Co. v. Jaber*, 107 S. W. 1170, 1171, 85 Ark. 232.

The word "may," as used in Code, § 3214, subd. 7, providing that where a circuit court judge is interested in a case which, but for such interest, would be within the jurisdiction of his court, the action may be brought in any county in an adjoining circuit, was not used in the sense of "may only," or "must," but thereunder a circuit court judge may bring an action in the circuit court of any county in his circuit in which the defendants reside. *Harrison v. Wissler*, 36 S. E. 982, 983, 98 Va. 597 (quoting and adopting *Thompson v. Roe ex dem. Carroll*, 22 How. [63 U. S.] 422, 434, 16 L. Ed. 391, and citing and adopting *Minor v. Mechanics' Bank*, 1 Pet. [26 U. S.] 46, 64, 7 L. Ed. 55).

#### Same—Change of venue

Gen. St. 1909, § 5650, provides that, where it shall be made to appear that the judge is interested in the subject-matter or is otherwise disqualified, the court may, upon application of either party, change the place of trial. Held, that "may," as used, means "must," and, where the necessary facts have been made to appear, a change of venue is not a matter of discretion of the court, but a right in the party applying therefor. *Jones v. American Cent. Ins. Co.*, 109 Pac. 1077, 1080, 83 Kan. 44.

The word "may" in Rev. Codes 1899, § 6652, providing that a justice of the peace may before trial, on motion, change the place of trial in certain cases, should be construed to mean "must." *Walker v. Maronda*, 106 N. W. 296, 297, 15 N. D. 63.

Under Laws 1891, c. 50, amending section 7312, Comp. Laws, providing that a criminal action prosecuted by indictment may, at any time before trial is begun, on the application of defendant, be removed from the court in which it is pending, whenever it shall appear to the satisfaction of the court, by affidavit, that a fair and impartial trial

cannot be had, the word "may" will be construed as imperative, where an affidavit is presented by accused sufficiently alleging prejudice of the presiding judge. *State v. Henning*, 54 N. W. 536, 538, 3 S. D. 492.

The Legislature, by using the term "shall grant a change of judge," in Sess. Laws 1907-08, c. 68, art. 1, § 10, p. 592, instead of the term "may, on application of either party, change the place of trial to some county where such objection does not exist," in view of the construction of the word "may" in the case of *Kansas Pacific Ry. v. Reynolds*, 8 Kan. 630, did not render the statute in that respect any more mandatory, and there can be no special significance in the use of the word "shall" instead of the word "may." *State ex rel. Smith v. Brown*, 103 Pac. 762, 765, 24 Okl. 433.

#### Withdrawal of plea

Code, § 5337, providing that at any time before judgment the court "may" permit a plea of guilty to be withdrawn and other plea or pleas substituted, is mandatory. *State v. Hortman*, 97 N. W. 981, 982, 122 Iowa, 104.

#### MAY BE

The term "may be," in a will providing that the trust "may be" ended when the testator's eldest child comes to 21 years of age, or, being a daughter, is married, implies necessarily that the trust may or not be then terminated. Hence, until it has been terminated by the act of the parties or of a court of competent jurisdiction, the trust will endure so as to conserve the title and interest devised, to the ends intended by the settlor. *Davis v. Dovey (Ky.)* 85 S. W. 725, 726.

The rule appears to be settled that where the term "may be" is used in statutes, unless the contrary appears from the context, it is to be construed as meaning in the future. *Bohart v. Anderson*, 103 Pac. 742, 743, 744, 24 Okl. 82, 20 Ann. Cas. 142 (citing *Board of Commissioners of Pitkin County v. Aspen Mining & Smelting Co.*, 32 Pac. 718, 3 Colo. App. 223; *Shoemaker v. Smith*, 37 Ind. 128; 5 Words and Phrases, p. 4447).

Clv. Code, § 3193, provides that an acceptance of a bill of exchange must be in writing, and "may be made" by the acceptor writing his name across the face of the bill, with or without other words. Held, that the phrase "may be made" indicates that the section is permissive, only, and that any other written acceptance clearly disclosing the drawee's intention to accept will constitute an acceptance. *Hughes Bros. v. Rawhide Gold Mining Co.*, 116 Pac. 969, 971, 16 Cal. App. 293.

Where testator bequeathed a sum to his daughter, but provided that the amount she "may be" owing on his books should be deducted therefrom, and about \$20,000 was charged against her at the time, but no ad-

vancements were made thereafter, the words quoted referred to advancements already made. In *re Bresler's Estate*, 119 N. W. 1104, 1107, 155 Mich. 567.

"May be revived," in equity rule 56, prescribing the procedure to revive a suit on the death of a party, the expression "may be revived" should be read "must be" or "shall be," and one entitled to revive a suit in equity, which has abated by the death of a party, is not authorized to proceed therefor by motion, but must follow the procedure prescribed by rule 56 by filing a bill of revivor, or a bill in the nature of a bill of revivor. *Dillard's Adm'r v. Central Virginia Iron Co.*, 125 Fed. 157, 159.

#### MAY BECOME

"The phrase 'may become' prima facie refers to the future." *Haspel v. O'Brien*, 67 Atl. 123, 218 Pa. 146, 11 Ann. Cas. 470.

#### MAY COME

Code, § 841, describing embezzlement by a receiver as the fraudulent conversion to his own use of property which "may come" into his possession by virtue of his employment, comprehends property in the hands of the receiver before the passage of the act, but embezzled thereafter. *Fields v. United States*, 27 App. D. C. 433, 439.

#### MAY CONTINUE IN SESSION

The expression "may continue in session," etc., in *Baltimore City Charter* (Laws 1898, p. 359, c. 123) § 216, declaring that the city council shall meet on the Thursday next after the third Monday in May, 1899, and upon the same day in each year thereafter, and may continue in session for 120 days, and no longer, in each year, provided that they may so arrange their sittings that the same may be held continuously or otherwise, does not mean that at the end of the 120 days, or at the end of the year during which the council meet that number of days, all unfinished business must come to an end, and be again gone over from the beginning to give it effect. *Bond v. City of Baltimore*, 74 Atl. 14, 16, 111 Md. 364.

#### MAY DEDUCT

Though the words "may deduct," as used in Code Civ. Proc. § 1903, as amended by Laws 1904, p. 1285, c. 515, providing that, in an action for wrongful death, plaintiff "may deduct" from the amount recovered the expenses of the action, the reasonable funeral expenses of the decedent, and his commissions upon the residue, confer a mere power, the power is given without limitation as to the persons in whose favor it may be exercised, and the observance of the statute is therefore not merely discretionary but is rendered necessary by the scope of the statute and its clear intent and purpose. In *re McDermott's Estate*, 99 N. Y. Supp. 829, 49

Misc. Rep. 402 (citing *Pelletier v. Saunders*, 67 N. C. 261; In *re Thornton's Estate*, 5 Ohio Dec. 151).

#### MAY FRAME CHARTER

The provision in the state Constitution that cities of a specified class "may frame a charter for its own government" means that a city of such class may frame a charter for the government of itself as a city, which includes all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves. Nor does the Constitution confer unlimited power on the city to regulate, by its charter, all matters that are strictly local, for there are many matters that are local to a city, requiring governmental protection which are foreign to the scope of municipal government. *State ex rel. Garner v. Missouri & K. Telephone Co.*, 88 S. W. 41, 43, 189 Mo. 83.

#### MAY HAVE

Where a witness replied to a question concerning his former testimony, "I don't know; I may have," the words "may have" were not necessary or even probably intended as a statement that his best recollection was that he had so testified, but rather that he had no recollection whatever about it. The answer seems to be a statement that he did not know and had no recollection. *Higgins v. Shepard*, 70 N. E. 1014, 1015, 186 Mass. 57.

Plaintiff gave defendant railroad company a receipt reciting that it was in full satisfaction of all claims and demands whatsoever which plaintiff "has or may have" against defendant by reason of damages to plaintiff's land from the overflow of water, etc., for all expenses caused by the overflow, for the conveyance of a parcel of land over which the overflow was, and for a general release, and providing that a deed and release should be executed. Held, that the receipt only provided for the release of the existing claim for damages caused by the overflow, and not for future claims for such damages. *McCabe v. New York Cent. & H. R. R. Co.*, 124 N. Y. Supp. 652, 654, 139 App. Div. 698.

"'May have suffered' is a form of the verb 'to suffer,' descriptive of completed action, and, so far as tense is concerned, is the equivalent of the past tense, indicative mood, 'has suffered.' This latter form of the verb may be substituted for that used without change of meaning." An instruction authorizing the jury to allow damages for any permanent injuries plaintiff "'may have suffered' by reason of the injury in question, if any," was not objectionable as permitting the allowance of such damages based on mere probability or conjecture. *Ballard v. Kansas City*, 86 S. W. 479, 480, 110 Mo. App. 391.

**MAY HOLD COURT**

The words "may hold court," as used in Const. art. 7, § 11, empowering the Legislature to authorize judges of circuit courts to hold court for each other, do not limit the power of circuit judges to the exchange only to hold a regular term of the circuit court, but permit the Legislature to authorize a judge of one circuit to make orders at chambers in another circuit, and conduct generally the business in such circuit which a judge is authorized by law to transact. In re Southern Wisconsin Power Co., 122 N. W. 801, 808, 140 Wis. 245.

**MAY LIMIT**

The words "may limit," as used in the New York Motor Vehicle Law, which prohibits the operation of motor vehicles in closely built up districts at a greater speed than a mile in six minutes, and provides that the municipal authorities may limit, by ordinance, the speed of motor vehicles on public highways, are equivalent to the words "may still further restrict." A city or village is thus authorized to enact an ordinance prescribing a lower rate of speed within its territorial jurisdiction than that permitted by the general law itself, and the driver of a motor vehicle at a speed in excess of the lower rate, but not in excess of a mile in six minutes, is subject to prosecution, for violation of the ordinance only; but a person operating an automobile at a greater speed than a mile in six minutes, though within the limits of the municipality, is still liable to punishment under the general law. People ex rel. Hainer v. Keeper of Prison of Seventh District Magistrates' Court of City of New York, 83 N. E. 44, 46, 190 N. Y. 315.

**MAY NEED**

See As She May Need.

**MAY PERMIT**

The term "may permit," in equity rule 67, as it stood prior to the amendment of May 15, 1893, as given in 149 U. S. 793, 13 Sup. Ct. III, cannot properly be held to mean "may require" or "may compel," and the rule, as amended, providing that on due notice given, as prescribed by previous order, the court may, in its discretion, permit the whole or any part of the evidence to be adduced orally in open court on final hearing, does not require the court to require an unwilling party to so adduce evidence and forego his right to use the methods prescribed by the rule prior to the amendment. Hyams v. Federal Coal & Coke Co., 152 Fed. 970, 973, 82 C. C. A. 324.

**MAY THEN BE**

See As It May Then Be.

**MAY USE**

An agreement by one party to furnish and by the other party to purchase all the

coal of a stated kind the second party "may use" in the operation of a mine and reduction works during a limited time is valid, and binds the purchaser to take from the seller all the coal that may be needed or required in the conduct of such business during the time specified. Golden Cycle Mining Co. v. Rapson Coal Mining Co., 188 Fed. 179, 183, 112 C. C. A. 95.

**MAY WISH**

See As She May Wish.

**MAY 1ST, 2 PER CENT., OR JULY NET**

Terms of sale, "May 1st, 2 per cent, or July net," mean that the purchaser may pay on or before the earlier date and save the discount, that if he does not care to do so, by losing the discount he has additional time within which to pay, and that the bill is not due except at option of purchaser until July 1st. Howes & Howes v. Union Mfg. Co. (Ky.) 113 S. W. 512, 513.

**MAYHEM**

See. also, Maim.

Under Code 1896, § 5095, providing that one who "unlawfully, maliciously and intentionally cuts, bites or strikes off an ear" of another person is guilty of "mayhem," the injury to the ear must be such as disfigures to ordinary observation, as distinguished from a wounding which simply mars the member. Green v. State, 44 South. 194, 151 Ala. 14, 125 Am. St. Rep. 17, 15 Ann. Cas. 81.

**MAYOR**

As judicial officer, see Judicial Officer.

"The word 'mayor' first occurs in English history in 1189, when Richard I substituted a mayor for the two bailiffs of London. The Romans styled such officer 'prefectus urbi,' and originally the English title for such officer was either 'bailiff' or 'portreeve,' just as the sheriff was 'shirreeve'; i. e., sheriff." "It is said that the word 'mayor' comes from the old English word 'maier,' which means 'power,' 'authority,' and not from the Latin 'major,' meaning greater. He represents the power and authority of the town, and the duty of presiding at meetings of the town commissioners is only one of the duties he exercises. While the power and duties of 'mayor' may vary according to the charter of the town or the laws of the state, it is probably without any exception his duty to execute the laws and local regulations of his city and to supervise the discharge of their duties by the subordinate officers of the city government." State v. Thomas, 53 S. E. 522, 523, 141 N. C. 791 (quoting 5 Words and Phrases, p. 4450).



The general municipal act of March 18, 1883 (St. 1883, p. 93, c. 49), divides cities into six classes, provides for a mayor in the first four, makes him in the fourth class a member of the council, with the right to vote only in case of a tie, and in the last two classes requires the council to elect one of its members president, imposing on him the duty of signing all ordinances preliminary to publication, but giving him no veto power, and not requiring him to perform the duties of a mayor. Act March 27, 1897 (St. 1897, p. 190, c. 129), entitled, "An act to require ordinance and resolution passed by the city council or other legislative body of any municipality to be presented to the mayor, or other chief executive officer of such municipality, for his approval," provides (section 1) that every ordinance imposing a penalty passed by the council shall before it takes effect be presented to the mayor for his approval, and that, if it fails to receive his approval, it shall be lost, unless on its return it receives the votes of three-fourths of all the members, "provided that \* \* \* this section shall not apply to cities in which the mayor is a member of the city council, or other governing body," and provides (section 4, p. 191) that in municipalities in which there is no mayor the duties imposed on said officer by the provisions of the act shall be performed by the president of the board of trustees, or other chief executive officer of the municipality. Held, that to prevent injustice and absurdity, the proviso in section 1 should be made to read "mayor or other chief executive," or the word "mayor" should be held to include all executive officers similarly situated, and thus prevent a construction giving the veto power to the president of the board of trustees of cities of the fifth and sixth classes, when it is denied to the mayor of cities of the fourth class. *City of San Buenaventura v. McGuire*, 97 Pac. 526, 527, 8 Cal. App. 497.

## MAYORDOMO

A "mayordomo" is an officer in charge of an irrigation water system under the laws of New Mexico. *Candelaria v. Vallejos*, 81 Pac. 589, 595, 13 N. M. 146.

## MEADOW

The term "meadow" included salt marshes and beaches. *Sandiford v. Town of Hampstead*, 90 N. Y. Supp. 76, 82, 83, 97 App. Div. 163.

## MEAL

### See Coarse Meal.

If a single sandwich satisfies the desires of a person, it constitutes a "meal," and the keeper of a hotel has the right to serve liquors to him with such meal, under Laws 1897, p. 234, c. 812, § 31, cl. "k," providing that the keeper of a hotel, being the holder

of a liquor tax certificate, may sell liquor on Sunday to his guests with their meals. *In re Cullinan*, 87 N. Y. Supp. 660, 662, 93 App. Div. 427.

In the manufacture of corn meal for culinary purposes, the corn is first kiln-dried, then cracked or ground between rollers, and afterwards bolted. A product made by the same rollers but set farther apart so as not to crush the grain so finely, and with the corn not kiln-dried, and the product not bolted, but merely passed between the rollers and then loaded in the cars, and variously known as "cracked corn," "chop," "coarse meal," was not in the ordinary acceptance of the term "meal," and was properly distinguished from meal in apportioning cars among shippers. *State ex rel. Crandall v. Chicago, B. & Q. R. Co.*, 101 N. W. 23, 24, 72 Neb. 542.

## MEAN TIME

"Mean solar time" is arrived at by the motion of a fictitious sun called the "mean sun," which is imagined to move with perfect uniformity, being sometimes behind the true sun and sometimes in advance of it. This time changes with the longitude, and, in a country of the magnitude of the United States, the difference of time between places caused much difficulty in the regulation of the movements of railway trains. About the year 1883 the principal railroads of the United States adopted an arbitrary standard for the purpose of securing uniformity in the operation and connection of their trains. Under this system the country was divided into four sections, eastern, central, mountain, and Pacific, approximately 15 degrees in width from east to west, and the time of the central meridian of each section was adopted as the uniform railroad time for the entire section. *Globe & Rutgers Fire Ins. Co. v. David Moffat Co.*, 154 Fed. 13, 20, 83 C. C. A. 91.

## MEANDER

### MEANDER CORNERS

"Meander corners" hold, as declared by the rules of the United States Land Office, the peculiar position of denoting a point on line between landowners without usually being the legal terminus or corner of the land owned. Where meander corners of a government survey are lost or obliterated, they must be restored in accordance with the circulars of the United States Land Office. *Kleven v. Gunderson*, 104 N. W. 4, 6, 95 Minn. 246.

### MEANDER LINE

Generally "meander lines" are lines which course the banks of navigable streams or other navigable waters. *Chapman & Dewey Land Co. v. Bigelow*, 92 S. W. 534, 537, 77 Ark. 338.

The point to which the water of a navigable stream usually rises, in an ordinary season of high water, is the "meander line" which forms the boundary of the title of the government. *State v. Portland General Electric Co.*, 98 Pac. 160, 162, 52 Or. 502.

"A 'meander line' is not a line of boundary, but one designed to point out the sinuosity of the bank or shore and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser." *Sherwin v. Bitzer*, 106 N. W. 1046, 1047, 97 Minn. 252 (quoting and adopting definition in *Whitaker v. McBride*, 25 Sup. Ct. 531, 197 U. S. 510, 49 L. Ed. 857).

A "meander line" is not a boundary line, but is designed to point out the sinuosities of the bank or shore of a river to ascertain the quantity of land in a fractional subdivision, except where such line is run and monuments erected, so that in the absence of such monuments the fact that a stream has been meandered does not limit the title of a grantee of the riparian land to the meandered line instead of to the thread of the stream. *People v. Economy Light & Power Co.*, 89 N. E. 760, 767, 241 Ill. 290.

"Meander lines" are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream. *Seabrook v. Coos Bay Ice Co.*, 89 Pac. 417, 418, 49 Or. 237.

"The 'meander lines' run along or near the margin of waters are run by the government surveyors for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines." *McDade v. Bossier Levee Board*, 33 South. 628, 630, 109 La. 625 (quoting and adopting definition in *Hardin v. Jordan*, 11 Sup. Ct. 811, 838, 140 U. S. 380, 35 L. Ed. 428).

A "meander line" is not established as a boundary, but is a line drawn along the shore of water disregarding its minor sinuosities, and is not used to mark the limits of land, but to determine the number of acres for which the government will demand payment; and, when payment for such acreage is made, the purchaser's title exists to the water's edge, though there be small unmeasured tracts lying outside the meander line. *Barringer v. Davis*, 120 N. W. 65, 68, 141 Iowa, 419.

"A 'meander line,' in an official survey, is not a line of boundary, but, as said in *Horne v. Smith*, 15 Sup. Ct. 988, 159 U. S. 40, 40 L. Ed. 68, is used 'as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.'" *Tolleston Club of Chicago v. Lindgren*, 77 N. E. 818, 820, 39 Ind. App. 448.

A "meander line" is not a boundary line, where it substantially represents a water

line, and the surveyed tracts actually abut on a body of water proper to be meandered under the rules governing public survey, and in such case the title of the abutting owner extends to the actual water line, at least as it existed at the time the survey was made. Owners of land bounded on a nonnavigable lake or on a body of water, the banks of which were meandered in the original government survey, have no title to the submerged bed of such lake or body of water. *Wright v. City of Council Bluffs*, 104 N. W. 492, 493, 130 Iowa, 274, 114 Am. St. Rep. 412.

The court judicially knows that "meander lines" are unsatisfactory as the basis for determination of boundaries. The "meander lines" running along or near the margin of waters are run for the purpose of ascertaining the quantity of the upland to be charged for and not for the purpose of limiting the title of the grantee to such meander lines. *Kleven v. Gunderson*, 104 N. W. 4, 6, 95 Minn. 246 (citing *Hardin v. Jordan*, 11 Sup. Ct. 808, 140 U. S. 371, 35 L. Ed. 428; *St. Paul & P. Ry. Co. v. Schurmeier*, 7 Wall. [74 U. S.] 272, 19 L. Ed. 74; 5 Words and Phrases, p. 4452).

A government survey or plat of a township selected by the state under the swamp lands act (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519) showed that a certain part of the survey was not laid out into sections and subdivisions, and that the surveyed part was separated from the unsurveyed part by a meandered line, the unsurveyed part being designated as "sunk lands" and in the surveyor's field notes described as low, wet lands. The township was patented to the state according to the official plats of the survey. Held, that a "meandered line," being an ordinary line bounding a body of land, there was nothing to show that the sunk lands was a body of water, though temporarily covered with water, and under the patent the entire township passed to the state as swamp lands. *Chapman & Dewey Lumber Co. v. Board of Directors, St. Francis Levee Dist.*, 139 S. W. 625, 628, 100 Ark. 94.

## MEANING

See Plain Meaning.

## MEANS

See External, Violent and Accidental Means; Mechanical Means; Reasonable Means; Safe Means.

Any means, see Any.

Any other means, see Any Other.

Other means, see Other.

In an interference involving the invention of a machine for mechanically transferring a cigar "bunch" from the mould to a wrapping mechanism by which the wrapper is applied to the cigar "bunch," and in which the machines of the parties showed

different species of transferring device, the term "means," in the issues calling for the combination with the wrapping mechanism of "means for transferring the bunches from the mould to the wrapping mechanism," was a generic term, and applicable alike to the transferring device of each party. *Lecroix v. Tyberg*, 33 App. D. C. 586, 591.

"Means" signifies a plan or method of procedure. *Texas & P. Ry. Co. v. Beezley*, 101 S. W. 1051, 1052, 46 Tex. Civ. App. 108.

In a patentee's claim reading, "In a sewing machine a back guide, around which the goods are adapted to be held, a needle co-operating with said back guide, means for reciprocating said needle longitudinally and means for causing said needle to recede laterally from said back guide after its point has entered the material," the word "means," describing the word needle as an element of the combination, refers to some mechanism other than the needle, the latter being separately specified as one element, so that the claim is not infringed by a machine embodying all the elements of the combination, but in which defendant's needle is slightly inclined, and the path in which its point reciprocates passing the back guide is nearer thereto than is the like path of its shaft, and the reciprocation of which is longitudinal. *Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co.*, 163 Fed. 950, 955, 90 C. C. A. 310.

The word "means," as used in Rev. Codes 1890, § 8042, providing that, when an offense may be committed by the use of different "means," the "means may be alleged in the alternative in the same count," is to be defined as synonymous with the word "agency" or "instrumentality." The fraudulent appropriation of property or the secreting of it with a fraudulent intent to appropriate it as described in Rev. Codes 1890, § 7462, defining "embezzlement," are different acts or facts that may constitute the crime of "embezzlement," and are not the "means" of committing the offense. *State v. Lonne*, 107 N. W. 524, 525, 15 N. D. 275.

A wall in course of construction is not "works," "ways," nor "means," within the New York Employers' Liability Act (Laws 1902, p. 1748, c. 600), making an employer liable for injuries caused by defective works, ways, or means. *Ripp v. Fuchs*, 113 N. Y. Supp. 361, 364, 129 App. Div. 321.

In Rev. St. § 5444, providing that every officer of the revenue, who, by any means whatever, knowingly admits or aids in admitting any goods on payment of less than the amount of duty legally due thereon, shall be punished, if the "means" adopted by him was to accept a duty that did not belong to him, and to take advantage of his knowledge that his performance of that duty would be recognized by his superior officer, that would be quite as much of a "means,"

within the meaning of the statute, as if he had departed from a duty regularly laid on him. *United States v. Rosenthal* 126 Fed. 766, 774.

The expression "means at his command," used in a charge in a prosecution for murder asserting the proposition that, in order to justify a killing under a claim of self-defense, the slayer must have resorted to all reasonable "means at his command," consistent with his own safety, to avoid the necessity of taking human life, is equivalent to the expression "means in his power." *King v. State*, 44 South. 941, 942, 54 Fla. 47.

A system of perforated pipes in a building, connected with valves outside the building for the use of firemen, constitute a "means of preventing and extinguishing fires," within the provisions of Greater New York Charter, Laws 1897, p. 263, c. 378, § 762, providing that the owners of manufactories, office buildings, etc., shall provide such fire hose, fire extinguishers, and other means of preventing and extinguishing fires as the fire commissioners may direct. *Lantry v. Hoffman*, 105 N. Y. Supp. 353, 354, 55 Misc. Rep. 261.

#### MEANS OF KNOWLEDGE

See Equal Means of Knowledge.

"Means of knowledge" plainly within reach of stockholders by the exercise of the slightest diligence is in legal effect equivalent to knowledge." *Cole v. Birmingham Union Ry. Co.*, 89 South. 408, 405, 143 Ala. 427 (quoting and adopting definition in *Jesup v. Illinois C. R. Co.*, 48 Fed. 483).

The existence of public records of deeds, access to which is easy, and which would disclose that a trustee's representation that he had sold trust property worth \$2,200, so as to net less than \$600, was fraudulent, since the "means of knowledge" are equivalent to knowledge. A clue to the fact, which, if followed up diligently, would lead to a discovery, is, in law, equivalent to discovery, equivalent to knowledge. *Irwin v. Holbrook*, 73 Pac. 860, 363, 82 Wash. 349.

#### MEASURE

See Board Measure.

Under a statute giving mayors of certain cities power to veto any measure passed by the board of aldermen, a mayor has no power to veto the election of a police justice by the board of aldermen, since such an election is not a measure. *Rich v. McLaurin*, 85 South. 387, 83 Miss. 95.

The word "measure," in Const. art. 4, § 1, providing that an initiative petition shall "include the full text of the 'measure,'" and as it is used in Laws 1907, p. 400, § 2, providing that the initiative petition "shall be attached to a full and correct copy of the title and text of the 'measure,'" etc., means an act as it comes from the hands of the Leg-

islature at the close of the session, complete so far as it is concerned, and does not necessarily include the title of the act. *Palmer v. Benson*, 91 Pac. 579, 581, 50 Or. 277.

Const. art. 5, § 6, providing that any measure rejected by the people through the powers of the initiative and referendum cannot be proposed by the initiative within three years thereafter by less than 25 per cent. of the legal voters, relates to constitutional amendments proposed by the Legislature or initiated by petition of the people and bills or acts initiated by the Legislature or by the people by an initiative petition; and a question submitted to the electors for acceptance or rejection by means of a joint resolution of both houses of the Legislature, being neither a constitutional amendment nor initiated bill, is not a measure rejected by the people through the power of the initiative and referendum, as contemplated by the Constitution, so as to prevent the initiation of substantially the same measure within three years by less than 25 per cent. of the legal voters. In re Initiative Petition No. 2, "The New Jerusalem" Proposition, 109 Pac. 823, 824, 26 Okl. 548.

#### MEASURE OF DUTY

See Legal Measure of Duty.

#### MEASURED IN THE WALL

In an action for bricks sold for the construction of a building, plaintiff claimed that they were sold to be "measured in the wall," defendant, that they were to be counted in the wall; the number of rows being multiplied by the number of bricks in a row. Held, that it was competent to show by the testimony of persons in the trade, what the expression "measured in the wall" meant, and that the measurement allowed 21½ bricks to a cubic foot of wall; this not being an attempt to establish a custom. *Welsh v. Huckestein*, 25 Atl. 138, 152 Pa. 27.

#### MEASUREMENT

See Proportional Measurement.

#### MEAT

See Cured Meat; Fresh Meat.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 275, 30 Stat. 172, the provision for "meats of all kinds prepared or preserved," includes cooked poultry and game, in tins, and also goose livers prepared as *pâté de foie gras*. *James P. Smith & Co. v. United States*, 168 Fed. 462.

Duck meat in tins, some salted and dried, and some packed in oil, is not "poultry \* \* \* dressed," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172, but is rather classifiable as "meats of all kinds, prepared or preserved," under par. 275, 30 Stat. 172. *Kwong Yuen Shing v. United States*, 177 Fed. 606, 606.

## MECHANIC

Laborers or mechanics, see Laborers.

"Mechanic," once synonymous with "artisan," is now commonly restricted to a workman who is skilled in constructing, repairing, or using machinery. *State v. City of Ottawa*, 113 Pac. 391, 398, 84 Kan. 100.

In its broadest sense, a "mechanic" is any one who is a skilled worker with tools. *Jackson v. State*, 117 S. W. 818, 819, 55 Tex. Cr. R. 557.

#### Architect or draftsman

Under Revisal 1905, § 2016, giving mechanics and laborers lien for work done upon buildings, an architect who furnished plans and specifications for a building is not entitled to a lien, having neither performed labor upon it, nor being a "mechanic"; the term as used in the lien laws meaning a person skilled in the practical use of tools. *Stephens v. Hicks*, 72 S. E. 313, 314, 156 N. C. 239, 36 L. R. A. (N. S.) 354, Ann. Cas. 1913A, 272 (citing 5 Words and Phrases, p. 4457).

#### Barber

A barber is a "mechanic," within the meaning of the exemption laws. *Ex parte Caldwell*, 118 N. W. 133, 136, 82 Neb. 544; *Terry v. McDaniel*, 53 S. W. 732, 733, 103 Tenn. 415, 46 L. R. A. 559.

#### Civil engineer

A civil engineer is not entitled to a lien for wages earned by him in the construction of a railroad, under Rev. St. art. 3312, being neither a "mechanic," "laborer," nor "operative." *Gulf & B. V. R. Co. v. Berry*, 72 S. W. 1049, 1050, 31 Tex. Civ. App. 408.

#### Contractor or master builder

Under Const. 1898, art. 229, providing that "all persons, associations of persons, and corporations pursuing any trade, profession, business or calling, may be rendered liable to such tax (a license tax) except clerks, laborers clergymen and school-teachers, those engaged in mechanical, agricultural and mining pursuits," the phrase "those engaged in mechanical, agricultural and mining pursuits" includes a corporation engaged in such pursuits, since the article of the Constitution applies to both persons and corporations. According to Worcester's Dictionary, a "mechanic" is one employed in mechanical or manual labor, and "mechanical" is defined to be "employment in manual labor." Taking the phrase "engaged in mechanical pursuits" according to these definitions, it is clear that the Constitution is to be construed as intending to relieve from license those persons who are engaged from day to day in the performance of manual labor, in mechanical or agricultural pursuits, and that the master builders and contractors who employ men to do the work which they merely superintended should, like other professional men, pay

the license tax. *State v. C. O. Hartwell Co.*, 41 South. 444, 447, 117 La. 144 (citing *Theobalds v. Conner*, 7 South. 690, 42 La. Ann. 789; *State v. McNally*, 12 South. 117, 45 La. Ann. 45; *City of New Orleans v. O'Neil*, 10 South. 245, 43 La. Ann. 1182; *Roy v. Schuff*, 24 South. 788, 51 La. Ann. 86; *City of New Orleans v. Bayley*, 35 La. Ann. 545; *City of New Orleans v. Lagman & Son*, 10 South. 244, 43 La. Ann. 1180; *State v. Dielenschneider*, 11 South. 823, 44 La. Ann. 1116; *State v. Comptoir National D'Escompte de Paris*, 28 South. 91, 51 La. Ann. 1272).

The mechanic's lien act of 1883 (Acts 1883, p. 140, c. 115) and amendments thereto (Burns' Ann. St. 1908, §§ 8295-8307), giving a lien to "mechanics, laborers, and materialmen," does not give a lien to contractors or subcontractors. *Fleming v. Greener (Ind.)* 90 N. E. 73, 75.

#### Painter

The term "mechanics" includes painters. A fire insurance policy is not made void by the use of a gasoline torch by a painter for the purpose of burning off paint from the building insured, where the work has continued for less than the 15 days allowed by the policy for repairs. *Garrebrant v. Continental Ins. Co.*, 67 Atl. 90, 92, 75 N. J. Law, 577, 12 L. R. A. (N. S.) 443.

#### Seaman

Defendant was a contractor engaged in constructing for the United States jetties near Cape May harbor, extending from the shore into the open sea. The jetties were built up with stone, thrown overboard from barges, which were towed across Delaware Bay, anchored, and as needed towed to the jetties and warped along while being discharged. As crews of such barges defendant employed engineers, boatmen, and hookmen, selected for their seafaring experience, who operated the barges and also discharged their cargoes. The work done and the time required to do it depended on tide, wind, and weather, which ordinarily required variable hours of service on the part of the men. Held, that such men were seamen, with the rights of such, including the right to a lien on the vessel for their wages, and could not be classed as laborers or mechanics, within the meaning of Act Aug. 1, 1892, c. 352, § 1, which makes it unlawful for any contractor for government work to require or permit any laborer or mechanic employed by him thereon to work more than eight hours in any calendar day, except in case of extraordinary emergency. *Breakwater Co. v. United States*, 183 Fed. 112, 114, 105 C. C. A. 404.

#### Subcontractors

The mechanic's lien act of 1883 (Acts 1883, p. 140, c. 115) and amendments thereto (Burns' Ann. St. 1908, §§ 8295-8307; Burns' Ann. St. 1901, §§ 7255-7267), giving a lien to "mechanics, laborers, and materialmen," does not give a lien to contractors or subcon-

tractors. *Fleming v. Greener (Ind.)* 90 N. E. 73, 75.

#### MECHANIC ARTS

Employed in mechanic arts, see *Employé*.

#### MECHANICAL BUSINESS

See *Manufacturing and Mechanical Business*.

#### MECHANICAL CONTRIVANCE

See *Vehicles and Other Mechanical Contrivances*.

The words "scaffolding" and "mechanical contrivance" include any contrivance made of parts erected or used for support in or about the particular kinds of work mentioned in the statute. *Koepp v. National Enameling & Stamping Co.*, 139 N. W. 179, 184, 151 Wis. 302.

#### Box

A box or floor in which concrete is spread in laying concrete floors is a "mechanical contrivance," within Laws 1897, p. 467, c. 415, § 18, providing that persons employing or directing another to perform labor in the erection, repairing, or altering of a building shall not furnish, for the performance of such labor, any mechanical contrivance which is unsafe. *Michael v. Standard Concrete Steel Co.*, 105 N. Y. Supp. 131, 132, 55 Misc. Rep. 255.

#### Buggy

A "buggy," consisting of a tongue about 14 feet long, with two large wheels at its rear end, connected by an axle, used to move iron beams in the construction of a building, is not a "mechanical contrivance," within the meaning of the Employers' Liability Act (Laws 1897, p. 467, c. 415, § 18), requiring persons employing others to perform labor in the erection of a building to furnish safe and suitable mechanical contrivances. *Pluckham v. American Bridge Co.*, 79 N. E. 1114, 186 N. Y. 561; *Id.*, 93 N. Y. Supp. 748, 750, 104 App. Div. 404.

#### Jack

Labor Law (Consol. Laws 1909, c. 31) § 18, provides that a person employing or directing another to perform labor in the repairing of a house, building, or "structure" shall not furnish, erect, or cause to be furnished or erected, for such labor, scaffolding, "holsts," stays, or other mechanical contrivances which are unsafe, and which are not such as to give proper protection to a person so employed or engaged. Held that, where a car repairer was injured by the breaking of the handle of a ratchet jack with which the body of a freight car had been hoisted to permit repairs on the trucks, as the body was being lowered, the jack, while not a "hoist" within the statute, is nevertheless a "mechanical contrivance" furnished by the railroad company for plaintiff's use, and the car was a "structure" as to which the

jack was being used; and hence the defective jack was within the statute. *Corbett v. New York Cent. & H. R. R. Co.*, 135 N. Y. Supp. 137, 139, 151 App. Div. 159.

### MECHANICAL CORPORATION

The Pioneer Pasteurizing Company, authorized by its articles of incorporation to engage in the business of buying, manufacturing, and dealing in milk, cream, butter, cheese, and other dairy products, and pasteurizing and treating said milk, and packing, storing, handling, and selling said products so pasteurized and treated, is not exclusively a manufacturing or mechanical corporation, within Const. art. 10, § 38, and its stockholders are therefore liable for its debts. *Meen v. Pioneer Pasteurizing Co.*, 97 N. W. 140, 141, 90 Minn. 501.

### MECHANICAL EQUIVALENT

A "mechanical equivalent" is a thing which performs the same function, and performs that function in substantially the same manner, as the thing to which it is alleged to be an equivalent. *Maunula v. Sunell*, 155 Fed. 535, 539 (quoting and adopting the definition in *Walk. Pat. [4th Ed.] § 354*, and citing *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 Fed. 693, 45 C. C. A. 554; *New Departure Bell Co. v. Bevin Bros. Mfg. Co.*, 64 Fed. 859; *National Typographic Co. v. New York Typograph Co.*, 46 Fed. 114; *Columbus Watch Co. v. Robbins*, 64 Fed. 384, 12 C. C. A. 174; *Ide v. Trorlicht, Duncker & Renard Carpet Co.*, 115 Fed. 187, 149, 53 C. C. A. 341; *Shelby Steel Tube Co. v. Delaware Seamless Tube Co.*, 151 Fed. 64).

The term "mechanical equivalent," as used in the patent law, means that each of the ingredients comprising the invention covers every other ingredient which in the same arrangement of the parts will perform the same functions, if that was well known as a proper substitute for the one described in the specification at the time of the patent. *Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey*, 169 Fed. 793, 803, 95 C. C. A. 259; *American Steel & Wire Co. v. Denning Wire & Fence Co.*, 160 Fed. 108, 120.

"The term 'mechanical equivalent,' when applied to the interpretation of a pioneer patent, has a broad and generous signification. When applied to a slight and almost immaterial improvement, it has a very narrow and limited meaning. When applied to that great majority of inventions which falls between these two extremes, its significance is proportioned to the character of the advance or invention under consideration, and it is so interpreted by the courts, as to protect the inventor against piracy and the public against unauthorized monopoly." *Universal Brush Co. v. Sonn*, 146 Fed. 517, 529 (quoting *National Hollow Brake Beam Co. v.*

*Interchangeable Brake Beam Co.*, 106 Fed. 693, 45 C. C. A. 544); *Simmons Mfg. Co. v. Southern Spring Bed Co.*, 140 Fed. 606, 607, 72 C. C. A. 174 (quoting and adopting the definition of Judge Sanborn in *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 106 Fed. 710, 45 C. C. A. 561); *Sanders v. Hancock*, 128 Fed. 424, 426, 68 C. C. A. 166; *Mallon v. William C. Gregg & Co.*, 187 Fed. 68, 79, 69 C. C. A. 48.

The rule applicable to the determination of equivalency under the patent laws depends upon the importance and the breadth of the original invention, and does not depend upon the question whether it was the first in the field relating to that subject, but upon the degree of advancement which the invention has made in newness of discovery and utility, for there may be as much merit in bringing on a large illumination from a feeble start as in the conception of the first beclouded idea which may have originated in the course of study and discovery along that line. *American Can Co. v. Hickmott Asparagus Canning Co.*, 142 Fed. 141, 145, 73 C. C. A. 359 (quoting and adopting *Penfield v. Chambers Bros. & Co.*, 92 Fed. 630, 638, 34 C. C. A. 579).

### MECHANICAL ESTABLISHMENT

As manufacturing establishment, see *Manufacturing Establishment*.

### MECHANICAL MEANS

The phrase "by mechanical or other means," as used in the statute making it a misdemeanor for any person not licensed to record or register, by mechanical or other means, bets or wagers on trials of speed, etc., embraces something outside the mechanical class, and covers the registration of such bets by means of the initials or private marks of the parties written on cards. *State v. Villines*, 81 S. W. 212, 213, 107 Mo. App. 593.

### MECHANICAL PIANO PLAYER

As musical instrument, see *Musical Instrument*.

### MECHANICAL PURSUIT

Work on a turpentine farm is not a "mechanical pursuit," within the meaning of Pen. Code 1895, § 1039, providing that convicts shall not be employed in such mechanical pursuits as will bring the products of their labor into competition with the product of free labor. *McDonald v. State*, 64 S. E. 1108, 1118, 6 Ga. App. 339 (citing 5 Words and Phrases, p. 4462).

The trade of a barber is a "mechanical pursuit," within the meaning of Const. art. 8, § 1, exempting persons engaged in mechanical pursuits from an occupation tax; and hence Acts 30th Leg. 1907, p. 273, c. 141, imposing a license tax on barbers, is invalid. *Jackson v. State*, 117 S. W. 818, 819, 55 Tex. Cr. R. 557.

According to Worcester's Dictionary, a "mechanic" is one employed in mechanical or manual labor, and "mechanical" is defined to be "employment in manual labor," and it has been held that master builders and contractors who employ men to do the work which they merely superintended are not engaged in "mechanical pursuits." *State v. C. C. Hartwell Co.*, 41 South. 444, 447, 117 La. 144 (citing *Theobalds v. Conner*, 7 South. 690, 42 La. Ann. 789).

#### MECHANIC'S LIEN

See Incumbrance; Public Record.  
Filing, see File.

A mechanic's lien is in the nature of, and has been likened to, a notice of lis pendens and to an attachment. *Sawyer v. Shick*, 120 Pac. 581, 582, 30 Okl. 353.

Mechanics' liens are purely a creation of statute in this country, and were unknown to the common law, and the principle on which the statutes were originally enacted was to subject land to a lien for material and labor expended in the construction of buildings which have by being placed on the land become a part thereof. *Joplin Supply Co. v. West*, 130 S. W. 156, 159, 149 Mo. App. 78.

A "mechanic's lien" is a pure creation of statute, and compliance with statutory requirements is necessary to its validity. *Tenth Nat. Bank of Philadelphia v. Smith Const. Co.*, 67 Ala. 872, 878, 218 Pa. 581 (citing *Wharton v. Real Estate Inv. Co.*, 36 Atl. 725, 180 Pa. 725, 57 Am. St. Rep. 629; *Knelly v. Horwath*, 57 Atl. 957, 208 Pa. 487).

A mechanic's lien is purely a statutory creation, and can only be maintained by a substantial observance or compliance with the provisions of the statute. Whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. A substantial adherence to the terms of the statute in the notice of lien is indispensable. *Russell v. Hayner*, 130 Fed. 90, 92, 64 C. C. A. 424 (citing *Phillips, Mech. Liens* [3d Ed.] § 9).

A mechanic's lien is at most only a tentative charge against the property it purports to bind, and is liable to be defeated for lack of technical sufficiency, as well as by showing that the indebtedness or some considerable part thereof is not owing. *Beebe v. Redward*, 77 Pac. 1052, 1055, 35 Wash. 615.

"A 'mechanics' lien' is a statutory lien upon buildings and other improvements on realty, favoring certain classes of workmen, to secure them priority or preference of payment of compensation for work or materials." *Tommasi v. Archibald*, 100 N. Y. Supp. 367, 372, 114 App. Div. 838.

A "mechanic's lien" is a modern statutory right created to encourage the erection of improvements, and to protect those whose labor and material enter into their construc-

tion. *Hammond v. Darlington*, 84 S. W. 446, 449, 109 Mo. App. 333.

The "mechanics' lien" is a creature of the statute. It exists on certain conditions, independent of any special contract. It is unknown to the common law, and is a cumulative remedy which may be concurrently pursued in connection with the ordinary actions for the collection of debts. Filing the claim does not create, but simply establishes, the lien. It changes an inchoate and defeasible right to a lien into a fixed and definite incumbrance. A mechanic who files a claim for lien does not thereby release his debtor from personal liability. So, too, a subcontractor, to whom the contractor has given an order on the owner, may still enforce his rights under such order after he has filed his claim. It is a cumulative remedy which may be concurrently pursued in connection with the ordinary actions for the collection of debts. *Alberti v. Moore*, 93 Pac. 543, 547, 20 Okl. 78, 14 L. R. A. (N. S.) 1036 (citing *Ehlers v. Elder*, 51 Miss. 495; *Boisot, Mechanics' Liens*, 496; *Phillips, Mechanics' Liens*, § 9; 27 Cyc. p. 432).

"A 'mechanic's lien' is a statutory quasi mortgage founded upon consent." *Cummings v. Consolidated Mineral Water Co.*, 61 Atl. 353, 855, 27 R. I. 195 (citing *Briggs v. Titus*, 13 R. I. 188; *Blackmar v. Sharp*, 50 Atl. 862, 23 R. I. 412).

"A 'mechanics' lien' is additional security given by statute on certain conditions, but does not in any way abrogate the contract between the workman and his employer. \* \* \* The lien proceedings are in rem against the land, and the common-law action is in personam against the employer;" and a subcontractor may prosecute a petition for a mechanic's lien simultaneously with an action at law against the contractor. *Hunt v. Darling*, 59 Atl. 398, 399, 23 R. I. 480, 69 L. R. A. 497, 3 Ann. Cas. 1008.

A "mechanic's lien" is a security for "extras" supplied under the terms of the contract, though the original contract price, independent of such extras, has been paid. *Zollars v. Snyder & Lacey*, 94 S. W. 1096, 1097, 43 Tex. Civ. App. 120.

"A mechanic's lien on chattels, as on real estate, is simply a security for the payment of a debt. Without indebtedness to the mechanic there can be no lien. \* \* \* The lien is commensurate with the amount due." *Tenney v. Anderson Water, Light & Power Co.*, 48 S. E. 457, 458, 69 S. C. 430 (quoting *Phillips, Mech. Liens*, § 493).

#### MECHANIC-NEURAL THERAPY

Practice of science as practice of medicine, see Practice of Medicine.

#### MEDIA ANNATA

The "media annata" (Spanish) were not rents payable half-yearly and incident only to

grants by composition, but were the half of the estimated income or rent for the first year; and they were chargeable not only on composition, but on all grants, titles, and offices whatever. *Trevino v. Fernandez*, 13 Tex. 630, 659.

## MEDICAL

### MEDICAL ATTENDANCE

As family expense, see Family Expenses.  
As necessities, see Necessaries.  
As support, see Support.  
Expenses of medical attendance, see Expenses.

To constitute a medical attendance it is not requisite that a physician shall attend the patient at his home, as an attendance at his office is sufficient. *Gilligan v. Supreme Council of Royal Arcanum*, 26 Ohio Cir. Ct. R. 42, 43.

### MEDICAL COLLEGE

As public institution, see Public Institution.

### MEDICAL DEGREE

The words "without having legally received the medical degree," in section 153 of the public health laws (Laws 1893, p. 1547, c. 661, as amended by Laws 1895, p. 257, c. 398, and Laws 1905, p. 994, c. 455), providing that one shall be guilty of misdemeanor who shall append the letters "M. D." to his name or assume or advertise the title of doctor, so as to convey the impression that he is a legal practitioner "without having legally received the medical degree," or without having received a necessary license, mean without having received a medical degree such as legally entitled the holder to practice. *People v. Somme*, 104 N. Y. Supp. 946, 947, 120 App. Div. 20.

### MEDICAL EXAMINATION

A "medical examination" of an applicant for life insurance within a receipt of the first annual premium, which recites that an application has been made, that the first annual premium has been collected, provided the application is approved, and in that event the insurance will be in force from the date of the medical examination, is a final examination, and not an examination to be retained by the examiner, under an agreement with the applicant, contemplating a subsequent examination, but the applicant may decline to submit to another examination, and thereby make the examination final. *Northwestern Mut. Life Ins. Co. v. Neafus*, 140 S. W. 1026, 1028, 145 Ky. 563, 36 L. R. A. (N. S.) 1211.

### MEDICAL EXAMINER

As state officer, see State Officer.

### MEDICAL INSANITY

"Moral insanity" or "medical insanity" is a perversion of the sentiment and affections.

*Taylor v. McOintock*, 112 S. W. 405, 412, 87 Ark. 243.

## MEDICAL PRACTITIONER

See Practice of Medicine.

## MEDICAL TREATMENT

As accident, see Accident—Accidental

## MEDICINAL PREPARATION

The expression "medicinal preparations," as used in Tariff Act March 3, 1883, c. 121, Schedule A, 22 Stat. 494, means such articles as are of use, or believed by the prescriber or user fairly and honestly to be of use, in curing or alleviating, or palliating or preventing, some disease or affection of the human frame. *Dodge & Olcott v. United States*, 130 Fed. 624, 625.

### Adeps lanæ anhydrous

The term "medicinal preparations," in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68, includes adeps lanæ anhydrous and adeps lanæ cum aqua, which are highly finished products of wool grease, are used principally in therapeutics, are sold generally to the drug trade, and are used to some extent in salves and medicinal soaps. *Zinkelsen & Co. v. United States*, 167 Fed. 812, 313, 92 C. C. A. 624.

### Creolin-Pearson

Creolin-Pearson is not a medicinal preparation within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68. *Merck & Co. v. United States*, 147 Fed. 896.

### Chrysarobin

"Chrysarobin" is dutiable as a drug advanced in value, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, and not as a "medicinal preparation," under paragraph 68. *Levi v. United States*, 140 Fed. 128.

### Fruit juice

Fruit juice which has been concentrated and medicated but is not used by itself as a medicine, but as an ingredient in the preparation of a medicine, is not dutiable as a medicinal preparation under paragraph 75, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule A, 26 Stat. 570. *C. B. Richard & Co. v. United States*, 147 Fed. 891, 892.

### Gaduol

The commercial meaning of the term "medicinal preparation" is the same as its ordinary meaning, viz., a substance used solely in medicine and prepared for the use of the apothecary or physician, to be administered as a remedy in disease. Gaduol, an extract of cod liver oil, which, in the form in which imported, is not prepared for the use of the apothecary or physician, and which is not dispensed in that form, is not a "medicinal preparation," under the Tariff Act, but is dutiable as a "chemical compound." *United States v. Merck & Co.*, 136 Fed. 817, 69 C. C.



A. 472; *Merck v. United States*, 126 Fed. 438, 439.

#### **Gelatin capsules**

Gelatin capsules containing balsam are dutiable as "medicinal preparations," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68. *United States v. Lehn & Fink*, 172 Fed. 171, 173.

#### **Guarana**

"Guarana," a medicinal drug consisting of a dried paste in the form of sausage-shaped rolls, this being the crudest state in which it is ever imported, and which before being used as a medicine must be further prepared, is not dutiable as a "medicinal preparation," under paragraph 68, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, but is free under the provisions of paragraph 548, Free List, § 2, c. 11, of said act, for articles "which are drugs and not edible and are in a crude state." *Cowl v. United States*, 124 Fed. 475, 476.

#### **Glycerophosphate of lime**

Glycerophosphate of lime, though occasionally dispensed medicinally, is almost always used with other drugs in preparing elixirs. Held, not a "medicinal preparation," but a "chemical compound," within Tariff Act July 24, 1897, c. 11, § 1, Schedule A, pars. 3, 67. *A. Klipstein & Co. v. United States*, 167 Fed. 535, 536, 93 C. C. A. 67.

#### **Hexamethylenetetramin**

Hexamethylenetetramin is a "medicinal preparation" in the preparation of which alcohol is not used, within the meaning of paragraph 68, Tariff Act July 24, 1897, c. 11, § 1, Schedule A. *Lehn & Fink v. United States*, 147 Fed. 640.

#### **Paraldehyde**

Paraldehyde, though produced from aldehyde, which is a by-product in the distillation of alcohol, but contains no alcohol, is a "medicinal preparation" in the preparation of which alcohol is not used, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 68. *Merck & Co. v. United States*, 147 Fed. 895.

#### **Rose water**

Orange flower water and rose water are not dutiable as medicinal preparations under paragraph 68, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, but as unenumerated manufactured articles under section 6 of said act. *Euler & Robeson v. United States*, 147 Fed. 765, 766.

#### **Scammony resin**

Scammony resin, prepared from gum-scammony, or scammony root, and used principally in compounding medicines, is dutiable as a "drug advanced in value or condition," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, rather than as a "medicinal preparation," under paragraph 67. *United States v. Martin*, 155 Fed. 264, 265.

## **MEDICINE**

#### **As science**

See Practice of Medicine; Practice of Medicine and Surgery; Practice of Medicine, Surgery, and Osteopathy.

Practice of medicine as business, see Business.

"'Medicine' is an experimental, not an exact, science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies." *Bennett v. Ware*, 61 S. E. 546, 548, 4 Ga. App. 293 (quoting with approval from *State v. Biggs*, 46 S. E. 401, 133 N. C. 729, 64 L. R. A. 139, 98 Am. St. Rep. 741).

#### **As remedial substance**

See Domestic Medicines; Family Medicines; Patent Medicine.

As necessities, see Necessaries.

Medicinal preparations as intoxicating liquor, see Intoxicating Liquor.

Proprietary medicine, see Proprietary.

"'Medicine' in the popular sense is a remedial substance." *State v. Heffernan*, 65 Atl. 284, 287, 23 R. I. 20 (quoting and adopting the definition in *State v. Mylod*, 40 Atl. 753, 755, 20 R. I. 632, 637, 41 L. R. A. 428).

#### **Same—Arnica, iodine, and camphor**

Tincture of iodine, tincture of arnica, and spirits of camphor, when sold in sealed bottles, though commonly used as domestic remedies, are, nevertheless, "medicines," within Pharmacy Law (Laws 1900, c. 667) § 200 (now Public Health Law [Consol. Laws, c. 45]), prohibiting, under penalties, the sale of medicines or poisons except in the presence and under the supervision of a licensed pharmacist. *State Board of Pharmacy v. Matthews*, 90 N. E. 966, 967, 197 N. Y. 353, 26 L. R. A. (N. S.) 1013.

#### **Same—Cigars and tobacco**

"Tobacco" "in its manufactured form of cigars, cigarettes, smoking tobacco, chewing tobacco, snuff, and the like, cannot be said to be in any sense a drug or medicine," so as to be a proper subject of sale on Sunday. *Penniston v. City of Newnan*, 45 S. E. 65, 66, 117 Ga. 702.

#### **Same—Food**

The fact that the substance employed as a remedial agent may have value as a food, and a tendency to build up and restore wasted or diseased tissue, will not deprive it of its character as a "medicine," if it is administered and employed for that purpose. *State v. Bresee*, 114 N. W. 45, 47, 137 Iowa, 673, 24 L. R. A. (N. S.) 103.

A "condiment" is a "food" and not a "medicine." The "International stock food" is a "food or condiment" within the meaning of the Kentucky pure food law (Laws 1906, p. 282, c. 48), and its sale is subject to regulation thereunder. *Savage v. Scovell*, 171 Fed. 566.

**Same—Intoxicating Liquors**

A registered pharmacist may sell drugs and medicine containing intoxicating liquor or alcohol without a license authorizing him to sell liquor, provided the drugs and medicines are so compounded that they cannot be used as a beverage. Tonic bitters containing 30 per cent. alcohol, and capable of being used as a beverage, held a beverage, and not a medicine, and hence could not lawfully be sold by a pharmacist without a license to sell intoxicating liquors. *McNiel v. Horan*, 133 N. W. 1070, 1071, 153 Iowa, 630.

**MEDIUM**

Many scholars and successful business men sincerely believe in spiritualism, and of being able, not by all, but through the instrumentality of a particular few naturally qualified persons called "mediums," to converse with and be advised by the spirits of departed friends, and believe they recognize the voices and handwriting of the dead. It has been held that the mere fact that one entertains such belief is not evidence of want of testamentary capacity. *Wait v. Westfall*, 68 N. E. 271, 276, 161 Ind. 648.

**MEET—MEETING**

See Adjourned Meeting; Annual Meeting; Called Meeting; Camp Meeting; District Meeting; Legal Meeting; Regular Meeting; Same Meeting; Stated Meeting.

Any subsequent meeting, see Any.

Meeting as assemblage, see Assemblage.

Under article 598, Pen. Code, 1879, providing that, in order to reduce a homicide to manslaughter by reason of insulting words or conduct of the person killed towards a female relative of the party guilty of the homicide, it must appear that the killing took place immediately upon the happening of the insulting conduct, or as soon thereafter as the party killing may meet with the person killed after having been informed of the insult, the word "meet" signifies that the parties were brought into such proximity as would enable the defendant, to act in the premises, whether he was armed or unarmed. *Gillespie v. State*, 109 S. W. 158, 159, 53 Tex. Cr. R. 167.

**MEETING FOR PUBLIC WORSHIP**

See Public Worship.

**MEETING OF CREDITORS**

See First Meeting of Creditors.

**MEETING OF MINDS**

An assent is evidenced by a proposition emanating from one side and acceptance of it on the other, such proposition and acceptance together constituting what is called a meeting of the minds, and, where a meeting of the minds does not appear, there is no contract.

*Wm. J. Lemp Brewing Co. v. Secor*, 96 Pac. 636, 639, 21 Okl. 537.

A "meeting of minds" essential to constitute a contract is the agreement reached by the parties and expressed, and the "meeting of minds" is not determined by the secret intention of the parties, but by their expressed intention, which may be wholly at variance with the former, and the understanding of one of the parties to the agreement is immaterial. *Hudson v. Columbian Transfer Co.*, 100 N. W. 402, 403, 137 Mich. 255, 109 Am. St. Rep. 679 (citing *Brewington v. Mesker*, 51 Mo. App. 348; 9 Cyc. pp. 244, 578).

**MEETING POINT**

A contract under which defendant carried United States mail required it, at "meeting points," to transfer to connecting trains the mail which was to be forwarded by such trains. Held, that a "meeting point" was one where the defendant's mail route met another, as established by the government, and not a station upon the defendant's route, separated by a half mile from another mail route, although trains from the latter ran over said half mile to the station and there connected with, and received mail from, the trains of the defendant. *Johnson v. Boston & M. R. Co.*, 38 Atl. 267, 69 Vt. 521, 522.

**MEETING WITNESSES FACE TO FACE**

See Face to Face.

**MELANCHOLIA**

See Simple Melancholia.

**MEMBER**

See Active Member.

**Of city council**

A provision in the charter of a city that the legislative authority of the city shall be vested in a council, consisting of a mayor, two aldermen elected from each ward, and the city recorder, made the various officers named "members" of the city council within the meaning of other statutory provisions. *Blain v. Chippewa Circuit Judge*, 108 N. W. 440, 444, 145 Mich. 59 (dissenting opinion).

**Of Congress**

"When we speak of a member of Congress, we refer to one who is a component part of the Senate or House of Representatives; one who is in office—not out of office; one who is sharing the responsibilities and privileges of membership." The words "member of Congress," as used in the first provision of Rev. St. § 1781, making it a criminal offense for a member of Congress, or any officer or agent of the government, to agree to receive or receive a bribe for procuring or aiding to procure for another any contract, office, or place from the government, do not include a person elected to the office of

Senator of the United States until he has been accepted as member by the Senate of the United States and has assumed the duties of the office. *United States v. Dietrich*, 126 Fed. 676, 678, 681.

#### Of corporation

A resolution of the board of directors of a corporation which empowers the corporation to sell its lands to "members" of the corporation authorizes a sale to the shareholders who are not directors and is valid. *Davis v. Nueces Valley Irr. Co.*, 126 S. W. 4, 6, 106 Tex. 243.

Consol. Laws, p. 1381, c. 23, § 3, subd. 8, provides that the term "member of a corporation" shall include every person having a right to vote for the election of directors, other than a person having the right to vote only on a proxy. Section 23 provides that, "unless otherwise provided in the certificate of incorporation," every stockholder shall be entitled at every meeting to one vote for every share standing in his name on the books. Section 24 provides that the certificate of incorporation may provide that, at all elections of directors, each stockholder shall be entitled to as many votes as will equal the number of his shares multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director, or may distribute them among the number to be voted for, or any two or more of them, as he may see fit, which right, when exercised, shall be deemed cumulative voting. Held, that the phrase "unless otherwise provided in the certificate of incorporation," at the beginning of section 23, does not relate only to cumulative voting permitted by section 24, but permits the certificate of incorporation to provide what voting right classes of stockholders shall possess; and as it is lawful for different classes to agree that one class shall have no right to vote on questions relating to the management, and such agreement does not contravene public policy, the Legislature did not intend to compel every class to hold the right to vote, or prohibit formation of a corporation depriving preferred stockholders of voting power. *People ex rel. Browne v. Keonig*, 118 N. Y. Supp. 136, 137, 133 App. Div. 756.

#### Of family or household

Person of the family synonymous, see Person.

The "members" of a man's family are his wife and children. The phrase certainly does not, as usually understood, include the servants who may be casually employed in his kitchen. *Grand Lodge, A. O. U. W., of New Jersey, v. Gandy*, 53 Atl. 142, 147, 63 N. J. Eq. 692.

A member of a fraternal beneficiary society lived with friends, none of whom were dependent on him; and, while he paid no board, they expected compensation at his

death. Held, that the wife of the person in whose home the member lived was not a member of his family, within Laws 1895, p. 440, c. 86, § 1, relating to payment of death benefits. *Supreme Commandery, U. O. G. C., v. Donaghey*, 72 Atl. 419, 75 N. H. 197.

A party to be a member of a family within the meaning of the homestead article of the Constitution must be a member in good faith. A man and his wife purchased two lots, not exceeding half an acre, in a city, in 1885, and resided there until their death, in 1898. They had two children, one a son, married in 1876, and the other a daughter, married in 1887, and who resided with her parents until her death, in 1889, leaving two children. Her husband with one child removed to a home of his own, but his daughter remained with her grandparents under the understanding that they were to educate and support her as long as she lived, which they did until the death of the grandmother in February, 1898, and the grandfather in September of the same year. There was no legal adoption of such granddaughter by either of her grandparents. Held, that such granddaughter was a member of the family of her grandfather at the time of his death. *Adams v. Clark*, 37 South. 734, 736, 48 Fla. 205.

The constitution of a fraternal order provided that, on the death of a member, the person designated as beneficiary should be entitled to the benefit fund, provided the beneficiary should "be one or more members of his family or \* \* \* related to or \* \* \* dependent" on him. A certificate issued to a member designated his wife as beneficiary. Subsequently the parties were divorced. The member died without exercising his right to change the beneficiary. Held, that the wife was entitled to the benefit fund.—*Schmidt v. Hauer*, 111 N. W. 966, 967, 139 Iowa, 531.

The word "person" as used in Rev. St. Mo. 1899, § 570, providing for service of a summons by leaving a copy of the petition and writ at defendant's usual place of abode with some person of his family, is synonymous with the word "member" as used in a return showing that a copy of the writ and petition was left with a member of defendant's family. The words may be used interchangeably. One could not be a person of a family without being a member, nor could he be a member without being a person. *Colter v. Luke*, 108 S. W. 608, 609, 129 Mo. App. 702.

#### Of fire department

Under Civil Service Law (Laws 1899, p. 809, c. 370) § 21, as amended by Laws 1904, p. 1694, c. 697, providing that no person holding a position who shall have been a member of a volunteer fire department shall be removed from such position except for cause shown after hearing, a coroner's clerk, who became a member of the fire department for

the express purpose of taking advantage of the act, and who was not a resident of the district in which he became a member, was not a "member of a volunteer fire department" within the meaning of the act. *People ex rel. Schulum v. Harburger*, 116 N. Y. Supp. 994, 995, 132 App. Div. 280.

The word "firemen" in the statute of 1902 (P. L. 1902, p. 793), for the purpose of providing and maintaining a fund to pension "firemen" and their families, is synonymous with "members of the fire department." A lineman, a watchman, and a veterinary surgeon, who are members of the Newark Paid Fire Department, are entitled to membership in the corporate association organized by the department under the provision of the statute of 1902 (P. L. 1902, p. 793), for the purpose of providing and maintaining a fund to pension "firemen" and their families. *Leffingwell v. Klersted*, 65 Atl. 1029, 1030, 74 N. J. Law, 407.

#### Of Indian tribe

32 Stat. 641, relating to the Choctaws and Chickasaws commonly known as the "Supplemental Agreement," section 3, defines the word "member" as used in the "Supplemental Agreement" as meaning a member or citizen of the Choctaw or Chickasaw tribe of Indians in Indian territory and does not include freedmen. *Frame v. Bivens*, 189 Fed. 785, 788.

#### Of Legislature

In Const. art. 3, § 15, providing that no bill shall be passed unless it shall have been printed and placed on the desks of the members in its final form at least three calendar legislative days prior to its final passage, the word "members" means the members of the Legislature, not the members of the Senate and Assembly, merely as such, and is sufficiently complied with where a bill originating in one house is printed and placed on the desk of each member of both houses and every amendment made thereto as printed and placed on the desks of the members of the house in which the bill originated is also printed and placed on the desks of the members of the other house, so that the bill in its final form is on the desk of each member of each house of the Assembly for at least three days prior to its final passage. *People ex rel. Hatch v. Reardon*, 77 N. E. 970-972, 184 N. Y. 431, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515.

#### Of police force

The chief of police of a city is a "member of the police force" of the city, and amenable to an order established by the board of police examiners, created by the charter of the city, providing that no member of the police force should be permitted to be a delegate to any caucus or take part in any political canvass. *Brownell v. Russell*, 57 Atl. 103, 104, 76 Vt. 326.

### MEMBERSHIP

See Certain Ascertained Membership.

"Membership" in a social and beneficial association is in itself a personal right, especially when the purposes of the association include amelioration or improvement of the condition under which the members obtain their livelihood, and the holder of such a right is entitled to be protected in its enjoyment against any unauthorized act or proceeding on the part of his fellow members, either as individuals or in their official or collective capacity, by which his enjoyment of such right will be impaired or destroyed. *Dingwall v. Amalgamated Ass'n of Street Railway Employees of America*, 88 Pac. 597, 599, 4 Cal. App. 565.

### MEMBERSHIP CORPORATION

A building association organized under Laws N. Y. 1851, p. 234, c. 122, as amended, for the purpose of aiding its members in acquiring real estate, making improvements thereon, and the accumulation of a fund to be returned to its members who do not obtain advances on their shares when the funds to the credit of the share shall amount to \$100, the par value thereof, is not a "stock corporation" as defined by General Corporation Law (Laws 1892, p. 1801, c. 687) § 3, subd. 2, defining a "stock corporation" as one having stock divided into shares, but is a "membership corporation" in which the corporation entity discharges its duties by acting as trustee for funds contributed by the members to mature the shares and seeing that the moneys contributed by the members under their mutual agreements are properly used in maturing the shares, and the demands of equity can only be satisfied by holding each member to his contract, not so much with the corporation as with the individual members. *Preston v. Reinhart*, 96 N. Y. Supp. 851, 852, 109 App. Div. 781.

Under a statute defining a "membership corporation" to mean "a corporation hereafter incorporated under this chapter, or heretofore incorporated under any law repealed by this chapter, but does not include a membership corporation created by special law," and defining a cemetery corporation as "any corporation heretofore created for cemetery purposes, under a law repealed by this chapter or hereafter created under this article," a cemetery association organized under a prior special law not repealed by the later law is not a "membership corporation" within the meaning of the later law. *In re Owens*, 79 N. Y. Supp. 1114, 1115, 79 App. Div. 236.

### MEMORANDUM

As contract, see Contract.

By reason of any memorandum, see By Reason of.

#### Statute of frauds

A "memorandum" of a contract must include all its material features, so that no re-

sort to parol testimony is necessary, except to show the situation of the parties and the application of the language to the subject-matter. The memorandum of a contract within the statute of frauds, may consist of several distinct writings, provided they are so related that the particular paper signed by the party to be charged can be held to be an approval of the other documents in which the terms of the contract are set forth. One employed under a verbal contract, void under the statute of frauds, was discharged. He subsequently wrote to his employer a letter reciting the terms of the contract. The employer replied by letter reciting: "As for the talk I had with you when you applied for the situation, I expected much from you. That is why I offered you a large salary." Held, that the employer did not consent to the terms of the contract as stated by the employe, essential to constitute a sufficient memorandum to bind him. *Gulfport Cotton Oil, Fertilizer & Mfg. Co. v. Reneau*, 48 South. 292, 293, 94 Miss. 904, 136 Am. St. Rep. 607.

The phrase "note or memorandum," as used in the statute of frauds, does not mean written evidence must be comprised of a single statement, but that letters, telegrams, bills, receipts, or other forms of writing evidencing the contract of the parties may constitute the note or memorandum within the statute. There was a sufficient "note or memorandum" of a contract of sale to charge the buyers under the statute of frauds, where they wrote: "We have examined the corduroys thoroughly, and find we cannot possibly use them. Those goods were sold to us at first." "We do not mean to cancel our order on" them, etc. "If you have perfect goods on hand to deliver to us, we are ready to accept same at prices sold"—though the letters were written after the sale and in terms repudiate the buyers' liability for an alleged breach of warranty. *J. Spencer Turner Co. v. Robinson*, 105 N. Y. Supp. 98, 101, 55 Misc. Rep. 280.

A memorandum to satisfy the statute of frauds must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract, or some other writing to which it refers, without resort to parol evidence. A memorandum of a contract of sale of personalty need not, to be sufficient within the statute of frauds, fix the place of delivery, since, in the absence of such a stipulation, the law fixes the place of delivery. A written acceptance of a written offer to sell personalty is not necessary, to constitute a sufficient memorandum under the statute of frauds. A memorandum of a contract of sale of personalty, as evidenced by a letter by the buyer reciting, "Beg to confirm purchase of \* \* \* 100 B/S cotton \* \* \* at 12 cents f. o. b. \* \* \* September delivery," and a letter

firmation of the purchase of one bales cotton delivery. You make it September delivery, when it should be October. I am willing to put up margin for faithful performance of contract," etc., is a sufficient "memorandum," within Code 1906, § 4779, providing that a contract of sale of personalty is invalid unless some memorandum in writing is made and signed by the party to be charged. *Wills v. Ellis*, 53 South. 498, 499, 98 Miss. 197, Ann. Cas. 1913A, 1039.

However sufficient as a memorandum of a sale to satisfy the statute of frauds might be, a paper purporting merely to be a statement of account charging M. with \$4,000 as the price of lots, and crediting him with \$250, and containing a printed direction, signed by him, for the deed to be made to him, is not such, where the money was paid and such instrument given after the promise to M. that a contract of sale of a particular character containing the full terms of the proposed purchase was to be executed. *Colonial Park Estates v. Massart*, 77 Atl. 275, 278, 112 Md. 648.

A "memorandum" of a contract for the sale of land falling to state the consideration is not a sufficient "memorandum or note in writing" to satisfy the statute of frauds. *Bradley Real Estate Co. v. Robbins*, 103 S. W. 777, 778, 7 Ind. T. 94.

The "note or memorandum" required by the statute of frauds is such a written declaration of the parties to the agreement as will relieve the court from relying on parol evidence to ascertain the subject of the contract. It need not state the terms of the contract as to the consideration, which may be proved by parol even if to do so involves a contradiction of the memorandum. It may consist of two or more writings signed by the party to be charged shown to refer to the same subject-matter and describing the subject of the contract so that it may be identified. *Campbell v. Preece*, 118 S. W. 373, 374, 133 Ky. 572 (citing *Camp v. Moreman*, 82 S. W. 179, 84 Ky. 635).

A memorandum of an agreement for a lease for a longer term than one year must contain the terms of the lease, the time it is to begin, the conditions upon which it is executed, and must set forth the respective rights, duties, and obligations of the parties. *McKnight v. Broadway Inv. Co.*, 145 S. W. 377, 382, 147 Ky. 535.

The mere indorsement and deposit for collection of a check tendered in payment for a right of way is not a sufficient "memorandum," within *Revisal 1905*, § 976, which requires a conveyance of an interest in land to be in writing. *Leach v. Fosburgh Lumber Co.*, 75 S. E. 716, 717, 159 N. C. 532; *Moore, Keppel & Co. v. Ward*, 76 S. E. 807, 808, 71 W. Va. 393, 43 L. R. A. (N. S.) 390.

A mere indorsement of the name of the owner of property on the check given by a

prospective purchaser for earnest money is not a note or memorandum in writing, as required by the statute of frauds. *Koenig v. Dohm*, 70 N. E. 1061, 1064, 209 Ill. 468.

Defendant gave plaintiff an order for goods amounting to \$329.60, November 25, 1910, having previously given two other orders, and also one of later date. There was no sufficient memorandum to satisfy the statute of frauds, because not signed by defendant. On January 11, 1911, defendant by letter requested plaintiff not to ship any goods before March 10, 1911, or some time later, and on receiving a bill, dated March 27, 1911, again wrote requesting plaintiff not to ship any goods for the present stating that the amount called for by the bill was more than he had ordered or would want and requested shipment of one-half of the amount with the September dating; otherwise, he could not accept the goods. Held, that such letters, not being physically attached to the memorandum, could not be used in connection therewith to make out a sufficient "memorandum" of the sale within the statute of frauds. *Roaring Spring Blank Book Co. v. Lesser*, 133 N. Y. Supp. 1032, 1033, 75 Misc. Rep. 617.

A letter from a vendee to a vendor stating but a part of the terms of a parol contract for the sale of land is not a "memorandum of the oral contract," which will take the contract out of the statute of frauds. *Bogigian v. Booklovers' Library*, 79 N. E. 769, 770, 193 Mass. 444.

Where letters from the vendors' agent to a person who represented the purchaser in some capacity, either as agent, broker, or go-between, and from the vendors' agent to a bank which was to hold the deed in escrow, contained the names of the parties to the sale, the description of the property, the consideration, and all the terms and conditions of the sale, the letters constituted a sufficient "memorandum" to satisfy the statute of frauds. *Bronx Inv. Co. v. National Bank of Commerce of Seattle*, 92 Pac. 380, 381, 47 Wash. 566.

Where letters passing between buyer and seller of certain goods did not disclose the kind or quantity of goods or purchase price, and contained no reference either to memorandum made by salesman at the time he received an order or to an invoice made by the seller when the goods were shipped, and it was impossible from the letters to ascertain the terms of the sale, they were insufficient to constitute a "memorandum," within the statute of frauds. *Evans v. Pelta*, 131 N. Y. Supp. 411, 412, 146 App. Div. 749.

Letters addressed to a third person, stating and affirming a contract, may be used against the writer as a "memorandum" of the contract, and are sufficient evidence of the contract to warrant the court in giving effect to it. *Nicholson v. Dover*, 58 S. E. 444,

445, 145 N. C. 18, 18 L. R. A. (N. S.) 167 (citing *Brown*, Statute of Frauds, § 354a; *Mizell v. Burnett*, 49 N. C. 254, 69 Am. Dec. 744).

A letter admitting an oral agreement to buy land is insufficient under Rev. St. c. 113, § 1, par. 4, requiring such contracts to be evidenced in writing, where it fails to set up the terms previously agreed upon, and particularly omits any reference to the purchase price. Under Rev. St. c. 113, § 1, par. 4, requiring a contract for a sale of lands to be evidenced in writing, signed by the party to be charged, or his duly authorized agent, all essential terms of the contract must appear, including the amount of the purchase price where the contract contains a stipulation as to price, so that no part of the agreement need be proved by parol evidence. *Thurlow v. Perry*, 77 Atl. 641, 642, 107 Me. 127.

The entry in the seller's account book is not a memorandum signed by the party to be charged within Gen. St. 1906, § 2518, making contracts for sale of goods void, in the absence of certain circumstances, including a memorandum in writing of the contract signed by the party to be charged. *United Hardware-Furniture Co. v. Blue*, 52 South. 364, 366, 59 Fla. 419, 35 L. R. A. (N. S.) 1038.

The note or memorandum required by Rev. St. c. 113, § 4, to make a sale valid as against the statute of frauds, need not be in a single writing, but it is sufficient if letters signed by the party to be charged or his agent contain by direct statement or by reference to letters written by the other party all the essential parts of the bargain. *Weymouth v. Goodwin*, 75 Atl. 61, 62, 105 Me. 510.

#### Mechanic's lien

The word "memorandum," as used in a statute requiring a mechanics' lien claimant to file a written memorandum signed by him asserting his claim, has no peculiar meaning. The statute means no more than "a writing signed by him asserting his claim." Nor does the use of the word "claim" signify that the particulars of the contract or items of the account are to be set forth. This word obviously refers to the claim of a lien. The date when the job was completed or the pay became due need not appear in the absence of statutory requirement. The object of the memorandum required to be filed in the clerk's office is to give notice to the owner and persons dealing with the property that it stands charged with the payment of the bills for labor and material which went into it under such a contract as entitles the claimant to his lien. *Baldwin v. Spear Bros.*, 64 Atl. 235, 236, 237, 79 Vt. 43.

#### MEMORY

See *Disposing Mind and Memory*; *Sound Mind and Memory*.

"Memory" is the power of retaining knowledge in the mind. *State v. Coyne*, 114 S. W. 8, 12, 214 Mo. 344, 21 L. R. A. (N. S.) 993.

The regularly kept and original books of a corporation identified as such by the proper custodians, and constituting the records of the business transactions of the corporation, required by Civ. Code, § 377, to be kept by all corporations for profit, are admissible in an action between other parties without further preliminary proof, as constituting the "memory" of the transaction of the corporation. *Hurwitz v. Gross*, 91 Pac. 109, 111, 5 Cal. App. 614.

## MEN

See Bunco Men; Business Men; Masses of Men.

Rev. Codes, § 8536, requires iron-bonneted safety cages with doors in mine shafts over 300 feet deep to be used in lowering and hoisting the employes thereof, and that the doors must be closed "when lowering or hoisting the men." Held, that the words "the men" imported the singular as well, and that the statute required the closing of the doors during the hoisting or lowering of one or more of the men in the course of his employment, and was not complied with by a closing of the doors only when the shifts of men employed in the mine were being lowered or hoisted at the usual time of changing the workmen. *Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co.*, 107 Pac. 499, 502, 40 Mont. 508.

## MENACE

As threat, see Threat.

"Menace" is defined as the show of an intent to inflict evil; a threat; indication of probable evil or catastrophe to come; that which menaces; an impending evil. *Worley v. State*, 71 S. E. 153, 155, 136 Ga. 231.

A "menace" is defined to be the show of an intention to inflict evil. It is to act in a threatening manner, and any overt act of a threatening character, short of an actual assault, is a "menace." *Rossi v. State*, 68 S. E. 56, 58, 7 Ga. App. 732; *Price v. State*, 72 S. E. 908, 910, 137 Ga. 71 (quoting and adopting the definition in *Cumming v. State*, 27 S. E. 177, 99 Ga. 662).

To call a man a liar and raise a stick to strike him, if in anger, is a menace of violence, and constitutes a breach of a bond to keep the peace, under Pen. Code 1895, §§ 1238, 1239. *Rumsey v. Bullard*, 63 S. E. 921, 5 Ga. App. 802.

"Menace" is generally regarded as synonymous with "threat." It may have other meanings. On a prosecution for murder, an instruction that mere words or menaces, irrespective of how aggravating, do not of

themselves constitute provocation for the commission of murder in any degree, was not objectionable on the theory that the word "menaces" was equivalent to an overt act, especially in view of an instruction in which the proper distinction between words and threats and overt acts was clearly drawn. *Lynch v. People*, 79 Pac. 1015, 33 Colo. 128.

Civ. Code, § 1569, defines "duress" as (1) the unlawful confinement of a person; (2) unlawful detention of the property of any such person; (3) confinement of such person, lawful in form, but fraudulently obtained. Section 1570 defines "menace" as consisting of the duress specified in subdivisions 1 and 2, and unlawful and violent injury to the person and property of such person, or injury to his character. Defendant demanded the right to purchase boxes from plaintiff at an alleged contract price, which contract, in fact, did not exist, but plaintiff refused to sell at less than practically the market price, which was higher than the alleged contract price. It was practically impossible to then buy the boxes elsewhere, and they were essential to the continuance of defendant's business, and defendant claimed it was coerced into paying the price charged therefor. Held, that some element of compulsion or threatened exercise of power over the person or property to compel payment must be present to constitute duress, and defendant was not compelled by duress to purchase and pay the price charged for the boxes. *Standard Box Co. v. Mutual Biscuit Co.*, 103 Pac. 938, 943, 10 Cal. App. 746.

## MENINGITIS

See Encephalo Meningitis.

## MENS REA

"Mens rea"—guilty mind—while a necessary element of most criminal offenses, is, in some offenses, presumed from the facts proved. *Brown v. State* (Del.) 74 Atl. 836, 837, 7 Pennewill, 159, 25 L. R. A. (N. S.) 661.

## MENTAL

### MENTAL AGONY OR ANGUISH

Anguish as including, see Anguish.

"Mental anguish" is a high degree of mental suffering, and not mere disappointment or regret. *Gerock v. Western Union Telegraph Co.*, 60 S. E. 637, 646, 147 N. C. 1; *Hancock v. Western Union Tel. Co.*, 49 S. E. 952, 953, 137 N. C. 497, 69 L. R. A. 403.

The term "mental anguish," recognized by statute as a ground of action against a telegraph company, applies only to social and personal matters, and not to business affairs. The statute does not authorize recovery for vexation caused the sender of a telegram because of dishonor of a check for full-

ure to deliver the telegram in time. *Capers v. Western Union Tel. Co.*, 50 S. E. 537, 538, 71 S. C. 29. Nor for worry over the possible loss of a position. *Western Union Telegraph Co. v. Shenep*, 104 S. W. 154, 155, 83 Ark. 476, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145.

Mental anguish or suffering, as used in the statute authorizing a recovery of damages for mental anguish or suffering, means distress or serious pain as distinguished from annoyance, regret, or vexation. Mental anguish is intense mental suffering. *Johnson v. Western Union Telegraph Co.*, 62 S. E. 244, 245, 81 S. C. 235, 17 L. R. A. (N. S.) 1002, 128 Am. St. Rep. 905.

In order to recover damages under the "mental anguish" doctrine, it is necessary that the mental anguish suffered be real and with cause, and not merely the result of a too sensitive mind or a morbid imagination. *Western Union Telegraph Co. v. Archie*, 121 S. W. 1045, 1046, 92 Ark. 59.

Mental worry, distress, grief, and mortification are proper elements of mental suffering for which an injured person can recover; recovery not being limited to the form of mental suffering described as physical pain. *Merrill v. Los Angeles Gas & Electric Co.*, 111 Pac. 534, 540, 158 Cal. 499, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

Allegations in a petition, in an action against a sheriff and his deputy, that they wrongfully and unlawfully entered into a house and premises occupied by plaintiff under a lease and dispossessed him, and put his household goods and personal property in the public highway, and so put plaintiff to great trouble and distress, properly authorize a recovery for humiliation and mortification, or any phase of "mental anguish," since the word "distress," being a generic term, includes anguish or suffering, both of mind and body, and since "humiliation" and mortification are simply phases of mental anguish. *Perkins v. Ogilvie*, 146 S. W. 735, 738, 148 Ky. 309.

Allegations that plaintiff was humiliated, mortified, and shamed by being put off a train at a place where she was compelled to expose her person in alighting showed "mental distress," though that was not alleged in terms. *International & G. N. R. Co. v. Hood*, 118 S. W. 1119, 1122, 55 Tex. Civ. App. 334.

"Mental suffering" will be implied from illness accompanied by physical pain. *International & G. N. R. Co. v. Johnson*, 95 S. W. 595, 596, 43 Tex. Civ. App. 147 (citing *Texas & P. Ry. Co. v. Curry*, 64 Tex. 85; *Houston, E. & W. T. R. Co. v. Simpson* [Tex.] 81 S. W. 353; *Brown v. Sullivan*, 10 S. W. 288, 71 Tex. 470; *Galveston, H. & S. A. R. Co. v. Rubio* [Tex.] 65 S. W. 1127). See, also, *Ousley v. Hampe*, 105 N. W. 122, 123, 128 Iowa, 675.

There is a clear distinction between "mental suffering" and "impairment of the

mental faculties." *Gagnier v. Fargo*, 96 N. W. 841, 843, 12 N. D. 219.

## MENTAL CAPACITY

"Mental capacity" to execute a deed does not mean that the grantor comprehends the legal effect of the words employed; but, if the nature and effect of the instrument as a conveyance of property is understood, he possesses sufficient mental capacity, and mere weakness of intellect from sickness or old age is no ground for avoiding a deed in the absence of fraud or undue influence. *Moorhead v. Scovel*, 60 Atl. 13, 15, 210 Pa. 446.

The test of "capacity" to make a deed is whether the grantor at the time fully understood, realized, and appreciated the probable results and consequences of the transaction. *Corporation of Members of Church of Jesus Christ of Latter-Day Saints v. Watson*, 83 Pac. 731, 733, 30 Utah, 126.

The test of "mental capacity" necessary to make a valid deed is that the grantor is capable of understanding in a reasonable manner the nature and effect of the act in which he is engaged. The requisite mental capacity is present where the grantor is capable of understanding in a reasonable manner the nature and effect of the deed, and of comprehending and protecting his own interests in ordinary business affairs. *Fitzgerald v. Allen*, 88 N. E. 240, 243, 240 Ill. 80 (citing *Ring v. Lawless*, 60 N. E. 881, 190 Ill. 520).

No particular degree of mental capacity is essential to enable one to execute a deed, the test being whether the grantor had at the time sufficient mental capacity to understand the nature of the transaction, and assent thereto. *Wampler v. Harrell*, 72 S. E. 135, 138, 112 Va. 635.

To render a deed void on the ground of the grantor's mental incapacity, it must appear that his mental infirmity rendered him incapable of understanding the nature of his act, and mere infirmity of mind or body, not amounting to such incapacity to understand, is insufficient. *Du Bose v. Kell*, 71 S. E. 371, 376, 90 S. C. 196.

That a grantor was advanced in years and somewhat enfeebled in mind by sickness is not sufficient to make him mentally incompetent to execute a deed, where he had sufficient mental capacity to comprehend naturally the transactions in which he was engaged at the time the deed was executed. *McLaughlin v. McLaughlin*, 89 N. E. 645, 647, 241 Ill. 366.

One who is capable of exercising thought, reflection, and judgment, who knows what he is doing, and has sufficient memory and understanding to comprehend the nature and character of the transaction, has sufficient "mental capacity" to make a valid note. *Rogers v. Rogers* (Del.) 66 Atl. 374, 375, 6 Pennewill, 267.



The assignment by a father of his interest in his life policy to his son a few days before death is akin to a testamentary act, and the rules regarding mental capacity and undue influence applicable to a testator ought to be applied. Mental capacity of insured to make an assignment of life insurance means intelligence sufficient to understand the act he is about to perform, the property he possesses, what disposition he is making of it, and the persons and objects of his bounty. *Borchers v. Barckers*, 122 S. W. 357, 360, 143 Mo. App. 72.

#### Contributory negligence

"The word 'experience' means to have practical acquaintance with; which is equivalent to knowledge, and the word 'capacity,' in the sense in which it was used (in an instruction requiring of a boy the exercise of care and prudence equal to his capacity, etc.), means capability or skill as applied to the business in which he was engaged." And an instruction requiring a finding that plaintiff did not use such care and precaution as a person of his age and experience would have ordinarily used under the circumstances as a prerequisite to the finding of contributory negligence was proper, and not objectionable for failure to use the words "capacity," "age," "knowledge," and "experience." *Stanley v. Chicago, M. & St. P. Ry. Co.*, 87 S. W. 112, 113, 112 Mo. App. 601.

An instruction on contributory negligence of a child having experience as to the dangers of playing upon a turntable, which requires the jury to consider "her age, intelligence, and capacity," is bad as omitting the element of "experience"; this element not being included in the term "capacity." *Lake Erie & W. R. Co. v. Klinkrath*, 81 N. E. 377, 378, 227 Ill. 439.

The word "capacity" does not include experience; and, when used with reference to mentality in an instruction on the law of ordinary care governing children, it means ability to learn by experience. *Fowler v. Chicago & E. I. R. Co.*, 85 N. E. 298, 299, 234 Ill. 619.

#### Responsibility for crime

The test of mental capacity to commit crime is the power to distinguish moral or legal right from moral or legal wrong, and to recognize the particular act charged as moral or legal wrong. *State v. Jackson*, 69 S. E. 883, 886, 87 S. C. 407.

#### Testamentary capacity

The words "mental capacity," while more general and perhaps less definite, necessarily include the idea expressed in the phrase "sufficient strength of mind and memory." *Barricklow v. Stewart*, 72 N. E. 128, 180, 163 Ind. 438.

The test of whether testator had sufficient mental capacity to execute a valid will is whether at the time he understood the nature of the transaction, and intelligent-

ly assented to the provisions of the will. *Wampler v. Harrell*, 72 S. E. 185, 188, 112 Va. 685.

The test of "mental capacity" sustaining a will is sufficient understanding to comprehend the nature of the transaction, the nature and extent of one's property, and to whom he desires to give it. *Gibony v. Foster*, 130 S. W. 314, 322, 230 Mo. 106.

#### MENTAL COMPETENCY

See, also, Mental Capacity.

"Mental competency" in a testator does not require the sagacity, analytical powers, astuteness, and soundness of judgment requisite to the making of just such a contract, in every instance, as an experienced, skillful, and shrewd man would make. It suffices that a person in making a will or executing an instrument to operate as one knows what property he has, and what he wants to do with it. Mere infirmity of mind and body is insufficient to overcome the legal presumption of mental capacity in one who has executed a will, deed, contract, or other instrument. *Bade v. Feay*, 61 S. E. 348, 350, 63 W. Va. 166.

Where in a will contest it was claimed that proponent, who was the residuary legatee, had exercised undue influence over testatrix in procuring the will, and it appeared that he superintended the making of the will and obtained therefrom a large portion of testatrix's estate, though he was not of kin to her, to the exclusion of many of her relatives, the term "mental competency" under such circumstances included the ability of testatrix to understand the meaning and effect of the residuary clause of the will. *Cooper v. Harlow*, 128 N. W. 259, 261, 163 Mich. 210.

#### MENTAL DISQUALIFICATION

##### Witness

A witness who has a "mental disqualification" is one who has not the capacity to receive, to record, and to recall impressions and to testify intelligently concerning them. *Batterton v. State*, 107 S. W. 826, 827, 52 Tex. Cr. R. 881 (quoting and adopting the definition in 2 Elliott, Ev. § 750).

#### MENTAL DISTRESS AND INJURY

See Mental Agony or Anguish.

As cruelty, see Cruelty.

#### MENTAL FACULTIES

See Impairment of Mental Faculties.

#### MENTAL INCAPACITY

See, also, Mental Capacity.

No definite rule can be laid down defining "mental incapacity" which will apply in all cases and on which the court can rely as a foundation for granting or refusing the prayer of a bill to set aside a conveyance. The mental incapacity, however, as a sole

ground for setting aside a conveyance, must be such as leaves the person affected without understanding to know the consequences of his own act. *Allen's Adm'r v. Allen's Adm'rs*, 64 Atl. 1110, 1115, 79 Vt. 173.

### MENTAL SUFFERING

See Mental Agony or Anguish.

As personal injury, see Personal Injury.

### MENTAL UNSOUNDNESS

"Mental unsoundness" which exempts from responsibility for what otherwise would be an offense denotes a mind so far devoid of understanding that it is unable to distinguish between right and wrong, and is therefore without freedom of moral action. *Commonwealth v. Hallowell*, 72 Atl. 845, 846, 223 Pa. 494.

### MENTALLY INCOMPETENT

The phrases "incompetent," "mentally incompetent," and "incapable," as used in article 15, c. 86, §§ 5485, 5486, Comp. Laws 1909, mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. *Shelby v. Farve*, 126 Pac. 764, 765, 33 Okl. 651.

The term "mentally incompetent to have the charge and management of his property," within the statute relating to the appointment of guardians, means mental incapability to do so. *In re Streiff*, 97 N. W. 189, 191, 119 Wis. 566, 100 Am. St. Rep. 903 (citing *In re Leonard's Estate*, 95 Mich. 295, 54 N. W. 1082).

### MENTION

Any way mentioned, see Any.

#### Of dutiable articles

At the time of the arrival of claimant at the port of New York as a passenger from a foreign country, a treasury regulation provided that merchandise intended for sale and of the value of \$500 or over could not be examined on the pier, but must be regularly entered at the custom house and appraised. Claimant in her declaration made on landing listed certain articles and "one trunk for public stores"; that being the place where imported merchandise goes for examination and appraisal. Later she filed regular written entry at the custom house, and with it duplicate consular invoice of the contents of the trunk, which consisted of dutiable merchandise of over \$500 in value. Held, that the description in claimant's declaration was sufficient, and that her filing of the invoice at the custom house later was a compliance with Rev. St. § 2802, which requires all dutiable articles to be "mentioned to the collector" "at the time of making entry." *United States v. One Trunk*, 184 Fed. 317, 318, 106 C. C. A. 459.

#### Of after-born child

2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, art. 3, § 49, as amended by Laws 1869, p. 40, c. 22, provides that a child born after the making of his parent's will, not "provided for nor in any way mentioned in such will," shall take as if the parent died intestate. Held, that the words "in any way mentioned" indicate that the expression was to be used in the broadest possible sense, so as to cover any form of reference that showed that a testator had in mind the possibility of after-born children, and where a testator gave his estate to his wife to her own use, and that of her heirs forever, and provided that in case of her death during the lifetime of the testator, leaving issue, the issue would take the estate, and, if the wife should die leaving no lawful issue, the estate should be divided in accordance with the intestate laws, and testator at the time of the execution of the will was a married man, but had no children, a child born after testator's death was mentioned in the will, and he was bound by it, and could not take as if the testator had died intestate. *Stachelberg v. Stachelberg*, 101 N. Y. Supp. 178, 180, 52 Misc. Rep. 22.

A testator, when without children, executed a will, which, after making certain specific legacies, left the residue of his estate to his wife, and after the birth of a son, but before the birth of two daughters, he added a codicil directing what disposition should be made of his property "in the event of the death of myself, wife, and child or children at one and the same time." Held, that there was no such "mention" of an after-born child as was contemplated by Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, art. 3, § 49, as amended by Laws 1869, p. 40, c. 22, providing that whenever a testator shall have a child born after the making of his last will, and shall die leaving it unprovided for, such child shall succeed to the same portion that he would be entitled to if his parent had died intestate, and hence the surviving daughters were entitled to share in his estate as the statute provides. *Tavshanjian v. Abbott*, 115 N. Y. Supp. 938, 940, 130 App. Div. 863.

Where a will made prior to the birth of any children devised testator's property to his wife, and provided that in case she should have any children at testator's death the will should remain unchanged, a child born prior to testator's death was "mentioned" in the will within the meaning of Ky. St. 1903, § 4847, providing that a will, made prior to the birth of a child, wherein any child testator might have is not provided for or mentioned, shall be construed as if the devise therein had been limited on the death of the child under the age of 21 years, unmarried and without issue, especially in view of sections 4842 and 4848, providing that certain classes of children and grandchildren who are neither provided for nor expressly excluded.

ed by the will, but only pretermitted, shall inherit as in case of intestacy. *Logan v. Bean's Adm'r*, 87 S. W. 1110, 120 Ky. 712.

Under Rev. St. 1895, art. 5345, providing that a will made when testator had no child living, wherein any child he might have is not provided for or mentioned, shall be void on the birth of a child, etc., whether the unborn child is mentioned in the will is to be determined by construing its language with reference to the circumstances and knowledge of the testator, the word "mentioned" meaning "referred to," rather than designated by name, and the failure to make provision must be accidental to avoid the will; and hence the will of a wife, executed when in an advanced state of pregnancy, which devised the bulk of her realty to her husband, and devised her undivided interest in her father's homestead to persons named, which devise was to be void in case of living issue born of her body, mentioned the unborn child, for she must have known the practical certainty that a child would be born to her, and the provision that the devise is to be void in case of issue born obviously refers to the expected child. *Pearce v. Pearce*, 134 S. W. 210, 214, 104 Tex. 73.

## MERCANTILE

The word "mercantile," in its ordinary acceptance, means pertaining to the business of merchants, and is concerned with trade or the buying and selling of commodities. *People v. Federal Security Co.* 99 N. E. 668, 669, 255 Ill. 561; *H. H. Kohlsaat & Co. v. O'Connell*, 99 N. E. 689, 690, 255 Ill. 271.

"Mercantile" is defined thus: "Of or pertaining to merchants, or the traffic carried on by merchants, having to do with trade or commerce; trading; commercial." *Carr v. Riley*, 84 N. E. 426, 428, 198 Mass. 70.

The term "mercantile pursuits" in Bankr. Act July 1, 1898, c. 541, § 4b, making corporations principally engaged in such pursuits subject to the act, is to be given its common and generally understood meaning, and includes only corporations engaged in the buying and selling of commodities. *Zugalla v. International Mercantile Agency*, 142 Fed. 927, 930, 74 C. C. A. 97.

### Bakery

The word "mercantile" means having to do with, or engaged in, trade, or the buying of commodities; and a corporation organized to make bakers' goods and restaurant supplies, and sell them, was organized for "mercantile purposes," within the tax law. *H. H. Kohlsaat & Co. v. O'Connell*, 99 N. E. 689, 690, 255 Ill. 271 (citing 5 Words and Phrases, p. 4477).

### Building and loan association

The phrase "engaged principally in manufacturing, trading, printing, publishing,

mining or mercantile pursuits," as used in Bankr. Act 1898, limiting corporations which may be forced into bankruptcy to such as are engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, is to be taken in its natural and usual meaning, and any corporation which does not come within such meaning cannot be put into bankruptcy. A building and loan association organized to accumulate a fund from contributions of its members from which loans were to be made to assist members in purchase of real estate, the profits of which business were divided among its members, is not a corporation engaged principally in trading or mercantile pursuits within the act. In re *New York Building Loan Banking Co.*, 127 Fed. 471, 472.

### Buying and selling stocks

A corporation engaged in buying and selling stocks and bonds is engaged in a "mercantile pursuit," within section 106 of the Revenue Law (Hurd's Rev. St. 1911, c. 120), prohibiting the state board of equalization from assessing companies organized for mercantile purposes. *People v. Federal Security Co.*, 99 N. E. 668, 669, 255 Ill. 561.

### Coalyard

A coalyard, wherein coal mined by its owner is cleaned, assorted, and stored and from which it is sold, is a "mercantile institution or establishment," within Child Labor Act (Hurd's Rev. St. 1911, c. 48), prohibiting the employment of a child under the age of 14 years in any mercantile institution or establishment, and is also a manufacturing establishment, factory, or workshop, since that phrase as used in the statute has the meaning given to it by the Child Labor Act of June 9, 1897 (Laws 1897, p. 90), defining the words "manufacturing establishment, factory, or workshop" to mean any place where goods or products are manufactured or repaired, dyed, cleaned or sorted, stored or packed for sale. *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 99 N. E. 899, 902, 256 Ill. 110, 43 L. R. A. (N. S.) 193, Ann. Cas. 1913E, 335.

### Production and supply of electricity

A corporation engaged in generating electricity, transmitting it, and selling power or light to consumers, is neither a "manufacturing" nor a "mercantile" corporation within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, as amended by Act Feb. 5, 1903, c. 487, § 3, and is not subject to adjudication as an involuntary bankrupt. In re *Hudson River Electric Power Co.*, 173 Fed. 934, 941.

### Production and transportation of gas

Bouvier thus defines "merchandise": A term including all those things which merchants sell, either wholesale or retail, as dry goods, hardware, groceries, drugs, etc. It is usually applied to personal chattels only, and to those which are not required for

food or immediate support, but such as remain after having been used, or which are used only by a slow consumption. The Century Dictionary defines it: In general, any movable object of trade or traffic; that which is passed from hand to hand by purchase or sale; specifically, the objects of commerce; a commercial commodity or commercial commodities in general; the staple of a mercantile business; commodities, goods, or wares bought and sold for gain. A gas company which makes, transports through pipes, and sells gas to special customers within a limited area is not principally engaged in mercantile pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, as amended by Act Feb. 5, 1903, c. 487, § 3. In re Hudson River Electric Power Co., 173 Fed. 934, 952.

#### **Grain, bond, and stock broker**

Where a corporation was organized to carry on a general stock, bond, grain, and brokerage business and was authorized to trade on its own behalf in stocks, bonds, grains, etc., and lease and dispose of real and personal property, it was subject to adjudication as a bankrupt corporation engaged in "trading or mercantile business." In re H. R. Leighton & Co., 147 Fed. 311, 314 (citing Coll. Law & Pr. Bankr. [5th Ed.] p. 64; In re Surety Guaranty & Trust Co., 121 Fed. 73, 56 C. C. A. 654; In re Pacific Coast Warehouse Co., 123 Fed. 749; In re Cameron, 96 Fed. 756; In re New York Building-Loan Banking Co., 127 Fed. 471; In re Snyder & Johnson Co., 133 Fed. 806; In re United States Hotel Co., 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588).

The business of a stockbroker may be carried on by a limited partnership, within Code Pub. Gen. Laws, art. 73, § 1, authorizing the formation of limited partnerships for the transaction of any "mercantile, mechanical, manufacturing or banking business," and declaring that the provision shall not authorize any such partnership for the purpose of making insurance; for sales and purchases of bonds, stocks, and other securities are mercantile transactions. Safe Deposit & Trust Co. v. Cahn, 62 Atl. 819, 825, 102 Md. 530.

#### **Hotel**

A corporation engaged principally in running hotels is not engaged principally in "mercantile" pursuits, so as to be liable to be adjudged an involuntary bankrupt. Tox-away Hotel Co. v. J. L. Smathers & Co., 30 Sup. Ct. 263, 264, 216 U. S. 439, 54 L. Ed. 558; In re United States Hotel Co., 134 Fed. 225, 227, 67 C. C. A. 153 (citing Hall v. Cooley, 11 Fed. Cas. 217).

#### **Livery and boarding stable**

A "merchant" is a person who is engaged in the business of buying and selling, one who buys in order to sell. A corporation

organized to conduct a general livery and boarding stable business, and engaged in buying, keeping, and hiring its horses and vehicles for profit and keeping, feeding, and caring for the horses and vehicles of others for hire, not being engaged in buying and selling horses and vehicles or feed as a business, is not a trading corporation or one engaged chiefly in "mercantile" pursuits within Bankr. Act July 1, 1898, c. 541, § 4, cl. "b," providing that such corporations may become bankrupt. Gallagher v. De Lancey Stables Co., 158 Fed. 381, 382.

A corporation, the principal business of which is the keeping of a boarding stable to feed and care for horses for hire, is not subject to adjudication as a corporation engaged principally in mercantile and trading pursuits; such term embracing corporations whose principal business is the buying and selling of goods in the ordinary course of trade. In re Willis Cab & Automobile Co., 178 Fed. 113, 114.

#### **Lumber dealer**

A firm engaged in buying standing timber in large quantities, and cutting and sawing the same, and selling the lumber, is engaged in a "trading or mercantile business," within Gen. St. 1902, § 2342, providing for the assessment of the property of any trading or mercantile business; "to trade" being to engage in the purchase or sale of merchandise, and the word "mercantile" being defined as of or pertaining to merchants, or the traffic carried on by them. Jackson v. Town of Union, 73 Atl. 773, 774, 82 Conn. 266.

#### **Real estate dealer**

The term "mercantile pursuits," as used in Bankr. Act 1898, § 4b, c. 541, does not include dealing in real estate. In re Kingston Realty Co., 160 Fed. 445, 447, 87 C. C. A. 406, reversing 157 Fed. 299.

#### **Renting films for moving pictures**

A corporation engaged principally in the business of renting films for moving pictures is not engaged in trading or a mercantile pursuit which renders it subject to adjudication as an involuntary bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797. In re Imperial Film Exchange, 198 Fed. 80, 81, 117 C. C. A. 188.

#### **Restaurant**

A corporation operating a restaurant is not subject to adjudication as a bankrupt under Bankr. Act July 1, 1898, c. 541, authorizing an adjudication against corporations engaged in "mercantile pursuits"; the dishes furnished not being merchandise, nor the proprietor a merchant engaged in "mercantile pursuits." In re Wentworth Lunch Co., 159 Fed. 413, 415, 86 C. C. A. 393.

A restaurateur is not a "trader," nor, so far as his business of cooking and selling

food is concerned, is he engaged in "mercantile pursuits," within Bankr. Act July 1, 1898, c. 541, authorizing involuntary proceedings against traders and persons so engaged. In re Excelsior Café Co., 175 Fed. 294, 296.

**MERCANTILE AGENCY**

As publisher, see Publisher.

**MERCANTILE INSTITUTION OR ESTABLISHMENT**

See Manufacturing Establishment; Mercantile.

**MERCANTILE LAW**

See Commercial Law.

**MERCANTILE MARINE**

Rev. St. § 4233, providing that steam vessels, when towing other vessels, shall carry two bright, white masthead lights, vertically, in addition to their side lights, which shall be of such a character as to be visible on a dark night with a clear atmosphere for at least 5 miles and show a uniform unbroken light over an arc of the horizon at 20 points of the compass, applies only to the navy and mercantile marine of the United States, "mercantile marine" being used to mean the merchant service or business of commerce at sea, and does not apply to steam vessels engaged in towing on inland rivers. Beck v. Johnson, 169 Fed. 154, 164.

**MERCANTILE PURSUITS**

See Mercantile.

**MERCANTILE SPECIALTY**

See Specialty.

**MERCHANDISE**

See Dutiable Merchandise; Lawful Merchandise; Stock of Goods, Wares, and Merchandise; Stock of Merchandise. Any article of imported merchandise, see Any.

Goods, wares, and merchandise, see Goods.

Other merchandise, see Other.

"Merchandise" has a very extended meaning and usually means personalty used by merchants in the course of trade, but may include every article of traffic. Mara v. Branch (Tex.) 135 S. W. 661, 662; Whitewater Mercantile Co. v. Devore, 109 S. W. 808, 809, 130 Mo. App. 339.

"Merchandise" is defined as anything movable, customarily bought and sold for profit. H. H. Kohlsaat & Co. v. O'Connell, 99 N. E. 689, 690, 255 Ill. 271 (citing 5 Words and Phrases, p. 4482).

Rev. St. § 2766, provides that: "The word 'merchandise' as used in this title may include goods, wares and chattels of every description capable of being imported." United States v. Fifty Waltham Watch Movements, 139 Fed. 291, 294.

**Baggage**

As baggage, see Baggage.

In Rev. St. § 3082, prescribing a penalty for importing or bringing into the United States any merchandise contrary to law, the term "merchandise" is not restricted to general merchandise as distinguished from personal baggage, especially in view of section 2766, declaring that the word "merchandise" may include goods, wares, and chattels of every description capable of being imported, and sections 2799 and 2802, showing that wearing apparel and other personal baggage are embraced within the term. United States v. Chesbrough, 176 Fed. 778, 781.

**Carriages, wagons, etc.**

The term "merchandise" in the Bulk Sales Law does not include wagons or other appliances used in a retail coal business. Bowen v. Quigley 130 N. W. 690, 165 Mich. 337, 34 L. R. A. (N. S.) 218.

**Fruit**

Fruit is "merchandise" within Code Miss. 1906, § 1367, prohibiting the keeping open of a store on Sunday for the purpose of disposing of wares or merchandise. This term covers all kinds of personal property which is ordinarily bought and sold. City of Gulfport v. Stratakos, 43 South. 812, 90 Miss. 489, 13 Ann. Cas. 855 (citing Blackwood v. Cutting Packing Co., 18 Pac. 248, 76 Cal. 212, 9 Am. St. Rep. 199).

**Furniture and fixtures**

A fire policy on a stock of merchandise for a specified sum, and on store and furniture and fixtures for a specified sum which stipulates that the entire policy shall be void if the subject of insurance be incumbered by chattel mortgage, is not invalidated, as to the insurance on the furniture and fixtures, by the execution of a chattel mortgage on the "stock of merchandise" and improvements, the mortgage not covering the furniture and fixtures; "stock," in mercantile law, being defined as "the goods which a tradesman holds for sale or traffic," and "merchandise" being defined to be "the objects of commerce." Spring Garden Ins. Co. of Philadelphia v. Brown (Tex.) 143 S. W. 292.

**Horse or stallion**

A sale of horses, wagons, harnesses, coal bags, forks, shovels, baskets, stoves, sleigh runners, chutes, and books pertaining to a retail coal business was not a sale of "merchandise," within Bulk Sales Law (Pub. Laws 1905, No. 223), providing that sales in bulk of any part or the whole of a stock of merchandise, or merchandise and fixtures pertaining to a business, otherwise than in the ordinary course of trade, shall be void, etc. Bowen v. Quigley, 130 N. W. 690, 165 Mich. 337, 34 L. R. A. (N. S.) 218.

**Insurance**

Insurance is not an article of merchandise or manufacture, or one of the necessities

of life, within the laws against engrossing, prohibiting combinations among dealers in merchandise or manufacture or necessities of life. *Harris v. Commonwealth*, 73 S. E. 561, 563, 113 Va. 746, 38 L. R. A. (N. S.) 453, Ann. Cas. 1913E, 597.

#### Labor and services

Code, § 5060, prohibiting any combination to regulate the price "of any article of merchandise or commodity or to fix \* \* \* the amount or quality of any article, commodity or merchandise to be manufactured, mined, produced or sold," does not, when construed as required by section 48 by giving to the words and phrases the meaning of approved usage of the language, cover combinations to fix the price of skilled or unskilled labor, and does not prevent physicians from combining to fix charges for professional services; the word "merchandise" referring primarily to those things which merchants sell, and the word "commodity" qualified by the words "manufactured, mined, produced, or sold," not including labor either skilled or unskilled, though the word "commodity" primarily means a convenience, profit, benefit, or advantage, and, in reference to commerce, comprehends everything movable—that is, sold or bought—except animals. *Rohlf v. Kasemeier*, 118 N. W. 276, 277, 140 Iowa, 182, 23 L. R. A. (N. S.) 1284, 132 Am. St. Rep. 261, 17 Ann. Cas. 750.

#### Lumber, logs, and posts

Logs to be got out are "merchandise" within the statute of frauds. *Crosby Hard-Wood Co. v. Tester*, 63 N. W. 1057, 1058, 90 Wis. 412 (citing *Hanson v. Roter*, 64 Wis. 622, 25 N. W. 530).

Though the word "merchandise," as used in Acts 1903, p. 92, regulating the sale of "goods, wares and merchandise" in bulk, is not to be taken in such a restricted sense as to exclude the usual and customary accessories of a mercantile or trading establishment, when a sale in bulk is made of the whole, the statute is not applicable to a sale of substantially all the lumber manufactured by one who operates a sawmill at which trees are manufactured into lumber. *Cooney, Eckstein & Co. v. Sweat*, 66 S. E. 257, 133 Ga. 511, 25 L. R. A. (N. S.) 753.

#### Placer gold

The word "merchandise," defined in Rev. St. § 2766, as including goods, wares, and chattels of every description capable of being imported, is sufficiently broad to include placer gold. *Six Parcels of Placer Gold v. United States*, 76 Pac. 473, 475, 8 Ariz. 389.

#### Ship

A steamship owned by a corporation and plying between domestic ports is taxable as "merchandise," under St. 1903, p. 452, c. 437, § 84. The term "merchandise" also includes general objects of traffic and commerce, together with stocks or shares in in-

corporated companies. As used in the statute of frauds, the words "goods" and "merchandise" are sufficiently comprehensive to include promissory notes. The *Century Dictionary* states that "real property, ships, money, stocks and bonds are not merchandise," but the word may be used in different senses, and in any case of doubt the context throws much light on its meaning, and the meaning of "merchandise," as gathered from the context and the purpose of the act in which it occurs, is broad enough to include ships. *New England & Savannah S. S. Co. v. Commonwealth*, 81 N. E. 286, 288, 289, 195 Mass. 385, 11 Ann. Cas. 678 (citing *Tisdale v. Harris*, 20 Pick. [37 Mass.] 9, 13; *Baldwin v. Williams*, 3 Metc. [44 Mass.] 365, 367).

#### Tools and implements

A fire policy "on 'merchandise,' consisting principally of clothing made and in process of making and materials for same," covers the stock in trade and all articles necessarily or conveniently used in the business, and embraces tools and implements of the business as conducted by insured. *Oklahoma Fire Ins. Co. v. McKey* (Tex.) 152 S. W. 440, 441.

#### Undertaker's caskets, etc.

"Merchandise," within the bulk sales law (Pub. Acts 1905, No. 223), means such things as are usually bought and sold in trade by merchants, and includes caskets, steel vaults, robes, and casket hardware used in an undertaker's business. *People's Savings Bank v. Van Allsburg*, 131 N. W. 101, 102, 165 Mich. 524.

#### Wool

Wool owned by a manufacturing company, bought abroad and entered for warehousing in a United States bonded warehouse, is "merchandise," within St. 1909, c. 490, pt. 3, § 41, which provides for levy of an excise on domestic corporations, based on the value of merchandise, etc., which if owned by a natural resident would be liable to taxation. *Farr Alpaca Co. v. Commonwealth*, 98 N. E. 1078, 1079, 212 Mass. 156.

### MERCHANDISE BROKER

A "merchandise broker" is one who negotiates the sale of merchandise without having it in his possession or control. "He is simply an agent with very limited powers, and with reference to right to receive payment it is universally held: 'A broker has, ordinarily, no authority to receive payment for property sold by him for his principal, and a purchaser who pays the broker does so at his own risk. Such payment does not discharge him from liability to the principal, unless the authority of the broker to receive payment be express or may reasonably be implied from the circumstances.'" *J. M. Robinson, Norton & Co. v. Corsicana Cotton Factory*, 99 S. W. 305, 306, 124 Ky. 435, 8 L. R. A. (N. S.) 474, 14 Ann. Cas. 802 (quoting and adopting definition in *Story, Ag.*

§ 34; and citing *Mechem, Ag. § 949; Graham v. Duckwall*, 8 Bush [71 Ky.] 12; *Seiple v. Irwin*, 30 Pa. 513; *Higgins v. Moore*, 84 N. Y. 417; *Basset v. Lederer* [N. Y.] 1 Hun, 274; *Crosby v. Hill*, 39 Ohio St. 100).

#### **MERCHANDISE ENTITLED TO DEBENTURE**

See Entitled to Debenture.

#### **MERCHANDISE NOT IN EXISTENCE**

A crop of olives, nearly matured at time of contract for sale thereof, is not within Civ. Code, § 1768, providing that one who agrees to sell merchandise, "not then in existence," warrants that it shall be sound and merchantable at the contemplated place of production, and as nearly so at the place of delivery as can be secured by reasonable care, or section 1771, providing that one who sells or agrees to sell merchandise "Inaccessible to the examination of" the buyer thereby warrants that it is sound and merchantable. *Kenney v. Grogan*, 120 Pac. 433, 435, 17 Cal. App. 527.

### **MERCHANT**

See Commission Merchant; Court Merchant; Custom of Merchants; Forwarding Merchant; Law Merchant; Lumber Merchant; Permanent Merchant; Public Merchant; Transient Merchant.

A "merchant" is one who buys and sells goods of all or any kind. *Commonwealth v. Payne Medicine Co.*, 127 S. W. 760, 763, 138 Ky. 164.

"Merchant" is defined as any one who buys and sells any species of movable goods for gain or profit. *H. H. Kohlsaat & Co. v. O'Connell*, 99 N. E. 689, 690, 255 Ill. 271 (citing 5 Words and Phrases, p. 4482).

The word "merchant" is defined as "one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit, especially one who buys and sells in quantities or by wholesale," or "a shopkeeper" or "storekeeper." *Carr v. Riley*, 84 N. E. 426, 428, 198 Mass. 70.

A statutory provision empowering cities to impose license taxes upon "merchants," and to enact ordinances for the regulation and enforcement of such taxes, authorizes city councils to impose penalties upon agents and employes of such merchants who assist in carrying on an unlicensed business. *City of Emporia v. Becker*, 90 Pac. 798, 799, 76 Kan. 181, 12 L. R. A. (N. S.) 946.

#### **As dealer**

See Dealer.

#### **Laborer distinguished**

Within Act Cong. May 5, 1892, c. 60, 27 Stat. 25, providing for the deportation of Chinese laborers and defining "merchant" as a person engaged in buying and selling

merchandise at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant, a person who at the time of his arrest was working as a servant in a boarding house, and who since coming to the United States had worked as a cook and delivery man in a store in which he had no interest, was a laborer and not a merchant. *Mar Sing v. U. S.*, 137 Fed. 875, 877, 70 C. C. A. 213.

It has been held that a Chinese person engaged in keeping a restaurant and lodging house is a "laborer"; that a Chinese person whose occupation was that of a laundry man is a laborer within the meaning of the Chinese Exclusion Laws; that a Chinese person owning an interest in a mercantile firm, but not engaged in conducting it, who is also a cook in a restaurant of which he is part owner, is a laborer and not a merchant under such laws; and that a Chinaman who from the date of his landing in this country, although he has an interest in a mercantile business, is a laborer. Act Cong. Nov. 3, 1893, c. 14, amending Act May 5, 1892, c. 60, "to prohibit the coming of Chinese persons into the United States," does not restrict the meaning of the word "laborers," as used in the prior acts, so as to enlarge the privileged classes. *United States v. Yee Gee You*, 152 Fed. 157, 158, 159, 160, 81 C. C. A. 409.

#### **Farmer**

A farmer selling the products of his farm produced by his own labor is not a "merchant, grocer, or dealer in wares and merchandise, or a trader in any business," within Pen. Code, art. 199, prohibiting such persons from bartering or permitting their places of business to be open for traffic on Sunday. *Hanks v. State*, 99 S. W. 1011, 1012, 50 Tex. Cr. R. 577.

#### **Foreign corporation**

A foreign corporation engaged in the publication of school books, which has obtained a contract from the state text-book commission to furnish all the school books of the state, as provided by Acts 1890, p. 423, c. 205, and which has contracted with the dealers within the state to establish depots for the sale of school books in the state is a "merchant" doing business within the state, as defined by Acts 1903, p. 655, c. 258, § 27, and is therefore liable to a tax on the average value of its capital invested in its stock of merchandise kept on hand for sale within the state; the term "merchant" being defined by the statute as including all persons, copartnerships, or corporations engaged in trading or dealing in any kind of goods, wares, or merchandise, whether the same be kept on hand for sale or be purchas-

ed and delivered for profit as ordered. *American Book Co. v. Shelton*, 100 S. W. 725, 731, 117 Tenn. 745. A state is not precluded by the commerce clause of the federal Constitution from imposing a merchants' tax upon a nonresident manufacturing corporation which has selected a city of that state as a distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assort them, store them in a warehouse, and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company, since, under such circumstances, the goods, when stored in the warehouse, were no longer in transit, but had reached their destination, and were held in the state for sale. *American Steel & Wire Co. v. Speed*, 24 Sup. Ct. 865, 366, 192 U. S. 500, 48 L. Ed. 538.

#### **Fruit dealer**

The keeper of a fruit stand, from which he sold fruit on Sunday, was a merchant engaged in selling merchandise, etc., on Sunday, within Code 1906, § 1367, providing that a merchant, shopkeeper, or other person shall not keep open his store on Sunday for the purpose of disposing of any wares or merchandise, goods, or chattels. *City of Gulfport v. Stratakos*, 43 South. 812, 90 Miss. 489, 13 Ann. Cas. 855.

#### **Itinerant optician**

"Merchant" is defined by Webster, Dict. as "one who traffics on a large scale, especially with foreign countries; a trafficker; a trader; \* \* \* one who keeps a store or shop for the sale of goods; a shopkeeper." A merchant has also been defined as "one whose business is to buy and sell merchandise; one who buys to sell again, who does both, not incidentally or occasionally, but habitually, as a business." An itinerant optician, who merely prescribes and collects for spectacles, and has his orders filled and charged to him by a supply house, is not a merchant. *City of Waukon v. Fisk*, 100 N. W. 475, 476, 124 Iowa, 464 (quoting *Jewel v. Trustees of Sumner Tp.*, 84 N. W. 973, 113 Iowa, 47, 49).

#### **Manufacturer**

The words "merchants" and "dealers," according to common understanding, mean something different from the word "manufacturers." The former are generally employed to designate persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade; the latter to designate those engaged in the business of making or producing articles for use or sale. *Union County Nat. Bank, Liberty, Ind., v. Ozan Lumber Co.*, 179 Fed. 710, 715, 103 C. C. A. 584.

A "manufacturer" is one engaged in making materials, raw or partly finished, into wares suitable for use. A "merchant" is distinguished from a manufacturer, in that he sells to earn a profit, and the manufacturer sells to take profit already earned. A manufacturer of agricultural implements is not a "dealer" or "merchant," within Acts 1909, c. 479, § 3, and Assessment Act 1907 (Acts 1907, c. 602) §§ 8, 26, 27, providing for taxation of dealers and merchants; sales being made only to jobbers and commission men, and the only profit taken being for manufacturing the articles sold. *Chattanooga Plow Co. v. Hays*, 140 S. W. 1068, 1069, 125 Tenn. 148.

A manufacturer of acetylene gas lighting systems who sells through soliciting agents is not a "merchant" or "dealer" within Kirby's Dig. § 518, which provides that section 513, which makes void notes given in ordinary form for the price of patented machines, etc., shall not extend to merchants and dealers who sell patented things in the usual course of business; the words "merchant" and "dealer" meaning persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade. *Ensign v. Coffelt*, 145 S. W. 231, 234, 102 Ark. 568.

#### **Member of firm**

The term "merchant" is defined by Act Cong. May 5, 1892, c. 60, as amended by Act Nov. 3, 1893, c. 14, as a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. The names of any of the partners need not appear in the company name under which a Chinese grocery is actually conducted at a fixed place of business, in order to constitute them merchants within the meaning of the definition. *Tom Hong v. United States*, 24 Sup. Ct. 517, 519, 193 U. S. 517, 48 L. Ed. 772.

#### **Oil dealer**

A "merchant" is a person whose business it is to buy and sell merchandise and who habitually trades in merchandise. 2 Bouv. Law Dict. 155. A merchant's license contemplates that the merchant is to have a fixed place of business within a county or city consisting of a store or shop for the sale of goods. *Brown's Case*, 36 S. E. 485, 98 Va. 369. An oil company engaged in the business of refining and distributing oil and selling it to local dealers from tank wagons, and not from a fixed place of business, is not a "merchant" as that term is generally understood, and cannot, by voluntarily paying a state license as a merchant, prevent the assessment of a specific tax against its busi-



ness. *Standard Oil Co. v. City of Fredericksburg*, 52 S. E. 817, 820, 105 Va. 82.

A corporation selling oil drawn from stationary tanks owned by it, and from a wagon tank driven about town, is a "merchant," within an ordinance defining a merchant to be a person dealing in the selling of goods, wares, and merchandise at any store, stand, or place occupied for that purpose. *City of Troy v. Harris*, 76 S. W. 662, 663, 665, 102 Mo. App. 51.

#### **Salesman or solicitor of orders for goods**

Under the treaty of November 17, 1880 (22 Stat. 826), and the treaty of March 26, 1894 (28 Stat. 1210), providing that Chinese persons entitled to come into the United States, when provided with the certificate prescribed by Act Cong. July 5, 1884, c. 220, 23 Stat. 115, are Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, and under Act Nov. 8, 1893, c. 14, § 2, 28 Stat. 8, defining the term "merchant," as used in the exclusion acts, as a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who does not engage in manual labor, a person described in his certificate as a "salesman" is not a merchant, who is entitled to remain in the United States; a "salesman," as defined by the *Standard Dictionary*, being a man who sells goods in a shop or store or by canvassing, and being generally accepted to mean a person who sells goods for a merchant, and not to mean the merchant himself. *United States v. Gin Hing*, 76 Pac. 639, 640, 8 Ariz. 416.

Defendant took orders for groceries which he sent to a wholesale grocery firm, which shipped the goods to their own order and sent a bill therefor accompanying the bill of lading to their agent with directions to deliver only as paid for. Such agent received the goods and removed them to his warehouse, where the bulk was broken and the different packages for each customer segregated and delivered to them through defendant on their paying the price to defendant, and he delivered the money to such agent. Held, that defendant was a "merchant" as defined by Rev. St. 1899, § 8540, declaring every person who shall deal in the selling of goods, wares, and merchandise at any store, stand, or place occupied for that purpose to be a "merchant," and was therefore within a town ordinance prohibiting any "merchant" carrying on business without first having obtained a license. *Town of Canton v. McDaniel*, 86 S. W. 1002, 1096, 188 Mo. 207.

A "merchant" is one engaged in the business of buying commercial commodities and selling them again for the sake of profit. He is one who traffics or carries on trade, especially on a large scale; one who buys goods to sell again; and any one who is engaged

in the purchase or sale of goods; a trafficker; a trader. Under Code, § 700, giving to cities and towns the power to define by ordinance who shall be considered transient merchants, and to regulate, license, and tax their sales, a city may impose a license fee on one engaged in taking orders for goods on his own account, and subsequently having the orders filled by a wholesale house, and the goods shipped to him for delivery; he paying the wholesale price and collecting the retail price from his customers. *City of Cedar Falls v. Gentzler*, 99 N. W. 561, 562, 123 Iowa, 670.

#### **MERCHANT APPRAISER**

The "merchant appraiser" appointed by the collector of customs is an expert, selected as an emergency arises, upon the request of the importer for a reappraisal. He is not a clerk nor an agent nor a person employed in the customs department within the meaning of the civil service act, nor is he an officer of the United States. *Hand v. Cook*, 92 Pac. 3, 10, 29 Nev. 518 (quoting and adopting *Auffmordt v. Hedden*, 11 Sup. Ct. 108, 187 U. S. 310, 34 L. Ed. 674).

#### **MERCHANTABLE**

##### **Marketable synonymous**

"Marketable" and "merchantable" are practically synonymous. In an action for breach of contract to purchase hay, in which defendants alleged that plaintiff agreed to sell them merchantable hay, and that the hay shipped was not as represented, a request by plaintiff to an expert witness: "State whether or not this hay you saw there is considered as marketable hay here in Baker City, compared with other kind that is sold here"—was not objectionable; the persons who "considered" the hay merchantable being himself and those who, according to his previous testimony, he had seen purchasing such hay at Baker City. *Eaton v. Blackburn*, 88 Pac. 303, 304, 49 Or. 22 (citing *Webster's International Dict.*).

##### **Corn**

The term "merchantable," as used in the rule that a buyer of corn is entitled to merchantable corn, means corn of such quality as to be reasonably fit for the ordinary purposes to which such corn is put, and free from marketable defects, so as to be salable in the market at an average or ordinary price. *Atkins Bros. Co. v. Landa*, 95 S. W. 949, 950, 119 Mo. App. 119.

##### **Hay**

See *Good Merchantable Hay*.

##### **Lumber**

The words "merchantable lumber, mill run," are not in common use and have no settled, judicial meaning. They are peculiar to the lumber trade or business and have a special meaning well understood by persons engaged in such business, and in an action on

a contract for the purchase of lumber at a specified price per 1,000 for "merchantable lumber, mill run," evidence is admissible to show the meaning of the words. *Barnes v. Leidigh*, 79 Pac. 51, 52, 46 Or. 43.

### Timber

The term "merchantable timber," within a contract to sell land warranted to contain 100,000,000 feet of "merchantable timber," while not limited to timber that could be reduced to board measure and manufactured into lumber at a profit, is limited to timber capable of being measured in board feet when sawed or cut for the purpose of utilization. *Broad River Lumber Co. v. Middleby*, 194 Fed. 817, 819, 114 C. C. A. 521.

"The term 'merchantable' means fit for the market, of such a quality as will bring the ordinary market price." A deed of "merchantable" timber had reference to such timber as would bring the ordinary market price at the time the deed was executed. *Liston v. Chapman & Dewey Lumber Co.*, 91 S. W. 27, 29, 77 Ark. 116 (quoting and adopting *Webst. Dict.* and *Black Law Dict.*; and citing *Andrews v. Wade* [Pa.] 6 Atl. 48).

A contract for the sale of all merchantable pine timber, 10 inches in diameter and over, on a described tract of land, was not void for uncertainty, "merchantable" being used to describe the quality and determinable by experts with approximate certainty. *Lee Lumber Co. v. Hotard*, 48 South. 286, 287, 122 La. 850, 129 Am. St. Rep. 368.

A contract to sell the "merchantable pine timber" upon a certain tract of land to be sawed into lumber by the vendor according to the directions of the purchaser, and to be delivered at Richmond, is a contract that the lumber shall be merchantable, and that the timber will make merchantable lumber. *Ragland v. Butler*, 18 Grat. (59 Va.) 323, 335.

### Title

The term "merchantable title" does not necessarily import a clear and perfect record title, and is not of such clear and definite meaning that one contracting to sell standing timber and to give such a title may not assert as a defense for not giving such title that he was ignorant of its meaning, and when the contract was executed stated to the vendee that, if it meant a perfect title or one good of record, he would not sign, because he could not furnish such title, and that thereupon the vendee told him that a general warranty deed was all that was wanted, and that that was what was meant by the term, and that he signed in reliance on such assurance.—*Hughes v. Adams*, 119 S. W. 134, 136, 55 Tex. Civ. App. 197.

## MERCHANTS' GOODS, WARES, AND COMMODITIES

See Merchandise.

## MERE

### MERE LICENSE

See License; Licensee.

### MERE POSSIBILITY

The rights of living remaindermen, children of the life tenant, in a deed to one for life with remainder to the "heirs of her body," are not "mere possibilities" within Civ. Code, § 700, declaring that a mere possibility, such as the expectancy of an heir apparent, is not an interest of any kind, but they are estates in fee to vest in the future in such of them as survive their mother. *Los Angeles County v. Winans*, 109 Pac. 650, 652, 13 Cal. App. 257.

## MERGER

### Corporations

While there is a distinction recognized by most authorities between a "merger" and a "consolidation" of corporations, these terms are not always used with strict accuracy. *Chicago & E. I. R. Co. v. Doyle*, 100 N. E. 278, 281, 256 Ill. 514.

There is a distinct difference between a consolidation and a merger of two companies. In a consolidation, both go out of existence as separate corporations, and a new corporation is created, which takes their place and property; while in case of a merger one loses its identity by absorption in the other, which remains in existence, and succeeds to its property, and issues its own stock to the stockholders of the merged company. *Lee v. Atlantic Coast Line R. Co.*, 150 Fed. 775, 790. See, also, *Kent v. Common Council of City of Binghamton*, 81 N. Y. Supp. 198, 200, 40 Misc. Rep. 1 (2 Bouv. Law Dict. 175; *Webst. Int. Dict.* 914). *Irvine v. New York Edison Co.*, 128 N. Y. Supp. 297, 299, 143 App. Div. 344; *Central University of Kentucky v. Walters' Ex'rs*, 90 S. W. 1066, 1069, 122 Ky. 65; *Wasley v. Chicago R. I. & P. Ry. Co.*, 147 Fed. 608, 614.

The Atlantic Coast Line Railroad Company incorporated in Virginia and having its principal offices in Richmond, with power given by its charter to "consolidate with itself" other corporations, entered into an agreement of "consolidation and merger" with a company owning connecting lines, incorporated in other states, which agreement provided that the stock of the second company should be retired and canceled, and stock of the Coast Line Company issued in its place; that all the stock, property, and franchises of both should be merged, united, and consolidated, "so as to form a merged, united and consolidated company"; that "said merger, union, and consolidation shall be into the Atlantic Coast Line Railroad Company, which is to continue the name of the consolidated company"; and that its office should remain in Richmond. Under such

agreement the stock of the second company was canceled, but stock previously issued by the Coast Line Company remained outstanding, and such company took charge of and operated all lines previously owned and operated by either company, without any change in its management or control. Held, that such agreement effected a merger, and not a consolidation, and that the Coast Line Company continued to exist as a Virginia corporation. *Lee v. Atlantic Coast Line R. Co.*, 150 Fed. 775, 784.

A consolidation takes place when two companies are extinguished and a new one created taking over the holdings of those passing out of existence. It differs from "merger," which occurs when a thing of lesser importance is absorbed by one of greater importance. Both merger and consolidation, however, are equally productive of union, which means agreement, concord, harmony, and may exist without either merger or consolidation. *Ramsey v. Hicks*, 87 N. E. 1091, 1099, 44 Ind. App. 490.

#### Estates

A "merger," at law, is defined to be where a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate. The less estate is immediately annihilated, or, in the law phrase, it is said to be merged—that is, sunk or drowned—in the greater. The rule in equity is the same as at law, with this modification: That at law it is invariable and inflexible; in equity it is controlled by the expressed or implied intention of the party in whom the interests of estate unite. *Bagley v. McCarthy Bros. Co.*, 104 N. W. 7, 9, 95 Minn. 286 (quoting 5 Words and Phrases, p. 4492).

"Merger," in law, is accomplished when two or more estates comprising the whole legal and equitable interest unite in the same person; but in equity such union does not effect a merger, unless such was the intention of the parties, and when equity requires it. *Citizens' Permanent Savings & Loan Ass'n v. Rampe*, 116 N. Y. Supp. 597, 600; *Dudley v. People's Trust Co.*, 107 N. Y. Supp. 930, 933, 57 Misc. Rep. 230 (quoting *Asche v. Asche*, 21 N. E. 70, 113 N. Y. 232).

Where a greater and a lesser estate coincide and meet in the same person and in the same right, without any intermediate vested estate, the lesser is immediately annihilated, and is said to be "merged." *Tolsma v. Adair*, 73 Pac. 347, 348, 32 Wash. 383 (quoting and adopting definition in *Anderson's Law Dict.* 671; 2 *Bouv. Law Dict.* [Rawle's Rev.] 400, 401).

"Merger" is essentially a matter of intention, and where the intention to merge does not exist the doctrine is not operative. Four sisters and four brothers being seised in fee of a tract of land, the sisters conveyed their undivided interests amounting to one-half of

the fee to their brothers, three of whom, being of age, executed four several bonds to their sisters and gave them collectively a mortgage on the premises to secure a portion of the purchase money. The brother, who was a minor at the time the mortgage was given and who did not join therein, came of age within two years after the giving of the mortgage, and lived for more than thirty years thereafter and died, devising his one-fourth interest to his three brothers who made the mortgage. The entire fee of the premises subsequently vested in two of the brothers by virtue of their individual holdings and under the will of their deceased brother, and by a conveyance by their surviving brother, and in the years 1891, 1895, and 1903, made three mortgages upon the premises. One of the brothers died intestate, and his interest in the premises descended to his heirs at law, who are his surviving brother and his nephews and nieces, children of his deceased brothers and sisters. The surviving brother and the nephews and nieces are the owners of the interest in the mortgage of one of the sisters, as well as being owners of the fee. As against the mortgages of 1891 and 1895, there was no "merger" of their interest in the original mortgage to the sisters and the title to the fee in the lands. *Shreve v. Harvey*, 70 Atl. 671, 676, 74 N. J. Eq. 336.

The rule is absolute at law that a "merger" takes place when a greater estate and a lesser coincide and meet in one and the same person, in one and the same right, without the intervention of any other or outstanding right or title. Under such circumstances, the lessor estate is annihilated or merged into the greater. The doctrine of merger springs from the fact that, when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it would be of no use to the owner to keep up a charge upon the estate of which he was seised in fee simple; but, if there is an outstanding, intervening title, the foundation for the merger does not exist, and, as a matter of law, it is so declared. It therefore appears that, in order to effect a merger so as to extinguish the lesser estate, there must be a union, in the same person, of both the equitable and legal titles, without an intervening right operating to prevent a merger. *Curry v. Lafon*, 113 S. W. 246, 250, 133 Mo. App. 163 (citing *Stantons v. Thompson*, 49 N. H. 272; *Jones, Mortg.* [6th Ed.] § 848).

"Merger" occurs 'when a greater estate and a less coincide and meet in one and the same person, in one and the same rights without any intermediate estate.' The rule in equity is the same as at law, with this modification that at law it is inflexible, whereas in equity it is clear that a person may become entitled to an estate subject to a charge for his own benefit, and if he choose

can hold the estate and keep the charge alive. It becomes a question of intention in the person in whom the two interests are vested." Where a purchaser assumed the payment of notes executed by the vendor, secured by a mortgage on the premises, and conveyed the premises to a third person subject to the mortgage, and this person afterwards acquired the notes, the equitable estate was merged in the legal one, thereby extinguishing the mortgage and the debt secured. *Wonderly v. Giessler*, 93 S. W. 1130, 1133, 118 Mo. App. 708 (quoting and adopting *Bassett v. O'Brien*, 51 S. W. 108, 149 Mo. 389).

A "merger of estates" occurs, as declared in Civ. Code 1895, § 3106, when "two estates in the same property unite in the same person in his individual capacity, the less estate [being] merged in the greater," or where, as was held in *Lowe v. Webb*, 11 S. E. 845, 85 Ga. 731, two or more persons, having, as tenants in common, a life estate in realty, acquire in common the absolute fee thereto. "The doctrine of 'merger of estates' rests upon actualities, not upon mere possibilities. Coincidence of two independent estates presently held by one and the same person or class of persons is a necessary prerequisite to merger. No merger can take place until such identity of person and of present interest in point of fact exists." *Luquire v. Lee*, 49 S. E. 834, 838, 121 Ga. 624 (citing *Stringfellow v. Stringfellow*, 87 S. E. 767, 112 Ga. 494, 497; *Bardwell & Co. v. Edwards*, 45 S. E. 40, 117 Ga. 825; 1 Wash. Real Prop. [6th Ed.] § 368; *Knowles v. Lawton*, 18 Ga. 476, 63 Am. Dec. 290; *Cole v. Grigsby* [Tex.] 35 S. W. 690; *Asch v. Asch* [N. Y.] 18 Abb. N. C. 82; *Bomar v. Mullins* [S. C.] 4 Rich. Eq. 80; *Johnson v. Johnson*, 7 Allen [89 Mass.] 196, 83 Am. Dec. 676).

Rights are said to be "merged" when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights or extinguishment. *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 54 S. E. 1028, 1031, 126 Ga. 210, 7 L. R. A. (N. S.) 1139 (quoting *Bouvier Law Dict.* word "Merger," subtitle "Of Rights"; and citing *Rawle, Covenants* [5th Ed.] § 223; *Sibley v. Beard*, 5 Ga. 550; *Fields v. Willingham*, 49 Ga. 344; *Willis v. McGough*, 56 Ga. 198; Civ. Code 1895, § 3106; *Goodel v. Bennett*, 22 Wis. 565; *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Silverman v. Loomis*, 104 Ill. 137; *Waterbury v. Head*, 12 N. Y. St. R. 361).

#### Offenses

"Merger" in the criminal law occurs where the same act of crime is within the definition of a misdemeanor and likewise a felony, or of a felony and likewise of a treason; and the rule is that the lower grade merges in the higher. That is, an act cannot be both a felony and a misdemeanor—a doctrine which applies only where the iden-

tical act constitutes both offenses. \* \* \* Subject to whatever exception may be found in the doctrine of merger, a criminal person may be holden for any crime, of whatever nature, which can be legally carved out of his act. He is not to elect, but the prosecuting power is. If the evidence shows him to be guilty of a higher offense than he stands indicted for, or of a lower, or of one differing in nature, whether under a statute or at the common law, he cannot be heard to complain; the question being whether it shows him to be guilty of the one charged." *State v. Smith*, 90 S. W. 440, 444, 190 Mo. 706 (quoting and adopting definition in 1 Bish. Cr. Law [7th Ed.] §§ 786, 791).

## MERINO WOOL

In Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 349, relating to wools, the words "merino blood, immediate or remote," convey an unmistakable meaning, and include wool in which the presence of merino blood is marked, though of inferior quality. *United States v. American Express Co.*, 177 Fed. 735, 789.

## MERIT

### MERITORIOUS DEFENSE

Where a complaint alleged execution by defendants of a penal bond, the condition of which was that defendants would make certain repairs to a building for plaintiffs that they had failed to perform, and a default judgment was entered thereon, an answer admitting the execution of the bond and failure to perform, but alleging that the building was leased to defendants for gambling purposes, does not on a motion to set aside the default judgment set up a "meritorious defense," within *Mills' Ann. Code*, § 75, authorizing relief under such circumstances. *McConnell v. Schultz*, 128 Pac. 876, 877, 23 Colo. App. 194.

The word "meritorious," as used in connection with a "meritorious defense," means that the defense is good and lawful, and, when pleaded properly in time, must be recognized as a good lawful defense. While any defense given by statute is meritorious, it does not follow that for that reason it has merit equal to any other defense, thus removing from the courts the right to discriminate between different defenses, so that, where it appears that a defense otherwise meritorious when offered for the first time in an amended pleading if allowed would work an injustice instead of a justice, the court should refuse it. *O'Neill v. Jones*, 123 N. W. 495, 496, 24 S. D. 79.

### MERITS

As a technical legal term, "merits" has been defined as a matter of substance in law as distinguished from matters of form, and as the real or substantial grounds of action

or defense, in contradistinction to some technical or collateral matter raised in the course of the suit. *Wolfe v. Georgia Ry. & Electric Co.*, 85 S. E. 62, 63, 6 Ga. App. 410 (citing 5 Words & Phrases, p. 4493).

"The term 'merits' has been defined as meaning the strict legal rights of the parties as distinguished from those mere questions of practice which every court regulates for itself and from all matters which depend upon the discretion or favor of the court—matters of substance in law as distinguished from matters of form." *Smoot v. Judd*, 83 S. W. 481, 519, 184 Mo. 508.

The act of the trial court in an election contest in changing the case from the jury docket to the nonjury docket at a subsequent term, after an order had been made placing it upon the jury docket, but on the faith of which no steps had been taken, is within the discretion of the trial court, since the rule that trial judges cannot, at subsequent terms, change orders made at former terms does not apply to mere practice points, but only to the "merits of the controversy," which term is not confined to points in actual litigation. *Taylor v. Carr*, 141 S. W. 745, 748, 125 Tenn. 235, Ann. Cas. 1913C, 155.

In November, 1903, at the instance and request of plaintiff's counsel, a stipulation was entered into embracing the facts relevant to all the issues except one. Such stipulation was entered into in good faith, without fraud or any attempt to deceive plaintiff's counsel, and after most careful consideration. Defendant's counsel in good faith relied upon such stipulation for nearly six years. In March, 1908, the cause was tried and submitted upon such stipulated facts and certain testimony relevant to the issue not covered by the stipulation. In May, following, the trial court made its findings of fact and conclusions of law favorable to plaintiff, and ordered judgment accordingly, which was entered pursuant thereto on May 14, 1908. Defendant's counsel thereafter took steps to settle a statement of the case preparatory to appealing to the Supreme Court, and on July 25, 1908, on application of plaintiff's counsel, an order was made requiring defendant to show cause why an order should not be made vacating and setting aside such findings of fact, conclusions of law, and order for judgment, and judgment, and also why plaintiff should not be relieved from a portion of such stipulation of facts, or why such stipulation of facts should not be modified by eliminating such portion, or why the parties should not be relieved in toto from such stipulation. Upon the return of such order to show cause, and after due hearing, the order complained of was made vacating the findings, conclusions, order for judgment, and judgment. It was held that such order, in so far as it vacates the findings of fact, and relieves the parties from such stipulation, is appealable under subdivision 4, § 7225, Rev. Codes 1905,

upon the ground that it "involves the merits" of the action or some part thereof. *Northern Pac. Ry. Co. v. Barlow*, 126 N. W. 233, 237, 20 N. D. 197, Ann. Cas. 1912C, 763.

#### Amendment of pleading

The term "merits," in Code Civ. Proc. § 11, giving the right of appeal from an order involving the "merits," embraces more than the questions of law and fact constituting a cause of action or defense, and, whenever a substantial right of a party to an action material to obtaining a judgment is denied, a right of appeal lies. An order requiring plaintiff to amend his complaint by stating what of the acts charged were negligent and what willful is appealable. *Lynch v. Spartan Mills*, 44 S. E. 93, 95, 68 S. C. 12 (citing *Blakely & Copeland v. Frazier*, 11 S. C. 122).

#### Change of venue

An order granting a change of venue in a civil action involves the merits, and is appealable, under Rev. Codes 1899, § 5628, providing that an order is appealable when it involves the merits of an action or some part thereof. *Robertson Lumber Co. v. Jones*, 99 N. W. 1082, 13 N. D. 112 (citing *White v. Chicago, M. & St. P. Ry. Co.*, 41 N. W. 730, 5 Dak. 508).

#### Dismissal

Where there is conflicting evidence as to a question of fact on which plaintiff's right to recover depends, the court may not dismiss the case "on the merits" under Municipal Court Act (Laws 1902, p. 1561, c. 580, § 249), authorizing such dismissal where, at the close of the whole case, the court is of the opinion that plaintiff is not entitled to recover as matter of law. *Bowen v. Farley*, 99 N. Y. Supp. 205, 113 App. Div. 767.

Where a defendant is discharged because there was not sufficient evidence to hold him for trial, that is a "dismissal on the merits" within the meaning of Liquor Tax Law, § 25. *People ex rel. J. & M. Hoffen Brewing Co. v. Clement*, 124 N. Y. Supp. 102, 105, 139 App. Div. 502.

The precise meaning to be given to the words "on the merits" in an order or judgment has never been very clearly defined. It has been said that they are to be regarded as referring to the strict legal rights of the parties as contradistinguished from mere questions of practice. It is, however, not of controlling importance whether or not the judgment is declared to be on the merits; the real question being whether it is in fact an adjudication on the merits. A judgment dismissing a complaint on demurrer was one on the merits where there was no formal or technical defect or omission in the complaint, and it was obvious that it contained every allegation necessary to establish a cause of action if the contract sued on was lawful and valid. *Hirschbach v. Kitchun*, 81 N. Y. Supp.

957, 959, 40 Misc. Rep. 306 (citing *St. Johns v. West* [N. Y.] 4 How. Prac. 329).

The dismissal of a bill to set aside certain tax bills for alleged illegality after hearing and the awarding of a judgment for costs in favor of the defendant is a judgment on the merits, and is conclusive against a subsequent attack on the validity of the tax bills in a suit between the same parties. *Pond v. Huling*, 101 S. W. 115, 117, 125 Mo. App. 474.

#### Judgment on the pleadings

A judgment on the pleadings is conclusive, if it determines the merits of the controversy, as distinguished from the merits of the pleadings attacked, as the term "merits" is used in Code Civ. Proc. § 1005, providing that in every case other than those specified in section 1004 the judgment must be rendered on the merits. *Glass v. Basin & Bay State Min. Co.*, 90 Pac. 753, 754, 35 Mont. 567.

Under Code Civ. Proc. § 581, prescribing when an action may be dismissed or a non-suit entered, and section 582, providing that in every other case judgment must be rendered on the merits, a judgment on the pleadings is a judgment on the merits, so far as its conclusiveness is concerned. *Bailey v. Aetna Indemnity Co. of Hartford, Conn.*, 91 Pac. 416-419, 5 Cal. App. 740.

#### Quashing writ of mandamus

A motion to quash an alternative writ of mandamus on the ground of its insufficiency does not "involve the merits," within Code Civ. Proc. § 2075, providing that an alternative writ cannot be quashed on motion for any matter involving the merits. *People ex rel. Ajas v. Department of Health of City of New York*, 123 N. Y. Supp. 294, 297, 138 App. Div. 559.

#### Striking out pleading

An order, striking out most of defendant's answer embracing new matter relevant and material, held an order "involving the merits, and necessarily affecting the judgment," within Rev. Codes 1905, § 7081, including in the judgment roll "all orders and papers in any way involving the merits and necessarily affecting the judgment," and hence reviewable on appeal from the judgment. *State v. Meyers*, 124 N. W. 701, 705, 19 N. D. 804.

### MERRY-GO-ROUND

One of the distinguishing features of the "merry-go-round" is the inspiring music which it furnishes. A "scenic railway" being a railway on which cars are run for the purposes only of amusement, where the track is elevated for a considerable distance at the place of beginning and built on an incline, the cars being propelled by the force of gravity, is not "such place of public amuse-

ment" as a "merry-go-round," and is not prohibited from being kept open on Sunday, by Rev. Codes, § 6825. *Ex parte Hull*, 110 Pac. 256, 18 Idaho, 475, 30 L. R. A. (N. S.) 465.

### MERTON

See Statute of Merton.

### MESNE

#### MESNE PROCESS

"Mesne process" is defined by Bouvier's Law Dictionary as "process which is issued in a suit between the original and final process." *Moredock v. Kirby*, 118 Fed. 180, 185.

#### MESNE PROFITS

The words "mesne profits," within the rule that "mesne profits" only and not damages for trespass are recoverable, under Code 1896, § 1555, in ejectment, mean compensation for use and occupation. *Henry v. Davis*, 43 South. 122, 123, 149 Ala. 359, 13 Ann. Cas. 1090 (citing *Prestwood v. Watson*, 20 South. 600, 111 Ala. 604, 610).

The common-law rule that only nominal damages are recoverable in ejectment has been modified by statute authorizing a recovery of "mesne profits," which, under Civ. Code 1896, § 1555, are damages from the commencement of the tortious withholding to the time of the verdict, except as modified by sections 1535, 1540, defining the liability of a tenant asserting his right to possession under a lease and the liability of a person holding under color of title in good faith. *Scott v. Coulson*, 47 South. 60, 61, 156 Ala. 450.

### MESSAGES

See Day Message.

Sending a telephone message, see Send.

### MESSENGER

#### MESSENGER COMPANY

As common carriers, see Common Carrier.

#### MESSENGER WIRES

Wires which run from pole to pole immediately over telephone cables which they support are denominated "messenger wires." *Cumberland Telephone & Telegraph Co. v. Metzger* (Ky.) 97 S. W. 35, 36.

### METAL

See Composition Metal; Expanded Metal; Unwrought Metal.

Articles of, see Articles within Tariff Act.

Manufactures of, see Manufactures—Manufactured Articles.

Type metal, see Type.

**METALLIC CIRCUIT**

Where an electric current travels its entire course upon wires without coming into contact with the earth, it is known as a "metallic circuit." *Smith v. Missouri & K. Telephone Co.*, 87 S. W. 71, 73, 113 Mo. App. 429.

**METALLIFEROUS**

Mineral synonymous, see Mineral Land.

**METALLOPHONES**

As musical instrument, see Musical Instrument.

**METALLURGICAL COKE**

"Metallurgical coke" is coke suitable for the smelting of iron. *Hotchkiss v. Bon Air Coal & Iron Co.*, 78 Atl. 1108, 1114, 108 Me. 34.

**METHOD**

See Bench Method; Business Methods; Catalogue System or Method.

**METHYL ALCOHOL**

"Methyl alcohol" is obtained by the distillation of wood, and is the "wood alcohol" of commerce. *People v. Bowen*, 74 N. E. 489, 493, 182 N. Y. 1 (quoting and adopting definition in Webster's International Dict.).

**METIORITE**

As property, see Real Property.

**MEXICAN ONYX**

Dutiable as onyx, see Onyx.

**MFG.**

The letters "Mfg." are an abbreviation of the word manufacturing and a corporate signature employing such letters instead of the word "manufacturing" is sufficient. *Selberling v. Miller*, 69 N. E. 800, 802, 207 Ill. 443.

**MICANITE**

"Micanite" is a trade-name given to a substitute for mica, which has established for itself a recognized place in the electrical art. It is cheaper, more uniform as to dielectric strength, has a less possibility of flaws, can be easily molded or cut so that it can be had in required sizes larger than mica. *Mica Insulator Co. v. Union Mica Co.*, 137 Fed. 928, 933.

**MICROPHONE TRANSMITTER**

Every "microphone transmitter," as commonly understood in the telephonic art, is an instrument having carbon electrodes in loose or feeble contact. But a transmitter may

still be a microphone without having carbon electrodes, provided the electrodes are of solid material, and so capable of embodying microphonic action. *American Bell Tel. Co. v. National Tel. Mfg. Co.*, 119 Fed. 893, 898, 56 C. C. A. 423.

**MIDDLE****Channel or river**

The western boundary line of Tennessee, declared and fixed by treaties and legislative enactments to be "the middle of the Mississippi river," means a line along the river bed equidistant from the visible, defined, and substantially established banks confining the waters on either side, and does not mean the center of that part of the river which is deepest and constitutes the channel of commerce. This construction has become a rule of property and should not be disturbed. *State v. Munice Pulp Co.*, 104 S. W. 437, 441, 119 Tenn. 47.

In international law and by usage of European nations, the term "middle of the stream" as applied to a navigable river is the same as the middle of the channel of such stream. *State of Louisiana v. State of Mississippi*, 26 Sup. Ct. 408, 421, 202 U. S. 1, 50 L. Ed. 913 (quoting *Iowa v. Illinois*, 13 Sup. Ct. 239, 147 U. S. 1, 37 L. Ed. 55).

The middle of the main channel of the river is what is meant by the words "the middle channel of said river" in the act of February 14, 1859, admitting Oregon into the Union, with the Columbia river as its northern boundary. *State of Washington v. Oregon*, 29 Sup. Ct. 631, 632, 214 U. S. 205, 53 L. Ed. 969.

The middle line of a nonnavigable river at low-water mark is not the center of the channel, which means the continuous course of deepest water, but is a line equally distant from all points on the opposite banks at right angles with the thread at low-water mark. *Micelli v. Andrus*, 120 Pac. 737, 740, 61 Or. 78.

**MIDDLEMAN**

A middleman is a broker whose duties are limited by his contract to finding and procuring a purchaser able, willing, and ready to accept his client's terms or to effect a transaction with his client on any terms satisfactory to both, the term "middleman" being merely descriptive of the nature of the contract of employment, he being in no fiduciary relation to his principal nor under any obligation not to receive compensation from the opposite party to the transaction, while a broker, in addition to the duties of a middleman, is employed to use discretionary authority for the benefit of his employer and to act for his best interests, and therefore may not accept a secret double employment or commissions from both parties. *Langford v. Issenhuth*, 134 N. W. 889, 893, 28 S. D. 451.

## MIDDLINGS

See Wheat Middlings.

"Middlings" are the parts of a kernel of grain next to the skin of the berry, which, by the later milling processes, are reground so as to form a very fine flour, with larger and more uniform granules than that from the first grinding; also, the coarser particles resulting from milling, intermingled with foreign matter used for stock food. *State v. Weller*, 85 N. E. 761, 762, 171 Ind. 53.

## MIDSHIPMAN

See Cadet Midshipman.

## MIDWIFE

Both medical and popular lexicographers define "midwife" as a female obstetrician. *Commonwealth v. Porn*, 82 N. E. 31, 196 Mass. 326, 17 L. R. A. (N. S.) 94, 13 Ann. Cas. 569.

## MIDWIFERY

Both medical and popular lexicographers define "midwifery" as the practice of obstetrics. *Commonwealth v. Porn*, 82 N. E. 31, 196 Mass. 326, 17 L. R. A. (N. S.) 94, 13 Ann. Cas. 569.

## MIGHT

"The word 'might,' as defined by Webster, denotes not alone possibility, but also ability and capability. 'Could' denotes ability and capability." Hence instructions which used "might" and "could" interchangeably held not erroneous as allowing the jury to enter the realm of conjecture. *Nelson v. Boston & Montana Consol. Copper & Silver Min. Co.*, 88 Pac. 785, 786, 35 Mont. 223.

A warning given by an officer to one in his custody, which was in the usual form, with the exception of the use of the word "might" instead of "would or could," the officer telling the one in custody that any statement he might make "might" be used against him, was sufficient. *Garrett v. State*, 91 S. W. 577, 49 Tex. Cr. R. 235.

In an action for assault on a passenger by fellow passengers, in an instruction stating the duty of the conductor to protect the party assaulted if he "anticipated that such assault might be made," it was not error to use the word "might" instead of "would," since the law requires that a carrier use the highest degree of diligence to protect passengers from assault which may be reasonably anticipated, and the word "might" is used in place of "may" when referring to past time or a past event. *Louisville Ry. Co. v. Wellington*, 126 S. W. 370, 371, 137 Ky. 719.

An instruction defining the term "feloniously" as an intent to commit a felony, or an intent to commit a wrongful act which

"might" result in the commission of a felony, was erroneous, as the jury was in effect told that a person is presumed by law to intend all the possible, rather than the reasonably probable, consequences of his voluntary wrongful act. *State v. Denny*, 117 N. W. 869, 870, 17 N. D. 519.

Acts 1905, p. 579, c. 167, § 123, provides that any person aggrieved by any decision of the county commissioners in any proceeding relating to highways may appeal therefrom, etc., and that such appeal shall be tried de novo, and may be had as to any issue tried, "or that might have been tried," before the county board. *Held*, that the last clause only authorizes the trial of such issues on appeal as might have been tried under issues made before the board, and does not authorize the trial of issues not presented to the board. *Ætna Life Ins. v. Jones*, 89 N. E. 871, 872, 874, 173 Ind. 149.

## MIGHTY FAST

While the expression "mighty fast" is a term of relative meaning, when applied to the speed of a street car it is sufficiently definite to enable the jury to say whether or not the car was traveling in excess of seven miles an hour. In an action against a street railroad for injuries to a passenger, evidence that the car was going "mighty fast" was sufficient to render it error to exclude an ordinance limiting the rate of speed of a street car to seven miles an hour. *Moore v. Northern Texas Traction Co.*, 95 S. W. 652, 653, 41 Tex. Civ. App. 583.

## MIKE

"Mike" is not universally recognized abbreviation of "Michael," but is, strictly speaking, a mere diminutive or nickname. *Ohlmann v. Clarkson Sawmill Co.*, 120 S. W. 1155, 1158, 222 Mo. 62, 28 L. R. A. (N. S.) 432, 133 Am. St. Rep. 506.

## MILCH COW

Under Sayles' Ann. Civ. St. 1897, art. 2395, which exempts to every family from forced sale "five milch cows and their calves," heifers which had never been milked but which were with calf when the levy was made, and which the debtor, who was the head of the family, was keeping as his milch cows, are exempt. *Patterson v. English* (Tex.) 142 S. W. 18.

## MILE

See English Geographical Miles; Knot; Marine Miles.

"The statute, or English, 'mile' was adopted as the standard of land measurement in the thirty-fifth year of the reign of Queen Elizabeth, 1593. \* \* \* The statute 'mile' measures 5,280 feet on the land." In the Mus-



congrus Grant by the council of Plymouth in Devon, England, made between 1620 and 1635, after the inauguration of the geographical or marine mile, granting certain land, etc., within three miles of the mainland, the three-mile limit is to be measured by the geographical or marine mile or knot, and not by the statute "mile." *Lazell v. Boardman*, 69 Atl. 97, 99, 108 Me. 292, 18 Ann. Cas. 673 (citing *Rockland, M. D. & S. Steamboat Co. v. Fessenden*, 8 Atl. 550, 79 Me. 140).

In a prosecution under Code 1907, § 7737, for failure to work on a public road after legal notice given to one living "within three miles" thereof, the distance, in view of Code 1907, § 5804, means on an air line, where there are no barriers between impassable by ordinary means, and not a computation of the distance according to the practicable and usual way of travel. *Howell v. State*, 54 South. 542, 548, 171 Ala. 62.

## MILEAGE

As Fees, see Fees.

As salary, see Salary.

Mileage is compensation allowed to public officers for their expenses while traveling on public business. *Board of Com'rs of Weston County v. Blakely (Wyo.)* 123 Pac. 72, 77.

Under *Burns' Ann. St. 1908*, § 7335, which provides that a sheriff shall tax and charge the fees provided by law on account of services performed by him, the fees and amounts so charged to be designated "sheriff's costs," which shall be the property of the county, and section 240 which provides that words and phrases used in a statute shall be taken in their plain, ordinary, or usual sense, but that technical words and phrases shall be understood according to their technical import unless such a construction would be repugnant to the legislative intent or to the context of the statute, the amounts charged and collected by a sheriff as statutory mileage in the service of writs, summonses, notices, etc., are to be considered as fees provided by law on account of service in the discharge of official duties, and not as a reimbursement to him for expenses incidentally incurred in the service of such writs, so that when collected they belong to the county, and not to the sheriff personally. *Roberts v. Board of Com'rs of Brown County (Ind.)* 99 N. E. 1015.

## MILEAGE BOOK

"A 'mileage book' is a contract of carriage having attached thereto coupons, one for every mile; each coupon being in two parts, one part for the passenger's fare, the other for his baggage. When the baggage is checked, the baggage portion of every coupon according to the distance is torn off, and no more baggage can be checked upon the mileage book, unless the remainder of these

coupons, representing the carriage of the passenger, has been detached." One who leaves trunks in a baggage room by permission of the baggage clerk upon a statement that he will depart on a train the next day, and will then check them, cannot hold the railway company responsible as a carrier of baggage for the destruction of the trunks by fire, though he holds a mileage book good for transportation on the railway company's trains. *Southern R. Co. v. Rosenheim & Sons*, 58 S. E. 81, 82, 1 Ga. App. 766.

## MILEAGE RATE

See Continuous Mileage Rate.

## MILITARY

### MILITARY EXPEDITION OR ENTERPRISE

The term "military expedition," as used in Rev. St. § 5286, denouncing the organization of a military enterprise in the United States to be carried on against any foreign prince or state, does not contemplate an expedition or enterprise in matters of pleasure, commerce, or business, of a civil nature, unattended by the design of an attack, invasion, or conquest, but rather a hostile intention connected with the act of beginning or setting on foot the expedition or enterprise. *United States v. Ybanez*, 53 Fed. 536, 537.

### MILITARY PURPOSE

Armories are primarily intended for "military purposes," but the term "military purposes" must be understood to comprehend all such uses as may be said to be incidental to the general purpose to conserve the military needs of the regimental organization. Military balls and other entertainments which are frequently given at armories cannot be said to be for "military purposes," except in the sense that they contribute to the interest and good feeling of the members of the military organization. In that sense they are clearly consistent with the general purposes for which the armory buildings were intended. On the other hand, an armory cannot properly be devoted to a purely commercial use in disregard of military needs. *Hamill v. Dungan*, 68 Atl. 1096, 1097, 74 N. J. Eq. 251.

### MILITARY RESERVATION

In creating the Lake Superior land district in 1847, Congress reserved from the lands open for sale certain lands for school purposes, and also such reservations as the President should deem necessary for public purposes. Pursuant to the authority so given, the President, in order to have time to ascertain what lands were necessary for public purposes, reserved a number of tracts temporarily, one of which, consisting of half a township, included Ft. Brady on St. Mary's river, together with the reservation on which it stood, and also a small tract previously

reserved to the Indians by treaty for a camp, together with other lands. By a subsequent executive order in 1852, the reservations were more narrowly defined, and all the remaining lands so temporarily reserved, "except the military reservation at Ft. Brady," were released from reservation. The Indian right was extinguished by treaty in 1855. Held, that the exception in the order of release of the "military reservation at Ft. Brady" included only the original reservation as defined prior to 1847, and not the entire temporary reservation of that year which was the contemporaneous construction of the order by the department, so that in any event the Indian reservation became public lands, subject to disposition by the government after the treaty of 1855, and a patent subsequently issued therefor is valid. *United States v. Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 34, 81 C. C. A. 221.

### MILITARY ROAD

"The only 'military roads' belonging to the United States within the states are in the military reservations." *Pensacola Tel. Co. v. Western U. Tel. Co.*, 98 U. S. 1, 17, 24 L. Ed. 708.

### MILITARY SERVICE

See Actual Military Service.  
See, also, Service.

### MILITIA

See Organization of Militia.

The "militia" of the state is an arm of the state government, and is in no sense such a county institution or establishment as that any particular county can, exclusively, be required to impose taxes for its, or any part of its, maintenance. *State ex rel. Milton v. Dickenson*, 33 South. 514, 517, 44 Fla. 623, 60 L. R. A. 539, 1 Ann. Cas. 122.

### MILK

See Condensed Skimmed Milk; Impure Milk.

Dealer in milk, see Dealer.

A product of a patented chemical process for treatment of milk, called "concentrated milk," diluted by water, does not constitute "milk," within Rev. Laws, c. 56, § 55, prohibiting the keeping for sale of milk to which water has been added. *Commonwealth v. Boston White Cross Milk Co.*, 95 N. E. 85, 87, 209 Mass. 30, Ann. Cas. 1912B, 386.

A provision of a sanitary code adopted by a city board of health that no owner, lessee, or occupant of any restaurant, etc., which shall purchase milk or cream from any person or corporation not having obtained a license as therein provided, shall use, sell, or dispose of any milk, cream, or ice cream without obtaining a license, only re-

quires a person selling ice cream to obtain a license where it is made from milk or cream purchased from an unlicensed person or corporation, and not where the ice cream itself is so purchased, since, while "ice cream" is mostly cream or milk, it is a manufactured article with other ingredients, and is not covered by the term "milk or cream." *Syracuse Ice Cream Co. v. City of Cortland*, 138 N. Y. Supp. 338, 339, 153 App. Div. 456.

### MILL

See Cotton Seed Oil Mill; Public Mill; Roller Mill; Saw Mill; Spinning Mill; Water Mill.

The word "mill" has two definitions, a primary and secondary: (1) A complicated engine or machine for grinding and reducing to fine particles grain, fruit, or other substance, or for performing other operations by means of wheels and a circular motion as a gristmill for grain, a coffee mill, cider mill, and bark mill. The original purpose of mills was to comminute grain for food, but the word "mill" is now extended to engines or machines moved by water or steam for carrying on many other purposes, as oil mills, sawmills, slitting mills, bark mills, fulling mills, etc. (2) The house or building that contains the machinery for grinding. *Inhabitants of Norway v. Willis*, 72 Atl. 733, 734, 105 Me. 54 (citing *State v. Livermore*, 44 N. H. 386, 387).

The word "mill" does not ordinarily indicate a place or building in which goods are stored for hire. *McReynolds v. People*, 82 N. E. 945, 947, 230 Ill. 623.

Where a plaintiff purchased of defendant a sawmill and all machinery connected therewith located on certain land, reserving everything on the land, except timber, sawmill, and machinery, the term "sawmill" was limited to a machine constructed for the purpose of sawing logs, and therefore did not include the shed covering the mill. A sawmill is a machine for sawing logs, whether or not it is accompanied by a shed, and a shed covering such a mill is not a part of the sawmill, but is a part of the real estate to which it is attached. A saw is "a tool for cutting," and a "mill" is "a machine for grinding." According to the standard lexicographers, the first meaning of "mill" is a machine or device for grinding, cutting, etc. The particular purpose for which it is designed is usually designated by a prefix, such as sawmill, gristmill, etc. The term "mill" necessarily carries with it the idea of a machine, device, or tool, but it does not necessarily convey with it the idea of a shed or house. The term "mill" is frequently used to designate not only the machine used for grinding, cutting, etc., but also in a general and comprehensive sense to designate the house or shed where such machinery may be

in operation, and many lexicographers give this as the secondary meaning of the word. *Alexander v. Beekman Lumber Co.*, 95 S. W. 449, 451, 78 Ark. 169 (citing *Thesaurus Dict. Eng. Language*; *Worcester. Dict.*; *Cent. Dict.*; *Webst. Int. Dict.*).

A plant for mixing the materials used in making asphalt pavement, consisting of machinery mounted on an open or flat car, moved from place to place as required, is not a "factory, mill, or workshop" within the meaning of *Laws Wash.* 1905, c. 84, as amended by *Laws 1907, c. 205*, providing for the protection and health of employes in factories, mills, and workshops, and requiring the boxing or guarding of machinery and shafting therein, etc. *Casey v. Barber Asphalt Paving Co.*, 192 Fed. 432, 437.

A gasoline engine, used, in connection with machinery consisting of belts, pulleys, and cogwheels, to pump water through pipes to supply the inhabitants of a city, is not a "manufacturing establishment" or a "mill," within the meaning of these terms in section 4682, Gen. St. 1909. *Wind River Lumber Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 196 Fed. 340, 345, 116 C. C. A. 160; *Ward v. City of Norton*, 122 Pac. 881, 882, 86 Kan. 906.

Under section 5 of the act entitled "An act concerning private corporations," as amended in 1873, which provides for the creation of private corporations for the conversion and disposal of agricultural products by means of "mills," etc. (*Laws 1873, pp. 137, 139, subd. 36*), a corporation may be created "to build and maintain a flouring mill." *Ginrick v. Patrons' Mill Co.*, 21 Kan. 61, 63.

The title of the act of 1873 (Gen. St. 1873, c. 44; *Comp. St. 1911, c. 57*), "An act relating to mills and milldams," is sufficiently broad to admit of legislation in regard to mills of all kinds that are of public utility and having "machinery to be propelled by water." *Lucas v. Ashland Light, Mill & Power Co.*, 138 N. W. 761, 763, 92 Neb. 550.

#### **As public place**

See Public Place.

#### **As public use**

See Public Use (In Eminent Domain).

### **MILL AND ITS CONTENTS**

Where a contract between a railroad company and plaintiff authorized the latter to erect a stave mill on the right of way and exempted the railroad company from liability for the destruction of the "mill and its contents" by fire, the railroad company is not liable for damages to staves piled on the right of way near the mill, where it appeared that the use of a part of the right of way was necessary for the piling of the staves; the staves on the right of way appurtenant to the mill falling under the designation of

"mill and its contents." *Cincinnati, N. O. & T. P. Ry. Co. v. Saulsbury*, 90 S. W. 624, 627, 115 Tenn. 402, 5 Ann. Cas. 744.

### **MILL BUILDING**

See Planing Mill Building.

### **MILL PRIVILEGE**

"Mill privilege," as contained in an assessment of property for taxes described as "the mill privilege at Salmon Falls," meant the land and the dam situated as they were, with the capacity to hold the water of the stream and create power, but not the power or the water. *Saco Water Power Co. v. Buxton*, 56 Atl. 914, 98 Me. 295.

### **MILL RACE**

As used in a deed conveying a certain piece of land for a "mill race," and also a "privilege of a road to cross the said race near said gristmill to the land thus described," may be construed to mean either the head or the tail race; parol evidence being admissible to show what was meant. *Place v. Proctor (Pa.)* 2 Penny. 264, 269.

### **MILL SEAT**

The word "mill seat" is synonymous with "mill site" and means where the mill sits. "A 'mill site' comprehends not only the site of the mill building but also the water power connected therewith for milling purposes." The granting of a mill site conveys by implication the water power and the right to maintain a dam for the beneficial appropriation of the water. *State v. Sutton*, 51 S. E. 1012, 139 N. C. 574 (quoting in part definition in *Miller v. Alliance Ins. Co.*, 7 Fed. 651; *Curtiss v. Smith*, 35 Conn. 158).

As used in *Laws 1905, p. 1022, c. 824*, provides that it shall be unlawful for any person to hedge or fish with traps in the waters of a certain creek between the mouth of the creek and the "J. mill seat in L. county," the word "mill seat" was synonymous with "mill site," and included the millhouse, dam, and appurtenances used for operating the mill by water power and the ground on which they stood. *State v. Sutton*, 51 S. E. 1012, 139 N. C. 574.

Under *Laws 1905, p. 1022, c. 824*, a person, though entitled to maintain wire fences or hedges on the sheeting of the mill under the roof of the millhouse to catch fish coming out of the pond, was not entitled to maintain such hedges or fences in ditches below the millhouse and on both sides of the millrace, by which fish coming up from the mouth of the creek would be stopped before reaching the dam and mill seat; and this, though the owner of the millhouse also owned the land for 75 yards below the mill. *State v. Sutton*, 51 S. E. 1012, 1013, 139 N. C. 574.

### **MILL SHED**

An insurance policy covered lumber "piled in mill building, on cars, under mill

sheds and in sheds adjoining to said mill building." The "mill sheds" where lumber was piled were situated some distance from the mill. The roof of the mill itself extended out 10 or 12 feet over the tracks on either side of the mill to protect the lumber and men loading or unloading cars. It was undisputed that these projections or sheds were erected simply to cover the tracks, were open at the ends and sides, and were not intended to be used as lumber sheds. Held, that the words "mill sheds" in the policy should be construed as indicating the sheds located some distance from the mill, and not those projecting from the building, and the quoted clause of the policy should be construed as though it read, "On lumber in mill building; on lumber on cars; on lumber under mill sheds and on lumber in sheds adjoining to said mill building." *Wolverine Lumber Co. v. Palatine Ins. Co.*, 102 N. W. 991, 992, 139 Mich. 432.

### MILL SITE

Mill seat synonymous, see Mill Seat.

### MILLDAM

While chapter 184, Laws 1862, limiting the time for bringing actions for damages for flowing lands by the maintenance of milldams, applies only to milldams in the proper and strict sense of that word, and although a dam which is part of and necessary to a general scheme for the improvement of the navigation of a river, so as to make it a public highway, is not a "milldam," although the power created thereby is used to operate mills, a dam erected to create power to operate mills, which power is used exclusively for that purpose, is a "milldam," although the ownership of the dam and of the mills may be in different persons. *Green Bay & Mississippi Canal Co. v. Telulah Paper Co.*, 122 N. W. 1062, 1065, 140 Wis. 417 (citing *Armond v. Green Bay & Mississippi Canal Co.*, 35 Wis. 41).

### MILLING

The term "milling" is synonymous with "manufacturing." *Lucas v. Ashland Light, Mill & Power Co.*, 138 N. W. 761, 763, 92 Neb. 550 (quoting *Lamborn v. Bell*, 32 Pac. 989, 18 Colo. 846, 20 L. R. A. 240).

### MILLING IN TRANSIT

"Milling in transit" refers to cases where freight is shipped a long distance, and the carrier will at his own cost defray the expense of its change in form en route, because of the easier handling in the more compact shape. Under Laws 1899, p. 301, c. 164, § 13, providing that any carrier charging one person more than another for the same service is guilty of discrimination, a railroad company carrying raw material to factories cannot charge a factory which agrees to ship the manufactured product by the same road less for the same service than it charges a

factory which will make no such agreement; the carrier not being in a position to justify under "milling in transit." *Hilton Lumber Co. v. Atlantic Coast Line R. Co.*, 48 S. E. 813, 816, 136 N. C. 479, 1 Ann. Cas. 52.

## MILLINERY

### MILLINERY ARTICLES

Dutiable as articles in part of metal, see Articles Within Tariff Act.

### MILLINERY ORNAMENTS

Not dutiable as articles commonly known as jewelry, see Articles Within Tariff Act.

## MIMEOGRAPH COMPLAINT

A "mimeograph complaint" may be described as a form of complaint applicable in a general way to a particular class of cases. It is therefore nothing more than a blank which, before it can be of service in a special instance, must be properly filled out. *Berus v. New York City Ry. Co.*, 101 N. Y. Supp. 748, 749, 52 Misc. Rep. 181.

## MIND

See Disposing Mind and Memory; Meeting of Minds; Sound Mind and Memory; Testamentary Mind; Unsound Mind.

Distress of mind, see Distress.

### MIND OF A NON COMPOS

The "mind of a non compos" is to be taken *prima facie* as insane and nondisposing. A person who is adjudged a non compos and placed under guardianship is thereby rendered *prima facie* incapable of making a will while the adjudication remains in force. In *re Cowdry's Will*, 60 Atl. 141, 142, 77 Vt. 359, 3 Ann. Cas. 70.

## MINE

See Coal Mine; Fully Developed Mine; Known Mines.

Appropriation of claim, see Appropriation.

Waste water from mine, see Waste Water.

A "mine" is an excavation in the earth to obtain minerals, an excavation, properly under ground, to take out some useful product, and a mining right is a right to excavate in the earth to obtain minerals or other useful products. *People v. Bell*, 86 N. E. 593, 594, 237 Ill. 332, 19 L. R. A. (N. S.) 746, 15 Ann. Cas. 511.

The term "mines" is not limited to mere subterranean excavation or workings, nor is "minerals" limited to the metals or metaliferous deposits, whether contained in veins that have well-defined walls, or in beds or deposits that are irregular and are found

at or near the surface, or otherwise. *Nephi Plaster & Mfg. Co. v. Juab County*, 93 Pac. 53, 55, 33 Utah, 114, 14 L. R. A. (N. S.) 1043.

In ordinary parlance, a "mine" is a certain part of the soil or of the earth's surface in which there are mineral deposits and in which a person obtains not only a full right of ownership of the soil but a right to remove the minerals therefrom and to dispose of them as he sees fit. *Crichfield v. Julia*, 147 Fed. 65, 66, 77 C. C. A. 297.

The word "mine" includes the whole mass or vein of coal contained within the land. *Ammons v. Toothman*, 53 S. E. 13, 16, 59 W. Va. 165, 115 Am. St. Rep. 908.

In an action under the mining act (*Hurd's Rev. St.* 1908, c. 98), for the death of an employé by defendant's violation of section 4 in failing to have flanges on the drum of a hoisting engine used in sinking an air shaft, special findings that death was caused during the construction work preparatory to opening a coal mine, and that the shaft was not in use in connection with the mining of coal or for ventilating in coal mine or for an escapement shaft, do not bring defendant's property within section 34, defining "mine" and "coal mine" as all parts of the property of a mining plant which contribute directly or indirectly to the mining of coal, and defining "shaft" as any opening which is or may be used for ventilation or escapement, or for hoisting men in connection with mining, and are therefore so inconsistent with a general verdict for plaintiff that judgment for defendant is proper. *Moore v. Dering Coal Co.*, 89 N. E. 674, 675, 242 Ill. 84.

Whether a coal mine is within the provisions of Ky. St. §§ 2731, 2733, requiring the ventilation of coal mines to secure the safety of persons employed therein, is not dependent on the fact that the mine has progressed to such an extent that coal is being marketed therefrom or shipped from its opening. When, at the time of the accident, the main entry and airway of a coal mine had been driven about 850 feet, and the first and second right entries about 220 feet, and the distance from the main airway to the first break-through, from the first right entry to the airway in which plaintiff was working, was about 115 feet, and from the first break-through to the second it was about 65 feet, while from the second break-through to the point where plaintiff was injured was about 60 feet, the opening is a mine within Ky. St. §§ 2731, 2733 (*Russell's St.* §§ 2469, 2470), relating to the ventilation of mines. *Interstate Coal Co. v. Baxavente*, 137 S. W. 859, 861, 144 Ky. 172.

Defendant mining company maintained a hoisting engine at the top of an incline which was used for the dumping of rock, dirt, etc., which had been separated from the coal, and later constructed a second incline, over which coal intended for retail trade was

hoisted by the other side of the same engine; rock and coal cars being often operated in different directions at the same time. Thereafter another engine was substituted to haul the rock cars, and the old engine was continued to haul the coal cars which were permitted to descend by gravity. Held, that such hoist, though outside the mine, was a part of defendant's mine, as defined by *Hurd's Rev. St.* 1905, p. 1394, c. 93, § 84, to include all parts of a mining plant on the surface or under ground which contribute under one management to the mining and handling of coal, and was therefore within section 16, subd. "d," making it the duty of the mine manager to see that all dangerous places above and below were properly marked and danger signals displayed wherever required. *Spring Valley Coal Co. v. Greig*, 80 N. E. 1042, 1044, 226 Ill. 511.

#### As coal mine

The terms "mine" or "deposit yielding metals or minerals of any kind," as used in B. & C. Comp. § 5668, giving laborers and materialmen a lien for the working or development of any mine, lode, mining claim, or deposit yielding metals or minerals of any kind, include a coal mine, although the term "mining claim" as used therein may not do so. *Escott v. Crescent Coal & Navigation Co.*, 106 Pac. 452, 453, 56 Or. 190.

#### As land

As land, see Land.

#### As oil well

Const. 1898, art. 230, provides that property employed in mining operations shall be exempt from parochial and municipal taxes for a period of 10 years from January 1, 1900. Held, that a "mining operation" has to do with the working of a mine, and a "mine," defined as an excavation in the earth for the purpose of getting metal ores or coal, does not include an oil well, and property used in connection with petroleum wells is not exempted under the article. *J. M. Guffey Petroleum Co. v. Murrel*, 53 South. 705, 711, 127 La. 466.

#### Quarry distinguished

The verb "mine" in its ordinary acceptation means to dig in the earth to get ore, metals, coal, or precious stones. The noun "mine" means a pit or hole in the earth from which metallic ores, precious stones, or other mineral substances are taken by digging, distinguished from the pits from which stones for architectural purposes are taken, which are called "quarries." *J. M. Guffey Petroleum Co. v. Murrel*, 53 South. 705, 713, 127 La. 466 (quoting Webster's International Dict.).

"A 'mine,' properly speaking, is the pit or excavation in the earth from which the ore is taken. The term is certainly used to include the bed or vein of ore into which the pit enters, so far as may be necessary to the

working of the mine; and the whole series of shafts and subterranean passages and the chambers connected with it. But neither in ordinary parlance nor in strict technical language is a 'mine' understood to indicate the entire ore bed with which the shaft may be connected. And by a 'quarry' we understand, not an indefinite extent of stone or rock which may be worked, but the spot where the rock is quarried. The 'ore' may extend indefinitely, but the 'mine' is the pit from whence it is extracted." *Hoysradt v. Delaware, L. & W. R. Co.*, 151 Fed. 321, 331 (quoting *Shaw v. Wallace*, 25 N. J. Law, 462).

*Burns' Ann. St.* 1908, § 10,259, authorizing the valuation of real property on which there is a mine or quarry, owned by the same persons, at the price for which the property, including the mine or quarry, would sell at private, voluntary sale for cash, and, in case the mine or quarry is owned or leased by a person, other than the owner of the land, authorizing the valuation of the land and mine or quarry separately, does not authorize the assessment of hidden, undeveloped coal or other minerals underlying land; a "quarry" being an excavation for obtaining stone, slate, or limestone; and a "mine" being defined by section 8569 to include the workings in every shaft, slope, or drift which is used, or has been used, in the mining and removing of coal from and below the surface of the ground, and being also defined as a pit or excavation from which metallic ores or other similar substances are taken by digging. *Board of Com'rs of Greene County v. Lattas Creek Coal Co. (Ind.)* 96 N. E. 633, 637.

#### As road

See Road.

### MINE MANAGER

A "mine manager," within the meaning of Mining Act, § 33, providing that contributory negligence shall not bar a miner's recovery where the mine manager was willfully negligent, is a mine boss, foreman, or pit boss. *Donk Bros. Coal & Coke Co. v. Stroff*, 66 N. E. 29, 31, 200 Ill. 483.

### MINE SHAFT

See Shaft.

### MINE WEIGHTS

The language "mine weights to govern settlement," in a contract to furnish coal, means that the purchaser is to pay for the coal on the basis of the weights at the mines where it is delivered on cars for transportation. *Detroit Southern R. Co. v. Malcolmson*, 107 N. W. 915, 916, 144 Mich. 172, 115 Am. St. Rep. 390.

### MINER

As employé, see Employé.

### MINER'S INCH

"In speaking of the measurements of water in use in California, Mr. William Kent, in his recent reference book, for use by engineers and mechanics, states the situation, thus: 'The term "miner's inch" is more or less indefinite, for the reason that California water companies do not all use the same head above the center of the aperture, and the inch varies from 1.36 to 1.73 cubic feet per minute each; but the most common measurement is through an aperture two inches high and whatever length is required, and through a plank 1¼ inches thick. The lower edge of the aperture should be two inches above the bottom of the measuring box, and the plank five inches above the aperture, thus making a six-inch head above the center of the stream. Each square inch of this opening represents a miner's inch (under six-inch pressure) which is equal to a flow of 1¼ cubic feet per minute.'" *Gardner v. Wright*, 91 Pac. 286, 297, 49 Or. 609.

A contract to furnish a specified number of miners' inches of water for irrigation purposes is sufficiently certain to justify specific performance, where witnesses explain the meaning of the ambiguous term "miners' inch" and show that at the time of the making of the contract it was commonly understood that the term meant a quantity of water which would flow through an orifice an inch square under a four-inch pressure, and that a four-inch pressure meant a head of water which stood four inches above the top of the orifice, and such testimony is not disputed. *Ulrich v. Pateros Water Ditch Co.*, 121 Pac. 818, 820, 67 Wash. 828.

### MINERAL

See Crude Mineral; Land Valuable for Minerals; Valuable Minerals.

Other mineral, see Other.

Other valuable minerals, see Other.

The word "minerals," in the popular sense, means those inorganic constituents of the earth's crust which are commonly obtained by mining or other process for bringing them to the surface for profit. *Kansas Nat. Gas Co. v. Board of Com'rs of Neosho County*, 89 Pac. 750, 75 Kan. 335.

"Mineral," as defined in Webster's Dictionary, is "any inorganic species having a definite chemical composition." *O. G. Hempstead & Son v. Thomas*, 122 Fed. 538, 539, 59 C. C. A. 342.

The term "mines" is not limited to mere subterranean excavations or workings, nor is "minerals" limited to the metals or metaliferous deposits, whether contained in veins that have well-defined walls, or in beds or deposits that are irregular and are found at or near the surface, or otherwise. *Nephli Plaster & Mfg. Co. v. Juab County*, 93 Pac. 53, 58, 33 Utah. 114, 14 L. R. A. (N. S.) 1042.

Minerals embracing both surface and subsurface minerals include every constituent of the earth's crust. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.* (Tex.) 137 S. W. 171, 177 (citing 5 Words and Phrases).

The word "minerals," in conveyances of "minerals," means all substances in the earth's crust, sought for and removed for the substance itself, and is not limited to metallic substances, but includes salt, coal, clay, stone, etc. *McCombs v. Stephenson*, 44 South. 867, 869, 154 Ala. 109.

The term "mineral" found in a deed, lease, or other contract, unqualified and unrestricted by any other clause in the instrument, or by circumstances within the knowledge of the parties which may reasonably be deemed to have determined their intention, will be given a sufficiently broad meaning and effect to include prima facie every substance that can be gotten from underneath the surface of the earth for the purpose of profit, and will include not merely such articles as coal, ironstone, and freestone, but fire clay, and china clay or porcelain clay, and also every kind of stone, flint, marble, slate, brick earth, chalk, gravel, and sand; provided only that these articles are under the surface, and do not lie loosely upon it. *Sult v. A. Hochstetter Oil Co.*, 61 S. E. 307, 310, 63 W. Va. 317.

#### Diamond

A diamond is a "mineral." *Kentucky Diamond Mining & Developing Co. v. Kentucky Transvaal Diamond Co.*, 182 S. W. 397, 398, 141 Ky. 97, Ann. Cas. 1912C, 417.

#### Gas

Oil and gas are classed as minerals; that term not being confined to metallic substances. *Poe v. Ulrey*, 84 N. E. 46, 48, 238 Ill. 56.

Natural gas is a "mineral," and is a part of the land until severed. *Osborn v. Arkansas Territorial Oil & Gas Co.*, 146 S. W. 122, 124, 103 Ark. 175.

The Legislature has now classed oil and gas among minerals of this state; and persons engaged in producing these minerals are following a mining pursuit. Act No. 144 of 1908; Act No. 154 of 1910; Act No. 172 of 1910; Act No. 196 of 1910; Act No. 254 of 1910. *Etchison Drilling Co. v. Flournoy*, 59 South. 867, 872, 131 La. 442.

Oil and gas are "minerals" within Act April 25, 1850 (P. L. 573) § 24, recognizing a right of action by a tenant in common against a cotenant in sole possession for a share of the profits where minerals are held in common. *McIntosh v. Ropp*, 82 Atl. 949, 955, 233 Pa. 497.

A reservation of "all 'minerals'" includes gas. *Weaver v. Richards*, 120 N. W. 818, 819, 156 Mich. 320.

Under the broad division of all matter into three classes of animal, vegetable, and mineral, petroleum and gas are "minerals"; but the term may be used in a more restricted sense. "Mineral" is not per se a term of art or trade, but of general language, and in addition to its broader scientific meaning is also used in a commercial sense, where it may include any inorganic substance found in nature having sufficient value, separated from its condition as a part of the earth, to be mined, quarried, or dug for its specific uses; but it does not necessarily have so broad a meaning or include all such substances. A deed of land excepting the mineral underlying it did not include natural gas within the exception. *Silver v. Bush*, 62 Atl. 832, 833, 218 Pa. 195.

#### Granite, stone, silica, and clay

A deed to land largely covered with limestone and granite, rising above the natural surface, which reserved to the grantor all "mines and minerals" which may be found on the land, with the right of entry to dig and carry the same away, does not give a right to open quarrying and blasting, but such right passes to the grantee. *Brady v. Smith*, 73 N. E. 963, 964, 181 N. Y. 178, 106 Am. St. Rep. 531, 2 Ann. Cas. 686.

Const. art. 2, § 33, provides that the ownership of land by aliens other than those who in good faith have declared their intention to become citizens is prohibited, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice, provided that the statute shall not apply to lands containing valuable deposits of "minerals," metals, iron, coal, or fire clay. Held, that an alien may acquire by purchase lands containing valuable deposits of limestone, silica, and clay; the word "minerals" not being restricted to the valuable mineral ore contained in gold and silver, etc. *State ex rel. Atkinson v. Evans*, 89 Pac. 565, 566, 46 Wash. 219, 10 L. R. A. (N. S.) 1163.

#### Gypsum

Gypsum is a mineral, and lands containing it are mineral lands, within the federal statutes. *Madison v. Octave Oil Co.*, 99 Pac. 176, 178, 154 Cal. 768.

Gypsum is a "mineral," and constitutes a mineral deposit under the mineral laws. *Nepht Plaster & Mfg. Co. v. Juab County*, 93 Pac. 53, 54, 33 Utah, 114, 14 L. R. A. (N. S.) 1043.

A deed was executed in 1814, conveying farm land, but "excepting mines and minerals which are not hereby intended to be conveyed." Small deposits of gypsum had been discovered on the land in 1812, and gypsum rights had been leased in 1814, though it was first removed therefrom in 1842, at which time it was taken out by open quarrying, but could be mined. As found, it underlaid the limestone formation at a depth of from

25 to 40 feet, but in places rose to within a foot or 18 inches of the surface. Held, that an exception of "minerals" includes all inorganic substances which can be taken from the land in the absence of other words restricting the meaning of the term, so that the exception in the deed reserved to the grantor all minerals, including gypsum, but not the surface limestone. *White v. Miller*, 92 N. E. 1065, 1067, 200 N. Y. 29, 140 Am. St. Rep. 618.

#### As land

##### See Land.

#### Oil

Oil is a "mineral," and as such is a part of the realty. *Isom v. Rex Crude Oil Co.*, 82 Pac. 317, 318, 147 Cal. 659.

Oil and gas are classed as "minerals," that term not being confined to metallic substances. *Poe v. Ulrey*, 84 N. E. 46, 48, 233 Ill. 56.

Oil and gas are "minerals" within Act April 25, 1850 (P. L. 573) § 24, recognizing a right of action by a tenant in common against a cotenant in sole possession for a share of the profits where minerals are held in common. *McIntosh v. Ropp*, 82 Atl. 949, 955, 233 Pa. 497.

A reservation of "all 'minerals'" includes oil. *Weaver v. Richards*, 120 N. W. 818, 819, 156 Mich. 320.

The opening of a new mine on land by a life tenant amounts to waste, and this rule applies to oil wells, as oil is a mineral and part of the realty. *Ohio Oil Co. v. Daughette*, 88 N. E. 818, 820, 240 Ill. 361, 36 L. R. A. (N. S.) 1108.

The Legislature has now classed oil and gas among "minerals" of the state; and persons engaged in producing these minerals are following a mining pursuit. *Etchison Drilling Co. v. Flournoy*, 59 South. 867, 872, 131 La. 442 (citing Act No. 144 of 1908; Act No. 154 of 1910; Act No. 172 of 1910; Act No. 196 of 1910; Act No. 254 of 1910).

Oil before its extraction is a "mineral." *Swayne v. Lone Acre Oil Co.*, 86 S. W. 740, 742, 98 Tex. 597, 69 L. R. A. 986, 8 Ann. Cas. 1117; *Isom v. Rex Crude Oil Co.*, 82 Pac. 317, 318, 147 Cal. 659.

#### Petroleum

Under the broad division of all matter into three classes of animal, vegetable, and mineral, petroleum and gas are "minerals." *Silver v. Bush*, 62 Atl. 832, 833, 213 Pa. 195.

A reservation of "all 'minerals'" included petroleum. *Weaver v. Richards*, 120 N. W. 818, 819, 156 Mich. 320.

*Hurd's Rev. St.* 1905, p. 1399, c. 94, §§ 6, 7, declare that any mining right or the right to dig for or obtain iron, lead, copper, coal, or other mineral from land may be conveyed by deed or lease, which may be ac-

knowledge and recorded in the same manner as deeds and leases of real estate, and that when the owner of land shall convey, by deed or lease, any mining right therein, the conveyance shall be considered as so separating such right from the land as to be separately taxable. Held that, since petroleum is a mineral, the right of the lessee to mine for oil and gas on certain specified premises is a mining right, and separately taxable under such sections. *People v. Bell*, 86 N. E. 593, 237 Ill. 332, 19 L. R. A. (N. S.) 746, 15 Ann. Cas. 511.

Petroleum oil is a "mineral," and while it is in the earth it forms a part of the realty, and when it reaches a well and is produced on the surface it becomes personal property and belongs to the owner of the well. If it moves from place to place by percolation, or otherwise, it forms a part of the tract of land in which it carries for the time being; and, if it moves to the next adjoining tract, it becomes a part and parcel of that tract; and if it forms a part of the same tract, until it reaches a well and is raised to the surface and then for the first time, it becomes the subject of distinct ownership separate from the realty. It becomes the property of and belongs to the person who reaches it by means of a well and severs it from the realty. *Nonamaker v. Amos*, 76 N. E. 949, 951, 73 Ohio St. 163, 4 L. R. A. (N. S.) 980, 112 Am. St. Rep. 708, 4 Ann. Cas. 170 (citing *Kelley v. Ohio Oil Co.*, 49 N. E. 399, 57 Ohio St. 317, 39 L. R. A. 765, 63 Am. St. Rep. 721; *Northwestern Ohio Natural Gas Co. v. Ullery*, 67 N. E. 494, 68 Ohio St. 259).

#### As property

##### See Property; Real Property.

#### Sand

Sand, according to the circumstances, may or may not be a mineral, in the commercial sense intended by Act May 8, 1876 (P. L. 142), providing that, if any person or corporation shall dig minerals in the land of another without the consent of the owner, he shall be liable for double the value thereof. *Hendler v. Lehigh Valley R. Co.*, 58 Atl. 488, 489, 209 Pa. 263.

*Under Rev. St.* § 2329, by which claims usually called placers, including all forms of deposits excepting veins of quartz or other rock in place, shall be subject to entry, building sand is a "mineral"; and hence land more valuable for the building sand it contains than for agriculture is mineral land, subject to placer locations. *Loney v. Scott*, 112 Pac. 172, 175, 57 Or. 378.

#### Shale

Shale is a "mineral." *Bibby v. Bunch* (Ala.) 48 South. 916, 917.

#### Water

Subterranean waters are considered a "mineral" in respect to their use and enjoyment, irrespective of the character and quan-



ity of salts and gases which may be in solution. *Hathorn v. Natural Carbonic Gas Co.*, 87 N. E. 504, 508, 194 N. Y. 826, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989.

### MINERAL DEPOSIT

Valuable mineral deposits, see Valuable Minerals.

### MINERAL LAND

The words "said lands being mineral," as used in Act June 3, 1878, c. 150, § 1, is not confined to any species of mineral, but is synonymous with the word "metalliferous." *Morgan v. United States*, 169 Fed. 242, 248, 94 C. C. A. 518 (citing *Northern Pac. Ry. Co. v. Soderberg*, 23 Sup. Ct. 365, 188 U. S. 526, 47 L. Ed. 575).

Gypsum is a mineral, and lands containing it are "mineral" lands, within the federal statutes. *Madison v. Octave Oil Co.*, 99 Pac. 176, 178, 154 Cal. 768.

Coal lands are "mineral lands" within the meaning of that term as generally employed in the laws regulating the disposal of the public domain. *United States v. Northern Pac. Ry. Co.*, 170 Fed. 498, 500; *Washington Securities Co. v. United States*, 194 Fed. 59, 65, 114 C. C. A. 79.

The term "mineral lands," as used in Rev. St. U. S. § 2302, is one of broader significance than "known mines." It refers to a class of lands, rather than specific tracts easily ascertainable, not only by the Land Department, but by the applicants themselves. *Old Dominion Copper Mining & Smelting Co. v. Haverly*, 90 Pac. 333, 338, 11 Ariz. 241.

### MINERAL LODGE

See, also, Lode.

A "mineral lode" is a totally different thing from a placer mine and not a mere state or condition of such mine. *McCarter v. Sooy Oyster Co.*, 75 Atl. 211, 215, 78 N. J. Law, 394.

### MINERAL SUBSTANCE

Other mineral substances, see Other.

### MINIATURE FRAMES

Not dutiable as articles commonly known as jewelry, see Articles Within Tariff Act.

### MINIMUM

"Minimum," as applied to damages, means the least possible amount that may be awarded by a jury. The court should not instruct in a libel suit that, if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum, as the jury may under such circumstances award much more than the minimum as actual damages. *Dauphiny*

*v. Buhne*, 96 Pac. 880, 881, 883, 153 Cal. 757, 126 Am. St. Rep. 136.

The effect, if any, of the use of the word "minimum," in a contract relating to water rates, is that the rates shall not be less. *City of Mt. Vernon v. New York Interurban Water Co.*, 101 N. Y. Supp. 232, 233, 115 App. Div. 658.

The term "minimum charge," as used in water supply contracts, where the meter system obtains, usually signifies rate of compensation for expense and labor of being ready to supply water at will of consumer, though the supply be not used at all. *Cox v. Abbeville Furniture Factory*, 54 S. E. 830, 832, 75 S. C. 48.

Where the application for charter and the charter of the corporation name only one sum as the proposed capital of the corporation, that sum is the "minimum capital stock," which Civil Code 1910, § 2220, requires to be subscribed for in order to relieve the organizers of the corporation from individual liability to creditors. *Jos. Rosenheim Shoe Co. v. Horne*, 78 S. E. 953, 955, 10 Ga. App. 582.

### MINING

See Skillful and Careful Mining.

As public use, see Public Use (In Eminent Domain).

System of mining, see System.

The word "mining," in Bankr. Act July 1, 1898, § 4b, as amended in 1903 (Act Feb. 5, 1903, c. 487), is used in a broad sense and includes quarrying as of slate from an open quarry. *Burdick v. Dillon*, 144 Fed. 737, 740, 75 C. C. A. 606; *In re Mathews Consol. Slate Co.*, 144 Fed. 724, 735.

The form of coal obtained from the strata of the earth is a carbonaceous mineral substance, commonly known as mineral coal, and the procurement thereof by digging in the earth is termed "mining." *Escott v. Crescent Coal & Navigation Co.*, 106 Pac. 452, 453, 56 Or. 190.

If the business of a corporation formed to drill and mine for natural gas, petroleum, and other minerals and to purchase, lease, and otherwise acquire gas and petroleum wells and the products thereof and to furnish the same to its patrons for use was not within the classification of "mining," as employed in *Burns' Ann. St. Ind.* 1901, § 3851, authorizing the formation of corporations to carry on any kind of manufacturing, mining, etc., business, it was clearly brought within that classification by *Burns' Ann. St. Ind.* 1894, § 5099, defining the term "mining" as used in the former statute as covering and including sinking, drilling, boring, and operating wells for petroleum and natural gas. *Consumers' Gas Trust Co. v. Quinby*, 137 Fed. 882, 896, 70 C. C. A. 220.

**MINING AND MANUFACTURING**

A corporation engaged in operating a granite quarry, which it owned, and selling the stone either for building or paving purposes or after it had been manufactured and finished for monumental or other purposes, is chiefly engaged "mining and manufacturing" and is subject to bankruptcy proceedings under Bankr. Act July 1, 1898, c. 541, § 4b, as amended by Act Feb. 5, 1903, c. 487, § 3. *In re Quincy Granite Quarries Co.*, 147 Fed. 279.

**MINING BOSS**

The term, "mining boss," used in Acts 1881, p. 238, c. 170, § 8, requiring a coal mine operator to employ a competent mining boss who is required to keep a careful watch over the ventilating apparatus, airways, traveling ways, pumps, sumps, timbering, etc., indicated the person on whom is imposed nondelegable duties of the master, so that in the performance thereof the boss will be regarded as a vice principal. *Smith v. Dayton Coal & Iron Co.*, 92 S. W. 62, 63, 115 Tenn. 543, 4 L. R. A. (N. S.) 1180.

**MINING CLAIM**

See Necessary to Hold Mining Claim.

As permanent monument, see Permanent Monument.

As property, see Property; Real Property.

Development of, see Development.

Improvement on mining claim, see Improvement.

Inspection of as taking property, see Taking (In Eminent Domain).

The term "mining claim" means in the mining country a portion of the public mineral lands of the United States to which a qualified person may first obtain the right of occupancy and possession by means of location, and, secondly, title by pursuing prescribed methods therefor. *Gray v. New Mexico Pumice Stone Co.*, 110 Pac. 603, 606, 15 N. M. 478.

A "mining claim" is a parcel of land containing precious metal in its soil or rock. *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co.*, 25 Sup. Ct. 266, 270, 196 U. S. 337, 49 L. Ed. 501 (quoting and adopting the definition in *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, 649, 26 L. Ed. 875, 879).

A "mining claim" in the ordinary sense of the word is a "portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining law." *Berentz v. Kern King Oil & Development Co. (Cal.)* 84 Pac. 45, 46 (quoting and adopting *Morse v. De Ardo*, 40 Pac. 1018, 107 Cal. 622).

"The location and sale of oil land is governed by the mineral laws of the United States applicable to the location and sale of

placer mining claims, and, if land is located and held under this law, it is a 'mining claim' before patent in every sense of the word, and for the purpose of the lien law it does not cease to be a 'mining claim' when, by a patent from the government, the fee is transferred to the locator or his assigns." And an 80-acre tract of land in process of development as an oil mine is a "mining claim" within Code Civ. Proc. §§ 1183, 1187, providing that a miner working on a mining claim has a lien on the entire claim for his wages or the value of his material. *Berentz v. Belmont Oil Co.*, 8 Pac. 47, 48, 148 Cal. 577, 113 Am. St. Rep. 308.

In construing a statute the court must look to the purpose for which it was enacted, and statutes providing for liens are to be construed in favor of the purpose of the law. Hence where the purpose of a statute was to protect laborers and materialmen of a particular class, and the Legislature used the words "mining claim" in the title, the words are not to be strictly construed to determine the right to a lien, but they are to control in measuring the extent of the lien. *Escott v. Crescent Coal & Navigation Co.*, 106 Pac. 452, 454, 56 Or. 190.

One of the essential requirements of a valid location of a mining claim, as provided by Comp. St. 1910, § 3474, is that there shall be a discovery of mineral on the ground. *Dean v. Omaha-Wyoming Oil Co. (Wyo.)* 128 Pac. 881, 882.

**MINING DISTRICT**

Locality synonymous, see Locality.

**MINING LEASE**

Instruments by which estates or interests in minerals are created are frequently and without distinction called "mining leases." *Appeal of Sanford*, 54 Atl. 739, 741, 75 Conn. 590.

**MINING LICENSE**

Mining license as distinguished from lease, see Lease.

A contract simply giving a right to take ore from a mine, no estate being granted, confers a mere "license," and licensee acquires no right to the ore until separated from the freehold; but an instrument demising lands for mining purposes, for a designated term of years, at a fixed rent, and giving the right to erect all necessary buildings, is a lease, not merely a mining license. *Barnsdall v. Bradford Gas Co.*, 74 Atl. 207, 208, 225 Pa. 338, 26 L. R. A. (N. S.) 614.

**MINING LOCATION**

As property, see Property.

Extension of, see Extension.

Lode mining location, see Lode Location.

The words "claim" and "location" in mining law are used interchangeably. *Del Monte*

*Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 18 Sup. Ct. 895, 902, 171 U. S. 55, 43 L. Ed. 72.

A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. *Wright v. Lyons*, 77 Pac. 81, 82, 45 Or. 167 (citing *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. Ed. 735); *Knutson v. Fredlund*, 106 Pac. 200, 202, 56 Wash. 634 (quoting and adopting definition in *Purdum v. Laddin*, 59 Pac. 153, 154, 23 Mont. 387, 389); *Hickey v. Anaconda Copper Min. Co.*, 81 Pac. 806, 811, 33 Mont. 46 (quoting and adopting the definition in *Belk v. Meagher*, 104 U. S. 279, 28 L. Ed. 735).

A "mining claim" is a parcel of land containing precious metal in its soil or rock, and a "location" is the act of appropriating such parcel according to certain established rules. It usually consists in placing on the ground in a conspicuous position a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel according to the local custom or, since the statute of 1872, according to the provisions of that act. Rev. St. § 2324. The location, which is the act of taking a parcel of mining land, became among the miners synonymous with the mining claim originally appropriated; so now, if a miner has only the ground covered by one location, his mining claim and location are identical, and the two designations may be indiscriminately used to denote the same thing; but if, by purchase, he acquires the adjoining location of his neighbor and uses the ground which his neighbor has taken up and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim. Indeed, his claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes, or, in other words, will constitute his mining claim and will so be designated. Such is the general understanding of miners and the meaning that attached to the term. *Lockhard v. Asher Lumber Co.*, 123 Fed. 480, 493 (quoting *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 648, 26 L. Ed. 875).

"'Location' is the act or series of acts by which the right of exclusive possession of mineral lands is vested in the locator. For this the only requirement made by Congress is the marking on the surface of the boundaries of the claim. By section 2324, however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the state or territory within which the district is situ-

ated." *Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co.*, 25 Sup. Ct. 266, 270, 196 U. S. 337, 49 L. Ed. 501.

The word "location," in its application to mining claims, has two distinct meanings: First, all the acts, including discovery, requisite to perfect the right of possession; and, second, the placing of the claims, the posting of the notice, and the marking of the boundaries, excluding discovery. An agreed statement of facts, which stipulated that the lode claims of the plaintiff were "located in compliance with law" at dates anterior to the location of the defendant's tunnel site, and that as to the issue made in the pleadings upon the question whether mineral in rock in place was discovered in the plaintiff's claims before the location of the tunnel site the defendant offered testimony tending to negative such discovery, which is on plaintiff's objection ruled out by the court, and such ruling is excepted to by the defendant, used the word "location" in its more restricted sense, excluding discovery, and did not estop the defendant from litigating the issue relative to the discovery of mineral in rock in place in the plaintiff's claims prior to the location of the defendant's tunnel site. *Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co.*, 141 Fed. 563, 564, 567, 73 C. C. A. 35.

Rev. St. § 2324, providing that "location" of mining claims shall be distinctly marked on the ground so that the boundaries can be readily traced, and the location notice filed shall contain a description of the property by which it can be identified, is mandatory and must be complied with in order to secure a valid location. A "location" is not made by taking possession alone, but by marking on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local terms and regulations. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. *Ware v. White*, 108 S. W. 831, 834, 81 Ark. 220 (quoting *Belk v. Meagher*, 104 U. S. 279, 28 L. Ed. 735).

#### MINING OPERATION

Const. 1898, art. 230, provides that property employed in mining operations shall be exempt from parochial and municipal taxes for a period of 10 years from January 1, 1900. Held, that a "mining operation" has to do with the working of a mine, and a "mine," defined as an excavation in the earth for the purpose of getting metal ores or coal, does not include an oil well, and property used in connection with petroleum wells is not exempted under the article. *J. M. Guffey Petroleum Co. v. Murrel*, 53 South. 705, 711, 127 La. 466.

**MINING PARTNERSHIP**

Trading partnership distinguished, see Trading Partnership.

A mining partnership exists when two or more persons, who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same. *Marks v. Gates*, 2 Alaska, 519, 523.

In order to constitute a "mining partnership" under the Idaho Revised Statutes of 1887, it is essential that the co-owners actually engage in working the mine or in the business of operating the mine. The cotenancy of two or more persons in a mining claim is not of itself sufficient to constitute such tenants mining partners. It is not essential that all the tenants join in the working or business of mining in order to establish such partnership, but that relation may be established among such co-owners as have actually engaged in the working or "mining operation." Those not so engaging will be left to their right and chargeable by their duties as cotenants only. *Madar v. Norman*, 92 Pac. 572, 13 Idaho, 585.

"A 'mining partnership' exists between the tenants in common of a mine who work it together and divide the profits in proportion to their several interests. Ownership of shares or interests in the mine is an essential element of a mining partnership. The relation does not exist between the owners of a mine and one who, under a contract with them, works a mine for a share in the profits or proceeds. Mere profit sharing will not create a mining partnership. \* \* \* A mining partnership differs from an ordinary partnership in the fact that no contract between the partners is necessary to create it, that there is no *delectus personarum*, so that the death of a member of the transfer of his interest does not operate as a dissolution, and that there are no rights of survivorship. Because of the absence of these features, mining partnerships have been said not to be true partnerships, but rather a cross between tenancies in common and partnerships proper." *Blackmarr v. Williamson*, 50 S. E. 254, 256, 57 W. Va. 249, 4 Ann. Cas. 285.

A "mining partnership" may exist, though all of the partners may not have a personal interest in the property, if they have an interest in the working of the property, and it is not essential that there be an express agreement to become partners, or an express agreement to share profits and losses, as that is an incident to the prosecution of the general business. *Bentley v. Brossard*, 94 Pac. 736, 743, 33 Utah, 396.

A "mining partnership" exists where the several owners of a mine co-operate in working it. Where two parties leased mining property and obtained a bond for its conveyance upon payment of a sum by a certain

date, which was extended for a consideration, each paying half, and where, under the bond and lease, the parties agreed to work the property jointly, each to bear one-half the expense, the defendant putting in his own work and the plaintiff furnishing a man to do his share of the work, they were equal partners in respect to the joint enterprise in which they were engaged for the purpose of carrying out the provisions of the bond and lease. *Walker v. Bruce*, 97 Pac. 250, 44 Colo. 109.

A "mining partnership" exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same. An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation and existence of the partnership. The relation arises from the ownership of shares or interests in the mine and the working of the same. *Eisenberg v. Goldsmith*, 113 Pac. 1127, 1131, 42 Mont. 563 (quoting and adopting the definition in Rev. Codes, §§ 5535, 5536).

"Mining partnerships" are somewhat peculiar in their nature, and the ordinary rules regarding such relations do not, it seems, apply. Of course, there may be a strict partnership in a mining venture—for instance, where it is formed for the purpose of working a mine by extracting minerals therefrom—and in such a case there must be an accounting in equity. But parties may be tenants in common of a mining property without being partners. It is alleged in the petition that the contract in this case was for prospecting, locating, and developing mining claims on the public domain in the Cripple Creek district for the joint and equal benefit of the parties, and each was to furnish labor, supplies, and money for this purpose. If by this it was meant to charge that the mine, when discovered and developed, should be worked on joint account, doubtless a partnership would have been created, at least as to the working of the mine. But the petition does not allege such an agreement, nor did plaintiff's evidence show it. "Such agreements should be construed according to the intent of the parties, and while they may speak of each other as partners, this term, as is well known, does not in all cases mean that the parties are engaged in a joint enterprise, each agreeing to share the profits and to bear a part of the losses of the particular business. In order to create a 'mining partnership,' it seems to be necessary that there be an agreement to work the mine for the joint profit of the parties. Otherwise the owners of the property, acquired in such manner as is here charged, are tenants in common." *Doyle v. Burns*, 99 N. W. 195, 197, 123 Iowa, 488 (citing and approving *Boucher v. Mulverhill*, 1 Mont. 310; *Duryea v. Burt*, 28 Cal. 569; *Hartney v. Gos-*

Ing, 68 Pac. 1121, 10 Wyo. 115, 98 Am. St. Rep. 972; Patrick v. Weston, 43 Pac. 446, 21 Colo. 73; Anaconda Copper Mining Co. v. Butte & Boston Min. Co., 43 Pac. 492, 17 Mont. 519).

Where complainant and defendant, who were jointly interested in mining property, in the development of which complainant had made advances, entered into a contract giving complainant the right to manage the property and apply the profits, and also, in case of a sale, the proceeds of the property to the repayment of such advances, the arrangement and agreement constituted a "mining partnership." Connolly v. Bouck, 174 Fed. 312, 315, 98 C. C. A. 184.

### MINING PROPERTY

See Entire Mining Property.

### MINING PURSUIT

The Legislature has now classed oil and gas among minerals of this state: and persons engaged in producing these minerals are following a mining pursuit. Act No. 144 of 1908; Act No. 154 of 1910; Act No. 172 of 1910; Act No. 196 of 1910; Act No. 254 of 1910. Etchison Drilling Co. v. Flournoy, 59 South. 867, 872, 131 La. 442.

### MINING RECORDS

The term "mining records," as used in B. & C. Comp. § 5668, authorizing liens on mines in favor of laborers and materialmen, but providing that it shall not apply to the owner when the mine is worked by a lessee, if a copy of the lease is recorded in the mining records of the county before the work is begun, in the absence of a statute defining such term, or prescribing that such instruments shall be recorded in any particular book, is sufficiently complied with by the record of a mining lease in a book kept by the county clerk for the recording of leases and instruments affecting the title to mining claims, designated "mining conveyances." Slover v. Bailey, 90 Pac. 665, 666, 49 Or. 426.

### MINING RIGHT

As property, see Property.

"A 'mining right' is a right to enter upon and occupy ground for the purpose of working it, either by underground excavation or open working, to obtain from it the minerals or ores which may be deposited thereunder. By implication, the grant of such a right carries with it whatever is incident to it and necessary to its beneficial enjoyment. The term may also include licenses and the rights of the owner of the minerals." McGraw v. Laukin, 68 S. E. 27, 28, 67 W. Va. 385.

A "mine" is an excavation in the earth to obtain minerals, an excavation, properly under ground, to take out some useful product, and a mining right is a right to excavate in the earth to obtain minerals or other useful products. People v. Bell, 86 N. E. 593,

594, 237 Ill. 332, 19 L. R. A. (N. S.) 746, 15 Ann. Cas. 511.

Hurd's Rev. St. 1905, p. 1399, c. 94, §§ 6, 7, declare that any mining right or the right to dig for or obtain iron, lead, copper, coal, or other mineral from land may be conveyed by deed or lease, which may be acknowledged and recorded in the same manner as deeds and leases of real estate, and that when the owner of land shall convey, by deed or lease, any mining right therein, the conveyance shall be considered as so separating such right from the land as to be separately taxable. Held that, since petroleum is a mineral, the right of the lessee to mine for oil and gas on certain specified premises is a mining right, and separately taxable under such sections. People v. Bell, 86 N. E. 593, 594, 237 Ill. 332, 19 L. R. A. (N. S.) 746, 15 Ann. Cas. 511.

### MINING WORK

As improvement, see Improvement.

### MINISTER

As profession, see Profession.

A public school opened with prayer and the reading without comment of passages from King James' translation of the Bible, during which pupils are not required to attend, is not a "place of worship," nor are its teachers "ministers of religion," within the meaning of Const. § 5, providing that no person shall be compelled to attend any place of worship or contribute to the support of a minister of religion. Hackett v. Brooksville Graded School Dist., 87 S. W. 792, 793, 120 Ky. 608, 69 L. R. A. 592.

### MINISTERIAL

The term "ministerial" is generic rather than specific, and includes acts which are ministerial only and involve no judgment or discretion, and those which are quasi judicial; a purely ministerial act being one which a person performs on a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment on the propriety of the act. State v. Stutsman (N. D.) 139 N. W. 83, 88.

The word "ministerial" means "pertaining to executive offices as distinguished from judicial; administrative." An act in the performance of a ministerial duty is imperative. It is done in obedience to some legal mandate, and it involves the exercise of no official discretion and of no judgment as to the propriety of the act, thereby differing entirely from an act in the performance of judicial duties. Hamma v. People, 94 Pac. 326, 327, 42 Colo. 401, 15 L. R. A. (N. S.) 621, 15 Ann. Cas. 655.

The words "ministerial" and "administrative" may be, and frequently are, used interchangeably. An "administrative officer" is frequently classed as a "ministerial of-

fiar," and vice versa. Bouvier speaks of "administrative" as synonymous with "executive," a "ministerial duty"; one in which nothing is left to discretion. *People v. Salisbury*, 96 N. W. 936, 940, 134 Mich. 537 (citing *State v. Loechner*, 91 N. W. 874, 65 Neb. 814, 59 L. R. A. 915).

### MINISTERIAL ACT

A "ministerial act" is one which a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done. *Galey v. Board of Com'rs of Montgomery County*, 91 N. E. 593, 594, 174 Ind. 181, Ann. Cas. 1912C, 1099; *Freund v. Freund*, 75 N. E. 925, 930, 218 Ill. 189, 109 Am. St. Rep. 283; *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 174, 79 Am. Dec. 468; *Pennington v. Streight*, 54 Ind. 376, 377; *Galey v. Board of Com'rs of Montgomery County*, 91 N. E. 593, 594, 174 Ind. 181, Ann. Cas. 1912C, 1099; *Bair v. Struck*, 74 Pac. 69, 71, 29 Mont. 45, 63 L. R. A. 481 (citing *Throop*, Pub. Off. § 537).

A "ministerial act" is an "act, office, or power that is to be performed or exercised uniformly on a given state of facts, in a prescribed manner, in obedience to law or the mandate of legal authority, without dependence on the exercise of judgment as to propriety of so doing." *Metz v. Maddox*, 105 N. Y. Supp. 702, 712, 121 App. Div. 147 (quoting Cent. Dict.).

"A 'ministerial act,' as applied to a public officer, is defined to be an act or thing which he is required to perform by direction of legal authority upon a given state of facts, independent of what he may think of the propriety or impropriety of doing the act in the particular case." The duty of the Secretary of State in granting a certificate to a private banking corporation being purely ministerial, mandamus lies to compel him to issue the certificate. *State ex rel. Jones v. Cook*, 73 S. W. 489, 493, 174 Mo. 100.

A "ministerial act" is one which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. *Garff v. Smith*, 86 Pac. 772, 773, 31 Utah, 102, 120 Am. St. Rep. 924 (citing *State ex rel. North & South Ry. Co. v. Meier*, 45 S. W. 306, 143 Mo. 439).

"Official action, the result of performing a certain and specific duty, arising from fixed and designated facts, is a 'ministerial act.'" *Rainey v. Ridgway*, 43 South. 843, 844, 151 Ala. 532 (citing *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371; *Morton v. Comptroller General*, 4 S. C. 430;

*Commissioner of the General Land Office v. Smith*, 5 Tex. 471; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949).

### Allowance of claim

Prohibition does not lie to restrain the commissioners' court from proceeding with the construction of a bridge for the building of which a contract has been let by it; the allowance of a claim therefor being a "ministerial act." *Goodwin v. State ex rel. Wakefield*, 40 South. 122, 123, 145 Ala. 536.

### Assessment of omitted property for taxation

Where a city council by ordinance provided for the listing of omitted taxes upon notice and hearing, the act of "assessing omitted property partakes somewhat of ministerial and somewhat of judicial or quasi judicial functions. That is to say, the act in listing of the property for taxation is clearly a 'ministerial act'; and, as an incident, it finds the fact whether the property was in fact omitted, whether it belonged to the alleged recusant taxpayer, and what its fair value then was. To hear evidence, and therefrom to find whether a certain fact was or was not, partakes of 'judicial functions.' Still it is not necessarily judicial, in the sense that it is an act of a court. Many ministerial acts include in part the determination of pre-existing facts, and the exercising of the quality of judgment sometimes called 'discretion' with respect thereto. \* \* \* The action of the council in assessing omitted property is purely ministerial, although it has mixed certain discretion as to finding values and the like, which is not reviewable, and which quality is sometimes called 'judicial,' though it is not judicial in the sense that it is the act of a court." And hence the ordinance was not in violation of the constitutional limits upon the part of the Legislature to create any "judicial tribunals" other than the courts expressly named in that instrument. *Muir's Adm'r v. City of Bardonia*, 87 S. W. 1096, 1098, 120 Ky. 739.

### Entry of judgment

Under L. O. L. § 185, which provides that in an action arising upon contract for the recovery of money or damages only, if no answer is filed within the time limited, the clerk on the plaintiff's written application shall enter the default, and thereupon give judgment for the sum demanded against one or more of the defendants amenable by appearance on service of process, the clerk in entering such judgment exercises no judicial functions, but performs a "ministerial act," which in general consists in the discharge of some duty enjoined by law upon one or more persons, who, in obeying the rule prescribed, exercise no judgment or discretion regarding the matter. *Hodgdon v. Goodspeed*, 118 Pac. 167, 168, 60 Or. 1 (citing 5 Words and Phrases, p. 4523).

The rendition of a judgment by the court is a judicial act; but the entry thereof by the clerk is not, but is a "ministerial act." *Jaqua v. Harkins*, 82 N. E. 920, 922, 40 Ind. App. 639.

#### **Issuance of certificate to bank**

"A 'ministerial act' is one which a public officer or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." The duty of the bank commissioner to issue to a bank a certificate when all the things required to be done have been done is not discretionary, and mandamus will lie to compel him to perform such duty which is merely a ministerial one. *Smock v. Farmers' Union State Bank*, 98 Pac. 945, 949, 22 Okl. 825 (quoting and adopting definition in *Merrill, Mandamus*, p. 30).

#### **Judicial act distinguished**

See Judicial Act.

#### **Keeping office and records at seat of government**

A "ministerial act" is an act which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment, upon the propriety of the act done. The constitutional provision requiring each executive officer to keep his office and public records and papers at the seat of government requires a mere ministerial act, so that mandatory injunction will lie to enjoin the executive officers of the state other than the Governor from removing their offices, public records, etc., from the seat of government, and expending the state funds for that purpose. *State ex rel. Attorney General v. Huston*, 113 Pac. 190, 198, 27 Okl. 606, 34 L. R. A. (N. S.) 380 (quoting and adopting the definition in 27 Cyc. p. 793).

#### **As proceeding**

See Proceeding.

#### **Rejection and return of election ballot**

A moderator of a voting district, who honestly rejects the ballot of an elector and returns it as prescribed by statute, is not liable in tort to the elector, though the act following the quasi judicial determination of the invalidity of the ballot is a "ministerial act," which is performed in a given state of facts in obedience to the law, without regard to or the exercise of his own judgment on the propriety of the act being done. *Blake v. Mason*, 73 Atl. 782, 783, 82 Conn. 324.

#### **Relieving militia officer from command**

"Official action, the result of performing a certain and specific duty, arising from fixed and designated facts, is a 'ministerial act.'" The act of a Governor in relieving a relator from his command as colonel of a regiment in the state national guard for the good of the service, without a trial or hearing on charges

preferred, was not a ministerial act, but constituted an exercise of the Governor's discretion, which could not be controlled by mandamus. *State ex rel. Higdon v. Jelks*, 35 South. 60, 62, 138 Ala. 115 (quoting and adopting definition in *Grider v. Talley*, 77 Ala. 424, 54 Am. Rep. 65; *Ex parte Thompson*, 52 Ala. 98).

#### **MINISTERIAL DUTY**

A purely "ministerial duty" is one as to which nothing is left to discretion. *City of Biddleford v. Yates*, 72 Atl. 335, 337, 104 Me. 508, 15 Ann. Cas. 1091.

A "ministerial duty" is one regarding which nothing is left to discretion—a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist. If it is one that requires exercise of judgment in its performance, it is not ministerial but discretionary. *State v. Howard*, 74 Atl. 892, 395, 88 Vt. 6.

A "ministerial duty," the performance of which may in proper cases be required, is one in which nothing is left to discretion. It is a simple definite duty arising under conditions admitted or proved to exist and imposed by law. *State ex rel. Attorney General v. Huston*, 113 Pac. 190, 198, 27 Okl. 606, 34 L. R. A. (N. S.) 380 (quoting and adopting the definition in *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60).

Official duty is "ministerial," when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts. *People v. May*, 95 N. E. 999, 1000, 251 Ill. 54, Ann. Cas. 1912C, 510.

"An official duty is 'ministerial' when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action is ministerial when it is the result of performing a certain and specific duty arising from fixed and designated facts." *Garff v. Smith*, 86 Pac. 772, 773, 31 Utah, 102, 120 Am. St. Rep. 924 (quoting *People for Use of Munson v. Bartels*, 27 N. E. 1091, 138 Ill. 322).

Where an officer's duty necessarily requires examination of evidence in the decision of questions of law and fact, the duty is not ministerial, but judicial or discretionary. An act, however, is none the less ministerial because the person performing it may have to satisfy himself that a state of facts exists under which it is his right and duty to perform the act, though in doing so he must to some extent construe the statute by which the duty is imposed. *Stephens v. Jones*, 123 N. W. 705, 708, 24 S. D. 97.

#### **Granting election certificate**

A "ministerial" duty is "one which has been positively imposed by law and its per-

formance required at a time and in a manner or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent on the officer's discretion" (quoting Mecham on Public Officers, § 658). A "ministerial" duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is simply definite duty arising under conditions admitted or proved to exist or imposed by law (quoting *Sullivan v. Shanklin*, 63 Cal. 247, 251). "Where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of judgment, the act is 'ministerial'" (quoting *Commissioner of the General Land Office v. Smith*, 5 Tex. 471). Consequently, the duty imposed by Rev. St. Wyo. 1899, § 351, upon the Governor to grant a certificate of election to state officers after the canvassing board has filed its certificate showing him to have been elected, is a "ministerial" duty. *State ex rel. Irvine v. Brooks*, 84 Pac. 488, 490, 14 Wyo. 393, 6 L. R. A. (N. S.) 750, 7 Ann. Cas. 1108.

#### MINISTERIAL OFFICE—OFFICER

Assessors of taxes and county clerks are "ministerial officers," and, while in some respects their acts may be construed as judicial, they are not "judicial officers" as that term is used in the Constitution. They have no power to inflict penalties for violation of laws or to determine whether a law has been violated and adjudge persons guilty. *Cleveland, C. & St. L. R. Co. v. People*, 72 N. E. 725, 726, 212 Ill. 638.

##### Attorney

Acts 1880, p. 18, No. 11, making it unlawful for any judicial or "ministerial officer" of any of the courts of the state to go bail for any prisoner, etc., refers exclusively to such officers as judges, clerks, sheriffs, and their deputies, etc., as directly constitute the machinery of the court, and does not prohibit an attorney from becoming a surety on his client's bail bond, though an attorney is an officer of the courts generally. *State v. Bablin*, 50 South. 825, 826, 124 La. 1005, 18 Ann. Cas. 837.

##### City clerk

The city clerk of Los Angeles is a purely "ministerial officer" who must sign any ordinance duly passed, regardless of any views which he may entertain as to its legality. *City of Los Angeles v. Leland*, 106 Pac. 218, 219, 157 Cal. 30 (citing *City of Los Angeles v. Hance*, 70 Pac. 475, 137 Cal. 490).

##### Clerk of court

The clerk of a court is essentially a ministerial officer. He has nothing to do with the character or purpose of papers which are tendered to him to be filed. When suit is

ordered or process directed to be issued, it is his duty to comply, if the party is *prima facie* entitled to it, and for failure to do so he is liable for any loss; the measure of his liability being the damages which have resulted therefrom. In an action on the official bond of a clerk of the circuit court for refusal to issue a summons, the plaintiff must state, in his declaration, enough to show that he had a good cause of action against the parties whom he desired to sue. He cannot simply claim as damages the amount for which he wanted to bring suit. Any declaration or complaint which does nothing more is demurrable. *United States v. Bell*, 127 Fed. 1002, 1003 (citing 7 Cyc. p. 196).

##### Policeman

Under Code 1904, p. 1018, cl. 1, § 1017a, providing that officers and privates in the police force of cities and towns of the commonwealth shall possess such power and authority as now belongs to the office of constable at common law in enforcing the criminal laws of the commonwealth, and the ordinances of the city or town for which they are appointed or elected, and it shall be the duty of policemen to prevent the commission within the city or town of offenses against the laws of the commonwealth and against the ordinances of the city or town, to observe and enforce all such laws and ordinances, to detect and arrest offenders against the same, to preserve the good order of the city or town, and to secure the inhabitants thereof from violence and the property therein from injury, a policeman is not a purely "ministerial officer," since a number of the powers enumerated in the statute are of an executive character, and therefore a person bribing a policeman is subject to punishment under Code, § 3744, providing that if any person give or offer any gift or gratuity to any "executive officer" with intent to influence his act, decision, or judgment on any matter or question which is or may be then pending, or may be brought before him in his official capacity, shall be punished, etc. *Haynes v. Commonwealth*, 52 S. E. 358, 359, 104 Va. 854.

#### MINOR

Man as including, see *Man*.

See, also, *Child—Children* (In Criminal Law).

The common-law rule that a minor is of age on the beginning of the day preceding his twenty-first anniversary does not prevail here, under Rev. Civ. Code, art. 37, providing that minors are persons who have not yet attained the age of 21 years complete, and a minor whose twenty-first anniversary does not occur until the next day after an election cannot lawfully register to vote thereat. *State ex rel. Fleming v. Joyce*, 49 South. 221, 222, 123 La. 637, 17 Ann. Cas. 905.



The term "minor children," as used in Const. art. 16, § 52, declaring that the homestead shall not be apportioned among the heirs of the decedent, so long as the guardian of minor children may be permitted to occupy the same, and in Rev. St. 1895, art. 2046, requiring the setting apart for the benefit of the widow and minor children of property exempt from execution, etc., does not include minor grandchildren living as members of the grandmother's family, and on her death, her property may be sold to pay debts. *Ross v. Martin*, 140 S. W. 432, 433, 104 Tex. 558.

The fact that Civ. Code, §§ 25, 27, defines minors as males under 21 and females under 18 years of age, did not deprive the Legislature of the right to pass Juvenile Court Law (St. 1911, p. 658), declaring that various acts shall constitute dependency and delinquency, and shall apply to all persons under 21, whether male or female. *Moore v. Williams*, 127 Pac. 509, 510, 19 Cal. App. 600.

The words "minor children," as used in Rev. St. 1895, arts. 2046, 2049, providing for the setting apart of the homestead and exempt property to the widow, minor children, and unmarried daughters of the deceased, were used in the sense of immediate descendants of the deceased, and therefore did not include a grandchild who lived with the intestate as a member of his family. *Wilkins v. Briggs*, 107 S. W. 135, 140, 48 Tex. Civ. App. 596.

Laws 1899, p. 298, c. 141, § 17, providing for the redemption of real property of any "minor heir" from a sale for taxes, applies only to minors inheriting the property. *Burdick v. Kimball*, 101 Pac. 845, 848, 53 Wash. 198.

Complainant's mother conveyed certain real estate to defendant in trust for complainant, to be conveyed in fee to him on his becoming of age, with remainder over on his death before that time. When complainant became 18 years of age, he obtained an order removing his civil disabilities, and authorizing him to manage his property and to sue and be sued, whereupon he brought a bill to compel the trustee to convey the estate to him. It was held that the emancipation did not terminate complainant's minority, so as to entitle him to a conveyance of the trust estate, as Rev. Code 1892, § 1508, defines a "minor" to be any person under the age of 21. *Ray v. Kelly*, 35 South. 165, 168, 82 Miss. 597.

Rev. St. 1899, § 3009, provides that every dramshop keeper who sells intoxicants to a minor without his parent's written consent shall forfeit a certain sum, etc., and makes every dramshop keeper violating such provision guilty of a misdemeanor. Section 3477 provides that males of 21 years shall be considered of full age, except as otherwise provided by law and, until they reach such age, shall be considered "minors." Held, that the

fact that a minor to whom liquor was sold without his parent's consent was married and the head of a family would not prevent a conviction of the offender under section 3009. *State v. Selberling*, 127 S. W. 106, 107, 143 Mo. App. 318.

Section 721, Rev. St., declaring that the laws of the several states, except when the Constitution, treaties, or statutes of the United States otherwise provide, shall be the rules of decisions in trials at common law where they apply, does not require the recognition of state statutes in an examination before an immigration officer to determine the right of an alien to enter or to remain in the United States under our immigration statutes. Section 3636 of the Revised Laws of Minnesota of 1905, providing that the word "minor" shall mean a male under 21 or a female under 18 years of age, is not binding in determining whether an alien female attains her majority when she reaches the age of 18 years; but such officer should follow the common-law rule, which fixes the age of majority at 21 for both sexes. *Ex parte Petterson*, 166 Fed. 536, 546.

Under Civ. Code, § 25, defining "minors" to include males under 21 years of age and females under 18 years of age; and section 26 providing that the age of a minor must be calculated from the first minute of the day on which he or she was born to the same minute of the corresponding day completing the period of minority, a female born on March 17, 1889, completed her minority and became an adult at the commencement of the day on March 16, 1907, prior to her commitment on that day to a reform school as a minor delinquent. *Ex parte Wood*, 90 Pac. 961, 962, 5 Cal. App. 471.

A "minor" within Act May 27, 1908, c. 199, §§ 1, 2, 6, 35 Stat. 312, 313, authorizing the sale of the allotments of minor freedmen, includes males under the age of 21 years and females under the age of 18 years, and the marriage of such minor does not confer on him or her the authority to sell his or her allotted lands independent of the supervision of the probate courts. *Jefferson v. Winkler*, 110 Pac. 755, 758, 26 Okl. 653.

Within Comp. Laws Okl. 1909, § 5523, providing that the marriage of a minor ward terminates the guardianship, and that the guardian may be discharged by the county court whenever it appears that the guardianship is no longer necessary, and Act Cong. May 27, 1908, c. 199, 35 Stat. 312, providing that all lands of minor allottees, including mixed-blood Indians having less than half Indian blood, shall be free from restrictions on alienation, and section 2, providing that "the terms minor or minors as used in this act shall include all males under the age of twenty-one years," the marriage of a minor male ward, a member of the Cherokee tribe of Indians, of less than one-half Indian blood,

does not of itself terminate his guardianship, as to his allotment, nor abate the jurisdiction of the county court, and the guardian under such jurisdiction has authority to sell the minor's allotted lands. *Kirkpatrick v. Burgess*, 116 Pac. 764, 765, 29 Okl. 121.

### MINOR LEAGUE

Three organizations, the National League, the American League, and the National Association, include in their membership practically every professional baseball club in the United States. The first two are known as the "major leagues," and the last as the "minor league." *Kelly v. Herrman*, 155 Fed. 887, 888.

### MINOR OFFENSE

See, also, Misdemeanor.

An offense punishable by imprisonment in the parish prison or by hard labor in the penitentiary is a "minor offense," and not a felony. *State v. Wall*, 52 South. 556, 559, 126 La. 400.

The words "minor offenses," as used in the state Constitution authorizing the Legislature to grade all "misdemeanors and minor offenses against the state" and to fix the minimum and maximum penalty therefor, must be construed as meaning minor crimes, such as petty larceny and the like, which may be punishable by imprisonment in the penitentiary. The words were used to designate minor crimes which in the discretion of the court may be punishable by imprisonment in the parish jail or in the penitentiary, or, in other words, as misdemeanors or as felonies. Hence the act grading misdemeanors and minor offenses is constitutional in so far as it grades the offense of petty larceny and makes the same punishable by imprisonment in the parish jail. The contention was that petty larceny is a "felony," and not, therefore, within the purview of article 155 of the Constitution, or of the title of Act No. 107, p. 161, of 1902. The court says that the word "felony" in American law has no very definite or precise meaning, except in cases where it is defined by statute. "Apart from this, the word seems merely to imply a crime of a graver or more atrocious nature than a misdemeanor." *Black's Law Dictionary*. The term "felon" does not appear in the Constitution of 1898. In that instrument the words "offense" and "crime" are used as synonymous and "misdemeanor" as the lowest grade of offenses. Articles 9 and 12. Hence, in construing article 155, the words "minor offenses against the state" must be construed as meaning minor crimes, such as petty larceny and the like, which may be punishable by imprisonment in the penitentiary. The article reads, "All misdemeanors and minor offenses against the state." *State v. Eubanks*, 38 South. 407, 408, 114 La. 428.

### MINORITY

Real Property Law (Laws 1896, p. 565, c. 547) § 32, provides that for the purposes of the section a "minority" is deemed a part of a life, and not an absolute term equal to the possible duration of such "minority." *Toher v. Crounse*, 107 N. Y. Supp. 990, 994, 57 Misc. Rep. 252.

### MINORITY PARTY

Acts 1907, c. 435, § 1, providing that the members of the State Board of Elections shall be appointed by the Governor, was amended by Acts 1909, c. 103, § 1, requiring such board to be elected by the joint vote of both houses of the General Assembly. Section 3 of the amending act, amending section 4 of the original act, which fixed the term of office of the first members of the board and made the term of their successors two years, provides that all successors to the first board appointed shall be bona fide members of the same party to which the preceding members belong. Section 4, amending section 8 of the original act, which prohibited more than two of the members from being of the same political party, provides that not more than two of such members shall belong to the same political party, requires the representatives of the majority and minority parties to be bona fide members of such parties, and defines the "minority party" as that which polled the second highest number of votes at the preceding presidential election. Held, that the persons appointed by the Governor as members of the State Board of Elections under the original act could not, in proceedings to establish their right to office as against persons holding under the amending act, claim that sections 3 and 4 of the amending act contravened the Constitution, as imposing a political test as a qualification for office, unless the invalidity of such sections rendered the whole act invalid; such sections not imposing any burdens, so as to give them an interest in their validity as taxpayers, and not affecting them in a way not common to all citizens. *Richardson v. Young*, 125 S. W. 664, 667, 122 Tenn. 471.

### MINUTE

Loosely, a "minute" is a short space of time. We all know well that it is common parlance to describe the briefest space of time—a second or few seconds—as a "minute" or a "few minutes." The expression "a couple of minutes," used by plaintiff in an action against a railway in testifying that after getting on the car she waited a couple of minutes before attempting to reach a seat, is not necessarily a statement that she actually desisted for 120 seconds in the act of seeking a seat. *McGlynn v. Nassau Electric R. Co.*, 113 N. Y. Supp. 119, 120, 128 App. Div. 866.

## MINUTES

The "minutes" are the proper record of the court, and are under the eye of the judge, and are at least prima facie correct. *Dilzell Engineering & Construction Co. v. Lehmann*, 45 South. 138, 139, 120 La. 273.

While the "minutes" kept by the judge are not the memorial of the judgment, and are not records required by law to be kept, they constitute legal evidence of what was adjudged, and as such may serve as the foundation for the correction of errors of the clerk in the performance of his duty. The minutes are only evidence of what was done. *State ex rel. Sheridan Pub. Co. v. Goodrich*, 140 S. W. 629, 630, 159 Mo. App. 422 (citing *Kreisel v. Snively*, 115 S. W. 1060, 135 Mo. App. 158).

## MISADMINISTRATION

See Homicide by Misadventure.

## MISAPPLICATION

See Willful Misapplication—Willfully Misapply.

To constitute a "misapplication" of the funds of a national bank, it must appear that the officer has been guilty of conversion, though it is unnecessary to show that the recipient of the proceeds of misapplication was also guilty of a conversion. *United States v. Heinze*, 31 Sup. Ct. 98, 218 U. S. 532, 541, 54 L. Ed. 1139, 21 Ann. Cas. 884.

It is not a "misapplication of the funds" of a bank, as that term is used in Rev. St. § 5209, denouncing the willful misapplication of the funds of a national bank, where an officer merely gave credit to an insolvent person or corporation, or honored the check of a depositor when there were no funds to the credit of the depositor, without any intention of defrauding the bank. *Flickinger v. United States*, 150 Fed. 1, 12, 79 C. C. A. 515.

### Embezzlement distinguished

See Embezzlement.

## MISAPPLY

See Willful Misapplication—Willfully Misapply.

The word "misapply" as used in Rev. St. § 5209, providing that every president, director, cashier, teller, etc., of any national bank association who embezzles, abstracts, or willfully misapplies any of the moneys, funds, etc., shall be deemed guilty of a misdemeanor, etc., does not necessarily mean that the officer in charge should have physical possession of the funds misapplied. It is sufficient if he have such "control, direction, and power of management as to direct an application" of the same. *Lear v. U. S.*, 147 Fed. 349, 357, 77 C. C. A. 527.

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## MISAPPROPRIATION

See Willful Misappropriation.

While considered alone, the word "misappropriation" does not necessarily in all cases mean dishonesty, yet it is susceptible of a meaning of dishonesty, embracing embezzlement. *Johnson v. Turner*, 47 South. 570, 571, 159 Ala. 356 (citing 5 Words and Phrases, p. 4529).

"Misappropriation" means "wrong appropriation; to turn or put to a wrong purpose." As used in a provision of the bankruptcy act exempting from a discharge debts created by "misappropriation" while acting in a fiduciary capacity, the term contemplates a conscious "misappropriation." *Haggerty v. Badkin*, 66 Atl. 420, 424, 72 N. J. Eq. 473 (quoting and adopting Webster's International Dictionary and Ency. Dictionary).

Words spoken of plaintiff, that he had destroyed a docket or public record belonging to the mayor's office to cover up evidence of his misappropriation of public funds and fines belonging to the town, were defamatory per se as imputing moral turpitude, since, ascribing to the word "misappropriation" the most innocent of its commonly accepted meanings, the gravamen of the charge was that plaintiff had destroyed evidence of his wrongful conversion of or dealing with the public funds and fines, to cover up, with the purpose to hinder, if not to render impossible, the detection of his misconduct, innocent of speculation though it were, and imputed a species of dishonesty of a highly depraved character. *Johnson v. Turner*, 47 South. 570, 571, 159 Ala. 356.

Where a trustee for creditors, who was appointed receiver for the debtor, loaned the funds in his possession to a firm of which he was a member and concealed the facts from the court as long as possible, he was guilty of a "misappropriation" of the funds within Bankr. Act 1898, § 17, providing that a discharge shall release a bankrupt from his provable debts, except such as were created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in a fiduciary capacity, though he may have expected that the loan would be repaid. *Field v. Howry*, 94 N. W. 218, 214, 182 Mich. 687.

## MISBEHAVIOR

The conduct of an Indian is not to be held "misbehavior," justifying his arrest, in the absence of a law, rule, or regulation so defining it. *Ex parte Bi-A-Lil-Le*, 100 Pac. 450, 451, 12 Ariz. 150.

The giving of false, vague, and evasive testimony by an alleged bankrupt on his examination before a special commissioner, with the intention of misleading the court and concealing assets of his estate, is a "misbehavior," and constitutes a contempt, which the district court has power to punish under

Rev. St. § 725, on a summary hearing without a jury. *Ex parte Bick*, 155 Fed. 908, 909.

### MISBEHAVIOR IN OFFICE

See, also, Misconduct in Office; Misdemeanor in Office.

A statute specifying acts "in respect to a court of justice or proceedings therein," constituting contempts, naming "misbehavior in office" or other willful neglect or violation of duty by a sheriff or other person appointed or elected to perform a judicial or ministerial service, only includes misbehavior done "in respect to" such court or some proceeding therein, and does not include an unauthorized arrest not shown to be a willful disobedience of any judgment, order, or process of the court. *Hutton v. Superior Court of City and County of San Francisco*, 81 Pac. 409, 411, 147 Cal. 156.

### MISBRAND—MISBRANDING

An article long known and sold under its trade-name of "Coca-Cola," cannot be deemed misbranded within the meaning of the Food and Drugs Act (Act June 30, 1906, c. 3915, § 8, [U. S. Comp. St. Supp. 1909, p. 1191]), because it does not contain any material element derived from the leaves of the coca plant. *United States v. Forty Barrels and Twenty Kegs of Coca-Cola*, 191 Fed. 431, 436.

A food product, labeled "Compound; Pure Comb and Strained Honey and Corn Syrup," is not "misbranded," within the meaning of Food and Drugs Act June 30, 1906, c. 3915, § 8, so that its shipment in interstate commerce constituted a misdemeanor thereunder, merely because the percentage of corn syrup in the compound largely exceeds that of honey. *United States v. Boeckmann*, 176 Fed. 382.

An article composed of the compound of vanilline, cumerin, spirits, sugar, coloring, and water, and plainly labeled on one side with the words "Peerless Extract of Vanilla," and on the reverse side, in small letters, with the words "Formula Vanilline Cumerin Spirits Sugar Coloring Water," is "misbranded," within Agricultural Law, §§ 164, 165, as amended, declaring that an article shall be deemed misbranded where it is an imitation of, or offered for sale under the distinctive name of, another article, and is not a mixture or compound known under its own distinctive name, and not included under the definition of misbranded articles of food within the exception in section 165. *People v. James Butler*, 118 N. Y. Supp. 849, 850, 134 App. Div. 151.

The Pure Food Law (Act June 30, 1906, c. 3915) prohibits misbranding of articles of food, and section 8 declares that the term "misbranded" shall apply to all articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or

device, regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. Subdivision 4, par. 2, declares that an article of food which does not contain any poisonous or deleterious ingredients shall not be deemed misbranded if labeled so as to plainly indicate that they are compounds, imitations, or blends, etc., provided that the term "blend" shall be construed to mean a mixture of like substances. *Held*, that the proviso was not limited to cases where the blend was claimed without disclosing the ingredients, but applied as well to cases where the component parts of the blend were disclosed, and hence a label attached to vinegar, which was in fact distilled vinegar to which a small quantity of pure boiled apple cider had been added for coloring, describing the substance as "Saratoga Brand vinegar, a blend of pure boiled apple cider and distilled vinegar," was misbranded as misleading the public to believe that it was composed of pure boiled apple cider vinegar and distilled vinegar. *United States v. Ten Barrels of Vinegar*, 186 Fed. 399, 401.

The federal pure food act of 1906 (Act June 30, 1906, c. 3915, § 2, prohibits the introduction into any state from another state of food or drugs adulterated or branded within the meaning of the act. By section 6 the term "drug" is made to include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary, and whisky is so recognized in both. By section 7 a "drug" is to be deemed adulterated if, when it is sold under a name recognized in the United States Pharmacopoeia or National Formulary, it differs from a standard of strength, quality, or purity as determined by the test laid down in those publications, unless the actual standard thereof be plainly stated on the package. *Held* that, where bottles containing intoxicants are labeled as containing "monogram whisky" and marked "Blend," and the alcoholic content is less, and the residuum from 100 cubic centimeters is more, than the standard test prescribed by such act, the liquors are misbranded and adulterated within the meaning thereof. *State v. Intoxicating Liquors*, 76 Atl. 268, 269, 106 Me. 135.

Defendant manufactured syrup from cane sugar, flavored to represent maple syrup by the introduction of an extract from maple wood after it had been chopped down. The syrup was put up in bottles labeled "Western Reserve Ohio Blended Maple Syrup," the words "Ohio" and "Maple Syrup" being in red, and between them the word "Blended," and then below that in smaller type, the statement, "This syrup is made from the sugar maple-tree and cane sugar." *Held* that the label was misleading, in that purchasers would ordinarily understand that the article contained in part maple syrup made from the boiled-down sap drawn from live maple

trees, and that defendant was therefore guilty of misbranding. *United States v. Scanlon*, 180 Fed. 485, 486.

Claimants operated a canning factory in Benton Harbor, Mich., where fruits grown in Michigan, as well as in other states, were canned and prepared for sale. Claimants canned certain "tepee" apples and blackberries, grown in Arkansas, sold under a label on which was printed: "Tepee Apples [or Blackberries, as the case might be]. Packed by O. H. Godfrey & Son, Benton Harbor and Watervliet, Michigan." There was evidence that Michigan apples and blackberries were better than those grown in Arkansas. Held, that the labels indicated that the fruit was grown in Michigan, and that claimants were therefore guilty of misbranding in violation of Food and Drug Act Cong. June 30, 1906, c. 3915. *United States v. 100 Cases of Tepee Apples*, 179 Fed. 985, 987.

"Salad oil" prima facie means olive oil, and, in the absence of evidence that the term has recently acquired a more general meaning to include other oils, its use without further explanation on packages of cotton seed oil shipped in interstate commerce constitutes a misbranding in violation of Food and Drugs Act June 30, 1906, c. 3915, § 2. *Brina v. United States*, 179 Fed. 373, 105 C. C. A. 558.

Ordinary Croton water drawn from the pipes in New York City filtered and bottled after the addition of small quantities of mineral salts and carbonic acid gas, is not "spring water," as the term is generally understood, and the labeling of the bottles as spring water constitutes a misbranding within the meaning of the food and drugs act (Act June 30, 1906, c. 3915, § 8). *United States v. Morgan*, 181 Fed. 587, 588.

The H. Company, at Kansas City, Mo., on April 3, 1909, contracted to sell to the W. Company at Ft. Worth, Tex., 5,000 bushels of No. 2 red wheat, according to the Missouri official state grades. On April 29, 1909, the H. Company ordered the operator of a public elevator where it stored its grain to ship to the W. Company in fulfillment of this contract No. 2 red wheat. The operator loaded and sent to the W. Company a car of wheat. After this wheat was loaded, the official inspector of the state of Missouri at Kansas City inspected, adjudged, and certified this wheat to be No. 2 red wheat. An invoice of it was forwarded to the W. Company dated May 3, 1909, showing that it was shipped under the contract of April 3, 1909, and subject to Kansas City weights and grades. The wheat arrived in Texas without change. The Texas inspector, the federal inspector, and other witnesses there found it to be, and it was, wheat of another and less valuable grade. None of the officers or employes of the H. Company had any knowledge of this fact, or anything to do with the grading or

shipping, except to order the operator of the public elevator to ship No. 2 red wheat. Held, that H. Company was not guilty of misbranding or of adulterating within the meaning of sections 7 and 8 of the Pure Food Act (Act June 30, 1906, c. 3915). *Hall-Baker Grain Co. v. United States*, 198 Fed. 614, 617, 117 C. C. A. 318; *United States v. Seventy-Five Boxes of Alleged Pepper*, 198 Fed. 984, 987.

False and misleading statements in the labels on a proprietary medicine as to its curative or remedial effects, but which do not import any statement concerning identity, are not "misbranding," within the meaning of the food and drugs act of June 30, 1906, c. 3915, § 8, which defines that term as applicable to all drugs or articles of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular. *United States v. Johnson*, 31 Sup. Ct. 627, 221 U. S. 488, 55 L. Ed. 823.

## MISCARRIAGE

See Debt, Default, or Miscarriage of Another.

### In medical jurisprudence—Abortion synonyms

The word "abortion," when used in judicial proceedings, necessarily implies that the crime was committed on a woman with child, and is synonymous with "miscarriage" in its primary meaning. *Marmaduke v. People*, 101 Pac. 337, 338, 45 Colo. 357.

In strictness, abortion is not of itself a crime, since the word "miscarriage" in its legal acceptance does not necessarily include the destruction of the child before birth; nor is a design to cause its miscarriage the same thing as a design to destroy the child. *State ex rel. Gaston v. Shields*, 130 S. W. 298, 301, 230 Mo. 91.

Decedent, having applied for insurance in a mutual benefit society, answered that she had never had any local disease, personal injury, or illness of any kind, but in answer to the medical questions stated that her last confinement was in 1908, and that she had had two miscarriages from overexertion. In an action on the certificate, it was shown that in 1903, about seven years prior to decedent's death, she suffered an abortion when she was about three months advanced in pregnancy, and that about three years later another occurred at about the same stage. Held, that since the words "abortion" and "miscarriage" are synonymous, both meaning premature parturition, there was no breach of warranty or misrepresentation. *Royal Neighbors of America v. Bratcher* (Tex.) 151 S. W. 885, 886.

## MISCELLANY

If storage accounts against whisky in bond are not assessable as "accounts," they are assessable under the title "miscellany" of Ky. St. § 4058, making subject to taxation the "value of all of the property not mentioned above"; that item being placed in the statute to effectuate section 4050, requiring that, if there be no appropriate column for the statement and valuation of property, it shall be valued in the column headed "Miscellany." *Commonwealth v. Kentucky Distilleries & Warehouse Co.*, 136 S. W. 1032, 1039, 143 Ky. 314.

## MISCHIEF

See Malicious Mischief.

## MISCONDUCT

See Official Misconduct; Willful Misconduct.

His own official misconduct, see His. See, also, Malconduct.

"Misconduct" is defined as "wrong conduct; bad behavior; mismanagement." The synonyms are "misbehavior; misdemeanor; mismanagement; misdeed; delinquency; offense." The verb "misconduct" is defined: "To conduct amiss; to mismanage." *Bailey v. Examining & Trial Board of Police Department of City of Helena*, 122 Pac. 572, 574, 45 Mont. 197.

"Misconduct" is defined as improper conduct, wrong behavior. The sense in which the word is used in a threat by an attorney to expose "misconduct" of his client is a question of fact for the court. *Bar Ass'n of City of Boston v. Hale*, 83 N. E. 885, 887, 197 Mass. 423.

"Misconduct" of the prevailing party" as a statutory ground for a new trial is not confined to something occurring at the trial, but includes acts amounting to misconduct, which, though they occurred before, operate at the trial. *Phares v. Krhut*, 91 Pac. 52, 53, 76 Kan. 238.

### Attorney

The attorney for an administrator had, prior to the administrator's appointment, arranged to borrow money of him, and after the appointment the administrator withdrew from the bank funds belonging to the estate, which funds were deposited by the attorney in his own bank to his own credit; a part being used to cover an overdraft. The attorney then gave the administrator a check for a part of the funds, a note for the balance, and paid him \$50 in cash for making the loan. Held, that the attorney was guilty of "misconduct" within Code Civ. Proc. § 67, authorizing suspension from practice of attorneys therefor. *In re Freedman*, 99 N. Y. Supp. 135, 136, 113 App. Div. 327.

"Misconduct" of attorney, as used in Pol. Code Alaska, § 743, authorizing suspension or disbarment therefor, is not confined to misconduct in the attorney's relation to his client, but includes as well misconduct toward the court or a judge in or out of court. *Cobb v. United States*, 172 Fed. 641, 643, 96 C. C. A. 477.

For an attorney to publish and advertise a pamphlet, the purpose of which is to attract nonresidents to the state to apply to its courts for divorce, through his agency as an attorney, that he may profit financially thereby, is "misconduct," within Comp. Laws, § 2625, providing for removal or suspension of attorneys for misconduct. *In re Schnitzer*, 112 Pac. 848, 851, 33 Nev. 581, 33 L. R. A. (N. S.) 941.

### Corporate officer

The use of the word "misconduct" of officers of a corporation in an application for a removal of a receiver does not denote personal wrong, but merely that the business was not conducted properly; and while there may be some blame, or censure connected with it, it is not actionable as libel. *Lebovitch v. Joseph Levy & Bros. Co.*, 54 South. 978, 981, 128 La. 518.

The issuance of stock by officers of a corporation without authority from the directors, and without consideration flowing to the corporations, is misconduct, within Code Civ. Proc. § 1781, authorizing the removal of officers, etc., for misconduct towards the corporation. *People v. Lyon*, 104 N. Y. Supp. 319, 119 App. Div. 361; *Id.*, 82 N. E. 1130, 189 N. Y. 544.

### Executor

It is "misconduct" rendering the executor "unfit" for the execution of his office, for which his letters may be revoked (Code Civ. Proc. § 2685, subd. 2), where he claims the benefits of a contract between himself and testator, as to which there was strong evidence that testator was of unsound mind at the time of its execution, and by which the executor secured great pecuniary advantage, to the detriment of the estate. *In re Gleason's Estate*, 41 N. Y. Supp. 418, 428, 17 Misc. Rep. 510.

### Juror or jury

After the jury is sworn, misconduct on the part of an individual juror is misconduct of the jury. *State v. Mott*, 74 Pac. 728, 730, 29 Mont. 292.

"Misconduct" of a juror which is statutory ground for a new trial is misconduct while he is such juror, and has no reference to what he has done before he is sworn to try the case; and therefore a statement by a juror, before being sworn as a juror, that accused was guilty and ought to be punished, is not such "misconduct" as would be ground for a new trial. *People v. Emmons*, 95 Pac. 1032, 1039, 7 Cal. App. 635.

The fact that the jury made incorrect or untrue answers to special interrogatories returned with their general verdict is not "misconduct of the jury," within the meaning of a statute providing that a new trial may be granted for misconduct of the jury. *M. O'Connor Co. v. Gillaspay*, 83 N. E. 738, 741, 170 Ind. 428.

### MISCONDUCT IN OFFICE

See, also, *Misbehavior in Office; Misdemeanor in Office.*

"Misconduct in office" includes such acts as amount to a breach of the good faith and of the right action that are tacitly required of all officers. *Etzler v. Brown*, 50 South. 416, 417, 418, 58 Fla. 221, 138 Am. St. Rep. 113.

"Misconduct in office" in its penal sense is any act or omission in breach of a duty of public concern by one who has accepted public office, providing his act is willful and corrupt and is not judicial. *United States v. Haas*, 167 Fed. 211, 214 (adopting definition in *Bish*, New Cr. Law, §§ 459, 460).

The phrase "misconduct in office" is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office (citing *State ex rel. Lilley v. Slover*, 113 Mo. 208, 20 S. W. 788). It does not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive (citing *Mechem*, Public Officers, § 457). After defining "misconduct," Webster declares it to be synonymous with "misbehavior," "misdemeanor," "delinquency," and "offense." Pen. Code, § 758, provides that an accusation against any municipal officer for "willful or corrupt misconduct in office" may be presented by the grand jury. Section 772 provides for the summary removal of public officers on an accusation verified by the oath of any person alleging that the officer has "neglected or refused to perform the official duties pertaining to his office." Section 335 declares every public officer who refuses or neglects to inform against and prosecute persons whom he has reasonable cause to believe offenders against the chapter on gambling, guilty of a misdemeanor. Under the definitions and statutory provisions recited above, a public officer who fails to prosecute gamblers of whom he has knowledge is guilty of "willful misconduct" within the meaning of section 758, and may be accused by the grand jury thereunder. *Coffey v. Superior Court of Sacramento County*, 82 Pac. 75, 76, 77, 147 Cal. 525.

"Misconduct in office" means any unlawful misbehavior in regard to the duties of an office, willful in its character. A county commissioner, who, without willfulness or a corrupt motive, but through ignorance disre-

gards the provisions of a statute regulating the exercise of his official duties, is not thereby guilty of "misconduct in office," within the meaning of section 6915, Rev. St., which prescribes a fine and the forfeiture of office for such misconduct. *State v. Bair*, 73 N. E. 514, 515, 71 Ohio St. 410.

A charge against a chief of police of "misconduct in office" includes any act involving moral turpitude, or any act which is contrary to justice, honesty, principle, or good morals, if performed by virtue or authority of office. *State ex rel. Wynne v. Examining and Trial Board of Police Department of City of Butte*, 117 Pac. 77, 78, 48 Mont. 389, Ann. Cas. 1912C, 143.

Where a policeman, a married man, while not on duty called upon a married woman at her home in the absence of her husband, and, the husband returning unexpectedly, the policeman secreted himself in a bedroom, where he was found by the husband and driven from the house, the conduct of the policeman was "misconduct," within a statute providing that officers will not be removable at will for political reasons or for any other cause than "incapacity, misconduct, nonresidence, or disobedience of just rules and regulations." *Winters v. Board of Police Com'rs of Jersey City*, 71 Atl. 50, 51, 77 N. J. Law, 153.

The complaint against a police captain, alleging that a merchant complained to the officer of an obstruction, consisting of a stone step on the sidewalk in front of a certain house, and that the officer told him nothing could be done for him unless he would swear out a warrant, is sufficient to charge the offenses of misconduct in office and incompetency, triable under Rev. Codes, § 3309, by the police trial board, in view of a police regulation requiring an officer, to whom complaint is made, to remedy the matter, or, if he cannot do so at once, to make a memorandum at police headquarters of the complaint, so that it may receive proper attention. *Bailey v. Examining and Trial Board of Police Department of City of Helena*, 122 Pac. 572, 573, 45 Mont. 197.

Where a deputy county auditor in Minnesota authorized by law to act in the name of his principal and for whose official acts the auditor and his bondsmen were responsible to the county, and to any person injured by his "misconduct in office" (Gen. St. Minn. 1894, §§ 710, 5951), issued spurious refund orders on the county treasurer in favor of fictitious payees, purporting to be for the refunding of taxes received through redemption from tax sales, and procured the orders to be authenticated by the chairman of the board of county commissioners and forged the names of the fictitious payees to assignments thereof and sold them to a bank, any loss sustained by the bank through its pur-

chase could not be attributable to the official "misconduct in office" of the deputy in issuing the same, but the proximate cause was his individual act in forging the assignments and selling the orders as genuine, and, as the orders were nonnegotiable, the bank was put on inquiry, and acquired no greater rights than the supposed payees, and had no claim to recover any loss either from the county or from the sureties on the auditor's bond. *National Surety Co. v. State Savings Bank*, 156 Fed. 21, 25, 84 C. C. A. 187, 14 L. R. A. (N. S.) 155, 13 Ann. Cas. 421.

A deputy county auditor in Minnesota, authorized by law to act in the name of his principal and for whose official acts the auditor and his bondsmen were responsible, not only to the county, but to any person injured by his "misconduct in office" (Gen. St. Minn. 1894, §§ 710, 5951), issued spurious refund orders on the county treasurer in favor of fictitious payees, purporting to be for the refunding of invalid tax sale certificates. He procured the orders to be authenticated by the chairman of the county board, and they were presented to the county treasurer, who indorsed thereon that there were no funds available, but that they would be paid with 7 per cent. interest when there was money in the treasury for the purpose. Such deputy forged the names of the fictitious payees to assignments and sold the orders to a state savings bank, to which they were paid by the treasurer with interest a year later. The deputy auditor bore a good reputation, and his integrity had never previously been questioned. The bank was expressly authorized by statute to invest funds in such orders, and had done so before in the usual course of business. On discovering the forgeries, the county brought suit on the auditor's bond and recovered a judgment which was paid by the surety, which then brought suit against the bank. Held that, although the orders were not negotiable, the bank was not chargeable with any negligence in their purchase, but that the loss was one caused by the "misconduct in office" of the deputy auditor for which the surety was liable, and that it could not recover over against the bank. *National Surety Co. v. Arosin*, 198 Fed. 605, 606, 117 C. C. A. 313.

## MISDELIVERY

"Misdelivery" of goods is the same as a total failure to deliver them at all, and is deemed a conversion of the property by the carrier. Leaving goods at the wrong place may constitute a misdelivery and conversion of them, as well as delivering them to the wrong person. *Cleveland, C., C. & St. L. Ry. Co. v. C. & A. Potts & Co.*, 71 N. E. 685, 689, 33 Ind. App. 564 (citing *Elliot, Railroads*, § 1526; *Baltimore & O. R. Co. v. O'Donnell*, 32 N. E. 476, 49 Ohio St. 489, 21 L. R. A. 117, 34 Am. St. Rep. 579; *Houston & T. C. Ry. Co.*

*v. Adams*, 49 Tex. 748, 30 Am. Rep. 116; *Jeffersonville R. Co. v. White*, 69 Ky. [6 Bush] 251; *Claffin v. Boston & L. R. Co.*, 30 Mass. [7 Allen] 341).

## MISDEMEANOR

See Cases of Misdemeanor; High Crimes and Misdemeanors.

"A 'misdemeanor' is an act committed or omitted in violation of the public law, either forbidding or commanding it." *Commonwealth v. R. I. Sherman Mfg. Co.*, 75 N. E. 71, 72, 189 Mass. 76, 4 Ann. Cas. 268 (quoting and adopting definition in 4 Black. Com. 5).

"Misdemeanor" is generally understood to mean the lower criminal offense, as distinguished from a felony. *United States v. Stevenson*, 30 Sup. Ct. 85, 87, 215 U. S. 190, 54 L. Ed. 153.

A "misdemeanor" is misconduct or offense inferior to a felony. *People v. Butts*, 105 N. Y. Supp. 677, 678, 121 App. Div. 228.

A "misdemeanor" is a minor crime which does not amount to a felony. *State v. Doran*, 59 Atl. 440, 441, 99 Me. 329, 105 Am. St. Rep. 278.

A "misdemeanor" is defined to be an indictable offense which does not amount to a felony. *State v. Melles*, 42 South. 199, 200, 117 La. 656; *United States v. Zarafontis*, 150 Fed. 97, 101, 80 C. C. A. 51, 10 Ann. Cas. 290 (quoting 4 Chitty, Blackstone, 5, and note).

A "misdemeanor" is an offense punishable by fine or imprisonment in the county jail only. *State v. Wilson*, 126 S. W. 996, 140 Mo. App. 726.

A "misdemeanor" is defined by Rev. St. 1899, § 2395, to mean every offense punishable only by a fine or imprisonment in a county jail, or both. *State ex rel. Butler v. Foster*, 86 S. W. 245, 248, 187 Mo. 590.

"Misdemeanors," in the state of Indiana, are such wrongs of a public nature as are punished by criminal proceedings in the name of the state. The charges must be preferred upon oath in the form of an affidavit, information, or indictment. The process is a warrant, and it is served by arresting the person of the defendant. The punishment in all except capital cases is by fine or imprisonment or disfranchisement, or by two or more of these, and, whenever it is by fine only, the defendant stands committed until the fine is paid or bail is entered. *Adams Express Co. v. State*, 67 N. E. 1033, 1039, 161 Ind. 328.

The word "misdemeanor," as used in Charter of City of Kingston, § 51, providing that certain persons shall be punished according to the provisions of the Code of Criminal Procedure as for misdemeanor, includes the whole class of crimes bearing that



name. *People v. Schermerhorn*, 112 N. Y. Supp. 222, 223, 59 Misc. Rep. 146.

Maliciously threatening to accuse another of crime is a "misdemeanor." *Schultz v. State*, 116 N. W. 259, 264, 135 Wis. 644 (dissenting opinion of Judge Timlin, citing *Bouv. Law Dict.*; Stat. 1898, § 4380).

To solicit the commission of an offense which is a felony is a "misdemeanor" at common law, and it is immaterial whether the offense which is solicited is made a felony by act of Parliament or by the common law. One who solicits that he be bribed solicits the commission of a felony and is therefore guilty of a common-law "misdemeanor." *State v. Sullivan*, 84 S. W. 105, 109, 110 Mo. App. 75 (distinguishing *State v. Priestley*, 74 Mo. 24, *State v. Harney*, 14 S. W. 657, 101 Mo. 470).

B. & C. Comp. § 1067, subd. 1, authorizes disbarment on an attorney's conviction of felony or misdemeanor involving moral turpitude, and makes the conviction record conclusive evidence. Held, that the words "felony" and "misdemeanor" were used in their statutory sense, and, there being no offense known to the state law as "conspiracy to suborn perjury," an attorney's conviction of such offense in a federal court was not conclusive evidence, in a disbarment proceeding, of his commission of an act warranting disbarment. *State v. Biggs*, 97 Pac. 713, 714, 52 Or. 433.

#### Felony distinguished

See Felony.

#### Assault

Under Revisal 1905, § 3621, making it a felony for one to maliciously assault another with a deadly weapon by waylaying, etc., and section 3291, defining a misdemeanor as an offense not punishable by death or imprisonment in the state's prison, and Acts 1870-71, p. 94, c. 43, punishing by fine or imprisonment a person convicted of an assault, with or without intent to kill, a prosecution for an assault with a deadly weapon with intent to kill is a prosecution for a misdemeanor, and not for malicious mischief, defined by section 2676 as willfully injuring personal property with malice to the owner, and is barred in two years by section 3147, providing that all misdemeanors, except for "malicious mischief, and other malicious misdemeanors," shall be presented within two years after the commission of the same, the words "other malicious misdemeanors" being intended to describe an offense of which malice is a necessary ingredient, as in the case of malicious mischief. *State v. Frisbee*, 55 S. E. 722, 724, 142 N. C. 671.

#### Contempt

A contempt proceeding is classified as a misdemeanor, and not as a felony. *Bullock Electric & Mfg. Co. v. Westinghouse Elec-*

*tric & Mfg. Co.*, 129 Fed. 105, 107, 63 C. C. A. 607.

Ky. St. § 1127, divides all crimes into felonies and misdemeanors, defining "felonies" as offenses punishable with death or confinement in the penitentiary, and "misdemeanors" as all other offenses, whether at common law or by statute. Chapter 36, art. 4, subd. 6 (chapter 15, art. 12), classifies a contempt as a misdemeanor. Section 1138 (section 241) provides that prosecutions by the commonwealth to recover a penalty for violation of any penal statute shall be commenced within one year after the right to such penalty accrued, with immaterial exceptions. Held that, criminal contempt being a misdemeanor, and the punishment therefor regulated by statute, a prosecution therefor is a prosecution by the commonwealth to recover a penalty, within section 1138, barred by limitations after one year from the time that the penalty accrued. *Gordon v. Commonwealth*, 133 S. W. 206, 208, 141 Ky. 461.

#### Criminal libel

Criminal libel is a "misdemeanor," within Code, § 7, defining a misdemeanor to be any public offense, the punishment for which is not death or confinement in the penitentiary, and hence, under the express provisions of section 184, the trial may be had in the absence of defendant. *Walston v. Commonwealth (Ky.)* 102 S. W. 275.

#### Deterring witness from appearing or giving evidence

Rev. St. 1899, § 2041, provides that every person who shall by bribery or other means deter a witness from appearing or giving evidence in any cause shall be deemed guilty of a misdemeanor, and that, if the cause be a prosecution for a felony, the person so offending shall be punished by imprisonment in the penitentiary for two years, or in the county jail, or by fine. Section 2393 provides that the term "felony" shall be construed to mean any offense punishable with imprisonment in the penitentiary or with death, and by section 2395 the term "misdemeanor" is to be construed as including every offense punishable only by fine or imprisonment in the county jail, or both. Held, that an offense within the proviso of section 2041 is a misdemeanor, though punishable by imprisonment in the penitentiary. *State ex rel. Butler v. Foster*, 86 S. W. 245, 248, 187 Mo. 590.

#### Obstructing street

Under Rev. Laws, c. 215, § 1, defining a "felony" as a crime punishable by death or state imprisonment, and making other offenses misdemeanors, violation by a railroad company of St. 1906, c. 463, pt. 2, § 155, by obstructing a street, being punishable by a fine only, is a "misdemeanor." *Commonwealth v. New York Cent. & H. R. R. Co.*, 92 N. E. 766, 768, 206 Mass. 417, 19 Ann. Cas. 529.

### Possession and sale of counterfeit trade-marks and labels

The offense of having in possession and selling counterfeit trade-marks and labels, in violation of Pen. Code, § 364, subd. 4, is a "misdemeanor," and hence defendants, acting in concert in the commission of such offense, may be properly tried together. *People v. Strauss*, 88 N. Y. Supp. 40, 43, 94 App. Div. 453.

### Vagrancy

"Vagrancy," as defined in Pen. Code, § 647, subd. 6, declaring guilty of vagrancy every idle, lewd, or dissolute person, or associate of known thieves, or every person who wanders about the streets, at late or unusual hours of the night, without any visible or lawful business, though it cannot be committed by a single act observable at one time, is a "misdemeanor" that can be committed "in the presence" of an officer, so as to justify him, under sections 836-840, in arresting him without a warrant. Defendant, for the purpose of rebutting the evidence of his vagrancy, which was claimed to have existed to the knowledge of the officer arresting him, so as to justify the arrest without a warrant, having testified that he had a lease, covering several months prior and up to the time of the arrest, of a certain tenement, which he had sublet to prostitutes, and that he had in the meantime purchased a mining location, on which he intended to go as soon as the lease expired, may, for the purpose of showing that he had no lawful business, which fact, in connection with his wandering about the streets at late and unusual hours of the night, would constitute him a vagrant under Pen. Code, § 647, subd. 6, be required on cross-examination to testify that during the running of his lease he had no other business except gambling. *People v. Craig*, 91 Pac. 997, 1001, 152 Cal. 42.

### Violation of anti-trust law

St. 1907, p. 984, c. 530, § 1, defining "trusts," and for a violation thereof providing a fine of not less than \$50 nor more than \$5,000, or imprisonment not less than six months nor more than a year, or both, prescribes a "misdemeanor," since under Pen. Code, §§ 16, 17, a "felony" is a crime punishable by death or by imprisonment in the state prison, and every other crime is a "misdemeanor." *Union Ice Co. v. Rose*, 104 Pac. 1006, 1007, 11 Cal. App. 357.

### Violation of immigration law

Immigration Act Feb. 20, 1907, c. 1184, § 4, provides that "it shall be a misdemeanor" for any person to prepay the transportation or in any way to assist or encourage the importation of any contract laborer into the United States. Section 5 provides that for every violation of section 4 the persons knowingly violating the same "shall forfeit and pay for every such offense the sum of \$1,000, which may be sued for and recovered by the

United States or by any person who shall first bring his action therefor," etc. Held, that section 4 defines a criminal offense, and that, although the act provides no criminal punishment therefor, an indictment will lie under Rev. St. § 5440, for a conspiracy to commit such offense. *United States v. Tsokas*, 163 Fed. 129, 130, 131.

### Violation of license law

A violation of a license law is a "misdemeanor." *Perry v. Man*, 1 R. I. 263, 265.

### Violation of liquor law

The offense of manufacturing, selling, bartering, giving away, or otherwise furnishing any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of the prohibition article of the Constitution, is a "misdemeanor." *Ex parte Cain*, 93 Pac. 974, 976, 20 Okl. 125.

Since the punishment for retailing spirituous liquors is that fixed for a misdemeanor, under Revisal 1905, § 3291, providing that a "felony" is a crime punishable by either death or imprisonment in the state's prison, and that any other crime is a "misdemeanor," the word "feloniously," in a warrant charging that accused unlawfully, willfully, and feloniously retailed spirituous liquors, is superfluous. *State v. Shine*, 62 S. E. 1080, 1081, 149 N. C. 480.

An ordinance entitled "An ordinance concerning misdemeanors" is sufficiently broad to cover a provision prohibiting any one from engaging in any calling on Sunday, or from keeping open any place of business, or from permitting persons to resort thereto for the purpose of drinking intoxicating liquors on Sunday. *Town of Lovilia v. Cobb*, 102 N. W. 496, 497, 126 Iowa, 557.

### Violation of municipal ordinance or resolution

The violation of a municipal ordinance is not a "misdemeanor," within the meaning of Pen. Code 1895, §§ 2, 31, defining felony and misdemeanor, since those sections of the Code relate only to offenses against the public laws of the state and not to infractions of local laws of municipalities. *Pearson v. Wimblish*, 52 S. E. 751, 755, 124 Ga. 701, 4 Ann. Cas. 501.

The word "misdemeanor," in statutes conferring power on municipal corporations, is not synonymous with the same term as used at common law, or in general statutes defining offenses against the state, but has a more restricted meaning, and is limited to offenses against the smaller local government; and, while an offense against a city may also be an offense against the state, there are many offenses against municipalities which are not offenses against the state, and which the legislative bodies of the municipalities are authorized to define and declare by ordinance, subject to the condition that the ordinance is not in conflict with the Con-

stitution or general laws, or the charter, and is not unreasonable. *O'Haver v. Montgomery*, 111 S. W. 449, 450, 120 Tenn. 448, 127 Am. St. Rep. 1014.

Every offense punishable by fine or imprisonment, or both, is at least a "misdemeanor" which concerns the state at large and not specially any municipality. A violation of the resolution of the board of health of a town in Milwaukee county outside the city of Milwaukee, which prohibits the bringing therein of garbage, and which provides that any violation thereof shall be punishable under St. 1898, § 4608, making any person violating any regulation of any board of health punishable by imprisonment in the county jail or by a fine, is a "misdemeanor," within Laws 1899, c. 218, § 5, taking away from the justice of the peace of Milwaukee county jurisdiction of criminal actions, including misdemeanors, arising in the county, triable before a justice of the peace. *Stoltman v. Lake*, 102 N. W. 920, 921, 124 Wis. 402 (citing *City of Oshkosh v. Schwartz*, 13 N. W. 552, 55 Wis. 483).

A resolution of the board of health of a town in Milwaukee county outside the city of Milwaukee prohibits the bringing therein of garbage, etc., and provides that any violation thereof shall be punishable under Rev. St. 1898, § 4608, which makes any person who shall violate any order or regulation of any board of health punishable by imprisonment in the county jail not more than three months or by a fine not exceeding \$100. Rev. St. 1898, c. 142, § 3294, provides that in all cases not otherwise specially provided for by law, where a forfeiture shall be incurred, and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action; that when such act or omission is punishable by fine and imprisonment, or by fine or imprisonment, or is specially declared by law to be a misdemeanor, it shall be deemed a misdemeanor within the chapter, and that the word "forfeiture," as used in the chapter, shall include any penalty in money or goods other than a fine. Held, that a violation of the resolution is a misdemeanor, within Laws 1899, p. 359, c. 218, § 5, taking away from justices of the peace of Milwaukee county jurisdiction of criminal actions, including misdemeanors arising in the county otherwise triable before a justice of the peace, so as to deprive a justice of the peace of jurisdiction thereof notwithstanding the amendment of Laws 1899, p. 359, c. 218, § 5, by Laws 1901, p. 89, c. 70, § 1, and Laws 1903, p. 613, c. 388, adding thereto that nothing therein contained shall be construed to deprive any justice of the peace of any town in Milwaukee county, except only the city of Milwaukee, of jurisdiction of complaints for the violation of any ordinance of any such town. *Stoltman v. Town of Lake*, 102 N. W. 920, 921, 124 Wis. 402.

## MISDEMEANOR IN OFFICE

Within a statute providing that if any clerk shall knowingly and willingly do any act contrary to the duties of his office, or shall knowingly and willfully fail to perform any act or duty required of him by law, he shall be deemed guilty of a "misdemeanor in office," and authorizing his removal on information that he has been guilty of a "misdemeanor in office," the circuit judge is without jurisdiction to remove a clerk of the circuit court from office because he had been informed against for murder wholly disconnected with his office. *State ex rel. Henson v. Sheppard*, 91 S. W. 477, 480, 482, 192 Mo. 497.

## MISFEASANCE

"Misfeasance" is the improper doing of an act which a person might lawfully do." It is a failure to use, in the performance of a duty owing to an individual, that degree of care, skill, and diligence which the circumstances of the case reasonably demanded. *State, to Use of Cardin, v. McClellan*, 85 S. W. 267, 268, 113 Tenn. 616, 3 Ann. Cas. 992.

A "misfeasance" is the failure to do something imposed upon the person by law as a reasonable member of society, or the failure to use reasonable care and diligence in the performance of a duty imposed by contract which results in an injury to a third person. *Irvin v. Callaway*, 55 S. E. 1039, 1040, 127 Ga. 246 (citing *Southern Ry. Co. v. Grizzle*, 53 S. E. 244, 124 Ga. 737, 110 Am. St. Rep. 191).

"Misfeasance" is the performance of an act in an improper manner, whereby some one receives an injury." The directors of a county fair association failing to securely protect patrons of the grand stand from injuries by a wild ball pitched or batted in the game, one of the amusements of the county fair, are not liable to such patrons as for misfeasance. *Williams v. Dean*, 111 N. W. 931, 933, 134 Iowa, 216, 11 L. R. A. (N. S.) 410.

### Nonfeasance distinguished

"Nonfeasance" is doing nothing, while "misfeasance" is doing improperly. *Stiewel v. Borman*, 37 S. W. 404, 405, 63 Ark. 30, 36.

"Misfeasance" is the performance of an act, which might lawfully be done, in an improper manner, resulting in injury to another, while "nonfeasance" is the nonperformance of an act which should be performed. *Haynes' Adm'rs v. Cincinnati, N. O. & T. P. R. Co.* 140 S. W. 176, 179, 145 Ky. 209, Ann. Cas. 1913B, 719.

"Misfeasance" is the improper doing of an act, as distinguished from "nonfeasance," which is the total omission to do an act. If a party makes a gratuitous engagement, actually enters upon the execution of the business, and does it amiss through want of due

care, by which danger ensues to the other party, an action will lie for misfeasance. It has been held that misfeasance may involve to some extent the idea of not doing, as where an agent, while engaged in the performance of his undertaking, does not do something which it is his duty to do under the circumstances, as, for instance, when he does not exercise that care which a due regard for the right of the other party requires. Such negligence as would be actionable in any relation of life is "misfeasance" by not doing. *Southern Ry. Co. v. Rowe*, 59 S. E. 462, 466, 2 Ga. App. 557.

"A distinction ordinarily is taken between acts of 'misfeasance,' or positive wrongs, and 'nonfeasance,' or mere omissions of duty. The master is always liable to third persons for the misfeasances of his servants in all cases within the scope of his employment. The principal is also liable to third persons for like misfeasances of his agent. The agent is also liable to third persons for his own misfeasances and positive wrongs, but he is not liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability, in such cases, is to his principal. The distinction between misfeasance and nonfeasance, between acts of direct positive wrongs and mere neglects of agents as to their personal liability, seems to be founded on this ground. No authority whatever from a superior to an inferior can furnish the latter a just defense for his own positive wrongs or trespasses, for no man can authorize another to do a positive wrong. But in respect to nonfeasances, or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation except to those to whom he has become directly bound or amenable for his conduct." *Bryce v. Southern R. Co.*, 125 Fed. 958, 962 (quoting and adopting definitions in *Story, Ag.* [9th Ed.] §§ 308, 309).

"Misfeasance" and "nonfeasance," as used in connection with the acts of agents, is often difficult of determination. "Misfeasance" means a positive wrong. It may involve also, to some extent, the idea of not doing, as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances. The distinction to be observed between mere nonfeasance and misfeasance was considered in *Osborne v. Morgan*, 130 Mass. 103 (39 Am. Rep. 437), where the court said: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal,

but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But, if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing, but it is misfeasance, doing improperly." Where an agent has complete control of a tenement house, and constructs a new walk in the court, leaving a large hole in the walk, and plaintiff, a new tenant, without previous knowledge of the existence of the hole, stepped into it after dark and was severely injured, it is misfeasance of the agent rendering him liable, and not a mere nonfeasance. *Carson v. Quinn*, 106 S. W. 1088, 1091, 127 Mo. App. 525.

"There is a distinction between 'nonfeasance' and 'misfeasance' or 'malfeasance'; and this distinction is often of great importance in determining an agent's liability to third persons. In this connection 'nonfeasance' means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking, which he has agreed with his principal to do; 'misfeasance' means the improper doing of an act which the agent might lawfully do, or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons; and 'malfeasance' is the doing of an act which he ought not to do at all. It is not every omission or failure to perform a duty that will constitute a nonfeasance, but only an omission to perform such distinct duties as he owes to his principal, as distinguished from those which he owes to third persons, or the public in general as a member of society. Nonfeasance does not extend to the omission or failure to do some act, whereby a third person is injured after he has once entered upon the performance of his contractual obligations. For example, if an agent undertakes to perform certain acts for another, and he refuses or fails to enter upon such performance, it is nonfeasance; but if he once begins the performance of such acts, and, in doing so, fails or omits to do certain acts which he should have done, whereby a third person is injured, it is not a nonfeasance, but a misfeasance. Misfeasance may involve the omission to do something which ought to be done, as where an agent, engaged in the performance of his undertaking, omits to do something which it is his duty to do under the circumstances, as when he does not exercise that degree of

care which due regard for the rights of others requires." *Orcutt v. Century Bldg. Co.*, 99 S. W. 1062, 1068, 201 Mo. 424, 8 L. R. A. (N. S.) 929 (quoting and adopting definition in *Clark & Skyles, Law of Agency*, § 596).

"Nonfeasance" is the total omission or failure of the agent to enter upon the performance of a distinct duty or undertaking which he has agreed with his principal to do. "Misfeasance" means the improper doing of an act which the agent might lawfully do." *Southern Ry. Co. v. Miller*, 57 S. E. 1090, 1092, 1 Ga. App. 616 (quoting and adopting the definitions in *Southern Ry. Co. v. Grizzle*, 53 S. E. 244, 124 Ga. 735, 110 Am. St. Rep. 191).

The distinction between "nonfeasance" and "misfeasance" has been expressed by the courts of the state as follows: "If the duty omitted by the agent or servant devolved upon him from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable." *Dunham v. City Trust Co. of New York*, 101 N. Y. Supp. 87, 89, 90, 115 App. Div. 584.

The negligence of a mining company's superintendent in charge of its mine in maintaining a shaft in a dangerous condition, and in permitting its use by third persons unaware of its dangerous character, is not a "nonfeasance" for which he is responsible to the company only, but is "misfeasance" for which he is liable when such negligence is the proximate cause of injuries. *Hagerty v. Montana Ore Purchasing Co.*, 98 Pac. 643, 646, 38 Mont. 69, 25 L. R. A. (N. S.) 856.

The failure of a gas company operating as an agent of a city under contract for the illumination of the city streets to perform its duty to keep service pipes from its mains to the city lamps in repair involves an affirmative element of negligence amounting to misfeasance, and it is liable to any one injured in consequence thereof, for an agent who undertakes and enters on the execution of a particular work, must use reasonable care in the manner of executing it, and he cannot by abandoning its execution, exempt himself from liability to any person suffering injury by reason of his act, because that act is not "nonfeasance," but is "misfeasance." *Consolidated Gas Co. of Baltimore City v. Connor*, 78 Atl. 725, 729, 114 Md. 140, 32 L. R. A. (N. S.) 809.

## MISFORTUNE

Unavoidable casualty or misfortune, see Unavoidable Casualty.

## MISHAP

An injury to a servant from a cause which could not have been reasonably an-

ticipated, or anticipated under the circumstances surrounding the accident, may be characterized as a "mishap," for the result of which a master is not liable. *Hall v. Missouri & Kansas Tel. Co.*, 124 S. W. 557, 558, 141 Mo. App. 183.

## MISINSTRUCT

Where the defendant sugar company agreed that its agents should give instructions regarding the growing and delivery of beets to be raised on plaintiff's land, and plaintiff sues for damages because of misinstructions, the word "misinstruct," as understood and used in charging that if defendant misinstructed plaintiff in the growing of beets, etc., the verdict must be for plaintiff, means to instruct amiss or give wrong or improper instructions. *Smith v. Billings Sugar Co.*, 94 Pac. 839, 841, 37 Mont. 128, 15 L. R. A. (N. S.) 837.

## MISJOINDER

See, also, Multifariousness.

While not entirely synonymous, the common-law term "misjoinder" and the equity term "multifarious" have much in common. They each token improper joinder, and both have reference to the confusing result wrought thereby. Neither goes to the substance of complainant's claim, but merely asserts improper joinder of causes of action. Since these terms go only to form, and not to substance, objections for either or both are not defenses, within the accepted meaning of that term. *Skains v. Barnes*, 53 South. 268, 270, 168 Ala. 426.

There is no "misjoinder" of causes of action where a complaint states a good cause of action against one defendant but none against the other. *Reid v. Hennessy Co.*, 124 Pac. 273, 274, 45 Mont. 462.

## MISLEADING

See Grossly Misleading.

## MISMANAGE—MISMANAGEMENT

"Mismanagement," as used in Civ. Code 1902, § 2023, providing that any person who shall receive bodily injury or damage through a defect in any street, causeway, bridge, or public way, or by reason of defect or "mismanagement" of anything under control of the corporation within the limits of any town or city, may recover in an action against the same, means "mismanagement" in making repairs on the streets, so that the corporation should be held liable, not only for neglect in making repairs on the streets, but also for "mismanagement" of anything under the control of the corporation in making such repairs. *Bryant v. City Council of Orangeburg*, 49 S. E. 229, 281, 70 S. C. 137 (citing *Dunn v. Town of Barnwell*, 21 S. E.

315, 43 S. C. 401, 49 Am. St. Rep. 843; Acker v. Anderson, 20 S. C. 495; Brown v. Laurens County, 17 S. E. 21, 38 S. C. 282; Mason v. Spartanburg County, 19 S. E. 15, 40 S. C. 393, 42 Am. St. Rep. 887; Parks v. City Council of Greenville, 21 S. E. 540, 44 S. C. 172).

An allegation in an application for removal of a receiver of a company that the officers of the company mismanaged its affairs is not libelous or slanderous of the officers; the word "mismanaged" not denoting any wrong or turpitude on the part of the persons managing. *Lebovitch v. Joseph Levy & Bros. Co.*, 54 South. 978, 981, 128 La. 518.

Gen. St. Kan. 1901, § 5858, providing that railroad companies shall be liable for damages to any employé of said companies in consequence of any negligence of their agents or of any mismanagement of their engineers or other employés to any person sustaining such damage, does not make a distinction between agents on the one hand and engineers and other employés on the other, nor between negligence and "mismanagement," but by the act a company is made responsible for any mismanagement of its engineers or other employés to any person sustaining damage thereby. *Missouri, K. & T. Ry. Co. of Texas v. Kellerman*, 87 S. W. 401, 404, 39 Tex. Civ. App. 274.

## MISNOMER

Publication of an original notice designating the defendant as "Chase Marker," instead of "Chan Marker," constituted a fatal "misnomer." *Schaller & Son v. Marker*, 114 N. W. 43, 44, 136 Iowa, 575.

If two names are commonly used as the same name, although they differ in sound, if either is used for the other, it is not a "misnomer." Where one name is an abbreviation of the other, but both are taken by common use to be the same, both differing in sound, the use of one for the other is not a misnomer. Where the two names are derived from the same source, the use of one for the other is not a misnomer; but this must be held to mean the same source, as defined and understood in the English language, and not as including names derived from the same source in some other language. The names Helen and Ellen will not be regarded as the same name. *Thomas v. Desney*, 10 N. W. 315, 316, 57 Iowa, 58 (citing *Trimble v. State* [Ind.] 4 Blackf. 437; 4 Bac. Abr. "Misnomer").

## MISPRISON

See Clerical Misprison.

Misprison of felony at common law is a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with or subsequent

assistance of him as will make the concealer an accessory before or after the fact. *State v. Wilson*, 67 Atl. 533, 80 Vt. 249.

At common law it was one's duty to prevent the commission of a felony, with force if necessary, and the failure to do so constituted a misdemeanor, called misprison of felony. *Suell v. Derricott*, 49 South. 895, 901, 161 Ala. 259, 23 L. R. A. (N. S.) 996, 18 Ann. Cas. 636.

Civ. Code Prac. § 517, defines "misprison" of a clerk to consist in the rendition of judgment before the action stands for trial, or to render judgment against an infant, excepting married women or persons of unsound mind, until a defense or report is filed pursuant to section 36, subsec. 3. Held not to include the rendition of a judgment not in compliance with a prior order of the Court of Appeals in an equity suit after a retrial erroneously granted by the court; such error being judicial, and not ministerial. *Gayheart v. Childers*, 125 S. W. 1085, 1087, 137 Ky. 472.

## MISREPRESENTATION

See Fraudulent Misrepresentation; Knowingly Misrepresent; Material Misrepresentation.

Element of fraud, see Fraud.

Estoppel by misrepresentation, see Estoppel in Pais.

See, also, False Representation; Fraud; Fraudulent Representation.

A "misrepresentation" must be an affirmative statement or affirmation of some fact, in contradistinction to a concealment or failure to disclose, and to a mere expression of opinion. *Lee v. Haile*, 114 S. W. 403, 405, 51 Tex. Civ. App. 632 (citing 2 Pom. Eq. Jur. art. 877).

"To profess an intention to do or not to do when a party intends the contrary is as clear a case of 'misrepresentation and of fraud' as could be made." *Schrafft v. Fidelity Trust Co.*, 62 Atl. 933, 935, 73 N. J. Law. 57 (quoting and adopting the language of *Bigelow*, Fraud, 484).

A "misrepresentation" as the basis of rescission must be material; but it can be material only when it is of such a character that, if it had not been made, the contract would not have been entered into. The misrepresentation need not be the sole cause of the contract, but it must be of such nature, weight, and force that the court can say without it the contract would not have been made. *Greenawalt v. Rogers*, 91 Pac. 528, 528, 151 Cal. 630 (citing *Colton v. Stanford*, 23 Pac. 16, 28, 82 Cal. 351, 399, 16 Am. St. Rep. 137).

A "misrepresentation," the falsity of which will afford ground for a bill for rescission of a contract, must be as to an existing fact and an affirmative statement of facts in contradistinction to the mere expression of an opinion which is ordinarily not presumed

to deceive or misrepresent. *Dotson v. Kirk*, 180 Fed. 14, 23, 108 C. C. A. 368.

To entitle one to sue for fraud and deceit, it is necessary that the false representation be made directly to him, or that it be made by defendant personally; it being sufficient that defendant authorized it. *Keeler v. Seaman*, 95 N. Y. Supp. 920, 922, 47 Misc. Rep. 292.

A representation that a worthless medicine is a sure cure for hog cholera is a "misrepresentation of fact" and is actionable, and the representation cannot be said to be a mere expression of opinion, and hence not actionable. *McDonald v. Smith*, 102 N. W. 668, 670, 139 Mich. 211.

While ordinarily a "misrepresentation" must consist of an assertion or statement such as misleads another to his injury, as distinguished from an assertion or statement which is obviously the expression of an opinion, yet it is well settled that a misrepresentation, by reason of which injury results, may consist of concealment of truth, as well as of positive falsification. *United States v. Sterling Salt Co.*, 200 Fed. 593, 597.

Moral delinquency is a necessary element in "misrepresentation." This immoral element consists in the necessary guilty knowledge and consequent intent to deceive, sometimes designated by the technical term "scienter." The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. No "misrepresentation" is fraudulent at law unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time he makes it. *Mason v. Moore*, 76 N. E. 932, 936, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240 (citing 2 Pom. Eq. Jur. § 884).

"A 'misrepresentation to be material' should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion. A representation, which merely amounts to a statement of opinion, goes for nothing, though it may be true, for a man is not justified in placing reliance upon it." Where defendant, a machinist, with ample facilities to ascertain the exact condition of an ice plant, was offered every opportunity to determine its condition before purchasing it from the successors of a corporation which had been unable to operate it successfully, of which defendant was fully informed, the doctrine of caveat emptor applied, and defendant, in an action for the price, was not entitled to a set-off and damages because of alleged false representations that the plant, with some repairs, would turn out 4,400 pounds of ice a day. *Williamson v. Holt*, 61 S. E. 384, 386, 147 N. C. 515, 17 L. R. A. (N. S.) 240.

The word "misrepresentation," in Rev. St. 1899, § 8528, as amended, authorizing the board of dental examiners to revoke the

license of any dentist for "fraud, deceit, or misrepresentation" in the practice of dentistry, means untrue, improper, or unfaithful representation, such as a false statement of account or as a misrepresentation of one's motives, and the words, when so construed, prevent the statute from being invalid for uncertainty. *State ex rel. Williams v. Purl*, 128 S. W. 196, 201, 228 Mo. 1.

The "misrepresentation" which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge, and it must be a representation on which he relied, and by which he was actually misled; and where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the buyer does not avail himself of such means, he will not be heard to say that he was deceived by the representations. *Long v. Kendall*, 87 Pac. 670, 673, 17 Okl. 70.

#### In insurance

The terms "misrepresentation" and "suppression of fact by the employer" contained in a policy of guaranty insurance, which provides "that any material misstatements or suppression of fact by employer in any statement or declaration to the company, or in any claim made under this bond, shall render the bond void from the beginning," mean the same thing. Misrepresentations is here used in a somewhat more restricted sense than ordinarily. It has reference to misstatements, known to be untrue, or which are positively stated as true without actual knowledge by the insured, and made under circumstances which call for such knowledge as might be based upon reasonable care previously exercised. It is akin to the expression "suppression of fact by the employer," which is a species of misrepresentation as it leads the inquirer to believe what is apparently true by concealing the fact which shows it to be not true. One is the active, and the other is the passive, phase of the same thing. One is the false statement and the other is the suppression of the truth; each intended to mislead as to the matter pertaining to the risk. *Fidelity & Guaranty Co. of New York v. Western Bank (Ky.)* 94 S. W. 1, 4.

Under Rev. St. 1899, § 7890 (Ann. St. 1906, p. 3746), providing that no misrepresentation made in obtaining a policy of life insurance shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy has become due, the word "misrepresentation" embraces statements in the nature of a warranty, which are introduced into the policy as part of it. *Salts v. Prudential Ins. Co.*, 120 S. W. 714, 716, 140 Mo. App.

142 (citing *Jacobs v. Omaha Life Ass'n*, 48 S. W. 462, 146 Mo. 523; *Jenkins v. Covenant Mut. Life Ins. Co.*, 71 S. W. 688, 171 Mo. 375; *Keller v. Home Life Ins. Co.*, 95 S. W. 903, 198 Mo. 440).

## MISS

### MISSED SHOT

The term "missed shots," as used in the vocabulary of miners, means charges of powder that had failed to explode at the proper time. *Bird v. Utica Gold Mining Co.*, 84 Pac. 256-259, 2 Cal. App. 674.

### MISSING

*Burns' Ann. St.* 1894, § 7618, requires the Secretary of State, as soon as the acts are printed to certify that he has compared the printed with the enrolled acts and joint resolutions and found them correctly printed. It also authorizes him to use the engrossed bills; he to return them to the state library when the printing is complete. Held, that a certificate showing that a certain chapter of the acts of a given year was compared with the engrossed act, "the enrolled bill being missing," was prima facie evidence that there was such an enrolled bill, and that the same was an existing law, the word "missing" meaning that there was to the knowledge of the Secretary such enrolled bill, but that it was lost or gone at the time he compared the printed act with the engrossed act. *State v. Wheeler*, 89 N. E. 1, 3, 172 Ind. 578, 19 Ann. Cas. 834.

## MISSION

### MISSIONARY

The terms "missionary" and "missionary society" are of common use and have a well-known meaning which is the same whether the use is intended to be precise and technical or merely that of everyday speech. By universal acceptance the word "missionary," whether as a noun or as an adjective, embraces not only the conception of religious, charitable, or educational work or worker, but also work done through philanthropic motives for the welfare of others too poor, too unappreciative, or too indifferent to do it themselves, and by persons supported or means furnished in part at least by some agency of which those for whom the work is done do not form a sustaining part. The derivative of the word implies a sending, and so it is that in both technical and common speech the idea of sending forth to the service of others, the doing of a work for others, is associated with its meaning. Sometimes it is used to characterize the agency sent, sometimes the agency sending, but always there is associated with the notion of a benevolent service for others that of such service sent, whether far or near, by those who maintained it to those who need it.

There is no use of the term as descriptive of self-supporting religious effort in the maintenance by, within, or for an ecclesiastical society or parish of churches, church service, Sunday schools, and the ordinary agencies of worship or religious activity according to the usual practice, and especially the practice of congregational societies in the country towns of New England. *Bulkeley v. Worthington Ecclesiastical Soc.*, 63 Atl. 351, 354, 78 Conn. 526, 12 L. R. A. (N. S.) 526.

### MISSIONARY SOCIETIES OR CORPORATION

See, also, *Missionary*.

A bequest to a society incorporated to advance the cause of religion throughout an unlimited field by circulating the Bible, printing, establishing Sunday schools, and sending out persons to distribute religious books and tracts, being a bequest to a "missionary corporation," was exempt from a transfer tax, under Tax Law (Laws 1896, c. 908) § 221, as amended in 1905 (Laws 1905, c. 368), exempting legacies to such corporations. In re *McCormick's Estate*, 99 N. E. 177, 178, 206 N. Y. 100.

Testator bequeathed certain property to R. for life, and directed that on his decease it should be equally divided among the "schools and missionary societies mentioned in the will." The will had previously bequeathed a legacy in favor of the *Worthington Ecclesiastical Society*, and in succeeding paragraphs gave various sums to seven designated missionary corporations, boards, or societies. The ecclesiastical society was a corporation organized for the spread of religion by the maintenance and support of the church known as the "Congregational Church at Berlin, Connecticut," of which testatrix and her ancestors had been members and supporters. Held, that such society was not "a missionary society," entitled to share in the residue so bequeathed. *Bulkeley v. Worthington Ecclesiastical Soc.*, 63 Atl. 351, 354, 78 Conn. 526, 12 L. R. A. (N. S.) 526.

## MISSISSIPPI RIVER

As boundary between states, see *Boundary*.

The term "Mississippi river," used in the enabling act (Act Cong. Aug. 6, 1846, c. 89, 9 Stat. 56) descriptive of the boundary between Wisconsin and Minnesota, applies to the broad expanse of water flowing in a generally southerly direction, known at the date of such act as such river, not any bayou upon either side thereof. *Fransini v. Layland*, 97 N. W. 499, 501, 120 Wis. 72.

## MISSTATEMENT

See *Willful Misstatement*.



## MISTAKE

See Clerical Mistake; Gross Mistake; Material Mistake.

The "mistake" from which equity will relieve may be common to both parties to the contract and consist in either the expression of their agreement or of some matter of inducement thereto or to which it is to be applied. *Briggs v. Watkins*, 70 S. E. 551, 554, 112 Va. 14 (citing 5 Words and Phrases, p. 4540).

"Mr. Pomeroy says that 'mistake,' within the meaning of equity and as the occasion of jurisdiction, is an erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time." *Pearson v. Dancer*, 39 South. 474, 475, 144 Ala. 427 (quoting and adopting definition in 2 Pom. Eq. Jur. pp. 299, 300, §§ 839, 854).

"Mistake," within the rule making it a head of equity jurisdiction, has been defined as "some unintentional act, omission, or error, arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence." Where an instrument is drawn and executed, professing or intending to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or as to law, does not accomplish that purpose or violates it, equity will relieve from such mistake. Mere neglect or omission to read or know the contents of a written instrument before execution is not necessarily a bar to reformation thereof, but relief is proper in such case, if the instrument, through mistake, fails to accomplish the purpose intended. *Taylor v. Godfrey*, 69 S. E. 631, 683, 62 W. Va. 677.

Under the rule that equity will relieve against a judgment for "mistake," the erroneous advice of counsel is not such a "mistake" as will entitle a party to relief. *Donovan v. Miller*, 88 Pac. 82, 83, 12 Idaho, 600, 9 L. R. A. (N. S.) 524, 10 Ann. Cas. 444.

It can be found from the fact that one fails to act because of a "mistake" of his counsel that he was prevented from acting by "mistake." *Dame v. Wood*, 66 Atl. 484, 74 N. H. 212.

Where a written contract of insurance was not the contract made by insured and the general agent of insurer, and insured, though knowing that the policy as written did not accord with the agreement as made, had the right to rely on the representations made by the general agent, and was led to believe that the misstatement in the policy was merely formal, and could not be taken

advantage of by insurer, equity can reform the policy, since insured either acted under an erroneous conviction in accepting the policy containing the terms not agreed on, or he was imposed on, and became a victim of misplaced confidence; the word "mistake" being defined to be either the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done, or some intentional act or omission or error, arising from ignorance, surprise, imposition, or misplaced confidence. *Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co.*, 70 Atl. 380, 385, 74 N. J. Eq. 635.

Where a creditor, who attached the interest in land descending to the debtor on the ancestor dying intestate, knew of proceedings to probate the ancestor's will, which disinherited the debtor, who took no steps to become a party thereto, and the will was admitted to probate, the creditor's failure to contest the probate was not the result of "accident, mistake, or unforeseen cause," within the statute authorizing the granting of a new trial, where, by reason of accident, mistake, or unforeseen cause, judgment was rendered against the applicant for a new trial. *Seward v. Johnson*, 62 Atl. 569, 570, 27 R. I. 396.

An instruction that if defendant, on his express malice aforethought, with intent to kill M., shot at him with a gun, and by mistake killed deceased, he would be guilty of murder in the second degree, was objectionable in the use of the word "mistake" for "unintentionally"; they not being synonymous. *Deneaner v. State*, 127 S. W. 201, 204, 58 Tex. Cr. R. 624.

The code provision that the court may at any time permit a pleading or mistake in any other respect to be amended authorizes the substitution of a sufficient appeal bond in an election contest, where the bond given has failed to comply with the statutory requirements. *Galloway v. Bradburn*, 82 S. W. 1018, 1016, 119 Ky. 49.

That land is sold at administrator's sale which is not embraced in the petition to sell, nor in the decree of confirmation, is not a "mistake in description," within Code 1906, § 2072 (Ann. Code 1892, § 1897), providing that any mistake in describing land of decedent sold, etc., in any part of the proceedings, may be corrected on petition of the purchaser. *Pearson v. Caldwell*, 47 South. 436, 437, 93 Miss. 637.

The word "mistake" in Gen. Laws 1896, c. 256, § 21, giving relief to a garnishee failing through mistake to disclose to the court that he has no property of defendant in his hands, should receive a broad construction, and an affidavit by a garnishee that through accident and mistake he neglected to file his personal affidavit of no funds is within the provision. *Marshall v. McCormick*, 62 Atl. 212, 27 R. I. 357.

The mistake of persons in executing a lease of a lot, the belief of both parties that the lot was not within the district where construction of wooden buildings was prohibited by ordinance, whereas two days before the lease was executed an ordinance was passed putting it within such district, was not, as regards the lessee's right to rescind, a mistake caused by any neglect of his legal duty, within Civ. Code, § 1577, providing, as part of the definition of a "mistake," that it "was not caused by the neglect of a legal duty on the part of the person making the mistake." *Hannah v. Steinman*, 112 Pac. 1094, 1098, 159 Cal. 142.

Ballinger's Ann. Codes & St. § 5153, relating to the modification of judgments and orders and providing in subsection 3 that the same may be modified for mistakes, etc., of the clerk, etc., does not apply solely to mistakes of the clerk, but to any mistake warranting a modification of the judgment in furtherance of justice, and in view of section 4953 (section 426) providing that the court may, in furtherance of justice, etc., amend any pleading, etc., or by correcting a mistake in any other respect, the court had jurisdiction to modify an order of confirmation of a receiver's sale so as to conform the same to the order of sale. *National Bank of Commerce v. L. Kilsheimer & Co.*, 110 Pac. 15, 17, 59 Wash. 460.

A mortgagor's surviving husband, to protect his interest and that of his children, employed F. to bid for the property on foreclosure. One of the tracts was worth \$1,000 and was struck down to B. for \$610. F. immediately claimed the bid was his, but the officer making the sale declined to recognize it, and returned B. as the purchaser. The husband thereupon applied to set the sale aside as to such tract, agreeing on a resale to bid \$1,000. Held, to justify vacation of the sale for "mistake" and inadequacy of price, on condition that the husband give bond to bid \$1,000, pay the costs of the first sale, and interest on the purchaser's deposit. *Montclair Building & Loan Ass'n v. Farmer* (N. J.) 67 Atl. 852, 853.

#### **Impression equivalent**

See Impression.

#### **Mistake of law**

The word "mistake," when used alone, without any limiting expression, includes a mistake of law as well as of fact. If its meaning, as used in a statute, is narrowed to mistakes on questions of fact, it would have been proper and more natural for the Legislature to say so. Where a railroad company made a mistake in the construction of its statutory rights, such as an ordinarily prudent person, honestly desiring to act within his rights, might make, it is exempt from the penalty under Laws 1890, p. 1095, c. 565, § 37, as amended by Laws 1892, p. 1392, c. 676, providing for a penalty for

the exacting by a carrier of unlawful rates of fare, unless the overcharge was made through inadvertence or mistake, not amounting to gross negligence. *Goodspeed v. Ithaca St. Ry. Co.*, 77 N. E. 392, 393, 184 N. Y. 351.

Mistakes of law are mistakes within Code Civ. Proc. § 473, authorizing the court, in the furtherance of justice, to allow an amendment correcting mistakes in proceedings had during the progress of a trial in the furtherance of justice. *Dent v. Superior Court of Los Angeles County*, 95 Pac. 672, 673, 7 Cal. App. 683.

Civ. Code, § 1578, subd. 2, provides that a mistake of law constitutes a mistake within the meaning of the article only when it arises from (1) a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, or which they do not rectify. Several sales of defendant's property were made at the same time by the sheriff under executions issued on various judgments. Defendant redeemed from a junior lien, paying the amount thereof to the sheriff for plaintiff, who had purchased at all the sales, defendant believing that by the acceptance of such amount plaintiff was estopped to deny that the redemption was complete, and the property thereby freed from all prior liens. Plaintiff, knowing the law and defendant's supposition, accepted the money from the sheriff. After the expiration of the period of redemption plaintiff brought an action against defendant to quiet title to the property. Held that, as each party seemed to have aimed to obtain an advantage against the other to which he was not entitled plaintiff was entitled to the relief prayed only on the condition of repaying to defendant the amount paid by the latter for redemption, with interest from the date of its payment. *Woods v. Kellerman*, 89 Pac. 358, 360, 3 Cal. App. 422.

#### **Negligence of self or counsel**

The affidavit of counsel that, owing to a business engagement, which took him to another state after a stipulation for the extension of time to move for a new trial, of being engaged in court the day the stipulation expired, the serious illness of his wife, and the impression that the stipulation included another day, he neglected to ask for an extension of time for such motions shows "mistake, inadvertence, surprise, or excusable neglect" within Comp. Laws, § 3163, and entitled him to relief against his default and a further extension of time. *Sherman v. Southern Pac. Co.*, 102 Pac. 257, 31 Nev. 285.

A court is justified in setting aside a judgment against a defendant in ejectment, taken during the absence of himself and his

counsel, on the ground of "mistake, inadvertence, or surprise," where his counsel left the court, during the term at which the judgment was rendered, with the understanding and belief that the case was not to be tried at that term, and where a prima facie valid defense is shown. *Virginia, T. & C. Steel & Iron Co. v. Harris*, 151 Fed. 428, 429, 80 C. C. A. 658.

**Omission.**

Laws 1905, p. 204, c. 184, provides that whenever, after delivery of the tax roll to the treasurer, it shall be discovered that any town clerk, in making out the tax roll, has made a "mistake" therein in computing or carrying out the amount of the tax, the clerk, with the consent of the treasurer, at any time before the treasurer is required to make his return of delinquent taxes, may correct the errors, etc. Held, that the intent of the Legislature was not to cover a case where a tax apportionment was deliberately and intentionally omitted by the town clerk in making up the tax roll delivered to the treasurer, since such an omission is not a mistake within the contemplation of the statute. *State ex rel. Rowe v. Krumenauer*, 115 N. W. 798, 800, 135 Wis. 185.

**MISTAKE OF FACT**

A "mistake of fact" may be defined as an unconscious ignorance or forgetfulness of the existence or nonexistence of a fact past or present material to the contract. *Kansas City Packing Box Co. v. Spies (Tex.)* 109 S. W. 432, 434.

A "mistake of fact" takes place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. *Scott v. Ford*, 78 Pac. 742, 746, 45 Or. 531, 68 L. R. A. 469.

A "mistake of fact" extends to and includes the case of a party who, through mere ignorance of the existence or nonexistence of a material fact, is induced to do an act injurious to himself, where, if he had been informed of the existence or nonexistence of such fact, he would not have performed such an act. *Scott v. Ford*, 80 Pac. 899, 900, 45 Or. 531, 68 L. R. A. 469 (quoting and adopting *Hurd v. Hall*, 12 Wis. 125, 130).

A "mistake of fact" is a mistake not caused by the neglect of any legal duty on the part of the person making the mistake, but "which consists in his ignorance of some fact, past or present, material to the transaction, or in his belief in the existence of some fact material to the transaction which does not exist. Such a mistake may afford ground for relief in a court of equity." *Steinfeld v. Zeckendorf*, 86 Pac. 7, 11, 10 Ariz. 221.

"Mistake of fact," for which a contract may be avoided, is defined in Civ. Code, § 1577, to be "an unconscious ignorance or for-

getfulness of a fact, past or present, material to the contract." *White v. Stevenson*, 77 Pac. 828, 830, 144 Cal. 104.

"A mistake as to title is a 'mistake of fact,' even though arising from an erroneous view of the legal effect of a deed." *Busiere v. Reilly*, 75 N. E. 958, 960, 189 Mass. 518.

Under Wilson's Rev. & Ann. St. 1903, § 748, a "mistake of fact" is a mistake not caused by neglect of a legal duty on the part of the person making the mistake, and, where plaintiff made a mistake of fact in paying its taxes when it was not liable, the mistake was made by its own neglect of duty; and, the payment being voluntary, the law will furnish no relief. *Louisiana Realty Co. v. City of McAlester*, 108 Pac. 891, 892, 25 Okl. 728.

Civ. Code, § 1566, defines a "mistake of fact" as one not caused by the neglect of legal duty on the part of the person making the mistake, and consisting in: (1) An unconscious ignorance or forgetfulness of a fact past or present material to the contract, or (2) belief in the present existence of a thing which does not exist, or in the past existence of such a thing which has not existed. Plaintiff reinsured part of its risk with defendant, and then, on the defendant's request, placed such reinsurance with another commencing on a certain day, on which day it returned to defendant its written obligation. On the day previous unknown to them, the insured property was burned. Held, that the release, not being made in contemplation of a prior loss, was made under a mistake of fact, against which relief would be granted. *Trader's Ins. Co. of Chicago, Ill. v. Aachen & Munich Fire Ins. Co.*, 89 Pac. 109, 110, 150 Cal. 370, 8 L. R. A. (N. S.) 844.

Under Civ. Code, § 1689, providing that a party to a contract may rescind it if his consent was given by mistake, while the mistake may be one of fact, as defined by section 1577, or of law, as defined by section 1578, in which latter case the mistake must be by both parties, not only must the mistake be one but for which the party would not have consented to the contract, section 1568 declaring that consent is deemed to have been obtained through mistake "only when it would not have been given had such cause not existed," but in case of "mistake of fact," the mistake must be "material to the contract," this being an element of a mistake of fact, as defined by section 1577. *Hannah v. Steinman*, 112 Pac. 1094, 1096, 159 Cal. 142.

Where plaintiff paid the consideration for a deed on the belief that defendant had title to the premises, and thereafter it appeared that she had no title because the conveyance to her was a forgery, plaintiff was entitled to recover the consideration as money paid under a "mistake of fact" under Civ. Code, § 1577, subd. 2, providing that mistake of fact is a mistake not caused by

neglect of a legal duty, and consisting in the belief of the present existence of a thing material to the contract which does not exist or in the past existence of a thing which has not existed. *Horne v. Hughes*, 124 Pac. 736, 19 Cal. App. 6.

### MISTAKE OF LAW

As mistake, see Mistake.

"A 'mistake of law' happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect." *Scott v. Ford*, 78 Pac. 742, 746, 45 Or. 531, 68 L. R. A. 469 (quoting *Hurd v. Hall*, 12 Wis. 125).

A "mistake of law" is an erroneous conclusion as to the legal effect of known facts, and is no ground for the intervention of a court of equity. *Steinfeld v. Zeckendorf*, 86 Pac. 7, 11, 10 Ariz. 221 (citing *And. Law Dict.*).

A "mistake of law," from which a court of equity will relieve, is defined and governed by section 2123 of the Civil Code, which reads: "'Mistake of law' constitutes a mistake, within the meaning of this article, only when it arises from: (1) A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." *Bottego v. Carroll*, 77 Pac. 430, 31 Mont. 122.

Under Code Civ. Proc. §§ 2186, 3132, providing that a written contract supersedes all oral negotiations, and no evidence of the terms of an agreement other than the contents of the writing shall be received, except where a mistake or imperfection is in issue, and the validity of the instrument is in dispute, and to establish fraud, and sections 2117, 2123, declaring that actual fraud consists in a promise made without any intention of performing it, or any act fitted to deceive, and that "mistake of law" constitutes a misapprehension of the law by a party, of which the others are aware at the time of contracting, but which they do not rectify, where plaintiff alleged mistake and fraud, and the evidence disclosed that the inducement held out to plaintiff to sign an agreement was based on fraudulent representations of defendants that a lease need not be mentioned in a contract of sale of a business and the lease, evidence was admissible showing the purchase of the lease and defendants' fraudulent conduct, over objection that it varied the contract. *Sathre v. Rolfe*, 77 Pac. 431, 432, 31 Mont. 85.

### MISTRESS

Where a single woman consents to unlawfully cohabit with a man generally, as

though the marital relation existed between them, without any limit as to the duration of such cohabitation, and actually commences to cohabit with him under that understanding, she becomes his "concubine," or, as expressed in modern times, his "kept mistress." *Coy v. Humphreys*, 125 S. W. 877, 880, 142 Mo. App. 92.

### MISTRIAL

A "mistrial" is a nugatory trial, as distinguished from a new trial, which recognizes a completed trial which for some sufficient reason has been set aside so that the issues may be litigated de novo. It is a matter of law. A case does not result in a mistrial because the trial judge becomes disqualified to act on a motion to set aside the verdict and for new trial. *Stern v. Wabash R. Co.*, 101 N. Y. Supp. 181, 182, 52 Misc. Rep. 12.

It is a "mistrial" where there is no general verdict, and the jury's answer to specific questions do not cover all of the facts in issue. *Ward v. Gradin*, 109 N. W. 57, 61, 15 N. D. 649 (citing *Manning v. Monaghan*, 23 N. Y. 539).

### MITER BOX

A "miter box" is a rough three-sided box, without top or ends, into the two upright sides of which slits are sawed at the proper angle. *Metzler v. McKenzie*, 76 Pac. 114, 115, 34 Wash. 470.

### MITIGATE—MITIGATION

Extenuate synonymous, see Extenuate.

The term "mitigation of damages" is properly applied only to actions where the damages are not capable of exact pecuniary measurement and is used in contradistinction to the term "aggravation of damages"; and, where matter in aggravation of damages is proper, matter in mitigation may be shown. *Swank v. Elwert*, 105 Pac. 901, 907, 55 Or. 487.

There is a technical difference between the "commutation of a sentence" and the "mitigation" thereof. The first is a change of a punishment to which a person has been condemned into one less severe, while to mitigate a sentence is to reduce or lessen the amount of penalty or punishment. Reducing sentence of a court-martial, dismissing a naval officer from service, to suspension for five years on half sea pay, with a reduction in rank to the foot of the list of his grade, is a "mitigation of sentence," within the provision of Rev. St. U. S. § 1624, art. 54, that every officer authorized to convene a general court-martial shall have power, on revision of its proceedings, to "remit or mitigate," but not to "commute," the sentence of any such court which he is authorized to approve and confirm. *Mullan v. United States*, 29

Sup. Ct. 330, 332, 212 U. S. 516, 521, 53 L. Ed. 632 (citing Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. 549; Perkins Elec. Switch Mfg. Co. v. Buchanan, 129 Fed. 184).

"Mitigating circumstances" are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." *Smith v. People*, 75 Pac. 914, 916, 32 Colo. 251 (quoting and adopting the definition in *Black, Law Dict.*).

"Mitigating circumstances" are such as tend to an appreciable extent to prove the truth of the charge, though not completely proving it, so as to permit an inference that defendant was not actuated by malice, and must be connected with or bear upon the libelous charge. An alleged libel consisted of a magazine article entitled "Bucket Shop Sharks," and stated that the business of bucket shop keeping was followed by persons calling themselves "bankers and brokers" who fleeced their customers by pretended sales and purchases of stock; that H. was one of the members of plaintiff firm of "bankers and brokers"; that his picture was in the rogues' gallery; and that these were but specimens of the thieves who piled their trade as keepers of bucket shops while posing as "bankers and brokers." The complaint denied that H. was ever a member of their firm, or that they were brokers, or had ever done business as "bankers or brokers" or as brokers, or advertised themselves as such. The answer alleged that H. became "associated with the plaintiffs in their business" without stating in what capacity, and that plaintiffs held themselves out as "bankers"; their principal business being the promotion of corporate enterprises and marketing the capital stock of mining enterprises, which stocks plaintiffs and H. knew were practically worthless. Held, that the facts alleged in the answer were not a defense by way of mitigation and reduction of damages, they not even tending to prove the libelous matter in part. *Bergstrom v. Ridgway Co.*, 123 N. Y. Supp. 29, 33, 138 App. Div. 178.

To an action of libel for publishing a general charge of ignorance against plaintiff, an attorney, not limited to ignorance in the conduct of the particular case as to which the publication was made, defendant pleaded as a partial defense the statutory law relating to the former case and its bearing on that case and that plaintiff as attorney therein failed to raise any question thereunder because he did not understand and was ignorant of the law on that particular question, and in mitigation of damages, that this was known to defendant before publication, and that the article was published in reliance thereon in good faith and without malice. Held, that "mitigating circumstances" are those which, while not proving the truth of the charge, tend in some appreciable degree

toward such proof, and thus permit of an inference that defendant was not actuated by malice in his charge, and that the matter pleaded bore upon and tended to establish a charge of ignorance, and that the plea was good on demurrer. *Josephson v. Musical Courier Co.*, 130 N. Y. Supp. 434, 436, 146 App. Div. 20.

## MITTIMUS

An ordinary "mittimus" directs the officer to commit the convict then in custody to jail or prison, according to the sentence. It contains no order to arrest and does not authorize an arrest of one at large and not an escaped prisoner. Where, after conviction and sentence, a court of general or limited jurisdiction permits the convict to go at large without day, it cannot thereafter issue a mittimus for his commitment, for in such cases the court, having completed its judicial functions, has surrendered all further control over the case and person. *Tuttle v. Lang*, 60 Atl. 892, 894, 100 Me. 123.

## MIX

The art of enameling metal is old. Many different formulas and substances are used to form the enamel, but the usual process is substantially as follows: Certain ingredients, usually a mixture of silica or sand, and of other substances having a fluxing property to produce glass when mixed with sand, subjected to heat, are mixed together mechanically. This mixture is called by enamellers the "mix." The mix is then subjected to a high degree of heat and fused, resulting in a vitrified or glassy mass. This is called the "frit." The frit is then put in a mill and ground fine, with a mixture of clay and water, resulting in a liquid paste. This is called the "dip." The metal article to be enameled is then dipped in the paste, dried, and subjected to a very high temperature in an oven or muffle. In some cases more than one dipping and burning takes place. The result is, if the operation is successful, a metal article with its surface covered with an adherent coat of metal. *National Enameling & Stamping Co. v. New England Enameling Co.*, 151 Fed. 19, 20, 80 C. C. A. 485.

## MIXED

### MIXED ASSOCIATION

An insurance association, possessing some features incident to both a "stock company" and a "mutual company," but being neither, more nearly falls under the classification of a "mixed association." *State v. Alley*, 51 South. 467, 477, 96 Miss. 720.

### MIXED BLOOD

Indian of mixed blood, see *Indian*.

See, also, *Half Blood*.

The rule of the common law that children of freeborn parents take the legal status

of the father, and therefore children of a white father and Indian mother must be held to be whites, and as such to be disqualified from sharing in the tribal property belonging to the Indians, does not apply to treaties made with the Indians. "In the several treaties entered into between the United States and the Omahas, frequent reference is made to 'half blood' and 'mixed blood,' but in none is there a distinction made between those deriving their Indian blood from the mother and those deriving it from the father. It is not to be supposed that the Indians, when called upon to agree to an allotment of the lands under the provisions of the treaty of 1865 and the act of 1882 had knowledge of the artificial rule of the common law, which, if it was applied in these cases, would require the ruling that a half blood residing with the tribe, the child of a white father and an Indian mother, could not be deemed to be of mixed Indian blood, whereas a child of an Indian father and a white mother would be held to be of Indian blood and therefore entitled to share in the tribal property. As ordinarily understood by white people, a person of white and Indian parentage is deemed to be of 'mixed blood,' without regard to the source of the Indian blood." *Sloan v. United States*, 118 Fed. 283, 288.

#### MIXED COMPANY

An insurance association, possessing some features incident to both a "stock company" and a "mutual company," but being neither, more nearly falls under the classification of a "mixed company." *State v. Alley*, 51 South. 467, 477, 96 Miss. 720.

"Mixed insurance companies" are those which embody the characteristics of both stock and mutual companies. *State v. Willett*, 171 Ind. 296, 86 N. E. 68, 70, 23 L. R. A. (N. S.) 197.

#### MIXED NUISANCE

"There is a class of acts which may properly be denominated 'mixed nuisances,' being both public and private in their effects, public in that they produce injury to many persons or all the public, and private because at the same time they produce a special and particular injury to private rights, which subjects the wrongdoer to an indictment by the public, and to damages at the suit of persons injured. Of this class are \* \* \* establishments which, by reason of the nature of the business carried on, produce such noxious smells and vapors as to annoy the whole community, and are at the same time a special injury to those residing or doing business in their immediate vicinity, by rendering their houses untenable, or their enjoyment so uncomfortable that they sustain a special and particular damage, apart from and beyond the rest of the public." *Acme Fertilizer Co. v. State*, 72 N. E. 1037, 1038, 34 Ind. App. 346, 107 Am. St. Rep. 190 (quoting and adopting definition in *Wood, Nui-*

*sances* [3d Ed.] pp. 34, 35, §§ 14-16, and citing *Kenney v. Koopman*, 22 South. 503, 116 Ala. 310, 37 L. R. A. 497, 67 Am. St. Rep. 119).

In "mixed nuisances," an actionable wrong arises in favor of all persons who come within its effects and influence and whose rights of person or property are injuriously affected, and it is not required, to sustain such an action, that the person injured should establish damage different in kind and degree from others in like circumstances, however numerous they may be. The right of action in such case is sustained by showing the existence of appreciable damage to the plaintiff, whether such damage be special or otherwise. *McManus v. Southern Ry. Co.*, 64 S. E. 766, 768, 150 N. C. 655.

#### MIXED TRAIN

"Mixed trains" are trains composed of freight cars and passenger cars. *State v. Missouri Pac. Ry. Co.*, 117 S. W. 1173, 1176, 219 Mo. 156.

A "mixed train" is partly used for the transportation of freight but also has a passenger car or cars attached, and is held out to the world as a regular means for transporting passengers. *Southern Ry. Co. v. Cunningham*, 50 S. E. 979, 981, 123 Ga. 90.

A freight train with a passenger coach attached is a "mixed train." *Leach v. St. Louis & S. F. R. Co.*, 118 S. W. 510, 511, 137 Mo. App. 300.

A train consisting of four freight cars and a passenger coach is a "mixed train." *Holland v. St. Louis & S. F. R. Co.*, 79 S. W. 508, 509, 105 Mo. App. 117.

A "mixed train" is a train equipped to carry passengers as well as freight. In its arrangements, the safety of passengers is as much looked to as the carriage of freight. It usually has two or more coaches for passengers, and separate compartments or coaches for the races, and a baggage compartment or car, etc., and runs on a regular schedule, and subordinates its freight business to the passenger business so far as necessary to make connections with other passenger trains on its own line and those on connecting roads, and it stops opposite stations for the convenient ingress and egress of passengers. *White v. Illinois Cent. R. Co.*, 55 South. 593, 595, 99 Miss. 651.

#### MIXERS

See Batch Mixers; Continuous Mixers

#### MIXTURE

See Intoxicating Liquors and Mixtures; Liquid Mixture.

"If we are to say that every article is a 'mixture' or compound which has, chemically considered, more than one ingredient, then we would make every fruit of the earth a compound. Certainly we should make the

cocoa bean a 'mixture' or compound. But clearly a fair interpretation of the meaning of the words 'mixture' and 'compound' in the statute, is something resulting from the putting together of parts or ingredients other than as nature has put them together in the fruits of the earth." The provisions of War Revenue Act June 18, 1898, c. 448, § 20, that the stamp taxes provided for in Schedule B "shall apply to all medicinal articles compounded by any formula, published or unpublished," but that they shall not apply to any uncompounded medicinal drug or chemical, contemplate a compound made after some formula, and a natural product, such as papain, which is prepared from the juice of the pawpaw and cannot be made artificially, although it may be a chemical compound, is not "compounded," within the meaning of the statute, and is not taxable, whether used as the basis of a plaster, or prepared in the form of tablets or pills by being mixed with an excipient which has no medicinal effect. *Johnson & Johnson v. Herold*, 161 Fed. 593, 604 (quoting and adopting *Rose v. State*, 11 Ohio Cir. Ct. R. 87).

The term intoxicating liquors or "mixtures thereof" embraces bitters. *Intoxicating Liquor Cases*, 25 Kan. 751, 761, 87 Am. Rep. 284, 293.

## MOB

As public enemy, see Public Enemy.

An assemblage of a number of people acting in a tumultuous and riotous manner, calculated to put good citizens in fear, and to endanger their person or property, constitutes a "mob," but it is not necessary that all these elements must be present to have that effect. *Stevens v. Sheriff*, 80 Pac. 936, 937, 71 Kan. 434.

In an action under Gen. St. 1901, § 2501, making cities liable for injury done by mobs, an instruction that "a mob is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," is not erroneous because making no reference to a determination on the part of those composing it to resist opposition. *City of Cherrvale v. Hawman*, 101 Pac. 994, 80 Kan. 170, 23 L. R. A. (N. S.) 645, 133 Am. St. Rep. 195, 18 Ann. Cas. 149.

The persons engaged in a "riot," constitute a "mob"; the two terms being almost synonymous. *Lockett-Wake T. Co. v. Globe & Rutgers Fire Ins. Co.*, 171 Fed. 147, 148.

### Riot synonymous

The word "mob," in legal use, is practically synonymous with "riot," but the latter is the more correct term. *Adamson v. City of New York*, 96 N. Y. Supp. 907, 909, 110 App. Div. 58 (citing *Bouv. Law Dict.*).

## MODAL LEGACY

"A 'modal legacy' is a bequest accompanied with directions, as to the mode in which it should be applied for the legatee's benefit; for example, a legacy to Titius to put him an apprentice." A legacy to be applied to the education of testator's minor sons is a "modal legacy." *Heady v. State ex rel. Heady*, 60 Ind. 316, 323 (quoting and adopting the definition in 2 *Bouv.* 21).

## MODE

See Potential Mode.

The examination of a party before trial, authorized by Code Civ. Proc. N. Y. § 870, cannot be required by a federal Circuit Court sitting in that state, by virtue of the declaration of Act March 9, 1892, c. 14, that, in addition to the mode of taking the depositions of witnesses in causes pending in the federal District and Circuit Courts, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held. "Mode" usually means the manner in which a thing is done, and this act relates to the manner of taking 'depositions and testimony,' which the title treats as equivalent terms, and which may be so regarded so far as the question before us is concerned. But it is contended that the word 'mode,' as used in the act, has a broader significance, and embraces the production of evidence, thereby qualifying section 861, Rev. St., which prescribes the mode of proof. We cannot concur in this view." *Hanks Dental Ass'n v. International Tooth Crown Co.*, 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989.

## MODEL

While a model filed in the Patent Office will not, in itself, amount to an anticipation which will invalidate a subsequent patent to another, the word "model" as so used must be understood in its ordinary sense as meaning merely a pattern or representation, and not as meaning the actual machine or device of the invention. *American Writing Mach. Co. v. Wagner Typewriter Co.*, 151 Fed. 576, 583, 81 C. C. A. 120.

## MODEL OF INVENTION AND IMPROVEMENT

Exact models of steamships of improved design, showing the details of the vessels, valued at about \$1,000 each, and intended for exhibition in steamship offices, are models of improvements in the art of shipbuilding, and are free of duty under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 616, covering "models of inventions and of other improvements in the arts." *Boas v. United States*, 128 Fed. 470.

The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 616, for "models of inventions and of other improvements in the arts, including patterns for machinery," is not limited to the class of patterns known as "model patterns," intended to show the working of the thing illustrated, but includes also molders' patterns, which are used as models about which to form sand molds in which castings may be made, and which are fitted for successive use in that way. *R. Hoe & Co. v. United States*, 141 Fed. 488, 489.

## MODERATE

### MODERATE SPEED

"Moderate speed" is not a fixed rate of miles per hour, but something materially less than the vessel's full speed, depending upon surrounding circumstances. *The James A. Carney*, 192 Fed. 216, 217.

"Moderate speed," required of a steam vessel in a fog, is purely a relative term; and what constitutes such speed in a given case is to be determined with reference to the time, place, and circumstances, rather than from the actual speed. *Quinette v. Bisso*, 136 Fed. 825, 830, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303 (citing *The Colorado*, 91 U. S. 702, 23 L. Ed. 379; *Newton v. Stebbins*, 10 How. [51 U. S.] 606, 13 L. Ed. 551; *The Martello*, 14 Sup. Ct. 725, 153 U. S. 70, 38 L. Ed. 637; *The Umbria*, 17 Sup. Ct. 615, 166 U. S. 417, 41 L. Ed. 1053).

What constitutes a "moderate speed" on the part of a vessel in a fog cannot be determined by any hard and fast rule, but depends on the dangers which are known or should be anticipated in the particular case. *City of Chicago v. Goodrich Transit Co.*, 199 Fed. 112, 114, 117 C. C. A. 362.

The phrase "moderate speed," in the act of Congress providing that every vessel shall, in a fog, go at a "moderate speed," having careful regard to the existing circumstances, means that a vessel should, when in a fog, so reduce her speed that other vessels, free from blame, may not be injured. *Smith v. Norfolk & S. R. Co.*, 58 S. E. 799, 801, 145 N. C. 98, 122 Am. St. Rep. 423.

The "moderate speed" required of a vessel in a fog, by article 16 of the Inland Navigation Rules (Act June 7, 1897, c. 4), is such speed as under existing conditions will enable her to stop before coming into collision with another vessel after the latter can be seen, assuming that the other vessel also observes the rule. *The Cascades*, 178 Fed. 726, 731.

Rule 15 of the navigation rules for the Great Lakes (Act Feb. 8, 1895, c. 64), which provides that every vessel shall in thick weather go at a moderate speed and on hearing a fog signal ahead slow down to bare

steerageway, does not require a vessel to stop in a fog nor to slow down to bare steerageway while progress appears safe, but requires running at moderate speed, commensurate with dangers which are either known or must be anticipated; she having the right to proceed in expectation of compliance on the part of others with the law in respect of fog signals. *Erie & Western Transp. Co. v. City of Chicago*, 178 Fed. 42, 48, 101 C. C. A. 170.

A steam vessel passing from Portland down the Willamette river in a dense fog at a speed of 15 miles an hour, in view of the extensive commerce on such river, was not going at the "moderate speed" required by article 16 of the Inland Navigation Rules (Act June 7, 1897, c. 4), which provides that in a fog a vessel shall go at a moderate speed, "having careful regard to the existing circumstances and conditions." *The Bailey Gatzert*, 179 F. 44, 47, 102 C. C. A. 612.

A steamer at sea, proceeding at night in a dense fog, in frequented waters, at a speed of 10 or 11 knots an hour, is not going "at a moderate speed, having careful regard to the existing circumstances and conditions" as required by article 16 of the international navigation rules. A schooner which, as a preponderance of the evidence tended to show, was proceeding at night in a fog at a speed not exceeding 8½ knots an hour, held to have been going at a moderate speed in compliance with the rules. *Palmer v. Merchants' & Miners' Transp. Co.*, 154 Fed. 683, 689, 709 (citing *The Chattahoochee*, 19 Sup. Ct. 491, 494, 173 U. S. 540, 548, 43 L. Ed. 801; *The Etruria*, 147 Fed. 216, 218, 77 C. C. A. 442, 444; *The Nacoochee*, 11 Sup. Ct. 122, 137 U. S. 330, 34 L. Ed. 687; *The Cambridge*, 2 Lowell, 21, 23, 4 Fed. Cas. 1118; *The Louisburg*, 75 Fed. 424, 21 C. C. A. 424; *The Eleanora*, 17 Blatchf. 88, 8 Fed. Cas. 420; *The Martello*, 34 Fed. 71, 74; *The Parthian*, 55 Fed. 426, 432, 5 C. C. A. 171, 176; *McCabe v. Old Dominion Steamship Co.*, 31 Fed. 234, 237; *Marsden, Collisions* [5th Ed.] 373; *The Mount Hope*, 84 Fed. 910, 29 C. C. A. 365).

## MODERATOR

As quasi judicial officer, see *Quasi Judicial*.

A "moderator" is one of the officers provided by statutes in New Hampshire to conduct the affairs of a school district meeting. *State v. Waterhouse*, 53 Atl. 304, 71 N. H. 488.

## MODERN

### MODERN APPLIANCE

A charge in an action for fire set by a locomotive, stating that it was defendant's duty to have its engines properly equipped



with such appliances for arresting sparks as are in general and approved use, not, however, such as will prevent any spark from escaping, but such as are in general and common use, and that if the fire was caused by its failure to properly equip its engine with a spark arrester that was modern and in common use, or by failure to properly operate it, it was negligent, does not, by use of the word "modern," necessarily require the latest and best appliances. *Jeffress v. Norfolk-Southern R. Co.*, 73 S. E. 1013, 1016, 158 N. C. 215.

### MODERN ASPHALT ROADWAY

Where, at the time a contract for the sale of city lots, providing for the construction by the vendor of a "modern asphalt roadway," was executed, the only asphalt streets in that city were hot or sheet asphalt streets, and no such thing as a "cold Kentucky rock asphalt street" was known, the construction of such a street was not a compliance with the contract. *Tennant Land Co. v. Nordeman*, 146 S. W. 756, 757, 148 Ky. 361.

### MODIFY

See *As Modified*.

The word "modify," as used in a corporate charter, providing that, upon the report of commissioners to appraise property which the corporation seeks to acquire as a right of way, the judge of the district court shall confirm the report, modify it, or refer it back to the present or new commissioners, does not give the court authority to increase the amount found by the commissioners. *Louisiana Western R. Co. v. Crossman's Heirs*, 35 South. 784, 785, 111 La. 611.

Under Civ. Code, § 139, providing that, where a divorce is granted for an offense of the husband, the court may compel him to make a suitable allowance to the wife for her support during her life, or for a shorter period, and may from time to time modify its orders in such respect, where a divorce decree awarded plaintiff alimony at the rate of \$75 per month, the court had statutory authority to "modify" the decree so as to relieve defendant from further payment of such alimony, though the decree contained no reservation for such modification. Under this section it may "modify" its former order, either by increasing or reducing the amount of money to be paid at any one time, or enlarging or diminishing the frequency with which the payments are to be made. Neither is the authority to modify the decree limited by the section to a mere change in the amount of the allowance to be paid, but it includes a modification of the order in any respect which, under the circumstances of the particular case, may seem just to the court. Under such discretionary authority, it is within the power of the court, not only

to change the amount of the allowance, but also to suspend any enforcement of the order until its further direction. *Soule v. Soule*, 87 Pac. 205, 206, 4 Cal. App. 97.

A motion to correct a judgment rendered by a municipal court justice is a motion to amend or "modify" the same, within Municipal Court Act (Laws 1902, p. 1563, c. 580, § 254). *Ryan v. Brown*, 99 N. Y. Supp. 868, 869, 51 Misc. Rep. 67.

The word "modified," as used in Acts 1901, p. 608, c. 282, § 1, providing that, on the original hearing of an application for the construction of a district sewer, the "resolution shall be confirmed or 'modified,'" is to be given the meaning intended by the definition of the verb "modify" in the *Encyclopedic Dictionary*: "To change or alter the external qualities or incidents of anything; to vary; to alter; to give a new form, character, force, or appearance to"—and therefore the board of public works, after hearing a resolution to construct a district sewer, had power, without a further hearing, to modify the resolution so as to provide for the construction of such projected order. *Edwards v. Cooper*, 79 N. E. 1047, 1050, 168 Ind. 54.

As used in a declaration alleging that defendant insurance company, in violation of its agreement, modified a policy so that it covered a part only of the goods insured, and thereby canceled the policy as to the other goods, the words "modified" and "canceled" plainly referred to the physical changes made and to the effect which those changes would have had if authorized. *Goodhue v. Hartford Fire Ins. Co.*, 55 N. E. 1039, 1040, 175 Mass. 187, 189.

### MOLASSES

See *Stock of Sugar and Molasses*.

### MOLD

See *Button and Button Molds*.

### MOLDED

*Pressed synonyms*

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, the term "molded," as applied to glassware, is synonymous with "pressed." *United States v. Heil Chemical Co.*, 178 Fed. 537, 539, 102 C. C. A. 47.

### MOLDER'S PATTERN

"Molders' patterns" are intended to be placed in sand in order to form the matrix in which the molten metal is cast. The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 616, for "models of inventions and of other improvements in the arts, including patterns for machinery," is not limited to the class of patterns known as "model patterns," intended to show the working of the thing illustrated, but includes also molders' patterns, which are used as models about

which to form sand molds in, in which castings may be made, and which are fitted for successive use in that way. *R. Hoe & Co. v. United States*, 141 Fed. 488, 489.

## MOMENTARILY UNCONTROLLED

Generally it may be said that the event sought to be described by the phrase "momentarily uncontrolled" is wholly inconsistent with a condition where a horse is moving along the road in the course of a struggle for mastery. It is substantially limited to those spasmodic movements which often occur while the horse is generally within the control of his driver, but where the particular movement is so quick and unexpected that it and its results can take place before efforts to control can be exerted. A horse shied to one side, and then at a gallop ran forward 60 to 90 feet, the driver all the time pulling back on the lines, so that the horse was drawing the vehicle by the bit and resisting the efforts to stop him, till a defect in the highway was reached and an accident occurred. The horse could not be held to have been only "momentarily uncontrolled," within the law as to liability of a municipality for defects in highways. *Ehleiter v. City of Milwaukee*, 98 N. W. 934, 935, 121 Wis. 85, 66 L. R. A. 915, 105 Am. St. Rep. 1027, 2 Ann. Cas. 178.

## MONDAY

A defendant is presumed to know the law, and therefore to know that venires are drawn for the different weeks of the term, and not for the different days, and that a list served on him headed "Petit Jury for Monday, October 15, 1906," means for the week beginning on that day. *State v. Jones*, 42 South. 967, 968, 118 La. 369.

## MONEY

See Bond for the Payment of Money; Collection of Money; Condemnation Money; Contract for Payment of Money; Current Money; Lawful Money; Public Money; Purchase Money; Right to Recover Money; Smart Money; Suit Money; Sum of Money.

Earnest money, see Earnest.

My moneys, bonds, etc., see My.

Proceeds as money, see Proceeds.

Raise money, see Raise.

See, also, Lawful Currency.

In legal acceptance, the word "money" means current metallic coins. *Block v. State*, 44 Tex. 620, 622.

The word "money," in its most strict and technical sense, means coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value, but in its more popular use it imports any currency, tokens, bank notes, or other circulating medium in general use as the

representative of value. *Kennedy v. Briere*, 45 Tex. 305, 309.

"Money," in its strict technical sense, is coined metal, gold or silver, on which the government stamp has been impressed to indicate its value; but in its more popular sense any currency token, bank notes, or other circulating medium in general use as the representative of value is money, and the word designates the whole volume of the medium of exchange, regardless of its character or denomination. *Johnson v. State*, 52 South. 652, 167 Ala. 82, 140 Am. St. Rep. 19.

"Money," in the constitutional sense, means coins of gold and silver fabricated and stamped by authority of law as a measure of value, pursuant to the power vested in Congress by the Constitution. Coins of copper may also be minted for small fractional circulation, as authorized by law and the usage of the government for eighty years." *Legal Tender Cases*, 12 Wall. (79 U. S.) 457, 587, 20 L. Ed. 287.

"While gold coin is in one sense 'money,' it is in another an article of merchandise." *Gregory v. Morris*, 96 U. S. 619, 625, 24 L. Ed. 740.

The word "money," in reasonable and colloquial use, signified whatever customarily passed current as a medium of exchange and commerce, and was not necessarily confined to coined metals. *Clawson v. State*, 109 N. W. 578, 579, 129 Wis. 650, 116 Am. St. Rep. 972, 9 Ann. Cas. 966 (citing *State v. Kube*, 20 Wis. 217, 91 Am. Dec. 390).

"Money" includes "whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin." *State v. Quackenbush*, 108 N. W. 953, 955, 93 Minn. 515.

"Money" is a generic term, and, as commonly understood, is anything that circulates as the ordinary medium of exchange in buying and selling property. *State v. Finnegan*, 103 N. W. 155, 157, 127 Iowa, 286, 4 Ann. Cas. 628.

"Money" is the medium of exchange established by law, as well as by custom among men and nations, and to perform its functions it must circulate freely, unembarrassed by suspicion or inquiry as to its ownership by him who tenders it in payment of a debt, or in any transaction where its use is required or permitted; and, unless the one by whom it is received in any such transaction actually knows at the time that it is not the money of him from whom it is received, it becomes his absolutely, and he is not liable to him who was its real owner before he received it, even though it were stolen, either for the specific money received or its value. *Young v. Pecos County*, 101 S. W. 1055, 1058, 46 Tex. Civ. App. 319.

The term "money" or "moneys," as used in Acts 1895, p. 3, c. 4322, § 5, providing for

the taxation of property, means gold and silver coin, United States treasury and bank notes, legal tender, and all other forms of currency, and every deposit which any person owning the same or holding in trust and residing in the state is entitled to withdraw in money on demand. *Hunt v. Turner*, 45 South. 509, 513, 54 Fla. 654.

Laws 1903, c. 73, § 1, fixing a system of public revenue, defines the term "money" as including all kinds of coin and all kinds of paper issued by or under the authority of the United States circulating as money, whether deposited in a bank or elsewhere. *State ex rel. Palmer v. Fleming*, 97 N. W. 1063, 1066, 70 Neb. 529.

As used in Laws 1901, p. 166, § 2, prohibiting the conduct of games of chance for "money," checks, credits, or any representative of value, or for any property or thing whatever, the word "money" includes all money. *State v. Woodman*, 67 Pac. 1118, 1120, 26 Mont. 348.

In Rev. St. § 5209, which makes it a criminal offense for any officer or agent of a national bank to embezzle, abstract, or willfully misapply "any of the moneys, funds, or credits of the association," the word "moneys" refers to the currency or circulating medium of the country. *United States v. Smith*, 152 Fed. 542, 543 (citing *United States v. Greve*, 65 Fed. 489).

#### As baggage

See Baggage.

#### As cash

"Money or money's worth" means cash or its equivalent. *Gillett v. Chicago Title & Trust Co.*, 82 N. E. 891, 904, 230 Ill. 373.

The word "money" in a will, whereby a wife gave to her husband certain personalty, "money, securities for money, evidences of debt, and of title and accounts," etc., does not include the amount received by the wife under a will executed about nine years after the will of the wife, who died before the amount of her share in testatrix's estate was ascertained, so that the right of the executor of the wife at the time of her death was merely a chose in action; the word "money" covering only cash or money on deposit, unless the context gives it a more extended meaning. *In re Hendrickson*, 125 N. Y. Supp. 309, 313, 140 App. Div. 388.

The word "money" in its popular sense signifies cash or its equivalent, used as a circulating medium, as in its generic sense it is not confined to coin, but includes everything which by common consent is made to represent property and passes currently, such as gold and silver coins and the various kinds of paper money issued by the federal government. *People v. Clark*, 99 N. E. 866, 868, 256 Ill. 14, Ann. Cas. 1913E, 214.

#### As chattel

See Chattel.

#### As credits

See Credits.

#### As debt

See Debt.

#### As goods

See Goods.

#### As legal tender

The word "money," as used in statutes defining embezzlement or larceny, means only what is legal tender. *State v. Mispagel*, 106 S. W. 513, 516, 207 Mo. 557 (quoting and adopting *Bish. St. Crimes*, § 346).

#### As all personal estate

"The term 'money' can be used in a restricted, and also in an enlarged, sense. In one it is a standard of value or medium of exchange stamped by government authority; and in the other, in addition to this, it includes stocks, bonds, and other personal securities of an investment nature." *Testatrix*, after certain bequests, gave certain personalty to one H. and all "money" remaining after payment of debts. *Testatrix* left personalty amounting to about \$5,000 and real estate worth \$1,500. When she made the will she had \$400 in money, and \$327 at the time of her death. After paying expenses, debts, and legacies, the personal estate, consisting of furniture, mortgages, and railroad stocks, amounted to \$3,839. The real estate which was not devised was inherited by her brother. Held, that what remained of her personal estate passed by the will to H. *In re Blackstone's Estate*, 95 N. Y. Supp. 977, 980, 47 Misc. Rep. 538.

#### As property

Money as property, see Property; Personal Property.

*Testatrix*, after making bequests, gave the remainder of her estate to her sister B., and then provided that, if B. predeceased her, half of all "moneys" belonging to her estate should be paid to a society, and the other half should be divided among certain persons, who included all who would have taken under the intestacy laws. Held, that the word "moneys" was used in the sense of property, of whatever nature, without which meaning there would be a partial intestacy. *Mt. Holly Safe Deposit & Trust Co. v. Deacon*, 81 Atl. 356, 357, 79 N. J. Eq. 120.

#### Bank bills or notes

"Doubtless the word 'money' is often used as applicable to other media of exchange than coin. Bank notes lawfully issued and actually current at par in lieu of coin are treated as money, because flowing as such through the channels of trade and commerce without question." *Woodruff v. Mississippi*, 16 Sup. Ct. 820, 162 U. S. 291, 300, 40 L. Ed. 973.

Under Pen. Code 1895, art. 945, of the chapter on "Swindling," which provides that "within the meaning of money as used in this

chapter are included also bank bills or other circulating medium current as money," an indictment for swindling, alleging current money, includes bank bills, as well as United States treasury notes. *Baxter v. State*, 105 S. W. 195, 51 Tex. Cr. R. 576.

#### **Bonds, notes, and mortgages**

The word "money" in its usual meaning signifies gold, silver, or paper money used as a circulating medium of exchange, and does not include notes, bonds, evidence of debt, or other property, and such usual meaning should be given it when used in a will, unless it appears from construing the entire will that testator intended it to include bonds and other securities. *Pohlman v. Pohlman*, 150 S. W. 829, 830, 150 Ky. 679.

Railroad bonds deposited in a Circuit Court as collateral security by its order, and kept in a bank vault to which the clerk kept the key, are not "money," and the clerk is not entitled to a commission thereon, under Rev. St. § 828, when by order of the court he takes them from the bank and surrenders them to the depositor; nor is there any authority outside of the statute for the allowance of such a commission. *Michigan Cent. R. Co. v. Harsha*, 134 Fed. 217, 221, 67 O. C. A. 145.

A conditional sale contract required payment in 10 days either in cash or notes, declaring that all notes and open accounts shall be drawn payable at Oklahoma City, with 10 per cent. attorney's fees, and that on default in any installment the seller might consider the entire indebtedness due; the title to the goods to remain in the seller until the price had been paid in money. Held, that the word "money" was used in contradistinction to "notes," and did not include notes, so that the acceptance of notes did not constitute a payment vesting title in the buyer. *In re Gray*, 170 Fed. 638, 643.

The provision of a contract of sale that the title shall remain in the vendor until the price is paid "in money" is not complied with by the giving of a note for the price, and, while the giving of the note may be presumptively a payment of the price, it is not a payment "in money." *Anderson Carriage Co. v. Bartley*, 67 Atl. 567, 569, 102 Me. 492.

#### **Checks, drafts, and other bills of exchange**

"A check is a mere order for so much money to the credit of the drawer in the bank or drawee, which it is bound to honor when made in form and properly presented." Where an indictment charged the larceny of money, proof of the taking of a check on which the money was obtained was not a variance; and where defendant married a woman in pursuance of a scheme to procure certain money which she had on deposit in bank, and later procured a check for the money on representations that he would use the money in making an investment for her,

he was guilty of larceny. *Hunt v. State*, 79 S. W. 769, 772, 72 Ark. 241, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33.

Where a draft is obtained by false pretenses in Wisconsin, but is paid in Iowa, the crime of obtaining "money" by false pretenses in violation of Rev. St. 1898, § 4423, is committed in Iowa, and a prosecution therefor can only be maintained there. *Bates v. State*, 103 N. W. 251, 254, 124 Wis. 612, 4 Ann. Cas. 365.

A bill of exchange is not "money" nor legal tender. *United States Health & Accident Ins. Co. v. Clark*, 83 N. E. 760, 762, 41 Ind. App. 845.

#### **Debts and credits**

The term "money," in a gift to testatrix's husband for life, and thereafter over to another, of "all the money that may be in the hands of my said husband as trustee, for me at my decease," includes a debt to him as trustee for money of the trust fund which he has loaned out. *Dillard v. Dillard*, 34 S. E. 60, 61, 62, 97 Va. 434.

Issuance of bonds by a corporation for antecedent debts is not issuance for "money, labor, or property," etc., within St. Wis. 1898, § 1753, which prohibits issuance for other purposes. *Nichols v. Waukesha Canning Co.*, 195 Fed. 807, 812.

#### **Deposits in bank**

Under Rev. Civ. St. art. 5064, defining "money," as used in the provisions relating to taxes, to include deposits which the owner is entitled to withdraw in money on demand, an indictment for perjury in falsely listing the amount of money deposited in a bank is insufficient, which does not allege that the money was payable on demand. *Parker v. State (Tex.)* 69 S. W. 75, 76.

The word "money," in embezzlement statutes relating to public funds, is used in a generic, and not in a specific sense, viz., it includes all actual moneys, credits, and funds of every kind belonging to the public. so that, where accused was charged with an embezzlement of money, proof of the taking of public funds deposited in a bank on general deposit, by means of drawing checks on the deposit, did not constitute a variance. *Territory v. Hale*, 81 Pac. 583, 585, 13 N. W. 181, 13 Ann. Cas. 551.

The word "money," defined in Revenue Laws 1903, p. 389, c. 73, § 4, as including "all kinds of coin, all kinds of paper issued by or under the authority of the United States and circulating as money whether in possession or deposit in bank or elsewhere," includes "money" on general deposit in a bank upon certificates of deposit payable on demand, and not a credit against which the depositor's indebtedness can be offset. *White v. City of Lincoln*, 112 N. W. 369, 370, 79 Neb. 153 (citing *Critchfield v. Nance County*, 110 N. W. 538, 77 Neb. 807).

Revenue Act 1903, § 4, providing that the word "money," as used in the act for the purpose of listing for taxation shall include money deposited in bank or elsewhere, is intended to include money on general deposit in a bank. *Critchfield v. Nance County*, 110 N. W. 538, 77 Neb. 807.

#### Real estate

The term "money," when used to designate the property embraced in a residuary clause, is sufficient to include real estate. *Prison Association of Virginia v. Russell's Adm'r*, 49 S. E. 966, 968, 103 Va. 563 (citing *Schouler, Wills* [3d Ed.] § 522).

Testator's children signed an instrument acknowledging having received from their father "divers sums of money and other property," which he desired acknowledged in order that no misunderstanding or confusion might result in the settlement of his estate. Subsequently two of the children signed an instrument acknowledging that since executing the above instrument they had received certain real estate as an advancement, and consenting that the value of the same, as fixed at a certain sum set opposite their names therein, "may be deducted from any share we may become entitled to" in his estate. The will directed "that the sums of money which I have advanced and which I may hereafter advance to my children shall be considered as advances and charged against each; \* \* \* such advances and payment of money shall be taken out of their respective shares." Held, that the conveyances of land to the two sons were to be deemed "sums of money," or "advances and payment of money," within the intention of the will. *Vreeland v. Vreeland*, 56 Atl. 1089, 1092, 65 N. J. Eq. 668; *Id.*, 59 Atl. 1118, 66 N. J. Eq. 454.

#### State bank notes, etc.

Bank paper is not "money," and hence an action by petition which is allowed to be brought on a bond or note for the direct payment of money only, would not lie upon a note payable "in the money of this state," if it is intended thereby to make the note payable in the bank paper issued by authority of the state. *Chambers v. George*, 15 Ky. (5 Litt.) 335, 336.

"Bank notes payable to the bearer (or when payable to order, indorsed in blank) pass in the ordinary intercourse and business of life as 'money,' and circulate and are treated as money. They are not, indeed, in a legal and exact sense, money; but, for common purposes, they possess the attributes and perform the functions of money." *Briscoe v. Commonwealth Bank*, 11 Pet. (36 U. S.) 257, 330, 9 L. Ed. 709.

#### Stock

Certificates of stock in a bank on which only 60 per cent. has been paid, and which were held by the bank as security for the balance, are not moneys, funds, or credits of the

bank within Free Banking Act, § 30 (Rev. St. § 3821—85), making it an offense for an officer of a bank to embezzle moneys, funds, or credits of the bank. *State v. Davis*, 96 N. E. 1022, 1025, 85 Ohio St. 43.

#### MONEY APPLICABLE

A complaint in an action by a subcontractor to foreclose a mechanic's lien and for a personal judgment, which alleges that plaintiff contracted with a third person to furnish materials for a building on premises of defendant, that he furnished materials and received a part of the price, that the third person, for the balance, executed an order on defendant to deduct from the final payment a specified sum and pay the same to the subcontractor for goods delivered and to be delivered by him, that the owner accepted the order, that at the time of the acceptance of the order a contractual relation existed between the third person and defendant who had in his possession money belonging to the third person, that said money is in the hands of defendant applicable to the payment of the order, charges facts disclosing the existence of a fund against which the order was directed and states a cause of action as against a motion to dismiss treated as a demurrer, and any defect in the complaint must be reached by motion to make it more definite and certain; the term "money applicable" meaning money which one is entitled to have applied in payment. *Wood Mfg. & Realty Co. of Long Island v. Johnstone*, 133 N. Y. Supp. 422, 424, 148 App. Div. 747.

#### MONEY AT INTEREST

The phrase "money at interest" includes all forms of interest-bearing securities, whether represented by bonds, notes, or otherwise, unless the contrary appears from the assessment itself. *Sweetsair v. Chandler*, 56 Atl. 584, 586, 98 Me. 145.

The phrase "money at interest," as used in Rev. St. c. 9, § 5, imposing taxes on all obligations for money or other property, "money at interest," and debts due the person to be taxed more than they are owing, is embraced in the word "debts," and therefore the amount which the person to be taxed is indebted is to be deducted from money which he has at interest. *Taylor v. Inhabitants of Town of Caribou*, 67 Atl. 2, 3, 4, 102 Me. 401, 10 Ann. Cas. 1080.

Petitioners purchased land by contract providing for delivery of deed in escrow, to be delivered with possession of the property on complete payment of the purchase price, to be paid in installments, the last, at the option of the vendor, at one of two certain times. It was also provided that on installments paid the purchaser should be allowed 4½ per cent. interest in the final settlement. Held that, when the purchasers paid installments, ownership of the money passed to the

vendors, and that the arrangement for payment of  $4\frac{1}{4}$  per cent. on it was not strictly as interest on money belonging to them, so that they were not taxable thereon as "money at interest." *Williams v. City of Boston*, 94 N. E. 808, 809, 208 Mass. 497.

Where plaintiff advanced money to the purchasers of real estate under a bond from the owner, under an arrangement whereby the land was deeded to plaintiff on an understanding that he would convey to the purchasers under the bond on the payment to him of the amount advanced and interest, and plaintiff gave a bond binding himself to convey, and to those to whom the bond was given, gave no note, but promised to pay plaintiff the amount advanced, plaintiff was properly taxed on the amount under a statute subjecting "money at interest" to taxation. *Glidden v. Town of Newport*, 68 Atl. 117, 118, 74 N. H. 207.

### MONEY DECREE

An ordinary real estate mortgage foreclosure proceeding is in part at least other than a "money decree" within Gen. St. 1906, §§ 1701, 1909, regulating supersedeas bonds. *State ex rel. Purvis v. Palmer*, 48 South. 638, 57 Fla. 541.

### MONEY DELIVERED

An advance of money by discounting a church order for \$150 for decedent was a delivery of money, within section 4187, St. 1898, providing that book account entries of items of "money delivered," at one time exceeding \$5, are inadmissible to prove the account. *Dohmen v. Blum's Estate*, 119 N. W. 349, 350, 137 Wis. 560.

### MONEY DEMAND ON CONTRACT

As defined by Rev. St. 1852, the phrase "money demands on contracts," when used in reference to an action, means any action arising out of contract, where the relief demanded is the recovery of money. *State v. Mutual Life Ins. Co. of New York*, 93 N. E. 213, 218, 175 Ind. 59, 42 L. R. A. (N. S.) 258.

### MONEY DEPOSITED IN BANK

The expression "money deposited in bank," as used in section 4 of the revenue act of 1903 (Comp. St. 1903, p. 1283), is intended to include money on general deposit in bank. *Critchfield v. Nance County*, 110 N. W. 538, 77 Neb. 807.

### MONEY DISBURSED

Where pledgees of collateral by the bankrupt were entitled to sell the same at public or private sale without notice to the pledgors, and apply the proceeds to the payment of their liabilities, and in one case the pledgee was authorized to buy the securities pledged free from any right or equity of redemption in the pledgors, but after bankruptcy the trustee was permitted to sell the securities free from lien on payment of the debts by the

pledgees when the securities were delivered to the purchaser, on which sale the trustee received a balance of \$3,802.87, representing the bankrupt's equity in the securities, such sum, and not the price secured from the purchaser, was the "moneys disbursed," within Bankr. Act July 1, 1898, c. 541, § 48, as amended by Act June 25, 1910, c. 412, § 9, on which commissions were to be allowed. *In re Meadows*, 199 Fed. 304, 306.

### MONEY HAD AND RECEIVED

See Assumpsit for Money Had and Received.

Action for, as equitable action, see Equitable Action.

The action for "money had and received" rests on an implied promise, and may be maintained against the person who has received money from plaintiff, or from a third person, under such circumstances that, in equity and good conscience, he should not retain it. *Jackson v. Creek*, 94 N. E. 416, 418, 47 Ind. App. 541.

The action for "money had and received" is governed by equitable principles, and generally lies whenever one person has received money belonging to another which in justice and good conscience should be returned. *Stout v. Carruthersville Hardware Co.*, 110 S. W. 619, 621, 131 Mo. App. 520.

"The action for 'money had and received' lies to recover money to which plaintiff is entitled, and which in justice and equity the defendant ought to refund to the plaintiff, and which defendant cannot with a good conscience retain." *Whittle v. Whittle*, 91 Pac. 170, 172, 5 Cal. App. 696 (citing *Bouv. Law Dict.*).

"The count for 'money had and received' is a very important one, and in some respects differs from all other common-law actions. It is a sort of connecting link between law and equity, and by the use of the very convenient fiction of an implied promise this count will lie to recover any money which defendant has received, or in any manner obtained possession of, which in equity and good faith and conscience he ought to pay over to plaintiff." *Montgomery v. Wise*, 120 S. W. 100, 103, 138 Mo. App. 176 (quoting and adopting *Green & Myer*, *Missouri Prac. & Pl.* § 256).

### MONEY IN ANY BANK

All money in any bank, see All.

### MONEY IN THE HANDS OR POSSESSION OF BANK

Money deposited in a savings bank is "money or other property in the hands or possession" of the bank, within the meaning of Gen. St. 1902, § 1019, providing for actions in the nature of bills of interpleader. *Brown v. Clark*, 68 Atl. 1001, 1005, 80 Conn. 419.

**MONEY JUDGMENT**

"Money judgment," as used in Code Civ. Proc. § 685, providing that, in all cases other than for the recovery of a money judgment, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, etc., includes a decree allowing a certain sum to a commissioner in partition for services and expenses, and hence it cannot be enforced by execution after five years. *Cortez v. Superior Court*, 24 Pac. 1011, 86 Cal. 274, 21 Am. St. Rep. 37.

A judgment foreclosing a laborer's lien and directing a sale is not a "money judgment" within Rev. St. 1887, § 4810, providing that on appeal from a judgment directing the payment of money, appellant, to stay proceedings, must give a bond in double the amount of the judgment. *Naylor & Norlin v. Lewiston & S. E. Electric Ry. Co.*, 95 Pac. 827, 828, 14 Idaho, 722.

A judgment ordering a party to pay a specific sum into court, and authorizing the adverse party to withdraw it as soon as paid, is a judgment for the payment of money, within Civ. Code Prac. § 764, providing that, on the affirmance of a judgment "for the payment of money," the collection of which has been superseded, 10 per cent. damages on the amount superseded shall be awarded against appellant. Motion for assessment of damages on supersedeas, 99 S. W. 305, sustained. *Robinson-Norton & Co. v. Corsicana Cotton Factory*, 102 S. W. 869, 870, 126 Ky. 75, 11 L. R. A. (N. S.) 723, 15 Ann. Cas. 770.

A judgment for alimony is a "judgment for a sum of money only," within Code Civ. Proc. § 1913, providing that an action on a judgment for a sum of money only cannot be maintained between the original parties unless 10 years have elapsed since the docketing of the judgment. *Shepherd v. Shepherd*, 100 N. Y. Supp. 401, 402, 51 Misc. Rep. 418.

An application for foreclosure of a vendor's lien on realty in which personal judgment is rendered against defendant, with a decree directing the sale and application of the proceeds, is not a judgment directing the payment of money within Rev. Codes 1905, § 7209, providing that, to stay execution pending appeal from such a judgment, appellant must furnish a bond conditioned to pay the amount of the judgment; but the bond required is defined by Rev. Codes 1905, § 7212, conditioned that appellant will not commit or suffer waste and if the judgment is affirmed will pay the value of the property pending the appeal. *Schafer v. Olson* (N. D.) 182 N. W. 645, 647.

Civ. Code Prac. § 764, provides than on the affirmance or dismissal of an appeal from a judgment for the payment of money, the collection of which has been superseded, 10

per cent. damages on the amount superseded shall be awarded. Held, that a judgment requiring appellant to execute a deed to certain real estate on payment of the price pursuant to a contract of sale, and if appellant failed to do so that the court commissioner execute the deed, and that a writ of possession be issued on behalf of appellee, was not a judgment for the payment of money; and hence, on the dismissal of an appeal on which the judgment had been superseded, appellee was not entitled to damages. *Maret v. Sanders*, 182 S. W. 552, 141 Ky. 366.

**MONEY LENT**

Money deposited in a bank in New York at interest and subject to check constitutes "money lent" to the banker, within Civ. Code La. art. 3538 (3503), requiring actions for the payment of money lent to be brought within three years. *Schinotti v. Whitney*, 130 Fed. 780, 781 (quoting *Morse, Banks*, § 298).

**MONEY LOANED AND INVESTED**

A note and mortgage taken in exchange for property is not "money loaned and invested," within *Cobbey's Ann. St.* 1903, § 10, 427, but is a credit from which the holder may deduct the just debts by him owing at the time of making his tax return. *Oleson v. Cuming County*, 115 N. W. 783, 784, 81 Neb. 209.

"Money loaned or invested," within the ordinary meaning of the term, is money or capital laid out with a view of obtaining a profit or income therefrom. The fact that a fund in question has assumed the form of bonds, mortgages, or other securities does not of itself fix its nature or determine its use; it is the use to which it is put that determines its character. *Royal Highlanders v. State*, 108 N. W. 183, 186, 77 Neb. 18, 7 L. R. A. (N. S.) 380.

**MONEY NECESSARY FOR THE JOURNEY**

The phrase "money necessary for the journey," within the law as to the liability of carriers for the loss of effects of the passenger, includes a proper, reasonable, and necessary amount for the plaintiff to carry with him for his journey, taking into consideration his position and circumstances, the length and character of his journey, and the contingencies and accidents that might naturally arise, and the fact that he was in a foreign country. *Knieriem v. New York Cent. & H. R. R. Co.*, 96 N. Y. Supp. 602, 603, 109 App. Div. 709 (citing *Fairfax v. N. Y. C. & H. R. R. Co.*, 73 N. Y. 167, 29 Am. Rep. 119).

**MONEY OF THE CITY**

The power of a city to grade streets or lay sewers or water pipes at the cost of abutting property is not strictly a governmental function, and in the exercise of the

power it acts in its proprietary character, and the money collected from the abutting property owners is not "money of the city" within its charter, for it is only money raised by the operation of a general law that becomes "money of the city," or public funds, and subject to the charter provision as to the deposit thereof. *City of Seattle v. Stirrat*, 104 Pac. 834, 836, 55 Wash. 560, 24 L. R. A. (N. S.) 1275.

### **MONEY OF THE UNITED STATES**

Current money of the United States, see Current Money.

It is held that the term "money of the United States" includes gold, silver, and treasury notes of the government which are by law made legal tender for the payment of debts but not national bank notes. *Johnson v. State*, 83 S. W. 651, 652, 73 Ark. 101 (citing *Marshall v. State*, 75 S. W. 584, 71 Ark. 416; *Murphy v. Smith*, 3 S. W. 891, 49 Ark. 37; *Burton v. Brooks*, 25 Ark. 215).

The phrase "money or property of the United States," in the federal statutes, relating to embezzlement, does not include fees and emoluments received by the clerk of a federal district court, and the duty of a clerk of a federal district court to pay over to the United States the surplus fees and emoluments of his office which is half-yearly returned, or the audit thereof shown to exist over and above the compensation and allowances authorized by law to be retained by him, is not governed by the statutes relating to the embezzlement of money or property of the United States. *United States v. Mason*, 31 Sup. Ct. 28, 34, 218 U. S. 517, 54 L. Ed. 1133.

### **MONEY ORDER**

The terms "pay check" and "money order" mean practically the same thing. *Barnes v. State*, 35 South. 227, 228, 46 Fla. 96.

### **MONEY ORDER FUNDS**

Rev. St. § 4045, defines "money order funds" to consist of all money received for the sale of "money orders," including all fees thereon, all money transferred from the postal revenues to the money order funds to the service of the Post Office Department. The term "sale of money orders" related to the executed transactions, when the money order clerk at the post office building had sold the money order to an applicant and received the price, which then became part of the money order funds. *United States v. Mann*, 160 Fed. 552, 554.

### **MONEY OWING**

Code Civ. Proc. § 710, providing that a transcript of a judgment may be filed with the controller of the state or auditor of any municipal corporation from "which money is owing to" the judgment debtor, whereon the controller or auditor shall draw his warrant in favor of the creditor, or pay so much

money into court as will cancel the judgment, and which belongs to or is owing to the judgment debtor," applies to legislative officers, making their salaries subject to the payment of their debts; salaries and wages of public officers and employes being included in the phrases "money owing," "money which belongs to," etc. *Ruperich v. Baehr*, 75 Pac. 782, 784, 142 Cal. 190.

### **MONEY PAID**

Under Const. art. 12, § 6, providing that no corporation shall issue stock, except for "money paid" or "property actually received," a contract for the sale of stock, to be paid for in part in cash and in part by the purchaser's notes, payable on a future date, is ultra vires, though the notes are to be indorsed by a solvent indorser and secured by a pledge of the stock, since a note is not the equivalent of "money paid," and since, as between the parties, a note is mere evidence of indebtedness, and is not "property actually received." *McCarthy v. Texas Loan & Guaranty Co. (Tex.)* 142 S. W. 96, 97.

### **MONEY PAID IN FRAUD OF CREDITORS**

Rev. Laws 1902, c. 118, § 73, providing every life policy for benefit of a married woman, or after its issue transferred to her, shall inure to her separate benefit, provided that, subject to the statute of limitation, the amount of premiums paid in fraud of creditors, shall inure to their benefit from its proceeds, etc., gives to her insurance on a husband's life, originally for her benefit or subsequently transferred to her, whether or not he was insolvent at time of transfer, and gives creditors the benefit of premiums paid by him when insolvent, subject to such statute, and money paid by an insolvent as premiums on a policy insuring to a third person's benefit as a gift is "money paid in fraud of creditors"; and this is true whether or not such person is his wife. *Bailey v. Wood*, 89 N. E. 149, 153, 202 Mass. 562.

### **MONEY PAID INTO COURT**

See Paid into Court.

### **MONEY RAISED**

A note or bond would be as strictly "money raised" as would a subscription, within the meaning of a condition in a subscription to a church that the church raise a further sum within a certain time. *St. Paul's Episcopal Church v. Fields*, 72 Atl. 145, 150, 81 Conn. 670.

### **MONEY RECEIVED**

See Money Had and Received.

### **MONEY VALUE**

"The so-called 'money value' of real or personal property is but a conveniently short method of expressing the present potential 'usefulness,' and 'investment' becomes meaningless if construed to mean what the thing



invested in cost generations ago. Property, whether real or personal, is only valuable when useful. Its usefulness commonly depends on the business purposes to which it is or may be complied with. Such business is a living thing and may flourish or wither, appreciate or depreciate, but whatever happens its present usefulness, expressed in natural terms, must be its value." *Consolidated Gas Co. v. City of New York*, 157 Fed. 849, 358.

### MONEYED BUSINESS

The expressions "moneyed business" or "moneyed man" are often used, and in their common acceptance and generally understood meaning are not applied solely to the business of handling and loaning money, or to a man whose property merely consists of money. A person is commonly referred to as a moneyed man because of his large possessions, yet those possessions may consist exclusively of real estate. *State v. Fidelity & Deposit Co. of Maryland*, 80 S. W. 544, 553, 35 Tex. Civ. App. 214.

### MONEYED CAPITAL

Rev. St. U. S. § 5219, providing that shares of stock in national banks shall not be taxed at a greater rate than is assessed on "other moneyed capital" in the hands of individual citizens of the state, permits the taxation of national bank shares, provided no discrimination is made against them in favor of stock of other banks in competition with national banks; the terms "other moneyed capital" being defined as capital in corporations carrying on the business of banking as defined by law and custom, and which is employed in competition with the business of national banks. *Des Moines Nat. Bank v. City of Des Moines*, 133 N. W. 767, 768, 153 Iowa, 336. The phrase "other moneyed capital" applies to such capital as in its use comes into competition with the business of banks. *Lippincott v. Lippincott*, 66 Atl. 113, 114, 74 N. J. Law, 439.

Before a state statute denying all right in taxation to deduct debts from the stock in national banks assessed with taxes, but allowing deduction from other investments, can be held a violation of Rev. St. U. S. § 5219, prohibiting a state from taxing such stock at a greater rate than is assessed on "other moneyed capital," it must appear that such other moneyed capital exists in such an amount as to operate as a discrimination against such banks, and that it is of such character as to come in competition with National Banks. *West Virginia Nat. Bank v. Dunkle*, 64 S. E. 531, 65 W. Va. 210.

"The term 'moneyed capital,' as used in Rev. St. U. S. § 5219, respecting state taxation of shares of national banks, embraces capital employed in national banks, capital employed by individuals when the object of their business is the making of profit by the

use of their moneyed capital, as in banking." *First Nat. Bank of Albuquerque v. Albright*, 86 Pac. 548, 550, 13 N. M. 514 (quoting *Talbot v. Silver Bow County*, 11 Sup. Ct. 594, 139 U. S. 438, 35 L. Ed. 210).

The words "other moneyed capital," as used in Rev. St. U. S. § 5219, providing that the shares in national banks shall not be assessed at a greater rate than other moneyed capital in the hands of individual citizens, does not mean all capital, the value of which is measured in terms of money, nor all forms of investment in which the interest of the owner is expressed in money, nor shares of stock represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire property of the corporation, nor real or personal property, such as ordinary chattels or commodities, nor investments in manufacturing and industrial enterprises; but does include shares of stock or other interest owned by individuals in enterprises in which the capital employed in carrying on the business is money, and the object of the business is the making of a profit by the use of money. *First Nat. Bank of Nephi v. Christensen*, 118 Pac. 778, 780, 39 Utah, 568.

In a statute providing for the taxation of bank stock and directing that the assessment and taxation of such stock shall not be at a greater rate than is made or assessed upon "other moneyed capital" in the hands of individuals within the state, the expression "other moneyed capital" means such capital as in its use comes into competition with the business of banks. *Lippincott v. Lippincott*, 66 Atl. 113, 115, 74 N. J. Law, 439.

### MONEYED CORPORATION

The term "moneyed corporation" is defined in 1 Rev. St. N. Y. p. 598, § 51, to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances, and is defined by the New York act of 1890 (Laws 1890, c. 563) to be one formed under or subject to the banking or the insurance law. A Kansas trust company, empowered to receive deposits and to loan money on real estate and personal security, is a "moneyed corporation," within this definition and within the meaning of Code Civ. Proc. N. Y. § 394, prescribing a three-year limitation for actions to enforce stockholders' liabilities. *Platt v. Wilmot*, 24 Sup. Ct. 542, 545, 193 U. S. 602, 48 L. Ed. 809.

The expression "moneyed corporation," in *Sayles' Ann. St. 1897*, art. 5063, providing for the taxation of all personal estate of moneyed corporations, means all classes of corporations organized and created for business purposes, as distinguishable from public or charitable or other corporations which are exempted by law from taxation. The

Legislature evidently did not intend to use it in the restrictive sense, as applied only to corporations that dealt exclusively in money. *State v. Fidelity & Deposit Co. of Md.*, 80 S. W. 544, 553, 35 Tex. Civ. App. 214.

A company incorporated for pecuniary profit, though having no power to engage in banking or loaning money or to write insurance, is a "moneyed corporation," within the meaning of that phrase as used in the crimes act (Gen. St. 1909, § 2621), declaring one guilty of forgery who fraudulently makes false entries in the books of an association of that character. *State v. Chance*, 108 Pac. 791, 82 Kan. 392, 20 Ann. Cas. 134.

A corporation engaged in leasing its own property and collecting rents therefor, with power to sue and be sued, to contract debts, and to dispose of its property, is a "moneyed, business, or commercial corporation," against which involuntary proceedings in bankruptcy may be had under Bankruptcy Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act June 25, 1910, c. 412, § 4, 36 Stat. 839. *In re R. L. Radke Co.*, 193 Fed. 735, 736.

#### **MONEYED MAN**

See Moneyed Business.

#### **MONEYS AND CREDITS**

Corporate bonds are not taxable as "moneys and credits." *Murrow v. Heath*, 125 N. W. 259, 261, 146 Iowa, 347.

#### **MONEYS RECOVERED ON A RECOGNIZANCE**

"Moneys" deposited in lieu of bail are to be treated as if they had been recovered on a recognizance. The fact that a deposit of currency in lieu of bail, made under Code Cr. Proc. § 586, was made with money belonging to the estate of which the depositor was executor, and did not belong to him, did not entitle the estate to recover the money back after the failure of the executor to appear before the magistrate in accordance with the terms of the deposit, in the absence of an identification of the particular money misappropriated by the executor, or of proof that the sheriff or treasurer with whom the money was deposited knew or had notice that the executor was depositing moneys which did not actually belong to him. *Sutherland v. St. Lawrence County*, 91 N. Y. Supp. 962, 966, 101 App. Div. 299.

#### **MONEYS REMAINING**

Where a testator, after providing for the payment of his debts and funeral expenses, and devising his homestead to his wife, and bequeathing her the sum of \$50 per month, directed his executors to sell both real and personal estate and to invest the moneys remaining in their hands, the expression "moneys remaining" means that portion of the proceeds remaining after payment of the

debts and funeral expenses and payment to the wife. *Roll v. Roll*, 59 Atl. 296, 298, 68 N. J. Eq. 227.

The will of one whose personal property at the time of his death was insufficient to pay his debts and funeral expenses, and whose real estate, other than his homestead, had a rental value of only \$300 a year, directed that his debts and funeral expenses be paid, gave to his wife in lieu of debtor the homestead and \$50 a month to be paid each month during her life, authorized his executors to sell any part of his property, and directed that the "moneys remaining" in his hands should be invested. Held, that "moneys remaining" meant remaining from the proceeds of sale after deducting, which can only be of payments previously directed, which were three, to wit, the debts, funeral expenses, and payment to the wife, and would not mean remaining if only debts and funeral expenses were made. *Roll v. Roll*, 59 Atl. 296, 297, 68 N. J. Eq. 227.

#### **MONEY'S WORTH**

"Money or money's worth" means cash or its equivalent. *Gillett v. Chicago Title & Trust Co.*, 82 N. E. 891, 904, 230 Ill. 373.

#### **MONGOLIAN**

As Indian, see Indian.

#### **MONOMANIA**

The term "monomania" implies "partial insanity, and excludes the idea of any sort of ratiocination as to the particular subject to which the partial insanity relates. Monomania cannot be implied because a person takes a narrow, or prejudiced, or utterly illogical view of a particular subject. It is not the result of any conclusion. The person does not arrive at his conviction because of any attempt either at reasoning or investigation. The partial insanity is the offspring of a disordered intellect." The conclusion that a testator was a monomaniac is not warranted by the bare circumstance that, actuated by a spirit of resentment against his wife, he disinherited her in his will, for the sole reason that she had interfered with him in carrying out his deliberate choice to lead an immoral and dissolute life. *Bohler v. Hicks*, 48 S. E. 306, 307, 120 Ga. 800.

#### **MONOMANIAC**

"Monomaniac" is a person who is deranged in a single faculty of his mind or with regard to a particular subject only, and persons of that kind may, and often do, on all subjects foreign to the subject of mania, act rationally and with ordinary prudence and judgment, even to the making of a valid will, where the monomania does not in any degree influence or affect the provisions of the will. *Swygart v. Willard*, 76 N. E. 755, 757, 166 Ind. 25.

## MONOPOLY

See Contract in Aid of Monopoly; Unlawful Monopoly.

As public nuisance, see Public or Common Nuisance.

See, also, Combination in Restraint of Trade; Engrossing; Trust (Combination).

**As an exclusive franchise or privilege**

A "monopoly" is the exclusive power, right, or privilege of selling a commodity, or of dealing in the same article or trading in the same market; sole command in traffic in anything, however obtained. *State v. Central Lumber Co.*, 123 N. W. 504, 509, 24 S. D. 136, 42 L. R. A. (N. S.) 804.

Under the old English law, a technical "monopoly" was a license or privilege, granted by the sovereign to an individual for the sole buying and selling, making, working, or using of anything, whereby the people in general were excluded from the liberty of manufacturing and trading, which they had before enjoyed. It differed from "engrossing" only in that, in the case of a monopoly, a patent was had from the king, while engrossing was a transaction between individuals. *State v. Duluth Board of Trade*, 121 N. W. 395, 403, 107 Minn. 506, 23 L. R. A. (N. S.) 1260.

A "monopoly," as defined by Coke, was an institution or allowance by the King by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained from any freedom or liberty that they had before, or hindered in their lawful trade. The word was defined by Hawkins as an allowance by the King to a particular person or persons of the sole buying, selling, etc., of anything whereby any person is sought to be restrained from any freedom which he had before. *Standard Oil Co. of New Jersey v. United States*, 31 Sup. Ct. 502, 512, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

"A monopoly" is an institution or allowance to any person or persons, bodies politic or incorporate, of or for the sole buying, selling, making, working, or using anything, whereby any person or persons, bodies politic or corporate, are sought to be constrained of any freedom or liberty that they had before or hindered in their lawful trade." In re Charge to Grand Jury, 151 Fed. 834, 835 (quoting and adopting definition by Sir Edward Coke); *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 180 Fed. 160, 170 (quoting and adopting the definition by Lord Coke).

It is a "monopoly" when one person alone buys up the whole of one kind of commodity,

fixing a price at his own pleasure. *State v. Eastern Coal Co.*, 70 Atl. 1, 4, 29 R. I. 254, 132 Am. St. Rep. 817, 17 Ann. Cas. 96.

A "monopoly" exists when the manufacture and sale of any commodity is restrained to one or a certain number. *City of Seattle v. Dencker*, 108 Pac. 1086, 1090, 58 Wash. 501, 28 L. R. A. (N. S.) 446.

The purpose of the Wisconsin Public Utility Law was to give the holder of an indeterminate permit, as regards the conditions existing at the time of its origin, a qualified monopoly within the scope of the privilege, subject to the conditions and limitations of the public utility law; the term "monopoly" not being used in its common-law sense, except as to exclusiveness, but being characterized by purpose to promote public welfare, by a return consideration and by not being of common right, instead of being otherwise but for the grant and being for private gain. *Calumet Service Co. v. City of Chilton*, 135 N. W. 131, 140, 148 Wis. 334.

"The terms 'monopolies' and 'trusts' are, perhaps, too often employed at the bar to all business enterprises requiring and employing great aggregations of wealth, and in the vague sense in which, at the hustings, they are used to arouse envy and jealousy, forgetting the manifest necessity of such aggregations of wealth to produce the commodities, and their transportation, which our civilization and comfort require. Every railroad corporation is in one sense a monopoly. It has franchises giving rights and powers not common to all citizens. It alone can operate its own railroad, though subject to reasonable regulation by the state. All monopolies, in a strict sense, rest upon some grant by the sovereign power of an exclusive franchise or privilege." *State of Minnesota v. Northern Securities Co.*, 123 Fed. 692, 705.

A "monopoly," as generally defined or understood, is the exclusive control of supply and price due either to a single ownership of a large part of the sources of supply, or unity of action among a large proportion of the owners of such sources. With monopoly in this sense neither the pre-emption act nor the land act has anything to do, since there is nothing in either to prevent any person, having sufficient means, acquiring acres by the million under the policy of free disposition so greatly favored by the United States courts. *Pereles v. Well*, 157 Fed. 419, 427 (citing and adopting *Myers v. Croft*, 13 Wall. [80 U. S.] 291, 20 L. Ed. 562).

A "monopoly" not only includes an exclusive right granted by the state to a few, of something which was before of common right, but embraces any combination or contract, the tendency of which is to prevent competition in its broad and general sense and control prices to the detriment of the public, regardless of the form assumed.

Where owners of land adjacent to a city platted the same and executed deeds to the city for the streets, alleys, and public grounds, reservations therein to the grantors of the exclusive right to use the streets for the operation of street railways and for the maintenance of lighting appliances, sewers, gas, waterworks, and telephone lines, free from the control of the city, were void as tending to create a "monopoly." *Jones v. Carter*, 101 S. W. 514, 516, 45 Tex. Civ. App. 450.

#### **Same—Licensing of pilots**

Pub. Laws 1907, p. 903, c. 625, providing for the licensing of pilots for a river, and limiting the number to be commissioned to 20, does not create a "monopoly" in violation of Const. art. 1, §§ 7, 31, declaring that no man or set of men is entitled to exclusive or separate emoluments or privileges, etc., and that "monopolies" are contrary to the genius of a free state. *St. George v. Hardie*, 60 S. E. 920, 923, 147 N. C. 88.

#### **Same—Patent**

"Monopoly" restrains trade or commerce in articles, which were before the subjects of trade or commerce. Patented articles cannot be the subject of monopoly, since a patent is that which brings out from the realm of mind something which never existed before and gives it to the country. *Rubber Tire Wheel Co. v. Milwaukee Works Co.*, 142 Fed. 531, 537.

A patent is a "monopoly" created by law, and gives the right to exclude all others from making, using, and selling the invention or article made in accordance therewith. *National Hollow Brake Beam Co. v. Bakewell*, 123 S. W. 561, 566, 224 Mo. 203.

The "monopoly" authorized by a patent is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and it rests with the owner what part of this property he will transfer to others, and upon what terms he will make the transfer. *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 735, 64 C. C. A. 594.

#### **Same—Water franchise**

A contract between a city and a water company's assignor, by which the city agreed not to grant to any other person the right to furnish water for fire hydrants during the life of the contract, etc., was invalid as a "monopoly," in violation of Const. art. 1, § 3, prohibiting the granting of a perpetuity or monopoly. *Hartford Fire Ins. Co. v. City of Houston*, 116 S. W. 36, 38, 102 Tex. 317.

In an action against a water company to recover damages for cutting off plaintiff's supply of water, an allegation in the petition that defendant was possessed of "a monopoly of such business in said city" would not be

construed as used in an offensive sense or with the purpose of insinuating that the company was not conducting a legitimate business, but with a view to setting forth the pertinent fact that the company had the exclusive privilege of supplying the city and its inhabitants with water, and for this reason the plaintiff was wholly dependent upon defendant for his supply of water. *Freeman v. Macon Gas Light & Water Co.*, 56 S. E. 61, 63, 126 Ga. 843, 7 L. R. A. (N. S.) 917.

Defendant city entered into a contract with a water company, by which the city agreed not to grant to any other person the right to furnish water for fire hydrants during the life of the contract, which was for 25 years, and the city to have the privilege of buying the waterworks, but if the city did not exercise the option to purchase, the contract to continue until the city finally purchased the works. Held, that the exclusive privilege granted by the contract was a "perpetuity" and "monopoly," in contravention of Const. art. 1, § 26, prohibiting the granting of a perpetuity or monopoly, which rendered the contract entirely void; and hence the city could not recover for damages arising out of the water company's failure to furnish sufficient water pressure, whereby the city market house was burned. *Hartford Fire Ins. Co. v. City of Houston (Tex.)* 110 S. W. 973, 977.

#### **As a combination**

A "monopoly" is the concentration of business in the hands of a few. *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 264, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

A "monopoly," within the meaning of the Anti-trust Law, is more than the mere complete occupation of a certain field which does not unfairly exclude other competitors. *Fonotipia Limited v. Bradley*, 171 Fed. 951, 959.

The gravamen of the offense of "monopoly" consists in combining to acquire power, the exercise of which depends entirely upon the will of those who hold the power, and efforts to acquire the power of monopoly should be prevented. A monopoly embraces any combination the tendency of which is to prevent competition in its broad and general sense, and to control prices to the detriment of the public. *State v. Eastern Coal Co.*, 70 Atl. 1, 5, 29 R. I. 254, 132 Am. St. Rep. 817, 17 Ann. Cas. 96.

A "monopoly" exists where all, or so nearly all, of an article of trade or commerce within a district, is brought within the hands of one man, or set of men, as to practically bring the handling or production of the commodity or thing within such control to the exclusion of the competition of free traffic therein. *Grogan v. Chaffee*, 105 Pac. 745, 746, 156 Cal. 611, 27 L. R. A. (N. S.) 395.

A "monopoly," in its original sense, was the exclusive right granted by the state to one or a few persons to do something which was before of common right. As now used and understood, it embraces any combination, the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public. *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 56 S. E. 264, 269, 60 W. Va. 508, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667.

"At one time a 'monopoly' meant a grant from King or state of an exclusive right to manufacture or sell certain things, but now it means 'any combination, the tendency of which is to prevent competition, in its broad and general sense, and to control prices to the detriment of the public.'" *Charleston Gas Co. v. Kanawha Gas Co.*, 50 S. E. 876, 878, 58 W. Va. 22, 112 Am. St. Rep. 936, 6 Ann. Cas. 154 (citing 4 Black. Com. 159).

"The idea of 'monopoly' is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.' Its dominant thought now is, to quote another, 'the notion of exclusiveness or unity'; in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them." *National Cotton Oil Co. v. Texas*, 25 Sup. Ct. 379, 383, 197 U. S. 115, 49 L. Ed. 689.

"A 'monopoly,' as now understood, embraces any combination, the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public (quoting and adopting definition in 20 Ency. of Law, 846). A 'trust' has been defined as a contract, combination, confederation, or understanding, express or implied, between two or more persons, to control the price of a commodity or service for the benefit of the parties thereto and to the injury of the public, and which tends to create a monopoly. More accurately, perhaps, it is the entity resulting from the contract, etc., just described." A contract whereby plaintiff agrees to sell exclusively to defendant, and defendant to buy exclusively of the plaintiff, certain farm machinery to be sold in a certain territory is not injurious to the public as tending to create a monopoly, or a violation of Civ. Code 1902, § 2845, as lessening full and free competition to an unreasonable extent. *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hard-*

*ware Co.*, 55 S. E. 973, 974, 75 S. C. 378, 9 L. R. A. (N. S.) 501, 9 Ann. Cas. 902.

The size of a business alone does not constitute a "monopoly" in restraint of interstate commerce, in violation of section 2 of the anti-trust act (Act July 2, 1890, c. 647); but, to render a combination illegal thereunder it must intentionally and necessarily prevent other persons from engaging in such business, thereby stifling competition. *United States v. American Naval Stores Co.*, 172 Fed. 455, 458.

Personal service and occupation cannot be the subject of a "monopoly," but, unless there is property to be affected with a public interest, there is no basis for the fact or the charge of a monopoly. Labor organizations composed of carpenters, joiners, and other persons doing carpenter work and other labor in constructing buildings, organized to shorten the hours of labor and to increase the compensation therefor, is not a monopoly or unlawful combination in restraint of trade. *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997, 1002, 215 Mo. 421, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492.

Combination of several corporations, each selling or leasing machinery intended for different operations, not competing, but supplementing each other, does not ordinarily constitute a "monopoly" in restraint of trade. *United States v. Winslow*, 195 Fed. 578, 592.

The Texas anti-trust acts of May 25, 1899, and March 31, 1903, prohibiting any corporation becoming a party to any understanding with any other corporation to regulate the price in the state of any article of merchandise, etc., defining a trust as a combination to restrict commerce, fix the price of commodities, lessen competition, etc., and defining a "monopoly" as a combination of two or more corporations, with a view of stifling competition, etc., are not indefinite and uncertain, and are valid. *Waters-Pierce Oil Co. v. State*, 106 S. W. 918, 926, 48 Tex. Civ. App. 162.

Section 2 of the statute (Laws 1903, p. 119, c. 94) defines a monopoly as "a combination or consolidation of two or more corporations, when effected in either of the two following methods: (1) When the direction of the affairs of two or more corporations is in any manner brought under the same control for the purpose of producing \* \* \* a trust, as defined in the first section of this act. (2) Where any corporation acquires the franchises or other rights or the physical properties \* \* \* of any other corporation \* \* \* for the purpose of preventing or lessening \* \* \* competition," etc. Held, that the contract did not constitute a monopoly within the terms of said section 2, as the agreement by the railroad to haul the cars of the sleeping car company did not transfer to the latter any of the former's

franchise authorizing it to operate trains over its road. *Ft. Worth & D. C. Ry. Co. v. State*, 87 S. W. 336, 340, 99 Tex. 34, 70 L. R. A. 950.

An agreement by a seller of whisky not to sell any other whisky of the same brand in the places where the buyer was engaged in business until the buyer had disposed of the quantity purchased was not in violation of Acts 1899, p. 246, c. 146, prohibiting agreements to regulate or fix the price of any article, to maintain said price when so fixed, or to fix or limit the amount or quantity of any article, and defining "monopoly" as a "union or combination whereby any of the purposes mentioned in the act is accomplished or sought to be accomplished," and making it unlawful for persons engaged in buying or selling any articles to enter into any pool or agreement to control or limit the trade in such article, or to limit competition by refusing to buy from or sell to any other person for the reason that such other person or corporation is not a member of or a party to such pool or agreement. *Norton v. W. H. Thomas & Sons Co.*, 91 S. W. 780, 781, 99 Tex. 578.

A grocery company and a photographic company agreed that the latter should furnish the former with trading tickets, each entitling its holder to a photo art calendar at the photographic company's studio when countersigned by the grocery company, and the grocery company agreed to pay a certain amount for each ticket three months from date, or as soon as the tickets should be disposed of, if before that time, and to dispose of the tickets as soon as possible, and it was further agreed that from the date of the contract the photographic company should not, without the consent of the grocery company, or until the disposal of the tickets furnished, sell any other local grocery company any of such tickets. Such a contract was not a "monopoly" within the meaning of the act of 1903 (Gen. Laws 1903, p. 119, c. 94), prohibiting trusts, monopolies, and conspiracies in restraint of trade. *Forrest Photographic Co. v. Hutchinson Grocery Co. (Tex.)* 108 S. W. 768, 769.

A contract between a railroad company and an express company, whereby the latter was given exclusive privileges, and the former bound itself not to contract with others to do an express business on the road, and agreed that, in case privileges should be accorded others by legislation or judicial proceedings, the express company in question should have credit for the sums paid by other companies, was violative of Acts 1903, p. 119, c. 94, defining an unlawful trust as a combination of capital, skill, or acts, by two or more persons, to create or carry out restrictions in the free pursuit of any business authorized by the laws of the state or to prevent or lessen competition in the trans-

portation of merchandise. *State v. Missouri, K. & T. Ry. Co. of Texas*, 91 S. W. 214, 218, 99 Tex. 516, 5 L. R. A. (N. S.) 783, 13 Ann. Cas. 1072.

Where two corporations supplying the same community with natural gas made an agreement whereby they parceled out between them the territory, giving to each the exclusive right to sell gas in a given boundary, fixing the prices, and prohibiting change of prices except by their mutual consent, binding one company to use for public consumption only gas produced by the other, and prohibiting one from producing from the section of the country in which the other produced gas, the agreement tends to "monopoly" and is void as against public policy. *Charleston Gas Co. v. Kanawha Gas Co.*, 50 S. E. 876, 879, 58 W. Va. 22, 112 Am. St. Rep. 936, 6 Ann. Cas. 154.

A "monopoly" in trade and commerce is created within the anti-trust law (Gen. Laws 1899, p. 487, c. 359; Rev. Laws 1905, § 5168), when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of a commodity, and to thus suppress competition. *State v. Duluth Board of Trade*, 121 N. W. 395, 398, 107 Minn. 506, 23 L. R. A. (N. S.) 1260.

A "monopoly," within the anti-trust law (Rev. St. 1899, c. 143), is created when, as a result of any contract or combination, previously competing businesses are so concentrated into the hands of a single corporation, or of a few individuals or corporations acting in concert, that they have the power to practically control the prices of commodities and suppress competition. The chief question in determining whether a monopoly exists is not that prices are raised, and competition destroyed, but whether the power exists in the combine to raise prices and destroy competition at pleasure. *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 1045, 218 Mo. 1.

Where neither party to a contract giving an exclusive selling agency in specified territory was a corporation, and there being no evidence of a combination or consolidation, the agreement was not in violation of Rev. Civ. St. 1911, art. 7797, defining a "monopoly" as a consolidation or combination of two or more corporations. *Nickels v. Prewitt Auto Co. (Tex.)* 149 S. W. 1094, 1095.

It is the policy of the common law and the purpose of the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), prohibiting combinations whereby a "monopoly" may be created, or competition restrained, to keep free and unfettered the prosecution by individuals of any lawful business, and to protect competition in trade and commerce for the protection

of the public. The word "arrangement" in the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), making every "contract, agreement, arrangement or combination" whereby a monopoly may be created, or whereby competition may be restrained, unlawful, has a broader meaning than either the word "contract," "agreement," or "combination," and it may include each and all of these things, and more, and means the disposition of measures for the accomplishment of a purpose, and a structure or combination of things in a particular way for any purpose, and one buying the business of his competitors under an agreement binding them not to engage therein for a specified time within specified territory, for the purpose of creating a monopoly, or whereby competition may be restrained, makes an "arrangement" prohibited by the act. A purchase of a going business accompanied by an agreement by the seller not to engage in the same business for a limited time, and within a prescribed territory, made with no ulterior purpose of establishing a monopoly or preventing competition, is not illegal under the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), prohibiting combinations whereby a monopoly may be created, or competition restrained, but such a purchase for the purpose of creating a monopoly so as to be able to control prices is illegal. A contract whereby the seller of an ice business binds himself not to engage in such business for a specified term within a specified territory restricts the free pursuit in the state of a lawful business, and, if taken by the buyer for the purpose of creating a monopoly within the state, is illegal under the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), prohibiting combinations whereby a monopoly may be created, or competition restrained. The jury in determining whether a corporation engaging in the ice business in the city of New York, which procured contracts from competitors whereby the latter sold their business and bound themselves not to engage therein within a specified time within described territory, procured the contracts for the purpose of creating a monopoly in violation of the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), must consider all the accompanying facts, including the facts that the restrictive agreements included greater territory than that in which the selling competitor had previously done business, and that the corporation procured a great number of such contracts. A corporation becoming the owner of all or substantially all of the stock of existing corporations is not criminally liable for their acts in procuring before its own organization contracts for the purpose of creating a monopoly, but where, after its acquisition of such stock, it makes use of such contracts to maintain an arrangement to create a monopoly and prevent competition, it is liable under the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), prohibiting such

combinations. A corporation owning and controlling subordinate corporations, which, under its direction and for its use, bought the business of competitors and procured from them agreements not to engage in similar business for a specified time within described territory, for the purpose of creating a monopoly, is guilty of violating the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346). A contract whereby the seller of an ice business binds himself not to engage therein for a specified time within described territory is permissible only when innocently made without any purpose of creating or maintaining a monopoly, and a contract made with such an illegal purpose is illegal because it may prevent and restrain competition in violation of the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346). Anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), prohibiting every agreement or combination whereby a monopoly may be created, or whereby competition in the supply or price of any article in common use may be restrained, treats a monopoly and restraint of competition as two distinct things, as a monopoly usually restrains competition and usually is the result of a restraint of competition, but a restraint in competition may not extend to the degree of creating a monopoly, and, to vitiate contracts procured by one from his competitors on purchasing their business, it need not be shown that the arrangement results or may result in a total suppression of all competition, or in an absolute monopoly, and all that is essential is that they restrain competition and tend to deprive the public of the advantages of free competition. A corporation engaging in the ice business in the city of New York, which bought the business of competitors and procured from them agreements not to engage in such business for a specified period within described territory, for the purpose of creating or maintaining a monopoly, violated the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), prohibiting combinations whereby a monopoly may be created or competition restrained, though it did not subsequently raise prices. A monopoly condemned by the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), prohibiting combinations whereby a monopoly may be created, or competition restrained, need not be an absolute one, excluding all competition, but a monopoly is created where, as the result of effort to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or in a few persons or corporations, that they have power to practically control prices of a commodity, and thus suppress competition. A corporation engaging in the ice business in the city of New York, which establishes a monopoly covering a part of the borough of Manhattan, or of one district in the borough, so that the consumers in that portion of the city are deprived of the benefit of free competition, is guilty

of creating a monopoly in violation of the anti-monopoly act (Consol. Laws, c. 20, §§ 340-346). The anti-monopoly act (Consol. Laws, c. 20, §§ 340-346), punishing every person making or attempting to make any contract or combination whereby a monopoly may be created, or competition restrained, makes an attempt to create a monopoly unlawful, and one who attempts to create a monopoly by buying the business of his competitors and procuring from them agreements not to engage in such business for a specified period within described territory, and by doing any act for the consummation thereof, as by keeping such contracts in force and attempting to derive benefit therefrom, is guilty of violating the anti-monopoly act, though it failed of its purpose, and the creation of a monopoly became practically impossible. *People v. American Ice Co.*, 120 N. Y. Supp. 443, 447.

Stock Corporations Law N. Y. § 7, as amended, declares that no domestic stock corporation shall combine with any other corporation or person to create a "monopoly" or the unlawful restraint of trade, or to prevent competition in any necessary of life. Held, that the word "monopoly" was not used in its strict sense as requiring a control of all existing means of carrying on a business, or doing a particular thing, and the right to possess, own, or control all means of doing that thing in the future, but was satisfied by an exclusive privilege to carry on a traffic or the possession or assumption of anything to the exclusion of other possessors, and embraces any combination or contract the tendency of which is to prevent competition in its broad and general sense. *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945, 956.

Stock Corporation Law (Laws 1890, p. 1073, c. 564, § 40), as amended, permits a stock corporation to purchase stock of another corporation, if authorized in its certificate of incorporation, or if the corporation whose stock is purchased is engaged in a business similar to that of the purchasing corporation. Stock Corporation Law (Laws 1890, p. 1069, c. 564, § 7), as amended, provides that no corporation shall combine with any corporation or person for the creation of a monopoly or the unlawful restraint of trade, or for the prevention of competition in any necessary of life, and Laws 1897, c. 310, c. 383, and Laws 1899, p. 1515, c. 690, were enacted to destroy monopolies and prevent combinations in restraint of competition or the free pursuit of any lawful business. Held, that the consolidation under Laws 1884, p. 448, c. 367, of six companies engaged in the manufacture and sale of gas and electricity into a corporation to continue such business, and the subsequent purchase by such consolidated company of all, or a controlling interest in, the shares of other similar corporations, purchased to prevent competition, did not create a

"monopoly" in contravention of said acts, as it left the field open to any company that might be organized with the approval of the commission, provided for by Public Service Commission Law (Laws 1907, p. 889, c. 429). *Attorney General v. Consolidated Gas Co. of New York*, 108 N. Y. Supp. 823, 824, 124 App. Div. 401.

In statutes prohibiting contracts or combinations creating monopolies, the word "monopoly" is not used in a strict, legal sense as including the power to legally exclude all others from the field monopolized, since such a "monopoly" cannot be created by a contract or combination, but only by sovereign power; but it is used in a different, but equally well-understood, sense as meaning the obtaining of a substantially complete control of a particular business or article of trade. The acquisition by a corporation of controlling interest in the stock of the corporations owning or controlling and operating all of the street railway lines in the boroughs of Manhattan and the Bronx in New York City, including the underground, elevated, and surface lines, is unlawful, as creating a practical "monopoly" of the means for transportation of passengers in the city, in violation of Stock Corporations Law, § 7 (Laws 1897, p. 313, c. 384). *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389, 392.

A "monopoly," in the sense forbidden by Const. art. 1, § 26, consists in the ownership or control of so large a part of the market supply of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolies control over prices; and hence Act Jan. 28, 1905 (Acts 29th Leg. c. 7), which granted to a private corporation property owned by the state charged with its repair and maintenance for historical and patriotic purposes, subject to future legislation, did not violate the constitutional provision, since it was but the assumption of a burden which deprived no citizen of any privilege or right and brought no financial gain to the corporation. *Conley v. Daughters of the Republic of Texas (Tex.)* 151 S. W. 877, 883.

To constitute a violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, there must be a contract, combination, or conspiracy which in purpose or effect tends to restrain trade or commerce among the states or to monopolize some portion thereof. There must be a meeting of the minds of two or more to accomplish some common purpose directly violative of the act, or a purpose which will, whether intentionally or not, in effect constitute a restraint of trade and commerce among the several states. The mere extent of acquisition of business or property achieved by fair and lawful means cannot be the criterion of monopoly within the meaning of Anti-Trust Act July 2, 1890, c. 647, § 2; but in addition to acquisition and acquirement



there must be an intent by unlawful means to exclude others from the same traffic or business, or from acquiring by the same means property and material things. One of the purposes of Anti-Trust Act July 2, 1890, c. 647, § 1, in making illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several states, is to maintain interstate commerce on the basis of free competition, and any contract, combination, or conspiracy, the purpose or direct effect of which is to restrict such free competition by way of transportation or otherwise, is in restraint of interstate commerce and unlawful. The fact that the several acts by which the purpose of a combination in restraint of trade and commerce among the several states is effected are, taken in isolation, lawful or intrastate in character, and not within the purview of Anti-Trust Act July 2, 1890, c. 647, does not relieve the combination from illegality; but such acts must be viewed as elements of a whole and in the light of their purpose and effect in combination. *United States v. Reading Co.*, 183 Fed. 427, 456.

The generic character of the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, against combinations in restraint of interstate or foreign trade or commerce, and monopolization or attempts to monopolize any part thereof, covers every conceivable act which can possibly come within the spirit or purpose of the condemnation of the law, without regard to the garb in which such acts are clothed. The words "restraint of trade" in Anti-Trust Act July 2, 1890, c. 647, condemning combinations in restraint of interstate or foreign trade or commerce, or the monopolization or attempts to monopolize any part thereof, should be given a meaning which will not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of commerce, the free movement of which it was the purpose of the statute to protect. The standard of reason which had theretofore been applied at the common law and in the United States in dealing with subjects of the character embraced by the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part thereof, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided. *United States v. American Tobacco Co.*, 31 Sup. Ct. 632, 648, 221 U. S. 106, 179-184, 55 L. Ed. 663.

The control by one mining corporation organized under the laws of Michigan of another similar corporation engaged in a competing business in interstate and foreign commerce by acquiring a majority of its stock, or in part by soliciting and obtaining proxies from other stockholders with the

purpose and intention of eliminating competition and obtaining a monopoly of trade in their products, either complete or partial, is in violation of the federal Anti-Trust Law (Act July 2, 1890, c. 647), which makes unlawful every "combination in restraint of interstate or foreign trade and commerce," and also of Pub. Acts Mich. 1899, p. 409, No. 255, as supplemented by Pub. Acts Mich. 1905, p. 507, No. 329, prohibiting all combinations entered into for the purpose and with the intent of establishing and maintaining a "monopoly"; nor is such transaction relieved from its invalidity under the latter statute by Pub. Acts Mich. 1905, pp. 153, 154, No. 105, which authorizes mining corporations of the state to purchase and own stock in other similar corporations. *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869, 874.

A secret arrangement between two corporations, which together produced about 85 per cent. of all the licorice paste consumed in the United States and sold to consumers throughout the country, by which they ceased competition, fixed from time to time the prices at which each should sell, and apportioned the customers between them, and also by concerted action secured contracts with their chief, if not only competitors, which enabled them to control either the output of such competitors or the prices at which and the persons to whom they should sell, constitutes a virtual "monopoly" in the interstate distribution of the substance manufactured. *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 834.

The combination of the stocks of the various corporations trading in petroleum and its products in the hands of a holding company, with the intent to exclude others from the trade, and thus centralize in the combination the perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, constitutes a violation of the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, against combinations in restraint of interstate or foreign commerce, or the monopolization or attempt to monopolize any part of such trade or commerce. *Standard Oil Co. of New Jersey v. United States*, 31 Sup. Ct. 502, 516, 221 U. S. 1, 61, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

An indictment against operators of a cotton corner for alleged violation of the Sherman anti-trust law charged that defendants had conspired to monopolize a part of the trade and commerce among the several states by becoming members of and engaging in an unlawful combination in the form of an agreement by which they were severally to purchase cotton to such an extent that, together, they would have enough to enable them to control the price of such cotton, and severally to demand arbitrary, excessive, and monopolistic prices for the same on the sale

thereof by them respectively to spinners and manufacturers other than such conspirators. Held that, since no monopoly exists when individuals, each acting for himself, own large quantities of a commodity, the indictment was fatally defective as alleging only a scheme to demand monopolistic prices as the result of individual as distinguished from collective power. *United States v. Patten*, 187 Fed. 664, 672.

A business device by which a considerable number of competing corporations are welded into a single corporate entity controlling from 90 to 95 per cent. of the commerce of the country in a particular branch required for the economical production of a necessity of mankind, as shoe machinery, is a monopoly, within the federal anti-trust act. *United Shoe Machinery Co. v. La Chapelle*, 99 N. E. 289, 290, 212 Mass. 467, Ann. Cas. 1913D, 715.

An undue and unreasonable restraint of interstate commerce, forbidden by the act of July 2, 1890, results from the concerted scheme of railway carriers possessing a substantial monopoly of the transportation facilities between the anthracite deposits in Pennsylvania and tide-water distributing points, and also controlling, with the aid of their subsidiary coal-mining and selling companies, nearly three-fourths of the annual supply of anthracite, whereby a large number of the independent coal operators were induced to enter singly into uniform perpetual agreements for the sale to some one of such carriers, or its subsidiary coal company, of the entire output of their several mines and any others they might thereafter acquire, at a fixed percentage of the general average price prevailing at tide-water points at or near New York, which would net the operator slightly more than if he shipped and sold on his own account, the necessary result being to secure to the carriers the control at tide-water markets of the sale of a large part of the independent output. *United States v. Reading Co.*, 33 Sup. Ct. 90, 94, 226 U. S. 324, 57 L. Ed. 243.

## MONTE

As banking game see Banking Game.

"Monte" is a game kept by a dealer; that is, the dealer against all the bettors. *Chancellor v. State*, 107 S. W. 823, 824, 52 Tex. Cr. R. 464.

## MONTH

See Calendar Month; Tenant from Month to Month.

A month is a definite period of time, commencing on the 1st day thereof, and ending on the 28th, 29th, 30th, or 31st day. *Derby v. Dancey*, 36 South. 795, 796, 112 La. 891.

The term "months," when used in a statute, means calendar months, not lunar months, unless there is something in the statute which indicates that a contrary meaning was intended. *Simmons v. Hanne*, 39 South. 77, 79, 50 Fla. 267, 7 Ann. Cas. 322 (citing *Guaranty Trust & Safe Deposit Co. v. Buddington*, 9 South. 246, 27 Fla. 215, 12 L. R. A. 770; *Bacon v. State*, 22 Fla. 46; *Bertwell v. Haines*, 63 Pac. 702, 10 Okl. 468).

The word "month," whenever it occurs in the statute of this state, means a "calendar month," unless the contrary be particularly expressed. *Kimball v. Lamson*, 2 Vt. 138, 141.

Under Rev. St. 1878, § 2183, providing that a tenancy by sufferance may be terminated by the landlord giving "one month's notice" in writing to the tenant, requiring him to remove from the demised premises, a notice is sufficient where giving the proper number of days before the action is brought as contained in the calendar month in which it is given. *Minard v. Burtis*, 53 N. W. 509, 511, 83 Wis. 267.

The term "month" in a policy of life insurance construed to mean a calendar month. *Bohles v. Prudential Ins. Co. of America*, 83 Atl. 904, 905, 83 N. J. Law, 246.

The word "month" in a contract to sell 4,000 tons of asphalt to be delivered on orders not exceeding 400 tons "in any one month" payments to be made on the 10th of each month for asphalt delivered during the preceding month meant calendar month. *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.*, 110 Pac. 951, 953, 158 Cal. 264.

When an act is required by statute to be performed within a certain number of months after a certain date, the word "months" will be construed to mean calendar months, whether of 28, 29, 30, or 31 days, and proceedings in error commenced on the corresponding day of the fourth month after the rendition of the judgment comply with the statute in this regard. *Oehler v. Walsh*, 29 Ohio Cir. Ct. R. 446, 447.

The term "months," in a constitutional provision providing that a vacancy in an office of any judge holding office by election shall be filled by appointment, the appointee to hold his office until the next general election for any state officer, held at least six months after the vacancy occurs, means calendar months. *Foster v. State ex rel. Stanford*, 43 South. 179, 180, 149 Ala. 632.

Under Laws 1892, p. 1490, c. 677, § 26, relating to the computation of "months," and negating any right to include in such computation a day beyond the day in the last month so counted, having the same numerical order in the days of the month as the day from which the computation is made, and section 27 providing that a Sunday or public holiday must be excluded from

the reckoning if it is the last day of any such period, when a life insurance policy provides that no action can be maintained thereon after six months from the death of the insured, and such period expires on Sunday, an action commenced on the following Monday is barred by the express terms of the policy. *Ryer v. Prudential Ins. Co. of America*, 77 N. E. 727, 185 N. Y. 6.

### MONTHLY PAYMENTS

See In Monthly Payments as Due.

### MONTHLY SETTLEMENT

By a contract for services of plaintiff for five years in selling defendant's beer to certain customers, defendant agreed, on condition that such sales should not be less than 30,000 barrels per annum, to pay plaintiff 12½ cents per barrel so sold yearly during the term of the agreement, monthly settlements to be made. Held, that the words "monthly settlements" could not be construed to mean "monthly payments," thereby qualifying the provisions by which the promise to pay was conditioned on sales of a specified amount per annum, and payments were to be made yearly, and that nothing would become due until the expiration of a year, or at least until 30,000 barrels should have been sold. *Gminder v. Zeltner Brewing Co.*, 111 N. Y. Supp. 215, 217, 128 App. Div. 776.

### MONUMENT

See Suitable Monument.

Dutiable as dressed granite, see Dressed Granite.

A testator, who sets apart a specified sum from his estate for funeral expenses and proper interment of his remains and a suitable monument to his memory, and requests that his remains be buried on a designated ranch, does not authorize the executors to use a part of the fund for the erection of a free library as a memorial; the word "monument" being used in its natural sense as meaning a shaft or any structure placed over a tomb or at a grave, and not in its applied sense as meaning a reminder taking any form. In its applied sense, a monument, being a reminder, may take any form. Napoleon's battles are monuments to his memory. Horace by his poetry "built himself a monument more enduring than brass"; and Sir Christopher Wren in his oft-quoted epitaph, "Si Monumentum Requirit Circumspice," declares St. Paul's cathedral his monument. *Fancher v. Fancher*, 103 Pac. 206, 207, 156 Cal. 13, 23 L. R. A. (N. S.) 944, 19 Ann. Cas. 1157.

Act April 3, 1903 (P. L. 136), amending Act May 22, 1895, authorizing the erection of soldiers' monuments, and reciting the title of such amended act in its own title, is a sufficient notice of a provision in the amended act allowing county commissioners in

counties having a population of over 500,000 and less than 1,000,000 to erect a building in memory of the soldiers and sailors in the War of the Rebellion from such counties; a memorial hall being in the nature of a "monument." *Yoho v. Allegheny County*, 67 Atl. 648, 649, 218 Pa. 401.

### MONUMENTS (In Boundaries)

See Natural Monument; Permanent Monument.

"Monuments" are permanent landmarks established for the purpose of indicating boundaries. *Thompson v. Hill*, 73 S. E. 640, 643, 187 Ga. 808.

Permanent objects, such as streams, or rivers, and the shore of a lake, or highways, or other lands, or buildings, or stakes, when referred to in the description of property conveyed, are known as "monuments." *Temple v. Benson*, 100 N. E. 63, 213 Mass. 128.

A deed describing land as running along an unnavigable stream, or referring to it as the boundary, makes it a "monument." *Drake v. Russian River Land Co.*, 103 Pac. 167, 170, 10 Cal. App. 654.

In the description in a deed of land, commencing 26 feet west of the southeast corner of a certain lot, "being the southwest corner of the portion of said lot, formerly owned by B., where she now resides," and running thence north 26 feet, thence west 26 feet, or to and intersecting "the northeast corner of a lot formerly owned by M.," and running thence south to Seventh street, and thence to place of beginning, said southwest corner of land owned by B., and said northeast corner of land owned by M., are not real "monuments," which are fixed and visible objects, within the rule that real monuments called for in the description of a deed are ordinarily given precedence over distances called for; it not appearing that such corners are any more established than are the disputed lines of description in the deed. *Koch v. Gordon*, 138 S. W. 609, 610, 231 Mo. 645.

The engineer making an original survey of a tract into lots, blocks, and streets set stakes on the ground to indicate boundaries of lots. He made a resurvey from his original notes, and discovered a discrepancy between the stakes and the field notes. In placing the stakes originally, he intended to place them in accordance with the notes and plat. One of the earliest purchasers found the stakes, and relied thereon. Others accepted the stakes as marking the boundaries. An abutting street was improved with paving, gutters, curb, and parking in accordance with the boundaries of the lots established by the stakes. Held, that the stakes constituted monuments on the ground controlling the field notes, and established the boundaries between property owners and were controlling on the city. *Tomlinson v. Golden (Iowa)* 138 N. W. 448, 450.

**MOOR****MOORAGE**

Wharfage synonymous, see Wharfage.

**MOOT CASE**

A "moot case" is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. *Ex parte Steele*, 162 Fed. 694, 702.

The fact that a suit may be a friendly one would not of necessity render it a "moot case," which is defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights. *State v. First Catholic Church of Lincoln*, 128 N. W. 657, 658, 88 Neb. 2.

"A 'moot case' is one which seeks to determine an abstract question which does not rest upon existing facts or rights." "It is universally understood by the bench and bar \* \* \* that a moot case is one which seeks to get a judgment on a pretended controversy when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy." Where a request is made of a public officer to perform an act under a statute, and he, although believing that the law requires its performance, refuses because of a doubt on the subject and because he wishes the question to be quickly and finally settled by the decision of a court, a proceeding brought by the state to compel such action on his part is not fictitious. *State v. Dolley*, 108 Pac. 846, 847, 82 Kan. 533 (quoting *Adams v. Union Railroad Co.*, 42 Atl. 517, 21 R. I. 140, 44 L. R. A. 273; *Ex parte Steele*, 162 Fed. 694, 701).

**MORAL**

See Contrary to Good Morals.

**MORAL CERTAINTY**

See To a Moral Certainty.

"Moral certainty" is that degree of proof which the law requires of moral evidence. Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it. It is also declared to be a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. *People v. Lew Fook*, 75 Pac. 188, 141 Cal. 548.

"Moral certainty" is a probability sufficiently certain to justify action upon it. "Reasonable and moral certainty" may be said to be that degree of probability which exists with such strength as to justify human action upon it. *Austin v. State*, 64 S. E. 670, 6 Ga. App. 211.

Where a fact established by evidence is the only one that can reasonably exist under the circumstances, the truth is established to a "moral certainty," which is the highest degree of certainty obtainable in human affairs. Evidentiary circumstances relied on and essential to establish any necessary element in a criminal prosecution must, in order to be efficient, be shown to exist to the satisfaction of the jury with the same degree of certainty as the ultimate object of inquiry is required to be to warrant a finding in the affirmative. *Schwantes v. State*, 106 N. W. 237, 244, 127 Wis. 160.

A "mathematical demonstration" is wholly different from a "moral certainty." Evidence of demonstration relates to necessary truths, truths as to which the supposition of the contrary involves, not merely what is not and cannot be true, but what is also absurd, whereas moral evidence is the basis of contingent truth. It follows obviously that the convictions which these distinct and dissimilar classes of evidence are capable of producing are necessarily of very different natures. In the one absolute certitude is the result, to which moral certainty, the highest degree of assurance of which truths of the latter class admit, is necessarily inferior. *Wills, Cir. Ev. 5*. Moral certainty is that full and complete assurance which admits of no degrees, and induces a sound mind to act without doubt upon the conclusions to which it naturally and reasonably leads. 2 *Stewart's Elements*, c. 2, § 4. It is apparent, then, that the precision attainable in the one case is of a nature of which the other does not admit. *Bowman v. Little*, 61 Atl. 1084, 1086, 101 Md. 273.

The term "moral certainty," as applied to the evidence in a criminal case, has the same meaning as "reasonable doubt." *State v. Martin*, 74 Pac. 725, 728; 29 Mont. 273; *State v. Wappenstein*, 121 Pac. 989, 998, 67 Wash. 502; *Stewart v. State*, 115 S. W. 374, 375, 88 Ark. 602 (citing *Commonwealth v. Costley*, 118 Mass. 1; *Jones v. State*, 14 South. 772, 100 Ala. 88; *Woodruff v. State*, 12 South. 653, 31 Fla. 320; *Carlton v. People*, 37 N. E. 244, 150 Ill. 181, 41 Am. St. Rep. 346); *Norman v. State*, 74 S. E. 428, 10 Ga. App. 802. See, also, *People v. Buettner*, 84 N. E. 218, 220, 233 Ill. 272, 18 Ann. Cas. 235.

"Reasonable doubt" and "moral certainty" may be used interchangeably. The writers of legal dictionaries define "moral certainty" to mean that degree of certainty which will justify a jury in grounding upon

it their verdict. Bouvier defines the term to mean: "Certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. A certainty beyond a reasonable doubt." Black's Law Dictionary defines the term as follows: "In the law of criminal evidence that degree of assurance which induces a man of sound mind to act without doubt upon the conclusion to which it leads. *Hendrix v. United States*, 101 Pac. 125, 129, 2 Okl. Cr. 240.

To say that proof of the fact must be made reasonably certain is, by literal import of the words, tantamount to saying that the proof must be made beyond a reasonable doubt. This has been expressly held as to the phrase "moral certainty," which is equivalent to the words "reasonable certainty." A charge that if a passenger's sickness was not the result of her being put off the train, and that it was "reasonably certain" to have resulted from other causes, the carrier is not liable is erroneous as requiring proof beyond reasonable doubt. *St. Louis, A. & T. Ry. Co. v. Burns*, 9 S. W. 467, 468, 71 Tex. 479, 481.

Refusal to give an instruction in a murder trial that the presumption of innocence "must be overcome by competent evidence which convinces you of his guilt to a moral certainty" is not error where an instruction is given that "moral certainty, only, is required, or that degree of proof which produces conviction in an unprejudiced mind." *State v. Megorden*, 88 Pac. 306, 310, 49 Or. 259, 14 Ann. Cas. 130.

An instruction to the jury that they must be satisfied to a "moral and reasonable certainty" is the same in effect as saying that they must be satisfied "beyond a reasonable doubt." *Warren v. Gay*, 51 S. E. 302, 303, 123 Ga. 243 (quoting and adopting definition in *Dwight v. Jones*, 42 S. E. 48, 115 Ga. 744).

### MORAL CHARACTER

See Good Moral Character.

### MORAL DUTY

The term "performance of a moral duty," as applied to a meritorious consideration for a contract, is confined to three duties, of charity, of payment of creditors, and of maintaining a wife and children, and under the last head are included provisions made for persons, not being children of the party promising, but in relation to whom he has manifested an intention to stand in loco parentis in reference to the parental duty of making provision for a child. Where the only consideration for a deed by a father to his daughter was love and affection, the daughter could not enforce a provision in the deed that the grantor would pay an incumbrance on the property at maturity. *Fischer v. Union Trust Co.*, 101 N. W. 852, 853, 138 Mich. 612, 68 L. R. A. 987, 110 Am.

St. Rep. 329 (quoting and adopting definition in *Adams, Eq.* [8th Ed.] 98).

### MORAL HAZARD

"Moral hazard," in insurance, is but another name for a pecuniary interest in the insured to permit the property to burn." *Glens Falls Ins. Co. v. Michael*, 74 N. E. 964, 972, 167 Ind. 659, 8 L. R. A. (N. S.) 708 (quoting definition in *Columbian Ins. Co. of Alexandria v. Lawrence*, 2 Pet. [27 U. S.] 25, 49, 7 L. Ed. 335); *Connecticut Fire Ins. Co. v. Manning*, 160 Fed. 382, 385, 87 C. C. A. 334, 15 Ann. Cas. 338; *Johnson v. Sun Fire Ins. Co.*, 60 S. E. 118, 119, 3 Ga. App. 430 (quoting and adopting definition in 2 *Cooley, Briefs on Ins. p.* 1831 et seq.).

The term "moral hazard," as used in the law of fire insurance, means the possibility of loss by fires of incendiary origin. *Hartford Fire Ins. Co. v. Dorroh (Tex.)* 133 S. W. 465, 468.

### MORAL INSANITY

"Moral insanity" or "medical insanity" is a perversion of the sentiment and affections. *Taylor v. McClintock*, 112 S. W. 405, 412, 87 Ark. 243.

### MORAL MARRIAGE

"Moral marriage" was a term applied to a relation between slaves who, although they had no power to make the marriage contract, yet came together and agreed to live as man and wife. The essence of such an agreement was that it be bona fide, and that the parties act in accordance with it. *Watson v. Ellerbe*, 57 S. E. 855, 856, 77 S. C. 232.

### MORAL OBLIGATION

"Moral obligations" are those arising from the admonitions of conscience, and accountability to the Supreme Being. No human law-giver can impair them. They are entirely foreign from the purposes of the Constitution." *Ogden v. Saunders*, 12 Wheat. 213, 318, 6 L. Ed. 606 (Trimble, J., dissenting).

"Moral obligation" is defined to be an obligation "which cannot be enforced by action but which is binding on the party who incurred it in conscience and according to natural justice." It is again defined as "a duty which would be enforceable by law were it not for some positive rule which, with a view to general benefit, exempts the party in that particular instance from legal liability. It is held that such 'moral obligation' will sustain an express promise to pay." *Rathfon v. Locher*, 64 Atl. 790, 791, 215 Pa. 571 (quoting and adopting definitions from *Bailey v. City of Philadelphia*, 31 Atl. 925, 167 Pa. 569, 46 Am. St. Rep. 691).

A debt which a person "morally owes" is one which he owes in equity and good conscience, lawfully owes, but which he cannot be personally adjudged to pay. *MacDonald*

*v. Tefft-Weller Co.*, 128 Fed. 381, 385, 63 C. C. A. 123, 65 L. R. A. 106.

A "moral obligation" on the part of the state must have something more substantial than legislation obnoxious to the fundamental law to rest upon; something more for a foundation or starting point than a statute which is itself immoral. A moral obligation can never be deemed to rest upon the people of the state to discharge a contract made by the Legislature in direct violation of the Constitution. *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 97 N. W. 454, 457 (citing *Adsit v. Osmun*, 48 N. W. 31, 84 Mich. 420, 11 L. R. A. 534).

#### Political obligations distinguished

"'Moral obligations' are universal and immutable, but 'political obligations' must frequently vary according to political circumstances." *Shanks v. Dupont*, 3 Pet. 242, 263, 7 L. Ed. 666 (Johnson, J., dissenting).

#### MORAL TURPITUDE

"Everything done contrary to justice, honesty, modesty, or good morals is said to be done with 'turpitude.'" Thus where an attorney, acting as a notary public, falsely certified, to affidavits to be used in the prosecution of pension claims, that the affiants personally appeared before him and were sworn and acknowledged the execution thereof, and he was convicted in a federal court, under Rev. St. U. S. § 4746, imposing a fine for such an offense not exceeding \$500 or imprisonment for a term not exceeding five years, he was convicted of an offense involving "moral turpitude," justifying his disbarment, under Ballinger's Ann. Codes & St. § 4775. In *re Hopkins*, 103 Pac. 805, 806, 54 Wash. 569 (quoting and adopting definition in *Bouv. Law Dict.*).

"Turpitude," in its ordinary sense involves the idea of inherent baseness or villainess, shameful wickedness; depravity. In its legal sense, it includes everything done contrary to justice, honesty, modesty, or good morals. The word "moral," which so often precedes the word "turpitude," does not seem to add anything to the meaning of the term, other than that emphasis which often results from tautological expression, within the divorce statute. *Holloway v. Holloway*, 55 S. E. 191, 126 Ga. 459, 7 L. R. A. (N. S.) 272, 115 Am. St. Rep. 102, 7 Ann. Cas. 1164 (citing 5 Words and Phrases, p. 4580; *Webst. Dict.*; *Black, Law Dict.*; *Bouv. Law Dict.*).

Proof of a prior conviction of assault and battery was inadmissible to affect a witness' credibility, under the rule permitting evidence of prior convictions of offenses involving "moral turpitude," as such term signifies an inherent quality of baseness, villainess, and depravity not inherent in assault and battery. *Gillman v. State*, 51 South. 722, 723, 165 Ala. 135.

Carrying a concealed weapon is not an offense involving "moral turpitude," and the offender's conviction is not ground for his deportation. *Ex parte Saraceno*, 182 Fed. 955, 957.

The keeper of a disorderly house within Pen. Code 1911, art. 496, defining a disorderly house as any assignation house, or theater or house where liquors are kept for sale and women of bad reputation are permitted, is guilty of an offense involving "moral turpitude," and a witness for accused is properly cross-examined as to whether he is under an indictment for keeping a disorderly house. *Bird v. State (Tex.)* 148 S. W. 738, 739 (citing 5 Words and Phrases, p. 4580).

The illegal sale of intoxicating liquors is not a crime involving moral turpitude within Kirby's Dig. § 5247, authorizing the revocation of a physician's license on his conviction of crime involving moral turpitude, the words "moral turpitude" implying something immoral, regardless of the fact that it is punishable by law, and offenses against the liquor laws, such as illegal sales of liquor, are statutory crimes, and merely *mala prohibita*. *Fort v. City of Brinkley*, 112 S. W. 1084, 1085, 87 Ark. 400.

Proof of a conviction of an illegal sale of intoxicating liquors is not admissible to impeach a witness' credibility; the crime not showing "moral turpitude," which signifies an inherent quality of baseness, villainess, or depravity. *Swope v. State*, 58 South. 809, 811, 4 Ala. App. 83.

"Moral turpitude" is an act of baseness, villainess, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. Though the point at which an act begins to take on the color of turpitude is not very definitely marked, yet the commission of the crime of larceny, whether grand or petit, undoubtedly involves "moral turpitude," as that term is commonly used. In *re Henry*, 99 Pac. 1054, 1055, 15 Idaho, 755, 21 L. R. A. (N. S.) 207.

Fighting not being an offense involving "moral turpitude," the state may not, on cross-examination of defendant, show that he had paid several fines for fighting before the charge of assault for which he was being tried. *Pollok v. State (Tex.)* 101 S. W. 231, 232.

#### MORE

##### More necessary public use

Under a Code provision allowing property already taken for public use to be taken for a "more necessary public use" than that to which it has been already appropriated, the land of a private person, subject to an easement for a public highway, may be taken by a water company for a dam and reservoir.

**Marin County Water Co. v. Marin County, 79 Pac. 282, 283, 145 Cal. 586.**

#### More particularly

"Particularly" is defined as "in a particular manner; expressly with a specific reference or interest; in particular; distinctly." The term "more particularly described," as used in a contract to convey a farm "consisting of two hundred (200) acres, more or less, \* \* \* more particularly described," in a deed specified, means exactly described. *Sweet v. Marsh*, 117 N. Y. Supp. 930, 934, 133 App. Div. 315.

#### More testimony

An instruction was correct which, construed as a whole, told the jury that, after rejecting the testimony of witnesses discredited by them, their verdict should be for claimant, if there was "more testimony" (that is, a preponderance of testimony) tending to establish the validity of her claim, and if there was not, their verdict should be for the estate. *Taylor v. Taylor's Estate*, 101 N. W. 832, 835, 138 Mich. 658.

#### More than one

An allegation, in a pleading contesting the validity of an election in a school district authorizing the issuance of bonds, that "more than one" person voted in favor of the bonds who was not a taxpayer of the district is tantamount to an allegation that two votes were cast by persons who were not taxpayers of the district. *Hicks v. Krigbaum*, 108 Pac. 482, 486, 13 Ariz. 237.

#### More than ten years

Where defendant pleaded that he had been in peaceable possession of all the property described in plaintiff's petition, using and exercising ownership over same for "more than ten years next preceding the filing of said suit," the phrase quoted indicates that it was not the intention of the pleader to limit the time of possession to the ten years immediately preceding the filing of the suit. *Campbell Real Estate Co. v. Wiley* (Tex.) 83 S. W. 251, 252 (citing *Hennessy v. Savings & Loan Co.*, 55 S. W. 124, 22 Tex. Civ. App. 591).

### MORE OR LESS

The phrase "more or less" following a numeral conveys the meaning of an estimate of probable distance or amount. The idea of nearness is suggested but that of fixedness is excluded, and, where the question at issue in the controversy is one of distance, it is a question of fact for the jury to determine as to what is a reasonable limit in connection with the subject-matter and surrounding facts and circumstances of the particular case. *Geiger v. Kaestner*, 148 Ill. App. 529, 532; *Santa Paula Commercial Co. v. Parkhurst-Davis Mercantile Co.*, 120 Pac. 347, 348, 86 Kan. 328.

### MORE OR LESS (Personalty)

In a contract for sale of goods, the qualifying words "more or less" merely provide against slight and accidental variations in number, measure or weight. *Hills v. Edmund Peycke Co.*, 110 Pac. 1088, 1089, 14 Cal. App. 32.

The phrase "more or less," as used in a contract for the manufacture and sale of glass, where the quantity is stated at 200,000 square feet "more or less," means only such immaterial variations in quantity as would occur naturally in connection with such a contract. *Hadley-Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242, 243, 74 C. C. A. 462.

The words "more or less," in a contract for the sale of a designated number of staves "more or less," all being branded, etc., are merely precautionary so as to cover slight and unimportant inaccuracies and do not enlarge the descriptive words or quantity. *Little Rock Cooperage Co. v. Gunnels*, 101 S. W. 729, 730, 82 Ark. 286, 12 Ann. Cas. 293.

The terms "about" and "more or less," as used in a contract of sale of "about" 250 tons of grapes "more or less," do not create such an ambiguity in the contract as to let in extrinsic evidence of previous or contemporaneous conversations to show intent. *Peterson v. Chalm*, 90 Pac. 948, 951, 5 Cal. App. 525.

#### Quantity identified by independent circumstances, or determined by option of buyer

Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about," or "more or less," or words of like import, the contract applied to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases the governing rule is somewhat analogous to that which is applied in the description of land, where natural boundaries and monuments control courses and distances and estimates of quantity. A contract for the sale of cotton linters stipulated that the seller confirmed the sale to the buyer of the "season's output of linters \* \* \* estimated at 200 to 250" bales. Held, that the contract was for the sale of the output, regardless of the number of bales, especially in view of the evidence that the buyer was buying linters generally, and wanted all he could get, and the buyer was required to take the output consisting of 66 bales in excess of the maximum estimate.

*Loeb v. Winnsboro Cotton Oil Co. (Tex.)* 93 S. W. 515, 516 (quoting and adopting *Brawley, to Use of Myrick, v. United States*, 96 U. S. 171, 24 L. Ed. 622).

#### MORE OR LESS (Realty)

The words "more or less" ordinarily mean "about," when used in a deed. *Carling v. Wilson (Ala.)* 58 South. 417, 418.

Where land sold was described by metes and bounds, the words "containing by estimate" a certain number of acres were equivalent to the words "more or less." *Mayer & Schmidt v. Wooten*, 102 S. W. 423, 427, 46 Tex. Civ. App. 327.

"In common-law conveyances the words 'more or less,' while sometimes having practically no effect, are frequently added to prevent the precise quantity named from being conclusive on the parties, and may operate to make a sale of land one in gross instead of by the acre." *Ainsa v. United States*, 161 U. S. 208, 228, 16 Sup. Ct. 544, 40 L. Ed. 673.

When the description of the quantity of land conveyed by the deed concludes with the words "more or less," the purchaser is not entitled to any reduction on account of a deficiency unless it is very gross. *Keenan v. Bird*, 14 N. Y. Supp. 457, 60 Hun, 175, 177; *Cunningham v. Millner*, 82 Va. 526, 527.

Where an agreement for the conveyance of land describes it as 32 acres more or less, and which does not describe the land by metes and bounds, or by any fixed ascertainable monuments, the words "more or less" do not weaken or destroy the statement of the quantity. *Brooks v. Halane*, 116 Ill. App. 383, 388.

The qualification "more or less," specified in a conveyance of land, will cover any deficiency not so gross as to justify a suspicion of willful deception or mistake amounting to fraud. In the latter event the purchaser may have either a rescission of the sale or an apportionment of the price according to the relative value. The use of the words confers no additional right upon the seller. *Kendall v. Wells*, 55 S. E. 41, 42, 126 Ga. 343 (quoting and adopting definition in Civ. Code 1895, § 3542, and citing 4 Kent, Comm. [14th Ed.] 467; 1 Jones, Real Prop. §§ 398, 399, 400; Rawle, Cov. [5th Ed.] § 297; 3 Washb. Real Prop. [6th Ed.] § 2322; 1 Warv. Vendors, § 381; *Collinsville Granite Co. v. Phillips*, 51 S. E. 666, 123 Ga. 842; *Jackson ex dem. Suffern v. McConnell* [N. Y.] 19 Wend. 175, 32 Am. Dec. 439; *Powell v. Clark*, 5 Mass. 355, 4 Am. Dec. 67; *Wright v. Wright*, 34 Ala. 194; *Seegar v. Smith*, 3 S. E. 613, 614, 78 Ga. 616, 618; *Beall v. Berkhalter*, 26 Ga. 567; *Estes v. Odom*, 18 S. E. 355, 91 Ga. 600; *Perkins Mfg. Co. v. Williams*, 25 S. E. 556, 98 Ga. 388; *Seymore v. Rice*, 21 S. E. 293, 94 Ga. 184; *Harrison v. Talbot*, 2 Dana [82 Ky.] 258; *Noble v. Googins*, 99 Mass. 231; *Gauldin v. Shehee*, 20

Ga. 531 [4]; *Smith v. Dudley*, 69 Ga. 768 [3]; 2 Warv. Vendors, § 832; *Finney v. Morris*, 42 S. E. 1020, 116 Ga. 758; *Wylly v. Gazan*, 69 Ga. 506, 516; *Walton v. Ramsey*, 50 Ga. 618; *Adams, Eq.* [8th Ed.] 177, 178; *Spence v. Duren*, 3 Ala. 251; *Leyden v. Hickman*, 75 Ga. 684; *Seymore v. Rice*, 21 S. E. 293, 94 Ga. 183; *Yost v. Mallicote's Adm'r*, 77 Va. 610).

The words "more or less," as used in a deed stating that the land conveyed contained a specified number of acres more or less, are not construed to mean "as estimated," "as supposed," but are construed to mean about the specified number of acres, and are designed to cover only such small errors of surveying as usually occur in surveys. *Winton v. McGraw*, 54 S. E. 506, 508, 60 W. Va. 98.

The term "more or less," when appended to the expressed area of land stated in a deed, constitutes a recognition of the fact that measurements of land are apt to differ, and that men of intelligence and experience, who are familiar with the premises, may not agree in their estimates; and one who purchases land in bulk or as containing an estimated number of acres can ordinarily obtain no relief on account of any shortage which subsequent accurate measurement may disclose, but the introduction of the words "more or less" does not afford a shield against liability for false representations, and the mere fact that the deficiency is very large in proportion to the supposed quantity is often treated as in itself evidence of fraud or of mutual mistake, and in such case the purchaser is entitled to relief by rescission, or by an abatement of the price, or, where he has paid the price, an action at law for damages. *Boddy v. Henry*, 101 N. W. 447, 452, 126 Iowa, 31 (citing *Palne v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371; *Lewis v. Hoeldtke* [Tex.] 76 S. W. 309; *Couse v. Boyles*, 4 N. J. Eq. 212, 38 Am. Dec. 514; *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 202; *Triplett v. Alden*, 26 Grat. [67 Va.] 721, 21 Am. Rep. 320; *Hoback v. Kilgores*, 26 Grat. [67 Va.] 442, 21 Am. Rep. 317; *Camp v. Norfleet's Adm'r*, 5 S. E. 374, 83 Va. 380; *Fiske v. Fleming's Syndic*, 15 La. 202; *Estes v. Odom*, 18 S. E. 355, 91 Ga. 600; *Anthony v. Oldacre*, 4 Call [8 Va.] 489; *Cravens v. Kiser*, 4 Ind. 512; *Blessing's Adm'r v. Beatty*, 1 Rob. [40 Va.] 287; *Crislip v. Cain*, 19 W. Va. 438; *Wilson v. Randall*, 67 N. Y. 338; *McCandless v. Young*, 96 Pa. 289; *Baltimore Permanent Building & Land Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Hosleton v. Dickinson*, 1 N. W. 550, 51 Iowa, 244).

The language "more or less," used in contracts for the sale of land, must be understood to apply only to small excesses or deficiencies attributable to variance of instruments of surveyors, etc., and these terms are used to rather replace the idea of a contract of hazard, and implies that there is no con-



considerable difference in the quantity. *Berry's Ex'r v. Fishburne*, 51 S. E. 827, 104 Va. 459.

The return of appraisers setting aside a year's support to a widow described the property set aside as "450 acres of land, more or less, including homestead." Held, that the words "more or less" indicate that no precise number of acres was intended, but that the statement of the quantity was given as descriptive of the land assigned. *Hancock v. King*, 66 S. E. 949, 950, 133 Ga. 734.

The words "more or less," used in describing land, are ordinarily intended and understood not to admit of infinite variation, but to restrain the representation to a reasonable or usual allowance for small errors in surveys; and a description of land, in a bill to quiet title thereto, as beginning at a point on the south line of S. avenue, 60 feet, more or less, eastwardly from the southeast corner of S. avenue and B. avenue, said point being at the intersection of said south line of S. avenue, and the north and south fence separating the lot described from the lot at the southeast corner of said two avenues supposed to belong to B., 60 feet more or less, to the southeast corner of said B. lot, thence northwardly along the fence separating the lot described from the B. lot and parallel, or nearly so, with B. avenue, 202 feet, more or less, to the place of beginning, being sufficiently definite that, if the action had been ejectment, a surveyor would have been able, in case of recovery, to locate the exact limits, and the sheriff to execute a writ of possession, was sufficient. *Touart v. Jett Bros. Contracting Co.*, 53 South. 751, 753, 169 Ala. 638.

A grantor, whose land was bounded on the east by lands of S., conveyed a part to C., and then conveyed land lying between that conveyed to C. and that owned by S., describing it as "beginning at a point \* \* \* adjoining the land of C., thence running easterly \* \* \* 58 feet to the land of S., \* \* \* all distances above mentioned to be more or less." Held, that the conveyance covered all of the land owned by the grantor lying between the lands of S. and C., whether "more or less" than 58 feet wide. *Holden v. Crolly*, 138 N. Y. Supp. 23, 25, 153 App. Div. 254.

#### Mistake or fraud

Where through innocent mistake a grantor represented that a tract, described by metes and bounds, containing but 69.71 acres contained 82 acres more or less, the grantee, purchasing by the acre and paying the price in ignorance of the deficiency, could sue in equity for the deficiency in the acreage; the words "more or less" not including a considerable variance, and the mistake being sufficient to induce the court to believe that if the truth had been known the purchase would not have been made. *Straus v. Norris*, 79 Atl. 611, 612, 78 N. J. Eq. 488.

#### Reasonable excess or deficiency covered

The words "more or less" in a deed relieve only from the necessity for exactness, and not from gross deficiency. *Boggs v. Bush*, 122 S. W. 220, 222, 137 Ky. 95.

The words "more or less" in a conveyance ordinarily mean that the grantor does not warrant the precise quantity of land named therein, but import that the actual quantity is a near approximate to that mentioned, so that, if there is no more than a reasonable deficit in the quantity, such as a shortage arising from a part thereof taken for street, there is no breach of the covenant in the conveyance. *Kitzman v. Carl*, 110 N. W. 587, 133 Iowa, 340, 12 Ann. Cas. 296.

#### Risk as to quantity indicated

The general rule is that, where it appears in a deed conveying land by the qualifying words "more or less" that the statement of the number of acres in the deed is a mere matter of description and not of the essence of the contract, the purchaser, in the absence of fraud, takes the risk as to the quantity of acres conveyed to him. *Adams v. Betz*, 78 N. E. 649, 651, 167 Ind. 161; *Newman v. Kay*, 49 S. E. 926, 932, 57 W. Va. 98, 68 L. R. A. 908, 4 Ann. Cas. 39 (citing 4 Kent, Comm. 467; *Noble v. Googins*, 99 Mass. 231; *Flagg v. Mason*, 6 N. E. 702, 141 Mass. 64; *Libby v. Dickey*, 27 Atl. 253, 85 Me. 362; *Freche v. Chancellor of State of New Jersey*, 27 Atl. 140, 51 N. J. Eq. 624, 40 Am. St. Rep. 548; *Borkenhagen v. Vlauden*, 52 N. W. 260, 82 Wis. 206; *Estes v. Odom*, 18 S. E. 355, 91 Ga. 600; *Kendall v. Wells*, 55 S. E. 41, 44, 126 Ga. 343 (citing *Jones*, Real Prop. §§ 398, 399, 400; *Rawle*, Cov. [5th Ed.] § 297; 3 Washb. Real Prop. [6th Ed.] § 2322; *Collinsville Granite Co. v. Phillips*, 51 S. E. 666, 123 Ga. 842; *Jackson v. McConnell* [N. Y.] 19 Wend. 175, 32 Am. Dec. 439; *Powell v. Clarke*, 5 Mass. 355, 4 Am. Dec. 67; *Wright v. Wright*, 34 Ala. 194; *Cohen v. Numsen*, 65 Atl. 432, 433, 104 Md. 676; *Yates v. Buttrell* (Tex.) 132 S. W. 831, 832.

#### Sale in gross or by acre indicated

The description of land conveyed as containing so many acres, "more or less," constitutes a sale by the acre, unless it plainly appears from the whole deed that a sale in gross was intended. *Pack v. Whitaker*, 65 S. E. 496, 498, 110 Va. 122.

A description in a deed of land as 15 acres, "more or less," off the southwest corner of a quarter section, signified a sale in gross of 15 acres, and was not uncertain because of the words quoted. *W. C. Early & Co. v. Long*, 42 South. 348, 89 Miss. 285.

Where defendant rented a tract of land of plaintiff, and executed a rent note, promising to pay plaintiff \$160 for rent of 40 acres of land at \$4 per acre, more or less, etc., it was held that the words "more or

less" referred to the quantity of land, and that the instrument should be construed to evidence a contract for renting by the acre, and not for a gross sum for the entire tract. *Ayers v. Heustess*, 127 S. W. 957, 94 Ark. 493.

#### **Immaterial deviation—2 in 200 acres**

On an exchange of land, a deficiency of about two acres in a farm of "200 acres, more or less," is insufficient to raise a presumption that it would have prevented the exchange, if known. *Webber v. Harter*, 134 N. W. 947, 950, 154 Iowa, 317.

#### **Material deviation—8 in 200 acres**

Where a contract for the exchange of a stock of goods for a farm described it as containing 200 acres "more or less according to the government survey," such quoted words contemplated only such differences as were due to errors incident to measurements by different surveyors and the variance in the instruments used, and did not cover a discrepancy of 8.58; such discrepancy being sufficient to justify an allowance of damages. *Fisher v. Trumbauer & Smith* (Iowa) 138 N. W. 528, 530.

#### **Same—30 in 80 acres**

The term "more or less," in a deed describing the land as 80 acres more or less, does not cover a shortage of 30 acres, and the grantee going into possession and improving the land before discovering the fraud of the grantor, who knew that the land described was 50 acres, may elect to retain the land the grantor conveyed and demand an abatement of the price for so much as the quantity falls short of the amount represented. *McGhee v. Bell*, 70 S. W. 493, 496, 170 Mo. 121, 59 L. R. A. 761.

## **MORGUE**

As used in Rev. St. 1906, § 3586a, making it unlawful to establish a morgue on any street on which there are dwelling houses, unless the owners or occupants of such dwelling houses within 200 yards thereof give their written consent, the word "morgue" must be given its usual meaning, which is a place or deadhouse where the bodies of persons found dead are exposed for identification, or that they may be claimed by their friends. *Koebler v. Pennewell*, 79 N. E. 471, 473, 75 Ohio St. 278 (citing Black, Law Dict.; Rap. & L. Law Dict.; Cent. Dict.; Stand. Dict.; Webst. Dict.; Thesaurus, Dict.; Enc. Dict.).

## **MORTAL INJURY**

The words "mortal injuries," as used in an indictment for murder alleging that defendant inflicted certain mortal injuries, must be taken as the equivalent of "serious bodily injuries," as used in Cr. Code, § 215, providing that an aggravated assault is committed when a serious bodily injury is in-

flicted upon the person assaulted, and such indictment justifies a conviction for an aggravated assault. *Mapula v. Territory*, 80 Pac. 389, 391, 9 Ariz. 199.

## **MORTAR**

"Mortar" is a mixture of lime in paste with sand. It may be divided into two principal classes: Hydraulic mortar, which is made of hydraulic lime, and common mortar, made of common lime. *Donaldson v. Roksament Stone Co.*, 170 Fed. 192, 193.

## **MORTGAGE**

See Chattel Mortgage; Constructive Mortgage; Dry Mortgage; Equitable Mortgage; Indicia of a Mortgage; Kansas Cut-Throat Mortgage; Personal Mortgage; Purchase-Money Mortgage; Railroad Mortgage; Tight Mortgage.

Deed, mortgage, or otherwise, see Otherwise.

Party to mortgage, see Party.

Subject to mortgage, see Subject to.

"A 'mortgage' is literally a dead pledge." *Stumpe v. Kopp*, 99 S. W. 1073, 1076, 201 Mo. 412.

At common law a mortgage was a conditional conveyance to secure the payment of money or the performance of some act, to be void upon such payment or performance. By more modern law and under the statutes of many states a mortgage is a mere lien upon land. Its dominant attribute is security, but nevertheless it must be regarded as "both a lien in equity and a conveyance at law." *United States v. Commonwealth Title Ins. & Trust Co.*, 24 Sup. Ct. 546, 547, 193 U. S. 651, 48 L. Ed. 830 (citing Pom. Eq. Jur. § 1191).

A mortgage is a conveyance of an estate or property by way of pledge for the security of a debt, to become void on payment thereof, and is not a mere lien. *Poarch v. Duncan*, 91 S. W. 1110, 41 Tex. Civ. App. 275.

A "mortgage" is a pledge of land described in the agreement by a grantor to the grantee and to revert to the grantor on the discharge of the obligation for the performance of which it is pledged. *Safe Deposit Title Guaranty Co. v. Linton*, 62 Atl. 566, 213 Pa. 105 (citing *Lance's Appeal*, 4 Atl. 375, 112 Pa. 456; *Moran v. Munhall*, 53 Atl. 1094, 204 Pa. 242).

A "mortgage" is a conveyance or transfer of property, either real or personal, as security to pay a debt or in discharge of some other obligation. *Williams v. Davis*, 45 South. 908, 909, 154 Ala. 422.

An instrument will be deemed a mortgage, whatever its form, if, taken alone or in connection with the surrounding circumstances, it appears to have been given to se-

cure payment of money; and the mere absence of terms of defeasance does not control its nature as a mortgage. *Connor v. Connor*, 52 South. 727, 729, 59 Fla. 467; *Wyllly-Gabbett Co. v. Williams*, 42 South. 910, 929, 53 Fla. 872 (quoting *Cooper v. Brock*, 2 N. W. 660, 41 Mich. 488).

Act Feb. 25, 1909 (26 St. at Large, p. 161), provides that in every action to recover personal property which has been pledged in any way to secure credit or debt the defendant may plead a counterclaim arising out of the same transaction, and the jury may find the amount due the plaintiff, if any, in which case the defendant may pay said amount and costs, and have the property released from the incumbrance. Held that, by the use of the words "pledged in any way," the statute evidences an intention not to limit its application to cases of mere technical pledges, and, as a "mortgage" is a "pledge," the mortgage of chattels to secure the purchase price was properly permitted to interpose a counterclaim that the property in question was not suitable for the purpose for which it was purchased as represented by the seller in an action to foreclose the mortgage. *Woodruff Machinery & Mfg. Co. v. Timms*, 76 S. E. 114, 115, 93 S. C. 99.

Any instrument creating a lien, specifying the debt and personal property on which it is to take effect, is a mortgage, though there may be some language indicating an intention to convey legal title. *Powers & Co. v. Georgia-Florida Grocery Co.*, 67 S. E. 685, 686, 7 Ga. App. 592.

No particular formality is essential to the creation of a mortgage. A writing indicating an intention to create a lien, and specifying a debt to be secured and the property on which the lien is to take effect, is a mortgage. *Howard v. Rumble*, 61 S. E. 297, 4 Ga. App. 327.

A "mortgage" is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt. Whatever is substantially this is held to be a mortgage in a court of equity. *Wilson v. Fisher*, 62 S. E. 622, 624, 148 N. C. 535.

A "mortgage" is a contract pledging property embraced in it for the payment of the debt it is given to secure. *McClung v. Cullison*, 82 Pac. 499, 500, 15 Okl. 402.

A common-law "mortgage" is defined to be an absolute sale of the property by the mortgagor to the mortgagee, subject to be redeemed according to the terms of the contract. *Mower v. McCarthy*, 64 Atl. 578, 579, 79 Vt. 142, 7 L. R. A. (N. S.) 418, 118 Am. St. Rep. 942.

A conveyance of property in writing as security is a "mortgage," regardless of the letter of the instrument. The purpose, not the form, determines its character. No matter what the nature of a conveyance may be

which is given as security, when the evidence, either written or parol, establishes the fact that the relation of mortgagor and mortgagee exists between the parties, the right of the party is limited to a mere mortgage interest. *Smith v. Pfugger*, 105 N. W. 476, 477, 126 Wis. 253, 2 L. R. A. (N. S.) 783, 110 Am. St. Rep. 911 (citing *Starks v. Redfield*, 9 N. W. 168, 52 Wis. 349; *Holle v. Bailey*, 17 N. W. 322, 58 Wis. 434; *Schriber v. Le Clair*, 29 N. W. 570, 889, 66 Wis. 579; *McCormick v. Herndon*, 56 N. W. 1097, 86 Wis. 449; *Schierl v. Newburg*, 78 N. W. 761, 102 Wis. 552; *Cumps v. Kiyoy*, 80 N. W. 937, 104 Wis. 656).

"A transfer of property as security, regardless of the form thereof, is a 'mortgage,' and, as regards rights or remedies, must be dealt with as such. If, from all the circumstances of the case, it appears clearly that the parties intended to create the relation of debtor and creditor between themselves or to recognize that relation as existing as a basis for a mortgage, their purpose in that regard will be deemed to have been accomplished so far as necessary to carry into effect the incidental purpose to create the relation of mortgagor and mortgagee to secure payment of the indebtedness, though it does not appear that there was the express promise to pay which generally characterizes the creation of such principal relation." *Beebe v. Wisconsin Mortgage Loan Co.*, 93 N. W. 1103, 1105, 117 Wis. 328 (citing *Starks v. Redfield*, 9 N. W. 168, 52 Wis. 349; *Brayton v. Jones*, 5 Wis. 117; *Cumps v. Kiyoy*, 80 N. W. 937, 104 Wis. 656; *Schriber v. Le Clair*, 29 N. W. 570, 889, 66 Wis. 579; *Gettelman v. Commercial U. Assur. Co.*, 72 N. W. 627, 97 Wis. 237, 241; *Plato v. Roe*, 14 Wis. 453; *Sweet v. Mitchell*, 15 Wis. 641; *Jordan v. Warner's Estate*, 83 N. W. 946, 107 Wis. 539, 550).

An instrument in the form of a common-law deed of mortgage, reciting a loan of money and a sale of real estate to secure the repayment of the sum loaned, with interest, executed in the state of Louisiana and duly recorded in the mortgage office of the parish wherein the property is situated, has the legal effect of a "mortgage" or hypothecation against third persons. *In re Immanuel Presbyterian Church*, 36 South. 408, 413, 112 La. 348.

Where one executed an assignment and transfer of all the rents from a farm to secure payment of his note, the instrument amounted to a "mortgage." *Thatcher v. Jeffries* (Tex.) 91 S. W. 1091, 1092.

A building and loan contract providing that, on default by the borrower, the lending company may re-enter and repossess the premises, that all sums advanced by it shall become due and payable, and that it shall have power to sell the premises according to law, and be entitled to the rights and

remedies of the "mortgagee," and any overplus after satisfying the indebtedness shall be paid to the borrower, is in the nature of a "mortgage" and subject to foreclosure as such. *Preston v. D'Ambrosio*, 95 N. Y. Supp. 70, 71, 46 Misc. Rep. 523.

Where a fire policy provided that the loss, if any, was payable to R., trustee, as his interest might appear, and the interest of R. was that of a trustee under a deed securing bonds issued by insured, such interest would be treated as a mortgage, and the insurer estopped to deny liability on the ground that it did not know the nature and character of the trust. *Peerless Mineral Springs Co. v. German American Ins. Co. of New York*, 138 N. W. 1023, 1024, 151 Wis. 352.

#### Assignment distinguished

An "assignment for benefit of creditors" is more than a security for the payment of debts; it is an absolute appropriation of property to their payment. It does not create a lien in favor of creditors upon property which in equity is still regarded as the property of the assignor, but it passes both the legal and equitable title beyond the control of the assignor, and there remains in him no equity of redemption, and the trust which results to the assignor in the unemployed balance does not indicate such an equity. The assignment is voluntary on the part of the debtor, and no authority can exact it, and it therefore partakes of the nature of a private contract. *Miller v. Swihler*, 79 N. E. 1092, 1093, 40 Ind. App. 465 (citing *Burrill*, Assignm. § 6, and distinguishing *O'Neil v. Beck*, 69 Ind. 239; *Robinson v. Hughes*, 20 N. E. 220, 117 Ind. 293, 3 L. R. A. 383, 10 Am. St. Rep. 45; *Graves v. Hinkle*, 21 N. E. 328, 120 Ind. 157).

"If the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a 'mortgage,' even though the debtor is insolvent at the time, and it covers all his property, and but a portion of his debts are secured by it." Civ. Code, §§ 3449-3473, provide that an assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto, in case it gives a preference of one debt or class of debts over another, and that the assignment must be made to the sheriff of the county where the property is situated. A debtor executed a deed of a portion of her property to a trustee, who was to pay certain creditors from the profits, but it was provided that the surplus of profits should inure to the use of the grantor during her life, and that, after payment of the debts and the grantor's death, the property should be transferred to her children. Any surplus from the proceeds of any sale or mortgage by the trustee was to be invested by him, and he was empowered to exchange the property

for other property to be held subject to the trust. Held, that the deed was not intended as an absolute disposition of the property, or as an assignment for the benefit of creditors, within the meaning of the statute, and hence was not invalid for failure to comply therewith. *Heath v. Wilson*, 73 Pac. 182, 185, 139 Cal. 362 (quoting and adopting definition in *Cadwell's Bank v. Crittenden*, 23 N. W. 644, 66 Iowa, 240).

"A 'mortgage' or deed of trust in the nature of a mortgage is intended as security for the payment of money, or for the performance of some collateral act, and becomes void upon such payment or performance." "A 'mortgage' does not invest the mortgagee with an absolute and indefeasible title. The equitable title, called the 'equity of redemption,' remains in the mortgagor. The mortgage is a security for the debt, and creates a lien upon the property in favor of the creditor. There is no difference in legal effect between a mortgage with a power of sale and a deed of trust executed to secure a debt, where the power of sale is placed in a third person. Both are securities for a debt. Both create specific liens on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the lien created by the mortgage or deed of trust. \* \* \* An assignment for the benefit of creditors is well defined to be 'a transfer by a debtor of some or all of his property to an assignee in trust, apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor.'" The owner of a sawmill property, including the mill, machinery, and logs and lumber, the personalty being subject to a chattel mortgage, entered into a contract with the chattel mortgagee by which he purported to convey and transfer to said mortgagee all of the property, both personal and real, with authority to take possession and to operate the mill and to sell any and all of the property, the owner agreeing to execute conveyances of the same as required by him. In consideration of such contract, the grantee agreed to pay certain indebtedness of the owner, including his own, and to apply to that purpose all sums received from the operation of the mill or sales of the property, after deducting expenses; the surplus, if any, to be paid over to the grantor. Held, that such contract was not a mortgage, but a trust agreement or deed, which vested the absolute title to the property in the grantee, and that it avoided a policy of insurance previously issued to the grantor on the property containing a provision that it should be void if his interest in the property should be or become other than unconditional and sole ownership. *Brecht v. Law, Union & Crown*

Ins. Co., 153 Fed. 452, 455 (quoting and adopting definitions in *Ladd v. Johnson*, 49 Pac. 756, 32 Or. 195, 200; *Bartlett v. Teah*, 1 Fed. 768; *Burrill, Assignm.* § 2; and citing *Appolos et al. v. Brady et al.*, 49 Fed. 401, 1 C. C. A. 299; *Richmond v. Mississippi Mills*, 11 S. W. 960, 52 Ark. 30, 4 L. R. A. 413; *Robson v. Tomlinson*, 15 S. W. 456, 54 Ark. 229; *State, to use of Holliday, v. Benoist*, 37 Mo. 501; *Oadwell's Bank v. Crittenden*, 23 N. W. 646, 648, 66 Iowa, 240, 241; *Sabichi v. Chase*, 41 Pac. 29, 108 Cal. 81; *Montelth v. Hogg*, 20 Pac. 327, 17 Or. 270).

**As referring to mortgage on realty alone**

The word "mortgage," as used in Const. art. 13, § 4, providing that a mortgage by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in property affected thereby, has reference to mortgages on realty alone, an employment of the word countenanced even in legal usage, where "mortgage" is generally employed and meant to apply to the creation of liens upon real estate, while like liens upon personalty are designated as "chattel mortgages." *Bank of Woodland v. Pierce*, 77 Pac. 1012, 1013, 144 Cal. 434.

Const. art. 13, § 1, permits provision, except in case of credits secured, for a deduction from credits of debts due to bona fide residents. Pol. Code, § 3617, subd. 8, provides that a mortgage, or other obligation by which a debt is secured, when land is pledged, shall, for the purposes of taxation, be deemed an interest in the land so pledged, and by subdivision 6 the term "credits" means those solvent debts not secured owing to the person assessed, and the term "debt" means those unsecured liabilities owing by the person assessed to bona fide residents, and section 3628, provides that, in assessing solvent credits not secured, a reduction shall be made of debts due bona fide residents, and section 3650, subd. 15, provides that in entering assessments containing solvent credits, subject to deduction, the assessor must enter in the proper column the value of debts and deduct them therefrom. Const. art. 13, § 4, provides that a mortgage, or other obligation by which a debt is secured, shall, for the purpose of taxation, be deemed an interest in the property affected. Pol. Code, § 3627, contains the same provision. Held, that a collateral security of credits by a loan on personalty was not a mortgage, etc., or "other obligation by which a debt is secured," within Const. art. 13, § 4, that section applying only to liens on land; nor was it a "mortgage or trust deed," within section 1, so that the person assessed on such credits was entitled to have his debts deducted therefrom; and Pol. Code, § 3629, subd. 6, directing the assessor to require each person assessed to show separately all solvent credits unsecured, is not applicable, not

referring to the assessor's duty in making the assessment, but only prescribing the form of the taxpayer's return for the assessor's information. *Bank of Willows v. Glenn County*, 101 Pac. 13, 15, 16, 155 Cal. 352.

**As chattel**

See Chattel.

**As claim**

See Claim.

**Conditional sale distinguished**

See Conditional Sale.

**Contract for payment of money distinguished**

Defendant, having settled on unsurveyed public land, executed a written contract for the purchase of fruit trees, which recited that defendant was the owner of 160 acres, and that for the payment of the price of the trees he bound himself, his heirs, assigns, and grantees of and to the aforesaid land. Defendant thereafter acquired title to a quarter section of land in the section described in the contract, though not of the same technical description as the one therein described. Held, that the contract was a simple contract for the payment of money, and not a "mortgage" on the land. *Stark Bros. v. Royce*, 87 Pac. 340, 343, 44 Wash. 287.

**As a conveyance**

See Conveyance.

Convey as including, see Convey.

**Contract for sale of real estate**

The words "foreclosure of a mortgage" do not in common parlance refer to the foreclosure of a land contract, and the words, as used in Comp. Laws, § 435, providing that the circuit courts in chancery shall dismiss suits concerning property where the matter in dispute shall not exceed \$100, excepting suits for the foreclosure of mortgages, etc., do not include a foreclosure of a land contract, and a suit to foreclose a land contract on which there remains less than \$100 unpaid must be dismissed. *Sands & Maxwell Lumber Co. v. Gay*, 101 N. W. 53, 138 Mich. 82.

**Conveyance absolute in form**

An instrument, though in form an absolute deed, having been intended merely as security for payment of a debt, is a "mortgage." *Todd v. Todd*, 128 Pac. 413, 414, 164 Cal. 255; *White v. Walsh*, 114 N. Y. Supp. 1015, 1017, 62 Misc. Rep. 423 (citing *Mooney v. Byrne*, 57 N. E. 163, 163 N. Y. 86); *Marquam v. Ross*, 83 Pac. 852, 860, 47 Or. 374.

An absolute conveyance given to secure a note which the grantor intends to repay will in equity be held a "mortgage," where the form of the conveyance is dictated by the lender. *Plato v. Roe*, 14 Wis. 453, 457.

In determining whether an instrument in the form of a deed is or is not a "mortgage," the principal test to be applied is whether the relation of the parties towards each other,

of debtor or creditor, continued after the execution of the deed. The test is the existence or nonexistence of a debt, and equity looks behind the form to the fact. If the transaction was intended as a loan, if there remains a debt for which the conveyance is only a security, and the collection of which may be enforced independent of the security, equity will hold it a mortgage, no matter whether the transaction is evidenced by one or two instruments. *Plummer v. Ilse*, 82 Pac. 1009, 1010, 41 Wash. 5, 2 L. R. A. (N. S.) 627, 111 Am. St. Rep. 997.

The conveyance must be judged according to the real intent of the parties. If there is a debt subsisting between the parties, and it is the intention to continue the debt, it is a "mortgage"; but if the conveyance extinguishes the debt, and the parties intend that result, a contract for a resale at the same price does not destroy the character of the "deed" as an absolute conveyance. While J. was indebted to M., he made a fraudulent conveyance to K. Thereafter, for the purpose, not of extinguishing the debt, but of securing it, he conveyed land to M. by deed, reciting a consideration, the amount of the debt, and at the same time M. quitclaimed the land to J. for the same recited consideration, reserving a vendor's lien. Held, that M. still remained a creditor, whose debt existed at the date of the fraudulent conveyance. *James v. Mallory*, 89 S. W. 472, 473, 76 Ark. 509 (citing *Hays v. Emerson*, 87 S. W. 1027, 75 Ark. 551).

A deed absolute, with parol agreement that it shall be a mortgage is a "mortgage" from its inception. Where a cotenant's interest in land was to be sold on execution, and it was agreed that the other tenant should purchase the land at such sale, and take title under the sheriff's deed, as security for payment to him, by the judgment debtor, of the amount of the debt, the transaction created a "mortgage," although the agreement was unknown except to the tenants. *Stafford v. Stafford*, 71 S. W. 984, 986, 29 Tex. Civ. App. 73 (citing and adopting *Jones, Mortg.* § 285).

Where a deed is intended to secure a debt, and the relation of debtor and creditor exists between the parties, the legal inference is that a "mortgage" was intended. Thus a deed was a mortgage, and not a conditional sale, where it was given to secure payment for a horse, recited a consideration of "\$110 cash or its equivalent," a horse, describing it, contained the ordinary recitals of a warranty deed, and recited that the grantee should hold the land for 1½ years and reconvey on payment of \$118.60 "being purchase price hereof and necessary recording fee." *Tucker v. Witherbee*, 113 S. W. 123, 125, 130 Ky. 269.

"Where the proof is clear that the transaction was a borrowing of money, and that

the deed was made to secure the money borrowed, the deed will always be treated as a 'mortgage,' and redemption will be allowed, notwithstanding the form in which the parties may have put the contract." *Garvin's Adm'x v. Vincent* (Ky.) 87 S. W. 804, 805.

Where a contract and chattel mortgage executed contemporaneously with a deed absolute in form show that it was intended merely as security for a debt and to indemnify the mortgagee on a contract of guaranty for the benefit of the mortgagor, such deed will be given effect as a "mortgage." *Ferguson v. Boyd* (Ind.) 79 N. E. 549, 555 (citing *Davis v. Stonestreet*, 4 Ind. 101, 105; *Wilson v. Carpenter*, 62 Ind. 495, 500; *Crassen v. Swoveland*, 22 Ind. 427, 429; *Voss v. Eller*, 10 N. E. 74, 109 Ind. 260, 262, 263; *Heath v. Williams*, 30 Ind. 495, 513; *Watkins v. Gregory* [Ind.] 6 Blackf. 113, 114; *Lentz v. Martin*, 75 Ind. 228, 235; *Miller v. Curry*, 24 N. E. 219, 374, 124 Ind. 48, 49, 51; *Houser v. Lamont*, 55 Pa. 316, 98 Am. Dec. 755; *Appeal of Harper*, 64 Pa. 319; *Taylor v. Weld*, 5 Mass. 109; *Keithley v. Wood*, 38 N. E. 149, 151 Ill. 566, 42 Am. St. Rep. 265, 270; *Smith v. Brand*, 64 Ind. 427, 429, 430; *Loeb v. McAllister*, 41 N. E. 1061, 44 N. E. 378, 15 Ind. App. 643, 645; *Proctor v. Oole*, 66 Ind. 576, 578; *Pugh v. Davis*, 96 U. S. 332, 337, 24 L. Ed. 775; *Cox v. Ratcliffe*, 5 N. E. 5, 105 Ind. 374; *Cornell v. Hall*, 22 Mich. 377; *Russell v. Southard*, 12 How. [53 U. S.] 139, 13 L. Ed. 927; *Jones, Mortg.* [6th Ed.] §§ 7, 8, 242, 245, 247a, 258, 265, 340).

"Under Georgia law the word 'mortgage' is used in a double sense. Sometimes it refers to a mortgage which creates a lien, and at other times as passing title as a security for the debt. An instrument containing a defeasance clause describing the debt, and showing on its face that it is intended as security, is a mortgage, and passes no title. A writing in the form of an absolute bill of sale, but in fact intended only as security for a debt, conveys title, but is treated as an equitable mortgage." *Denton v. Shields*, 43 S. E. 423, 120 Ga. 1076.

Under Rev. Codes, § 3391, every transfer of an interest in real property other than in trust, made only as security for the performance of another act, is a "mortgage," though the conveyance is a deed absolute in form. *Hannah v. Vensel*, 116 Pac. 115, 116, 19 Idaho, 796.

Notwithstanding the provision of Civ. Code, § 2922, that a "mortgage" can be created only by writing executed with the formalities required in case of a grant of real property, a deed absolute on its face may in equity be shown by parol evidence to have been intended as a mere mortgage, and the indebtedness intended to be secured thereby, whether present or future, although not specified in the deed or in any contemporaneous writing, may also be shown by parol evi-

dence. The fact that the manager of plaintiff corporation, instead of plaintiff itself, was named as grantee in certain deeds executed to secure an indebtedness due plaintiff in no wise impairs the validity of such deeds as mortgages in plaintiff's favor. Absolute deeds, given solely by way of security, and constituting in fact only mortgages, carry with them no estate in the land, but create only a lien thereon as incident to the secured debt. *Anglo-Californian Bank v. Cerf*, 81 Pac. 1077, 1079, 147 Cal. 384.

Where a conveyance of land is made as security for a loan, although there is no personal obligation to repay, the mortgagee looking solely to the instrument, it will be deemed a "mortgage," if intended as security. *Conover v. Palmer*, 108 N. Y. Supp. 480, 482, 123 App. Div. 817.

Plaintiff advanced money to the purchasers of land under a bond from the owner, under an arrangement whereby the land was deeded to plaintiff, on an understanding that he would convey to the purchasers under the bond, on payment to him of the amount advanced and interest. Plaintiff gave a bond binding himself to convey, and those to whom the bond was given gave no note, but promised to pay him the amount advanced. Held, that the transaction constituted a "mortgage," within a statute subjecting to taxation money at interest, including money loaned on any mortgage, etc. *Glidden v. Town of Newport*, 66 Atl. 117, 118, 74 N. H. 207.

An owner of property executed a deed to a corporation in pursuance of an agreement by which payment therefor was to be made in the capital stock of the corporation at par; the value of the property to be determined by appraisers. Subsequently agreements were made between the corporation and a syndicate composed of the larger stockholders of the grantor and between the grantor and grantee for the purpose of aiding the grantor in adjusting its liabilities, by which the syndicate and grantee were to pay the indebtedness of the grantor and receive reimbursement therefor from the stock constituting the purchase price of the property, the stock to be deposited with a third party until such indebtedness was liquidated. Thereafter the grantor caused such property to be insured, the application containing a warranty that it was the sole owner, and the policy a provision that it should be void if the property was sold without the assent of the company, and subsequently the deed theretofore executed was delivered. The policy was not assigned, and no consent to the sale was given. The property was destroyed by fire. Held, that the insurance company was not liable, because insured had no insurable interest in the property at the time of its destruction, the transfer being an absolute one and not a "mortgage" within Rev. St. c. 92, § 1, defining mortgages as those made in the usual

form, in which the condition is set forth in the deed, and those made by a conveyance appearing on its face to be absolute, with an instrument of defeasance executed at the same time or as part of the same transaction, since there was no agreement purporting to be a defeasance and also because the property was "sold" without the consent of the insurer within the meaning of that term as used in the policy, and hence the policy was invalidated previous to the fire. *Buffalo Fertilizer Co. v. Aroostook Mut. Fire Ins. Co.*, 84 Atl. 1078, 1080, 109 Me. 483.

#### Same—Defeasance clause

Notes reciting that they are given to secure payment for certain described lands, and deeds reciting that the land is secured by the notes of the grantee (describing them), and that if the notes are not paid at maturity the deeds are to be null and void, constitute mortgages, and not conditional sales. *Land v. May*, 84 S. W. 489, 490, 73 Ark. 415 (citing *Gibson v. Martin*, 38 Ark. 207; *Stryker v. Hershey*, 38 Ark. 264; *Mitchell v. Wade*, 39 Ark. 377; *Hershey v. Luce*, 19 S. W. 963, 20 S. W. 6, 56 Ark. 320).

#### Same—Separate instrument of defeasance

A conveyance of land, absolute in form, accompanied by a contemporaneous instrument executed by the grantee and reciting that on the payment of a specified sum within a specified time the premises shall be reconveyed to the grantor, is a mortgage to secure the payment of a debt. *Raski v. Wise*, 107 Pac. 984, 988, 56 Or. 72. The test in determining whether such conveyance constitutes a "mortgage" is whether the relation of debtor and creditor continues to exist. *Fabrique v. Cherokee & P. Coal & Mining Co.*, 77 Pac. 584, 585, 69 Kan. 733.

Whether a conveyance absolute in form, when taken with a contemporaneous separate agreement to reconvey, constituted a mortgage, depends upon the existence of a debt; a deed made to secure a debt being a mortgage in legal effect, and the fact that the mortgagor subsequently leased the property from the mortgagee would not change the nature of the transaction. *Farmers' & Merchants' Bank of Scandia v. Kackley*, 127 Pac. 539, 540, 88 Kan. 70.

The contemporaneous agreement for a resale and purchase does not of itself make the deed a "mortgage." The conveyance must be judged according to the real intent of the parties. If there is a debt subsisting between the parties, and it is the intention to continue the debt, it is a "mortgage"; but if the conveyance extinguishes the debt, and the parties intend that result, a contract for a resale at the same price does not destroy the character of the deed as an "absolute conveyance." *Hays v. Emerson*, 87 S. W. 1027, 1028, 75 Ark. 551.

A deed executed as security for a loan, the lender executing, in turn, a written defeasance agreeing to reconvey to the borrower upon payment of the debt, constituted a "mortgage." *Wells v. Scanlan*, 102 N. W. 571, 572, 124 Wis. 229.

Where the relation of debtor and creditor exists between parties executing a deed absolute on its face, and a collateral agreement permitting redemption, the court is always inclined to treat such arrangement as constituting a mortgage. Where plaintiffs executed to defendant a deed absolute on its face, but on the same day a writing was executed reciting the sale and providing that plaintiffs were to occupy the house they lived in for five years at a certain rent, and at the end of such period they were to pay back the purchase money and redeem, defendant to have the rent of a log house and all the land as interest, plaintiffs to pay the taxes and keep the house insured, such deed and other writing constituted a mortgage, even though the collateral writing was made an hour after the deed, and nothing had been said about it before that time. *Sebree v. Thompson* (Ky.) 104 S. W. 781.

Where, at the time a deed of conveyance was executed, the grantees therein executed a deed to the grantors reciting the first deed, and stating that it was made in consideration of an agreement by the grantees to pay the grantors a sum of money, and purported to reconvey the land to secure the same, both deeds were to be construed as one, the former as a conveyance of title to the grantees, and the latter as a "mortgage," under Practice Act 1851, p. 93, § 260, providing that a "mortgage" shall not be deemed a conveyance, whatever its terms, so as to enable the mortgagee to recover possession without foreclosure. *Adams v. Hopkins*, 77 Pac. 712, 713, 717, 144 Cal. 19.

Although, under Real Property Law (Consol. Laws 1909, c. 50) § 320, one who records a deed without recording a defeasance agreement making the deed a mortgage, receives no benefit from the recording, the failure to record the defeasance agreement, and pay the mortgage recording tax, does not bring the grantee within the provision of Tax Law (Consol. Laws 1909, c. 60) § 258, forbidding the enforcement of any mortgage on which the tax has not been paid as Tax Law, § 250, defining a mortgage on real property as being every mortgage by which a lien is imposed on or which affects the title to real property, executory contracts for sale of real property and contracts increasing indebtedness secured by mortgage, does not include this kind of a mortgage, and, the law being a tax law, it must be strictly construed. *Gerken v. Sonnabend*, 130 N. Y. Supp. 605, 606.

Where plaintiff's land, worth \$790, was sold at judicial sale for \$455, and a subsequent agreement between him and defendant

recited that defendant had paid the purchaser at judicial sale \$455 and received a conveyance, and that defendant agreed to convey to plaintiff in case he should repay defendant before a specified date, but that otherwise defendant's duty to convey should terminate, the transaction amounted to a "mortgage." *Sheffield v. Day* (Ky.) 90 S. W. 545, 546.

Where plaintiff deeded land to defendant, her husband's creditor, under a separate agreement for a reconveyance on the payment of the amount of the debt, interest, etc., that plaintiff was not bound to pay the amount for which the reconveyance was to be had, does not show conclusively that the transaction was a conditional sale. If an instrument does not show clearly whether a "mortgage" or conditional sale was intended, equity will construe it as a "mortgage," rather than a conditional sale. *White v. Redenbaugh*, 82 N. E. 110, 111, 41 Ind. App. 580.

#### Conveyance conditioned for support

A conveyance conditioned for the support of the grantor will be treated as a "mortgage." *Abbott v. Sanders*, 66 Atl. 1032, 1033, 80 Vt. 179, 13 L. R. A. (N. S.) 725, 130 Am. St. Rep. 974, 12 Ann. Cas. 898.

#### Debt or obligation necessary

One sure test and essential requisite of a mortgage is the existence of a debt from the grantor to the grantee in the deed. If there is no debt, the instrument cannot be a "mortgage," whatever else it may be. *Jones v. Hubbard*, 90 S. W. 1137, 1141, 193 Mo. 147; *Goodbar & Co. v. Bloom*, 96 S. W. 657, 662, 43 Tex. Civ. App. 484. But it is not necessary that the debt be created by an express promise. *Beebe v. Wisconsin Mortgage Loan Co.*, 93 N. W. 1103, 1105, 117 Wis. 328.

One of the essentials of a mortgage is the existence of an indebtedness, payment of which the mortgage is designed to secure. An instrument, in form a conditional bill of sale, is not made a mortgage by reason of the fact that it contains a provision that the instrument shall be void if the grantors pay a certain sum of money by a certain day. *Smith v. Hope*, 35 South. 865, 866, 47 Fla. 295.

A "mortgage" is to be regarded as a mere incident or security of the debt. A mortgage given as part of a business transaction can be foreclosed only when it secures a debt. *Perkins v. Trinity Realty Co.*, 61 Atl. 167, 168, 69 N. J. Eq. 723.

A debt either pre-existing, or created at the time, or contracted to be created, is an essential requisite of a "mortgage." Hence a deed absolute on its face is not a mortgage, where it is delivered to extinguish a debt, and the parties so intended, though the grantee gave a contemporaneous promise to reconvey on being reimbursed within an agreed period an amount equal to the debt and interest



thereon. *Rotan Grocery Co. v. Turner*, 102 S. W. 932, 933, 46 Tex. Civ. App. 534.

A "mortgage" has been defined as a conveyance of lands upon a condition, in the deed or a defeasance out of it, that on the grantor's paying a sum of money, or doing some other act, the conveyance shall be void, and performance of the condition, without any other act, puts an end to all title and interest in the grantee. A deed absolute on its face will not be held a mortgage unless the relation of debtor and creditor exists between the grantors and grantee, and it was the intention of the parties to secure the payment of such debt. Where the grantee, in an absolute conveyance, by an agreement executed at the same time, reciting that the conveyance was made to pay a certain sum of money, stipulates that he will not convey the premises within a specified time without the consent of the grantor, and that, if the grantor within that time shall find a purchaser, the grantee will convey on receiving the amount, with interest, for which the land had been conveyed to him, the transaction is not a "mortgage," but is a conditional sale, giving the grantee the right to recover the land after the expiration of the specified time. *Duell v. Leslie*, 106 S. W. 489, 495, 207 Mo. 658.

The conveyance must be judged according to the real intent of the parties. If there is a debt subsisting between the parties, and it is the intention to continue the debt, it is a "mortgage"; but if the conveyance extinguishes the debt, and the parties intend that result, a contract for a resale at the same price does not destroy the character of the deed as an "absolute conveyance." *Hays v. Emerson*, 87 S. W. 1027, 1028, 75 Ark. 551; *James v. Mallory*, 89 S. W. 472, 473, 76 Ark. 509 (citing *Hays v. Emerson*, 87 S. W. 1027, 75 Ark. 551).

Where plaintiff, having an option on land which was about to expire, wished to borrow money to enable him to take it up, but defendant refused to make a loan, taking a mortgage on the land as security, but advanced the money, took title to the land in his own name, and executed to plaintiff a bond for title, the transaction did not constitute a "mortgage" entitling plaintiff to the rights of redemption. *Conner v. Clapp*, 79 Pac. 929, 931, 37 Wash. 299.

Under Civ. Code, § 2924, providing that every transfer of land, made only as security for another act, is a "mortgage," a transfer to enable the grantee to recover a judgment quieting title in him is not a mortgage. *Renton v. Gibson*, 84 Pac. 186, 187, 148 Cal. 650.

#### **As deed or grant**

See Deed; Grant.

#### **Deed of trust**

Certain trust deeds in real estate are recognized by our decisions, by which trust

deeds the legal title passes to the trustee, with power of sale. In all respects these deeds and transfers of title are "security," but they are not "mortgages." *Renton v. Gibson*, 84 Pac. 186-188, 148 Cal. 650.

#### **As evidence of indebtedness**

See Evidence of Indebtedness.

#### **As incumbrance**

See Incumbrance.

#### **As interest in land**

See Interest (In Property).

#### **As passing legal title**

A "mortgage" is a mere lien or security for the payment of money, and does not convey any title to the mortgagee. *Jump v. North British & Mercantile Ins. Co.*, 87 Pac. 928, 929, 44 Wash. 596, 12 Ann. Cas. 257 (citing *Dane v. Daniel*, 63 Pac. 268, 23 Wash. 379).

Under the Idaho statute and the decisions of the court construing the same, a "mortgage," or any contract or instrument made only as security for the payment of a debt, merely creates a lien on the real property therein described, and leaves the legal title in the mortgagor or grantor, which title can only be divested by judicial sale in a suit or action under and in conformity with the statute. *Hannah v. Vensel*, 116 Pac. 115, 117, 19 Idaho, 796.

Under the statute of South Dakota a "mortgage" on real estate is not a conveyance of title, but only a lien on the land as security for a debt. *Farr v. Semmler*, 123 N. W. 835, 837, 24 S. D. 290.

Under Civ. Code, § 2920, defining a mortgage as a contract hypothecating specific property for the performance of an act without the necessity of a change of possession, and section 2927, providing that a mortgage does not entitle the mortgagee to possession unless authorized by the express terms of the mortgage, a mortgage gives the mortgagee neither the title, possession, nor right to possession of the mortgaged property unless authorized by the express terms of the instrument. *Ely v. Williams*, 92 Pac. 393, 394, 6 Cal. App. 455.

A "mortgage" on real estate creates only a lien in favor of the mortgagee, and neither the legal nor equitable title passes to the mortgagee until after a valid foreclosure and sale thereunder. The rights of the mortgagee in possession are therefore not adverse to the rights of the mortgagor or his grantees, so long as the relation of mortgagor and mortgagee exists. *Gillett v. Romig*, 87 Pac. 325, 329, 17 Okl. 324 (citing *Balduff v. Grifwold*, 60 Pac. 223, 9 Okl. 439; 3 Pom. Eq. Jur. [3d Ed.] § 1183).

At common law a "mortgage" vests the legal title in the mortgagee, and, on condi-

tion broken, the mortgagee may re-enter or bring ejectment. The Colorado statute, however, has taken from the instrument the common-law character and deprived the mortgagee of all possession or right of possession either after or before condition broken, and before this right exists the mortgagee must foreclose his mortgage and sell the mortgaged property. *Moncrieff v. Hare*, 87 Pac. 1082, 1083, 38 Colo. 221, 7 L. R. A. (N. S.) 1001 (citing *Pueblo & A. V. R. R. Co. v. Beshoar*, 5 Pac. 639, 8 Colo. 32; *Fogarty v. Sawyer*, 17 Cal. 589).

In equity, a mortgage is not a conveyance of the legal title, but only a security for debt. *Barron v. San Angelo Nat. Bank* (Tex.) 138 S. W. 142, 144.

Under the statute, a "mortgage" does not convey title to the property mortgaged, but only creates a lien thereon. The mortgagor has the right to pay the indebtedness, and thus extinguish the lien, at any time before the property is sold by the mortgagee. The contract of the mortgagor does not terminate with his death, but by operation of law it is suspended until an administrator is appointed. *Litz v. Exchange Bank of Alva*, 83 Pac. 790, 792, 15 Okl. 564.

#### **Lien indicated**

As lien, see *Lien*.

The owner of property, exempt from taxation under its charter (Pub. & Loc. Laws 1869, c. 149), executed a mortgage to secure a loan, and executed its bonds to secure the mortgage, and agreed that it would pay all taxes and assessments imposed on the mortgaged property, all taxes assessed or imposed on the mortgage, and all taxes assessed against the lien or interest created by the mortgage. St. 1898, § 1042d, added by Laws 1903, c. 378, § 2, provided that, whenever taxable real estate is subject to mortgage, the mortgage, for the purposes of taxation, should be an interest in the real estate taxable as such where the real estate was located, or might be separately assessed and taxed. Held, in the mortgagee's action to foreclose because of the mortgagor's refusal to pay taxes against the bonds in the hands of purchasers from the mortgagee, that the first obligation referred only to general taxes or special assessments levied on the property; that the third obligation referred to an assessment against some interest in the mortgaged real estate, not including an assessment on the bonds; that the words "mortgage" and "lien or interest created thereby" were synonymous; that the obligation to pay taxes on the "mortgage" did not comprehend such taxes assessed on the bonds, and that the mortgagor was not liable therefor. *Citizens' Savings & Trust Co. v. School Sisters of Notre Dame*, 139 N. W. 439, 441, 151 Wis. 619.

#### **As a mere incident of the debt**

"A 'mortgage' is a mere incident of the debt which it is intended to secure." *Voorhees v. Nixon*, 66 Atl. 192, 195, 72 N. J. Eq. 791 (quoting *Magie v. Reynolds*, 26 Atl. 150, 51 N. J. Eq. 113, 117).

"The debt is the principal thing, and the 'mortgage' only an incident, a mere security for the payment of the debt, and the release of the debt secured by the mortgage need not be under seal, but the transfer of the debt will in equity carry the mortgage with it." *Bradley v. Lightcap*, 66 N. E. 546, 548, 201 Ill. 511 (citing *Vansant v. Allmon*, 23 Ill. 30).

"A 'mortgage' is but a security for a debt. Independent of the debt, the lien can have no existence in equity. The debt is the principal, the lien is the accessory, which can no more exist without the debt than the shadow without the substance." *Walsh v. Robinson*, 99 N. W. 282, 135 Mich. 16.

A "mortgage" is only an incident to the debt it was given to secure, and cannot be separated therefrom, and a transfer of the mortgage without the debt is a nullity. *Richards Trust Co. v. Rhomberg*, 104 N. W. 268, 270, 19 S. D. 595 (quoting and adopting definition in *Merritt v. Bartholick*, 36 N. Y. 44).

#### **As a mere security for the debt**

A mortgage itself does not create or alienate an estate in real property, but is a mere security for the payment of a debt or the discharge of an obligation. *Mueller v. Renkes*, 77 Pac. 512, 513, 31 Mont. 100. See, also, *Alexander v. Cleland*, 86 Pac. 425, 427, 13 N. M. 524.

A mortgage is a security for payment of a debt, or performance of some condition; the mortgagee only acquiring a chattel interest. *Malsberger v. Parsons* (Del.) 75 Atl. 698, 700.

"A 'mortgage' is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." Civ. Code, § 3810. "The lien of a mortgage is special, unless otherwise agreed, and is independent of possession." Civ. Code, § 3812. A mortgage does not create an estate in real property. "It is a mere security for the payment of a debt or the fulfillment of an obligation, and is only a chattel interest. While it affects lands by imposing a lien of charge upon them, it in no wise conveys title thereto." *Swain v. McMillan*, 76 Pac. 943, 945, 30 Mont. 433.

A "mortgage" is but a security for the payment of money with the right of lien upon the mortgage premises to enforce payment. It is not stamped with the character of real estate, but is a bare incumbrance or charge. In re *Lukens*, 138 Fed. 188, 191 (citing *Rickert v. Madeira* [Pa.] 1 Rawle, 328; *Corporation for Relief of Poor Ministers v. Wallace* [Pa.] 3 Rawle, 109; *Craft v. Webster* [Pa.]

4 Rawle, 242; Asay v. Hoover, 5 Pa. 21, 45 Am. Dec. 713; Wilson v. Shoenberger's Ex'rs, 31 Pa. 295; In re Lenning's Estate, 52 Pa. 135; McIntyre v. Velte, 25 Atl. 739, 153 Pa. 350).

In equity a "mortgage" is a mere security for the debt and only a chattel interest, and until a decree of foreclosure the mortgage continues the real owner of the fee. Where the owner of land conveyed the timber thereon on condition that the deed should be void unless the grantee paid a note for the purchase price at maturity, and removed the timber within a specified time, the deed created a relation in legal effect the same as in the case of a conveyance of absolute title with mortgage back to secure the purchase price. Ordway v. Farrow, 64 Atl. 1116, 1119, 79 Vt. 192, 118 Am. St. Rep. 951.

A "mortgage" is too narrowly defined when it is said to be a security for a debt. It may be a security for the payment of a debt, or for the performance of some duty, or for both. Stitt v. Rat Portage Lumber Co., 104 N. W. 561, 564, 96 Minn. 27 (citing Madison v. Mead, 16 N. W. 539, 31 Minn. 94).

A "mortgage," prior to its foreclosure and the final confirmation of the sale had thereunder, is but a security for the debt, and does not operate as a lien on the rents and profits of the mortgaged premises, unless an application is made for a receiver in the manner provided by law. Westerfield v. South Omaha Loan & Bldg. Ass'n, 105 N. W. 1087, 1088, 75 Neb. 53.

"A 'mortgage' is a mere security for a debt, and there is no such relation of trust or confidence between the maker and holder of a mortgage as prevents the latter from acquiring title to its subject-matter, either under his own or any other valid lien." Jones v. Black, 90 Pac. 422, 424, 18 Okl. 344, 11 Ann. Cas. 753 (quoting from opinion in Williams v. Townsend, 31 N. Y. 415).

A mortgagee holds his "mortgage" as security for the debt only, and, where there is no obligation in the contract on the part of the mortgagee to pay taxes on the property, he may acquire title through tax sale. The mortgagee has a mere lien on the property, but no title. His lien gives him no right of possession, and his only remedy is by foreclosure. Jones v. Black, 88 Pac. 1052, 1053, 18 Okl. 344, 11 Ann. Cas. 753.

#### Note or other security unnecessary

Under Rev. Civ. Code, § 2044, providing that every transfer of an interest in property, other than a trust, made as security for the performance of another act, shall be deemed a mortgage, a transfer of real property by deed made to secure a loan is a "mortgage," and may be shown to be such by proof of circumstances attending its execution and the actual intention of the parties. Where a deed was executed as security for a loan,

the fact that there was no collateral undertaking evidencing the indebtedness, and no covenant or personal obligation by the grantor to pay, was not fatal to the grantor's right to have the deed declared a mortgage. Krug v. Kautz, 113 N. W. 623, 624, 21 S. D. 461.

#### Promise to mortgage distinguished

An instrument reciting that, to secure intervenor as surety on a certain note of even date with the instrument, "I doth hereby agree, and doth agree to give unto" said intervenor a mortgage on certain real estate described, "to have and to hold the said property to secure said" intervenor as surety on said note, to be void on condition that the maker cause the note to be paid and signed by defendant and his wife, constituted a "mortgage" and not a mere promise to mortgage. Bray v. Ellison (Ky.) 83 S. W. 96.

#### As property

See Personal Property; Property.

#### As purchase

See Purchase.

#### As sale or transfer

See Sale; Sell and Convey; Transfer.

### MORTGAGE ACTION

Under Rev. St. 1895, § 1490, providing that all claims against a corporation at the time of receivership shall be paid out of the earnings thereof to the exclusion of mortgage action, the term "mortgage action" does not merely mean a mortgage, but relates to the action whereby a mortgagee secures the appointment of a receiver; and hence a mortgagee, not having secured the appointment of a receiver, is entitled to share in the earnings of a receivership. First Nat. Bank of Houston v. J. I. Campbell Co., 140 S. W. 430, 431, 104 Tex. 457.

### MORTGAGE CLAIM

See Open Mortgage Clause.

### MORTGAGE DEBT

See Transfer of Mortgage Debt.

### MORTGAGE SALE

Expenses of mortgage sale, see Expenses.

Though a chattel mortgage and mortgagee brought about an auction sale of the property by agreement, in order to create the impression that the sale was not a forced one, in order thereby to sell the property for a better price than on a forced sale, it being understood that the proceeds should be turned over to the mortgagee to satisfy his debt, the sale was nevertheless in legal effect a "mortgage sale." Seiberling & Co. v. Porter, 74 N. E. 516, 517, 165 Ind. 7.

### MORTGAGEE

As assigns, see Assigns.

As creditor, see Creditor.

As owner, see Owner.

As purchaser, see Purchaser.

As purchaser for valuable consideration, see Purchaser for Valuable Consideration.

As purchaser for value, see Purchaser for Value.

### MORTGAGEE IN GOOD FAITH

See Bona Fide Mortgagee; Good Faith.

### MORTGAGEE IN POSSESSION

The expression "mortgagee in possession" has been adopted by the courts and law writers as a convenient phrase to describe the condition of a mortgagee, who is in possession of mortgaged premises under such circumstances as to make the satisfaction of his lien a prerequisite to his being dispossessed, even in jurisdictions where the mortgage itself can confer no possessory right, either before or after default. *Stouffer v. Harlan*, 74 Pac. 610, 611, 68 Kan. 135, 64 L. R. A. 320, 104 Am. St. Rep. 396.

A "mortgagee in possession" is not only one who holds actual possession with the consent of the mortgagor, but one who has in good faith taken possession as the result of a void foreclosure. The possession must, however, be actual and not merely constructive. *Fuhrman v. Power*, 86 Pac. 940, 942, 43 Wash. 533.

A mortgagee who, while the mortgage is subsisting, obtains in a lawful manner the possession is a "mortgagee in possession," and his interest enables him to retain such possession and to defend against it against the mortgagor or those succeeding to his title. A mortgagee who has foreclosed his mortgage without bringing in a purchaser from the mortgagor, and who has entered into possession under such proceedings, though without the consent of the purchaser, may retain possession until his lien is released by payment, though the debt is barred by limitations. *Burns v. Hiatt*, 87 Pac. 196, 198, 149 Cal. 617, 117 Am. St. Rep. 157.

A "mortgagee in possession" is one who enters either by the consent of the mortgagor, honest mistake, or pursuant to lawful process, and he is not allowed for permanent improvements, but only for necessary reparations made by him during the time. *Faulkner v. Cody*, 91 N. Y. Supp. 633, 638, 45 Misc. Rep. 64 (citing *Moore v. Cable* [N. Y.] 1 Johns. Ch. 385; *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, 73 N. Y. 82; 3 Pom. Eq. Jur. § 1217).

It is not necessary to the status of a mortgagee in possession that possession of the land shall have been taken under the mortgage or by the consent of the mortgagor. To constitute a mortgagee in possession, it is enough if the possession be peaceably and legally taken; and one who takes possession under an invalid tax deed, and purchases a subsisting mortgage, is not precluded from claiming the rights of a mortgagee in possession.

*Jaggar v. Plunkett*, 106 Pac. 280, 281, 81 Kan. 565, 25 L. R. A. (N. S.) 935.

### MORTGAGOR

See Creditors of the Mortgagor.

As owner, see Owner.

Rev. Codes 1899, § 5845, authorizing a suit by a "mortgagor" to restrain foreclosure by advertisement, includes any person claiming title to the mortgaged premises under and in privity with the original mortgagor. *Scott v. District Court of Fifth Judicial Dist. of Barnes County*, 107 N. W. 61, 62, 15 N. D. 259.

As used in Rev. Codes 1905, § 7454, providing that when the mortgagee or his assignee has commenced foreclosure proceedings by advertisement, and it shall be made to appear by the affidavit of the mortgagor that the mortgagor has a legal counterclaim or any other valid defense, foreclosure may be enjoined, the word "mortgagor" includes persons in privity to and claiming under the mortgagor; and a subsequent mortgagee may take the necessary affidavit and enjoin the sale. *State v. Buttz*, 131 N. W. 241, 21 N. D. 540.

As used in Rev. St. 1899, § 4342, requiring the inclusion of the mortgagor and actual tenant or occupier of the land among the defendants in all actions to foreclose mortgages, the term "mortgagor," so far as it relates to the foreclosure of the equity of redemption, refers to the actual owner of the equity, who is an indispensable party to any kind of a foreclosure proceeding, but the absence of the grantor in a deed of trust constitutes no defect of parties, where, prior to such action, he has conveyed his equity of redemption. *McCauley v. Brady*, 100 S. W. 541, 543, 123 Mo. App. 558 (citing 2 Ping. Mortg. § 1707).

### MORTIFICATION

#### As mental anguish

Allegations in a petition, in an action against a sheriff and his deputy, that they wrongfully and unlawfully entered into a house and premises occupied by plaintiff under a lease and dispossessed him, and put his household goods and personal property in the public highway, and so put plaintiff to great trouble and distress, properly authorize a recovery for humiliation and mortification, or any phase of "mental anguish," since the word "distress," being a generic term, includes anguish or suffering, both of mind and body, and since "humiliation" and "mortification" are simply phases of mental anguish. *Perkins v. Ogilvie*, 146 S. W. 735, 737, 148 Ky. 309.

### MOSS

See Sea Moss.

Lily of the valley roots are not covered by Tariff Act Aug. 28, 1894, c. 349, § 2, Free

List, par. 558, relating to "moss, seaweeds, and vegetable substances," not being vegetable substances in the class of moss and seaweeds. *McAllister v. United States*, 147 Fed. 773.

Tariff Act July 24, 1897, c. 11, § 2, Free List, pars. 566, 617, relating to "fibrous vegetable substances" and to "moss, seaweeds, and vegetable substances," does not include birch bark. *Reed & Keller v. United States*, 172 Fed. 453.

## MOST

A bill for divorce a vinculo, filed June 16, 1906, in the county court of Cleburne county, alleged that complainant, a resident of Cleburne county, was married May 3, 1906, and that he and his wife lived together until June 4, 1906, most of the time residing in Cleburne county, and that complainant "has been a bona fide resident of Cleburne county for more than three years," and that respondent's particular place of residence was unknown. Held, that the verb "has been," descriptive of past action, referred the residence to a period before the bill was filed, but did not make a part of the period so averred the year next before the bill was filed, and that "most" signified, not all, but nearly all, of the time between the marriage and the date of the bill, and that the averment of more than three years' bona fide residence was insufficient as a jurisdictional averment of residence for "one year next preceding the filing of the bill," and hence that a decree entered on the bill was void on collateral attack. *Martin v. Martin*, 55 South. 632, 634, 173 Ala. 106.

## MOST CONVENIENT

As used in a charter party providing that the anchorage directed by the charterers must be the "most convenient," the words "most convenient" mean convenient as well for the ship as for the consignees of the cargo. *Reid v. Jones*, 23 Sup. Ct. 89, 187 U. S. 153, 47 L. Ed. 116.

## NOTES

Waste, to which a small quantity of cotton still attaches after it has been run through the machine at a cotton mill, is called "notes." *Washington Mills v. Cox*, 157 Fed. 634, 636, 85 C. C. A. 154.

## MOTHER

See From and Through the Mother; Through the Mother.

Father synonymous, see Father.

A statute referring to a father or mother does not, in the absence of special statement, include a natural father or mother. *Landry v. American Creosote Works*, 43 South. 1016, 1018, 119 La. 231, 11 L. R. A. (N. S.) 357.

The right granted by Rev. Civ. Code, art. 2315, to the surviving father or mother to recover damages for the death of their son, is a right granted to the actual father or mother, and not to an adopting parent. *Mount v. Tremont Lumber Co.*, 46 South. 103, 121 La. 64, 126 Am. St. Rep. 312, 15 Ann. Cas. 148.

The exemption allowed by Ky. St. 1903, § 1403, subsec. 5, to be set apart to "the widow or infant child" from the estate of an intestate, to the infant child, if no "mother" survives, and to the "widow" if there be no infant children, or if none reside in the family with the "widow," does not apply to the husband and children of the intestate wife. *Thaxton's Guardian v. Walters' Adm'r*, 113 S. W. 118, 119, 130 Ky. 235.

Where the constitution of a firemen's relief association organized pursuant to Laws 1885, c. 176 (St. 1898, §§ 1987, 1988), and acts amendatory thereof, providing for the organization of such associations, and designating that they may be organized for the purpose of giving relief to persons dependent upon the deceased members, but no others, stated the object of such association to be to give relief to families of deceased members, and provided that an insured could designate his mother or certain others as his beneficiary, a designation by an insured of his stepmother as beneficiary was valid, where he was a single man living with her as a member of the same family at the time of his death; the term "mother" in this connection not being limited in meaning merely to a mother by blood, though used with such meaning in a subsequent provision of the association's constitution which specified the heirs to whom relief money should be paid in case no beneficiary be designated by the insured. *Jones v. Mangan*, 138 N. W. 618, 620, 151 Wis. 215.

## MOTHER OF PEARL

Manufacture of, see Manufactures—Manufactured Articles.

## MOTION

See Greyhound Motion; Interlocutory Motion; Special Motion.

### In practice

See Civil Action—Case—Suit—Etc.

As answer, see Answer.

As commencement of action, see Commencement of Action.

As pleading, see Pleading.

As special proceeding, see Special Proceeding.

A "motion" is a request to the court to grant the mover some right which he claims. It is a notification that he considers himself entitled to what he asks. *Arnold v. Regan*, 69 Atl. 292, 29 R. I. 71. See, also, *Howard v. Carter*, 80 Pac. 61, 62, 71 Kan. 85 (citing

Clark v. Board of Com'rs of Mitchell County, 77 Pac. 284, 69 Kan. 542, 66 L. R. A. 965).

A "motion" is an application for an order and is usually made orally. Williams v. Hawley, 77 Pac. 762, 763, 144 Cal. 97.

A "motion" is an application for an order, and was sufficiently made within a required time by formal appearance in court and application for relief, stating the grounds and filing affidavits, though the opposing parties were not required to appear until a subsequent day. Brownell v. Superior Court of Yolo County, 109 Pac. 91, 94, 157 Cal. 703.

A "motion" is simply an application made in a pending or proposed action or special proceeding, and must depend for its granting upon its relevancy to the main litigation. It is not an independent right. In re Dietz, 122 N. Y. Supp. 1063, 1065, 138 App. Div. 283.

A "motion" seeks some order of court falling short of the dignity of a judgment. Ewing v. Vernon County, 116 S. W. 518, 519, 216 Mo. 681 (citing Bliss, Code Pl. [3d Ed.] §§ 418, 420, et seq.).

"Motions" are not original and independent proceedings, but are only incidental steps taken in all classes of cases pending; and the rulings of the court thereon are not "judgments." State ex rel. Shackelford v. McElhinney, 145 S. W. 1139, 1142, 241 Mo. 592.

A motion is not required to be signed, but it is a proper practice of the counsel for a party to sign it. Nobach v. Scott, 119 Pac. 295, 296, 20 Idaho, 558.

Applications for orders directing issuance of executions against the wages of defendant debtors are not "motions" within Code Civ. Proc. § 3236, authorizing the award of costs on motion. Brodie v. O'Donnell, 130 N. Y. Supp. 805, 806, 71 Misc. Rep. 530.

The district court at chambers has jurisdiction to open a judgment under Code Civ. Proc. § 83; the application being a motion within section 556 which defines "motion" as an application for an order addressed to the court or a judge in vacation. Taylor v. Woodbury, 120 Pac. 367, 368, 86 Kan. 236.

An application for suit money in a divorce action should be treated as a motion within Code, § 3833, authorizing motions to be supported by affidavit which may be considered as testimony on the hearing. Mengel v. Mengel (Iowa) 138 N. W. 495, 500.

Under Rev. St. 1909, § 2092, defining a motion as an application for an order, and section 1841, requiring motions to contain a written specification of the reasons on which they are founded, a motion possessing these requisites may be embodied as well in a brief in the Supreme Court as on a separate piece

of paper. Smith v. Moseley, 187 S. W. 971, 973, 234 Mo. 486.

Under Local Improvement Act, § 37 (Hurd's Rev. St. 1908, c. 24, § 543), providing that copies of the ordinance, the recommendation of the board, and the estimate of cost, certified under seal, must be attached to the petition, but that failure to so file them shall not affect the jurisdiction of the court to act on the petition, but, if it shall appear that such copies have not been attached, then, on motion of any objector for that purpose, on or before appearance day, the entire petition shall be dismissed, merely filing objections to the confirmation of the assessment, one of which objections was that the copies were not attached under seal, without calling the attention of the court to them in some way, is not a "motion" within the statute, since a motion is an application made to the court, and the filing of the paper in the office of the clerk is not such a motion. City of Marengo v. Eichler, 91 N. E. 758, 759, 245 Ill. 47.

The words "motion" and "application," as used in Code Civ. Proc. § 686, declaring that, notwithstanding the death of a party after judgment, execution may issue in case of the death of the judgment creditor on "application" of his executor, administrator, or successor in interest, and section 685 declaring that judgments may be enforced after five years from the date of its entry by leave of court on "motion," have the same signification, and on the death of a judgment creditor his administratrix is not required to institute an action at law to enforce the judgment but is entitled to an execution on "motion." Weldon v. Rogers, 90 Pac. 1062, 1063, 151 Cal. 432.

A judge may be disqualified for bias and prejudice to sit on a motion for new trial, when such disqualification is invoked pending the motion and before the day of hearing; such motion being a "motion," within the statute providing for such disqualification on the filing of an affidavit by any party to an "action, motion or proceeding" at any time before the day fixed for the hearing of such "action, motion, or proceeding." State ex rel. Carleton v. District Court of Lewis and Clarke County, 82 Pac. 789, 790, 33 Mont. 138, 8 Ann. Cas. 752.

#### Same—Notice of motion

An application to change the place of trial of an action commenced in the wrong county is not a motion within Code Civ. Proc. § 1005, providing for service of written notice of a motion, though under section 1010 the action of the court on a demand for a change of venue is an order, and though the application made on the demand is designated a motion, but the motion goes on the calendar to be called for hearing in the regular order of business. Bohn v. Bohn, 116 Pac. 568, 569, 16 Cal. App. 179.

**MOTION FOR JUDGMENT ON PLEADING**

A motion to dismiss the action and quash the attachment and levy therein, based on affidavits and files and records in the case, is not within Mills' Ann. Code § 387, declaring that decisions on "motions based on the pleadings," etc., shall be taken as a part of the record without being made such by bill of exceptions, and is not a part of the record, unless embodied in a bill of exceptions. *Everett v. Wilson*, 83 Pac. 211, 212, 84 Colo. 476.

**MOTION FOR NEW TRIAL**

A motion for a new trial is, in this state, a statutory remedy, and can only be invoked in the manner, within the time, and upon the grounds provided in the statute. The losing party must pursue the requirements of the statute, or else he cannot avail himself of the remedy. *State ex rel. City of Walkerville v. District Court of Second Judicial Dist.*, 74 Pac. 414, 415, 29 Mont. 176.

A "motion for a new trial" is not intended as evidence of previous action by the court. It is a proceeding taken by a party to a cause after verdict; its purpose being to secure a new trial on account of alleged errors which it assumes to designate that may have occurred on the trial or in the proceedings in pais, as distinguished from proceedings evidenced by the record proper, the errors in which are reached by motions in arrest of judgment. *Keigans v. State*, 41 South. 886, 894, 52 Fla. 57 (citing *Sedgwick v. Dawkins*, 18 Fla. 335; *Murray v. State*, 9 Fla. 246).

The "motion for a new trial" is a remedy accorded to a party for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. It is the only method by which the weight of the evidence can be reviewed. *Massey v. State*, 39 South. 790, 791, 50 Fla. 109.

**MOTION FOR NONSUIT**

A motion for nonsuit is a general one, and only challenges the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence. Upon a motion of this kind the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence fails in some particular matters. *State v. Eubank*, 74 Pac. 378, 33 Wash. 293 (citing *State v. Hyde*, 61 Pac. 719, 22 Wash. 551).

A motion for nonsuit at the close of plaintiff's case is tantamount to a demurrer to the evidence on the ground that it is in-

sufficient to establish one or more of the material issues devolving upon the plaintiff to prove, and that the cause therefore should not be submitted to the jury, and where defendant offers no evidence after the denial of the motion, and the plaintiff moves for a directed verdict, the court may direct the verdict; there being some evidence to sustain plaintiff's case, as both parties have waived the right to a jury trial by submitting the case to the court. *Patty v. Salem Flouring Mills Co.*, 98 Pac. 521, 522, 53 Or. 350.

A motion to dismiss in a justice's court on the ground that plaintiff has failed to prove his case is in effect a "motion for a nonsuit," and the question presented on a motion for a nonsuit it is a question of law. *Smith v. Superior Court of Napa County*, 84 Pac. 54, 55, 2 Cal. App. 529 (citing *Donahue v. Gallavan*, 43 Cal. 576).

**MOTION FOR REHEARING**

The words "motion for a rehearing," as used in the statute relating to appeals, are to be construed broadly as including any motion involving a setting aside or modification of the judgment actually rendered by the court, inclusive both of the motion for a rehearing, strictly so called, and those motions for the modification of a judgment, but not for a reargument of the case, which have come to be termed "motions in the nature of a motion for a rehearing." *Ott v. Boring*, 111 N. W. 833, 834, 181 Wis. 472, 11 Ann. Cas. 857.

**MOTION TO AMEND**

See Amend.

**MOTION TO DIRECT VERDICT**

A motion for verdict is considered in law as in the nature of a demurrer to the evidence, and on a motion for a verdict the province of the court is not to weigh the evidence and ascertain where the preponderance is, but it is limited to a determination as to the existence of evidence from which, if true, it may be reasonably inferred that the fact affirmed exists, excluding the effect of all modifying or contrary evidence. *Bass v. Rublee*, 57 Atl. 965, 966, 76 Vt. 395.

A motion by defendant at the close of plaintiff's testimony, reciting that plaintiff had failed to allege or prove certain specified things, "wherefore defendant moves the court to instruct the jury to return a verdict for the defendant," was not a "demurrer to the evidence" but a "motion to direct a verdict," and the interposition of the same did not preclude defendant from introducing defensive evidence after it was overruled. *Woldert Grocery Co. v. Veltman* (Tex.) 83 S. W. 224.

**MOTION TO DISMISS**

"A 'motion to dismiss' is the equivalent of a general demurrer, and may be made at

the trial term, if the petition is fatally defective; but such a motion cannot reach mere defects in pleading, such as may be cured by appropriate amendment." *Minnesota Lumber Co. v. Hobbs & Livingston*, 49 S. E. 783, 784, 122 Ga. 20.

"A 'motion to dismiss' and a demurrer are not interchangeable. The former can be used to abate an action only when it is apparent from the record that the court has no jurisdiction. The latter admits the jurisdiction but attacks the pleadings." *Littlesfield v. Maine Cent. R. Co.*, 71 Atl. 657, 660, 104 Me. 126.

### MOTION TO QUASH

A motion to quash the writ in habeas corpus amounts to a demurrer, and, if denied and excepted to, may be urged on appeal, though issues were joined and trial had, providing the proceeding is one which is appealable. *Bleakley v. Barclay*, 89 Pac. 906, 912, 75 Kan. 462, 10 L. R. A. (N. S.) 230.

A "motion to quash" an indictment may be made when there is a defect apparent upon the face of the record. *Lindsey v. State*, 69 N. E. 126, 128, 69 Ohio St. 215.

### MOTION TO SET ASIDE JUDGMENT

As part of record, see Record.

### MOTION TO STRIKE OUT

A motion to strike seeks an order of court of less dignity than a judgment, while a demurrer raises an issue at law and seeks a trial and judgment on that issue. A motion to strike a petition might lie against a frivolous pleading, a second petition departing from the first, or a sham pleading, or against trifling, nugatory, redundant, or irrelevant matter, or matter of duplicity, but it cannot fill the office of a demurrer on challenging demurrable defects in the petition. *Ewing v. Vernon County*, 116 S. W. 518, 519, 216 Mo. 681.

A "motion to strike" is applicable where a pleading, either as a whole or any part of it, is so framed as to prejudice, or embarrass, or delay a fair trial, and is thus distinguished from a demurrer which goes to a pleading as a whole for insufficiency. If the answer to an alternative writ of mandamus is wholly irrelevant and impedes a fair trial of the cause, it may be stricken on motion, while, if it is wholly insufficient as a pleading, a demurrer will lie. *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 44 South. 230, 236, 53 Fla. 711.

### MOTIVE

See Improper Motive.

As consideration, see Consideration.

"In the sense of the criminal law, 'motive' has been well enough defined as that which leads or tempts the mind to indulge in a criminal act, and it is something that

may be resorted to as a legitimate help in arriving at the ultimate act in question." *Thompson v. United States*, 144 Fed. 14, 18, 75 C. C. A. 172, 7 Ann. Cas. 62.

In murder, "motive" is the impulse or purpose that induces the murderer to kill his victim. Where it is demonstrated that the defendant murdered the deceased, no question of motive need arise. *State v. Hyde*, 136 S. W. 316, 322, 234 Mo. 200, Ann. Cas. 1912D, 191.

"Motive" means reason, cause, inducement, and incentive to do the acts and things charged in the indictment. *Ball v. Commonwealth*, 101 S. W. 956, 960, 125 Ky. 601; *Gambrell v. Commonwealth*, 113 S. W. 476, 480, 130 Ky. 513.

"Motive" is an inferential fact, and may be inferred, not merely from the attendant and surrounding circumstances, but, in conjunction with these, all previous occurrences having reference to and connected with the commission of the offense." *State v. Bond*, 86 Pac. 43, 48, 12 Idaho, 424 (quoting *Walker v. State*, 4 South. 686, 85 Ala. 7, 7 Am. St. Rep. 17).

#### Intent distinguished

"Intent," in its legal sense, is quite distinct from "motive." It is defined as the purpose to use a particular means to effect a certain result. "Motive" is the reason which leads the mind to desire that result. *Baker v. State*, 97 N. W. 566, 570, 120 Wis. 135.

"Motive" must be distinguished from "intent." "Motive" is the moving power which impels an action for a definite result. It is that which incites or stimulates a person to do an act. "Motive" is not an essential element of a crime, and a good motive does not prevent an act from being a crime. *People ex rel. Hegeman v. Corrigan*, 87 N. E. 792, 796, 195 N. Y. 1 (quoting *People v. Molineux*, 61 N. E. 286, 296, 168 N. Y. 264, 297, 62 L. R. A. 198; *Clark, Or. Law*, § 14).

### MOTOR

#### MOTOR CYCLE

As motor vehicle, see Motor Vehicle.

#### MOTOR VEHICLE

As wagon, see Wagon.

Running, registration, and license of as within police power, see Police Power.

The Maryland Statute (Code Pub. Gen. Laws 1904, art. 56, § 180) provides that whenever the term "motor vehicle" is used in statute it shall be construed to include automobiles, locomobiles, and all other vehicles propelled otherwise than by muscular power, except those running on rails. *Fletcher v. Dixon*, 68 Atl. 875, 878, 107 Md. 420.

A motor cycle is a "motor vehicle" within Pub. Acts 1905, p. 287, Act No. 196, providing for the registration and identification



of such vehicles, and regulating their use, and defining the same (section 1) to mean "all vehicles propelled by power, other than muscular power, except traction engines and such motor vehicles as run only upon rails or tracks." *People v. Smith*, 120 N. W. 581, 582, 156 Mich. 173, 21 L. R. A. (N. S.) 41, 16 Ann. Cas. 807.

A statute requiring the licensing of operators of automobiles and "motor cycles," and defining them as all vehicles propelled by other than muscular power, except railroad and railway cars, and motor vehicles running only upon rails or tracks, and road rollers, includes a road locomotive or traction engine used to draw cars. *Emerson Troy Granite Co. v. Pearson*, 64 Atl. 582, 74 N. H. 22.

## MOUNTED

In machine construction, the expression "mounted on" seems to have an ordinary meaning. The thing mounted upon another must be borne or supported by it. Mere riding in or over another in a slot for the purpose, although operating in connection therewith, is not equivalent to being mounted thereon. In *re Duncan*, 28 App. D. C. 457, 460.

## MOUTH ORGAN

As musical instrument, see Musical Instrument.

## MOVABLE

The word "movable," as applied to property, is defined as "that which may be lifted, carried, drawn, turned, or conveyed, or in any way made to change place or position." *Monarch Laundry v. Westbrook*, 63 S. E. 1070, 1072, 109 Va. 382.

"Movables" are converted into immovables by destination, when placed by the owner of a tract of land upon it "for its service and improvement." Civ. Code, art. 468. Hence it would seem that when from any cause a "movable" ceases to be of service to a tract of land, or is detached from a building or tenement of which it formed a part as an accessory, there is no longer ground for a claim that such "movable" appertains to realty. *Folse v. Triche*, 37 South. 875, 113 La. 915.

The lease required the lessee of rooms in an office building to surrender the premises in as good condition as reasonable use permitted, and provided that all alterations, additions, or improvements made by either party, except movable office furniture put in by the lessee, should be surrendered to the lessor as a part of the premises. The lessee removed some of the permanent partitions with the lessor's consent, agreeing to restore them at the termination of the lease, and constructed temporary partitions, which did not

extend to the ceiling, and were lightly nailed to the floor and walls, and at the termination of the lease the permanent partitions were restored. Held, that the reasonable intention of the parties was the test of whether fixtures were annexed to the realty, and the word "improvements" alone, though of wider meaning than "fixtures," did not include the temporary partitions; and, construing the word in connection with the exceptions in the lease, and in view of the intention shown thereby that such partitions should not be permanently annexed, they were not "improvements," but were "movable office furniture," within the meaning of the lease, and removable by the lessee. *United Booking Offices v. Pittsburgh Life & Trust Co.*, 119 N. Y. Supp. 216, 217, 65 Misc. Rep. 31.

Where, in a press for making screw insulators, an essential element, to differentiate the prior art, is a rotary table or its equivalent to support the molds and carry them in a fixed and predetermined path to and from other parts of the machine, by which the process involved is carried out, the specification of a "movable mold adapted to travel," although under some circumstances competent to imply a structural arrangement by which the mold is moved back and forth mechanically, in a predetermined way, between designated points, the specific means employed for doing so in the patent in suit being of the essence of the invention, a claim in which it is not made an element of the combination is invalid, as being too broad; or if, disregarding this, the omitted element is read into the claim as being implied, it will also be bad where, as here, it thereby duplicates another claim. *Novelty Glass Mfg. Co. v. Brookfield*, 170 Fed. 946, 956, 95 C. O. A. 516.

## MOVE

The word "moved," as applied to a change of one's residence, may or may not, according to circumstances, warrant an inference of a permanent change. *Dixon v. Dixon*, 66 Atl. 597, 598, 72 N. J. Eq. 588.

## MOVE SLOW SIGNAL

A "move slow signal" is one calling for a slow and gradual movement of the train. *Texas Mexican R. Co. v. Higgins*, 99 S. W. 200, 201, 44 Tex. Civ. App. 523.

## MOVED BY HAND

In Code Pub. Gen. Laws Md. art. 83, § 11, exempting from execution all tools or other mechanical instruments or appliances moved or worked by hand or foot necessary to the practice of any trade or profession and used in the practice thereof, the expression "moved or worked by hand or foot" evidently applies only to machinery, and the governing idea of the section seems to be that the articles exempted are those necessary to the

practice of the trade or profession, not moved by steam, electricity, or other motive power than hand or foot. *Steiner v. Marshall*, 140 Fed. 710, 712, 72 C. O. A. 103.

## MOVEMENT

See Forward Movement.

## MOVING CAUSE

See Initial and Moving Cause.

## MOVING PICTURE SHOW

As circus, see Circus.

As other amusement, see Other.

As public show, see Public Show.

As theater, See Theater.

See, also, Panorama.

## MOVING TRAFFIC

Used in moving interstate traffic, see Use—Used.

A freight car which was being taken to a repair shop to be repaired was not within Rev. Laws, c. 111, §§ 203, 209, prohibiting a railroad company, in "moving traffic," from hauling a car not equipped with an automatic coupler. *Taylor v. Boston & M. R. R.*, 74 N. E. 591, 188 Mass. 390.

## MRS.

In the absence of a statute, parties to a litigation must be designated by name, and not merely by description of the person, and the designation "Mrs." is not a name, but usually distinguishes the person referred to as a married woman. *Feld v. Loftis*, 88 N. E. 281, 283, 240 Ill. 105; *Uihlein v. Gladieux*, 78 N. E. 363, 365, 74 Ohio St. 232.

The prefix "Mrs.," before the name of a party in a pleading, indicates that the party is a female, but leaves it doubtful whether she is married or single (using the word "single" in a sense broad enough to include a divorced person). *Wrightsville & T. R. Co. v. Vaughan*, 71 S. E. 691, 693, 9 Ga. App. 371.

Where the back of a railroad mileage book contained a line for the signature of the purchaser, preceded by a printed M., which was to be followed either by the designation Mr. or Mrs., such designation was a mere matter of courtesy, although intended to show the sex of the purchaser, and a conductor should not refuse to accept mileage where he knows that through some error, a book purchased by plaintiff, a woman, read "Mr." instead of "Mrs." *Parish v. Ulster & D. R. Co.*, 85 N. E. 153, 154, 192 N. Y. 353.

## MUCH

See As much as.

The word "many," in a provision of a city charter that notice of the introduction of an ordinance shall be published at least as many as ten days before the adoption of such ordinance, meant the same as though the

word "much" had been used, and required merely that the notice be published ten days before the action was taken, but did not require that it be published every day for ten days. *Smith v. Atlanta*, 51 S. E. 741, 742, 123 Ga. 877.

## MUCK BAR

"'Muck bar' is more advanced than pig iron, for it is the product of pig iron after its conversion into wrought iron in the puddling furnace. But to make muck bar the wrought iron is rolled through a set of rolls. This rolled iron comes from the rolls in bar form. \* \* \* Knight's Mechanical Dictionary defines 'muck bar' as 'bar iron which has passed once through the rolls.'" *Moorehead Bros. & Co. v. United States*, 127 Fed. 779, 780.

## MUCKER

A "mucker" is one who removes the ore, rock, and debris thrown down by miners. His work must be done in part, at least, ahead of the timbering, which is to afford protection against the falling of ore, rock, and debris. *Smith v. Hecla Min. Co.*, 80 Pac. 779, 780, 38 Wash. 454; *Bird v. Utica Gold Min. Co.*, 84 Pac. 256-260, 2 Cal. App. 674.

## MUD

See Water and Mud.

## MUFFLER

"Muffler," anything used to muffle or wrap up, is an ordinary English word, which fitly describes a neck scarf. The name "mufflet," used as a trade-mark, is not, under the trade-mark law, preclusive of the word "muffler." *Hygienic Fleeced Underwear Co. v. Way*, 137 Fed. 592, 595, 70 C. O. A. 553 (citing Cent. Dict.).

A "muffler" is a device attached to the exhaust pipe of a gas engine and through which the exhaust passes, used to muffle or deaden the sound of the explosion. *Wolf v. Des Moines Elevator Co.*, 98 N. W. 301, 302, 126 Iowa, 659.

## MUGUET

As enfleurage grease, see Enfleurage Grease.

## MULATTO

A person too dark to be white and too bright to be a griff is a "mulatto." *State v. Treadaway*, 52 South. 500, 508, 126 La. 300, 139 Am. St. Rep. 514, 20 Ann. Cas. 297.

## MULCT

The words "mulct," "punishment," and "fine," as used in the decisions of the Supreme Court of Alabama in referring to the statutory action for death, given by Code Ala. 1896, § 27, are not used in the sense that is ordinarily attached to such words in the domain of criminal law, and therefore such statute is not a penal one, within the rule that one state will not enforce the penal laws of another state. *Whitlow v. Nashville, C. & St. L. R. Co.*, 84 S. W. 618, 620, 114 Tenn. 344, 68 L. R. A. 503 (citing *Southern Ry. Co. v. Bush*, 26 South. 168, 174, 122 Ala. 470, 488, 489).

## MULCT TAXES

The term "mulct taxes," in Code, § 2433, etc., imposing "mulct taxes" on dealers in intoxicating liquors, and providing that the tax shall be a lien on the property where the liquor is sold, is not a license for the privilege of carrying on the business of selling intoxicating liquors, but is a tax without legalizing the business, and its imposition is levied pursuant to the taxing power and may be collected as other taxes. *Newton v. McKay*, 102 N. W. 827, 828, 180 Iowa, 596.

## MULE

As horse, see Horse.

As mare, see Mare.

As work horse, see Work Horse.

## MULTIFARIOUSNESS

Duplicity synonymous, see Duplicity.

A bill is generally understood to be multifarious when distinct and independent matters are improperly joined in one bill, and thereby confounded, as for example, where several perfectly distinct and unconnected matters against one defendant are united in one bill. *Baumgartner v. Bradt*, 69 N. E. 912, 913, 207 Ill. 345; *State Trust Co. v. Kansas City, P. & G. R. Co.*, 128 Fed. 129 (citing *Story, Eq. Pl.* [10th Ed.] par. 271).

While the rule as to multifariousness may be said to be one of convenience, and there may not be any inflexible rule as to what constitutes fatal multifariousness, yet, broadly speaking, "multifariousness" may be defined as the improper joining in one bill distinct and independent matters. *Murrell v. Peterson*, 49 So. 31, 34, 57 Fla. 480.

A bill is multifarious when it states distinct, separate, and independent equities that can better be adjudicated in more than one suit. *Arcadia Mercantile Co. v. Branning*, 52 South. 588, 589, 59 Fla. 428.

"Multifariousness" is the improper joining in one bill of distinct and independent unconnected matters against one defendant or the demand of several matters of a distinct and independent nature against sever-

al defendants. *Martin v. Brown*, 59 S. E. 302, 306, 129 Ga. 562.

Strictly speaking, misjoinder of parties plaintiff is not "multifariousness." *Breimeyer v. Star Bottling Co.*, 117 S. W. 119, 122, 136 Mo. App. 84.

A bill is multifarious when it improperly joins several defendants in charging matters of a distinct nature. *Baker v. Berry Hill Mineral Springs Co.*, 65 S. E. 656, 658, 109 Va. 776.

While not entirely synonymous, the common-law term "misjoinder" and the equity term "multifarious" have much in common. They each token improper joinder, and both have reference to the confusing result wrought thereby. Neither goes to the substance of complainant's claim, but merely asserts improper joinder of causes of action. Since these terms go only to form, and not to substance, objections for either or both are not defenses within the accepted meaning of that term. *Skains v. Barnes*, 53 South. 208, 270, 168 Ala. 426.

"To render a bill 'multifarious,' it must contain, not only separate and distinct matters, but such that each entitles the complainant to separate equitable relief. It is not so if it be single as to the subject-matter and object thereof, and the relief sought, if all the defendants are connected, though differently, with the whole subject of dispute." *Braun & Ferguson Co. v. Paulson (Tex.)* 95 S. W. 617, 619 (quoting and adopting definition in *Love v. Keowne*, 58 Tex. 191, and citing *Skipwith v. Hurt*, 60 S. W. 423, 94 Tex. 322; *Singer Mfg. Co. v. Ponder*, 18 S. W. 152, 82 Tex. 653).

By "multifariousness" is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters, of a distinct and independent nature, against several defendants in the same bill. *United States v. Rea-Read Mill & Elevator Co.*, 171 Fed. 501, 515 (quoting and adopting definitions in *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729).

The objection of "multifariousness," as containing different causes of action, is not supported unless "two things occur: First, the grounds of suit must be different; second, each ground must be sufficient, as stated, to sustain a bill." *Howe & Davidson Co. v. Haugan*, 140 Fed. 182, 184 (citing *Brown v. Guarantee Trust & S. D. Co.*, 9 Sup. Ct. 127, 128 U. S. 403, 411, 412, 32 L. Ed. 468).

A bill may contain equity and not be "multifarious," which is generally understood to indicate a case where a party is brought in as a defendant on a record, with a large portion of which, and in the case

made by which, he had no connection whatever. *Alabama Great Southern R. Co. v. Prouty*, 43 South. 352, 354, 149 Ala. 71 (quoting and adopting the definition in *Adams v. Jones*, 68 Ala. 117, and citing *Mayfield's Dig.* 290, §§ 2104, 2105).

A joinder of two causes of action against the same party for the same relief, one against him as an individual and one against him as an officer, does not make the bill "multifarious." No bill is multifarious which presents a common point of litigation, the decision of which will affect the entire subject-matter and settle the rights of the parties to the suit. *Rogers v. Penobscot Mining Co.*, 154 Fed. 606, 614, 83 C. C. A. 380.

The vice of "multifariousness" is the union of causes of action which, or of parties whose claims, it is either impracticable or inconvenient to hear and adjudicate in a single suit. Where it is practical and convenient for the court and the parties to deal with the claims or causes of action presented, and the parties joined by a petition, in one suit as in many, the pleading is not multifarious and should be sustained. The union of several causes of action for the same demand or relief in a bill or petition does not constitute multifariousness. The joinder of a cause of action to enforce a mechanic's lien and a cause of action to enforce an equitable lien upon the same property, to secure the same debt, in a bill or petition to enforce the preferential payment of the debt, does not render the pleading multifarious; it being more convenient and practicable to try and adjudicate these causes of action in one suit than in several. *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.*, 137 Fed. 26, 31-33, 71 C. C. A. 1 (citing *Stephens v. McCargo*, 9 Wheat. [22 U. S.] 502, 504, 6 L. Ed. 145; *Gerrish v. Towne*, 3 Gray [69 Mass.] 82; *Halsey v. Goddard*, 86 Fed. 25, 28; *Chaffin v. Hull*, 39 Fed. 887, 889, 891; *Davis v. Berry*, 106 Fed. 761; *Barcus v. Gates*, 89 Fed. 783, 791, 32 C. C. A. 337, 345; 1 *Daniell*, Ch. Pl. & Prac. \*343, \*344 [6th Am. Ed.]; *Story*, Eq. Pl. §§ 531, 532, p. 461 [10th Ed.]; *Fletcher*, Eq. Pl. & Prac. § 108, p. 145).

"A bill in equity is said to be 'multifarious' when distinct and independent matters are joined therein. If the subject-matter in the main relates to one transaction around which the others cluster, and each party has an interest in some matters in the suit, and they are connected, even though all the parties do not have an interest in all the matters in the suit, the bill is not multifarious." Where complainants were all interested in a suit to compel specific performance of a contract to dispose of real and personal property by will, there was no misjoinder of parties complainant, because they were not all interested to the same extent. *Stewart v. Smith*, 91 Pac. 667, 669, 6 Cal. App. 152 (quot-

ing and adopting definition in *Whitehead v. Sweet*, 58 Pac. 376, 126 Cal. 70).

The essence of "multifariousness" in pleading is the improperly blending of distinct demands or independent matters in one bill. A bill alleging that defendant H. was the holder of notes variously indorsed by plaintiffs, representing a single transaction or series of transactions, consisting of loans or discounts at usurious rates and usurious renewals, that among such notes were two indorsed by defendant N., which were given to H. as collateral without further consideration, that H., in renewing the loans, had purposely so mingled his usurious transactions as to make it difficult, without a full accounting with him, to determine the amount of the legal indebtedness to him either of plaintiff or defendant N. on the notes bearing their names, and prayed for such an accounting, was not objectionable for "multifariousness," in so far as defendant N. and H. were concerned. *Horne v. Nitsch*, 63 Atl. 1052, 1054, 103 Md. 498.

"Multifariousness" is avoided if each of the parties is concerned in matters material, provided they are allied to or connected with the others. So, where some defendant may be a necessary party to some essential portion of the relief growing out of the entire controversy, the objection will not obtain. A bill is not "multifarious" which seeks to have an accounting on contracts with one of the defendants, where another defendant is joined under allegations that the two have wrongfully taken the funds equitably belonging to the complainant, and fraudulently sought to cover them up by investing them in lands, taking the legal title thereto in themselves, and the bill seeks to fasten a trust thereon for the use of the complainant. *McMullen Lumber Co. v. Strother*, 136 Fed. 295, 306, 69 C. C. A. 433 (citing *Barcus v. Gates*, 89 Fed. 783, 32 C. C. A. 337; *Brown v. Guarantee Trust & Safe-Deposit Co.*, 9 Sup. Ct. 127, 128 U. S. 403, 412, 32 L. Ed. 468; *Kelley v. Boettcher*, 85 Fed. 64, 29 C. C. A. 14; *Curran v. Campion*, 85 Fed. 70, 29 C. C. A. 26; *Weir v. Bay State Gas Co.*, 91 Fed. 940).

"By 'multifariousness in a bill,' as defined by *Story*, Eq. Pl. § 271, is meant: 'The improperly joining in one bill of distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of distinct and independent nature against several defendants in the same bill.'" There is no fatal misjoinder of causes of action in equity in any bill which presents a common point of litigation, the decision of which will affect the whole subject-matter and will settle the rights of all the parties to the suit. It is not indispensable that all the parties should have an interest in all the matters contained in the

suit. It will be sufficient if each party has an interest in some material matters in the suit, and that they are connected with the others. Where an insurance corporation issued a large number of policies and contracted to pay a certain sum to each policy holder, together with an equitable portion of a profit fund, to be made up from gains and profits from lapses and other sources, and, when such policies were outstanding, the company transferred its assets to another company, disabling itself from performing its contracts, and went out of business, and its successor, after issuing similar policies, transferred its assets to a third, and the third to a fourth, company, the holders of policies in the transferring companies were entitled to join in a bill in equity for some form of relief with respect to the assets transferred as a trust fund, and where the bill contained allegations tending to negative any novation to join all the companies as defendants. *Watson v. National Life & Trust Co.*, 162 Fed. 7, 10, 88 C. C. A. 380 (quoting and adopting *Kelley v. Boettcher*, 85 Fed. 55, 64, 29 C. C. A. 14; *Brown v. Guarantee Trust Co.*, 9 Sup. Ct. 127, 130, 128 U. S. 403, 412, 32 L. Ed. 468).

It is difficult to give any distinct definition of "multifariousness," and the cases so nearly approach each other that it is not easy to distinguish them. A learned author states that "multifariousness means the joining together improperly in one bill of complaint of distinct and independent matters and thereby confounding them"; also that "a claim against two or more defendants cannot be properly united in the same bill with a separate claim against one only." Our own court has said that it "is generally understood to include those cases 'where a party is brought as a defendant on the record,' with a large portion of which, and in the case made by which, he has no connection whatever." A bill for specific performance of a contract for the assignment of an interest of a partner in the firm property, and for an accounting from one who had done business with the assignor in violation of the provisions of the assignment, and for an accounting of the firm business by the other partners, is multifarious. *Bentley v. Barnes*, 47 South. 159, 161, 151 Ala. 659 (citing 1 Beach, Mod. Eq. Prac. §§ 115, 121; *Adams v. Jones*, 68 Ala. 117, 119).

"Multifariousness" is incapable of exact definition. The objection is frequently a matter of discretion, and every case must, in a measure, be governed by what is convenient and equitable under its own peculiar facts, subject to the recognized principles of equity jurisprudence. It is always proper to exercise this discretion in such manner as to discourage future litigation about the same subject-matter, and to prevent a multiplicity of suits, but never to do plain violence to the maxim that "courts of equity delight to do

justice and not by halves." All that can be done in each particular case, as it arises, is to consider whether it comes nearer to the decisions where the objection has been held fatal or to those where it has not been so held. Complainant purchased a portion of a plat of ground, all of which originally belonged to his vendor, W., who had previously sold another portion of the plat to G., who had taken possession only of the portion so purchased; W. retaining the balance. As the result of inaccuracies and misdescriptions in each of the deeds, there was a confusion of boundaries on the face of the paper titles, and G., claiming that her deed conveyed the land claimed by complainant, instituted ejectment against him to recover the lot of which he was in possession, whereupon complainant filed a bill against G. and W. and wife, seeking to correct the errors and misdescriptions in both deeds, to enjoin the ejectment suit, and for general relief. Held, that the bill was properly maintainable to prevent a multiplicity of suits, and was therefore not demurrable for multifariousness. *Sicard v. Guylou*, 41 South. 474, 147 Ala. 239 (citing *Adams v. Jones*, 68 Ala. 117; 1 *Daniell*, Ch. Pl. & Prac. 334, note 2; *Boyd v. Hunter*, 44 Ala. 705).

There is no fixed or inflexible rule by which to determine whether or not a bill is "multifarious." The test must be applied to the facts of each particular case, in the light of the general principles regulating singleness in pleading, which forbid the blending in the same suit entirely distinct and separate matters relating to different parties. A bill to reach property fraudulently conveyed is not multifarious because it joins as defendants with the debtor a number of persons alleged to have severally assisted him in covering up separate and distinct portions of his property by accepting transfers thereof. *Regester v. Regester*, 65 Atl. 12, 13, 104 Md. 359.

As to whether a bill is "multifarious" depends on the particular fact of each case and is largely within the sound discretion of the court. It is not indispensable that all the parties to a suit in equity should have an interest in all the matters contained in the suit, but it is sufficient if each party has an interest in some material matters in the suit and they are connected with the others. In a suit for the appointment of a receiver of a bankrupt prior to adjudication for the purpose of taking possession of property alleged to have been fraudulently conveyed to various relatives of the bankrupt, the bill was not "multifarious" because many claimants were joined who were the various alleged fraudulent transferees of the property. *Horne-Gaylord Co. v. Miller & Bennett*, 147 Fed. 295, 298 (citing *United States v. American Bell Telephone Co.*, 9 Sup. Ct. 90, 128 U. S. 315, 32 L. Ed. 450; *Walker v. Powers*, 104

U. S. 245, 26 L. Ed. 729; *Brown v. Guarantee Trust & S. D. Co.*, 9 Sup. Ct. 127, 128 U. S. 403, 32 L. Ed. 468; *South Penn Oil Co. v. Calf Creek Oil & Gas Co.*, 140 Fed. 516; *Shaffer v. O'Brien*, 8 S. E. 293, 31 W. Va. 601).

"'Multifariousness,' abstractly, has been properly said to be incapable of a distinct definition, but is generally understood to include those cases 'where a party is brought as a defendant on the record, with a large portion of which, and in the case made by which, he has no connection whatever.'" A bill against a cotton compress company and a carrier for discovery and the value of cotton damaged or lost is not multifarious because, on an accounting, it may result that one of the defendants may be shown to be liable to complainant on one or more items for which the other is not, and with which it is in no wise connected. *Gulf Compress Co. v. Jones Cotton Co.*, 47 South. 251, 254, 157 Ala. 32 (citing *Adams v. Jones*, 68 Ala. 117, 119).

A stockholder's bill to compel the cancellation of an alleged illegal issue of the corporation's common stock and the rescission of a transfer thereof and for a receiver to conduct the corporation's affairs for a reasonable time and an injunction restraining the transferee of the stock from voting the same as stockholders' meetings was not demurrable for multifariousness, under the rule that whether a bill is "multifarious" is a question of discretion, and that the bill will not be so held where there are only separate claims to the same individual subject-matter. *Howard v. National Telephone Co.*, 182 Fed. 215, 220.

A bill filed by the United States to cancel for fraud a large number of separate conveyances made by individual Indians to the several defendants, and having no connection with each other, the suit being on behalf of the various grantors, is multifarious. *United States v. Allen*, 171 Fed. 907, 928 (citing 5 Words and Phrases, p. 4616).

A bill by a judgment creditor against the debtor and others to set aside various conveyances by which it is alleged the debtor fraudulently transferred his property to different corporations organized for the purpose, and of which he owned the stock, the purpose being to cover it up and place it beyond the reach of execution, through which transfers the other defendants have acquired or claimed some interest in different portions of the property, has but a single object, which is to reach and subject the property, is based on a series of transactions forming one course of dealing, and is not demurrable for "multifariousness," although the interests of the other parties defendant are separate and distinct. Where the object of the suit is single, and it happens that different persons have separate interests in distinct questions which arise out of the single object, it necessarily follows that such different persons must be

brought before the court in order that the suit may conclude the whole subject; and in order to determine whether a suit is multifarious, or, in other words, contains distinct matters, the inquiry is, not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. *Fowler v. Palmer*, 160 Fed. 1, 16, 17, 18, 19, 87 C. C. A. 157.

A bill in equity, which charges: (1) That certain real estate was bought for the plaintiff corporation by its president, and was paid for in whole or in part with its funds, or with the proceeds of its stock unlawfully issued and sold, and not properly accounted for, and that its president fraudulently caused the real estate to be conveyed to his son, one of the defendants, through whom several other defendants, but not all the defendants, have legal or equitable titles, which they should convey to the plaintiff; (2) that a part of the above defendants, and two other defendants, have unlawfully received stock in the plaintiff corporation, which they should account for to it; and (3) that still another defendant has unlawfully received and sold the stock of the plaintiff, in part, at least, other than that mentioned in the preceding class, for the proceeds of which he should account to it—is bad for "multifariousness." *Camden Land Co. v. Lewis*, 63 Atl. 523, 526, 101 Me. 78.

## MULTIPHASE SYSTEM

Technically the "multiphase system," as used in the transmission of electric power, consists of the use of two or more alternate currents of equal period, but differing in phase. *Harrison v. Detroit, Y., A. A. & J. Ry.*, 100 N. W. 451, 452, 137 Mich. 78.

## MULTIPLICITY

### MULTIPLICITY OF PROCEEDINGS

The continuation of a pending suit for infringement of a patent, and the taking of testimony therein by complainant after it has filed a petition for a reissue on the ground of the invalidity of the patent in suit, constitutes a "multiplication of proceedings," so as to unreasonably and vexatiously increase the costs, within the meaning of Rev. St. § 982, and on a dismissal of the suit after the granting of a reissue defendant is entitled thereunder to a special allowance commensurate with the expense occasioned thereby. *Motion Picture Patents Co. v. Yankee Film Co.*, 192 Fed. 134, 135.

### MULTIPLICITY OF SUITS

A "multiplicity of suits" does not mean a multitude of suits, the term not applying merely because each of several parties jointly and severally liable may be independently

sued, but where one may be sued several times respecting the same subject-matter in its entirety, or some element or elements thereof. *Illinois Steel Co. v. Schroeder*, 113 N. W. 51, 55, 133 Wis. 561, 14 L. R. A. (N. S.) 239, 126 Am. St. Rep. 977.

## MULTITUDE

The law of trespass or forcible entry requires a demonstration of force sufficient to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace being committed, either by a "multitude" or by weapons, and three persons have been held sufficient to constitute a multitude. *State v. Davis*, 13 S. E. 883, 109 N. C. 811, 14 L. R. A. 206.

## MUNICIPAL

The term "municipal," as commonly used, is appropriately applied to all corporations exercising governmental functions, either general or special. *Merchants' Nat. Bank of San Diego v. Escondido Irr. Dist.*, 77 Pac. 937, 938, 144 Cal. 329.

The word "municipal" is defined as meaning or pertaining to a city or corporation having the right to administer local government. *Miller v. People*, 82 N. E. 521, 523, 230 Ill. 65.

The word "municipal," as originally used in its strictness, applied to cities only, but it now has a much more extended meaning, and, when applied to corporations, the words "municipal," "political," and "public" are used interchangeably. *Smith v. Board of Trustees of Robersonville Graded School*, 53 S. E. 524, 527, 141 N. C. 143, 8 Ann. Cas. 529 (quoting and adopting definition in *Currier v. District Tp. of Sioux City*, 17 N. W. 191, 62 Iowa. 102).

The term "municipal" relates not only to a town or city as a territorial entity but also pertains to local self-government in general, and in a broader sense to the internal government of a state. A town or a city is wholly a creature of the state and wholly subservient to the state, and for that reason is not strictly a corporation, as interpreted by the common law. It is rather a quasi municipal corporation. *City of Augusta v. Augusta Water Dist.*, 63 Atl. 663, 664, 101 Me. 148 (citing *Standard Dict. "municipal"*).

The word "municipal" appears to have been derived from "municipium," meaning a town, particularly in Italy, which possessed the right of Roman citizenship, but was governed by its own laws, a free town; and it may be thus defined: (1) Of or pertaining to a city or corporation having the right of administering local government, as municipal rights, municipal officers. (2) Of or pertaining to a state, kingdom, or nation, as municipal law, municipal offense, in contradistinction to international law or international

offense—and strictly the word applies only to what belongs to a city. Laws 1905, p. 275, c. 163, creating a board, to be known as the state capitol commission, for the purpose of procuring the erection of a capitol building, and authorizing the commission to procure the erection of a building, adopt plans and specifications, etc., is not in conflict with Const. art. 3, § 26, declaring that the Legislature shall not delegate to any special commission power to perform any "municipal" function; the erection of a capitol building not being a "municipal" function, which in such case is restricted to the affairs of cities and towns. *Davenport v. Elrod*, 107 N. W. 833, 834, 20 S. D. 567 (citing *Webst. Int. Dict. and Bouv.*).

The word "municipal" applies strictly only to a city or community within a state possessing rights of self-government. Practice Act (Hurd's Rev. St. 1909, c. 110) § 118, which provides that appeals from and writs of error to circuit courts and the superior court of Cook county shall be taken direct to the Supreme Court in cases in which the validity of a "municipal" ordinance is involved, upon a certificate of the trial court that the public interest so requires, applies only to ordinances of cities and villages and not to ordinances of the sanitary district of Chicago. *People ex rel. Mortell v. Bergman*, 97 N. E. 695, 696, 253 Ill. 469.

The term "municipal officer," as used in Const. art. 16, § 6, limiting the terms of office thereof to two years, means "city officers"; the word "municipal" having its origin in the idea of a free town or city, and in its popular use is applied to cities, though in its general meaning it embodies the idea of local self-government, as distinguished from centralized government. "Municipal" may either refer to a town or a city. *State ex rel. Quintin v. Edwards*, 99 Pac. 940, 941, 946, 38 Mont. 250 (quoting and adopting definition in 5 Words and Phrases, p. 4618).

## MUNICIPAL AFFAIRS

The phrase "municipal affairs" has a meaning and a most significant one, and, as used in the organic law, referred to the internal business affairs of the municipality. Const. art. 11, § 6, provides: "Cities and towns heretofore or hereafter organized, and all charters thereof framed and adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws." The wording of this provision shows that all matters of legislation pertaining to and bearing upon municipalities do not come within the signification of the words "municipal affairs" as used in the Constitution. *Fragley v. Phelan*, 58 Pac. 923, 925, 126 Cal. 383, 388.

The power to impose a license tax for revenue purposes, granted by the state to a municipality for municipal purposes, became a "municipal affair," within Const. art. 11,

§ 6, providing that cities and their charters shall be subject to and controlled by general laws, except in municipal affairs, and the Legislature was without authority to withdraw or modify such power. *Ex parte Braun*, 74 Pac. 780, 788, 141 Cal. 204.

A provision in a charter authorizing a municipality to impose and collect a license tax for purposes of municipal revenue is a "municipal affair," and within the proper scope of a municipal charter. *Ex parte Jackson*, 77 Pac. 457, 460, 143 Cal. 564.

The election and dismissal of teachers in the public schools are not "municipal affairs," which may, by a freeholder's charter, be regulated in a manner in conflict with that provided by the general law. *Barthel v. Board of Education of City of San Jose*, 95 Pac. 892, 893, 153 Cal. 376.

The amendment of Const. art. 11, § 6, by insertion of the words "except in municipal affairs," so as to protect the cities and counties and parties thereof except in municipal affairs, shall be subject to and controlled by general laws, and was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws, while intended to give municipalities the sole right to regulate, control, and govern their internal conduct, independent of general laws, and this internal regulation and control by municipalities comprises the municipal affairs spoken of in the Constitution. *Dinan v. Superior Court of City and County of San Francisco*, 91 Pac. 806, 808, 6 Cal. App. 217 (citing *Fragley v. Phelan*, 58 Pac. 923, 126 Cal. 383).

The election of municipal officers is strictly a municipal affair, within Const. art. 11, § 6, providing that general laws shall not be applicable to municipalities as to matters which are strictly "municipal affairs." *Socialist Party v. Uhl*, 103 Pac. 181, 186, 155 Cal. 776.

The licensing of bawdy houses, and the sale of intoxicating liquors is not "municipal affairs" within Const. art. 11, § 6, declaring that "all charters, \* \* \* except in municipal affairs, shall be subject to and controlled by general laws." *Farmer v. Behmer*, 100 Pac. 901, 904, 9 Cal. App. 773.

The regulation and fixing of charges to be made by telephone companies doing business within a city is none the less a "municipal affair," within the jurisdiction of the city, because rates so fixed would not be uniform throughout the state; the reasonableness of the charge depending on the value of the plant, cost of maintenance and operation, which vary in different localities. The regulation of the charges of a public service corporation within the limits of the city is a "municipal affair." The streets of the city are public highways in which the people of the whole state are interested; and yet the

opening and widening of streets are "municipal affairs," and the regulation of telephone rates in a city would seem to be more clearly a matter of local concern than the control of streets. *Home Telephone & Telegraph Co. v. Los Angeles*, 155 Fed. 554, 564.

The construction and maintenance of telephone wires along the streets of a city, and the terms and conditions under which they shall be constructed and maintained, is a municipal affair within Const. art. 11, § 6, as amended in 1896, making the provisions of a freeholders' charter, adopted by a city, paramount to general laws enacted by the state Legislature in municipal affairs. Since the rights of a telephone company to maintain and operate a telephone line on the streets of a city is a municipal affair within Const. art. 11, § 6, making the provisions of a freeholders' charter paramount to general statutes in municipal affairs, the rights of a telephone company, using the streets of a city governed by a freeholders' charter, were not extended by Civ. Code, § 536, as re-enacted by St. 1905, p. 492, authorizing telegraph or telephone corporations to construct lines along and on any public road or highway, etc. *Sunset Telephone & Telegraph Co. v. City of Pasadena*, 118 Pac. 796, 802, 803, 161 Cal. 265.

Where the power to impose a license tax for revenue for municipal purposes is conferred upon a municipality, that power becomes a "municipal affair," within the meaning of those words, as used in Const. art. 11, § 6, declaring that cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, except in municipal affairs shall be subject to and controlled by general laws. *Ex parte Helm*, 77 Pac. 453, 454, 143 Cal. 553.

Under Const. art. 2, § 6, providing that the charters of cities heretofore or hereafter organized shall be subject to the general laws, except in "municipal affairs," San Francisco has power to incur a bonded indebtedness for the erection of new school-houses for the acquisition of land for these purposes, and for additional land for playgrounds of established schools; they being "municipal affairs." *Law v. San Francisco*, 77 Pac. 1014, 1017, 144 Cal. 384.

San Diego City Charter, art. 6, c. 2, § 13, provides that the common council shall determine the necessity for public improvements, and that where the ordinary revenues are insufficient, bonds may be issued, the proceedings for which shall be in accordance with the general laws relating to municipal bonded debts, but the charter is silent as to how money so raised shall be spent. Held that, in the silence of the charter, the expenditure of the money was not a "municipal affair" within Const. art. 11, § 6, providing that city charters shall be controlled by



general laws, "except in municipal affairs," so that the general law followed as to the mode of issuing the bonds for the improvement, Laws 1901, c. 30, § 9, was controlling, which forbids spending such funds, except on competitive bidding. *Clouse v. City of San Diego*, 114 Pac. 573, 574, 159 Cal. 484.

Proceedings for annexation of territory to a city are had under Act March 19, 1889 (St. 1889, p. 358, c. 247), a general law providing a complete scheme for annexation which, under the Constitution, controls and is superior to city charter provisions, except in "municipal affairs," annexation of territory to a city being in no sense a "municipal affair" within the Constitution; and hence an annexation was not void because the ordinance calling the special election on that question and ordering notice thereof to be given, published as provided by the act of 1889, was not published for 10 days as prescribed by the city charter for ordinances calling elections. *People ex rel. Peck v. City of Los Angeles*, 97 Pac. 311, 314, 154 Cal. 220.

General Municipal Incorporation Act (Gen. Laws 1906, p. 898), § 862, empowering cities of the sixth class to acquire and maintain waterworks and works for light, relates to a "municipal affair," and is not special legislation because confined to cities of the sixth class. *Cary v. Blodgett*, 102 Pac. 668, 669, 10 Cal. App. 463.

The supplying of water by a city to outside territory, when incidental to the main purpose of supplying water to its own inhabitants is a "municipal affair" of the city, within Const. art. 11, § 6, providing that the charters of cities "except in municipal affairs" shall be controlled by general laws, and the charter of the city prevails over the general legislation embodied in Act March 27, 1897, St. 1897, p. 182, c. 121, authorizing a city, having in its supply more water than is necessary for its inhabitants, to sell the surplus, etc. *City of South Pasadena v. Pasadena Land & Water Co.*, 93 Pac. 490, 496, 152 Cal. 579.

Act March 8, 1909 (St. 1909, c. 133), providing for the care and custody of children who are likely to develop criminal tendencies, and giving additional powers to the superior courts in respect thereof, provides for an exercise of the police powers of the state through the judicial department, and its subject-matter is not embraced within "municipal affairs" as used in Const. art. 11, § 6, providing that charters of cities and towns except in municipal affairs shall be subject to and controlled by general laws, though the functions of the particular extension of the system may be exercised exclusively within incorporated cities having a freeholders' charter. *Nicholl v. Koster*, 108 Pac. 302, 303, 157 Cal. 416.

Act April 10, 1908 (P. L. p. 286), providing for a special election in any election dis-

trict in which the Secretary of State has placed voting machines to determine upon the retention or rejection of such machines, is not in violation of the constitutional prohibition against private, local, or special acts affecting the internal affairs of municipalities. *Mara v. City of Bayonne*, 71 Atl. 1131, 77 N. J. Law, 288; *Id.*, 75 Atl. 1101, 78 N. J. Law, 740.

#### MUNICIPAL BOND

As negotiable instrument, see Negotiable Instrument.

The term "municipal bond" imports a municipal debt or obligation. The common mind understands, from the fact that a municipal bond is issued, that a municipal debt has been created, and that the faith and good credit of the municipality issuing the bond is pledged to its payment. As used in Const. art. 16, § 5, as amended in 1894, permitting the investment of the school funds in national, state, county, municipal, or school district bonds, the term does not include bonds of a city indebted to its constitutional limit, issued under the express provisions of Laws 1901, p. 177, c. 85, for the payment of a waterworks plant, payable out of a special fund composed of a fixed per cent. of the gross receipts of the plant, and such further sum as the city may from time to time by ordinance transfer from the receipts of the plant or from its general revenue, without pledging the credit of the city. *State ex rel. City of Port Townsend v. Clausen*, 82 Pac. 187, 190, 192, 40 Wash. 95.

"By the term 'municipal bonds' is meant evidences of indebtedness issued by cities, incorporated towns, townships, school districts, and other corporate public bodies negotiable in form payable at a designated future time, bearing interest payable annually or semiannually, and usually having coupons attached evidencing the several installments of interest. Municipal bonds issued in the usual negotiable form and authorized by law have all the attributes of negotiable commercial paper of individuals and private corporations; they are usually made payable to bearer; they pass by delivery and, like other negotiable papers, are not subject to equities between prior holders in the hands of a bona fide purchaser for value, before due, without notice of such equities." But, despite the similarity in form, county commissioners, authorized to issue new bonds to take up old ones, have no power to issue bonds to take up the promissory notes. *Muskingum County Com'rs v. State*, 85 N. E. 562, 566, 78 Ohio St. 287 (quoting and adopting definition in *Harris, Mun. Bonds*, 8).

#### MUNICIPAL CHARTER

See Charter.

#### MUNICIPAL CLAIM

Registered taxes are "municipal claims," within a statute providing for service for

posting and advertisement in proceedings on a "municipal claim." *Jones v. Beale*, 66 Atl. 254, 217 Pa. 182.

### MUNICIPAL CONTRACT

As privilege of citizen, see Privileges and Immunities.

### MUNICIPAL CORPORATION

Charter of, see Charter.

See, also, Municipality; Public Corporation.

Municipal corporations are mere governing bodies having charge of and jurisdiction over particular political subdivisions of the state. *Uvalde Asphalt Paving Co. v. City of New York*, 134 N. Y. Supp. 50, 51, 149 App. Div. 491.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people. *People v. Sours*, 74 Pac. 167, 172, 31 Colo. 369, 102 Am. St. Rep. 34 (citing 1 Dill. Mun. Corp. § 23).

The term "municipal corporation" implies the organization of a certain geographical district under authority of law including within its jurisdiction and control a certain geographical area. *Short v. Gouger* (Tex.) 130 S. W. 267, 269.

A "municipal corporation" is one created by a government for political purposes, having subordinate and local powers of legislation; and the word "municipal" applies strictly only to a city or community within a state possessing rights of self-government. *People ex rel. Mortell v. Bergman*, 97 N. E. 695, 696, 253 Ill. 469.

A "municipal corporation" is a body corporate, established by law to share in the civil government of the country, but chiefly to regulate the local or internal affairs of the city, town, or district incorporated. *State v. Mayor, etc., of City of Knoxville*, 90 S. W. 289, 293, 115 Tenn. 175 (citing *East Tennessee University v. Mayor, etc., of City of Knoxville*, 6 Baxt. [65 Tenn.] 166).

The term "municipal corporations" involves the idea of a voluntary association by the inhabitants of a particular territory, sanctioned by the power of the state for the purposes of local government. But the sovereign power may, without regard to any prior agreement or action on the part of the inhabitants of the territory involved, provide for the exercise of powers, such as the election of local officers by the inhabitants, and these organizations, though public in character and partaking somewhat of the nature of a corporation, are not, strictly speaking corporations, but "quasi corporations." *Hanson v. City of Cresco*, 109 N. W. 1109, 1110, 1111, 132 Iowa, 533.

A municipal corporation in its historical and proper sense is the incorporation by the authority of the government of the inhabit-

ants of a particular place or district and authorizing them in their corporate capacity to exercise subordinate specified powers to legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper. *Ex parte Simmons*, 112 Pac. 951, 955, 4 Okl. Cr. 662.

A complaint, in an action for damages by a change in the grade of a street, which alleges that the defendant is a municipal corporation, organized and existing under the laws of the state, and that in a specified year the defendant committed the act causing the injury complained of, sufficiently alleges that the city which committed the act was at that time a municipal corporation and a "body politic and corporate," within Rev. Codes, § 3202. *Drew v. City of Butte*, 119 Pac. 279, 280, 44 Mont. 124.

Action for lands may not be brought in the name of the state for the use of the board of directors of a levee district, such board being under Acts 1893, p. 24, a "body politic and corporate" with power to sue, and so having the right to sue for the lands in its own name. *State v. Southwestern Land & Timber Co.*, 126 S. W. 73, 75, 93 Ark. 621.

A municipal corporation is a legal institution formed by charter from sovereign power, erecting a populous community of prescribed area into a body politic and corporate, with corporate name and continuous succession, and for the purpose and with the authority of subordinate self-government and improvement and local administration of affairs of state. *Ancrum v. Camden Water. Light & Ice Co.*, 64 S. E. 151, 154, 82 S. C. 284, 21 L. R. A. (N. S.) 1029.

"Municipal corporations" or governments are creatures of the law, and the warrant for their creation must be found in a valid statute or they have no legal existence. *Hurley v. Motz*, 152 S. W. 248, 250, 151 Ky. 451.

A "municipal corporation" is a creature of statute, and the adjustment of its powers and duties and its rights relative to those of citizens is the province of the Legislature. *Scott v. Village of Saratoga Springs*, 115 N. Y. Supp. 796, 797, 131 App. Div. 347 (quoting *MacMullen v. City of Middletown*, 79 N. E. 863, 187 N. Y. 37, 11 L. R. A. [N. S.] 391).

Municipal corporations are bodies politic vested with many political and legislative powers for local government and police regulations, established to aid the government by the state, and a municipal government has power to make more definite regulations than are usually provided by general legislation and to enforce them by appropriate penalties. *City of Chicago v. Union Ice Cream Mfg. Co.*, 96 N. E. 872, 873, 252 Ill. 311, Ann. Cas. 1912D, 675.

"Municipal corporations" are bodies politic and corporations vested with political

and legislative powers for local civil government and police regulations of the inhabitants of particular districts included in the boundaries of the corporations. They are in many respects local governments established to aid the government of the state. The necessity of their organization may be found in the density of the population of localities and the conditions incidental thereto. *Town of Neola v. Reichart*, 109 N. W. 5, 7, 181 Iowa, 492.

"Municipal corporations" are bodies politic, created by laws of the state for the purpose of administering the affairs of the incorporated territory. They exercise powers of government, which are delegated to them by the Legislature, and they are subjected to certain duties. They are the auxiliaries, or the convenient instrumentalities, of the general government of the state for the purpose of municipal rule. The consideration of the grant of a charter is the benefit to the public, and their relation to the state is not contractual, in the constitutional sense, for there is no element of reciprocity, and the corporate duties are incompatible with the notion of a compact. The whole interests are the exclusive domain of the government itself, and the power of the Legislature over them is supreme and transcendent, except as restricted by the Constitution of the state. Their charters being granted for the better government of the particular districts, the right to insert such provisions as seem to best subserve the public interest would seem, from the very nature of such institutions, to be inherent. *MacMullen v. City of Middletown*, 79 N. E. 863, 864, 187 N. Y. 37, 11 L. R. A. (N. S.) 391 (citing *People ex rel. Wood v. Draper*, 15 N. Y. 532, 544; *People v. Tweed*, 63 N. Y. 207; *Meriwether v. Garrett*, 102 U. S. 472, 511, 26 L. Ed. 197; *Dartmouth College v. Woodward*, 4 Wheat. [17 U. S.] 518, 4 L. Ed. 629; *Cooley*, Const. Lim. \*pp. 191-193; *Dill. Mun. Corp.* §§ 9, 30; *Ang. & A. Corp.* § 31).

"A 'municipal corporation' is, for the purposes of its creation, a government possessing, to a limited extent, sovereign powers, which in their nature are either legislative or judicial, and may be denominated 'governmental' or 'public.' The extent to which it may be proper to exercise such powers, as well as the mode of their exercise by the corporation, within the limits prescribed by the law creating them, are of necessity intrusted to the judgment, discretion, and will of the properly constituted authorities to whom they are delegated; and, being public and sovereign in their nature, the corporation is not liable to be sued either for a failure to exercise them or for errors committed in their exercise." *Hull v. Town of Roxboro*, 55 S. E. 351, 352, 142 N. C. 453, 12 L. R. A. (N. S.) 638 (quoting and adopting the definition in *Kistner v. Indianapolis*, 100 Ind. 210).

"A 'municipal corporation' is, for the purposes of its creation, a government possessing, to a limited extent, sovereign powers. \* \* \* The extent to which it may be proper to exercise such powers, as well as the mode of their exercise by the corporation, within the limits prescribed by the law creating it, are of necessity intrusted to the judgment and discretion and will of the properly constituted authorities to whom they are delegated." *Indiana Ry. Co. v. Calvert*, 80 N. E. 961, 964, 168 Ind. 321, 10 L. R. A. (N. S.) 780, 11 Ann. Cas. 635 (quoting and adopting definition in *Brinkmeyer v. City of Evansville*, 29 Ind. 187).

"The framers of our Constitution intended, by the term 'municipal corporations,' to use it in its restricted sense as applicable only to cities, towns, or villages invested with the power of local legislation." *Davenport v. Elrod*, 107 N. W. 833, 834, 20 S. D. 567 (quoting and adopting the definition in *Town of Dell Rapids v. Irving*, 64 N. W. 149, 7 S. D. 310, 29 L. R. A. 861).

The term "municipal corporations," as used in Const. 1898, art. 48, prohibiting the General Assembly from passing any local or special law creating corporations or renewing or amending the charter thereof, provided that "this shall not apply to municipal corporations having a population of not less than 2,500 inhabitants, or to the organization of levee districts and parishes," is limited by the context to cities, towns, and villages. *Board of School Directors of Madison Parish v. Coltharp*, 54 South. 299, 300, 127 La. 956.

"Counties, cities, and towns are 'municipal corporations' created by the authority of the Legislature, and they derive all their powers from the source of their creation, except where the Constitution of the state otherwise provides. Beyond doubt they are, in general, made bodies politic and corporate, and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the state." *State ex rel. Potter v. King County*, 88 Pac. 935, 936, 45 Wash. 519 (quoting *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 552).

#### As an agent or instrumentality of the state

A "municipal corporation" is an agent of the state for local purposes. *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. 421, 422.

"'Municipal corporations' are but public agencies with limited rights and powers."

*Peters v. City of St. Louis*, 125 S. W. 1184, 1135, 226 Mo. 62, 21 Ann. Cas. 1069.

A "municipal corporation" is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting affairs of government, and as such it is subject to the control of the Legislature. They owe their origin to, and derive their powers and rights wholly from, the Legislature. *Ryan v. City of New York*, 69 N. E. 599, 601, 177 N. Y. 271 (quoting *Williams v. Eggleston*, 18 Sup. Ct. 617, 619, 170 U. S. 304, 310, 42 L. Ed. 1047; *City of Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 455).

A "municipal corporation" in the machinery of the state is a mere agency. It possesses no inherent and independent authority to create rights in others which affect the public interests. *Rhinehart v. Redfield*, 87 N. Y. Supp. 789, 791, 93 App. Div. 410.

"Municipal corporations" are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative powers. *Wolff v. City of Denver*, 77 Pac. 364, 365, 20 Colo. App. 135 (citing *Lewis v. Denver City Waterworks Co.*, 34 Pac. 993, 19 Colo. 236, 41 Am. St. Rep. 248).

"Municipal corporations" are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. *Attorney General ex rel. Battishell v. Township Board of Springwells*, 107 N. W. 87, 90, 143 Mich. 523 (quoting and adopting definition in *Meriwether v. Garrett*, 102 U. S. 472, 511, 26 L. Ed. 197).

"A 'municipal corporation' is but a governmental agency or local organization for governmental purposes. Its officers are none the less governmental officers because elected or chosen by the people of a particular locality." *Livesley v. Litchfield*, 83 Pac. 142, 143, 47 Or. 248, 114 Am. St. Rep. 920.

"Municipal corporations" are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." *Hunter v. City of Pittsburgh*, 28 Sup. Ct. 40, 46, 207 U. S. 161, 52 L. Ed. 151.

"Municipal corporations" are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. The charter of a municipal corporation is conferred for political purposes, and the power to alter municipal charters or to repeal them exists without limitation; and Const. 1901, § 229, providing that the charter of any corporation shall be subject to amendment or repeal under general laws, applies only to private business corporations.

*City of Ensley v. Simpson*, 52 South. 61, 65, 166 Ala. 366 (citing *Hunter v. Pittsburgh*, 28 Sup. Ct. 207, 207 U. S. 161, 52 L. Ed. 151).

"Municipal corporations," such as counties and incorporated cities and towns, are instrumentalities of the state government. They serve its political and civil purposes, more or less generous in their nature and extent and more particularly where they are located. They are public in their nature, and the Legislature has control over them. It may determine and establish their powers and enlarge or modify their powers and authority from time to time; it may create new ones prescribing their powers and authority as public necessity and convenience require." *Folsom v. Greenwood County*, 137 Fed. 449, 451, 69 C. C. A. 473 (quoting definition given in *Wood v. Town of Oxford*, 2 S. E. 655, 97 N. C. 230).

"Municipal corporations," including chartered municipalities, are agencies in the work of government. They are created by the Legislature, which delegates to them certain clearly defined portions of the sovereign power. Except as restrained by constitutional provisions, these auxiliary agencies of government are under the absolute control of the Legislature. Powers and duties may be imposed and taken away at the legislative will." *Schigley v. City of Waseca*, 118 N. W. 259, 260, 106 Minn. 94, 19 L. R. A. (N. S.) 689, 16 Ann. Cas. 169.

"Municipal corporations" are the instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of the power upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the Legislature itself. *Glide v. Superior Court of County of Yolo*, 81 Pac. 225, 226, 147 Cal. 21.

"Municipal corporations" are the administrative agencies established for the local government of towns, cities, and counties, or other particular districts. The special powers conferred on them are not vested rights as against the state, nor are they in the nature of contracts, but, being wholly political, they exist only during the will of the Legislature. Such powers may at any time be changed, modified, repealed, or destroyed by the Legislature, saving only the vested rights of the individuals." *Ex parte Corliss*, 114 N. W. 962, 981, 16 N. D. 470 (citing *Black*, Const. Law, § 132).

"A 'municipal corporation' is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department. The Legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the

limits of the former city. The city is 'the creature of the state.' *City of Worcester v. Worcester Consol. St. Ry. Co.*, 25 Sup. Ct. 327, 329, 196 U. S. 539, 49 L. Ed. 591 (quoting *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 584, 13 L. Ed. 518, 528).

#### As possessing double character

"Municipal corporations," as ordinarily constituted, possess a double character—the one, governmental, legislative, or public; the other, in a sense proprietary or private—and over its civil, political, or governmental powers the authority of the Legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the Constitution of the particular state. But, in its proprietary or private character, the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct personality or corporate individual; and as to such powers, and to property acquired thereunder, the corporation is to be regarded *quo ad hoc* as a private corporation. *Town of Nahant v. United States*, 136 Fed. 273, 281, 70 C. C. A. 641, 69 L. R. A. 723 (citing *Dill. Mun. Corp.* [4th Ed.] §§ 66, 67, and notes).

A "municipal corporation" is the delegate of sovereign power to legislate as to the public needs of the locality, and in a sense it possesses a dual character. It acts in a governmental capacity to the extent that it exercises its powers in matters of public concern, and it acts in a private capacity in so far as it exercises its powers under its by-laws for private advantage in matters pertaining to the municipality, as the proprietor of the various works and properties. It cannot be held liable for the nonexercise of governmental powers delegated by the state, which are discretionary powers, and which are classed as a public or legislative character; neither can it be held responsible for the manner in which it exercises those powers. *O'Donnell v. City of Syracuse*, 76 N. E. 738-740, 184 N. Y. 1, 8 L. R. A. (N. S.) 1053, 112 Am. St. Rep. 558, 6 Ann. Cas. 173 (citing *Lloyd v. Mayor, etc., of City of New York*, 5 N. Y. 369, 55 Am. Dec. 347).

#### As corporate body or person

See *Corporate Body*.

#### Corporation as including

See *Corporation*.

#### As embracing inhabitants

A "municipal corporation" is a fictitious being created for the sole and exclusive purpose of administering the public interest. Such corporation and the inhabitants of its territory are in law distinct separate persons, and a corporation is not the mandatory of the inhabitants individually for entering into

contracts for them individually. It does not follow, from the fact that the inhabitants are interested, that the obligations of contractors toward the "municipal corporation" shall be faithfully complied with, or, from the fact that they, as taxpayers, contribute the money with which the payments have to be made, that they are principals in the contracts entered into by the corporation. *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 37 South. 980, 981, 113 La. 1091, 68 L. R. A. 650, 104 Am. St. Rep. 525, 2 Ann. Cas. 471.

#### As part of state

As political subdivision, see *Political Subdivision*.

A "municipal corporation" is a subordinate subdivision of the state government. It derives its existence, powers, and privileges from the state. *State v. City of Aberdeen*, 74 Pac. 1022, 1023, 34 Wash. 61.

"Municipal corporations" constitute a part of the civil government of the state, and their streets are highways." *Southern Bell Telephone & Telegraph Co. v. Mobile*, 162 Fed. 523, 529.

A "municipal corporation" is a subordinate branch of the domestic government of the state. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation, instituted for the purpose of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution it exists for the benefit of the people within its corporate limits. The Legislature invests it with such powers as it deems adequate to the ends to be accomplished. *State v. Butler*, 77 S. W. 560, 570, 178 Mo. 272 (quoting *Nashville v. Ray*, 19 Wall. [86 U. S.] 468, 475, 22 L. Ed. 164).

A "municipal corporation" is a part of the governmental machinery of the state, organized for the purpose of exercising certain functions of government, within a specified locality; and it possesses such powers, and such only, as are conferred upon it by the Legislature; and they are to be exercised in such form, mode, and manner, and by such agencies, as the Legislature may from time to time prescribe, within the limits of the Constitution. *Tommasi v. Bolger*, 100 N. Y. Supp. 367, 372, 114 App. Div. 838; *People ex rel. Devery v. Coler*, 65 N. E. 956, 958, 173 N. Y. 103 (quoting *People ex rel. City of Rochester v. Briggs*, 50 N. Y. 553-559).

It is within the power of the Legislature to abolish the office of chief of police of the city of New York, and as chapter 33, Laws 1901, to that effect, does not purport to abrogate any right of such chief of police to any pension, he has the power to assert any vested rights which he may have to such pension or in the pension fund by a proper

proceeding. *People ex rel. Devery v. Coler*, 65 N. E. 956, 958, 173 N. Y. 103.

#### As political or public corporation

"The American 'municipal corporation' is simply and purely a strictly public corporation. It is a corporation of citizens, for citizens, and by citizens. Its sole object is local government." *Beale v. Pankey*, 57 S. E. 661, 663, 107 Va. 215, 12 Ann. Cas. 1134.

For the purpose of general designation, it is not uncommon to use the term "municipal corporation" as including quasi corporations to distinguish public or political corporations from those which are termed "private." A county is a "municipal corporation," within a constitutional provision providing that no right of way shall be appropriated for the use of any corporation other than municipal until full compensation shall have been made, irrespective of benefits. *Lincoln County v. Brock*, 79 Pac. 477, 478, 37 Wash. 14.

The term "municipal corporations," as used by text-writers in discussing the delegation of the power of taxation to municipal corporations, is not used in the restricted sense of cities and towns, but in a more enlarged and generally received acceptation, which includes municipal corporations technically so termed, and also public corporations created by the state for the purpose of exercising defined and limited governmental functions in certain designated portions of the state's territory. These are termed by authors of approved excellence and decisions of authority to be "public quasi corporations," and are said to include counties, townships, school districts, and the like. *Smith v. Board of Trustees of Robersonville Graded School*, 53 S. E. 524, 527, 141 N. C. 143, 8 Ann. Cas. 529.

"The term 'municipal,' as used in defining a corporation, indicates by its historical meaning a corporation proper, as distinguished from a quasi corporation, and designates only cities and incorporated towns which have powers of local self-government, and, in strictness of meaning, would not include counties and school districts, although they are expressly declared by statute to be bodies corporate. But, in common speech, the term 'municipal corporation' is used to include all public or political corporations having corporate powers." *Hanson v. City of Cresco*, 109 N. W. 1109, 1112, 132 Iowa, 533 (citing 5 Words and Phrases, p. 4620).

#### Board of drainage commissioners

Code 1906, § 3485, providing that money deposited in banks by an officer having the custody of public funds, "state, county, municipal, or levee board," is prima facie public money, and a trust fund, and may not be taken by the general creditors of the bank, is in derogation of the common law and must be strictly construed, and the word "municipal"

embraces only municipal corporations represented by cities, towns, and villages, and does not include the board of drainage commissioners, and the funds of such board deposited in a bank are not within the protection of the statute. *United States Fidelity & Guaranty Bank v. First State Bank of Shaw (Miss.)* 60 South. 47.

#### Board of education

Under Detroit City Charter (Comp. 1904, § 596), providing the school inspectors shall be a body corporate, known as "board of education of the city of Detroit," and in that name may sue and be sued, and hold and convey real and personal property, such board is a "municipal corporation," and not liable for the negligence of its employes and agents. *Whitehead v. Board of Education of City of Detroit*, 102 N. W. 1028, 1029, 139 Mich. 490.

#### County

A county is a "municipal corporation." *Wadsworth v. Board of Sup'rs of Livingston County*, 115 N. Y. Supp. 8, 16 (citing County Law [Laws 1892, p. 1744, c. 686] § 2; General Corporation Law [Laws 1890, p. 1061, c. 563] § 3, subd. 1).

A county, properly speaking, is not a "municipal corporation." *Knowles v. Board of Education of City of Topeka*, 7 Pac. 561, 564, 33 Kan. 692 (citing Dill. Mun. Corp. § 22).

A county is a "municipal corporation" within the rule that a municipal corporation cannot be estopped by the unauthorized or illegal agreements or acts of their agents. *People ex rel. Sweet v. Board of Sup'rs of St. Lawrence County*, 91 N. Y. Supp. 948, 949, 101 App. Div. 327.

While a county is not strictly a municipal corporation, yet, in the sense that it is a body corporate with only such powers as are expressly conferred by statute, it is within the rules applicable to such corporations. *Morse v. Granite County*, 119 Pac. 286, 289, 44 Mont. 78.

A county is a municipal or quasi municipal corporation invested with legislative powers to be exercised for local purposes, subject to the control of the state, but is not, in a strict sense, a "municipal corporation." *Schubel v. Olcott*, 120 Pac. 375, 378, 60 Or. 503.

"Municipal corporations" are subordinate parts of the state, and invested with limited powers. In Montana counties are at most only quasi municipal corporations, with no legislative authority vested in the several boards of county commissioners, in the sense that they may adopt ordinances and prescribe penalties for a violation thereof, or define nuisances and provide for their abatement. In *re O'Brien*, 75 Pac. 196, 199, 29 Mont. 590, 1 Ann. Cas. 373 (citing *Wilcox v. Deer Lodge County*, 2 Mont. 574).

A "municipal corporation" proper is created mainly for the interest, advantage, and convenience of the locality and its people, as distinguished from a county organization which is created almost exclusively with a view to the policy of the state at large. *People ex rel. Attorney General v. Johnson*, 86 Pac. 233, 235, 34 Colo. 143 (citing 1 Dill. Mun. Corp. § 23).

A "county" is a governmental agency of the state, and in a sense a "municipal corporation." *Kumpe v. Bynum*, 48 South. 55, 66, 158 Ala. 311.

A special school district is not within the constitutional provision declaring that no county, city, town, or municipality shall issue any interest bearing evidence of indebtedness. All corporations intended as agencies in the administration of civil government are public, as distinguished from private, corporations. Cities are "municipal corporations," while school districts and "counties," properly speaking, are not. *Schmutz v. Special School Dist. of City of Little Rock*, 95 S. W. 438, 439, 78 Ark. 118 (citing *Memphis Trust Co. v. Board of Directors of St. Francis Levee Dist.*, 62 S. W. 902, 69 Ark. 284; 1 Dill. Mun. Corp. § 22).

The "county" is a political subdivision of the state, though for many purposes it is deemed a municipality. Its power of contracting indebtedness is limited to the matters expressly conferred by the Legislature, or which are conferred by necessary implication as an incident of powers expressly conferred. Not only is it limited as to the things for which, but it is limited as to the manner in which, it may become bound by contract. *McDonald's Adm'r v. Franklin County*, 100 S. W. 861, 862, 125 Ky. 205.

A "county" is a local subdivision of the state, created by the state of its own will, and is not a "municipal corporation" proper, which is called into existence either at the direct solicitation or by the consent of the persons composing it, for the promotion of their private advantage, and a county cannot be sued except on an express contract. *Marion County v. Rives & McChord*, 118 S. W. 309, 311, 133 Ky. 477.

#### **Drainage district**

"Municipal corporations" cease to exist only by legislative consent, and a failure for a term of years to exercise the functions of a municipality does not effect a dissolution, neither does a failure to elect officers. Drainage districts are classed as municipal corporations. *People ex rel. Gauen v. Niebruegge*, 91 N. E. 115, 117, 244 Ill. 82.

A drainage district, although a quasi public corporation, is not a "municipal corporation" within the purview of Const. art. 5, § 5, providing that property belonging to the state or municipal corporations shall be exempt from taxation, and hence under

Const. art. 5, § 3, art. 7, § 9, respectively, providing that all moneys, stocks, and personal property shall be taxed by uniform law, and that all taxes levied by any county, city, or town shall be uniform, the Legislature was without power to exempt from taxation bonds issued by a drainage district, as was attempted by Pub. Laws 1911, c. 177. *Drainage Com'rs v. C. A. Webb & Co.*, 76 S. E. 552, 160 N. C. 594.

#### **Irrigation district**

Irrigation districts organized under the laws of the state are quasi municipal corporations, and are governed by the general election laws of the state; and the qualifications prescribed by the Constitution for voters at elections apply to an election held in an irrigation district. *Pioneer Irr. Dist. v. Walker*, 119 Pac. 304, 307, 20 Idaho. 605.

#### **Levee board or district**

Acts 1909, p. 660, creating levee district No. 2, in Jackson county, provides by section 2 that the district shall have power to make such by-laws and regulations as they may deem proper, not inconsistent with their charter and state law, to carry into effect the object of their incorporation, and to do all other acts not inconsistent with state law which may be proper to effectuate the purpose of the act, and section 9 authorizes them to hear complaints from parties aggrieved by the assessment and make all necessary corrections therein. Held, that the district is not a municipal corporation within Const. art. 12, § 4, prohibiting a municipal corporation from levying a tax on realty to a greater extent in one year than five mills on the dollar of the assessed valuation. *St. Louis, I. M. & S. Ry. Co. v. Board of Directors of Levee Dist. No. 2, Jackson County*, 145 S. W. 892, 895, 103 Ark. 127.

Levee boards, under the Constitution, are bodies politic, entirely separate and distinct from "municipal corporations," for the purpose of taxation. *United Railroad & Trading Co. v. Meyers*, 36 South. 797, 799, 112 La. 897.

#### **Parish precinct**

A parish precinct is not one of the subdivisions mentioned in Const. art. 232, authorizing special election to be held in any parish, "municipal corporation," ward, or school district. *Regard v. Police Jury of Avoyelles*, 42 South. 438, 117 La. 952.

#### **Port district**

A port district incorporated to provide public terminal facilities for both sea and land commerce is a "municipal corporation," within a constitutional limitation as to the amount of indebtedness of "counties, cities, towns, school districts, and other municipal corporations," and when properly and legally organized it will possess the same powers as the municipal corporations specifically mentioned; and, though it be superimposed over

territory occupied by such other municipalities, existing for an entirely different purpose, the limit of its power to incur indebtedness is independent of and not measured by the portion of the constitutional limitation not taken up by the indebtedness of the other divisions. *Paine v. Port of Seattle*, 127 Pac. 580, 581, 70 Wash. 294.

#### Reclamation district

A reclamation district is a public, as distinguished from a private, corporation, acting as a state agency invested with limited powers, but it is not a "municipal corporation," possessing in any degree general powers of government, though, within the limits of the authority granted to it, it exercises public functions. *Metcalf v. Merritt*, 111 Pac. 505, 506, 14 Cal. App. 244.

#### School district

A school district is not a "municipal corporation." *State ex rel. Carrollton School Dist. No. 1, Tp. 53, R. 23, v. Gordon*, 133 S. W. 44, 51, 231 Mo. 547; *Knowles v. Board of Education of City of Topeka*, 7 Pac. 561, 564, 33 Kan. 692 (citing Dill. Mun. Corp. § 22).

A school district is not a municipal corporation within Const. art. 7, § 6, prohibiting the Legislature from imposing taxes for the purpose of any municipal corporation. *Fenton v. Board of Com'rs of Ada County*, 119 Pac. 41, 44, 20 Idaho, 392.

A school district is a "municipal corporation," within Const. art. 8, § 1, excepting such corporations from the prohibition against creating corporations by special act. *Board of Education of Union Free School Dist. No. 6 of Town of Cortlandt v. Board of Education of Union Free School Dist. No. 7 of Town of Cortlandt*, 78 N. Y. Supp. 522, 524, 76 App. Div. 355.

Graded school districts are public quasi corporations within the term "municipal corporation," as used in Const. art. 7, § 7, prohibiting any city, town, or other municipal corporation from contracting debts except for necessary expenses, unless by vote of the qualified voters; so that a graded school district could not issue bonds to erect a school building unless their issue was approved by a majority of the qualified voters; the erection of a school building not being a "necessary expense" within section 7. *Ellis v. Trustees of Graded School of Oxford*, 72 S. E. 2, 3, 156 N. C. 10.

School districts are public quasi corporations included in the term "municipal corporations" as used in article 7, § 7, of our Constitution, and so come within the express provisions of section 7, that "no county, city, town, or other municipal corporation, shall contract any debt, pledge its faith, or loan its credit, etc., nor shall any tax be levied unless by a vote of the qualified voters." And the principle of uniformity is established and required by section 9 of this

article. *Smith v. Board of Trustees of Robersonville Graded School*, 53 S. E. 524, 527, 141 N. C. 143, 8 Ann. Cas. 529.

Const. art. 5, § 1, directing the General Assembly to levy a poll tax equal to the tax on property valued at \$300, but providing that the state and county poll tax combined shall not exceed \$2 a head, does not apply, as to such limitation, to a special school district created pursuant to Revisal 1905, § 4115, but such district is a public quasi corporation included within the term "municipal corporations," as used in Const. art. 7, and subject only to the limitations contained in that article, forbidding a municipal corporation to contract any debt or to levy any tax, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters, and requiring all taxes levied to be uniform and ad valorem. *Perry v. Commissioners of Franklin County*, 62 S. E. 608, 609, 148 N. C. 521.

#### State

Laws 1905, p. 370, c. 175, in amendment of Code Civ. Proc. § 1391, authorizing an execution against the wages or salary of the judgment debtor, and making it the duty of any person or corporation, municipal or otherwise, to whom the execution shall be presented, and who shall be indebted to the judgment debtor, to pay over to the officer the amount of the debt, does not authorize the issuance of an execution against the salary of a state officer; the state being neither a person nor a corporation nor a municipal corporation. *Osterhoudt v. Keith*, 117 N. Y. Supp. 800, 810, 133 App. Div. 83.

#### Town or township

A township is clearly to be classed with quasi corporations, and not with "municipal corporations." *Hanson v. City of Cresco*, 109 N. W. 1109, 1112, 132 Iowa, 533.

"Townships" are the lowest grade of "municipal corporations," being created for specific purposes, and endowed with limited powers and liabilities, acting through officers duly authorized by the law for that purpose. *Posey Tp., Franklin County, v. Senour*, 86 N. E. 440, 441, 42 Ind. App. 590.

Under General Corporation Laws, §§ 2, 3, Town Law, § 2, and General Municipal Law, § 1, a "town" is a "municipal corporation." *Town of Hempstead v. Lawrence*, 122 N. Y. Supp. 1037, 1039, 138 App. Div. 473.

New York Town Law defines a "town" as a "municipal corporation" comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as may be conferred or imposed upon it by law; and hence a town is a municipal corporation which may enter into a lighting contract. *Dunn v. Whitestown*, 185 Fed. 585, 588.



Code Civ. Proc. § 264, provides that no award shall be made on any claim against the state, except upon such legal evidence as would establish liability against an individual or corporation. Canal Law, § 47, provides that no judgment shall be awarded by the Court of Claims for damages from neglect or conduct of any state officer having charge of canals, or from any accident connected with the canals, unless the facts make out a case which would create a legal liability against the state, were they established in court against an individual or corporation. Held, that the phrase "individual or corporation" includes a town; Town Law, § 2, defining a "town" as a "municipal corporation" comprising the inhabitants within its boundaries. *O'Bryan v. State*, 125 N. Y. Supp. 490, 491, 68 Misc. Rep. 618.

### MUNICIPAL COUNCIL

See Council.

### MUNICIPAL COURTS

As state court, see State Court.

There is no substantial or material difference between the terms "city court" and "municipal court." *Miller v. People*, 82 N. E. 521, 523, 230 Ill. 65.

### MUNICIPAL DEPARTMENT

A covenant in a lease that the tenant shall comply with the orders of "municipal departments" of the city of New York included the tenement house department of such city, although its existence began at a date subsequent to the execution of the lease. *Palmieri v. Antinozzi*, 95 N. Y. Supp. 865, 866, 47 Misc. Rep. 237.

### MUNICIPAL ELECTION

See Next General Election.

Included in any election, see Any.

Under Rev. Laws 1905, § 836, municipal elections, as well as state and county collections, may be contested, and a village election is a "municipal election." *State ex rel. Village of Excelsior v. District Court of Hennepin County*, 120 N. W. 894, 895, 107 Minn. 437.

An election authorized by the general council of a city of the fourth class to submit the question of whether the city should issue bonds to raise money for the erection of common school buildings was not held under any statutes relating to common schools, but was a "municipal election" held under Ky. St. § 3490, subsec. 34, authorizing cities of the fourth class to issue municipal bonds for municipal purposes, and providing that the city council, if they deem it necessary to incur a debt, shall give notice of an election to determine whether the debt shall be incurred, and, if two-thirds of the qualified electors vote therefor, shall provide by ordinance for creating the debt, so that the election was properly held by secret ballot, as

provided by the Constitution, even if elections relating to common public schools must be held viva voce. *Frost v. Central City*, 120 S. W. 367, 368, 134 Ky. 434.

### MUNICIPAL FUNCTION

Const. art. 11, § 13, providing that the Legislature shall not delegate to any association or individual power to perform any "municipal function," has no application to St. 1899, p. 358, c. 247, permitting territory to be annexed to towns at the discretion of the inhabitants, nor does it effect the validity thereof, for "the fixing of the boundaries of the territory to be annexed is in no sense of the words a 'municipal function.'" There is no constitutional provision that intimates that this power can be conferred only on some legislative body, and not upon the electors of the locality to be affected, and, in the absence of such a provision, the question as to whether it shall be given to the one or the other is purely one of policy, upon which the determination of the Legislature is conclusive. *People v. Town of Ontario*, 84 Pac. 205-208, 148 Cal. 625.

Laws 1905, p. 275, c. 163, creating a board, to be known as the state capitol commission, for the purpose of procuring the erection of a capitol building, and authorizing the commission to procure the erection of a building, adopt plans and specifications, etc., is not in conflict with Const. art. 3, § 26, declaring that the Legislature shall not delegate to any special commission power to perform any "municipal function"; the erection of a capitol building not being a "municipal function," which in such case is restricted to the affairs of cities and towns. *Davenport v. Elrod*, 107 N. W. 833, 834, 20 S. D. 567.

### MUNICIPAL GOVERNMENT

"Municipal governments" are entities distinct from the state government, incurring liabilities of their own, in no way binding upon the state, and acquiring rights and property in which the state has no property interest. Except where the law makes the municipal government an agent for the state in collecting the state's taxes, or in discharging some other state function, there is no relation between the one and the other of principal and agent, as that relation is usually understood in the law. The state may, through its legislative branch, confer upon, and withdraw from, the counties and cities power of taxation. But, when the power thus conferred is for the benefit of the local community in which it is to be exercised, its exercise is not by agent for a principal. It is by a quasi independent government for the benefit of the people within its limits." *Bank of Kentucky v. Commonwealth (Ky.)* 94 S. W. 620, 621 (quoting and adopting definition in *Northern Bank of Kentucky v. Stone*, 88 Fed. 413).

**MUNICIPAL INDEBTEDNESS**

An indebtedness created by bonds for a street improvement as authorized by statute, allowing a city to order the original construction of a city improvement at the cost of abutting owners, and to issue 10-year bonds against the property not paying in cash, is not a "municipal indebtedness" within the Constitution, limiting municipal indebtedness. *Gullfoyle's Ex'r v. City of Maysville*, 112 S. W. 666, 667, 129 Ky. 532.

**MUNICIPAL LAW**

"Municipal law" is a rule of civil conduct prescribed by the supreme power of a state. That definition is a part of Sir William Blackstone's, which adds, commanding what is right, and prohibiting what is wrong. *Merchants' Exchange of St. Louis v. Knott*, 111 S. W. 565, 571, 212 Mo. 616 (citing 1 Kent, Comm. 447).

**MUNICIPAL LEGISLATION**

The only acts of a city council subject to the referendum by Const. art. 4, § 1a, reserving the referendum as to "municipal legislation," are such as come within the term "municipal legislation"; and such legislation must be considered in the sense of laws of general application, and does not include transient orders to a particular person, and the latter may be adopted without reference to the referendum. *Long v. City of Portland*, 98 Pac. 1111, 1112, 53 Or. 92.

To understand the signification of the words "municipal legislation," as used in Const. art. 11, § 2, prohibiting the Legislature from amending the charters of cities and towns, the right of which is reserved to the voters thereof, and article 4 providing that the referendum may be demanded by the people, which power is reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation of every character in and for their respective municipalities and districts, requires an interpretation of the term "local and special legislation," the right to formulate rules in relation to which is impliedly denied to cities and towns, on the principle that the expression of one thing is the exclusion of another. The qualifying words "local" and "special" are synonymous, and, in the sense in which they are used, mean any enactment that is plainly intended to affect a particular person or thing or to be in effect in some specified locality only. The words "municipality" and "district" are evidently expressions of equivalent import, for a district legally created from a designated part of the state and organized to promote the convenience of the public at large is a "municipal corporation." The authority of such a corporation has been heretofore derived from an act of the legislative assembly creating it, and, as such statute is applicable to and enforceable in a part of

the state only, it is a local or special law. The change in the organic law deprives the legislative assembly of all authority to enact, amend, or repeal any charter of a town, the legal voters of which reserve to themselves the exercise of all such power, except the right of repeal, and it was evidently the intention of the framers of such constitutional provision, and also the people who ratified it, to vest an incorporated city or town with authority to provide the manner of exercising the initiative and referendum powers as to amendments of a charter, which change is reasonably within the term of "municipal legislation." *Acme Dairy Co. v. City of Astoria*, 90 Pac. 153, 154, 49 Or. 520.

**MUNICIPAL OFFENSE**

As crime, see Crime.

**MUNICIPAL OFFICE**

A "village," as defined in the statute on elections (Rev. Laws 1905, § 154), is a municipality, and an office therein is a "municipal office," within section 338. *State ex rel. Village of Excelsior v. District Court of Hennepin County*, 120 N. W. 894, 895, 107 Minn. 437.

**MUNICIPAL OFFICER**

See, also, City Officer.

In the broad sense "municipal officers" include all local elective or appointive officers. *Uvalde Asphalt Paving Co. v. City of New York*, 134 N. Y. Supp. 50, 52, 149 App. Div. 491.

The mayor and aldermen constitute the "municipal officers of a city," under Rev. St. 1903, c. 1, § 6, par. 25. *Huntington v. City of Calais*, 73 Atl. 829, 830, 105 Me. 144.

The term "municipal officer," as used in Const. art. 16, § 6, limiting the terms of office to two years, means "city officers." *State ex rel. Quintin v. Edwards*, 99 Pac. 940, 946, 38 Mont. 250 (citing 5 Words and Phrases, p. 4618).

**Sergeant at arms of council**

"The distinction is plainly taken between a person acting as a 'servant' or 'employé,' who does not discharge independent duties but acts by the direction of others, and an 'officer' empowered to act in the discharge of a duty or legal authority in official life." Where a fireman, wrongfully discharged from the fire department of the city of New York, pending reinstatement, accepted a position as sergeant at arms to the council of the municipal assembly, he was a mere "employé" of the city, and not an "officer," within New York City Charter (Laws 1897, p. 543, c. 378, § 1549), prohibiting "municipal officers" from holding two offices. *Padden v. City of New York*, 92 N. Y. Supp. 928, 928, 45 Misc. Rep. 517 (quoting and adopting definition in *Olmstead v. City of New York*, 42 N. Y. Super. Ct. 481, and citing *People v. Murray*, 73 N. Y. 535).

**Judge**

Judges of city courts, organized by Rev. St. 1899, c. 37, § 240, are municipal officers, within Const. art. 9, § 11, providing that the fees, salary, or compensation of no municipal officer elected or appointed for a definite term shall be increased or diminished during the term. *Wolf v. Hope*, 70 N. E. 1082, 1087, 210 Ill. 50.

**Policeman**

A policeman is not strictly a state officer, nor is he a "municipal officer" or servant of a city in which his duties are to be performed, and is therefore not within Const. art. 16, § 6, limiting the terms of office of municipal officers to two years. *State ex rel. Quintin v. Edwards*, 99 Pac. 940, 946, 38 Mont. 250.

A private policeman or watchman employed by a private corporation, who is paid by the corporation and who may be discharged by it, is not a municipal officer, so as to make his wages exempt from garnishment, notwithstanding the fact that he was empowered to make arrests and subject to the supervision and control of the city police department. *Tabb v. Mallette*, 47 S. E. 587, 588, 120 Ga. 97, 102 Am. St. Rep. 78.

**State officer distinguished**

The distinction between "state officers" and "municipal officers" is that the duties of the former concern the state at large and the general public, although exercised within definite territorial limits, while the functions of the latter relate to a particular community. *Ex parte Corliss*, 114 N. W. 962, 968, 16 N. D. 470.

**MUNICIPAL ORDINANCE**

See Ordinance.

As statute, see Statute.

Violation of ordinance as crime, see Crime.

**MUNICIPAL PROPERTY**

As private property, see Private Property.

A tax legally imposed by a municipality is "municipal property" of which the municipality cannot be deprived without due process of law. *Harris v. Stearns*, 97 N. W. 361, 363, 17 S. D. 439.

**MUNICIPAL PURPOSES**

See Corporation for Municipal Purposes.

The erection of a school building was a "municipal purpose" for which the city was authorized to issue bonds. *Frost v. Central City*, 120 S. W. 367, 368, 134 Ky. 434.

Acts Ala. 1894-95, p. 593, entitled "An act to amend an act entitled an act to incorporate the city of Columbia," etc., provides (section 29) for the construction of a bridge across the Chattahoochee river, and authorizes the issue of bonds therefor. Held that,

since the river constitutes the south and east boundary of the city, as declared in its amended charter, the construction of a bridge across the river was a "municipal purpose," and hence the authority for the bond issue was valid and within the title to the act. *City of Columbia v. Chicago Title & Trust Co.*, 200 Fed. 569, 571, 119 C. C. A. 49.

Under a charter authorizing a city to incur indebtedness for "municipal purposes," the furnishing of water for street sprinkling, for use in public buildings, etc., is a municipal purpose. *City of Winchester v. Winchester Waterworks Co.*, 148 S. W. 1, 6, 149 Ky. 177.

The acquisition of parks is, without any express words of authorization, included whenever a grant of power is conferred to acquire property for "municipal purposes." *City of Oakland v. Thompson*, 91 Pac. 387, 388, 151 Cal. 572.

An ordinance of a town out of debt, levying a property tax for "municipal purposes" and a poll tax "for said purposes," sufficiently specifies the purposes for which the taxes are levied, within Const. § 180, requiring an ordinance imposing a tax to specify distinctly the purpose for which the same is levied. The expression "for municipal purposes," in the ordinance, is the same in meaning as if it had read "for ordinary municipal purposes" or "for carrying on the town government in the ordinary routine." *Town of Mt. Pleasant v. Eversole (Ky.)* 96 S. W. 478, 479.

Laws 1905, p. 2096, c. 737, § 11, providing that no municipality shall build and operate for other than "municipal purposes" any systems for furnishing gas or electricity for lighting purposes, without a certificate of authority granted by the state gas commission, enacted when Laws 1897, p. 438, c. 414, authorizing a village to maintain a lighting system for lighting its streets and the private buildings of its inhabitants, was in force, prohibits a village from erecting a lighting system for lighting the private buildings of its inhabitants unless authority therefor is granted by the commission. *Potsdam Electric Light & Power Co. v. Village of Potsdam*, 97 N. Y. Supp. 190, 192, 49 Misc. Rep. 18.

Const. art. 8, § 8, gives the Legislature power to establish and abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter the same. Article 9, § 5, provides that the Legislature shall authorize counties or incorporated cities and towns to impose taxes for county and municipal purposes, and for no other. Article 12, § 1, provides that the Legislature shall institute a uniform system of public free schools and provide for the liberal maintenance thereof. Section 10 requires the Legislature to provide for the division of the counties into convenient school districts,

and for the levying and collecting of a district school tax for the exclusive use of public free schools within the district. Section 11 provides that any incorporated town or city may constitute a school district, and the fund raised by section 10 may be extended in the district where levied for building or repairing schoolhouses, purchase of school libraries and text-books, etc., so that the distribution among all the schools of the district be equitable. Held, that the power given the Legislature to prescribe the "powers" of municipalities and to authorize cities and towns to assess and impose taxes for "municipal purposes" does not authorize the giving to municipalities, as such, authority to issue bonds and levy a municipal tax to pay them, when the proceeds are to be used to erect schoolhouses and maintain a system of public education in the municipality, as provided by Laws 1899, c. 4869, § 37, as amended by Laws 1907, c. 5817, § 3. *Brown v. City of Lakeland*, 54 South. 716, 717, 61 Fla. 508.

### MUNICIPAL TREASURY

Expenses of municipal treasury, see Expenses.

### MUNICIPAL YEAR

The "municipal year" has usually been taken to be the political year, or year intervening between the taking of office by the respective city officers elected in each year. So where the time of elections was fixed as the first Tuesday of April in each year, and as this day may fall on the first or any day up to and including the 7th day of the month, the municipal year may vary several days in length. It is not a fixed number of days or weeks or months. The term "municipal year," as used in Comp. St. 1903, c. 50, § 25, providing that a liquor license shall expire on the last Monday of the "municipal year," means the political year. *Reusch v. City of Lincoln*, 112 N. W. 377, 378, 78 Neb. 828.

### MUNICIPALITY

See Freeholder of the Municipality.

As owner, see Owner.

Improvement of municipality, see Improvement.

Other municipalities, see Other.

Private powers of municipality, see Private Powers.

"Municipalities" are statutory creatures. *Burke v. State*, 119 N. Y. Supp. 1089, 1099, 64 Misc. Rep. 558.

"Municipalities" are but mere departments or agencies of the state, charged with the performance of duties for and on its behalf, and subject always to its control. *Straw v. Harris*, 103 Pac. 777, 782, 54 Or. 424.

"'Municipalities' are agencies of the commonwealth created by the sovereignty of the people." *Adams v. Oklahoma City*, 95 Pac. 975, 979, 20 Okl. 519.

A "municipality" is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government, essentially a revocable agency, subject to legislative control "which may destroy its very existence with the mere breath of arbitrary decision." In *re City of Pittsburg*, 66 Atl. 348, 352, 217 Pa. 227 (quoting and adopting the definition in *City of Philadelphia v. Fox*, 64 Pa. 169).

"A 'municipality' is a mere political subdivision of the state." "It is a public corporation having for its object the administration of a portion of the powers of the government delegated to it for that purpose." *Peaick v. Foster*, 58 S. E. 773, 775, 129 Ga. 217, 12 L. R. A. (N. S.) 1159, 12 Ann. Cas. 346.

A "municipality" is an arm of the state, an effluence from its sovereignty, and is an instrumentality by which the state seeks to give its citizens the best government possible; hence a municipal waterworks system is of a governmental and public nature, and is exempt from taxation. *Commonwealth v. City of Covington*, 107 S. W. 231, 232, 128 Ky. 36, 14 L. R. A. (N. S.) 1214.

The word "municipality," as used before the independence of Texas, comprehended not only the town but certain adjacent country, and the square set apart for municipal buildings was granted for the use of the people of the whole district, municipality, or precinct, and was not granted to the central or capitol town alone. *City of Victoria v. Victoria County (Tex.)* 94 S. W. 368, 371.

The term "municipality" has sometimes been limited by definition to include municipal corporation in the proper and strict sense. But the term is also used by good authority in a broader sense to include public and political corporations which are not strictly municipal. *Hanson v. City of Cresco*, 109 N. W. 1109, 1112, 132 Iowa, 533 (citing 5 Words and Phrases, p. 4630).

As used in Const. art. 4, providing that the referendum may be demanded by the people, which power is reserved to the legal voters of every "municipality" and district, as to all local, special, and municipal legislation of every character in and for their respective municipalities and districts, the words "municipality" and "district" are evidently expressions of equivalent import, for a district legally created from a designated part of the state and organized to promote the convenience of the public at large is a municipal corporation. The authority of such a corporation has been heretofore derived from an act of the legislative assembly creating it, and, as such statute is applicable to and enforceable in a part of the state only, it is a local or special law. *Acme Dairy Co. v. City of Astoria*, 90 Pac. 153, 154, 49 Or. 520.

### County

A county is within Const. art. 4, § 1a, reserving the initiative and referendum powers to the voters of every municipality and district, and the people of the several counties are authorized, by article 9, § 1a, to regulate taxation and exemptions within their several counties, as provided by article 4, § 1a, in a manner subservient to any general law which may be enacted, though the word "district," as used in article 4, § 1a, has a broader signification than "county," and may designate a territory comprising more than a county, or containing less area. *Schubel v. Olcott*, 120 Pac. 375, 379, 60 Or. 508.

The original meaning of a "municipality" was a "free town under the Roman Empire, with powers of local self-government." Its precise use now would confine it to subordinate subdivisions of the state having powers of local self-government. Dillon, however, points out in the same section, after stating the proper signification of the word: "But sometimes it is used in a broader sense that includes also public or quasi corporations, the principal purpose of whose creation is as an instrumentality of the state, and not for the regulation of the local and special affairs of a compact community." Act March 30, 1892 (P. L. p. 369; Gen. St. p. 2078), providing for liens for persons doing labor or furnishing materials under any contract for a public improvement made with any city, town, township, or other municipality authorized by law to make contracts for public improvements, applies to contracts with counties for public improvements. *Union Stone Co. v. Board of Chosen Freeholders of Hudson County*, 65 Atl. 466, 469, 71 N. J. Eq. 657 (citing 1 Dill. Mun. Corp. [4th Ed.] p. 39, § 20).

Act March 30, 1892 (P. L. p. 369; 2 Gen. St. p. 2078), provides that any person who, pursuant to the terms of a contract for any public improvement in any city, town, township, or other "municipality," within the state, authorized by law to contract for such improvement, shall perform labor or furnish materials for the completion of such contract, shall have a lien on the moneys due under the contract. Held that, where a county let a contract for the construction of a county courthouse, the county was a "municipality," within such act. *Herman & Grace v. Board of Chosen Freeholders of Essex County*, 64 Atl. 742, 71 N. J. Eq. 541.

### School district

A special school district is not within the constitutional provision declaring that no county, city, town, or "municipality" shall issue any interest bearing evidence of indebtedness. All corporations intended as agencies in the administration of civil government are public, as distinguished from private, corporations. Cities and school districts are public corporations. Cities are

municipal corporations, while school districts and counties, properly speaking, are not. A municipality is a corporation having the right to administer local government as a city or incorporated town. A school district is merely an agency of state with limited corporate powers belonging to a class of corporate bodies known as quasi corporations. *Schmutz v. Special School Dist. of City of Little Rock*, 95 S. W. 438, 439, 78 Ark. 118 (citing *Memphis Trust Co. v. Board of Directors of St. Francis Levee Dist.*, 62 S. W. 902, 69 Ark. 284; 1 Dill. Mun. Corp. § 22).

### Township

Code Supp. 1902, § 2575, provides that when a controversy arises between municipalities or boards of health thereof respecting the location of pesthouses, reference shall be made to the president of the state board of health, who shall appoint a committee whose order in the premises shall be final. Code, § 394, declares each county to be a body corporate for civil and political purposes, and gives it power to sue and be sued and other corporate powers. A township is not expressly declared to be a body corporate, and has no right to sue or to be sued and none of the characteristics of a corporation. Held, that, in view of the evident legislative intention, a township is a "municipality" within the statute. *Hanson v. City of Cresco*, 109 N. W. 1109, 1112, 182 Iowa, 538.

### Village

A village, as defined in the statute on elections (Rev. Laws 1905, § 154), is a "municipality." State ex rel. *Village of Excelsior v. District Court of Hennepin County*, 120 N. W. 894, 895, 107 Minn. 437.

## MURDER

See Assault with Intent to Commit Murder; Common-Law Murder.

Willful murder, see Willful—Willfully.

See, also, Express Malice; Intent to Kill; Kill.

The word "murder" defines the crime itself, and is not a constituent element thereof. *Hocker v. Commonwealth (Ky.)* 111 S. W. 676, 679.

"Murder" is an unlawful killing with malice. *Cole v. State*, 59 S. E. 24, 26, 2 Ga. App. 734.

"Murder" is the unlawful killing of a human being with malice aforethought. *State v. Tinkler*, 83 Pac. 830, 831, 72 Kan. 262; *State v. Ireland*, 83 Pac. 1036, 1038, 72 Kan. 265; *State v. Wetter*, 83 Pac. 341, 346, 11 Idaho, 433; *State v. Abbott*, 62 S. E. 693, 64 W. Va. 411; *State v. Johnson (Del.)* 78 Atl. 605, 2 Boyce, 49; *State v. Brown*, 60 S. E. 945, 946, 79 S. C. 390; *State v. Moore (Del.)* 74 Atl. 1112, 1114, 1 Boyce, 142.

Murder is the unlawful killing of a human creature in being with malice afore-

thought, either express or implied. *State v. Pepe* (Del.) 76 Atl. 367, 369, 1 Boyce, 232; *State v. Jackson* (Del.) 82 Atl. 824, 825; *State v. Stockley* (Del.) 82 Atl. 1078, 1079; *State v. Moore* (Del.) 74 Atl. 1112, 1114, 1 Boyce, 142.

"Murder" is the killing of a human being by a person of sound memory and discretion with malice aforethought, either express or implied. *State v. Mills* (Del.) 69 Atl. 841, 842, 6 Pennewill, 497; *State v. Wilson* (Del.) 62 Atl. 227, 230, 5 Pennewill, 77; *State v. Di Guglielmo* (Del.) 55 Atl. 350, 351, 4 Pennewill, 336; *Smith v. State*, 55 S. E. 475, 126 Ga. 544 (quoting and adopting the definition in Pen. Code 1895, § 60.)

"Murder" is the unlawful killing of a human creature with malice aforethought, either express or implied, and is of the first or second degree, as the malice is express or implied. *State v. De Paolo* (Del.) 84 Atl. 213, 214.

"Murder," at common law, was committed when a person of sound mind and discretion unlawfully killed any reasonable creature in being, in the peace of the sovereign, with malice aforethought, either expressed or implied. According to this rule, if one feloniously and with malice aforethought wounded another, from which wound death ensued within a year and a day, it was murder, unless excuse or justification was shown. Under our statute, such act would not constitute an element of murder, unless perpetrated with a premeditated design, to effect the death of the person killed or of some other person, but would be embraced within some one of the lower degrees of homicide." *Morris v. Territory*, 99 Pac. 760, 767, 1 Okl. Cr. 617 (quoting with approval from *Jewell v. Territory*, 4 Okl. 53, 43 Pac. 1075).

Under a statute defining "murder" as the unlawful killing of a human being, an indictment charging that the act was done "feloniously," and which omits the word "unlawfully," is sufficient, as the word "feloniously" includes that which would be charged by the use of the word "unlawfully." *People v. St. Clair*, 91 N. E. 573, 244 Ill. 444.

"Murder" is the unlawful, willful, and felonious killing of another with malice aforethought, not in the necessary or apparently necessary self-defense of the slayer. *Commonwealth v. Mosser*, 118 S. W. 915, 133 Ky. 609.

If the killing by a defendant or his aiding or abetting of the killing by another was done with malice unlawfully and willfully in sudden affray, it was murder. *Watkins v. Commonwealth*, 97 S. W. 740, 742, 123 Ky. 817.

As expressly defined by Pen. Code, § 187, "murder" is the "unlawful killing of a human being with malice aforethought." *People v. Frank*, 83 Pac. 578, 579, 2 Cal. App. 283.

By Pen. Code, § 350, "murder" is the unlawful killing of a human being with malice aforethought. *State v. Hliboka*, 78 Pac. 965, 31 Mont. 455, 3 Ann. Cas. 934.

Rev. St. 1887, § 6560, defines "murder" as the unlawful killing of a human being with malice aforethought. *State v. Phinney*, 89 Pac. 634, 13 Idaho, 307, 12 L. R. A. (N. S.) 935, 12 Ann. Cas. 1079.

An information charging that accused unlawfully, feloniously, willfully, premeditatedly, deliberately, and of his malice aforethought shot and killed decedent, a human being, sufficiently charges murder as defined by Rev. Codes, § 8290, defining murder as the unlawful killing of a human being with malice aforethought. *State v. Crean*, 114 Pac. 603, 605, 43 Mont. 47, Ann. Cas. 1912C, 424.

An information alleging that accused on a specified date did willfully, unlawfully, and feloniously and with malice aforethought assault S., with intent then and there to kill and murder her, was not fatally defective for failure to allege that S. was a human being, the term "murder" being defined as the unlawful killing of a human being with malice aforethought, under Pen. Code, § 950, subd. 2, providing that an information shall contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. *People v. Vaughn*, 111 Pac. 620, 622, 14 Cal. App. 201.

"Murder" in this state is the unlawful killing of a human being with malice aforethought. Allegations sufficient for a common-law indictment are sufficient for an information under the statute defining murder as above. *State v. McGowan*, 93 Pac. 552, 555, 36 Mont. 422 (citing *Territory v. Stears*, 2 Mont. 324; *State v. Lu Sing*, 85 Pac. 521, 34 Mont. 31).

Where the act of killing another is done willfully, feloniously, and with malice aforethought, accused is guilty of murder. *Combs v. Commonwealth* (Ky.) 112 S. W. 658, 659.

A deliberate killing committed in revenge for an injury inflicted in the past, either near or remote, is "murder." *Ex parte Fraley*, 109 Pac. 295, 297, 3 Okl. Cr. 719, 139 Am. St. Rep. 988.

"The word 'murder' is a legal and technical term and implies something more than mere killing, though it includes all the elements of the latter word, but there is nothing technical about the word 'kill.' It means to deprive of life; to put to death; to slay." An allegation that defendant did "kill and murder" the deceased is a sufficient allegation that the latter died. *State v. Sly*, 80 Pac. 1125, 1127, 11 Idaho, 110.

Homicide is "murder" when perpetrated without authority of law and with a premeditated design to effect the death of the

person killed. *Baysinger v. Territory*, 82 Pac. 728, 730, 15 Okl. 386.

"All voluntary felonious homicide, without a provocation, is undoubtedly 'murder.'" The presumption of murder arises from proof of voluntary homicide, and, when the killing is admitted or proved, the burden of proof is thenceforth on the defendant to excuse or justify his act. *Rutherford v. Foster*, 125 Fed. 187, 190, 60 C. C. A. 129 (quoting and adopting definition in *Fost. Crown Law*, p. 313).

"Murder" is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide. *Jones v. State*, 96 S. W. 930, 931, 50 Tex. Cr. R. 329.

The crime of "murder" includes the lesser crimes of second degree murder and manslaughter. *State v. Pepoon*, 114 Pac. 449, 451, 82 Wash. 635.

Under a statute providing that where an involuntary killing happens in the commission of an unlawful attack, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death or confinement in the penitentiary, the offense shall be deemed "murder," one indicted for murder may be convicted of involuntary manslaughter, where the evidence on the part of the state would authorize a verdict of murder. *Chatman v. State*, 65 S. E. 360, 6 Ga. App. 564.

In view of Pen. Code 1901, § 172, defining "murder" as the unlawful killing of a human being with malice aforethought, an indictment sufficiently charges murder by alleging facts showing the unlawful killing of a human being with malice aforethought, without alleging facts bringing it within one of the statutory degrees of murder; it being for the jury to determine the degree. *Williams v. Territory*, 114 Pac. 556, 13 Ariz. 306.

"Murder," as defined in Pen. Code, § 187, declaring that "murder is the unlawful killing of a human being with malice aforethought," includes murder in the first degree and murder in the second degree. *People v. Ung Ting Bow*, 75 Pac. 899, 142 Cal. 341 (citing *People v. De la Cour Soto*, 63 Cal. 166).

One is guilty of murder who by feloniously severing another's blood vessel causes him to bleed to death, where through want of assistance decedent is unable to prevent excessive loss of blood. *Rigsby v. State*, 91 N. E. 925, 927, 174 Ind. 284.

An information in extradition proceedings charging accused with "assault with intent to kill and murder" sufficiently brings the offense within article 10 of the treaty with Great Britain, authorizing extradition of persons charged with "assault with intent to commit murder." An assault with intent

to kill and murder is practically the same as an assault with intent to commit murder, though the words "to kill" do not necessarily imply more than the destruction of life, which may have been caused without guilt, while to commit murder implies killing with malice aforethought. But the use of the word "kill" in the conjunctive with "murder" shows that it was intended to charge the commission of the crime of assault with intent to kill with malice aforethought. *United States v. Plaza*, 133 Fed. 998, 999.

In view of Pen. Code 1901, § 172, defining murder as the unlawful killing of a human being with malice aforethought, an indictment charging that accused unlawfully, willfully, feloniously, and of his deliberately premeditated malice aforethought made an assault with a loaded revolver upon R., "a human being, with the intent, then and there, willfully, unlawfully, feloniously, and of his deliberately premeditated malice aforethought to kill and murder him, the said R.," sufficiently alleged the crime of assault with intent to murder. *Williams v. Territory*, 114 Pac. 556, 13 Ariz. 306.

Under Pen. Code, §§ 187, 189, defining murder as the unlawful killing of a human being with malice aforethought, and defining murder in the first and second degrees, and section 192, defining manslaughter as the unlawful killing of a human being without malice, and dividing manslaughter into voluntary and involuntary manslaughter, and section 274, making it a felony to perform a criminal abortion, an unlawful killing with malice aforethought is "murder," and is also "manslaughter," because it is the unlawful killing of a human being, though it cannot be logically classed as voluntary or involuntary manslaughter, and under a charge of murder by attempting a criminal abortion, a verdict of manslaughter may be returned. *People v. Huntington*, 97 Pac. 760, 762, 8 Cal. App. 612.

Under Pen. Code, §§ 242, 246, 254, declaring that a homicide is either murder, manslaughter, excusable homicide, or justifiable homicide, that homicide is "murder," when perpetrated with a premeditated design to effect the death of the person killed, and that homicide is "manslaughter," when perpetrated without a design to effect death, and in heat of passion, etc., and Code Cr. Proc. § 409, authorizing a conviction of any offense necessarily included in the offense charged, the jury may find accused guilty of manslaughter in the first degree under an indictment charging murder. *State v. Stumbaugh*, 132 N. W. 666, 668, 28 S. D. 50.

An indictment which shows that the homicide complained of is the result of a premeditated design to effect the death of the person killed, and is without authority of law, sufficiently alleges "murder." *Cavett v. Territory*, 98 Pac. 890, 893, 1 Okl. Cr. 493.

Under 2 Wilson's Rev. & Ann. St. 1903, § 2167, defining "murder" as "homicide when perpetrated without authority, of law and with a premeditated design to effect the death of the person killed, or of any other human being," a killing of a human being, perpetrated without authority of law and with a premeditated design to effect the death of the person killed, is "murder." *Walcher v. Territory*, 90 Pac. 887, 888, 18 Okl. 528.

"Murder" must be committed by an act applied to or affecting the person either directly, as by inflicting a wound, or indirectly, as by exposing the person to a deadly agency or influence, from which death ensues, and the working upon the fancy of another, or treating him harshly or unkindly, by which he dies of fear or grief, would not constitute this offense. *State v. McGowan*, 93 Pac. 552, 554, 36 Mont. 422 (citing *Commonwealth v. Webster*, 5 Cush. [59 Mass.] 295, 52 Am. Dec. 711; *State v. Turner* [Ohio] Wright, 20).

If a man shoots at another with the intention of killing him (and such killing if consummated would be murder), and kills a bystander or another, he is guilty of the murder of the person killed, whether the killing of the latter was due to a mistake as to his or her identity, or to recklessness in the aim of the one doing the killing. *United States v. Hart*, 162 Fed. 192, 197.

Where one shoots with intent to kill an intended victim, it is immaterial, on a prosecution for killing a different person, whether he saw the person who was killed by the shot when he fired. *Gater v. State*, 37 South. 692, 695, 141 Ala. 10.

In an indictment for the murder of one person, committed with a premeditated design to effect the death of a different person, it is not necessary to allege an actual assault upon the person designed to be killed, under a statute defining murder as the killing of one human being by another, without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being. *Fooshee v. State*, 108 Pac. 554, 559, 560, 3 Okl. Cr. 666.

Under Rev. St. 1908, § 1624, the term "murder" includes all killing perpetrated from a deliberate and premeditated design, unlawfully and maliciously, to effect the death of any human being other than him who is killed, so that where defendant was damaged in an altercation with two others, and shortly thereafter, when a half dozen or more persons, including these two, were gathered, defendant came around the corner with a revolver in each hand, and fired five or six shots toward the crowd, resulting in the death of deceased, who was unknown to him and only accidentally there, the provision of the statute is expressly applicable. *Ryan v. People*, 114 Pac. 306, 308, 50 Colo. 99, Ann. Cas. 1912B, 1232.

One who, as heir, would, under Civ. Code, § 1386, share in the estate of decedent, is not, by reason of his conviction of manslaughter for killing intestate, within section 1409, declaring that no one convicted of "murder" of deceased shall succeed to any of his estate; "murder" not only being a technical word within section 13, requiring such words to be construed according to their peculiar or technical meaning, but being precisely defined by Pen. Code, § 187, so as to exclude manslaughter, and Pol. Code, § 4480, requiring, with relation to each other, the provisions of the four Codes to be construed as though they were all parts of the same statute. In *re Kirby's Estate*, 121 Pac. 370, 102 Cal. 91, 39 L. R. A. (N. S.) 1088, Ann. Cas. 1913C, 928.

The word "murder" is often used in the dual character of both a noun and a verb. When it is said that A. concealed himself with intent to murder B., it is understood that his purpose was to commit "murder" upon B., without the use of the verb, "commit." Hence a verdict finding defendant guilty of an assault with intent to "murder" is not objectionable for failure to use the verb "commit" before "murder." *Nickles v. State*, 37 South. 312, 313, 48 Fla. 46.

The statute dividing murder into two degrees has not added to or taken away any ingredients of murder at common law, and every murder at common law is murder under the statutes of Alabama. *McMahan v. State*, 53 South. 89, 90, 168 Ala. 70.

#### **Deliberation and premeditation**

Where, in a prosecution for homicide, there was evidence that defendant killed deceased deliberately, intending so to do, the length of time that such intention existed was immaterial to make the offense of murder. *State v. Powell* (Del.) 61 Atl. 966, 971, 5 Pennewill, 24.

Under Rev. Codes, § 8290, defining "murder" as the unlawful killing of a human being with malice aforethought, an information charging accused with willfully, unlawfully, and feloniously, and of his "deliberately premeditated" malice aforethought, killing another sufficiently charged that the killing was with malice aforethought, and that the words quoted characterized the malice, and not the killing, was immaterial. Deliberation and premeditation need not be alleged. *State v. Nielson*, 100 Pac. 229, 230, 38 Mont. 451.

Under White's Ann. Pen. Code, art. 708, providing that though a homicide occurs under circumstances showing no deliberation, if the guilty person provoked a contest with the apparent intent of killing decedent, or doing him serious bodily harm, the offense is not manslaughter, if accused provoked the contest with the apparent intention of killing decedent, or doing him serious bodily injury, he is guilty of murder, though he may have killed him suddenly without deliberation and



to protect his own life, though, if he provoked the contest without intent to kill, or inflict serious bodily injury and suddenly without deliberation killed decedent, the offense might be a lower grade than murder. *Keeton v. State*, 128 S. W. 404, 413, 59 Tex. Cr. R. 316.

To constitute "murder," the homicide must be committed with the premeditated design, on the part of the accused, to unlawfully take the life of the person slain or some other person. *Kent v. State*, 126 Pac. 1040, 1042, 8 Okl. Cr. 188.

In its last analysis murder in Oklahoma consists in the unlawful killing of a human being with a premeditated design to effect his death, or the death of some other person. This premeditated design to effect death must be established either by direct evidence as a matter of fact, or it arises as a conclusive presumption of law in the class of cases mentioned in paragraphs 2 and 3 of section 2268, Comp. Laws 1909. These paragraphs do not state a rule of pleading to be followed in an indictment, but they establish a rule of evidence for the trial judge in the admission of testimony and in his instructions to the jury. *Turner v. State*, 126 Pac. 452, 457, 458, 8 Okl. Cr. 11.

#### **As felonious homicide**

See Felonious Homicide.

#### **Malice**

To constitute "murder," it is sufficient if the malice existed at the moment of the killing. *State v. Heidelberg*, 45 South. 256, 258, 120 La. 300.

At common law the reckless killing of another with a deadly weapon was murder; malice being implied. *Ewing v. Commonwealth*, 111 S. W. 352, 355, 129 Ky. 237.

Malice is the essence of "murder." In murder of the first degree such malice must be express, and may be indicated by all such facts and circumstances as show a deliberately formed design to take life. In murder of the second degree, malice may be shown by such cruel acts and conduct as indicate a reckless disregard of human life, although unaccompanied with a deliberate design to take life. In manslaughter there is no malice. *State v. Collins* (Del.) 62 Atl. 224, 226, 5 Pennewill, 263.

"Murder" is the unlawful killing of a human creature in being with malice aforethought, either express or implied; it being sufficient that the malice is implied from any unlawful act which in itself denotes a wicked heart, fatally bent on mischief, or a reckless disregard for human life. *State v. Lee* (Del.) 74 Atl. 4, 5, 1 Boyce, 18.

"Murder" does not consist merely in the killing of a human being. The killing must be done with malice." Where, on a trial for murder, the accused admitted the killing, but coupled such admission with declarations,

which, if believed, showed justification, no presumption that the homicide was murder arose from such admission. *Perkins v. State*, 52 S. E. 17, 124 Ga. 6.

"Murder" is where a person of sound memory and discretion unlawfully kills any human being with malice aforethought, either express or implied. The chief characteristic of this crime, as distinguished from other homicides, is malice aforethought. *State v. Wilson* (Del.) 62 Atl. 227, 230, 5 Pennewill, 77.

The crime of murder is the unlawful killing of a human creature in being with malice aforethought, either express or implied. If the killing is proved, it must be also proved that it was done with malice, either express or implied, before the person charged can be convicted of murder; but such malice may be implied from any unlawful act, such as in itself denotes a wicked heart fatally bent on mischief, or a reckless disregard of human life. The deliberate selection of a deadly weapon has been held to be evidence of malice, and where malice exists, together with the killing, the crime of murder is complete. *State v. Scott* (Del.) 57 Atl. 534, 535, 4 Pennewill, 538.

Under Revisal 1905, § 3631, providing that a murder which shall be perpetrated by means of poison, etc., or by any other kind of willful, deliberate, and premeditated killing, shall be deemed "murder in the first degree," and that all other kinds of murder shall be deemed murder in the second degree, malice is always an essential ingredient of murder. *State v. Baldwin*, 68 S. E. 148, 151, 152 N. C. 822.

To constitute "murder," the evidence must show that accused thought of it beforehand, though as to the time it is immaterial whether it was thought of an hour beforehand, or a day beforehand, or a minute beforehand. If the thought came to the mind of the accused, "I will kill," and he did kill immediately after that, the killing is "murder"; there being malice aforethought. *Green v. United States*, 104 S. W. 1159, 1160, 7 Ind. T. 733.

Both before and since the statute dividing the crime of "murder" into two degrees (Revisal 1905, § 3631), "murder" is the unlawful killing of another with malice aforethought. This malice may arise from personal ill will or grudge, but it may also be said to exist whenever there has been a wrongful and intentional killing of another without lawful excuse or mitigating circumstances. The statute does not undertake to give any new definition of murder, but classifies the different kinds of murder as they existed at common law, and which were before the statute all included in one and the same degree. Thus all murder done by means of poison, lying in wait, etc., or by any other kind of willful, deliberate, or premeditated

killing, or murder done in the effort to perpetrate a felony, shall be murder in the first degree, and punished with death. All other kinds of murder shall be deemed murder in the second degree, and punished by imprisonment in the state's prison. But the constituent definition of murder remains as it was, and in neither degree is it necessarily required that the unlawful killing should be from personal ill will or grudge. *State v. Banks*, 57 S. E. 174, 176, 143 N. C. 652 (citing *Clark*, Cr. Law, p. 187; *State v. Wilcox*, 23 S. E. 928, 118 N. C. 1131; *State v. Finley*, 24 S. E. 495, 118 N. C. 1161).

An instruction that when a homicide occurs, and the circumstances are absent which would excuse or justify the act or reduce it to manslaughter, the law implies malice, and the killing would be murder, was a mere abstract statement applicable to all degrees of murder, as prescribed by St. 1898, § 4365, and was not erroneous, the court having also charged that the law presumes that every person intends all the natural and probable consequences of his acts, and when one assaults another with a dangerous weapon, likely to kill, not in self-defense, nor in sudden heat of passion caused by provocation apparently sufficient to make passion irresistible or involuntary, and the life of the person assaulted is taken in consequence of such assault, then the legal presumption is that death was intended, and the law implies malice making the killing murder, etc. *Hedger v. State*, 128 N. W. 80, 90, 144 Wis. 279.

#### **Killing in commission of unlawful act**

If an involuntary killing happens in the commission of an unlawful act, which, in its consequences, naturally tends to destroy life of a human being, the offense is murder, under Pen. Code 1895, § 87. *Gadsden v. State*, 68 S. E. 497, 134 Ga. 785.

#### **Killing in perpetration of a felony**

Under Code, § 4727, defining "murder" as the killing of a human being with malice aforethought, and under section 4728 providing that all murder committed in the perpetration or attempt to perpetrate any robbery is murder in the first degree, one who, with intent to rob, displaced the rails of a railroad for the purpose of wrecking a train is guilty of murder, where the train was wrecked in consequence of his act, and a person named was fatally injured. *State v. Von Kutzleben*, 113 N. W. 484, 487, 136 Iowa, 89.

An indictment for murder while committing robbery, under Code, § 798 (31 Stat. 1321, c. 854), providing that one who kills another in perpetrating any offense punishable by imprisonment in the penitentiary is guilty of murder, is not demurrable on the ground that robbery is not punishable by such imprisonment; section 810 punishing robbery by imprisonment for not less than 6 months or more than 15 years, and section 934 pro-

viding for jail imprisonment where the sentence is for more than 6 months and not exceeding a year, and for imprisonment in the penitentiary where it exceeds a year. *United States v. Evans*, 28 App. D. C. 264, 265.

#### **Manslaughter distinguished**

Voluntary manslaughter distinguished, see Voluntary Manslaughter.

The unlawful killing of another with malice is "murder," as distinguished from "manslaughter," which is an unlawful killing without such malice. *State v. Lee*, 60 S. E. 524, 525, 79 S. C. 223.

"Murder" and "manslaughter" are distinguished, in that malice is essential to the former offense, and by absence of premeditation or deliberation in the latter. *Reed v. State*, 145 S. W. 206, 208, 102 Ark. 525.

While, in one sense "murder" and "manslaughter" are separate and distinct crimes, yet, in a broader sense, they both involve but one offense and are simply different degrees of felonious homicide. On an indictment for murder, defendant may be convicted of manslaughter. *Rhea v. Territory*, 105 Pac. 314, 316, 3 Okl. Cr. 230.

"Homicide" is 'murder,' unless it be attended with extenuating circumstances, which must appear to the satisfaction of the jury. If A. assaults B., giving him a severe blow, or otherwise making the provocation great, and B. strikes him with a deadly weapon, and death ensues, the law, in deference to human passion, says this is 'manslaughter.' \* \* \* If the provocation be slight, and it can be collected from the weapon used or any other circumstances that the prisoner intended to kill or do great bodily harm, and death follows, it is 'murder.'" *State v. White*, 51 S. E. 44, 48, 138 N. C. 704 (quoting and adopting definition in *State v. Smith*, 77 N. C. 488).

If the slayer provoked the combat or produced the occasion in order to have a pretense for killing his adversary or doing him great bodily harm, the killing will be "murder," no matter to what extremity he may have been reduced in the combat. But if he had no felonious intent, intending, for instance, an ordinary battery merely, the final killing in self-defense would be "manslaughter" only; the distinction being between the right of perfect and the right of imperfect self-defense. *State v. Kelleher*, 100 S. W. 470, 475, 201 Mo. 614 (citing *State v. Partlow*, 4 S. W. 14, 90 Mo. 608, 59 Am. Rep. 31).

"Manslaughter" is distinguished from "murder" by the absence of malice as a contingent element. If, under the influence of some violent emotion, a sudden intent was formed, which on adequate provocation overwhelmed the reason of the appellant, then the killing was not murder, but manslaughter only. *State v. Clark*, 77 Pac. 287, 288, 69 Kan. 576.

The chief distinction between "murder" and "manslaughter" is deliberation and malice in murder, and the want thereof in manslaughter, and, where the issue was whether accused or a third person inflicted the fatal wound, the error in an instruction that if accused killed decedent without authority of law, and not in necessary self-defense, he was guilty of manslaughter, arising from the omission of the words "without malice, and in the heat of passion," was not prejudicial. *Guest v. State*, 52 South. 211, 212, 96 Miss. 871.

Generally it is not "murder" but "manslaughter" to kill an officer, or other person, to prevent an illegal arrest. Consequently, shooting at an officer without killing him, if done to prevent an illegal arrest, is *prima facie* not an assault with intent to murder, but the statutory crime of shooting at another, described in Code 1882, § 4370. *Jenkins v. State*, 59 S. E. 435, 436, 3 Ga. App. 146 (quoting with approval from *Thomas v. State*, 18 S. E. 305, 91 Ga. 206).

Under Pen. Code, §§ 187, 189, defining murder as the unlawful killing of a human being with malice aforethought, and defining murder in the first and second degrees, and section 192 defining manslaughter as the unlawful killing of a human being without malice, and dividing manslaughter into voluntary and involuntary manslaughter, and section 274 making it a felony to perform a criminal abortion, an unlawful killing with malice aforethought is "murder," and is also "manslaughter," because it is the unlawful killing of a human being, though it cannot be logically classed as voluntary or involuntary manslaughter, and, under a charge of murder by attempting a criminal abortion, a verdict of manslaughter may be returned. *People v. Huntington*, 97 Pac. 760, 762, 8 Cal. App. 612.

"Manslaughter" is an unlawful killing, which becomes "murder in the second degree" when it has the added element of malice. *State v. Fowler*, 66 S. E. 567, 151 N. C. 731.

"Manslaughter" consists of the unlawful killing of a human being without malice, and so, in a prosecution for assault with intent to commit murder, the accused cannot be convicted if, had his victim died, his crime would have only been manslaughter. *State v. Stockley* (Del.) 82 Atl. 1078, 1079.

"Manslaughter" is an unlawful killing in anger without malice. Proof of prior provocation may exclude the idea of malice in the homicide, but does not exclude the idea of unlawfulness. It merely substitutes the element of anger without malice for the element of malice, thus distinguishing manslaughter from "murder." *Cole v. State*, 59 S. E. 24, 26, 2 Ga. App. 734.

"Murder" in the second degree consists of the killing of another without a formed design to take life, and without provocation

to reduce the offense to "manslaughter," and under the influence of a wicked or depraved heart, or with cruel and wicked indifference to human life. "Manslaughter" is where one in a sudden affray, in the heat of blood, or in a transport of passion, without malice, inflicts a mortal wound, without time for reflection or for the passions to cool. It is where one person unlawfully kills another without malice. In order to reduce the crime to 'manslaughter,' the provocation must be very great, so great as to produce such a transport of passion as to render the person for the time being deaf to the voice of reason. While 'murder' proceeds from a wicked and depraved heart and is characterized by malice, 'manslaughter' results, not from malice, but from unpremeditated and unreflecting passion." *State v. Cephus* (Del.) 67 Atl. 150, 151, 6 Pennewill, 160.

When a killing is intentional and is not lawful, it is generally "murder"; but under circumstances of provocation, or of mutual combat, it may be reduced to "manslaughter." *State v. Goldsby*, 114 S. W. 500, 508, 215 Mo. 48 (citing 2 Bish. Cr. Law [6th Ed.] § 695).

Murder is where a person of sound memory and discretion unlawfully kills any human being under the peace of the state, with malice aforethought, either express or implied. The chief characteristic of this crime, distinguishing it from manslaughter and every other kind of homicide, and therefore indispensably necessary to be proved, is malice preconceived or aforethought. *State v. Brinte* (Del.) 58 Atl. 258, 262, 4 Pennewill, 551.

A charge that, where an officer is shot and killed by one whom he is seeking legally to arrest, the offense is "murder" and not manslaughter was not erroneous when taken in connection with the evidence, which was sufficient to show that defendant was violating the law in the presence of the officer, and that, upon an effort to arrest him, he drew a pistol and shot the officer. *Johnson v. State*, 60 S. E. 160, 161, 130 Ga. 27.

In an instruction correctly defining murder and manslaughter, the statement that, "You see by these definitions that in murder malice must exist, but that manslaughter is the killing of a human being without malice," made only to distinguish the two, is not reversible error. *Prince v. United States*, 109 Pac. 241, 242, 3 Okl. Cr. 700.

If two persons deliberately agree to fight with deadly weapons on a subsequent day at a definite time and place, and, both being armed, meet by chance near the appointed place and near the appointed time, and without any fresh cause of a quarrel or other altercation one slays the other without justification, the crime is "murder," and not voluntary manslaughter. *Bundrick v. State*, 54 S. E. 683, 685, 125 Ga. 753.

**MURDER IN FIRST DEGREE**

As felonious homicide, see *Felonious Homicide*.

"Murder in the first degree" is the willful, deliberate, and premeditated killing of a human being. *State v. Briggs*, 52 S. E. 218, 219, 58 W. Va. 291.

"Murder in the first degree" is the willful, felonious, deliberate, and premeditated killing of a human being with malice aforethought. *State v. Hottman*, 94 S. W. 237, 239, 196 Mo. 110.

Willful, deliberate, and premeditated killing, without any motive appearing at all, is murder in the first degree. *State v. Jagers*, 58 Atl. 1014, 1015, 71 N. J. Law, 281, 108 Am. St. Rep. 743.

"Murder of the first degree" is where the killing was done with malice aforethought. *State v. Primrose* (Del.) 77 Atl. 717, 2 Boyce, 164; *State v. Roberts* (Del.) 78 Atl. 305, 310, 2 Boyce, 140.

To constitute murder in the first degree, the offender's mind must be cool and sedate; and there must be express malice aforethought. *Dixon v. State*, 103 S. W. 399-401, 51 Tex. Cr. R. 555.

"Murder in the first degree" is defined in Rev. St. 1899, § 4950, as a purposeful and premeditated malicious killing. *Hollibaugh v. Hehn*, 79 Pac. 1044, 1047, 13 Wyo. 269.

To constitute "murder in the first degree," the killing must be done with malice aforethought, express or implied, and with willful premeditation and determination. *State v. McKay*, 63 S. E. 1059, 1060, 150 N. C. 813.

A homicide committed with express malice aforethought is "murder in the first degree." *State v. Brooks* (Del.) 84 Atl. 225, 227.

An indictment charging that accused purposely, feloniously, and with premeditated malice killed a person named charges murder in the first degree. *Stout v. State*, 92 N. E. 161, 162, 174 Ind. 395, Ann. Cas. 1912D, 37.

"Murder of the first degree" is a killing done with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable with death. *State v. Wiggins* (Del.) 76 Atl. 632, 634, 7 Pennewill, 127; *State v. Brown* (Del.) 61 Atl. 1077, 1078, 5 Pennewill, 339; *State v. Powell* (Del.) 61 Atl. 966, 971, 5 Pennewill, 24; *State v. Russo* (Del.) 77 Atl. 743, 745, 1 Boyce, 538; *State v. Mills* (Del.) 69 Atl. 841, 842, 6 Pennewill, 497; *State v. Samuels* (Del.) 67 Atl. 164, 165, 6 Pennewill, 36; *State v. Johns* (Del.) 65 Atl. 763, 764, 6 Pennewill, 174; *State v. Tilghman* (Del.) 63 Atl. 772, 773; *State v. Roberts* (Del.) 78 Atl. 305, 310; *State v. Blackburn* (Del.) 75 Atl. 536, 539, 7 Pennewill, 479; *State v. Bell* (Del.) 62 Atl. 147, 148, 5 Pennewill, 192.

"Murder in the first degree" occurs where the killing was done in perpetrating or

attempting to perpetrate a crime punishable with death. *State v. Reese* (Del.) 79 Atl. 217, 221, 2 Boyce, 434.

Murder in the first degree consists in killing a human being with malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable with death, where the murder is committed with sedate deliberate mind, and formed design to take life. *State v. Adams* (Del.) 65 Atl. 510, 511, 6 Pennewill, 178.

Murder in the first degree is the taking of human life with express malice aforethought or in perpetrating or attempting to perpetrate a crime punishable with death, when the act is done deliberately and with a formed design to take life or do some great bodily harm. *State v. Collins* (Del.) 62 Atl. 224, 226, 5 Pennewill, 263; *Same v. Bell* (Del.) 62 Atl. 147, 148, 5 Pennewill, 192; *Same v. Brown* (Del.) 61 Atl. 1077, 1078, 5 Pennewill, 339.

Under Code Iowa, § 4728, killing shown not only to have been done in malice, but with deliberation, premeditation, and with specific intent to kill, is "murder in the first degree." *State v. Baldes*, 110 N. W. 440, 442, 133 Iowa, 158.

An instruction on murder in the second degree which fails to state that there must be no circumstances of mitigation, justification, or excuse is erroneous. *Campbell v. Territory* (Ariz.) 125 Pac. 717, 721.

Under L. O. L. § 1893, defining "murder in the first degree" as a homicide with deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, the state, charging a killing while in the commission of such other offenses, need not prove deliberate or premeditated malice; but, as malice is not necessarily excluded by such other offenses in which homicide results, defendants cannot complain if the state elects to predicate the murder upon a killing with deliberate and premeditated malice. *State v. Humphrey*, 128 Pac. 824, 827, 63 Or. 540.

Under the statute declaring that whoever purposely and with premeditated malice kills another is guilty of "murder in the first degree," the intent to kill, the premeditation, or deliberation, and malice are as much elements of the crime as the act of killing, and each must exist and be established beyond a reasonable doubt. *State v. Pressler*, 92 Pac. 806, 808, 16 Wyo. 214, 15 Ann. Cas. 93.

The statutes define "murder in the first degree" as follows: "Every person who shall purposely and in his deliberate and premeditated malice kill another shall be deemed guilty in the first degree." *State v. Lindgrind*, 74 Pac. 565, 566, 33 Wash. 440.

The crime of "murder" is divided into two degrees in North Dakota, according to the facts and circumstances attending the kill-

ing, depending upon the presence or absence of deliberation and premeditation. These degrees are not distinct crimes but are simply degrees of murder dependent upon the facts attending the killing. There are no degrees of murder in the first degree; the elements of murder in the second degree are necessarily included in the charge of murder in the first degree. *State v. Noah*, 124 N. W. 1121, 1124, 20 N. D. 281.

Under Rem. & Bal. Code, § 2392, defining "murder in the first degree" as the killing of a human being with the premeditated design that accused did, with a premeditated design to effect her death, kill and murder a specified person, is sufficient, without alleging that the person died. *State v. Jahns*, 112 Pac. 747, 61 Wash. 636.

Where death naturally ensues from the force, manner, or instrumentality of a chastisement, and the chastisement is made regardless of its probable result in death, the jury may convict of murder in the first degree. *Rosemond v. State*, 110 S. W. 229, 230, 86 Ark. 160.

Where accused entered into a plot with another, by which the latter was to do the killing, while he was to wait at some little distance from the house to allow the murderer to escape, and then to set fire to the house, and the plot was carried out, accused could be convicted of murder in the first degree. *Commonwealth v. Johnson*, 66 Atl. 233, 235, 217 Pa. 77.

One who kills another, who is approaching in a friendly manner, with no weapon in his hand, and making peaceable overtures, by shooting at him, both at close range and after he has fled across the street and into another's house, is guilty of murder in the first degree. *State v. Williams*, 84 S. W. 924, 927, 186 Mo. 128 (citing *State v. Wieners*, 66 Mo. 13; *State v. Ellis*, 74 Mo. loc. cit. 218, 219; *State v. Robinson*, 73 Mo. 306; *State v. McKenzie*, 76 S. W. 1015, 177 Mo. 699).

Where defendant, having manifested express antecedent malice against deceased, followed him down a creek, in which he and his wife were fishing, and without any cause shot him to death, and threw his body into the creek, and there were no mitigating circumstances, he was properly convicted of murder in the first degree. *Young v. State*, 84 S. W. 822, 47 Tex. Cr. R. 530.

The killing of a human being in the perpetration of or attempt to perpetrate the crime of arson is "murder in the first degree." *Ludwig v. State*, 85 N. E. 345, 347, 170 Ind. 648.

An instruction that all murder committed with express malice is "murder in the first degree," and that all murder committed in the perpetration of robbery is "murder

in the first degree," is correct. *Ransom v. State (Tex.)* 70 S. W. 960, 963.

An indictment charging the commission of murder by accused while engaged in perpetrating a burglary charges murder in the first degree. *Stout v. State*, 92 N. E. 161, 162, 174 Ind. 395, Ann. Cas. 1912D, 37.

A murder which is perpetrated by poison, lying in wait, or any other kind of willful, deliberate, and premeditated killing is murder in the first degree. *State v. Abbott*, 62 S. E. 693, 64 W. Va. 411.

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate a felony, is "murder of the first degree." *State v. Hliboka*, 78 Pac. 965, 31 Mont. 455, 3 Ann. Cas. 934.

Rev. St. § 6908, provides that whosoever purposely and either of deliberate and premeditated malice or by means of poison or in perpetrating or attempting to perpetrate any rape, arson, robbery or burglary kills another is guilty of "murder in the first degree." *State v. Schiller*, 70 N. E. 505, 506, 70 Ohio St. 1.

Pen. Code 1901, § 173, providing that all "murder" which is perpetrated by means of poison, etc., shall be murder in the first degree, and all other kinds of murder are in the second degree, does not prescribe that all "killing" perpetrated by means of poison is murder in the first degree, but that all "murder" so perpetrated is so; the word "murder" being used to denote all that is covered by section 172, defining murder as the unlawful killing of a human being with malice aforethought, etc. *Eytinge v. Territory*, 100 Pac. 443, 445, 12 Ariz. 131.

By Rev. St. 1887, § 6562, "murder of the first degree" includes all murder "which is performed by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, robbery, burglary, or mayhem." *State v. Phinney*, 89 Pac. 634, 13 Idaho, 307, 12 L. R. A. (N. S.) 935, 12 Ann. Cas. 1097.

Pen. Code, § 189, provides that murder committed in the perpetration or attempt to perpetrate arson, robbery, rape, burglary, or mayhem is murder in the first degree. Held, that it is immaterial on a trial for such a murder whether the killing was willful, deliberate, and premeditated, or absolutely accidental. *People v. Milton*, 78 Pac. 549, 145 Cal. 169.

Where two persons acting together armed themselves and broke into a dwelling to rob it, and were, when discovered, engaged, one in robbing the house and the other in

tional discharge of his pistol. The state adduced evidence that the killing was willful and intentional, and occurred during the attempt to perpetrate a robbery. Held, that it was not error for the court to instruct that though the killing was done in perpetrating or in an attempt to perpetrate a robbery, and though the information contained no allegations of the killing under such circumstances, nevertheless the accused could, under the allegations contained in the information, be convicted of first degree murder. *State v. Thorne*, 117 Pac. 58, 60, 39 Utah, 208.

In a prosecution for statutory murder in the first degree, the state claimed that accused killed deceased with premeditated design. The court charged that premeditated design was simply an intent to kill, that "design" meant "intent," and that both words implied premeditation, that premeditation did not exclude sudden intent, and that whether it be described by the words "actual intent," "design," or "premeditated design" was immaterial; that the intent was understood to be premeditated because without mental action the purpose could not be formed; that, when there were no circumstances to prevent the presumption, the law would presume that the unlawful act was intentional and malicious; that, in the absence of evidence to the contrary, he who takes the life of another by some act naturally calculated to produce death would be presumed to have intended that result and to be guilty of murder in the first degree, it being presumed that such person intended the result that followed, and must be guilty of murder in the absence of evidence that the homicide was justifiable or excusable or such as to raise a reasonable doubt on the question; thus that where accused fired a shot, the weapon being aimed at a vital part of the body, and death ensued as a natural result, the presumption of fact as to the intention to take life, in the absence of any explanatory circumstances, makes a prima facie case for the prosecution, the state not being required to negative any probability that there were circumstances reducing the homicide below that of murder in the first degree, or excusing or justifying it. Held, that such charge was correct in so far as it related to statutory murder in the first degree under the facts proved. *Hedger v. State*, 128 N. W. 80, 90, 144 Wis. 279.

Pen. Code 1895, art. 710, provides that every person who shall unlawfully kill any person with malice aforethought, either express or implied, shall be guilty of murder, and that all murder committed in the perpetration of robbery is murder in the first degree, and that all murder not of the first degree is murder of the second degree. White's Ann. Code Cr. Proc. art. 554, provides that, if the defendant pleads guilty, he shall be admonished of the consequences of such plea, and no such plea shall be received unless it appears that he is sane and is uninfluenced

by fear or hope of pardon. Article 555 provides that where a defendant in a case of felony persists in pleading guilty, if the punishment of the offense is not absolutely fixed by law, a jury shall be impaneled to assess the punishment on evidence submitted to enable them to decide thereon. Pen. Code, 1895, art. 712, provides that, if a person pleads guilty to murder, a jury shall be summoned to find of what degree of murder he is guilty. Held, that when an accused pleaded guilty of murder, and his plea was accepted by the court after examination, and evidence was introduced before a jury which conclusively showed that the murder was committed in the perpetration of robbery, the court was not compelled to submit the issue of second degree murder, under article 712. Neither was the court in error in not defining for the jury murder in the first degree. *Miller v. State*, 126 S. W. 864, 58 Tex. Cr. R. 600.

#### Deliberation and premeditation

Deliberation, as an element of first degree murder, is established if accused had time for thought, and, thinking, though but for a moment, did intend to kill, and in fact did kill. *State v. Russo* (Del.) 77 Atl. 743, 745, 1 Boyce, 538.

To constitute "murder in the first degree," there must be, not only an intention to kill on the part of the slayer, but there must be a premeditated design to kill or effect death. *Keigans v. State*, 41 South. 886, 887, 52 Fla. 57.

"Murder of the first degree" is where a homicide is committed with sedate, deliberate mind and formed design to kill, though the deliberate and formed design exist only for a moment. *State v. Harmon* (Del.) 60 Atl. 866-868, 4 Pennewill, 580; *State v. Blackburn* (Del.) 75 Atl. 536, 539, 7 Pennewill, 479.

A homicide committed under such circumstances that the law implies malice is not always murder in the first degree, but is such only where there exists at the time on the part of accused a premeditated design to effect the death of the person killed or of any human being. *Hedger v. State*, 128 N. W. 80, 90, 144 Wis. 279.

"Murder in the first degree" is not determined by a design to kill, unless that design originated in, or resulted from, a sedate, deliberate mind, or in other words, at the time the design is formed, the mind must be calm, sedate, and deliberate. *Wynne v. State*, 127 S. W. 197, 199, 59 Tex. Cr. R. 117 (citing *Farrer v. State*, 42 Tex. 271).

To constitute "murder in the first degree," there must be both an intent to kill and a deliberate and premeditated design to kill, which design must precede the killing by some appreciable space of time. It need not be long, but it must be sufficient for some reflection on the matter and a choice to kill or not to kill. *People v. Boggiano*, 72 N. E. 101, 179 N. Y. 267.

To constitute "murder in the first degree," the killing must be willful, premeditated, and deliberate, but willful intent, premeditation, or deliberation need not exist for any prescribed length of time before the crime is committed; it is sufficient that there is premeditation and design to kill distinctly formed in the mind at any time before or at the time the shot is fired. *State v. McMullin*, 71 S. W. 221, 224, 170 Mo. 608.

The law defining "murder in the first degree" does not fix any invariable rule as to the length of the time that must elapse between a formed design to kill and its execution, but only requires that the killing must have been deliberate and that a formed design to kill existed. *Snowberger v. State*, 126 S. W. 878, 882, 58 Tex. Cr. R. 530.

If one actually forms the purpose maliciously to kill another, and deliberates and premeditates upon it, and then does the act, he commits "murder in the first degree," no matter how short the time may have been, if but the time necessary for one thought to follow another between the purpose and its execution. *Wickham v. People*, 93 Pac. 478, 481, 41 Colo. 345.

To constitute "murder in the first degree" it is not essential that there should be any appreciable space of time between the intent to kill and the act of killing; i. e., any interval "capable of being appreciated or duly estimated." The intent to kill must be formed deliberately and with premeditation; but, when so formed, there need be no appreciable space of time between the intent and the act. *People v. Suesser*, 75 Pac. 1093, 1097, 142 Cal. 354.

To constitute "murder in the first degree," there need be no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind—and it is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation; and where such is the case, the killing is murder in the first degree, no matter how rapidly the acts of the mind may succeed each other, or how quickly they may be followed by the act of killing. *People v. Yee Foo*, 89 Pac. 450, 452, 4 Cal. App. 730.

A killing in a combat which engenders hot blood is not "murder in the first degree," in the absence of premeditation. *Osburn v. State*, 73 N. E. 601, 604, 164 Ind. 262.

"In order to constitute 'murder in the first degree,' where only the question of malice is involved, and not robbery, or some of those extraneous matters made murder in the first degree by the statute, the intent to kill must be formed in a mind that is cool, deliberate, and sedate. The intent to kill, formed in a mind that is not cool, deliberate, and sedate, is not murder in the first degree." *Manning v. State*, 85 S. W. 1149, 48 Tex. Cr. R. 55.

It is not necessary, under our statute, in order to constitute murder in the first degree, that the murder should be committed by means of poison, or by lying in wait, or that it shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem; but any kind of willful, deliberate, and premeditated killing, is "murder in the first degree." A murderous purpose to draw some one into a dispute, and then strike him down with a deadly weapon, is sufficient to support a finding that the homicide was deliberate and premeditated. *State v. Vinso*, 71 S. W. 1034, 1037, 171 Mo. 576 (quoting and adopting *State v. Fairlamb*, 25 S. W. 897, 121 Mo. loc. cit. 144).

"To constitute 'murder in the first degree' there must have been an unlawful killing done, purposely and with deliberate and premeditated malice. If the person has actually formed the purpose maliciously to kill and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time that constitutes the distinctive difference between murder in the first degree and murder in the second degree. An unlawful killing with malice, deliberation, and premeditation constitutes the crime of murder in the first degree. It matters not how short the time, if the party has turned it over in his mind and weighed and deliberated upon it." *Reed v. State*, 106 N. W. 649, 651, 75 Neb. 509.

"In order to warrant a verdict of 'murder in the first degree,' malice must be shown by the evidence to have existed (that is, the jury must be satisfied from the evidence, beyond a reasonable doubt, that the killing was a consummation of a previously formed design to take the life of the person killed, and that the design to kill was formed deliberately with a sedate mind; that is, at the time when the design was formed, the mind of the person killing was self-possessed and capable of contemplating the consequences of the act proposed to be done). There is, however, no definite space of time necessary to intervene between the formed design to kill and the actual killing; a single moment of time may be sufficient; all that is required is that the mind be cool and deliberate in forming its purpose, and that the design to kill is formed." *Gregg v. State (Tex.)* 100 S. W. 1161, 1163.

Rev. Laws, c. 207, § 1, declares that murder committed with deliberately premeditated malice aforethought, or in the commission or attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree, and punishable with death. In a prosecution for such offense, the state charged that the words "deliberately evilly,

meditated malice aforethought" meant simply "thought upon, resolved upon beforehand, not a thing done suddenly, not a thing that comes into the mind of a sudden, and is done before there is time to think about it, but a thing thought upon or planned some time before, or thought upon long enough before the act is done so that it can reasonably be said to have become a purpose of the mind," that "no particular length of time is necessary" and illustrated the same by stating that if a robber with a dirk or pistol turns a corner and meets a bank messenger with a roll of bills, and determines in one moment to get it, and the next shoots or stabs the messenger dead, takes the package, and flees, his malice was deliberately premeditated, though it occupied only a few seconds to accomplish. Held, that both the definition and illustration were proper. *Commonwealth v. Tucker*, 76 N. E. 127, 138, 140, 141, 189 Mass. 457, 7 L. R. A. (N. S.) 1056.

An instruction that, to constitute "murder in the first degree," there must be proof of malice and premeditation, and that if either of these elements is absent there can be no conviction for that grade of homicide, that a "premeditated design or purpose" is one resulting from thought and reflection, a design conceived and afterwards so deliberately considered as to become resolved and fixed, that when the design to take human life is formed after deliberation, and there is adequate time and opportunity for deliberate thought, then, no matter how soon the felonious killing follows the formation of the settled purpose, it is murder in the first degree, that there need be no appreciable space of time between the formation of the intention to kill and the killing, but that it is as much "premeditation" if it enters into the mind of the guilty agent a moment before the act as if it entered years before, and that it is only necessary that the act of killing be preceded by the concurrence of will, deliberation, and premeditation, but that, when there is no time and opportunity for deliberate thought, the unlawful killing cannot be murder in the first degree, is correct. *Welty v. State* (Ind.) 100 N. E. 73, 81.

#### Intent

"Murder in the first degree" cannot be predicated on the mere existence of an intent to kill at the time of committing the crime. *State v. Mangano*, 72 Atl. 366, 367, 77 N. J. Law, 544.

It is not necessary that a prior intention to do the act of killing be conceived for any particular period of time in order to constitute murder in the first degree. *Ferguson v. State*, 122 S. W. 236, 237, 92 Ark. 120.

If there was a fixed, deliberate, and settled purpose to kill, usually termed "specific intent to take life," willful, deliberate, and premeditated, although in the course of mu-

tual combat, the offense was "murder of the first degree." *State v. Taylor*, 50 S. E. 247, 252, 57 W. Va. 228.

To constitute "murder in the first degree," the killing must be intentional, must be deliberate and premeditated, and no killing can be murder in the first degree unless the act of killing is preceded by a willful, deliberate, premeditated, and specific intent to kill. *State v. Marx*, 60 Atl. 690, 692, 78 Conn. 18.

Under *Mills' Ann. St. § 1176*, providing that murder in the perpetration of robbery shall be deemed murder in the first degree, the intent is immaterial, so that, where several conspire to rob, and one of the conspirators commits murder in the perpetration of robbery, the others are responsible for his act, though murder was not originally intended. *Andrews v. People*, 79 Pac. 1081, 1033, 33 Colo. 193, 108 Am. St. Rep. 76.

"Under Code, § 4728, all murder which is perpetrated by means of poison is 'murder in the first degree.' Hence a homicide committed by the administration of poison, with a bad motive or intent, is murder in the first degree, no matter whether there was specific intent to kill." *State v. Burns*, 99 N. W. 721, 722, 124 Iowa, 207 (citing *State v. Van Tassel*, 72 N. W. 497, 103 Iowa, 6; *State v. Wells*, 17 N. W. 90, 61 Iowa, 629, 47 Am. Rep. 822; *State v. Bertoch*, 83 N. W. 967, 112 Iowa, 195).

The distinctive feature of "murder in the first degree" is a willful, deliberate, malicious, and premeditated intent to take life, and, although it is not indispensable that the premeditated design should have existed in the mind of the slayer for any particular length of time before the killing, yet to constitute murder in the first degree it is indispensable that the evidence should show that the killing was not only done with malice but that it was preceded by a clearly formed design to kill, a clear intent to take life. *Howard v. State*, 100 S. W. 756, 757, 82 Ark. 97 (citing *Bivens v. State*, 11 Ark. 460; *Fitzpatrick v. State*, 37 Ark. 239).

Under Code, § 4728, providing that the killing of a human being by means of a willful, unlawful, and felonious administration of poison is "murder in the first degree," an indictment for homicide so committed is not objectionable for failing to allege a specific intent. A homicide so committed cannot constitute murder in the second degree or manslaughter, and hence a specific intent to kill is not an essential allegation in the indictment. *State v. Robinson*, 101 N. W. 634, 635, 126 Iowa, 69 (citing *State v. Van Tassel*, 72 N. W. 497, 103 Iowa, 9; *State v. Wells*, 17 N. W. 90, 61 Iowa, 629, 47 Am. Rep. 822; *Epp v. State*, 1 N. E. 491, 102 Ind. 539).

If a person takes the life of another by an act naturally calculated to produce that



result, in the absence of any explanatory circumstance or circumstances rendering the homicide excusable or justifiable, or criminal in some degree less than the highest, or creating a reasonable doubt in regard to one of such contingencies, the law presumes that he intended the result effected, and he is guilty of murder in the first degree. *Cupps v. State*, 97 N. W. 210, 214, 120 Wis. 504, 102 Am. St. Rep. 996.

Pen. Code 1901, § 172, declares that "murder" is the unlawful killing of a human being with malice aforethought. Such malice is express or implied. Section 173 declares that all murder perpetrated by poison or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of certain crimes, is murder in the first degree, and all other kinds of murder are in the second degree. Held, that the word "other" in section 173 was used to supply the sense of addition to the enumeration; and hence an instruction that it was not essential to a verdict of murder in the first degree by poison that there should be proof that defendant administered the poison to decedent with a specific intent to kill him was proper; malice being implied. *Eytlinge v. Territory*, 100 Pac. 443, 445, 12 Ariz. 131.

Penal Law (Consol. Laws, c. 40) § 1044, subd. 1, provides that the killing of a human being is "murder in the first degree" when committed from a deliberate and premeditated design to effect the death of the person killed or of another. Subdivision 2 provides it is murder in the first degree when committed without a design to effect death while in the commission of a felony. Section 610 provides that, upon the trial of an indictment, the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime. Held, that although murder in the first degree as defined by section 1044, subd. 1, is broad enough to embrace murder in the second degree or manslaughter in either degree, where accused was tried for murder under section 1044, subd. 2, the power of the jury to convict of a lesser degree could not be exercised, since an intent to kill is not a necessary ingredient to the crime, and it was enough to show beyond a reasonable doubt that the killing was done in committing or attempting to commit a felony. *People v. Schleiman*, 90 N. E. 950, 951, 197 N. Y. 383, 27 L. R. A. (N. S.) 1075, 18 Ann. Cas. 588.

In a prosecution for statutory murder in the first degree, the state claimed that accused killed deceased with premeditated design. The court charged that premeditated design was simply an intent to kill, that "design" meant "intent," and that both words implied premeditation, that premeditation did not exclude sudden intent, and that whether it be described by the words "actual intent," "design," or "premeditated design" was im-

material; that the intent was understood to be premeditated because without mental action the purpose could not be formed; that, when there were no circumstances to prevent the presumption, the law would presume that the unlawful act was intentional and malicious; that, in the absence of evidence to the contrary, he who takes the life of another by some act naturally calculated to produce death would be presumed to have intended that result and to be guilty of murder in the first degree, it being presumed that such person intended the result that followed, and must be guilty of murder in the absence of evidence that the homicide was justifiable or excusable or such as to raise a reasonable doubt on the question; thus that where accused fired a shot, the weapon being aimed at a vital part of the body, and death ensued as a natural result, the presumption of fact as to the intention to take life, in the absence of any explanatory circumstances, makes a prima facie case for the prosecution, the state not being required to negative any probability that there were circumstances reducing the homicide below that of murder in the first degree, or excusing or justifying it. Held, that such charge was correct in so far as it related to statutory murder in the first degree under the facts proved. *Hedger v. State*, 128 N. W. 80, 90, 144 Wis. 279.

#### Malice or motive

Malice is an essential element of "murder in the first degree." *State v. Reese* (Del.) 79 Atl. 217, 220, 2 Boyce, 434.

To establish "murder of the first degree," it must be shown that the killing was committed with express malice aforethought. *State v. Borrelli* (Del.) 76 Atl. 605, 606, 1 Boyce, 349.

First degree murder is included within the term "felonious homicide" and malice is an essential ingredient thereof. *State v. Russo* (Del.) 77 Atl. 743, 745, 1 Boyce, 538.

"Murder of the first degree" is where the killing was done with malice aforethought. *State v. Primrose* (Del.) 77 Atl. 717, 719, 2 Boyce, 164.

"Murder in the first degree" occurs where the killing was done with express malice aforethought. *State v. Reese* (Del.) 79 Atl. 217, 221, 2 Boyce, 434.

"Murder of the first degree" exists where the killing is done with express malice aforethought, and express malice aforethought exists where the killing is done with a sedate, deliberate mind and formed design to kill. *State v. Brelawski* (Del.) 84 Atl. 950, 952.

"Murder of the first degree" is committed when the killing is done with express malice aforethought; that is, with a sedate, deliberate mind, and formed design to kill. *State v. Miele* (Del.) 74 Atl. 8, 9, 1 Boyce, 33; *State v. Uzzo* (Del.) 65 Atl. 775, 777, 6 Pennewill,

212; *State v. Short* (Del.) 82 Atl. 239, 241, 2 Boyce, 491.

If a person puts poison in flour with intent that it shall be cooked and eaten by B., but it is eaten by C., who dies therefrom, such person will be guilty of murder, though he had no malice against C. *Chelsey v. State*, 49 S. E. 258, 259, 121 Ga. 340.

An instruction that, if any person in the perpetration, or in the attempt to perpetrate, a robbery shall take the life of the person intended to be robbed, he is guilty of "murder in the first degree" is erroneous as eliminating malice. *Oates v. State*, 103 S. W. 859, 860, 51 Tex. Cr. R. 449.

"Murder," within Rev. St. 1908, § 1624, cl. 4, providing that murder perpetrated by any act greatly dangerous to the lives of others, but indicating a depraved mind regardless of human life, shall be "murder in the first degree," is such as is committed by an act greatly dangerous to the lives of persons other than the one killed, and showing a reckless disregard of human life; and it therefore does not include a killing resulting from intentional shooting of the individual slain, and where there is no element of what is termed "universal malice" shown. *Longinotti v. People*, 102 Pac. 165, 168, 46 Colo. 173 (citing and adopting *Darry v. People*, 10 N. Y. 120; *Mitchell v. State*, 60 Ala. 28; *Jewell v. Territory*, 43 Pac. 1075, 4 Okl. 53; and *Golding v. State*, 8 South. 311, 26 Fla. 530).

Revisal 1905, § 3631, declaring that murder by means of poison, lying in wait, etc., or by any other kind of willful, deliberate, or premeditated killing, shall be murder in the first degree, and that all other kinds of murder shall be murder in the second degree, classifies the different kinds of murder at common law, without giving any new definition, and the malice essential to constitute murder in the first degree need not arise from personal ill will, but may exist where there has been a wrongful and intentional killing without lawful excuse or mitigating circumstances. *State v. Banks*, 57 S. E. 174, 176, 143 N. C. 652.

Murder may be committed without any motive. It is the intention, deliberately formed after premeditation, so that it becomes a definite purpose to kill, and a consequent killing without legal provocation or excuse, that constitutes "murder in the first degree." The existence of a motive may be evidence to show the degree of the offense, or to establish the identity of the defendant as the slayer; but motive is not an essential element of the crime, nor is it indispensable to a conviction of the person charged with its commission. *State v. Adams*, 50 S. E. 765, 768, 138 N. C. 688.

#### **Murder in second degree distinguished**

"Murder in the first" and "murder in the second degree" are distinguished, in that

specific intent to kill is essential to the offense in the first degree. *Reed v. State*, 145 S. W. 206, 208, 102 Ark. 525.

The distinction between murder in the first and second degrees is that in "murder in the first degree" a specific intent to take life must be shown, while in murder in the second degree it is not necessary to prove such intent. *Petty v. State*, 89 S. W. 465, 466, 76 Ark. 515.

Under Kirby's Dig. § 1766, declaring that all murder by means of poison, lying in wait, or other malicious or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or larceny, shall be deemed "murder in the first degree," when the fact of killing alone is proved, it will be presumed that the crime is murder in the second degree. *Ferguson v. State*, 122 S. W. 236, 237, 92 Ark. 120.

Where there exists a design deliberately formed in the mind of accused to take life, and death ensues from his act, the homicide is "murder in the first degree"; but where there exists no design to take life, but death results from an unlawful act of violence, and there is no adequate provocation, the homicide is murder in the second degree. *State v. Honey* (Del.) 65 Atl. 764-766, 6 Pennewill, 148.

The statute, providing that all murder in robbery or in the perpetration of robbery is "murder in the first degree," eliminates murder in the second degree in homicide committed in robbery or in the perpetration of robbery, and the killing of one in the perpetration of the robbery of another is "murder in the first degree." *Milo v. State*, 127 S. W. 1025, 1029, 59 Tex. Cr. R. 196.

Revisal 1905, § 3631, declaring that murder by means of poison, lying in wait, etc., or by any other kind of willful, deliberate, or premeditated killing, shall be "murder in the first degree," and that all other kinds of murder shall be "murder in the second degree," classifies the different kinds of murder at common law, without giving any new definition. *State v. Banks*, 57 S. E. 174, 176, 143 N. C. 652.

The degree of murder under the statute declaring that murder perpetrated by any kind of willful, deliberate, and premeditated killing shall be "murder in the first degree," and all other kinds of murder shall be murder in the second degree, depends on the question whether the crime was willful, deliberate, and premeditated, and on that question it becomes material whether accused was in such a condition of mind by reason of intoxication as to be incapable of deliberation and premeditation. *Brennan v. People*, 86 Pac. 79, 81, 37 Colo. 256.

The characteristic quality of "murder in the first degree," and that which distinguish-

es it from murder in the second degree or any other homicide, is the existence of a settled purpose and fixed design on the part of the assailant that the act of assault should result in the death of the party assaulted; that death being the end aimed at, the object sought for and wished. The distinctive characteristic of murder in the first degree is premeditation. When the act of killing is not done in the commission or attempt to commit some felony nor by poison, or lying in wait, the killing must be done willfully, deliberately, maliciously, and with premeditation. *Turner v. State*, 108 S. W. 1139, 1142, 119 Tenn. 663, 15 L. R. A. (N. S.) 988, 123 Am. St. Rep. 758, 14 Ann. Cas. 990 (quoting *Dale v. State*, 10 Yerg. [18 Tenn.] 551; *Swan v. State*, 4 Humph. [23 Tenn.] 136; *Lewis v. State*, 3 Head [40 Tenn.] 148).

A willful, deliberate, and premeditated killing, or a killing done in the perpetration, or attempted perpetration, of robbery, is "murder in the first degree." Otherwise a killing is "murder in the second degree," where accused unlawfully and with malice aforethought killed decedent, and in determining the degree any evidence of the mental status of accused is proper. *State v. Johnny*, 87 Pac. 3, 8, 29 Nev. 208.

An unlawful killing, done purposely and with deliberate and premeditated malice, is "murder in the first degree," and it matters not how short the time may be between the time of the formation of the purpose to kill and its execution, if the person committing the crime has deliberated upon it. "Murder in the second degree" consists in an unlawful killing done purposely and maliciously, but without deliberation and premeditation. *Hamblin v. State*, 115 N. W. 850, 853, 81 Neb. 148, 16 Ann. Cas. 569.

The only essential difference between "murder in the first degree" and "murder in the second degree" is that the former is committed after deliberation and premeditation, which elements do not inhere in the lower grade of the crime, but all the elements of murder in the second degree are included in the statutory definition of murder in the first degree. To render one who is not present and does not aid or assist in a murder guilty thereof, by reason of a former conspiracy with the slayer, it must appear that the murder was within the contemplation of the conspiracy, or was the natural and probable outcome thereof. *State v. Keleher*, 87 Pac. 738, 739, 74 Kan. 631.

In a prosecution for murder, the court charged that "malice is also necessary to murder in the first degree. The distinguishing feature, so far as malice is concerned, is that, in murder of the first degree, malice must be proven to your satisfaction beyond a reasonable doubt as an existing fact, while in murder of the second degree malice will be implied from the fact of an unlawful kill-

ing." Held that, if the instructions stood alone, the latter part of the paragraph might be erroneous, but as it was followed by an instruction defining malice as being that which the law infers from certain acts, however suddenly done, as when the fact of an unlawful killing is established and the facts do not establish malice beyond a reasonable doubt, though they tend to excuse or justify the act, then the law implies malice, and the murder is murder of the second degree, and also that if the killing is unlawful and done with implied malice aforethought, it would be murder in the second degree, the instructions taken together were correct. *Eggleston v. State* (Tex.) 128 S. W. 1105, 1109.

The next lower grade of culpable homicide than "murder in the first degree" is "murder in the second degree." Malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that in murder in the first degree malice must be proved to the satisfaction of the jury beyond a reasonable doubt as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing. Implied malice is that which the law infers from or imputes to certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree, and the law does not further define murder in the second degree than if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and, on the other hand, there is nothing that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree. *Dobbs v. State*, 113 S. W. 923, 927, 54 Tex. Cr. R. 550.

## MURDER IN SECOND DEGREE

As felonious homicide, see Felonious Homicide.

All murder not of the first degree is "murder of the second degree." *Waters v. State*, 114 S. W. 628, 632, 54 Tex. Cr. R. 322.

By Pen. Code, § 352, "murder of the second degree" is all murder which does not amount to murder of the first degree. *State v. Hilboka*, 78 Pac. 965, 966, 31 Mont. 455, 3 Ann. Cas. 984.

"Murder of the second degree" is all murder not murder in the first degree, as defined by Rev. St. 1887, § 6502. *State v. Phinney*, 89 Pac. 634, 13 Idaho 307, 12 L. R. A. (N. S.) 935, 12 Ann. Cas. 1079.

To render one guilty of "murder in the second degree," he must have inflicted an act of violence on decedent which produced

212; *State v. Short* (Del.) 82 Atl. 239, 241, 2 Boyce, 491.

If a person puts poison in flour with intent that it shall be cooked and eaten by B., but it is eaten by C., who dies therefrom, such person will be guilty of murder, though he had no malice against C. *Chelsey v. State*, 49 S. E. 258, 259, 121 Ga. 340.

An instruction that, if any person in the perpetration, or in the attempt to perpetrate, a robbery shall take the life of the person intended to be robbed, he is guilty of "murder in the first degree" is erroneous as eliminating malice. *Oates v. State*, 103 S. W. 859, 860, 51 Tex. Cr. R. 449.

"Murder," within Rev. St. 1908, § 1624, cl. 4, providing that murder perpetrated by any act greatly dangerous to the lives of others, but indicating a depraved mind regardless of human life, shall be "murder in the first degree," is such as is committed by an act greatly dangerous to the lives of persons other than the one killed, and showing a reckless disregard of human life; and it therefore does not include a killing resulting from intentional shooting of the individual slain, and where there is no element of what is termed "universal malice" shown. *Longinotti v. People*, 102 Pac. 165, 168, 46 Colo. 173 (citing and adopting *Darry v. People*, 10 N. Y. 120; *Mitchell v. State*, 60 Ala. 26; *Jewell v. Territory*, 43 Pac. 1075, 4 Okl. 53; and *Goldring v. State*, 8 South. 311, 26 Fla. 530).

Revisal 1905, § 3631, declaring that murder by means of poison, lying in wait, etc., or by any other kind of willful, deliberate, or premeditated killing, shall be murder in the first degree, and that all other kinds of murder shall be murder in the second degree, classifies the different kinds of murder at common law, without giving any new definition, and the malice essential to constitute murder in the first degree need not arise from personal ill will, but may exist where there has been a wrongful and intentional killing without lawful excuse or mitigating circumstances. *State v. Banks*, 57 S. E. 174, 176, 143 N. C. 652.

Murder may be committed without any motive. It is the intention, deliberately formed after premeditation, so that it becomes a definite purpose to kill, and a consequent killing without legal provocation or excuse, that constitutes "murder in the first degree." The existence of a motive may be evidence to show the degree of the offense, or to establish the identity of the defendant as the slayer; but motive is not an essential element of the crime, nor is it indispensable to a conviction of the person charged with its commission. *State v. Adams*, 50 S. E. 765, 768, 138 N. C. 688.

#### **Murder in second degree distinguished**

"Murder in the first" and "murder in the second degree" are distinguished, in that

specific intent to kill is essential to the offense in the first degree. *Reed v. State*, 145 S. W. 206, 208, 102 Ark. 525.

The distinction between murder in the first and second degrees is that in "murder in the first degree" a specific intent to take life must be shown, while in murder in the second degree it is not necessary to prove such intent. *Petty v. State*, 89 S. W. 465, 466, 76 Ark. 515.

Under Kirby's Dig. § 1766, declaring that all murder by means of poison, lying in wait, or other malicious or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or larceny, shall be deemed "murder in the first degree," when the fact of killing alone is proved, it will be presumed that the crime is murder in the second degree. *Ferguson v. State*, 122 S. W. 236, 237, 92 Ark. 120.

Where there exists a design deliberately formed in the mind of accused to take life, and death ensues from his act, the homicide is "murder in the first degree"; but where there exists no design to take life, but death results from an unlawful act of violence, and there is no adequate provocation, the homicide is murder in the second degree. *State v. Honey* (Del.) 65 Atl. 764-766, 6 Pennewill, 148.

The statute, providing that all murder in robbery or in the perpetration of robbery is "murder in the first degree," eliminates murder in the second degree in homicide committed in robbery or in the perpetration of robbery, and the killing of one in the perpetration of the robbery of another is "murder in the first degree." *Milo v. State*, 127 S. W. 1025, 1029, 59 Tex. Cr. R. 196.

Revisal 1905, § 3631, declaring that murder by means of poison, lying in wait, etc., or by any other kind of willful, deliberate, or premeditated killing, shall be "murder in the first degree," and that all other kinds of murder shall be "murder in the second degree," classifies the different kinds of murder at common law, without giving any new definition. *State v. Banks*, 57 S. E. 174, 176, 143 N. C. 652.

The degree of murder under the statute declaring that murder perpetrated by any kind of willful, deliberate, and premeditated killing shall be "murder in the first degree," and all other kinds of murder shall be murder in the second degree, depends on the question whether the crime was willful, deliberate, and premeditated, and on that question it becomes material whether accused was in such a condition of mind by reason of intoxication as to be incapable of deliberation and premeditation. *Brennan v. People*, 86 Pac. 79, 81, 37 Colo. 256.

The characteristic quality of "murder in the first degree," and that which distinguish-

es it from murder in the second degree or any other homicide, is the existence of a settled purpose and fixed design on the part of the assailant that the act of assault should result in the death of the party assaulted; that death being the end aimed at, the object sought for and wished. The distinctive characteristic of murder in the first degree is premeditation. When the act of killing is not done in the commission or attempt to commit some felony nor by poison, or lying in wait, the killing must be done willfully, deliberately, maliciously, and with premeditation. *Turner v. State*, 108 S. W. 1139, 1142, 119 Tenn. 663, 15 L. R. A. (N. S.) 988, 123 Am. St. Rep. 758, 14 Ann. Cas. 990 (quoting *Dale v. State*, 10 Yerg. [18 Tenn.] 551; *Swan v. State*, 4 Humph. [23 Tenn.] 136; *Lewis v. State*, 3 Head [40 Tenn.] 148).

A willful, deliberate, and premeditated killing, or a killing done in the perpetration, or attempted perpetration, of robbery, is "murder in the first degree." Otherwise a killing is "murder in the second degree," where accused unlawfully and with malice aforethought killed decedent, and in determining the degree any evidence of the mental status of accused is proper. *State v. Johnny*, 87 Pac. 3, 8, 29 Nev. 203.

An unlawful killing, done purposely and with deliberate and premeditated malice, is "murder in the first degree," and it matters not how short the time may be between the time of the formation of the purpose to kill and its execution, if the person committing the crime has deliberated upon it. "Murder in the second degree" consists in an unlawful killing done purposely and maliciously, but without deliberation and premeditation. *Hamblin v. State*, 115 N. W. 850, 853, 81 Neb. 148, 16 Ann. Cas. 569.

The only essential difference between "murder in the first degree" and "murder in the second degree" is that the former is committed after deliberation and premeditation, which elements do not inhere in the lower grade of the crime, but all the elements of murder in the second degree are included in the statutory definition of murder in the first degree. To render one who is not present and does not aid or assist in a murder guilty thereof, by reason of a former conspiracy with the slayer, it must appear that the murder was within the contemplation of the conspiracy, or was the natural and probable outcome thereof. *State v. Keleher*, 87 Pac. 738, 739, 74 Kan. 631.

In a prosecution for murder, the court charged that "malice is also necessary to murder in the first degree. The distinguishing feature, so far as malice is concerned, is that, in murder of the first degree, malice must be proven to your satisfaction beyond a reasonable doubt as an existing fact, while in murder of the second degree malice will be implied from the fact of an unlawful kill-

ing." Held that, if the instructions stood alone, the latter part of the paragraph might be erroneous, but as it was followed by an instruction defining malice as being that which the law infers from certain acts, however suddenly done, as when the fact of an unlawful killing is established and the facts do not establish malice beyond a reasonable doubt, though they tend to excuse or justify the act, then the law implies malice, and the murder is murder of the second degree, and also that if the killing is unlawful and done with implied malice aforethought, it would be murder in the second degree, the instructions taken together were correct. *Eggleston v. State (Tex.)* 128 S. W. 1105, 1109.

The next lower grade of culpable homicide than "murder in the first degree" is "murder in the second degree." Malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that in murder in the first degree malice must be proved to the satisfaction of the jury beyond a reasonable doubt as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing. Implied malice is that which the law infers from or imputes to certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree, and the law does not further define murder in the second degree than if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and, on the other hand, there is nothing that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree. *Dobbs v. State*, 113 S. W. 923, 927, 54 Tex. Cr. R. 550.

## MURDER IN SECOND DEGREE

As felonious homicide, see Felonious Homicide.

All murder not of the first degree is "murder of the second degree." *Waters v. State*, 114 S. W. 628, 632, 54 Tex. Cr. R. 322.

By Pen. Code, § 352, "murder of the second degree" is all murder which does not amount to murder of the first degree. *State v. Hliboka*, 78 Pac. 965, 966, 31 Mont. 455, 3 Ann. Cas. 984.

"Murder of the second degree" is all murder not murder in the first degree, as defined by Rev. St. 1887, § 6562. *State v. Phinney*, 89 Pac. 634, 13 Idaho, 307, 12 L. R. A. (N. S.) 935, 12 Ann. Cas. 1079.

To render one guilty of "murder in the second degree," he must have inflicted an act of violence on decedent which produced

death, with the intention to kill decedent or to do an act of violence from which ordinarily, in the usual course of events, death or great bodily harm might result. *Fowler v. State*, 49 South. 788, 789, 790, 161 Ala. 1.

"The law requires that, before a homicide can be 'murder in the second degree,' it must be unlawfully done, and upon malice aforethought." *Thomas v. State*, 74 S. W. 36, 38, 45 Tex. Cr. R. 111.

Where one person unlawfully kills another with implied malice, the crime is "murder in the second degree." *State v. Short* (Del.) 82 Atl. 239, 241, 2 Boyce, 491.

Killing with implied malice constitutes "murder in the second degree"; that is, where the malice is not express, as in murder in the first degree, but is an inference or conclusion of law from facts proved, where there is no deliberate mind and formed design to take life, but where the killing is done without justification or excuse, and without provocation, or without sufficient provocation to reduce the offense to manslaughter. *State v. Brooks* (Del.) 84 Atl. 225, 227; *Same v. Brelawski* (Del.) 84 Atl. 950, 952; *Same v. De Paolo* (Del.) 84 Atl. 213, 214.

Where the killing with a deadly weapon was established, or admitted, and the plea was self-defense, the two presumptions that the killing was unlawful and that it was done with malice arose, and, where accused merely rebutted the presumption of malice, the presumption that the killing was unlawful stood, justifying a conviction of "manslaughter," which is an unlawful killing, which becomes "murder in the second degree" when it has the added element of malice. *State v. Fowler*, 66 S. E. 567, 151 N. C. 731.

Murder in the second degree is the unlawful killing of a human being with malice, but without deliberation or premeditation. *Miller v. State*, 40 South. 47, 48, 145 Ala. 677.

"Murder in the second degree" is the unlawful killing of a human being with malice aforethought, but without deliberation, premeditation, or preconcerted design to kill. *State v. Bradley*, 24 Atl. 1053, 1055, 64 Vt. 466.

An instruction that "murder in the second degree" is the killing of a human being, "willfully, premeditatedly, and with malice aforethought," is correct. *State v. Myers*, 121 S. W. 131, 135, 221 Mo. 598.

"Murder in the second degree" is the killing of a human being willfully, premeditatedly, and with malice aforethought, but without deliberation. *State v. West*, 100 S. W. 478, 481, 202 Mo. 128.

A killing with malice aforethought, but without express malice is "murder in the second degree." *McMeans v. State*, 114 S. W. 837, 839, 55 Tex. Cr. R. 69.

"Murder in the second degree" is constituted by the absence of express malice upon one side and extenuating circumstances or self-defense or adequate cause upon the other. *Wheeler v. State*, 121 S. W. 166, 167, 56 Tex. Cr. R. 547.

"Murder in the second degree" consists design to take life, and without provocation of the killing of another without a formed design to reduce the offense to manslaughter, and under the influence of a wicked or depraved heart, or with cruel and wicked indifference to human life. *State v. Cephus* (Del.) 67 Atl. 150, 151, 6 Pennewill, 160.

Murder in the second degree is a killing with implied malice; that is, without design or premeditation, but under the influence of a depraved heart and with a cruel and wicked indifference to human life. *State v. Uzzo* (Del.) 65 Atl. 775-777, 6 Pennewill, 212.

Murder of the second degree is where there is no sedate, deliberate mind and formed design to take life, but when the circumstances show that the homicide was committed under the influence of a wicked and depraved heart, and with a cruel and reckless indifference to human life. *State v. Harmon* (Del.) 60 Atl. 866-868, 4 Pennewill, 580.

"Murder in the second degree" is the killing of a human being without a sedate, deliberate purpose and formed design to take life, but one which is committed suddenly, without justification or excuse, and without provocation sufficient to reduce the crime to manslaughter. *State v. Mills* (Del.) 69 Atl. 841, 842, 6 Pennewill, 497.

"Murder in the second degree" is where the killing is done with implied malice; that is, without justification or excuse or without provocation or sufficient provocation to reduce it to manslaughter. *State v. Tilghman* (Del.) 63 Atl. 772, 773.

"Murder of the second degree" is where there is no deliberate mind and formed design to take life, but where the killing is malicious, and without justification or excuse, without provocation, or without sufficient provocation to reduce the homicide to manslaughter. *State v. Adams* (Del.) 65 Atl. 510, 511, 6 Pennewill, 178.

"Murder of the second degree" is committed when the killing is done with implied malice, where there is no deliberate mind or formed design to take life or to perpetrate a crime punishable with death, but where the killing is without justification or excuse, and without sufficient provocation to reduce the offense to manslaughter. *State v. Mele* (Del.) 74 Atl. 8, 9, 1 Boyce, 33; *Same v. Brown* (Del.) 61 Atl. 1077, 1078, 5 Pennewill, 339; *Same v. Johns* (Del.) 65 Atl. 763, 764, 6 Pennewill, 174.

"Murder of the second degree" occurs where the killing is done with implied malice; that is, where there is no deliberate

mind or formed design to take life, but where the killing was done without justification or excuse, or without provocation to reduce the offense to manslaughter. *State v. Reese* (Del.) 79 Atl. 217, 220, 2 Boyce, 434; *Same v. Powell* (Del.) 61 Atl. 966, 971, 5 Pennewill, 24.

"Murder of the second degree" is the killing with implied malice, inferred from the facts proved, where there is no deliberate mind or formed design to take life, but where the killing is done without justification or excuse, and without provocation sufficient to reduce the offense to manslaughter. *State v. Russo* (Del.) 77 Atl. 743, 746, 1 Boyce, 538; *Same v. Roberts* (Del.) 78 Atl. 305, 810, 2 Boyce, 140.

"Murder of the second degree" is when the killing is done with implied malice, not with a deliberate or formed design, but without justification or excuse, and without provocation, or sufficient provocation to reduce the offense to manslaughter. *State v. Primrose* (Del.) 77 Atl. 717, 719, 2 Boyce, 164.

"Murder in the second degree" is where there is no such deliberate mind and formed design to take life, but where, nevertheless, the killing is malicious and without justification or excuse, without any provocation, or without sufficient provocation to reduce the homicide to the grade of manslaughter. *State v. Emory* (Del.) 58 Atl. 1036, 1038, 5 Pennewill, 126.

Where there is no deliberate mind or formed design to take life, or to perpetrate a capital crime, but where the killing is done without justification or excuse, and without provocation, or sufficient provocation to reduce the offense to manslaughter, it is "murder of the second degree." *State v. Borrelli* (Del.) 76 Atl. 605, 606, 1 Boyce, 349.

"Murder in the second degree" is where the killing was done with implied malice; where there was no deliberate mind or formed design to take life or to perpetrate a crime punishable with death; but where the killing was done without justification or excuse and without provocation, or without sufficient provocation to reduce the offense to manslaughter. *State v. Brown* (Del.) 61 Atl. 1077, 1078, 5 Pennewill, 339.

"Murder in the second degree" is the killing of a human being without a deliberately formed design to take life, or to perpetrate or attempt to perpetrate a crime punishable with death, but without justification, excuse, or sufficient provocation to reduce the homicide to manslaughter. *State v. Collins* (Del.) 62 Atl. 224, 226, 5 Pennewill, 263; *Same v. Bell* (Del.) 62 Atl. 147, 148, 5 Pennewill, 192.

"Murder in the second degree" is proved where it is satisfactorily shown that the killing was done with a sedate, deliberate purpose and formed design to take life, or in perpetrating or attempting to perpetrate any crime punishable with death, but is usually

shown to have been done suddenly, without justification or excuse, and without provocation sufficient to reduce the homicide to manslaughter or in the committing or attempting to commit a noncapital felony or an act of violence from which malice is presumed. *State v. Wilson* (Del.) 62 Atl. 227, 230, 5 Pennewill, 77.

"Murder in the second degree" is constituted by the absence of express malice on one side and extenuating circumstances or self-defense or adequate cause on the other; and where the one who killed another laid in wait for him and shot him, adequate cause and self-defense were not in the case, and the killing could not be lower than murder in the second degree. *Wheeler v. State*, 121 S. W. 166, 167, 56 Tex. Cr. R. 547.

"Murder in the second degree" is defined in Comp. Laws 1897, § 1064, as "every murder which shall be perpetrated without a design to effect the death, by a person while engaged in the commission of a misdemeanor, or which shall be perpetrated in the heat of passion without design to effect death, but in a cruel and unusual manner or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable homicide or which shall be perpetrated unnecessarily either while resisting an attempt by the person killed to commit any offense against person or property or after such attempt shall have failed." *Territory v. Hendricks*, 84 Pac. 523, 524, 13 N. M. 300.

"Murder in the second degree" is: First, all murder which shall be perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor; or, second, all murder which shall be perpetrated in the heat of passion without design to effect death, but in a cruel and unusual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide; or, third, all murder which shall be perpetrated unnecessarily, either while resisting an attempt by the person killed to commit an offense against the person, or property, or after such attempt shall have failed. Comp. Laws 1897, § 1064. An instruction that premeditation and malice aforethought are not elements of the crime of murder in the second degree, and defining it as the killing of a human being by the use of a dangerous weapon without premeditation and without malice aforethought, is erroneous. *Territory v. Gutierrez*, 79 Pac. 716, 718, 13 N. M. 138.

A killing in a combat which engenders hot blood is not "murder in the second degree," unless the elements of purpose and malice concur in the act. *Osburn v. State*, 73 N. E. 601, 604, 164 Ind. 262.

To constitute "murder in the second degree" in Texas, the statute only requires that

the killing be done in a passion aroused without adequate cause. *Redman v. State*, 108 S. W. 365, 367, 52 Tex. Cr. R. 591.

If a design to kill is formed in a mind excited by passion, or disturbed by any inadequate cause, and cooling time has not elapsed before the execution of the design, the homicide is not greater than "murder in the second degree." *Manning v. State*, 85 S. W. 1149, 48 Tex. Cr. R. 55.

"Murder in the second degree" is the wrongful killing of a human being with malice aforethought, but without deliberation. It is where the intent to kill is in a heat of passion, executed the instant it is conceived, or before there has been time for the passion to subside. *State v. Robertson*, 77 S. W. 528, 530, 178 Mo. 496.

One who intentionally and premeditatedly kills another with a deadly weapon, but while smarting under the insult and passion aroused by vile epithets spoken of him in his presence and hearing by deceased, is guilty of "murder in the second degree." *State v. Williams*, 84 S. W. 924, 927, 186 Mo. 128 (citing *State v. Wieners*, 66 Mo. 13; *State v. Ellis*, 74 Mo. loc. cit. 218, 219; *State v. Robinson*, 73 Mo. 306; *State v. McKenzie*, 76 S. W. 1015, 177 Mo. 699).

To reduce a murder from the first to the second degree, it is not necessary that the homicide should occur in a sudden transport of passion. A passion is not required to be sudden, nor is it necessary that there be a transport of passion, and if the mind of the slayer is not cool and deliberate when the intent is formed, but is laboring under any excitement or passion, this will reduce the homicide to the second degree. It is an undue limitation and restriction, calculated to cause a conviction of "murder in the first degree," for a charge on "murder in the second degree" to require the jury to believe that accused shot decedent in a sudden transport of passion. *Kannmacher v. State*, 101 S. W. 238, 242, 51 Tex. Cr. R. 118.

Though deceased brought on the difficulty by calling defendant names, and struck the first blow, yet, it having been with his hands, and he not having offered to strike him with anything else, and defendant having from the first cut and slashed deceased with his knife, and continued it after deceased had fallen, mortally wounded, a conviction of "murder in the second degree" is justified. *Hatchell v. State*, 84 S. W. 234, 237, 47 Tex. Cr. R. 380.

Mere words or epithets, however opprobrious or insulting, cannot justify the killing of the person who uses them, but his killing by one while in a violent passion aroused by such language, though not deliberate, is "murder in the second degree," if done willfully, premeditatedly, and of malice aforethought. *State v. Ballance*, 106 S. W. 60, 64, 207 Mo. 607.

"If a person to whom opprobrious epithets or insulting gestures are applied is thereby aroused to a sudden heat of passion, and, before such passion has had time to cool, with a deadly weapon kills the person who applies such opprobrious epithets or gestures to him, then such killing is done without deliberation, and a homicide committed under such circumstances is 'murder in the second degree.'" *State v. Brown*, 79 S. W. 1111, 1112, 181 Mo. 192.

Defendant, with another, went into a saloon of decedent, and there proposed to throw dice for the drinks, and invited decedent to throw and also to drink, both of which decedent refused to do, using at the time insulting language toward defendant. Thereupon, after drinking, defendant, with his companion, left the saloon. While walking away defendant suggested to his companion that decedent had it in for him (companion) as the reason why he had insulted defendant, to which his companion replied that decedent had nothing against him, but that he (defendant) was the man decedent was after. Defendant's companion then left him, and about 15 minutes later defendant returned to decedent's place with a pistol, and in a renewal of the difficulty shot decedent. Held that, if defendant's intent to kill was formed at the time of the first meeting, or after the conversation with his companion, and he then went for a pistol, and his mind was inflamed by the insulting language either at the time it was spoken or in the subsequent conversation with his companion, and cooling time had not elapsed before he returned and shot decedent, he was guilty of no greater offense than "murder in the second degree." *Rice v. State*, 108 S. W. 1156, 1168, 51 Tex. Cr. R. 255.

Our statute declares murders committed by lying in wait, by poison, and in attempt to perpetrate certain felonies, and all other willful, deliberate, and premeditated murders, to be of the first degree, and all other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, to be "murder in the second degree." Those murders committed in a heat of passion engendered, not by what was legal provocation at common law to reduce a homicide from murder to manslaughter, but by opprobrious epithets or other insults, sufficient to arouse the same heat of passion which would be caused by a technical, legal provocation, are of second degree. An instruction that, if deceased used words towards defendant which were a reasonable provocation for an assault by defendant on deceased, defendant is only guilty of manslaughter in the fourth degree was properly refused, since such provocation by mere words would only reduce the grade of the offense to murder in the second degree, where the party provoked used a deadly weapon with which he killed his opponent. *State v. Gartrell*, 71 S. W.



1045, 1053, 171 Mo. 489 (quoting and adopting *State v. Kotovsky*, 74 Mo. 247).

The killing of a human being with malice aforethought, without premeditation or deliberation, is, generally speaking, "murder in the second degree." Hence an instruction that the intoxication of accused should be considered in determining the degree of the murder was improperly refused. *State v. Williams*, 97 N. W. 992, 995, 122 Iowa, 115.

"Murder in the second degree" is the wrongful killing of a human being with malice aforethought, but without deliberation. Where the court, on a trial for murder, had defined "premeditatedly" as "thought of beforehand," and "malice aforethought" as meaning that the killing was done with malice and premeditation, an instruction that, if "the defendant did unlawfully, premeditatedly, and of his malice aforethought, but without deliberation, as defined in these instructions, kill the deceased," etc., to find him guilty of "murder in the second degree," was not objectionable in that it omitted to tell the jury that, to constitute that degree of murder, the homicide must be committed "willfully" or "intentionally." *State v. Marsh*, 71 S. W. 1003, 1004, 171 Mo. 523.

Any error in defining "murder in the second degree" as the felonious killing of a human being could not have misled the jury, where the court subsequently defined it as the felonious killing of a human being by one of sound memory and discretion with malice aforethought, which might be either express or implied, and such charge was afterwards repeated. *State v. Tweed*, 68 S. E. 139, 152 N. C. 843.

Where, in a prosecution for murder, the court properly presented the issue of self-defense, and correctly defined murder in the second degree, and then charged the jury to find defendant guilty if he shot deceased with a gun, which was a deadly weapon, and that such shooting was not under the immediate influence of sudden passion, produced by an adequate cause, and was not in defense of himself against an unlawful attack, etc., the charge is not erroneous, as nowhere charging that the killing must be unlawful or that such killing was done on malice, since, to justify a conviction of murder in the second degree, facts must be found which would make the killing unlawful under circumstances which would imply malice. *Pratt v. State*, 127 S. W. 827, 829, 59 Tex. Cr. R. 167.

An instruction, on a trial for murder alleged to have been committed in the perpetration of burglary by setting fire to the house burglarized and occupied by decedent, that if decedent occupied the house, and if accused broke and entered the same with the intent to fraudulently take corporeal personal property of value then and there in the house, and without the consent of decedent, and if ac-

cused, acting with implied malice aforethought, set fire to the house, and by reason thereof decedent was burned and died therefrom, etc., accused was guilty of "murder in the second degree," etc., sufficiently defined arson and burglary. *Jones v. State*, 110 S. W. 741, 742, 53 Tex. Cr. R. 131, 126 Am. St. Rep. 776.

In a prosecution for homicide, the court charged that, if a person by his own wrongful act brings about the necessity of taking the life of another to prevent being killed himself, he cannot claim that the killing is in self-defense, but the killing will be imputed to malice; that a person provoking a difficulty with another with the willful intention of killing the latter or of doing him serious bodily harm is guilty of murder, though he may have done the killing suddenly and without deliberation to save his own life, and if the jury believed beyond a reasonable doubt that defendant by his acts or language, or both, provoked the difficulty with deceased, and cause deceased to attack defendant with a gun, and defendant, pursuant to his original, unlawful and willful intention to kill deceased, shot and killed him to save his own life, the homicide would be "murder in the second degree." Held a correct charge on the issue of provoking a difficulty. *Woodard v. State*, 111 S. W. 941, 943, 54 Tex. Cr. R. 86.

Where accused intentionally shot decedent with a pistol and killed him, and the state failed to show beyond a reasonable doubt that the killing was done with deliberation and premeditation, accused was guilty of "murder in the second degree." *State v. Jones*, 59 S. E. 353, 354, 145 N. C. 466.

Where accused admitted that he killed decedent while holding the pistol so close to her body as to scorch her clothing, and he offered no excuse therefor except decedent's refusal to surrender a child of the parties, and that he fired to make her release the child, he was at least guilty of "murder in the second degree." *State v. Thompson*, 69 S. E. 254, 255, 153 N. C. 618.

Defendant and decedent, brothers, had an altercation, in which a knife was used, and defendant was ordered from their mutual home, and he returned an hour later, secured his clothing and a gun, and in a renewal of the difficulty killed decedent. Held, that if the intention to kill was formed through passion, without adequate cause, and a sufficient time had not elapsed for his mind to cool to the extent of contemplating the consequences of his act, he was guilty of no greater offense than "murder in the second degree." *Dixon v. State*, 103 S. W. 399, 401, 51 Tex. Cr. R. 555.

Accused admitted the shooting of decedent twice with a rifle, inflicting wounds either of which would produce death, and relied on self-defense. The killing took place

in the woods while the parties were hunting. Both had whisky with them, and accused admitted that he was a little drunk at the time of the shooting. There was no motive for the killing. The evidence showed a quarrel between them after a deer had been killed. Held to justify a finding of "murder in the second degree" within St. 1898, § 4339, defining murder in the second degree, as a killing perpetrated by any act imminently dangerous to others and evincing a depraved mind, though without any premeditated design to effect the death, instead of finding him guilty of murder in the first degree. Where the case was one where the jury might conclude from the evidence beyond a reasonable doubt that murder either in the first or second degree had been committed, but, not being wholly convinced that the greater offense had been perpetrated, the jury properly gave accused the benefit of the doubt, and found him guilty of murder in the second degree. *Lillystrom v. State*, 132 N. W. 132, 133, 146 Wis. 525.

Pen. Code 1895, art. 710, provides that every person who shall unlawfully kill any person with malice aforethought, either express or implied, shall be guilty of murder, and that all murder committed in the perpetration of robbery is murder in the first degree, and that all murder not of the first degree is murder of the second degree. *White's Ann. Code Cr. Proc.* art. 554, provides that, if the defendant pleads guilty, he shall be admonished of the consequences of such plea, and no such plea shall be received unless it appears that he is sane and is uninfluenced by fear or hope of pardon. Article 555 provides that where a defendant in a case of felony persists in pleading guilty, if the punishment of the offense is not absolutely fixed by law, a jury shall be impaneled to assess the punishment on evidence submitted to enable them to decide thereon. Pen. Code 1895, art. 712, provides that, if a person pleads guilty to murder, a jury shall be summoned to find of what degree of murder he is guilty. Held, that when an accused pleaded guilty of murder, and his plea was accepted by the court after examination, and evidence was introduced before a jury which conclusively showed that the murder was committed in the perpetration of robbery, the court was not compelled to submit the issue of second degree murder, under article 712. Neither was the court in error in not defining for the jury murder in the first degree. *Miller v. State*, 128 S. W. 864, 865, 58 Tex. Cr. R. 600.

#### Intent

Where there was a fixed purpose to do bodily harm, without killing, and death resulted, it was "murder of the second degree." *State v. Taylor*, 50 S. E. 247, 252, 57 W. Va. 228.

#### Malice

Malice is an essential element of "murder in the second degree." *State v. Reese* (Del.) 79 Atl. 217, 220, 2 Boyce, 434.

"Murder in the second degree" is a killing done with implied malice. *State v. Wiggins* (Del.) 76 Atl. 632, 635, 7 Pennewill, 127; *Same v. Borrelli* (Del.) 76 Atl. 605, 606, 1 Boyce, 349; *Same v. Underhill* (Del.) 69 Atl. 880, 882, 6 Pennewill, 491.

If the killing is shown to be unlawful, without any other proof, malice is implied, so as to make the slayer guilty of second degree murder. *Wilson v. State*, 129 S. W. 613, 614, 60 Tex. Cr. R. 1.

"Murder of the second degree" is committed where the killing is with malice aforethought implied by law, arising as an inference or conclusion of law from the facts found. *State v. Blackburn* (Del.) 75 Atl. 536, 539, 7 Pennewill, 479.

Where a killing is committed under the influence of a depraved heart, or with cruel indifference to human life, the law implies malice, and makes the offense "murder of the second degree"; the killing neither being deliberate nor in the heat of passion. *State v. Primrose* (Del.) 77 Atl. 717, 719, 2 Boyce, 164.

A charge that, when an unlawful killing is established, and the facts neither show express malice nor tend to mitigate, excuse, or justify the act, the law implies malice, and the killing constitutes "murder in the second degree," is a correct definition of murder in the second degree. *Burns v. State* (Tex.) 145 S. W. 356, 364.

"The crime of 'murder in the second degree' necessarily involves an act done with malice aforethought, but that term, used in defining the crime, is technical rather than descriptive. It does not necessarily require an intent to murder. Malice aforethought may be implied where there is no intent to kill but an intent to commit a felony, from which death results, although that result is unintended. That death resulting from a criminal attempt to commit an abortion constitutes murder in the second degree is in this state well settled." *State v. Gibbons*, 120 N. W. 474, 475, 142 Iowa, 96.

An instruction with reference to "murder in the second degree" that malice was not an essential ingredient of that offense, the distinguishing feature being that in murder in the first degree malice must be proved beyond a reasonable doubt, while in murder in the "second" degree malice will be implied from an unlawful killing, where the facts do not reduce it to manslaughter, that implied malice is that which the law infers from certain acts, however suddenly done, as when the fact of an unlawful killing is established, and there are no facts which establish the existence of express malice, and none which

tend to reduce the killing to manslaughter or to excuse it, then the law implies malice, correctly defined second degree murder. *Edwards v. State*, 135 S. W. 540, 546, 61 Tex. Cr. R. 307.

A charge that implied malice is what the law infers from or imputes to certain acts, however suddenly done, as when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice and the murder is in the second degree, was not upon the weight of the evidence, but was a general definition in effect that where an unlawful killing is shown, of which accused is guilty, and the evidence does not show express malice or facts justifying or excusing the homicide, or reducing it to manslaughter, such killing, being unlawful, is "murder in the second degree," stating the distinguishing features between murder in the first degree, murder in the second degree, and manslaughter. *Carson v. State*, 123 S. W. 590, 592, 57 Tex. Cr. R. 394, 136 Am. St. Rep. 981.

#### **Murder in first degree distinguished**

See Murder in First Degree.

### **MURDER IN THIRD DEGREE**

"Murder in the third degree," as defined in Comp. Laws 1897, § 1065, is "every killing of a human being by the act, procurement, or culpable negligence of another, which under the provision of this act is not murder in the first or second degrees and which is not excusable or justifiable homicide, as now defined by law." *Territory v. Hendricks*, 84 Pac. 523, 524, 13 N. M. 300.

### **MUSEUM OF ART**

As educational corporation, see Educational Corporation.

### **MUSHROOMS**

Truffles in tins are dutiable as "mushrooms in tins," by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170. *Von Bremen, MacMonnies & Co. v. United States*, 168 Fed. 889, 94 C. C. A. 301.

The provision in paragraph 241, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 170, for "mushrooms prepared or preserved," does not include mushrooms dried merely by evaporation, which are dutiable under paragraph 257 of said act, 30 Stat. 171, as "vegetables in their natural state." *Kraut v. United States*, 139 Fed. 94.

Mushrooms dried in order to preserve them and placed in hermetically sealed tins holding from 30 to 45 pounds, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170, relat-

ing to "mushrooms prepared or preserved, in tins, jars, bottles or similar packages," rather than paragraph 257, 30 Stat. 171, relating to "vegetables in their natural state." *Choy Chong Woh & Co. v. United States*, 153 Fed. 879, 82 C. C. A. 608.

### **MUSIC**

#### **MUSIC TEACHER**

As wage-earner, see Wage-Earner.

#### **MUSICAL**

"A well-recognized definition of 'musical' is of or pertaining to music or the performance of music." *Æolian Co. v. Hallett & Davis Piano Co.*, 184 Fed. 872, 880.

#### **MUSICAL COMPOSITION**

"A 'musical composition' is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention." *White-Smith Music Pub. Co. v. Apollo Co.*, 28 Sup. Ct. 319, 324, 209 U. S. 1, 52 L. Ed. 655, 14 Ann. Cas. 628.

In Rev. St. § 4952, the author or proprietor of any "musical composition," on compliance with the provisions of the copyright act, being given the exclusive liberty of copying and vending the same, the words "musical composition" undoubtedly relate to the intellectual conception of the composer. The act confers protection to only the material semblance in which the musical composition finds expression. A perforated record or sheet, designed to be played with mechanism, is not to be protected. *White-Smith Music Pub. Co. v. Apollo Co.*, 139 Fed. 427, 430.

#### **MUSICAL INSTRUMENT**

Certain metallophones and mouth organs or harmonicas, having at least one full octave, and capable of playing a musical air, but not so finished as to musical qualities that they would be used by musicians, being fitted rather for the amusement of children, are dutiable as "toys," under paragraph 418, Tariff Act July 24, 1897, c. 11 (30 Stat. 191), and not as "musical instruments," under paragraph 453 of said act (30 Stat. 193). *Borgfeldt v. United States*, 124 Fed. 473, 474.

Rev. St. 1899, § 3018, forbids a dramshop keeper to keep, exhibit, or use, or suffer to be kept, exhibited, or used in his dramshop, a piano, organ, or other musical instrument whatever, "for the purpose of performing upon or having the same performed upon in such dramshop." While a Regina Concerto, which is a musical machine set playing by dropping a coin in a slot, and thereby releasing the spring setting the machinery in motion, is a musical instrument, and winding it up and dropping a coin in the slot constitutes performing on it, it is not such a "musical instrument" as the Legislature meant to

designate in the statute, which meant the keeping of an instrument with the intention of the dramshop keeper to perform on it himself or engaging some one else to do so; the word "having" in the phrase "having the same performed on" not being synonymous with "permitting," but importing making an arrangement to have an act done. *Thiebes-Stierlin Music Co. v. Weiss*, 121 S. W. 1099, 1101, 142 Mo. App. 598.

A mechanical piano player is a "musical instrument." *Æolian Co. v. Hallett & Davis Piano Co.*, 134 Fed. 872, 880.

## MUSICIAN

As servant, see *Servant*.

## MUST

Words like "may," "must," "shall," etc., are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed. *Fields v. United States*, 27 App. D. C. 433.

### As mandatory

May construed as must, see *May*.

The word "must" is not always to be construed as mandatory. It has been construed as directory only. *People ex rel. Jerome v. Goff*, 98 N. Y. Supp. 66, 67, 49 Misc. Rep. 72 (citing *In re Hennessy*, 58 N. E. 446, 164 N. Y. 393).

"It is true the word 'must' is sometimes construed as 'may'—permissive—but this only when the context requires it. Where the context plainly shows the provision to be mandatory, the word 'must' is a command, and cannot be construed as permissive, but must be given the signification which it imparts." *Gibbs v. Gibbs*, 73 Pac. 641, 653, 26 Utah, 382.

Const. art. 2, § 20, declaring that "the style of the laws of this state shall be," etc., is mandatory and must be complied with; the word "shall" being equivalent to "must." *State ex rel. Gouge v. Burrow*, 104 S. W. 526, 529, 119 Tenn. 376, 14 Ann. Cas. 809.

The word "must," in Code Civ. Proc. § 483, providing that, where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action "must" be separate and numbered, and section 507 providing that defendant may set forth as many defenses as he has, and that each defense "must" be separately stated and numbered, is a mandatory word, and the provisions are mandatory, and the court cannot disregard them. *Stern v. Marcuse*, 103 N. Y. Supp. 1026, 1027, 119 App. Div. 478.

As used in Rev. St. 1899, § 2627, prescribing the order of trial in criminal cases, and providing that the prosecuting attorney

must first state the case, the word "must" is used in a mandatory or imperative sense. Hence it is not permissible for hired counsel to open and close to the jury on behalf of the state. *State v. Price*, 85 S. W. 922, 923, 111 Mo. App. 423.

In a statute providing for a hearing and determination of by the Supreme Court of an election contest, the provision that, on the presentation of the petition, the court "must" proceed to a summary canvass of the vote" should not be construed as depriving the court of its discretion to determine whether the petition presented facts justifying such action. *Metz v. Maddox*, 105 N. Y. Supp. 702, 708, 121 App. Div. 147 (concurring opinion of Judge Rich).

The word "must," in Municipal Court Act, § 25, subd. 5, providing that actions to recover a penalty or a fine for a violation of any provision of the Sanitary Code must be brought in the district where the violation happened or occurred, when that subdivision is read in connection with subdivision 4, providing that, if an action is brought in a different district, it may nevertheless be tried therein unless transferred to the proper district before trial on demand of the defendant made on or before joinder of issue, is not mandatory in the sense of taking away jurisdiction from a court other than the one specified as the place of trial, but simply gives the defendant an absolute right of removal to the proper district, if demand is made at the proper time and in the proper way. *Department of Health of City of New York v. Halpin*, 81 N. Y. Supp. 679, 681, 40 Misc. Rep. 243.

The word "must," as used in Pol. Code. § 4645, providing that the clerk of the district court must give each juror, when excused from service, a certificate, signed by himself under seal, stating the amount due him, etc., and on its presentation to the county treasurer the amount must be paid, etc., indicates that the duty of the clerk becomes imperative as soon as a juror is entitled to his pay, and that the duty of the treasurer is imperative as soon as a certificate properly issued by the district court is presented to him. *Ex parte Farrell*, 92 Pac. 785, 786, 36 Mont. 254.

Code Cr. Proc. § 466, provides that: "The application for a new trial 'must' be made before judgment, except an application made under subdivision 7 of section 465, which may be made at any time within one year, and except in case of a sentence of death, when the application may be made at any time before execution." The court says: "The learned judge at special term in his opinion herein said: Not always is the word 'must' to be construed as mandatory." "That is quite true, but, considering the history of these provisions, the prior state of the law, and that new trials in criminal cases are per-

missible by statute only, it seems to me that the words are too plain and imperative to permit of such construction. It is like a statute of limitations. If the motion for a new trial 'may' be made after judgment, 'may' a motion upon the ground of newly discovered evidence other than capital be made after a year?" *People ex rel. Jerome v. Court of General Sessions*, 98 N. Y. Supp. 557, 560, 112 App. Div. 424.

Code Civ. Proc. § 1670, provides that, when a notice of pendency of action is filed with the complaint, personal service of the summons "must" be made upon defendant within 60 days after the filing, or else, before the expiration of that time, publication of the summons must be commenced, or service thereof must be made without the state. Section 1674 authorizes the court in its discretion to cancel a *lis pendens* if a plaintiff filing the notice unreasonably neglects to proceed in the action. Held, that the provision of section 1670 is peremptory, and a failure to comply with it is a form of unreasonable neglect which requires the court to cancel the notice; and hence where a *lis pendens* was filed November 14, 1907, and an amended summons and complaint was filed November 18, 1907, and the summons and complaint were not served on defendant until January 20, 1908, no attempt being made to serve it until January 6th, and no attempt made to effect substituted service, the *lis pendens* should be canceled. *Brown v. Mando*, 109 N. Y. Supp. 726, 125 App. Div. 380.

Code Civ. Proc. § 134, as amended, provides that no court other than the Supreme Court "must" be open on any of the holidays mentioned in section 10, except to give instructions to juries on their request, to receive a verdict or discharge a jury, or for the exercise of the powers of a magistrate in a criminal action, and that injunctions and writs of prohibition may be issued on any day. Previous to the amendment of 1907 the section read no court "shall" be open nor shall any judicial business be transacted, etc., provided that the Supreme Court and the superior courts shall always be open for the transaction of business, and that injunctions and writs of prohibition may be issued on any day. Among the holidays mentioned in section 10 is any day appointed by the Governor for a holiday. Section 133 provides that courts of justice may be held and judicial business transacted on any day except as provided in section 134. Section 135 provides that, if any day mentioned in section 134 happens to be the day appointed for the holding of a court or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day. Held, that section 134 as amended March 19, 1907, still means what it has always meant, that the superior court shall not on a legal holiday transact any judicial business outside of the constitutional and statutory exceptions, notwithstanding

the substitution of the word "must" for "shall"; and hence a sentence pronounced on a day appointed by the Governor as a legal holiday was void. *Ex parte Smith*, 93 Pac. 191, 193, 194, 152 Cal. 566.

## MUTATIS MUTANDIS

Where profits are defined by a certain article, all the provisions of which are to apply to the relations between the parties springing into existence after the expiration of the contract "mutatis mutandis," these latter words mean necessary changes in details to conform to a single vital alteration, and suggest a reversal of the relative positions of the parties under the contract, which was to continue the same in other respects. *Copeland v. Eaton*, 95 N. E. 291, 209 Mass. 139, Ann. Cas. 1912B, 521.

## MUTE

See *Stood Mute*.

## MUTILATE—MUTILATION

"Mutilate" is defined by the Standard Dictionary as follows: "To cut off or deprive of a limb or essential part of, as an animal body; maim; cut or break off, or otherwise remove any part of, as a statue; disfigure; to retrench, remove, expunge, or delete an essential or material part of, so as to render incomplete or imperfect, as a literary composition; as to mutilate a speech." The main idea of such a definition is the removal of an essential part, so that the whole is rendered imperfect. A railroad ticket is not mutilated, within the meaning of a stipulation on the face thereof that it should not be good for passage if mutilated in any way, where both pieces are presented to the conductor at the same time, and it is apparent that they are parts of the same ticket, and that together they form the entire ticket. *Young v. Central of Georgia R. Co.*, 47 S. E. 556, 120 Ga. 25, 65 L. R. A. 436, 102 Am. St. Rep. 68, 1 Ann. Cas. 24.

Code Cr. Proc. 1895, art. 470, provides that, when an indictment or information has been lost, mutilated, or obliterated, the district or county attorney may suggest the fact to the court, and another indictment or information may be substituted. Held, that the county attorney had no authority to change the date of filing on an information and complaint, and that such change constituted a mutilation, rendering the same nugatory. *Kelly v. State*, 127 S. W. 544, 59 Tex. Cr. R. 14.

## MUTUAL

The words "mutual" and "mutually," as applied to an exception in the charter of a vessel, providing for allowances for demurrage and dispatch money, that delay from

causes beyond control of the parties shall be "always mutually excepted," cannot be construed in the sense of reciprocal in respect to the same broken engagement, but should be understood as meaning that the exception was intended to protect the parties from liability to each other, whenever performance of any covenant was prevented or delayed by any exception. *Pool Shipping Co. v. Samuel*, 200 Fed. 36, 118 C. C. A. 264.

### MUTUAL ACCOUNTS

An account of a miller for supplies furnished on the credit of a physician, pursuant to his orders, and an account of the physician for professional services rendered the miller and his family during the period of the furnishing of the supplies, consist of reciprocal demands constituting a mutual current account, within Code Civ. Proc. § 386, declaring that a cause of action on a mutual current account accrues from the time of the last item proved in the account on either side. *Miller v. Longshore*, 131 N. Y. Supp. 1041, 147 App. Div. 214.

An account of loans between the lender and the borrowing firm, kept on the firm's books or on slips of paper, did not constitute a "mutual, open, and current account," within Code Civ. Proc. N. Y. § 386, providing that in an action to recover a balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action was deemed to have accrued from the time of the last item proved in the account on either side. In *re Girvin*, 160 Fed. 197.

That one party kept one side of the account and the other party the other side thereof is immaterial in determining whether there were mutual accounts. *Lapham v. Kansas & Texas Oil, Gas & Pipe Line Co.*, 123 Pac. 863, 87 Kan. 65, Ann. Cas. 1913D, 813.

A current account kept by a husband of his transactions with his wife's money does not constitute a "mutual account," nor is an account mutual where it simply contains items of money, received and paid, nor one in which there were but three items of credit during a period of five years; cash items being also held to form no part of a mutual, open, and running account. In *re Girvin*, 160 Fed. 197.

A husband transferred his business and accounts due him to his wife, who executed to him a power of attorney to manage the business for her. At the time of the transfer, a debtor was indebted to the husband for goods sold at various times. After the transfer, an account therefor was rendered the debtor, who made a cash payment, and at various times delivered materials to the husband. Subsequently the wife reassigned the account to the husband. Held, that the account was an open account as distinguished from an account stated, since mutual ac-

counts are made up of matters of set-off, and there must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts. *Culver v. Newhart*, 123 Pac. 975, 18 Cal. App. 614.

A bill alleging damages to property growing out of the laying of a pavement and change of grade and praying for an accounting, alleging that it was necessary to raise plaintiff's residence, surface her yard, and various other things, does not state a cause wherein "the accounts to be investigated are mutual," within Const. 1890, § 161, relating to causes of which the chancery court and circuit courts have concurrent jurisdiction. *Murphy v. City of Meridian (Miss.)* 60 South. 48.

Where an officer of a corporation, acting as general manager with the knowledge and consent of the other officers and others interested, kept the books of the corporation in the usual course of business, and during the period of his service as manager credited himself from time to time with salary and charged against such credits items of cash received from time to time during such period, the account between him and the corporation was a "mutual, open account," within Rem. & Bal. Code, § 166, declaring that in an action on a mutual, open account the cause of action accrues from the time of the last item proved in the account on either side; there being nothing to show that the officer had not actually received the amounts charged from time to time. *Blom v. Blom Codfish Co.*, 127 Pac. 596, 71 Wash. 41.

### Items on both sides required

Under Rev. St. § 4226, providing that the cause of action for the balance due on a mutual and open account current accrues at the time of the last item proved therein, it is proper to charge that such an account "is an account consisting of credits as well as debits, charges, and credits, between the parties. An account in which A. charges B. with a number of items extending through a considerable time, but in which B. has no credits, is not a 'mutual and open account current.'" *Dunn v. Howard*, 41 N. W. 707, 73 Wis. 545 (citing and adopting *Hannon v. Engelmann*, 5 N. W. 791, 49 Wis. 282; *Fitzpatrick v. Estate of Phelan*, 16 N. W. 606, 55 Wis. 254).

### Payments alone insufficient

The claim for services and the 47 items of expenses set forth in the petition, with proper credits of payments thereon, constitute one account only. The answer challenges the correctness of the charge for services and of the items of expenses therein, and sets forth 34 items of alleged payments which, if correct, should have been included in the account. Held, that no "mutual accounts" were involved. *Lapham v. Kansas & Texas Oil, Gas & Pipe Line Co.*, 123 Pac. 863, 87 Kan.

65, Ann. Cas. 1913D, 813 (citing 5 Words and Phrases, p. 4647).

Where the items of an account are all on one side, there being none on the other side, except credits of payment, or where the account consists merely of matters of charge on the one side and demands of set-off on the other, it is not a "mutual account." *Hoosier Const. Co. v. National Bank of Commerce of Seattle*, 73 N. E. 1006, 1008, 35 Ind. App. 270.

A "mutual account" implies a reciprocity of dealing between the parties to the account, and is made up of matters of set-off wherein each party has a right of action against the other; and a set-off can be pleaded only when the right of action is against the plaintiff in the same capacity as that in which he is prosecuting his claim; and an individual obligation is not a matter of set-off to a partnership claim or to a claim by the plaintiff in a representative capacity; nor can a partnership debt be a set-off to a claim by one of the members of the partnership; and, on a general payment on an open account between them, the account would not for that reason have been rendered mutual, since the mere payment of money upon an account does not have that effect, but operates simply as a reduction pro tanto of the claim. *Flynn v. Seale*, 84 Pac. 263-265, 2 Cal. App. 665.

Where the items of an account are all on one side as between a shopkeeper and his customer, and where goods are charged and payments credited, there is no "mutuality" which will prevent the statute from barring the account. Under Rev. Code Civ. Proc. § 64, providing that an action for a balance due upon an open account, where there have been reciprocal demands, shall be deemed to accrue from the time of the last item proved on account on either side, an account consisting entirely of charges on one side and a payment on account on the other is not a mutual account; the important prerequisite being a condition of mutuality and reciprocity of dealing sufficient to reasonably justify the inference of an understanding between the parties that the items of one account are to be set off against the items of the other, so far as they go. *McArthur v. McCoy*, 112 N. W. 155, 157, 21 S. D. 314 (quoting *Bouv. Law Dict.*).

#### MUTUAL AGREEMENT

A "mutual agreement" implies an offer and acceptance, or a promise for a promise, and means a reciprocal agreement, or one that requires something to be done or forborne by either party for the other. *Grossman v. Schenker*, 100 N. E. 39, 206 N. Y. 466.

#### MUTUAL AND DEPENDENT COVENANTS

Where a written contract for the sale of land recited the payment of a sum down by the purchaser, and required him to pay the remainder of the purchase money on a

specified date, and further provided that on such payment being made the vendor should "on demand thereafter" cause to be executed to the purchaser "a good and sufficient deed in fee simple of the premises above described, free and clear of all legal liens and incumbrances," the covenants for payment of the purchase money and for the delivery of the deed conveying a good title were "mutual and dependent," and a tender of performance by the vendor in accordance with the contract was a condition precedent to his right to maintain an action to recover the purchase money from the purchaser. *Michigan Home Colony Co. v. Tabor*, 141 Fed. 332, 336, 72 C. C. A. 480.

#### MUTUAL AND OPEN ACCOUNT

See Mutual Accounts.

#### MUTUAL AND RECIPROCAL

Where a husband and wife, advanced in years, and each owning separate property, agreed that they would have their wills made, and he made a will giving her a life estate in his property, and she conveyed her property to him, the deed to take effect on her death, but it did not appear that any agreement was made between them as to the terms of the will, or that one was to be the consideration for the other, a contention that the deed and the will were "mutual and reciprocal," and for that reason irrevocable, was without merit. *Sappingfield v. King*, 90 Pac. 150, 49 Or. 102, 8 L. R. A. (N. S.) 1066.

#### MUTUAL ASSENT

Element of sale, see Sale.

"Mutual assent" is assent to the same thing in the same sense and under a common understanding of the stipulations agreed to. *Martin v. Thrower*, 60 S. E. 825, 3 Ga. App. 784.

#### MUTUAL COMBAT

"Mutual combat" can exist where there is "mutual intent" to fight, though only one of the parties strikes a blow. *Lee v. State*, 58 S. E. 676-678, 2 Ga. App. 481.

"Mutual combat," within the meaning of Pen. Code, § 73, providing that, if a person kill another in his defense, it must appear that the danger was so urgent and pressing that to save his own life the killing of the other was absolutely necessary, and that it must appear also that the person killed was the assailant, or that the slayer had in good faith endeavored to decline any further struggle, is a mutual fight following a mutual intention to fight with felonious purpose. *Warnack v. State*, 60 S. E. 288, 290, 3 Ga. App. 590.

A charge that if defendant believed a deceased had taken possession of a field claimed by him, and would be there with an armed party on the morning of the killing, and they had made threats against the life

of defendant, and defendant, knowing all these things, voluntarily organized a party, arming them with deadly weapons for the purpose of meeting such parties in deadly conflict, and a conflict ensued and the deceased was killed, then such conflict was a "mutual combat," and all parties intentionally engaged in it are guilty of murder, was not under the theory of the prosecution erroneous. *Driggers v. United States*, 95 Pac. 612, 21 Okl. 60, 129 Am. St. Rep. 823, 17 Ann. Cas. 66.

### MUTUAL CONSENT

To constitute a contract, the agreement must be mutual and communicated to each other, and "consent is not mutual" unless the parties all agree upon the same thing in the same sense. *Humphrey v. Timken Carriage Co.*, 75 Pac. 528, 533, 12 Okl. 413.

### MUTUAL CONTRACTS

See Mutuality of Contract.

For a contract to be "mutual," an obligation must rest on each party to do or permit to be done, something in consideration of the act or promise of the other; that is, neither party can be bound, unless both are bound. *Cal Hirsch & Sons Iron & Rail Co. v. Paragould & M. R. Co.*, 127 S. W. 623, 148 Mo. App. 173.

### MUTUAL COVENANTS

See Mutual and Dependent Covenants.

### MUTUAL CREDITS

"Mutual debts or mutual credits," within the Bankruptcy Act, providing that, in all cases of "mutual debts" or "mutual credits" between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid, are established on proof that an insolvent has money on deposit in a bank subject to check, and also owes the bank on a promissory note, the money deposited being the money obtained on the note, and the bank may, before the insolvent is declared a bankrupt, credit the amount of the deposit on the debt due on the note. *West v. Bank of La-homa*, 85 Pac. 469, 471, 16 Okl. 328.

The Bankruptcy Act of 1898, providing that, in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and only the balance paid. The Bankruptcy Act of 1867 had a substantially similar provision taken from the earlier English acts, under which it was decided that "mutual credits" must in their nature terminate in debts, or a debt be in the contemplation of the parties. Some of the latter English cases arose under the more recent English acts, in which the term "mutual dealings" was used, and this the court said is a much more comprehensive term than "mutual credits." It was held

that the act of 1898 does not authorize the setting off against the claim of a landlord for rent under a lease to the bankrupt of an unliquidated claim for damages in favor of the bankrupt, sounding in tort, and arising independently of the contract of lease. In *re Becker Bros.*, 139 Fed. 366, 367.

A bailment contract, transferring the possession of a mercantile business to the bankrupts to operate the same for a year, provided that, for the use of the property, the bankrupts should pay to the bailor certain percentages on sales, and rent and insurance; that the bankrupts should keep the stock up to within \$500 of the original inventory value; that on termination of the contract the bailor should pay any inventory excess up to \$500; and that the bankrupts should be liable for any deficiency. On the termination of the contract, the inventory excess amounted to \$1,323.42, but the bankrupts were indebted to the bailor on account of unpaid insurance and percentages on sales etc., \$679.73. Held, that such items were "mutual debts and credits," as defined by Bankr. Act July 1, 1898, c. 541, § 68 (30 Stat. 565), providing that such claims shall be set off in bankruptcy. *Walther v. Williams Mercantile Co.*, 169 Fed. 270, 94 C. C. A. 546.

A claim for money expended as quasi surety for a bankrupt is a "mutual credit," within section 68 of the bankrupt act, providing inter alia that, in all cases of mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other. etc. *Wagner v. Burnham*, 73 Atl. 990, 991, 224 Pa. 586.

While equity usually follows the statutes allowing a set-off or counterclaim in an action at law, and while ordinarily a mere claim or account will not furnish ground for equitable relief, and while equity will intervene and effect a set-off only when, under the strict rules of law, justice cannot be effectuated, equity, independent of statute, and under its general jurisdiction, will grant relief where, though there are mutual and independent debts, there is a mutual credit between the parties founded on the existence of some debt due by the crediting party to the other; "mutual credit" meaning mutual trust. *Tuttle v. Bisbee*, 120 N. W. 699, 144 Iowa, 53.

### MUTUAL DEALINGS

"Mutual dealings," within the statute of limitations applicable to an account, may consist of one item or many items on each side of the account. It is the nature and not the extending of the dealings that give them the character of mutuality. *Benjamin v. Webster*, 65 Me. 170, 171.

### MUTUAL DEBTS

"Mutual debts or mutual credits," within the Bankruptcy Act, providing that, in all cases of "mutual debts or mutual credits"



between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid, are established on proof that an insolvent has money on deposit in a bank subject to check, and also owes the bank on a promissory note, the money deposited being the money obtained on the note, and the bank may, before the insolvent is declared a bankrupt, credit the amount of the deposit on the debt due on the note. *West v. Bank of Lahoma*, 85 Pac. 469, 471, 16 Okl. 328.

A firm note to a bank, assumed by an insolvent partner on dissolution, became his individual indebtedness, and such debt with the amount due him as a depositor, independent of any partnership consideration, became mutual debts within Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565), § 68, allowing set-offs. *Hooks v. Gila Valley Bank & Trust Co.*, 100 Pac. 806, 12 Ariz. 815.

A bailment contract transferring the possession of a mercantile business to the bankrupts to operate the same for a year provided that, for the use of the property, the bankrupts should pay to the bailor certain percentages on sales, and rent and insurance, that the bankrupts should keep the stock up to within \$500 of the original inventory value, that on termination of the contract the bailor should pay any inventory excess up to \$500, and that the bankrupts should be liable for any deficiency. On the termination of the contract, the inventory excess amounted to \$1,323.42, but the bankrupts were indebted to the bailor on account of unpaid insurance and percentages on sales, etc., \$679.73. Held, that such items were "mutual debts and credits" as defined by Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565, providing that such claims shall be set off in bankruptcy. *Walther v. Williams Mercantile Co.*, 169 Fed. 270, 94 C. C. A. 546.

#### MUTUAL FIRE INSURANCE COMPANY

A mutual fire insurance company organized under the laws of the state is an association to provide mutual relief for loss by fire, and all policy holders are members, and each has the same proportionate interest, and is liable to the same proportionate extent. *J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 119 N. W. 1048, 18 N. D. 253.

#### MUTUAL INSURANCE

"Mutual insurance" is essentially different from 'stock insurance,' and much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to local business. They need many by-laws and conditions that

are not required in stock companies; and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires toward himself." *J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 119 N. W. 1048, 1049, 18 N. D. 253 (quoting with approval from *May, Ins.* § 146).

#### MUTUAL IRRIGATION COMPANY

An irrigation company organized under the laws of the state, which derives no revenue from the operation of its canal and conducts its business solely to irrigate the lands of its stockholders, is, de facto, a "mutual irrigation company" as defined by *Cobbey's Ann. St. 1909*, § 6845. *Swanger v. Porter*, 128 N. W. 516, 87 Neb. 764.

#### MUTUAL MISTAKE

To constitute a "mutual mistake" so as to authorize reformation of an instrument, the minds of the parties must meet in a common intent. *Potter v. Frank*, 76 Atl. 489, 106 Me. 165.

In an action on a contract, findings held not to show a mutual mistake, entitling defendant to equitable relief from the contract for a breach of which plaintiff seeks to recover damages. *C. H. Young Co. v. Springer*, 129 N. W. 773, 113 Minn. 382.

A "mutual mistake," which will justify the reformation of an instrument, is a mistake reciprocal and common to both parties, where each alike labored under the same misconception in respect to the terms of the instrument. Equity will not reform a written contract, unless the mistake is proved to be a mistake of both parties, but may rescind and cancel a contract upon the ground of mistake of facts material to the contract by one party only. *Coleman v. Illinois Life Ins. Co. (Ky.)* 82 S. W. 616, 617 (citing *Botsford v. McLean [N. Y.]* 45 Barb. 478; *Pritchett v. Frisby [Ky.]* 68 S. W. 10; *Bush v. Starks [Ky.]* 65 S. W. 589; *Reeder v. Lewis & Mason Turnpike Road*, 7 Ky. Law Rep. 373; *Tandy's Assignee v. Hatcher & Co.*, 9 Ky. Law Rep. 151; *Stockhoff & De Witt v. Brannin*, 14 Ky. Law Rep. 717).

A mistake in a conveyance as to the subject-matter surveyed, superinduced by ignorance of the true description of the land which the grantor intended to sell and the grantee intended to buy, when participated in by both parties, is a "mutual mistake of fact" which equity will correct. *American Ass'n v. Williams*, 166 Fed. 17, 93 C. C. A. 1.

#### MUTUAL RELIEF ASSOCIATION

A "live stock insurance company" incorporated under Rev. St. 1895, art. 642, subd. 46, authorizing the incorporation of fire, marine, life, and live stock insurance companies, to conduct a live stock insurance company on a mutual or co-operative plan without

capital stock, and to issue policies of indemnity on live stock to its members, is a live stock insurance company conducted on the mutual or co-operative plan, and is not a "mutual relief association" within article 3096, providing that nothing in the title—title 58, entitled "Incorporation of Insurance Companies"—shall apply to mutual relief associations. *State v. Burgess*, 109 S. W. 922, 101 Tex. 524.

### MUTUAL STANDARD

The term "mutual standard," as used with reference to mutual standards in the construction of ambiguous words or clauses in contracts, means the meaning in which an ambiguous word or phrase was used and accepted by both parties to the contract or undertaking to express in writing the terms of the actual agreement. It is subject to the modification that a clear and unambiguous meaning will not be overthrown by resort to parol to determine what the parties actually meant. *West v. Hermann*, 104 S. W. 428, 47 Tex. Civ. App. 131.

### MUTUAL WILL

See, also, Reciprocal Will.

A joint will is a single instrument containing the wills of two or more persons. A "mutual will," or, more strictly speaking, a reciprocal will, is one by which each testator makes testamentary disposition in favor of the other. *Bower v. Daniel*, 95 S. W. 347, 357, 196 Mo. 259 (citing *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *In re Diez*, 50 N. Y. 88; *Cawley's Estate*, 20 Atl. 567, 136 Pa. 628, 10 L. R. A. 93).

A "joint will" is one where the same instrument is made the will of two or more persons and is jointly signed by them, being not necessarily either mutual or reciprocal, while "mutual wills" are the separate wills of two persons reciprocal in their provisions. A will that is both joint and mutual is one executed jointly by two or more persons, the provisions of which are reciprocal, and which shows on its face that the devises are made one in consideration of the other. A joint will which is not reciprocal is simply the individual personal will of each of the persons signing it and is subject to the same rules as apply to several wills. *Frazier v. Patterson*, 90 N. E. 216, 243 Ill. 80, 27 L. R. A. (N. S.) 508, 17 Ann. Cas. 1003.

A testamentary disposition contained in one writing disposing of property held jointly is a "joint will"; whereas, the same document, if it refers to and deals with property held separately, would be a "mutual will." *Deseumeur v. Rondel*, 74 Atl. 703, 76 N. J. Eq. 394.

### MUTUALITY OF CONTRACT

See Mutual Contracts.

"Mutuality of contract" means that an obligation rests upon each party to do or

permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless the both are bound. Where a contract under which plaintiff was to cut and deliver, at defendant's factory, timber of certain dimensions at a certain price, did not bind plaintiff to furnish any specified quantity thereof, but left him at liberty to cease cutting and delivering at any time, there was no mutuality of contract. *Campbell v. American Handle Co.*, 94 S. W. 815, 816, 117 Mo. App. 19.

"Mutuality of contract" means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." Where it was alleged that plaintiff promised to marry defendant on his request, and that defendant promised plaintiff to so marry her on his request, the agreement was unenforceable for lack of mutuality; defendant's engagement being a mere option to marry plaintiff. *Smythe v. Greacen*, 91 N. Y. Supp. 450, 457, 100 App. Div. 275.

"Mutuality of contract" means that an obligation must rest upon each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound. A contract by which a city gave defendant the privilege of sorting and appropriating to his own use refuse at specified dumps of the department of street cleaning for one year, in consideration of a certain weekly payment, the city reserving the right to at any time change the locations and increase the number of dumps, was not void for want of mutuality; there being an implied obligation on the part of the city to provide for one year the refuse for defendant's use at the places named in the contract. *City of New York v. Paoli*, 116 N. Y. Supp. 544, 546, 63 Misc. Rep. 411 (quoting and adopting definition in *Laclede Construction Co. v. Tudor Iron Works*, 60 S. W. 384, 160 Mo. 137).

"Mutuality of contract" means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." Where plaintiff contracted with third persons to make excavations for them for railroad side tracks, on the agreement of defendant railroad company, held out by it as an inducement for his making the excavation contract, that it would furnish the cars and take away the dirt, there is no lack of mutuality in the agreement between plaintiff and defendant. *St. Louis, I. M. & S. R. Co. v. Clark*, 119 S. W. 825, 827, 90 Ark. 504.

An engagement lacks "mutuality" where one party is bound and the other is not; for example, where one offers to supply another with such goods of a certain kind as he may

choose to order or may wish during a certain time, and the other accepts the offer. In such case, there is no consideration for the promise or offer; for the promisee has not bound himself to anything and has incurred no legal liability at all. *Steinwender-Stoffregen Coffee Co. v. F. T. Guenther Grocery Co. (Ky.)* 80 S. W. 1170, 1171 (citing 7 Cyc. p. 327).

A contract is void for lack of "mutuality" where there is no consideration for the promise of one party to furnish or sell so much of the commodity as the other may want, except the promise of the other to take and pay for so much of the commodity as he may want, and there is no agreement that he shall want any quantity whatever, and no method exists by which it can be determined whether he will want any of the commodity, or what quantity he will want. *Higbie v. Rust*, 71 N. E. 1010, 1011, 211 Ill. 333, 103 Am. St. Rep. 204.

"Where there is an agreement founded on a consideration, it is not invalid for want of 'mutuality' because one party has an option and the other has not; or, in other words, because it is obligatory on one and optional on the other. So want of 'mutuality' cannot be set up as a defense by the party who has received the benefit simply because it was left optional with the other as to whether he would enforce his right." *Pittsburg Vitrified Paving & Building Brick Co. v. Bailey*, 90 Pac. 803, 805, 76 Kan. 42, 12 L. R. A. (N. S.) 745 (quoting and adopting definition in 9 Cyc. p. 334).

A contract between an iron company and a railroad company, evidenced by a writing reciting that the iron company obligated itself to furnish such rails of a certain kind and splice bars as it might have, without any showing of any contract or act of the railroad company recognizing the existence of the contract between the parties, is void for lack of mutuality. *Cal Hirsch & Sons Iron & Rail Co. v. Paragould & M. R. Co.*, 127 S. W. 623, 148 Mo. App. 173.

A contract of employment, reciting that the employé "is to begin service for" the employer on a specified date "and as manager of local agencies for" the employer at a specified salary, "it being mutually understood that the said position here given" the employé "is for five years," and the ability and willingness of the employé "to perform the duty of his position are also a part of the essentials" of the agreement, is not void for want of "mutuality"; there being an obligation on the employé to serve for five years and on the employer to continue him in the service for such period. The word "mutually" means reciprocally given and received. It means an interchange of promises between the parties that the thing stated is agreed to. *Butterick Pub. Co. v. Whitcomb*,

80 N. E. 247, 248, 225 Ill. 605, 8 L. R. A. (N. S.) 1004.

## MUTUALITY OF LEGAL RIGHT

The term "mutuality of legal right," as used in the rule that specific performance will not be decreed unless there is mutuality of legal right as well as of remedy, means only that the contract must be binding on both parties, i. e., that it is nudum pactum. *Naylor v. Parker (Tex.)* 139 S. W. 93.

## MUTUALLY

See Mutual.

## MUTUALLY ACKNOWLEDGED

See Acknowledge—Acknowledgment.

## MUTUALLY BOUND

The words "mutually bound," as used in Civ. Code, § 1301, with reference to the obligations of coterminous owners in respect to the maintenance of boundaries and fences between them, necessarily suggest that the burden must rest equally upon each, and as applied to fences, this burden includes one-half of the ground upon which the fences shall rest. *Hoar v. Hennessy*, 74 Pac. 452, 454, 29 Mont. 253.

## MUTUALLY INDEBTED

Rev. St. 1899, § 4487, provides that, if any "two or more persons are mutually indebted" in any manner whatsoever, and one of them commences an action against the other, one debt may be set off against the other, though such debts are of a different nature. Held, that where plaintiff was indebted to defendant on certain judgments, and plaintiff claimed that defendant was liable for damages for conversion of personal property, plaintiff and defendant were not "mutually indebted," defendant's claim being in contract, while plaintiff's was in tort; and hence the claims could not be set off. *Caldwell v. Ryan*, 108 S. W. 533, 210 Mo. 17, 16 L. R. A. (N. S.) 494, 124 Am. St. Rep. 717, 14 Ann. Cas. 814.

## MY

All my estate, see All.

All my lands, see All.

All my property, see All.

A mortgage, though using the pronouns "I" and "my," being signed by both husband and wife, included the wife as well as the husband, though she was not named in the body of the instrument, and was therefore sufficient to cover the grantors' homestead interest in the land. *Bray v. Ellison (Ky.)* 83 S. W. 96, 97.

While the words "I" and "my" in a mortgage ordinarily refer to the actor or speaker, who expresses himself through the draftsman, the connection in which they are used may sometimes make it doubtful to whom they refer, and they will not be considered

to have been so used, where the effect would be to burden the mortgagee with a condition which the mortgagor could not impose. *Jones v. Norris*, 60 S. E. 714, 715, 147 N. C. 84.

#### **My estate**

An agreement to sell "my estate," without any provision as to the vendor's title, did not clearly show that the land was free from incumbrance or define the title to be conveyed, so that parol evidence was admissible to show that it was understood that the deed was to be subject to a lease on the property. *Jennings v. Puffer*, 89 N. E. 1036, 208 Mass. 534.

Where certain real estate had been conveyed for the use of testatrix for life, with remainders over, by a deed providing that she at any time, by any writing or writings sealed and attested, might revoke, annul, change, and alter all and every use or uses, estate or estates, previously and expressly limited and declared concerning the premises granted, testatrix properly executed such power by a will reciting that as to all "my" estates, real and personal, and "with intent to execute all powers vested" in her, she gave, devised, bequeathed, and appointed the property as follows, etc. *Du Bois v. Walnut*, 70 Atl. 796, 221 Pa. 235.

#### **My executor**

A will empowering "my executor" to compromise claims and to sell and dispose of property, and providing that, in case of the executor's death, it is testator's wish that designated other persons act as trustees and executors, with all the powers vested in the original executor, vests the legal title to the real estate, with power to sell and convey the same in the executor, as trustee under the will, and not by virtue of appointment by the court. *Haggart v. Ranney*, 84 S. W. 703, 704, 73 Ark. 344.

#### **My farm**

A devise of "my farm" includes, not only the testator's homestead, but also other outlying lots, which had been used by the testator in carrying on the business of farming for years before he wrote his will, and which had been referred to in business transactions as his farm. *Scoville v. Mason*, 57 Atl. 114, 115, 76 Conn. 459.

#### **My hand and seal**

The clause in a will, "I have hereunto set my hand and seal," does not necessarily import that testatrix signed her name with her own hand, as it became her hand if her name was written by some one at her direction to the same extent as if she had written it with her own hand. *Elston v. Montgomery*, 90 N. E. 3, 242 Ill. 348, 26 L. R. A. (N. S.) 420.

#### **My house and lot**

"In *Warvelle on Vendors*, § 135, it is said that a description as 'my house and lot' imports a particular house and lot rendered certain by the description that it is the one that belongs to 'me.'" *Moayon v. Moayon*, 72 S. W. 33, 38, 114 Ky. 855, 60 L. R. A. 415, 102 Am. St. Rep. 308.

#### **My land**

The words "my land," prefixed to an uncertain description of a tract of land in a certain section wherein a testator devising the land had but one tract, would remove the uncertainty. In *re Lynch's Estate*, 75 Pac. 1086, 1088, 142 Cal. 373.

#### **My legal heirs**

A clause in a will providing for the division of property among "my legal heirs" refers to the next of kin and legal heirs of the testator, and does not include the next of kin or legal heirs of his wife. *Miller v. Metcalf*, 58 Atl. 743, 744, 77 Conn. 176.

#### **My moneys, bonds, etc.**

A bequest to a hospital of "my moneys, bonds, notes, and money in savings bank" included railroad stock and scrip, when considered in the light of the other provisions and the general construction of testator's will, which provided for the payment of all testator's debts and two small legacies, then disposed of testator's live stock, household furniture, and land to the hospital, which left to be disposed of merely notes, bonds, money in savings bank, and the railroad stock and scrip; the stock and scrip being avails of the bonds, and the testator's evident intention being to dispose of the bulk of his whole estate to the hospital. *Scoville v. Mason*, 57 Atl. 114, 115, 76 Conn. 459.

#### **My property**

Testator gave all "my" furniture and stock and the farm on which "I now reside" to his wife for life, with remainder over, and directed that all legacies should be paid out of "my" estate. The residuary clause purported to pass only "my" property. Held, that the will disposed only of testator's separate property, and did not purport to dispose of community property, so as to require the wife to elect whether to take under the will or her own property. *Sauvage v. Wauhop* (Tex.) 143 S. W. 259.

"My property," and the "property I possess," mean one and the same thing. *Thomas v. Blair*, 35 South. 811, 813, 111 La. 673.

#### **My wife**

A bequest in a will to "my said wife, C." is to C. as testator's wife, and, if she failed to answer that description, the gift to her would fail. The words "my wife," as used here, are not words of description to desig-

nate the legatee, but rather to indicate the character or capacity in which alone she could take. *Collard v. Collard* (N. J.) 67 Atl. 190, 192.

**My will**

Insured assigned all his right, title, and interest in certain life insurance policies to "trustees to be named in my will," for plain-

tiff's use. Held to mean the trustees named in the document finally admitted to probate as the will of insured. *Frost v. Frost*, 88 N. E. 446, 202 Mass. 100, 27 L. R. A. (N. S.) 184, 132 Am. St. Rep. 476.

**MYELITIS**

As disease, see Disease.

## N

**N. P.**

The initials "N. P." will be recognized by the court as the usual and ordinary abbreviation for the official title of a notary public. *Towler v. Carithers*, 61 S. E. 1132, 1133, 4 Ga. App. 517; *Williams v. Lobban*, 104 S. W. 58, 59, 206 Mo. 399 (citing *Sumner v. Mitchell*, 10 South. 562, 29 Fla. 179, 14 L. R. A. 815, 30 Am. St. Rep. 106; *Rowley v. Berrian*, 12 Ill. 198); *Worley v. Adams*, 69 S. E. 929, 931, 111 Va. 793.

**N. W.**

The abbreviation "N. W." in the column headed "Part of Section," is sufficient to identify the land as the northwest quarter of the section named in the assessment roll. *Beggs v. Paine*, 109 N. W. 322, 15 N. D. 436 (distinguishing *Power v. Bowdle*, 54 N. W. 404, 406, 3 N. D. 107, 21 L. R. A. 323, 44 Am. St. Rep. 511; *Power v. Larabee*, 49 N. W. 724, 2 N. D. 141).

**NAKED****NAKED POWER**

A "naked power," or a power simply collateral and without interest, "is when, to a mere stranger, authority is given of disposing of an interest, in which he had not before, nor hath, by the instrument creating the power, any estate whatever." *Weaver v. Richards*, 108 N. W. 382, 387, 144 Mich. 395, 6 L. R. A. (N. S.) 855 (quoting and adopting definition in *Chancellor Kent in Bergen v. Bennett* [N. Y.] 1 Caines Cas. 1, 15, 2 Am. Dec. 281).

**NAME**

See Christian Name; Fictitious Name; Good Name; Legal Name; Nickname; Surname; Trade-Name.

As property, see Property.

As trade-mark, see Trade-Mark.

Identity of names, see *Idem Sonans*.

Ignorant of name, see Ignorant.

Suffix Sr. as part of, see Sr.

By the common law since the Norman Conquest, a legal name has consisted of one "Christian name," or that which is given one after his birth or at baptism, or is afterwards assumed by him in addition to his family name, and of one "surname," or family name, which is that derived from the common name of his parents, or borne by him in common with other members of his family. *Schaffer v. Levenson Wrecking Co.*, 81 Atl. 434, 82 N. J. Law, 61.

In law, the name of a person consists of one given name and one surname; the two, using the given name first and the surname

last, constituting such person's legal name; and to be ignorant of either the given or surname is to be ignorant of the person's name within Code Civ. Proc. § 148, providing that, when plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and that, when his true name is discovered, the pleading or proceeding may be amended accordingly, and that plaintiff must state in the verification of his petition that he could not discover the true name, and the summons must contain the words "real name unknown" and a copy thereof be personally served upon defendant. *McNamara v. Gunderson*, 131 N. W. 183, 184, 89 Neb. 112.

"The word 'Junior,' 'Jr.,' or words of similar import are ordinarily mere matters of description, and form no part of a person's legal 'name,' and to omit or add such appellation or cognomen is harmless error, both in civil and in criminal proceeding." *Windom v. State*, 72 S. W. 193, 194, 44 Tex. Cr. R. 514.

**Full name**

In giving constructive notice to a defendant not sued on a written instrument signed by himself, his legal name includes his full first Christian name and surname. *Butler v. Smith*, 120 N. W. 1106, 1107, 84 Neb. 78, 28 L. R. A. (N. S.) 436.

On service by publication on defendant in a suit to foreclose a mortgage where he is not sued on a written instrument signed by himself, notice to "R. B. Ballard" not showing his Christian name is insufficient. *McCabe v. Equitable Land Co.*, 129 N. W. 1018, 1019, 88 Neb. 453.

**As indicating identity**

A person's name is the designation by which he is known and called in the community in which he lives and is best known. *Loser v. Plainfield Savings Bank*, 128 N. W. 1101, 1103, 149 Iowa, 672, 31 L. R. A. (N. S.) 1112.

The word "name" is defined as "a word by which a person or thing is denoted; the word or words by which an individual, person, or thing, or class of persons or things, is designated and distinguished from others." *Koth v. Pallachucola Club*, 61 S. E. 77, 78, 79 S. C. 514; *Uihlein v. Gladieux*, 78 N. E. 363, 365, 74 Ohio St. 232 (citing *Bouv. Law Dict.* 467).

A "name" is a word or words, designation, or appellation used to distinguish a person or thing or class from others, and words indicated by single letters are only less adapted to that purpose than words indicated by several letters. *Griffith v. Bonawitz*, 103 N. W. 327, 329, 73 Neb. 622.

"A man's 'name' is simply the sound or sounds by which he is commonly designated

by his fellows, and by which they distinguish him. It is a mere means of description. Sometimes a man is known by several different names, and it was formerly the custom, in drawing indictments, to charge him under all the names by which he was known, connecting them with the words 'alias dictus,' or with simply 'alias.' These words mean 'otherwise called' or 'otherwise.' State v. Howard, 77 Pac. 50, 51, 30 Mont. 518.

An indictment for rape on an illegitimate child, whose mother married when the child was three years old, which gives as the surname of the child the surname of the husband of the mother, is sufficiently supported by proof that after the marriage the child was generally known by such name; a bastard not necessarily bearing its mother's name; a "name" being one or more words to designate a person or thing. People v. Gray, 96 N. E. 268, 273, 251 Ill. 431.

#### Middle name or initial

It is necessary in court proceedings to correctly give all the initials in a person's name, though at common law mistakes in a middle name or initial were not material. Carney v. Bigham, 99 Pac. 21, 22, 51 Wash. 452, 19 L. R. A. (N. S.) 905.

"The common law recognizes but one Christian 'name,' and a middle initial may be dropped or changed at pleasure. Its presence or absence or difference affects nothing. While a letter of the alphabet does not constitute a name, yet the initial letter of the Christian name is so commonly used that it is to be regarded, not as the name of some other person, but as an abbreviation of the Christian name of the person intended." Illinois Cent. R. Co. v. Hasenwinkle, 83 N. E. 815, 816, 232 Ill. 224, 15 L. R. A. (N. S.) 129.

The middle name is no part of the name, and under Acts 33d Gen. Assem. c. 118, relating to notice to owners of land in a drainage district, a notice to "Emma Forsythe Jones," whose maiden name was "Forsythe," was a sufficient notice to "Emma Jones." Collins v. Board of Sup'rs of Pottawattamie County (Iowa) 138 N. W. 1095, 1097.

#### NAMED

See Herein Named.

A trustee who is named in the way the testator has provided to perpetuate the trust is "named in the will," within the meaning of Pub. St. 1901, c. 185, § 2, cl. 12, authorizing the probate court to appoint the trustees named in the will. Carr v. Corning, 62 Atl. 168, 169, 73 N. H. 362.

#### NAPHTHA

A commercial compound, of which one of the substantial parts is naphtha, but which, when compounded with other ingredients, becomes a distinct product, is not within Rev. Laws, c. 102, § 108, punishing the sale or

keeping for sale of "naphtha" under an assumed name; but where the contributed parts merely supply color to the fluid, with a slight thickening, making the mixture adhesive when applied, the jury must determine whether the article does not remain essentially naphtha, which is a product of petroleum intermediate between the associate products of gasoline and benzine, all of which do not differ in their essential nature, but vary only in the degree of inflammability when brought into contact with radiant heat. Gately v. Taylor, 97 N. E. 619, 621, 211 Mass. 60, 39 L. R. A. (N. S.) 472.

#### NAPKIN

As printed matter, see Printed Matter.

#### NARROW

The word "narrow," as used in the definition of "galloon" as a "narrow, tapelike fabric used for binding hats, shoes, etc.," is a relative term of varying meanings. It is easy to conceive of a tapelike fabric so narrow as to come within the definition, and equally easy to conceive of one so wide that it must fall without it. There is nothing in the dictionary which indicates just where the dividing line occurs. Certain woven cotton articles, from 1 to 2½ inches wide, chiefly used as hat bands for trimming men's hats, are not galloons, under Tariff Act Aug. 28, 1894, c. 349, § 1, Schedule I, par. 263, 28 Stat. 529. United States v. Walter H. Graef & Co., 127 Fed. 688, 689, 62 C. C. A. 414.

#### NARROW CHANNEL

"Narrow channels," within the meaning of article 25 of the inland navigation rules (Act June 7, 1897, 30 Stat. 96), are bodies of water navigated up and down in opposite directions, and do not include harbor waters, with piers on each side, where the necessities of commerce require navigation in every conceivable direction. Tested by such rule, the Hudson river above Twenty-Third street, New York, and within the city limits is not a narrow channel. The Number 4, 161 Fed. 847, 850, 88 C. C. A. 665; The Islander, 152 Fed. 385, 386, 81 C. C. A. 511.

The Hudson river in the vicinity of Yonkers, where it has a single deep and straight channel for a number of miles, is a "narrow channel," within the meaning of the inland navigation rules. The Benjamin Franklin, 145 Fed. 13, 15, 76 C. C. A. 43.

#### NATION

See Comity of Nations.

"The terms 'state' and 'nation' are used in the law of nations, as well as in common parlance, as importing the same thing; and imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society

has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws." *Cherokee Nation v. Georgia*, 5 Pet. 1, 52, 8 L. Ed. 25 (Thompson, J., dissenting).

The term "nation," as applied to the Indian nations, means a people distinct from others. The Indians have always been regarded as having a semi-independent position when they preserved their tribal relations, not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the powers of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the state within whose limits they reside. *Glenn-Tucker v. Clayton*, 70 S. W. 8, 13, 4 Ind. T. 511.

### NATIONAL BANK

A "national bank" is a corporation, the powers of which are defined and limited by the acts of Congress authorizing the creation of such institutions. *Hansford v. National Bank of Tifton*, 73 S. E. 405, 406, 10 Ga. App. 270.

"National banks" are federal instrumentalities, subject to the paramount authority of the United States. An attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void whenever such attempted exercise of the authority conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of those agencies of the federal government to discharge the duties for the performance of which they were created. *Schlesinger v. Kelly*, 99 N. Y. Supp. 1083, 1087, 114 App. Div. 546 (citing *Easton v. Iowa*, 23 Sup. Ct. 288, 188 U. S. 220, 47 L. Ed. 452; *Davis v. Elmira Savings Bank*, 16 Sup. Ct. 502, 161 U. S. 275, 40 L. Ed. 700).

"'National banks' are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." The coverture of the legatee of shares of stock in a national bank, when her name was placed upon the bank's books as a stockholder, and when she received the certificate of stock, does not protect her against a personal judgment at law for the amount due as a shareholder under an assessment made by the Comptroller of the Currency to pay the debts of the bank, although a married woman may be incapable, under the local law, of making or binding herself personally by contract, if such law does not incapacitate her from becoming an owner of such stock, by bequest or otherwise. *Christopher v. Norvell*, 26 Sup. Ct. 502, 505, 201 U. S. 216, 50 L. Ed. 732, 5 Ann. Cas. 740 (quoting and adopting definition in *Davis v. Elmira Sav. Bank*, 16 Sup.

Ct. 502, 503, 161 U. S. 275, 283, 40 L. Ed. 700, 701).

"For some purposes a 'national bank' is a public institution, notwithstanding it is the subject of private ownership. It may issue bills, which circulate as part of the currency of the country. It is subject to examination, and, in a large measure, to the supervision, of the Comptroller of the Currency. It is examined at stated periods, and may be the subject of special examination by order of the Comptroller. But it is owned by shareholders, like other banking institutions." Any legal right which a stockholder of a "national bank" may have to obtain an inspection of its books may be enforced in the state courts by mandamus, in view of the provision of the act of August 13, 1888 (25 Stat. 433, c. 866), that, for actions against national banks at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the federal circuit and district courts shall have jurisdiction only as in cases between individual citizens of the same state. *Guthrie v. Harkness*, 26 Sup. Ct. 4, 7, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

"A 'national bank' is an instrumentality of the United States; its circulating notes are guaranteed by the United States; and if the United States should be compelled to pay them, the United States has a paramount lien on the assets of the bank for reimbursement. The administration of the bank's assets is therefore vested in the Comptroller of the Currency as an officer of the United States. He appoints the receiver, and directs his acts. The individual liability of a stockholder can only be enforced by his order. The provision is as much for the benefit of the stockholders as for the United States, and it is indispensable to the bringing of a suit against the stockholder. In other words, the liability dates from the order of the Comptroller." *Rankin v. Barton*, 26 Sup. Ct. 29, 30, 199 U. S. 228, 50 L. Ed. 163.

### NATIONAL BANK NOTES

As legal tender, see *Legal Tender*.

### NATIONAL BANK OFFICER

See *Officer (of corporation)*.

## NATIVE

### NATIVE WINE

The words "native wine," as used in Rev. Laws, c. 100, § 1, prohibiting the sale of intoxicating liquor without a license, except "sales by the makers thereof of native wine or of cider manufactured in this commonwealth," mean wine made in the commonwealth, and not wine made in any of the states in the Union. *Commonwealth v. Petranich*, 66 N. E. 807, 188 Mass. 217.



## NATURAL

An instruction that no form of words was necessary to constitute a contract, but that, if the "natural" inference from what appeared to have passed between the parties was that their minds met presently in an agreement, a valid contract was made, whatever might have been the verbal expression used, is not prejudicial because of the use of the word "natural" instead of the better word "reasonable." An inference can hardly be reasonable without being natural. *Sicard v. Albenberg Co.*, 118 N. W. 179, 180, 186 Wis. 622.

## NATURAL AFFECTION

"Natural affection" is such as naturally exists between near relatives, as a father and child, brother and sister, husband and wife, and it is regarded in law as a good consideration. The word "father" is interchangeable with "mother" in so far as relationship is concerned, and the presumable natural affection of a child for the mother is a good consideration to support a contract. *Worth v. Daniel*, 57 S. E. 898, 900, 1 Ga. App. 15 (quoting and adopting definitions in 2 Bouv. Law Dict. p. 269; *Black's Law Dict.* 6).

## NATURAL BOUNDARY

Courses and distances must, as a general rule, give way to a call for a natural boundary, because a natural boundary, if fixed, is unchangeable, and more likely to be the true call than courses and distances. A well-known and established line of an adjacent tract is a "natural boundary" within the rule that courses and distances give way to a natural boundary, because the line is more certain than course and distance. *Willson Lumber & Milling Co. v. Hutton & Bourbonnais*, 68 S. E. 2, 4, 152 N. C. 537.

The line of another tract of land is a "natural boundary" if, at the time a deed calling for it is made, the line is indicated by visible marks, so that it can be identified and located, or if it can be otherwise located with reasonable certainty. *Lance v. Rumbough*, 63 S. E. 357, 360, 150 N. C. 19.

## NATURAL CAUSES

Other natural causes, see *Other*.

"It is not essential that the negligence should be the direct cause of the injury. It suffices that it is the natural and probable cause. It is the 'natural cause' when either it acts directly in producing the injury, or sets in motion other causes so producing it and forming a continuous chain in natural sequence down to the injury, thus linking the negligence with the injury by a chain of natural and consequential causation, although the former may be neither the immediate nor the direct cause of the event. But such causation cannot be proximate cause in law to arouse liability, unless an ordinarily prudent and intelligent person ought, in the

exercise of such intelligence, to have foreseen that an injury might probably result from the negligence under like circumstances." *Meyer v. Milwaukee Electric Ry. & Light Co.*, 93 N. W. 6, 8, 116 Wis. 336 (citing *Delsenrieter v. Kraus-Merkel Malting Co.*, 72 N. W. 735, 97 Wis. 279; *Dehsoy v. Light Co.*, 85 N. W. 973, 110 Wis. 412; *Seaver v. Town of Union*, 89 N. W. 163, 113 Wis. 322).

## NATURAL CEMENT

"Natural cement" is the quick-setting product of a low temperature kiln burning a cement rock of irregular composition. *Donaldson v. Roksament Stone Co.*, 170 Fed. 192, 193.

## NATURAL CONDITION

The phrase "natural condition," in an ordinance requiring any person who opens or excavates a highway to restore the same to its "natural condition," is applicable to the erection of electric light poles, as the phrase means only that the street is to be restored to the condition which is natural to the street with the contemplated improvements for which the excavation is required. "No street that has been improved at all is, strictly speaking, in a 'natural condition'; it can only be in a condition natural to a street." *Cook v. North Bergen Tp.*, 59 Atl. 1035, 1036, 72 N. J. Law, 119.

## NATURAL CONSEQUENCES

A "natural consequence" of an act is the consequence which ordinarily follows it; the result which may reasonably be anticipated from it. *The Santa Rita*, 173 Fed. 413, 417 (quoting and adopting definition in *Cole v. German Savings & Loan Soc.*, 124 Fed. 115, 59 C. C. A. 595, 63 L. R. A. 416).

"A 'natural consequence' is one which has followed from the original act complained of, in the usual, ordinary, and experienced course of events; a result, therefore, which might reasonably have been anticipated or expected. Natural consequences, however, do not necessarily include all such as, upon a calculation of chances, would be found possible of occurrence, or such as extreme prudence might anticipate, but only those which ensue from the original act, without any such extraordinary coincidence or conjunction of circumstances as that the usual course of nature should seem to have been departed from." *Winfree v. Jones*, 51 S. E. 153, 154, 104 Va. 39, 1 L. R. A. (N. S.) 201 (quoting and adopting definition in *Watson, Damages*, § 33).

For the purpose of civil liability, those consequences, and those only, are deemed "natural" and probable which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow such conduct. The doctrine of "natural and probable" conse-

quences is illustrated in the law of negligence, and there the substance of the wrong itself is failure to act with due foresight. The negligent delay of a carrier in moving goods intrusted to it for transportation, not so unreasonable as to amount to a conversion, would not render it liable for the loss of the goods after they have been carried to their destination, if they are there destroyed by an act of God before delivery. *Rodgers v. Missouri Pac. R. Co.*, 88 Pac. 885, 75 Kan. 222, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441 (quoting with approval from *Pollock, Torts*).

For damages to be the "natural and proximate consequence" of a breach of contract of carriage by failure to deliver the goods within a reasonable time, the loss must be immediately connected with the supposed cause of it, and, if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of the one to the other is established. *Williams v. Atlantic Coast Line R. Co.*, 48 South. 209, 212, 56 Fla. 735, 24 L. R. A. (N. S.) 134, 131 Am. St. Rep. 169 (citing *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6).

#### NATURAL DRAIN

As used in Laws 1910, c. 183, which creates a special drainage district to provide effectual drainage by artificial drains or other drainage facilities, and provides for a commission to develop a drainage system by artificial canals and by improving all natural drains, the words "natural drains" mean a natural water course, including creeks, streams, brooks, or rivers, and the act is therefore in violation of Const. § 90, par. "q," prohibiting the Legislature from passing special laws relating to water courses. *Belzoni Drainage Commission v. Winn*, 53 South. 778, 779, 98 Miss. 359.

#### NATURAL EFFECT

The rule of law requires that the damages recoverable from a wrongdoer must be the natural and proximate effects of his delinquency. The term "natural" imports that they are such as might reasonably have been foreseen. *Smith v. Public Service Corporation of New Jersey*, 75 Atl. 937, 938, 78 N. J. Law, 478, 20 Ann. Cas. 151.

#### NATURAL FLOWERS

Statice wreaths, which have all the appearance of "natural flowers \* \* \* preserved," are dutiable under the enumeration of such articles in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 251, 30 Stat. 170. *Bayersdorfer & Co. v. United States*, 171 Fed. 286, 287.

#### NATURAL FOOL

A "natural fool" is one that hath no understanding of his nativity and therefore is by law presumed never likely to obtain any. *Hauber v. Leibold*, 107 N. W. 1042,

1044, 76 Neb. 706 (quoting and adopting definition of Blackstone, cited in *Clark v. Robinson*, 88 Ill. 498, 502).

#### NATURAL GAS

As mineral, see *Mineral*.

As property, see *Personal Property*; *Property*.

"Natural gas" is a mineral, and is a part of the land until severed. *Osborn v. Arkansas Territorial Oil & Gas Co.*, 146 S. W. 122, 124, 103 Ark. 175.

#### NATURAL GUARDIAN

The father is the "natural guardian" of his child. In re *Knott*, 126 N. W. 1040, 1042, 162 Mich. 10.

Under Kirby's Dig. § 3757, and under the common law, the father, unless incompetent or unfit, is the "natural guardian" and entitled to the care, custody, and education of his minor children, and, even as between the father and the mother, the custody in the father is generally allowed unless the child, on account of tender years, or being a female, imperatively requires that attention which a mother only can supply. But between the parent and the grandparent or any one else, the law prefers the former as custodian of the child, unless the parent is incompetent, or unfit because of his or her poverty or depravity to provide the proper physical comforts and moral training. *Baker v. Durham*, 129 S. W. 789, 790, 95 Ark. 655.

#### NATURAL INCREASE

Testator devised shares of stock of a corporation in trust to pay to his daughter the income during life, and at her death to divide the same between her children and grandchildren. After testator's death, the corporation issued additional shares under a resolution reciting that it accumulated a surplus, and that it was desirable to increase the capital to a certain sum, and that additional shares to the amount of the surplus capitalized be issued to the stockholders. Held, that under Civ. Code 1910, § 3667, providing that the natural increase of the property belongs to the tenant for life, and any extraordinary accumulation goes to the remainderman, the additional shares attached to the corpus can go to the remainderman: the words "natural increase of the property," as applied to corporate stock, meaning dividends. *Jackson v. Maddox*, 70 S. E. 865, 866, 136 Ga. 31, Ann. Cas. 1912B, 1216.

#### NATURAL JUSTICE

By "natural justice," in the rule that where one makes a will contrary to natural justice, that fact may be considered with other facts, means that which is founded in equity, honesty, and right, and "natural justice" requires that a parent shall care for his children. The fact that testatrix, 70 years of age, gave the bulk of her property

to a public library to the exclusion of her two sisters and her brother living in other cities did not show lack of testamentary capacity; there having been litigation tending to embitter them, and their relations not being intimate. *Spencer v. Terry's Estate*, 94 N. W. 372, 374, 183 Mich. 89.

#### NATURAL LIFE

See *During Natural Life; Imprisonment for Life or Less Than Natural Life; Quarterly During His Natural Life.*

#### NATURAL MONUMENT

The limitation on the rule that a body of water appearing on the original government survey and plat as the boundary of a tract of land is a "natural monument," and will constitute the boundary, however distant from the position indicated for it by the meander line, and that, where the meander line is drawn on one side of one of the regular survey lines, the one-quarter line, or the one-sixteenth line, the boundaries cannot be extended across such line to reach the water front, especially if such survey line appears on the government plat as a boundary of a lot conveyed to another, is inapplicable, where, though in some places the meander line falls south of the east and west one-sixteenth line and west of the north and south one-sixteenth line, yet at other points is located north of the one and east of the other, thus conclusively refuting the inference that the government intended that the lot line should be confined within either of such one-sixteenth lines. *Brown v. Dunn*, 115 N. W. 1097, 1098, 135 Wis. 374.

The mouth of the second right-hand fork of a stream called for in a survey is a "natural, indestructible monument," which will prevail over courses and distances. *Morgan v. Renfro*, 99 S. W. 311, 313, 124 Ky. 314.

#### NATURAL MOTHER

Mother as including, see *Mother*.

#### NATURAL OBJECT OF HIS BOUNTY

If a person has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who would or should or might be the objects of his bounty, and the scope and power of the provisions of his will, he has testamentary capacity; the term "natural objects of his bounty" does not mean that he should know and recognize every distant relative who is entitled to inherit from him under the existing canons of descent, and does not include cousins to the second and remoter degrees of propinquity, but refers to his near relatives. In *re Campbell's Will*, 136 N. Y. Supp. 1066, 1067.

#### NATURAL OBLIGATION

"I think it incontestably true that the 'natural obligation' of private contracts between individuals in society ceases and is

converted into a civil obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government. The right and power of enforcing performance exists, as I think all must admit, only in the law of the land, and the obligation resulting from this condition is a civil obligation." *Ogden v. Saunders*, 12 Wheat. 213, 320, 6 L. Ed. 606 (per Trimble, J., dissenting).

#### NATURAL OFFSPRING

##### As heir

A deed of land to a woman and her "children, the natural offspring of her body," creates an estate tail, the quoted words being equivalent to the expression "heirs of her body," which estate by statute is changed to a life estate in the first holder with a remainder in fee to the first taker after termination of the life estate. *Dempsey v. Davis*, 136 S. W. 975, 976, 98 Ark. 570.

#### NATURAL PERSON

Corporation distinguished, see *Corporation*.

Under the bankruptcy act providing that any "natural person" may be adjudged an involuntary bankrupt, the word "person" does not include an infant or a lunatic. In *re Kehler*, 153 Fed. 235, 237.

"Natural persons" are such as the God of nature formed us." A "natural person" is a man, woman, or child. *John C. Orr Co. v. Cushman*, 104 N. Y. Supp. 510, 511, 54 Misc. Rep. 121 (quoting and adopting definition in *Blackstone* and 2 Abb. Law Dict. p. 151).

The provision of the bankrupt act exempting a person engaged chiefly in farming from liability to be adjudged a bankrupt does not apply to a corporation. The use of the phrase "natural person," when construed in connection with the phrase "except wage-earners and those chiefly engaged in farming," and all that follows it, excludes corporations from the exception. In *re Lake Jackson Sugar Co.*, 129 Fed. 640, 648.

#### NATURAL POSSESSION

"Natural possession" is that by which a man detains a thing corporeally, as by occupying a house, cultivating ground, or retaining a movable possession. Civ. Code, art. 3428. Such a possession in its nature must be visible, open, and public. *Albert Hanson Lumber Co. v. Baldwin Lumber Co.*, 52 South. 537, 539, 126 La. 347.

#### NATURAL PREMIUM

The term "natural premium plan," is used in the law of insurance to represent what is commonly known as the "assessment plan," or the writing of insurance by companies limiting their assessments to such sum as is necessary to cover the actual cost of insurance from one renewal period to another. *Westerman v. Supreme Lodge Knights*

of Pythias, 94 S. W. 470, 481, 196 Mo. 670, 5 L. R. A. (N. S.) 1114.

### NATURAL RIGHTS

The right to demand that property pass by inheritance or will is a "natural" and inherent right, which cannot be wholly taken away or substantially impaired by the Legislature, but is subject only to reasonable regulation. *Nunnemacher v. State*, 108 N. W. 627, 628, 129 Wis. 190, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711. But see *Magoun v. Illinois Trust & Sav. Bank*, 18 Sup. Ct. 594, 596, 170 U. S. 283, 42 L. Ed. 1087; *Pullen v. Wake County Com'rs*, 66 N. C. 361, 363.

### NATURAL STATE

See *Arrowroot in Its Natural State*.  
Pearls in their natural state, see *Pearl*.

Hanks and balls of dried and salted cabbage, the salting and manipulation of which were done as a preparation, fitting the cabbage for cooking purposes, and intended to be permanent, are dutiable as vegetables "prepared or preserved," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170, and not as vegetables in their "natural state," under paragraph 257, 30 Stat. 171. *Sun Kwong On v. United States*, 177 Fed. 595, 596.

### NATURAL WANT

A finding of the master directed to find and report whether an upper proprietor's use of a stream by maintaining a dam across it was reasonable, that the stream was so small that the amount of water flowing in it during certain seasons of the year was barely sufficient under the best conditions to supply the "natural" wants of the users thereof, was a finding that the upper proprietor's use was unreasonable because the stream was so small that at times it furnished barely enough water for the domestic uses of lower proprietors; the term "natural wants" designating domestic uses. *Lawrie v. Sillsby*, 74 Atl. 94, 95, 82 Vt. 505.

### NATURAL WATER COURSE

See, also, *Water Course*.

A "natural water course" is a stream having defined bounds and continuity of flow. *Jennings v. Bohner*, 134 N. Y. Supp. 943, 944.

A "natural water course" is a natural stream flowing in a definite bed or channel with banks and sides, and having a permanent source of supply. *McHenry v. City of Parkersburg*, 66 S. E. 750, 753, 66 W. Va. 533, 29 L. R. A. (N. S.) 860 (citing 2 Bouv. Law Dict. 468, 1219; *Neal v. Ohio River R. Co.*, 34 S. E. 914, 47 W. Va. 316).

A living stream, with a well-defined channel, is a "natural water course." *Wilson v. Pennsylvania R. Co.*, 113 N. Y. Supp. 1101, 1108, 129 App. Div. 521.

A water course with well-defined banks which is the natural outlet of lakes, and through which the waters will reach a common place, is a "natural water course," though it is called a swag or a swamp or a creek, and whether its course is straight or crooked. *Hastle v. Jenkins*, 101 Pac. 495, 496, 53 Wash. 21.

It is not essential to the existence of a "natural water course" that the supply should be living water, but it may be surface water collected on a large watershed which cuts for itself a well-defined channel; nor is it necessary that there should be a constant and continuous flow of water. *Brown v. Schneider*, 106 Pac. 41, 81 Kan. 486, 135 Am. St. Rep. 396; *Palmer v. Waddell*, 22 Kan. 352, 353.

To constitute a "natural water course" it is not necessary that the flow of water be sufficient to wear out a channel having well-marked sides and banks; but, if the surface water uniformly or habitually flows over a given course having reasonable limits as to width, the line of its flow is a water course. *Hull v. Harker*, 106 N. W. 629, 630, 130 Iowa. 190 (citing *Lambert v. Alcorn*, 33 N. E. 53, 144 Ill. 313, 21 L. R. A. 611).

A depression or slough separating an island from the Mississippi river, so that in time of high water it became an arm of the river with water flowing into it at the north end and emptying at the south end, and also forming a drain for surface water, was a "natural water course." *St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz*, 80 N. E. 879, 882, 226 Ill. 409.

Where the flow of water through an artificial ditch for many years was such as would constitute a "natural water course" if the flow had begun without artificial aid, a finding that it was a water course to which the same rules of law apply as are applicable to natural water courses was warranted. *Stimson v. Inhabitants of Brookline*, 83 N. E. 893, 894, 895, 197 Mass. 568, 16 L. R. A. (N. S.) 280, 125 Am. St. Rep. 382, 14 Ann. Cas. 907.

After high-water channels are artificially opened, and the cuts connecting them with the main stream are used by the parties opening them and such use is acquiesced in as branches of the main stream for the period of limitations, they become natural channels, and owners of land adjacent thereto are entitled to the same rights as those on the main channel. *Hough v. Porter*, 95 Pac. 732, 98 Pac. 1083, 1101, 51 Or. 318.

To constitute a "natural water course," it is not necessary that there should be a stream with well-defined banks and bed, or that the water flow at all seasons of the year, but, where the conformation of the land is such as to give surface water flowing from one tract to another, a fixed determinate course, so as to uniformly discharge it on the

servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a water course. *Town of Bols D'Arc v. Convery*, 99 N. E. 666, 668, 255 Ill. 511.

Where surface water in a hilly region of high bluffs seeks an outlet through a gorge or ravine during the rainy season and by its flow assumes a definite and natural channel, and such has always been the case so far as the memory of man runs, such accustomed channel through which the water flows possesses the attributes of a "natural water course." The flow of the water need not be continuous, and the size of the stream is immaterial. *Jaquez Ditch Co. v. Garcia* (N. M.) 124 Pac. 891, 893.

### NATURAL WEAR AND TEAR

A lease by which the lessee not only agreed to exercise every precaution in the use of the leased machinery, but agreed to assume all cost of repairs, and, at expiration of the term, turn over the machinery and equipment in perfect condition, "saving natural wear and tear," required the lessee to make whole damage to machinery resulting from accidents, like the fracture of an engine shaft, though not resulting from its negligence; "natural wear and tear" signifying wear resulting from friction and the gradual tearing apart of joints, rivets, and other portions in the operation of the machinery. *Pepper v. St. Louis Brass Mfg. Co.*, 123 S. W. 1012, 1015, 146 Mo. App. 187 (citing *Jaques v. Gould*, 4 Cush. [58 Mass.] 384; *Thompson v. Cummings*, 39 Mo. App. 537; *Green v. Kelly*, 20 N. J. Law, 544; *Waddell v. De Jet*, 23 South. 437, 76 Miss. 104; *McIntosh v. Lown* [N. Y.] 49 Barb. 550; *Lockrow v. Horgan*, 58 N. Y. 635).

### NATURALIZATION

See Lawfully Naturalized.

As civil action, see Civil Action—Case—Suit—Etc.

Order as judgment, see Judgment.

"Naturalization" creates a political status which is entirely the result of legislation by Congress, and, in the case of a person not born a citizen, naturalization can be obtained only in the way in which Congress has provided that it shall be granted, and upon such a showing of facts as Congress has determined must be set forth. *In re Knight*, 171 Fed. 299, 301.

### NATURE

See Crime against Nature; Intensely Alkaline Nature; Local Nature; Style and Nature.

#### Of accusation

The contention that an indictment charging subornation of perjury before a federal

grand jury did not sufficiently set forth "the nature and cause of the accusation," within the meaning of Const. U. S. Amend. 6, because it did not "set forth in some definite way the matter or thing which was under investigation at the particular time, so that the defendant may know as to what particular controversy the alleged false testimony is claimed to be material, and how to meet the allegation of materiality," is too frivolous to serve as the basis of a writ of error from the federal Supreme Court to a circuit court, to review a conviction under such indictment, where the description therein of the proceeding in which the perjury was committed is as follows: " \* \* \* Sitting as a grand jury \* \* \* and, among other matters, inquiring into certain criminal violations of the laws of the said United States relating to the public lands and the disposal of the same, and the unlawful fencing thereof, which had then lately before been committed within the said district." *Hendricks v. United States*, 32 Sup. Ct. 313, 315, 223 U. S. 178, 56 L. Ed. 394.

#### Of act

An instruction on insanity, in a prosecution for homicide, that, if accused was sufficiently sane to know the nature and quality of his act, he was then legally responsible therefor, was not objectionable for failure to also require that he was sufficiently sane to know that his act in killing deceased was wrong; the term "nature of act" being defined to mean the attributes which constitute the thing and distinguish it from all others, while "quality of act" is the power to clearly and distinctly apprehend its nature, so that, if a person has sufficient mental power to fully appreciate and know what he is doing, he must necessarily know that the killing of a human being is wrong. *Montgomery v. State* (Tex.) 151 S. W. 813, 817.

#### Of proposition submitted to voters

A requirement that the voter be apprised of the "nature" of a public utility means that the ballot title shall in specific language notify him only of the kind, sort, or character of such public utility. A ballot title reading, "Shall the city of W. \* \* \* incur an indebtedness \* \* \* for an electric plant in and to be owned exclusively by said city? \* \* \*" was sufficient to apprise the voter of the nature of such utility, within the contemplation of Const. art. 10, § 27, as construed in *Coleman v. Frame*, 109 Pac. 928, 26 Okl. 193, 31 L. R. A. (N. S.) 556, wherein it is stated that the proposition submitted "must be stated in such specific language as to apprise the voter of the 'nature' of the specific utility the city wishes to purchase, construct, or repair." *City of Woodward v. Raynor*, 119 Pac. 964, 966, 29 Okl. 493 (citing *State v. Murphy*, 48 Pac. 628, 23 Nev. 390; *State v. Birchim*, 9 Nev. 95; also citing *Webster's International Dict.*).

## NAVAL STORES

"The term 'naval stores' includes rosin, turpentine, products of crude turpentine, tar, and rosin oil." *Interstate Commerce Commission v. Louisville & N. R. Co.*, 118 Fed. 613, 617.

In Florida, where the production of spirits of turpentine and rosin, otherwise known as "naval stores," constitutes one of the state's leading industries, the courts will take judicial notice of the fact that such naval stores are the manufactured products of the gum extracted from pine trees. *Knight v. Empire Land Co.*, 45 South. 1025, 1026, 55 Fla. 301.

## NAVIGABLE

See Not Navigable; Point of Navigability.

Improvement of, as taking property, see Taking (In Eminent Domain).

Improvement of navigable water, see Improvement.

Navigable stream as highway, see Highway.

See, also, Floatable Stream.

In England the term "navigable waters" is synonymous with tidewaters. *Olds v. Commissioner of State Land Office*, 112 N. W. 952, 958, 150 Mich. 134 (quoting and adopting *Illinois Cent. R. Co. v. Illinois*, 13 Sup. Ct. 110, 146 U. S. 387, 36 L. Ed. 1018).

A nontidal stream, which was not meandered in the survey by the United States in 1823, is prima facie a nonnavigable stream. In determining the navigability of a freshwater stream, navigable for only a part of the year, not less than all of the following considerations should be considered: Whether the stream is suitable for valuable floatage for a sufficient length of time for its beneficial use by the public; whether the public or only a few individuals are interested in transportation on it, or any great public interests are promoted in its use for transportation; whether it has been previously used generally, and how long it has been and will be used, by the public; and whether it was meandered by government surveys, or included therein. *Blackman v. Mauldin*, 51 South. 23, 25, 164 Ala. 337, 27 L. R. A. (N. S.) 670.

A meandered lake is "navigable," under St. 1898, § 1596, making navigable all streams meandered by the government. *Runyard v. Oetting Bros. Ice Co.*, 125 N. W. 931, 932, 142 Wis. 471.

The part of a river above falls and above the ebb and flow of the tide is not a "navigable river" at common law. *Charles C. Wilson & Son v. Harrisburg*, 77 Atl. 787, 788, 107 Me. 207.

The term "navigable" at common law and in a legal sense means a stream in which

the tide ebbs and flows, and the fact that a river is quite a large one and capable of furnishing considerable water power does not change the rule, nor does the fact that the river may in certain portions of it be a navigable stream in fact, for that merely affects the question of the public right to transportation over it. *Laws 1788*, p. 334, c. 67, permitting the commissioners of the land office to grant land under "navigable rivers" as they might deem necessary to promote the commerce of the state, provided the grant should be made to the adjacent owner, is only applicable to a tidal stream and does not extend to a nontidal stream, though in fact navigable. *Fulton Light, Heat & Power Co. v. State*, 116 N. Y. S. 1000, 1006, 1013, 62 Misc. Rep. 139.

At common law a "navigable river" was confined to rivers or arms of the sea in which the tide ebbed and flowed, all fresh water rivers being nonnavigable; but all streams actually capable of navigation were common highways for commerce. *Fulton Light, Heat & Power Co. v. State*, 94 N. E. 199, 202, 200 N. Y. 400, 37 L. R. A. (N. S.) 307.

A river is "navigable" if the tide ebbs and flows therein, or if it is in fact navigable during some season of the year for the floatage of boats, lighters, rafts, logs, etc. In re *Delaware River at Stilesville*, 115 N. Y. Supp. 745, 750, 131 App. Div. 403.

### Actual navigability

Though by the English common law, "navigable waters" are tidal waters only, in the United States those waters are navigable in contemplation of law which are navigable in fact. *McGivra v. Ross*, 161 Fed. 394, 399; *Smart v. Aroostook Lumber Co.*, 68 Atl. 527, 531, 103 Me. 37, 14 L. R. A. (N. S.) 1083 (citing *The Daniel Ball*, 10 Wall. [77 U. S.] 557, 19 L. Ed. 999; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561; *The Montello*, 20 Wall. [87 U. S.] 430, 22 L. Ed. 391; *Healy v. Joliet & C. R. Co.*, 6 Sup. Ct. 352, 116 U. S. 191, 29 L. Ed. 607; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Kinhead v. Turgeon*, 104 N. W. 1061, 1062, 74 Neb. 573, 1 L. R. A. (N. S.) 762, 121 Am. St. Rep. 740, 13 Ann. Cas. 43.

The term "navigable," as applied to waters, includes streams navigable in fact, though not subject to the ebb and flow of the tide, though the term does not necessarily extend to streams that are only capable of use for pleasure boating, fowling, cutting ice, or skating. *Hobart v. Hall*, 174 Fed. 433, 467.

While the common-law rule as to navigable waters is in force in Illinois in so far as it relates to the questions of boundary and ownership, yet, on the question of navigability, the common-law rule that waters are

"navigable" only where the tide ebbs and flows is not the law, and waters navigable in fact are navigable in law; the test being whether they are of sufficient depth to afford a channel for useful commerce or practicable public utility. *Schulte v. Warren*, 75 N. E. 783, 785, 218 Ill. 108, 13 L. R. A. (N. S.) 745.

A stream, in order to be "navigable," must be of common or public use for the carriage of boats and lighters, and of bearing up and floating vessels for the transportation of property conducted by the agency of man. It is navigable in fact only when it affords a channel for useful commerce, and is a practical utility to the public as such, and in its ordinary natural condition furnishes a highway over which commerce is or may be carried in the customary modes of conducting commerce by water. It is not sufficient that it is available in places for rowboats or small launches, or that hunters and fishermen pass over the water in boats used for that purpose. *People v. Economy Light & Power Co.*, 89 N. E. 760, 771, 241 Ill. 290; *Schulte v. Warren*, 75 N. E. 783, 785, 218 Ill. 119, 13 L. R. A. (N. S.) 745.

The term "navigable waters," as applied to the dominion of the national and state governments over shore lands and the rights which they have or can convey, means waters which are navigable in fact and not simply tidal waters. *McGivra v. Ross*, 30 Sup. Ct. 27, 31, 215 U. S. 70, 78, 54 L. Ed. 95.

The term "navigable stream" is not limited to a tidewater stream, but the question in each case is whether it is in fact navigable; that is, used or susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Willow river, an indirect tributary of the Mississippi, capable of floating logs at certain seasons of the year and carrying rowboats, although not meandered, and so shallow that in places the boats have to be pushed, is a public "navigable stream." *Willow River Club v. Wade*, 76 N. W. 273, 276, 100 Wis. 86, 42 L. R. A. 305.

In general those rivers are "public and navigable" in law which are navigable in fact. *State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow*, 69 S. W. 374, 377, 169 Mo. 109 (quoting and adopting definitions in *Gould, Waters* [3d Ed.] § 45).

A stream running into the sea, and in which the tide ebbs and flows, is "navigable water," and subject to the jurisdiction of the United States as far up as it is actually navigable for the purposes of interstate and foreign commerce. *United States v. President, etc., of Jamaica & R. Turnpike Road*, 183 Fed. 598, 601.

"If a stream is 'navigable in fact, it is navigable in law.' *Gould, Waters* (3d Ed.) §

67. The capability of being used for purposes of trade and travel in the usual and ordinary mode is the test, and not the extent and manner of such use. \* \* \* Navigability cannot be affected by the conditions on the adjacent land, such as there being a large town on the shore, with numerous streets and wharves, or whether \* \* \* one riparian owner has a monopoly of the land, with no public road to the water, thus cutting off access to the land. It is the navigability of the water that is the test." *State v. Twiford*, 48 S. E. 586, 587, 136 N. C. 603.

A stream is "navigable" legally if it is navigable in fact. A stream which is only navigable for three or four miles from its mouth at high tide by small boats drawing from three to four feet of water, and is floatable for its entire length, is not a navigable stream within Act Sept. 19, 1890, c. 907, § 10, 26 Stat. 454, prohibiting the creation of an obstruction not authorized by law to the navigable capacity of any waters over which the United States has jurisdiction. *State ex rel. Pealer v. Superior of Chehalis County*, 109 Pac. 340, 341, 58 Wash. 565.

A "navigable river" is a natural highway for commerce. The Cumberland river is navigable in fact from its mouth to a point far above Nashville, and it is therefore a natural highway for commerce between two or more states, and, as such, is the property of the public constituting the country at large, and jurisdiction over it for purposes of interstate commerce is in Congress. *Ryman Steamboat Line v. Commonwealth*, 101 S. W. 403, 125 Ky. 253, 10 L. R. A. (N. S.) 1187.

A river in fact nonnavigable, which is declared by Laws 1844-45, p. 299, a public highway, is not thereby made a navigable river, within Rev. St. 1899, § 8278, as amended by Laws 1903, p. 234, § 1, and re-enacted by Laws 1905, p. 180 (Ann. St. 1906, p. 3917), authorizing the improvement of a nonnavigable stream for the drainage of lands, for a "public highway" is a way open to all persons, and all streams which are actually capable of floating and of permitting the passage of ordinary boats are "navigable." *State ex rel. Applegate v. Taylor*, 123 S. W. 892, 919, 224 Mo. 393.

#### Capacity for navigation

Any water, to be "navigable," must be susceptible of use for purposes of commerce, or possess the capacity for valuable floatage in transportation to market of the products of the country through which it runs, and must be of practical usefulness to the public as a public highway in its own state and without the aid of artificial means; a theoretical or potential navigation or one that is temporary, precarious, and unprofitable not being sufficient. *Hurst v. Dana*, 122 Pac. 1041, 1042, 86 Kan. 947.

A "navigable stream" is one capable of bearing on its bosom, either for the whole or

a part of the year, boats loaded with freight in regular course of trade. The mere rafting of timber or transporting wood in small boats at certain seasons of the year is not sufficient to render the stream navigable. *Seaboard Air Line R. Co. v. Sikes*, 60 S. E. 868, 869, 4 Ga. App. 7.

A "navigable stream" is one which is large enough to float a boat of some size, engaged in carrying trade, and implies the possibility of transporting men and things. *Burns v. Crescent Gun & Rod Club*, 41 South. 249, 251, 116 La. 1038.

The words "navigable stream" ordinarily mean a stream navigable in part, one of sufficient capacity to permit of saw logs being floated down the same at high water, and of small row boats being used thereon to some extent, and such meaning must be attributed to such words when used in a statute, in the absence of ambiguity suggesting that a different meaning might have been intended, which is discoverable by judicial construction. *Village of Bloomer v. Town of Bloomer*, 107 N. W. 974, 979, 128 Wis. 297.

It is not necessary that the waters should be "navigable" in all their parts, or that the navigable portion is open for use all the year, in order that the public may have a right of navigation where the waters are deep enough and fit for such use. *Schulte v. Warren*, 75 N. E. 783, 785, 218 Ill. 108, 13 L. R. A. (N. S.) 745; *People v. Economy Light & Power Co.*, 89 N. E. 760, 767, 241 Ill. 290.

A slough emptying into the sea, which during the ebb and flow of the tide is navigable for scows and for rafting and booming logs, is a "navigable stream." *Dawson v. McMillan*, 75 Pac. 807, 808, 34 Wash. 269.

A stream has "navigable capacity" when it is capable of being navigated over any part of the waters in their normal condition. *Hubbard v. Fort*, 188 Fed. 987, 996.

Streams in the state of Idaho are "navigable" if used either for transporting freight or passengers by boats, or for floating lumber, logs, wood, or any other product to market. The rule applied in that state is stated in *Black's Pomeroy on Water Rights*, § 218, as follows: "In those states, where lumbering is a principal industrial interest, it has been found necessary to establish a new rule in respect to the use of the streams, which is not founded upon any principle or precedent of the common law, but solely on the local exigencies and customs. This rule is that a fresh water stream which is capable of being used for the purpose of floating down logs to mills or to market, although it may be too small to admit of navigation, is 'navigable' (or, more properly, 'floatable'), and a public highway in the sense that the general public have an easement of passage over it for that purpose, though the title to the bed of the stream may remain in the riparian

owner subject to such public easement." The rule generally applied is that "to be 'navigable' a water course must have a useful capacity as a public highway of transportation"; but, where the streams of a state are more generally used for floating timber than for carrying passengers or freight, this rule does not apply. *Johnson v. Johnson*, 95 Pac. 499, 507, 14 Idaho, 561, 24 L. R. A. (N. S.) 1240 (quoting *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447); *Moss & Bros. v. Ramey*, 95 Pac. 513, 14 Idaho, 598.

"To be 'navigable' a water course must have a useful capacity as a public highway of transportation. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes." *Harrison v. Fite*, 148 Fed. 781, 784, 78 C. C. A. 447.

A channel in a tide river which at half tide is navigable with a rowboat, and which at full tide is navigable for boats, is a "navigable channel," though at low tide there is not much water therein. *Judson v. Tide Water Lumber Co.*, 98 Pac. 377, 379, 51 Wash. 164.

A lake on which a steamboat carrying pleasure parties is operated, and on which numerous small boats are used for rowing and fishing, the average depth of water being 16 feet, is a "navigable water." *Kalez v. Spokane Valley Land & Water Co.*, 84 Pac. 395, 396, 42 Wash. 43.

A lake not of sufficient size to warrant its use for maritime or commercial purposes is not "navigable" within the definition of navigable waters, and such a lake is properly subject to individual ownership by the riparian owners. *City of Geneva v. Henson*, 124 N. Y. Supp. 588, 593, 140 App. Div. 49.

Where a lake had a total area of 905 acres, 499 of which were covered to a depth of over 25 feet with a maximum depth of 50 feet, and boats of considerable dimensions, as well as smaller craft at different times, had piled on its waters, and booms of logs, piles, shingle bolts, and other timber products had been transported from place to place thereon, as well as moored in booms while awaiting the process of manufacture, the lake was navigable, though little used for navigation. *Brace & Hergert Mill Co. v. State*, 95 Pac. 278, 281, 49 Wash. 326.

The extended application of the right of the public to use "navigable streams," whether tidal or nontidal, even those of inconsiderable size, as highways for transporting merchandise, rafting and driving logs, and propelling boats, has made the terms "navigable" and "floatable" practically synonymous. *Smart v. Aroostook Lumber Co.*, 68 Atl. 527, 531, 103 Me. 37, 14 L. R. A. (N. S.) 1063 (citing *Knox v. Chaloner*, 42 Me. 150).



### Public usefulness

A "navigable stream" is a highway open to the use of all. *State ex rel. Guenther v. Charleston Light & Water Co.*, 47 S. E. 979, 983, 68 S. C. 540.

A body of water deep enough in places for hunters and fishermen to use it for small boats is not legally "navigable" as a whole, but there may be a public right of navigation in the places where the water is deep enough for use. *Schulte v. Warren*, 75 N. E. 783, 785, 218 Ill. 108, 13 L. R. A. (N. S.) 745.

### Same—Floatage of logs

A river capable of floating logs is a navigable stream. In *re Southern Wisconsin Power Co.*, 122 N. W. 801, 805, 140 Wis. 245; *Weatherby v. Meiklejohn*, 13 N. W. 697, 698, 56 Wis. 73; *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295, 305; *Cohn v. Wausau Boom Co.*, 2 N. W. 546, 548, 47 Wis. 314.

That a stream is capable of floating logs thereby entitling the public to a right of highway therein for that purpose is wholly insufficient to establish that it is "navigable" within St. 1898, § 3374, authorizing the erection and maintenance of a dam across any stream not navigable. *Allaby v. Mauston Electric Service Co.*, 116 N. W. 4, 6, 135 Wis. 345, 16 L. R. A. (N. S.) 420.

A stream which in its natural state can be practicably used for the floating of single bolts to market is a "navigable stream." *Monroe Mill Co. v. Menzel*, 77 Pac. 813, 815, 35 Wash. 487, 70 L. R. A. 272, 102 Am. St. Rep. 905.

Where streams were large enough to be used for floating logs and for commerce the greater part of the year, one being about a mile long, 300 feet wide, and from 6 to 8 feet deep, and the other 2 or 3 miles long, 50 feet wide at its mouth, and 10 or 12 feet deep in high water, they were navigable streams. Under *Sayles' Ann. Civ. St. 1897*, art. 4147, defining "navigable stream," the public would have a right to the use of such streams as navigable public highways whenever they have sufficient water for such purpose. *Orange Lumber Co. v. Thompson (Tex.)* 126 S. W. 604, 605.

A stream capable of transporting rafts of railroad ties for several months during the spring of the year, without the aid of men on the banks thereof, is "navigable," within the meaning of the law for that purpose and subject to the use of the public therefor, and the rights of the riparian owners to the soil adjacent to and underlying the bed of such stream are subject to this right or easement in the public, which rests upon the necessities of commerce; and, where it appears that there was no other practical route by which ties could be transported to market, the adjacent owners would have no right to interfere with one using the stream for the commercial purposes indicated. *Mc-*

*Kinney v. Northcutt*, 89 S. W. 351, 355, 114 Mo. App. 146.

### Actual use

A stream which is used only a few times in many years by a boat for a picnic or excursion is not "navigable," within the meaning of Laws 1850, p. 224, c. 140, § 28, subd. 5, authorizing railroads to cross streams, but providing that nothing in the acts shall be construed to authorize the erection of any bridge across any navigable stream or lake. *People v. New York, O. & W. Ry. Co.*, 117 N. Y. Supp. 1048, 1051, 133 App. Div. 476.

### Continual navigability

Any stream sufficient during the high-water season to be used for floating logs or timber to market or the place of use is "navigable," and to that extent and for that purpose is a public highway; and it is not necessary that such stream be navigable the whole year for such purpose or any purpose. *Idaho Northern R. Co. v. Post Falls Lumber & Mfg. Co.*, 119 Pac. 1098, 1101, 20 Idaho, 693, 38 L. R. A. (N. S.) 114. But it is sufficient that the stream have periods of navigable capacity, ordinarily recurring from year to year, and continuing long enough to make it useful as a highway. *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.*, 43 N. W. 680, 74 Wis. 652.

The court's instruction, in an action for the obstruction of a stream so as to interfere with the rafting of logs, that a navigable stream is one capable of being used at all times or periodically during the year for times long enough to make it susceptible of beneficial use to the public as a means of transportation, sufficiently defined a "navigable stream" for the purpose of the case, and defendant's requested instruction upon the same matter was properly refused. *Burr's Ferry, B. & C. Ry. Co. v. Allen (Tex.)* 149 S. W. 358, 360.

A stream is a "navigable" or "floatable" one if, by the increased precipitation at seasons, recurring periodically with reasonable certainty, the flow of water will be sufficient to be substantially useful to the public for transportation. *Hot Springs Lumber & Mfg. Co. v. Revercomb*, 55 S. E. 580, 582, 106 Va. 176, 9 L. R. A. (N. S.) 894.

A stream which had been successfully used for more than 20 years during the winter for floating logs to the market from a distance at least 10 miles above plaintiffs' mill was a "navigable stream" at the mill, notwithstanding opinions of witnesses that the stream was not navigable. *Trullinger v. Howe*, 97 Pac. 548, 53 Or. 219, 22 L. R. A. (N. S.) 545.

The navigability of a stream is shown where it appears that, a great many years previously, boats navigated it at certain seasons of the year, and there is no evidence that its condition has changed. *Miller & Lux*

*v. Enterprise Canal & Land Co.*, 75 Pac. 770, 771, 142 Cal. 208, 100 Am. St. Rep. 115.

In an action for damages for placing obstructions in a bayou and river alleged by plaintiff to be navigable, thus preventing him from floating logs placed therein to market, an instruction to find for plaintiff, if the jury believed from the evidence that he had placed logs in the bayou and river, and further believed that said bayou and river "were navigable for the purpose of floating said logs to market," is inaccurate, as such waters might have been navigable at the time that plaintiff wished to market his logs and not navigable at other times, and the stream to be navigable must be capable of use by the public, either at all times during the year, or for times long enough to make them useful to the public as a means of transportation. *Orange Lumber Co. v. Thompson* (Tex.) 113 S. W. 563, 564.

#### Natural navigability

According to the general definition, water is "navigable" when in its ordinary state it forms by itself or its connection with other waters a continued highway over which commerce is or may be carried in the customary mode, and a stream not naturally navigable, but made so by artificial means, is not navigable water in a legal sense. *State ex rel. Lyon v. Columbia Water Power Co.*, 63 S. E. 884, 887, 82 S. C. 181, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343.

A stream incapable of carrying logs without the construction of dams to increase the volume of water is not "navigable" for floating logs. *La Veine v. Stack-Gibbs Lumber Co.*, 104 Pac. 666, 667, 17 Idaho, 51, 134 Am. St. Rep. 253.

Every stream, which in its natural state is capable of floating logs or other commercial and floatable commodities for any practical period of time, is to such extent and for such time a "navigable stream," and the bed thereof is for such purposes subject to the regulation of the state. *Mashburn v. St. Joe Improvement Co.*, 113 Pac. 92, 95, 19 Idaho, 30, 35 L. R. A. (N. S.) 824.

Whether a stream is "navigable" must be determined with reference to its natural condition. Where a stream is in fact navigable in its natural state, it may be improved to enlarge its usefulness for the public's benefit. *People v. Economy Light & Power Co.*, 89 N. E. 760, 769, 241 Ill. 290.

A river which in its natural condition, unaided by artificial means, is susceptible to public use to float vessels, rafts, or logs, is a navigable or floatable stream according to the law of Maine, though not a navigable river in the technical sense of the common law. *Charles C. Wilson & Son v. Harrisburg*, 77 Atl. 787, 789, 107 Me. 207.

A stream, to be "navigable" or floatable for saw logs, must be capable, in its natural

condition, at ordinary recurring freshets, of being successfully and profitably used for that purpose, and a stream not navigable or floatable in its natural condition cannot be made so by artificial means. Where a stream is such that in its natural condition sawlogs cannot be floated therein, except at extreme high water, continued for a few hours at a time, and then only small logs, it is not a navigable stream for the purpose of floatage. *Kamm v. Normand*, 91 Pac. 448, 451, 50 Or. 9, 11 L. R. A. (N. S.) 290, 126 Am. St. Rep. 698.

#### Public termini necessary

A "navigable body of water" is one which the public has a right to use for navigation. The term includes all waters having sufficient capacity to float water craft for a period long enough to be of commercial value, or to float to market the products of the country through which the water extends so as to be useful to the population along its banks. The stream must be of some value to trade, commerce, or agriculture, and the term therefor excludes waters which are merely capable of floating a skiff for pleasure. To be useful for commercial purposes, the water must connect with other waters or lead from one public place to another, so as to be in the path of commerce. A stream which leads from a public river to a private house, or to which the public had no access, except at one point where the highway approaches it, is not navigable so as to render it a public highway. A "navigable body of water" must have a terminus by which the public can enter it and another from which it can leave it, but it need not lead from one county to another. The rights of the public in a body of water are entirely dependent on its capacity for navigation. *King v. Muller*, 67 Atl. 380, 384, 73 N. J. Eq. 32 (citing 1 Farnham, p. 100; 3 Farnham, p. 2407).

#### NAVIGABLE WATERS OF THE UNITED STATES

The term "navigable waters of the United States" applies: First, to all waters capable of sustaining or being used for interstate or foreign commerce, covering every part of any body of water, tidal or otherwise, any portion of which is capable of such use; and, second, to all waters under the admiralty and maritime jurisdiction of the United States and over which the District Court of the United States can exercise its peculiar admiralty jurisdiction. *United States v. Banister Realty Co.*, 155 Fed. 583, 593.

Where a river within a state was navigable for some distance from its mouth, and was actually navigated by small steamboats and river craft for the purpose of carrying up groceries, supplies, clothing, loggers' tools, etc., to the head of navigation, and returning with farmers' products, a bill was maintainable in the federal courts to restrain a boom

company from maintaining a boom in the river in such a manner as to be an obstruction to navigation, though the river was chiefly valuable for floating logs, and there was no proof of actual carriage of goods on the river in interstate commerce. To render a river navigable in law, it must be navigable in fact. A river is navigable in fact when it is used, or is susceptible of being used, while in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in customary modes of trade and travel on water. "Navigable waters" of the United States, within the meaning of the Acts of Congress, in contradistinction with the navigable waters of the states, are those waters which form, in their ordinary condition, by themselves or by unity with other waters, a continued highway, over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. The term "navigable waters of the United States" has reference to commerce of a substantial and permanent character. *United States v. Wishkah Boom Co.*, 136 Fed. 42, 45, 47, 68 C. C. A. 592 (citing *The Daniel Ball*, 10 Wall. [77 U. S.] 557, 563, 19 L. Ed. 999; *Leovy v. United States*, 20 Sup. Ct. 797, 177 U. S. 621, 44 L. Ed. 914).

#### State waters distinguished

The Erie Canal, which, though lying wholly within the state of New York, forms a part of a continuous highway for interstate and foreign commerce by connecting Lake Erie with the Hudson river, is a "navigable water" of the United States, as contradistinguished from a navigable water of the state. *Perry v. Haines*, 24 Sup. Ct. 8, 11, 191 U. S. 17, 48 L. Ed. 73.

"Navigable waters" lying within the limits of a state are both state and national in their character, with a paramount right of control or regulation in the general government, when Congress chooses to exercise the authority over the same. But, until such authority is exercised, the jurisdiction and power of the state to authorize the erection or construction of bridges over the same is clearly established. Act Cong. March 3, 1890, § 10, 30 Stat. 1151, which provides that "the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited," is prospective purely, and not intended to take away from a railroad company, which, under a duly authorized grant from a state, has constructed a bridge over a navigable interstate river, the implied power to make all necessary repairs. *Kansas City, M. & B. R. Co. v. J. T. Wylgul & Son*, 33 South. 965, 967, 968, 82 Miss. 223, 61 L. R. A. 578 (quoting and adopting *Rhea v. Newport News & M. V. R. Co.*, 50 Fed. 16).

## NAVIGATE

### NAVIGATION

See Dangers of Navigation; Inland Navigation; Practical Improvement of Navigation; Right of Navigation.

As commerce, see Commerce.

Obstruction of navigation, see Obstruct-Obstruction.

"Navigation" is defined by Bouvier as whatever relates to traversing the sea in ships; the art of ascertaining the geographical position of a ship and directing its course. The construction of a dock, while it may be useful to individuals engaged in navigation, is not involved in the public right of navigation as understood by the law. *Trustees of the Freeholders & Commonalty of Town of Brookhaven v. Smith*, 90 N. Y. Supp. 646, 651, 98 App. Div. 212.

## NAVY

Belonging to the navy, see Belong-Belonging.

## NE EXEAT

Under the English practice, the "writ of ne exeat" regno was a prerogative writ which issued to prevent a person from leaving the realm. In America it has been treated, not as a prerogative writ, but as a writ of right in the cases in which it is properly grantable. *Lamar v. Lamar*, 51 S. E. 763, 123 Ga. 827, 107 Am. St. Rep. 169, 3 Ann. Cas. 294.

"The object of a writ of 'ne exeat' is to secure to the plaintiff the presence of the defendant at the termination of the suit, either by his detention or by his giving equitable bail." *Dunsmoor v. Bankers' Surety Co.*, 91 N. E. 907, 908, 206 Mass. 23.

A writ of "ne exeat," at common law, was simply a writ to obtain equitable bail. It was issued by a court of equity upon application of the complainant against the defendant when it appeared that there was a debt positively due, certain in amount, or capable of being made certain on an equitable demand not suable at law (except in cases of account and possibly some other cases of concurrent jurisdiction), having conveyed away his property, or under other circumstances which would render any decree ineffectual. *Davidor v. Rosenberg*, 109 N. W. 925, 130 Wis. 22, 118 Am. St. Rep. 986.

A writ of "ne exeat" is one of right, and not prohibited by the constitutional provision regarding imprisonment for debt. It is little more than an order to hold to equitable bail, the party generally getting rid of it by giving security to abide the event of the litigation. *Gooding v. Reid, Murdock & Co.*, 177 Fed. 684, 686, 101 C. C. A. 310 (citing *Dean v. Smith*, 23 Wis. 483, 99 Am. Dec. 198; 2 Story, Eq. Jur. [10th Ed.] § 1469; preface to Warner's 1st Am. Ed. of Beames' Ne Exeat Regno;

*Patterson v. McLaughlin*, 18 Fed. Cas. 1826, 1 Cranch, C. C. 352; *Union Mut. Life Ins. Co. v. Kellogg*, 24 Fed. Cas. 611; *In re Rosser*, 101 Fed. 562, 41 C. C. A. 497; *Enos v. Hunter*, 4 Gilman [9 Ill.] 211; *Mitford & Tyler's Pl. & Pr. in Equity*, p. 144; *Gibson's Suits in Chancery* [1907], note to section 865).

## NEAR

See *As Near as May Be*; *At or Near*; *In or Near*; *Property On or Near Premises*.

"Near" means "adjacent to, close by, not far from." It is a relative term, and its precise import can only be determined by surrounding facts and circumstances. *Kilgore v. Jackson*, 118 S. W. 819, 821, 55 Tex. Civ. App. 99; *Karczenska v. City of Chicago*, 88 N. E. 188, 189, 239 Ill. 483.

### As an indefinite term

"Near" is a relative term, the precise import of which can only be determined by the surrounding facts and circumstances in the case in which it is used, and so an averment that plaintiff lived near a telegraph station is not equivalent to an allegation that he lived within a mile thereof. *Western Union Telegraph Co. v. Klitzke*, 89 N. E. 405, 406, 45 Ind. App. 550.

Stating that plaintiff was in front of and "near" to defendant's car alleged to have injured her when it started was not sufficiently certain to warrant a conclusion that the starting of the car was negligence as matter of law; the word "near" being an indefinite word which may mean a foot, a chain, or any other distance. *Cobe v. Malloy*, 88 N. E. 620, 622, 44 Ind. App. 8.

The word "near," in the *Vrooman* act (St. 1885, p. 147), as amended by St. 1891, p. 196, providing for the posting of notices in street assessment proceedings "on or near the chamber door of" the city council, etc., is a relative term, and its meaning must be determined by reference to the subject-matter, and the posting of the notices on a bulletin board in the city hall in which the council chamber was located was sufficient where such bulletin board was in plain view from the main entrance of the hall, and so placed as to be likely to bring the notices to the attention of persons visiting the council chamber, though the bulletin board was far removed from the council chamber. *Haughwout v. Percival*, 119 Pac. 649, 650, 161 Cal. 491, Ann. Cas. 1913D, 115.

### As allowing discretion as to place

The word "near," as applied to space, can have no positive or precise meaning. It is a relative term depending for its significance on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects. A charter granting a railroad a right to cross a river "above" or

"near" a certain town conferred a right to locate its bridge "below" such town. *Pedrick v. Raleigh & P. S. R. Co.*, 55 S. E. 877, 883, 143 N. C. 485, 10 L. R. A. (N. S.) 554 (quoting and adopting the definition in *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen [87 Mass.] 221; *Wood*, Nula § 274).

The title of Acts 1909, c. 1, an act to prohibit the sale of intoxicating liquors as a beverage "near" any schoolhouse, where a school is kept, whether it be in session or not, cannot be said not to warrant the provision of the act prohibiting such a sale within four miles of such a schoolhouse, especially where such provision has repeatedly been made before under a like title; the word "near" being a relative term, the proper import of which is dependent on the sense and connection in which it is used, considered together with the purposes to be accomplished. *J. W. Kelly & Co. v. State*, 132 S. W. 193, 201, 123 Tenn. 516.

Civ. Code 1902, § 203, provides that at all general elections held in the state the same shall be conducted at the polling precincts fixed by law in the various counties, cities, and towns, the location of which shall be as designated, and then declares that, at the Waverly precinct, in R. County, the polling place shall be "at or near the fork of the Rice Creek spring and Camden road." Held, that it could not be said as a matter of law that a polling place located a quarter of a mile from the crossing of the stream and road was not properly located "near" such point. *Verner v. Muller*, 71 S. E. 854, 856, 89 S. C. 117.

### On synonyms

See *On—Upon*.

The call from the third to the fourth corner of a survey of land, made under warrant of the state of Kentucky and afterwards carried into a patent issued by the state, was from a stake on the top of Cumberland Mountain, "thence south, 60 degrees west, 8,320 poles, to a stake near Cumberland Gap." If the course and distance be followed, it would carry the fourth corner several miles within the state of Tennessee; whereas, if the line be run following the state line along the crest of the Cumberland Mountains in a general southwesterly course, it would strike the center of the Gap at the Tennessee line. Held, that the words "near Cumberland Gap" should be construed to mean at or in Cumberland Gap, and that, as so construed, such natural object would control the calls for course and distance, and fix the corner at the center of the Gap. *Davis' Heirs v. Hinckley*, 141 Fed. 708, 710; *Davis v. Farmer*, 141 Fed. 703, 707.

## NEAR BEER

"Near beer" is an imitation of beer. *Manus v. State*, 66 S. E. 1037, 7 Ga. App. 377.

One who has paid the tax imposed by Acts 1908, p. 1112, known as the "near beer act," and has obtained a license thereunder, is not entitled to keep on hand at his place of business any alcoholic, spirituous, malt, or intoxicating liquors, but only such liquors as, if drunk to excess, will not produce intoxication. *Cassidy v. State*, 72 S. E. 939, 941, 10 Ga. App. 123.

The court will take judicial notice of the nonintoxicating qualities of "near beer," a term currently used to designate all that class of malt liquors which contain so little alcohol that they will not produce intoxication, though drunk to excess, and including all malt liquors not within the purview of the general prohibition law. *Loh v. City of Macon*, 70 S. E. 149, 150, 8 Ga. App. 744.

Act March 12, 1908 (Laws 1908, p. 275, c. 189), known as the "Byrd Liquor Law," is entitled "An act to define and regulate the sale, distribution, rectifying, manufacture and distilling of intoxicating liquor and malt beverages, and to impose a license thereon," and defines what shall be deemed intoxicating spirits, including beer, etc., therein, and section 23½ provides that "malt beverage" shall mean the by-products of a brewery, but must be nonintoxicating, and shall not contain more than 2¼ per cent. of alcohol, and shall only be sold by the manufacturer to the customer and in quantities of not less than one-half dozen bottles or more than four dozen bottles at a time; that the name "malt beverage" shall be blown in the bottles in the manner stated, with the name and address of the manufacturer, and that no person shall place in such bottles liquid containing more than 2¼ per cent. volume of alcohol, and prescribes a penalty for its violation. Held, that the section was intended to regulate the manufacture and sale of all classes of malt liquors not containing 2¼ per cent. alcohol, "malt beverage" being synonymous with "small brew" and "near beer," and was a valid exercise of the state's general police power, as well as of the authority granted by Const. § 62 (Code 1904, p. ccxxiii), authorizing the General Assembly to enact laws regulating or prohibiting the manufacture or sale of intoxicating liquors; that section of the Constitution not being designed to limit but to enlarge the police power over intoxicants. *Commonwealth v. Henry*, 65 S. E. 570, 572, 110 Va. 879, 26 L. R. A. (N. S.) 883.

"Near beer" is a term used to designate all malt liquors which contain so little alcohol that they will not produce intoxication, though drunk to excess, and includes all malt liquors not within the purview of the general prohibition law. *Campbell v. City of Thomasville*, 64 S. E. 815, 818, 6 Ga. App. 212.

#### **As intoxicating liquor**

See Intoxicating Liquor.

#### **NEAR COMPACT PART OF TOWN**

The phrase "near the compact part of a town" in Rev. St. c. 52, § 86, providing that no engine or train shall run across a highway near the compact part of a town at a speed greater than 6 miles an hour, unless the railroad maintains a flagman, a gate, or certain signals at such crossing, is not limited to the largest or principal compact part of a town, but applies to any compact portion, and includes a village with church, schoolhouse, engine house, store and dwelling houses, in all at least 25 buildings, and all situated within 350 feet of the central point. *Moore v. Maine Cent. R. Co.*, 76 Atl. 871, 872, 106 Me. 297.

#### **NEAR RELATIVES**

The term "near relatives," in a petition for leave to appeal from a decision admitting a will to probate, averring that the petitioners are "near relatives" and heirs at law of the deceased and entitled to a distributive share of the estate if the will should be set aside, is used as synonymous with the term "heirs," and is sufficient to show that the petitioners are beneficially interested in the estate and entitled to appeal. *Perry v. Scaife*, 105 N. W. 920, 921, 126 Wis. 405.

#### **NEAR TO**

As on, see On—Upon.

#### **NEAREST**

There is a shade of difference between the words "next" and "nearest." The word "next," in a certificate of membership of a mutual benefit society, providing for payment of a benefit on the death of a member to the beneficiary named, who under the by-laws must be either the wife, children, adopted children, parents, etc., and, if the member outlived the beneficiary named and died without naming another beneficiary, the benefit was to go to the member's "next" living relation in the order named, is used as a synonym of "nearest," and refers to the member and not to the beneficiary. Therefore, where a member named his wife as beneficiary, and she died, and he married again, leaving a second wife, without having changed the beneficiary, the second wife, and not his children, took the benefit. *Speegle v. Sovereign Camp of Woodmen of the World*, 58 S. E. 435, 436, 77 S. C. 517.

#### **NEAREST BLOOD RELATIONS**

The words "my nearest blood relatives," used in wills, generally mean such persons as take under the statute regarding the distribution of estates of intestates, but any reasonably different meaning may be given thereto when necessary to effectuate the intention of the testator. In *re Sander's Estate*, 105 N. W. 1064, 1065, 126 Wis. 660, 5 Ann. Cas. 508.

No one is "nearest" in degree of blood, if some one else be "nearer." In *re Weaver's*

Estate, 119 N. W. 69, 70, 140 Iowa, 615, 22 L. R. A. (N. S.) 1161, 17 Ann. Cas. 947.

### NEAREST CAUSE

As proximate cause, see Proximate Cause.

### NEAREST ENTRANCE

In Liquor Tax Law, § 17, subd. 8, requiring the consent of owners of dwellings, the nearest entrance of which is within 200 feet, measured in a straight line, of the nearest entrance to the premises on which traffic in liquor is to be carried on, the expression "nearest entrance to the dwelling" includes all entrances, front, side, or rear, and by the same course of reasoning the "entrance to the place where the liquor is to be sold" means any entrance. By the use of the word "nearest," the statute clearly contemplates that there might be more than one, and, as it is not probable that there would ordinarily be more than one front entrance, it must include rear and side entrances. In re McMonagle, 84 N. Y. Supp. 1068, 1071, 41 Misc. Rep. 407.

### NEAREST OF KIN

"It is certainly difficult to distinguish between the expressions 'next of kin,' 'nearest of kin,' 'nearest of kindred,' and 'nearest blood relations'; and primarily the words indicated the nearest degree of consanguinity." De Graffenreid v. Iowa Land & Trust Co., 95 Pac. 624, 635, 20 Okl. 687 (quoting Swasey v. Jacques, 10 N. E. 758, 144 Mass. 135, 59 Am. Rep. 65).

The term "nearest of kin," in a will, signifies those standing in the nearest relationship to testator, according to the legal rules for computing degrees of kinship; brothers and sisters taking to the exclusion of the children of a deceased brother or sister. Clark v. Mack, 126 N. W. 632, 634, 161 Mich. 545.

### NEAREST RELATIONS

The term "nearest relation," as used in a statute, giving the property of an intestate who has no children to the "nearest relation," means some one person, and that person is neither husband nor wife of the intestate. De Graffenreid v. Iowa Land & Trust Co., 95 Pac. 624, 635, 20 Okl. 687.

Testator, after giving his entire estate to his wife, stated: "It is my wish that my nearest relatives, brother, sister or their children shall inherit one-half of all the estate my wife may possess at the time of her death \* \* \* the other half shall come to the nearest relatives of my wife, or if she wants to make a will to anyone else, she can dispose of one-half of all she may leave just as she pleases." Held, that "nearest relatives," as applied to the wife's half, did not carry the same meaning as in the case of the husband's half, but that the presumption was that testator meant such relatives as should be properly defined as nearest, and that a sister of

the wife took to the exclusion of children of a deceased sister. In re Atldorfer's Estate, 73 Atl. 1068, 1069, 225 Pa. 136.

### NEARLY EQUAL

See As Nearly Equal as May Be.

### NEARSILK

Imitation silk yarn, which is made from cotton waste, subjected to a chemical process, whereby it loses its identity as cotton, and which resembles silk yarn in quality, texture, and use, is held, by virtue of the similitude clause in section 7, Tariff Act July 24, 1897 (30 Stat. 205, c. 11), to be dutiable at the rate applicable to silk yarn, under paragraph 335 of said act (30 Stat. 185, c. 11, § 1, Schedule L). All yarns of this character, whether made from silk waste or from cotton waste, are known as "imitation silk," and the fabric woven therefrom is known as "nearsilk." Von Bernuth v. United States, 133 Fed. 800, 801.

### NECESSARIES

Other necessities, see Other.

A contract for necessities made by an infant is binding, but the word "necessaries" is a relative term, except when applied to such things as are obviously requisite for the maintenance of existence, and depends on the social position and situation in life of the infant, as well as on his own fortune and that of his parents. International Text Book Co. v. Connelly, 99 N. E. 722, 725, 206 N. Y. 183, 42 L. R. A. (N. S.) 1115.

What are included in the word "necessaries," when applied to goods purchased by a wife, and for which it is sought to charge the husband, are such articles of utility as are suitable to maintain her according to the degree and estate of her husband and his ability to pay. Schwartz v. Cohn, 129 N. Y. Supp. 464, 465.

In order that articles purchased by a wife for herself and children may be classed as necessities under Rev. St. 1896, arts. 2970, 2971, providing that the wife may contract debts for necessities furnished herself and children, if the expenses incurred be reasonable and proper, such articles must be reasonable and proper under the conditions and surroundings of the parties. Desmond v. Dockery (Tex.) 116 S. W. 114, 115.

Where a person is so insane as to attempt to injure himself or to destroy property, the services of a nurse or watchers fall within the class of "necessaries" for which the estate of the insane person is liable. Waldron v. Davis, 58 Atl. 293, 294, 70 N. J. Law, 788, 66 L. R. A. 591.

The services of a nurse during confinement are "necessaries" for which a husband is liable, although he is living apart from his wife and paying her a certain sum per week. Schneider v. Rosenbaum, 101 N. Y. Supp. 529, 52 Misc. Rep. 143.

A judgment for damages caused by negligence is not for "necessaries," within Code Civ. Proc. § 1391, authorizing execution against wages or salary, when the judgment was obtained wholly for necessaries furnished. *Kelly v. Mulcahy*, 116 N. Y. Supp. 61, 131 App. Div. 639.

A judgment, in an action on a judgment of another state, is not one recovered for "necessaries," within Code Civ. Proc. § 1391, as amended by Laws 1903, p. 1071, c. 461, authorizing an order for execution on such a judgment, against income from a trust fund. *Neuman v. Mortimer*, 90 N. Y. Supp. 524, 525, 98 App. Div. 64.

#### Attorney's fees

Protection of a wife's character in a suit against her by employing counsel is as much a necessary as food, etc., within the rule requiring one to provide his wife with necessities suitable to their station in life. *Hamilton v. Salisbury*, 114 S. W. 563, 133 Mo. App. 718.

Attorney's services in bringing an action of divorce for a wife are not "necessaries," within the meaning of a statute making a husband liable to a person furnishing his wife articles necessary for her support. *Sears v. Swenson*, 115 N. W. 519, 520, 22 S. D. 74.

#### False teeth

Artificial teeth made by a dentist for a married woman constituted "necessaries" for which her husband was primarily liable. *Clark v. Tenneson*, 130 N. W. 896, 896, 146 Wis. 65, 33 L. R. A. (N. S.) 426, Ann. Cas. 1912C, 141.

#### Groceries

Groceries bought by a wife are "necessaries" which the husband is bound to furnish or pay for. *Fisher v. Brady*, 94 N. Y. Supp. 25, 26, 47 Misc. Rep. 401.

#### Insurance

Insurance is not an article of merchandise or manufacture, or one of the "necessaries" of life, within the laws against engrossing, prohibiting combinations among dealers in merchandise or manufacture or necessities of life. *Harris v. Commonwealth*, 73 S. E. 561, 563, 113 Va. 746, 38 L. R. A. (N. S.) 458, Ann. Cas. 1913E, 597.

#### Medical attendance and medicines

The phrase "necessaries of life," as used in connection with the subject of restraint of trade, must be regarded as broad enough to include proprietary medicines and articles, of which the public consumes \$60,000,000 worth in a year. *John D. Park & Sons v. National Wholesale Druggists' Ass'n*, 87 N. E. 136, 141, 175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 578.

A claim for surgical services is not within Code Civ. Proc. § 1391, relating to exemptions and providing that where a judgment has been recovered wholly for "necessaries," etc., and execution has been returned un-

satisfied, the judgment creditor may have execution against wages due the debtor. *Taylor v. Barker*, 95 N. Y. Supp. 474, 108 App. Div. 21.

Medical services are necessities of life which parents are required to furnish their children, and hence within the purview of Civ. Code, § 171, as amended in 1905 (St. 1905, p. 206), making a wife's separate estate liable for necessities furnished the family while living with her husband. *Evans v. Noonan*, 128 Pac. 794, 795, 20 Cal. App. 288.

#### Question of law or fact

In the absence of notice to the contrary, the law will imply authority on the part of a wife, who is living with her husband, to buy such articles on his credit as pertain to the household arrangements, which are commonly under a wife's care, or, as has been said, she is presumed to have authority to purchase "necessaries" on the husband's credit as his agent. When the parties are maintaining conjugal relations, the necessity of the wife's purchase may be a material circumstance to prove her authority. As to "necessaries," in the sense of food, clothing, shelter, medical attendance, and such things as every one must have, there can never be a question of a wife's right to provide them if her husband does not. But when the "necessaries" are taken to mean not only articles of strict necessity, but things needed to equalize the wife in comfort to other women of her condition, an element of uncertainty is introduced. As to such things, the husband's responsibility does not depend on the question of necessity but on the wife's agency, which is a question for the jury. The necessity of the articles bought, the means of the parties, their condition in life, and the previous conduct of the husband with reference to the wife's purchases in his name, all enter into the inquiry, as circumstances bearing on the measure of authority she has received, or appears to have received, from him. *Johnson v. Briscoe*, 79 S. W. 498, 499, 500, 104 Mo. App. 493.

#### Rent of house

A claim for rent is not one for "necessaries," within the law permitting execution against the wages of the debtor. *Beard v. Covill*, 102 N. Y. Supp. 204, 205.

### NECESSARIES (For Infants)

#### Articles used in business

Articles furnished to an infant for use in business, such as merchandising, farming, or conducting a shop of any kind, are not regarded as "necessaries." *Wallace v. Leroy*, 50 S. E. 243, 244, 57 W. Va. 263, 110 Am. St. Rep. 777.

#### Attorney's fees

Beneficial services rendered a minor by an attorney are classed as necessities, and payment therefor cannot be avoided on the

ground of the client's minority. *Sutton v. Heinzie*, 115 Pac. 560, 561, 84 Kan. 756, 84 L. R. A. (N. S.) 238.

Under Rev. Laws, c. 145, § 25, requiring guardians to sue for and receive debts due their wards, and to represent their wards in all actions unless some other person is appointed as guardian ad litem or next friend, and section 23 providing for guardians ad litem for minors in suits in which the latter may be interested, services of an attorney in settling the estate of a deceased person, in which a minor is interested, are not "necessaries" for which the minor is liable, in the absence of an employment of the attorney by the minor's guardian. *McIsaac v. Adams*, 76 N. E. 654, 190 Mass. 117, 112 Am. St. Rep. 321, 5 Ann. Cas. 729.

#### **Buggy**

A buggy is not a "necessary" to an infant not engaged in any business requiring the use of a buggy, nor attending school, so as to make it necessary for him to ride to and from school. *Heffington v. Jackson & Norton*, 98 S. W. 108, 109, 43 Tex. Civ. App. 560.

#### **Clothing, education, food, lodging, and medicine**

The question of what are "necessaries" for an infant depends largely upon his rank, social position, and like circumstances. Generally speaking, necessities for an infant include support and maintenance, food, lodging, clothing, medical attendance, and education suitable to his station in life. *McLean v. Jackson*, 76 S. E. 792, 12 Ga. App. 51.

"What may be included in the term 'necessaries' is a question upon which the authorities are not entirely harmonious, but certainly the term is not so limited as to include only what is necessary to the actual support of life, and it is usually held to be sufficiently extensive to include articles fit to maintain a particular person in the state, station, and degree in life in which he is, so that things may be necessary for one person which would not be necessary for another in a different station in life (quoting and adopting definition in *Clark on Contracts* [2d Ed.] 156). 'Necessaries' are defined by Mr. Greenleaf to be such things as are useful and suitable to the party's state and condition in life, and not merely such as are requisite for bare existence." In order to determine the question whether or not the contract of an infant for a course in stenography was a contract for necessities, in the sense in which the term "necessaries" is used to render the contract binding upon such infant, the evidence in the case should show the state, degree, and condition in life in which the infant is whose contract is under consideration; and it should also affirmatively appear that the parents or guardian of such infant failed or refused to furnish the alleged necessary. *Mauldin v. Southern Short-*

*hand & Business University*, 55 S. E. 922, 126 Ga. 681, 8 Ann. Cas. 130.

#### **Question of law or fact**

Articles suitable and which would be beneficial to an infant are not *ex vi termini* necessities, but the question is for the jury. *Nielson v. International Textbook Co.*, 75 Atl. 330, 331, 106 Me. 104, 20 Ann. Cas. 591.

#### **NECESSARIES (For Vessels)**

The "necessaries" for which the master of a vessel may, in a proper case, bind his vessel means whatever is fit and proper for the service on which a vessel is engaged. *The Pleroma*, 175 Fed. 639, 640.

### **NECESSARILY**

See Unnecessarily.

As used in an instruction that, if plaintiff was employed by defendant, plaintiff assumed all the dangers "necessarily" incident to such employment, but plaintiff did not assume any dangers arising from or caused by defendant's carelessness and negligence, the word "necessarily" means inevitably, not to be avoided even by the exercise of the highest degree of care, and such instruction is erroneous as imposing too high a degree of care. *Reickert v. Hammond Packing Co.*, 118 S. W. 525, 527, 136 Mo. App. 565.

#### **NECESSARILY ACQUIRED KNOWLEDGE**

"By 'necessarily acquired knowledge' is meant that which arises from the obvious and open negligence which the servant must have seen and known in performing his work by the use of ordinary care." *Galveston, H. & S. A. Ry. Co. v. Stoy*, 99 S. W. 135, 136, 44 Tex. Civ. App. 448 (citing *Bonnet v. Galveston, H. & S. A. Ry. Co.*, 33 S. W. 334, 89 Tex. 72; *Missouri, K. & T. Ry. Co. v. Hannig*, 48 S. W. 508, 91 Tex. 347; *Peck v. Peck*, 87 S. W. 248, 99 Tex. 10; *El Paso & S. W. R. Co. v. Vizard*, 88 S. W. 457, 39 Tex. Civ. App. 534).

### **NECESSARILY AFFECT JUDGMENT**

Code Civ. Proc. § 1068, provides that a writ of review shall issue only where an inferior tribunal has exceeded its jurisdiction and there is no appeal or other adequate remedy. Section 956 provides that, upon an appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision excepted to which involves the merits or "necessarily affects the judgment," held that, though no appeal lies from an order dismissing or refusing to dismiss an action, an erroneous order denying plaintiff's motion to dismiss the action affects the judgment thereafter rendered on the merits against the plaintiff, so that such order may be reviewed on appeal from the judgment, and hence a writ of review will not lie. *Huntington Park Imp. Co. v. Supe-*



rior Court of Los Angeles County, 121 Pac. 701, 703, 17 Cal. App. 692.

### NECESSARILY AND SOLELY

The requirement of an accident policy that death must have resulted "necessarily and solely" from accidental injury is satisfied, where the injury was the predominating and efficient cause of the death, and that other conditions were set in motion by the injury which may have contributed to the death is immaterial. *Continental Casualty Co. v. Colvin*, 95 Pac. 565, 568, 77 Kan. 561.

### NECESSARILY CONFINED TO HOUSE

A policy insuring against diseases provided for a weekly indemnity for the period an assured "should be necessarily confined to the house." Held, that the clause, in the case of a person taking treatment for tuberculosis, meant confined to any part of the house, either inside or upon the porches attached to it on the outside. *Dulany v. Fidelity & Casualty Co. of New York*, 66 Atl. 614, 617, 106 Md. 17.

A health indemnity policy provided for payment for the number of consecutive days after the first week that insured was necessarily and continuously confined within the house and regularly visited by a physician by reason of illness contracted after the policy had been in force for 30 days. Plaintiff was taken ill in a hotel while in Florida, where he was treated by a physician, and, after getting somewhat better, was transported in a Pullman car to his home, where it was determined that it was necessary for him to undergo an operation by surgeons in a nearby city. He was operated upon, attended by them daily by being taken to them in a carriage from his hotel near by and occasionally walking to them when able, and on being returned to his home was yet under the treatment of physicians and confined to his house, except occasionally when he sat on the porch, and was once driven to his place of business without taking any part in business matters. At another time he was taken to the physicians' office, and with these exceptions he was in the house and much of the time in bed. Held, that the policy did not require that plaintiff should be literally confined within the walls of his house all the time, and that he was necessarily and continuously confined within the house within the terms of the policy. *Ramsey v. General Accident, Fire & Life Ins. Co.*, 142 S. W. 763, 160 Mo. App. 236.

### NECESSARILY INCLUDED

To be "necessarily included" in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof. *People v. Kerrick*, 77 Pac. 711, 712, 144 Cal. 46.

Code Cr. Proc. § 444, provides that on an indictment for crime consisting of different degrees the jury may find defendant not guilty of the crime charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime. Section 445 provides that in all other cases defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment. Penal Law (Consol. Laws, c. 40) § 404, provides that a person who with intent to commit a crime therein breaks and enters a building, etc., is guilty of burglary in the third degree. Section 405 provides that a person who, under circumstances or in a manner not amounting to a burglary, enters a building or any part thereof, with intent to commit a felony, or a larceny or any malicious mischief, is guilty of a misdemeanor. Held, that the words "necessarily included" in said section 445 should not be so construed as to require that the lesser offense for which a conviction may be had must be so included in the statutory definition of the crime for which defendant is indicted, but it suffices that the acts constituting the lesser crime be charged in the indictment and duly proven, and hence one charged with burglary in the third degree may be convicted of an unlawful entry with intent to commit a larceny, where the indictment charges the commission of all the acts necessary to establish the latter crime. *People v. Miller*, 128 N. Y. S. 549, 550, 143 App. Div. 251.

### NECESSARILY INCURRED

Code Civ. Proc. § 1033, allowing recovery of disbursements "necessarily" incurred in the action, does not make the premium paid a surety company for a replevin bond, procured pendente lite by a plaintiff ultimately successful, a proper item of costs; it not being a necessity to plaintiff's cause of action that he take into possession the property pending the action, but a privilege granted on filing the bond, and the filing of the bond by a surety company likewise being a privilege, and not a necessity. *Williams v. Atchison, T. & S. F. Ry. Co.*, 103 Pac. 885, 156 Cal. 140, 134 Am. St. Rep. 117, 19 Ann. Cas. 1260.

### NECESSARY

See Proper and Necessary.

The word "necessary" must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. *Rexroth v. Holloway*, 90 N. E. 87, 45 Ind. App. 36.

Though plaintiff in an employee's personal injury action alleged in his complaint that it was "necessary" for him to do his work in

a particular way, it was not error to refuse to instruct that he was bound to prove that allegation, and to instruct, in lieu thereof, that it was not essential that plaintiff was absolutely required to do his work in that way if the method he adopted was customarily pursued and was a reasonably safe method; it not appearing that plaintiff intended to use the term "necessary" in its restricted sense as meaning indispensable. *Killeen v. Barnes-King Development Co.*, 127 Pac. 89, 93, 46 Mont. 212; *State v. Marron* (N. M.) 128 Pac. 485, 491.

The word "necessary" has no fixed meaning or character peculiar to itself. It is flexible and relative. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a given object cannot be dispensed with, or it may mean something reasonably useful and proper, and of greater or lesser benefit or convenience, and its force and meaning must be determined with relation to the particular object sought, and is a relative and comparative term, depending upon its application to the object sought, the character of and reasons for the convenience as public or private, and its adaptation to the public needs or public convenience, and especially is this true where it is based upon a condition or state of affairs in which the public are directly interested, and as to which a public duty is imposed upon a public instrumentality, as a railroad. *Chicago, I. & L. Ry. Co. v. Baugh*, 94 N. E. 571, 573, 175 Ind. 419.

The word "necessary" is a somewhat elastic term, and according to Webster's Dictionary may mean such as must be; impossible to be otherwise; not to be avoided; inevitable; or, according to Bouvier's Law Dict., it may mean that one thing is convenient, or useful, or essential to another. In an action against a railroad company to recover for the death of employes of a contractor, the court instructed the jury that if it was contemplated in the construction contract that the workmen should use the tracks in going to and from their work, or that such use was practically necessary, such use of the track did not constitute the employes trespassers or mere licensees, but they were there by the invitation of the company. It is plain from the context that in the instruction under consideration the word "necessary" was used in its primary sense as given in Webster's Dictionary, especially as the court in another instruction said: "If, on the contrary, the jury believe from the evidence that such use was neither contemplated nor necessary, as aforesaid, then the mere use of said tract, by said employes, even with the company's knowledge, whether for the sake of convenience or otherwise, constitutes them mere licensees, and as such the defendant owed them the same duty as to trespassers."

*Norfolk & W. R. Co. v. Denny's Adm'r*, 56 S. E. 321, 328, 106 Va. 383.

"To have been 'necessary,' the administration of chloroform must have 'such as would be; that cannot be otherwise;' or (2) 'such that it cannot be disregarded or omitted; indispensable, requisite, essential, needful, required.'" *Mella v. Northern S. S. Co.*, 162 Fed. 499, 511 (quoting and adopting Cent. Dict.).

The word "necessary," as used in Rev. St. 1898, c. 48, providing for the taxation of railroads according to gross profits, and section 1038, subd. 14, declaring that all the track, right of way, depot grounds, and buildings, machine shops, rolling stock, and all other property necessarily used in operating any railroad, shall be exempt from taxation for any purpose, except special assessments for local improvements, means neither inevitable nor merely convenient or profitable, but refers to a stage of utility or materiality to the general business of a common carrier less than the first and greater than the latter of such expressions. *Chicago, St. P., M. & O. R. Co. v. Douglas County*, 99 N. W. 1030, 1031, 122 Wis. 273.

The word "necessary," in St. 1896, § 4075, giving the privilege of secrecy to all information, required by a physician from patient in attending the latter professionally, necessary to enable prescription for such patient, will not receive any technical or unduly restricted meaning, and the testimony and opinion of a decedent's attending physician as to her mental capacity, based entirely on information derived from her statements or the physician's observation while treating her professionally, and for the purpose of such treatment, are properly excluded in a proceeding contesting the probate of decedent's will. *In re Hunt's Will*, 100 N. W. 874, 876, 122 Wis. 460 (citing *In re Bruendl's Will*, 78 N. W. 169, 102 Wis. 45).

"When it comes to determining what is 'necessary' for the conduct of the business and transaction of the affairs for which a corporation has been chartered, it must, of course, be understood that what is meant is a due and profitable prosecution of its lawful purposes; that the 'necessity' contemplated is a relative one having reference to economy, convenience, efficiency, and success; and that some latitude is to be allowed to the discretion of the corporation itself in deciding what, from time to time, is or is not, in that sense, necessary." *Folk v. State Capital Savings & Loan Ass'n*, 63 Atl. 1013, 1016, 214 Pa. 529.

The term "necessary or in use in the proper operation," in Comp. Laws 1897, § 6277, providing that specified railroad taxes shall be in lieu of other taxes, except such real estate as is owned and can be conveyed by such corporations, and not actually occupied in the exercise of its franchises, and not

"necessary or in use in the proper operation" of its road, includes land owned by a railroad but in the possession of private individuals and used exclusively by them in their individual business for wood and coal yards and sheds and storage of grain, and such property is taxable as other real estate. *Grand Rapids & I. Ry. Co. v. City of Grand Rapids*, 100 N. W. 1012, 1013, 137 Mich. 587, 4 Ann. Cas. 1195.

#### As convenient

The declaration in an action for injuries to an employé in a coal mine while placing a loaded car on a side track alleged that it became "necessary" for the employé in the performance of his duty to place the car on the side track. The evidence showed that it was convenient, and tended to greatly facilitate the performance of the work to place the car on the side track, which was not more than 200 feet from where it was loaded, instead of taking it from one-fourth to one-half a mile distant. Held, that the proof sustained the allegation; the word "necessary" not meaning indispensable, unavoidable, or that which must be, but meaning reasonably convenient. *Brooks v. Chicago, W. & V. Coal Co.*, 84 N. E. 1028, 1031, 234 Ill. 372.

The word "necessary," as used in an agreement permitting the construction of a switch necessary for the accommodation of a railway company, does not mean absolutely requisite, but is equivalent to the words "reasonably convenient." *Reeser v. Philadelphia & R. R. Co.*, 64 Atl. 376, 377, 215 Pa. 136.

The word "necessary," as used in an allegation, in a railroad company's complaint to restrain the enforcement of an order requiring the construction of a connection with another road, that all the land it was required to use for such connection was "necessary" to enable it to handle its traffic, meant nothing more than that the lands would be reasonably convenient. *Pittsburgh, C. & St. L. R. Co. v. Railroad Commission of Indiana*, 86 N. E. 328, 334, 171 Ind. 189 (citing 5 Words and Phrases, p. 4705).

#### As expedient or appropriate

In determining what is reasonably necessary in making a public improvement, and what the authorities in charge are therefore empowered to do, the word "necessary" does not mean indispensable, but includes whatever is appropriate to render the improvement effective. *Meriwether v. Board of Directors of St. Francis Levee District*, 165 Fed. 317, 319, 91 C. C. A. 285.

The word "necessary," as used in Rev. St. c. 34, § 26, making it the duty of the county board of each county to provide a suitable courthouse when "necessary" and the finances of the county will justify it, "is not to be interpreted as referring to such measures as are absolutely and indispensably

necessary, but as including all appropriate means which are conducive or are adapted to the end to be accomplished, and which in the judgment of the board will most advantageously effect it." *Coles County v. Goehring*, 70 N. E. 610, 617, 209 Ill. 142.

#### As involving discretion

The words "when necessary," as used in a statute, making it the duty of the court, whether requested or not, to instruct the jury on all questions of law necessary for their information, which instruction shall include, whenever necessary, the subject of good character, do not mean that it is discretionary with the court as to including, in its instructions, good character, when there is evidence upon which to base the instruction. The province of the court is to guide the jury by proper instructions upon the facts in proof and not to consider the necessity of an instruction which practically, if that rule should be adopted, would permit the court to determine whether the facts in proof would have any effect upon the conclusion to be reached, and the court must instruct on good character whenever there is testimony as to good character in evidence. *State v. Auslinger*, 71 S. W. 1041, 1043, 171 Mo. 600.

#### As material or relevant

Code Civ. Proc. § 885, making it a prerequisite to the granting of an order for the appointment of a referee to take depositions of the officers of a corporation that the affidavit show that it is "necessary" for use on a motion, etc., requires that it shall appear first that the person sought to be examined can, and if compelled will, swear to the facts desired, and that the facts to which he can swear are relevant to the proceeding. *Calvet-Rogniat v. Mercantile Trust Co.*, 93 N. Y. Supp. 241, 243, 46 Misc. Rep. 20.

In Code Civ. Proc. § 870 et seq., and general rule of practice 82, requiring, for the examination of an adverse party before trial, a showing by affidavit that the testimony is material and necessary, the words "material" and "necessary" are not used synonymously, even if the word "necessary" does not mean indispensable to the making of an issue. *Koplin v. Hoe*, 108 N. Y. Supp. 602, 603, 128 App. Div. 827.

In Code Supp. 1907, § 3060a14, providing that, where a negotiable instrument is wanting in any "material particular," the person in possession has prima facie authority to complete it by filling up the blank therein, etc., the word "material" was not used as synonymous with "necessary," so as to restrict the right to filling in an omission essential to the completion of a negotiable instrument, but included all omitted matter usually found in such instruments, and where a negotiable note was delivered to the payee complete, except for the filling of a blank left for the place of payment, the payee had prima facie authority, before indorsing

it to a bona fide holder for value before maturity, to fill the blank so as to make the note payable at a place other than that where the maker resided. *Johnston v. Hoover*, 117 N. W. 277, 278, 139 Iowa, 143.

**As probable, usual, and ordinary**

In prosecutions for homicide, in charging as to the presumption that persons intend the ordinary results of their acts, the words "necessary," "probable," "usual," and "ordinary" are substantially synonymous. *Beauregard v. State*, 131 N. W. 347, 351, 146 Wis. 280.

**As reasonably necessary**

The phrase "necessary ballast," as used in a contract for necessary ballast for a traction company's tracks, means the ballast reasonably necessary to complete the road for the purposes for which it was built, and the contract is not void for want of mutuality of obligation, where the necessary amount can be determined from the testimony of experts. *Blue Grass Traction Co. v. Hedges & Adair*, 104 S. W. 370, 372, 139 Ky. 358.

**NECESSARY (In Eminent Domain)**

**As convenient**

The word "necessary," as used in a statute authorizing the taking of land necessary for canals, does not mean absolute and indispensable, or that, without the use of the land in the given case, the work could not possibly go on. That would be the same as extreme necessity. The Legislature used the word in a more reasonable and popular sense. It is sufficient that the land used and the materials taken from it are needful and conducive to the object and more convenient in the application and less valuable, and the use of them less injurious to the owner than any that might readily be selected. There must, from the reason of the thing and the nature of the case, be great latitude of discretion in the selection of land and the materials. Under Canal Law (Laws 1894, p. 635, c. 338) § 70, providing that the superintendent of public works may take any lands, the appropriation of which, for the use of canals and the works connected therewith, shall in his judgment be necessary, section 71 (page 636) authorizing a permanent appropriation, and section 72 (page 636) authorizing a temporary appropriation, the determination as to necessity of appropriation, which need not be an absolute necessity, and as to whether a permanent appropriation of the lands be necessary or whether a permanent easement or a temporary use of the lands will be sufficient, is for such superintendent acting in good faith and with sound discretion. *People v. Fisher*, 83 N. E. 482, 485, 190 N. Y. 468 (quoting *Jerome v. Ross* [N. Y.] 7 Johns. Ch. 315, 339, 11 Am. Dec. 484).

**As indispensable**

The word "necessary," as used in the rule that a party having the right of con-

demning private property for public purposes can only condemn such amount thereof as is "necessary," is not meant to be used in the sense of indispensable. Necessity for public use is not such an imperative necessity that would render the contract of a railroad, for instance, impossible without the amount of land in question. *Piedmont Cotton Mills v. Georgia Ry. & Electric Co.*, 62 S. E. 52, 55, 131 Ga. 129 (citing 15 Cyc. p. 633).

Evidence that the tracks proposed to be located over and across the streets sought to be appropriated are necessary in the use and operation of the switching yards of the railroad company does not authorize a trial court to find that such tracks are necessary within Rev. St. § 3283, authorizing the railroad company to appropriate so much of any street as may be necessary for the purposes of its road. *Village of Rockport v. Cleveland, C., C. & St. L. Ry. Co.*, 97 N. E. 133, 136, 85 Ohio St. 73.

**As reasonably necessary**

The word "necessary," in acts involving the right of eminent domain, does not mean "absolutely necessary or indispensable," but "reasonably necessary," to secure the end in view. *Sayre v. City of Orange* (N. J.) 67 Atl. 933.

"Necessary accommodations," to maintain which a carrier can condemn lands, are such as are reasonably suitable and useful, and are not limited to those which are absolutely necessary. *Chicago, I. & L. Ry. Co. v. Baugh*, 94 N. E. 571, 573, 175 Ind. 419.

As used in Rev. Codes, § 7334, providing that, before property can be taken by eminent domain, it must appear that the use is authorized by law, and that the taking is necessary to such use, the term "necessary" does not import absolute necessity, but only such as may be characterized as reasonable, in view of the purpose to which the property sought to be condemned is to be devoted and the benefits to accrue therefrom to the public. *Northern Pac. Ry. Co. v. McAdow*, 121 Pac. 473, 474, 44 Mont. 547.

The word "necessary," as used in *Balinger's Ann. Codes & St. § 4335*, providing that a corporation formed for the construction of a railroad shall have power to cross or join its railway with any other railway before constructed, and that, if the two corporations cannot agree as to the amount of compensation, it may be ascertained in the manner provided by law for the taking of lands necessary for the construction of its road, does not mean an absolute "necessity," or that there shall be no other place for the location of the road, but means a reasonable necessity, depending upon the circumstances of the particular case. *State ex rel. Kent Lumber Co. v. Superior Court of King County*, 90 Pac. 663, 665, 46 Wash. 516.

The word "necessity" in Code 1904, § 1038, as amended by Acts 1908, c. 349, authorizing any city or town to acquire land necessary for the acquisition and operation of waterworks and other public utilities, but no property shall be condemned, unless the necessity therefor shall be shown to exist, does not mean absolutely necessary, but reasonably necessary for the greatest benefit to the public with the least inconvenience and expense. *Miller v. Town of Pulaski*, 75 S. E. 767, 768, 114 Va. 85.

#### NECESSARY AND PROPER

The words "necessary and proper," as used in the provision of the federal Constitution declaring that Congress shall have power to pass all laws which are "necessary and proper" for carrying into execution the power to regulate commerce between the states, etc., do not imply the employment of only such means as are absolutely necessary to effect the object sought, but include as well all the means which in the judgment of Congress may be proper to carry out the power so granted. *United States v. Hoke*, 187 Fed. 992, 994.

The allegation in an information that the board of county commissioners did not make "necessary and proper" rules and regulations to prevent the outbreak and spread of contagious and infectious diseases is not a sufficient allegation that no rules or regulations in regard thereto had been made. *Corker v. Pence*, 85 Pac. 388, 391, 12 Idaho, 152.

#### NECESSARY BRIDGE

Code 1907, § 5765, provides that the court of county commissioners shall have general supervision of the public roads within the county, and may establish new roads and change or discontinue old ones, and shall have power to maintain public roads, bridges, and ferries, so as to render travel safe. Section 3024 confers on such court the same powers over bridges as it has over public roads. Section 3025 provides that whenever a bridge on the line between two counties is necessary, and the work is too great to be done by the overseers, the same must be built at the joint expense of such counties. Held, that the court of county commissioners of one county cannot without the concurrence of the court of another county make the latter county liable for the expense of erecting a bridge on the line of the two counties, for a bridge, becomes necessary within the meaning of this act only when it has been declared so by the concurring judgment of the commissioners' courts of both counties. *Pickens County v. Greene County*, 54 South. 998, 999, 171 Ala. 377.

#### NECESSARY CHARGES

The word "necessary," as used in a contract allowing the state to make necessary changes in the plans and specifications for

a canal improvement, should not be construed as meaning indispensably requisite, and the construction of the clause in which it occurs is not to be limited to the particular contract in which the clause is found, as the contract is for only a portion of an entire improvement and must be construed in the light of the whole work, and it may be construed as meaning reasonably necessary, and the changes provided for as being those needful, requisite, or desirable, but not extravagant or wasteful of public funds, or made without the exercise of sound discretion, or arbitrary or such as substantially changed the nature of the cost of the work. What changes are necessary in the contract is a question for the courts. *Ferguson Contracting Co. v. State*, 126 N. Y. Supp. 808, 811, 70 Misc. Rep. 472.

A contract for the construction of a section of the state barge canal, including a lock, reserved to the state the right to make deductions from the work, or such changes in the plans as might be necessary, and that the contractor should make no claim for any loss of profits resulting from any change so made, and stated that the contractor had satisfied himself by investigation as to the conditions affecting the work, and that he would make no claim against the state because of estimates and representations by any agent of the state, and that the contract should not be invalidated by any changes so made. Held, that the provision for changes necessarily implied reasonable necessity therefor, and where, by reason of the underlying character of the earth, it became impossible to construct the lock on the section covered by the contract, and the state for that reason eliminated the construction thereof within the section, such change did not constitute a breach of the contract by the state nor entitle the contractor to recover profits lost by reason thereof. *Kinser Const. Co. v. State*, 97 N. E. 871, 874, 204 N. Y. 381.

#### NECESSARY CHARGES

All other Necessary charges, see All Other.

A vote of a town required the selectmen to insert in any franchise granted a street railway company certain conditions enumerated as to the rails to be laid, and the portion of the street to be paved, and required the company to employ resident laborers at uniform wages, and that there should be but one fare of five cents to any point in another town. A second vote provided for a committee to confer with the selectmen, or independently attend and represent the town on all questions of franchises, etc., to be granted to any street railway company, which committee was authorized to employ counsel, and a third vote instructed the treasurer to borrow \$300 to carry the second vote into effect. Held, that the three votes must be construed

as a whole, and as in several of the conditions, the town had no corporate interest, the scheme as a whole did not constitute a "necessary charge," within Rev. Laws, c. 25, § 15, authorizing town officers to appropriate money for necessary charges arising in the town. *Flood v. Leahy*, 66 N. E. 787, 183 Mass. 232.

### NECESSARY CONCLUSION

The word "necessary," as used in an instruction that negligence must be based on and be a reasonable, logical, and necessary conclusion from the facts and circumstances shown by the evidence, meant beyond the possibility of a doubt, and therefore rendered the instruction erroneous. *Dakan v. G. W. Chase & Son Mercantile Co.*, 94 S. W. 944, 951, 197 Mo. 238.

### NECESSARY COST OF PRESERVING ESTATE OF BANKRUPT

The claim of a landlord for rent of premises occupied by the receiver and trustee of a bankrupt is entitled to rank as a preferred claim under Bankr. Act July 1, 1898, c. 541, § 64b (1), 30 Stat. 563, as a necessary cost of preserving the estate. The trustee's commissions rank under subdivision 3 as a cost of administration. An allowance made to the attorney for the trustee for services ordinarily falls within the same subdivision, although, when such services were necessary to preserve the estate, such claim may be classified under subdivision 1. In *re Grignard Lithographing Co.*, 158 Fed. 557, 558.

### NECESSARY DILIGENCE

"Necessary diligence" is that degree of diligence which men, ordinarily engaged in and acquainted with a particular kind of business, would use in their own affairs. *Sanderson v. Brown*, 57 Me. 308, 312.

### NECESSARY DISBURSEMENTS

Under Code Civ. Proc. § 1806, providing that "a party to whom costs are awarded in an action is entitled to include in his bill of costs 'necessary disbursements' as follows: \* \* \* The legal fees paid stenographers for per diem or for copies; \* \* \* the reasonable expense in making transcript for the Supreme Court"—the fact that copies of the testimony were ordered during the trial and prior to a final decision, being paid for by the parties obtaining them, did not prevent a recovery of the amount paid for them within the limitation fixed by statute; such copies being necessary to secure a review of the case. *Montana Ore Purchasing Co. v. Boston & Montana Consol. Copper & Silver Min. Co.*, 84 Pac. 706, 707, 33 Mont. 400.

If a witness can recover compensation from the litigant who procured his attendance, the sum so paid would undoubtedly be a "necessary cost or disbursement" in the action. *Anderson v. Ferguson-Bach Sheep*

*Co.*, 86 Pac. 41, 42, 12 Idaho, 418, 10 Ann. Cas. 395.

### NECESSARY EASEMENT

The term "necessary," used to describe the easement which may be established by an implied reservation where there has been a unity of possession and a subsequent sale of a portion of the land over which the easement is claimed, means there can be no other reasonable mode of enjoying the dominant tenement without the easement; there should be an element of absolute necessity. *Cherry v. Brizzolara*, 116 S. W. 668, 671, 89 Ark. 308, 21 L. R. A. (N. S.) 508 (citing *Crosland v. Rogers*, 10 S. E. 874, 32 S. C. 130).

### NECESSARY EXPENSES

Any and all necessary expenses, see Any. Other necessary expenses, see Other.

#### Of administrator

Under Code Civ. Proc. § 2730, providing that an administrator may be allowed such necessary expenses actually defrayed by him as appears just and reasonable, a litigation can be treated as "necessary" only when it has been prosecuted, not only in good faith, but also in the exercise of a reasonable judgment. In *re Huf's Estate*, 115 N. Y. Supp. 984, 989, 62 Misc. Rep. 600 (citing *Matter of Huntley*, 35 N. Y. Supp. 113, 13 Misc. Rep. 375; *Matter of Stanton*, 84 N. Y. Supp. 46, 41 Misc. Rep. 278; *St. John v. McKee* [N. Y.] 2 Dem. Sur. 236; *Estate of Peyster*, 5 N. Y. St. Rep. 334).

#### Of building and loan association

The acquisition of a place or home by a building and loan association for the conduct of its business is a "necessary expense," within Ky. St. 1903, § 863, making provision for the allowance of necessary and proper expenses from moneys accumulated. *Home Savings Funds Co. Bldg. Ass'n v. Driver*, 112 S. W. 864, 866, 129 Ky. 754.

#### Of city

Furnishing light and water for public purposes is a "necessary purpose," and the cost thereof is a "necessary expense" of municipalities furnishing the same. *Wadsworth v. City of Concord*, 45 S. E. 948, 950, 133 N. C. 587.

The construction of water and electric light plants is a necessary expense, within Const. art. 7, § 7, providing that no municipal corporation shall contract any debt, except for the "necessary expenses" thereof, unless by vote of the majority of the voters therein, and the indebtedness therefor need not be approved by popular vote; but under Code, §§ 3800, 3821, authorizing municipal corporations to levy taxes, and providing that their debts shall be paid only by taxation, they have power to contract and provide for payment for such improvements, in the absence of a charter provision forbidding them to do

so. *Fawcett v. Town of Mt. Airy*, 45 S. E. 1029, 1030, 134 N. C. 125, 63 L. R. A. 870, 101 Am. St. Rep. 825.

The protection of a town from fire and disease by providing water and sewerage is a "necessary expense," within the meaning of Const. art. 7, § 7, and Revisal 1905, § 2974, providing that no municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein, and, therefore a vote of the people is not required to render bonds issued to provide waterworks and a sewerage system valid, in the absence of statutory restrictions enacted under Const. art. 8, § 4, making it the duty of the Legislature to restrict the power of cities to tax, borrow money, contract debts, or loan their credit. *Underwood v. Town of Asheboro*, 68 S. E. 147, 152 N. C. 641.

The expense of maintaining the streets of a town in a proper manner is a "necessary expense," within Const. art. 7, § 7, forbidding a municipality to contract a debt, etc., except for a necessary expense, without a popular vote. *Town of Hendersonville v. Jordan*, 63 S. E. 167, 168, 150 N. C. 85.

In the absence of any legislative restriction on taxation and the contracting of debts, there is no objection to the issuance of bonds for the necessary expenses of a town, without a popular vote authorizing the same; and bonds issued by a town, for the purpose of extending and enlarging its water and sewerage system and making street improvements, fall within the class of "necessary expenses." *Town of Murphy v. C. A. Webb & Co.*, 72 S. E. 460, 461, 156 N. C. 402.

Working the roads is a "necessary expense," within Const. art. 7, § 7, forbidding the levy of any tax by municipal corporations except for the necessary expenses thereof unless by a vote of the majority of the qualified voters. *Crocker v. Moore*, 53 S. E. 229, 230, 140 N. C. 429.

#### Of condemnation proceedings

The use of automobiles by commissioners of appraisal in condemnation proceedings is not a "necessary expense" or "necessary traveling expense," which under Laws 1905, c. 725, § 5, and chapter 724, § 32, is to be allowed them, there being railroads, on which many trains run, going very near all parts of the lands, and livery teams being accessible; the statute contemplating the ordinary method of travel. In *re Bensel*, 124 N. Y. Supp. 716, 723.

#### Of district attorney

County Law (Consol. Laws 1909, c. 11) § 240, subd. 1, provides that the expenses necessarily incurred by the district attorney in criminal actions or proceedings arising in his own county are a county charge. Held

to invest a district attorney with much discretion in determining what expenses are necessary; the term "necessary expenses" being a flexible one, to be applied in the district attorney's discretion, depending on the circumstances of each particular case. *People ex rel. Koetteritz v. Board of Sup'rs of Herkimer County*, 132 N. Y. Supp. 808, 810, 148 App. Div. 302.

#### Of execution of will

On appeal from the decree of a probate court proving a will, the executor named in the will may, if acting in good faith, prosecute the probate in the appellate court at the expense of the estate, and the reasonable expenses incurred by him in so doing, are "necessary expenses incident to administration." *Hazard v. Engs*, 14 R. I. 5, 9.

#### Of guardian

A judgment against the ward for costs is not a liability of the guardian ad litem, and payment thereof by him is not, under ordinary circumstances, to be recognized as a necessary expenditure. In *re McNaughton's Will*, 118 N. W. 997, 1006, 138 Wis. 179.

#### Of schools

Graded school districts are public quasi corporations within the term "municipal corporation," as used in Const. art. 7, § 7, prohibiting any city, town, or other municipal corporation from contracting debts except for necessary expenses, unless by vote of the qualified voters; so that a graded school district could not issue bonds to erect a school building unless their issue was approved by a majority of the qualified voters; the erection of a school building not being a "necessary expense" within section 7. *Ellis v. Trustees of Graded School of Oxford*, 72 S. E. 2, 3, 156 N. C. 10.

#### Of sheriff

The sum allowed a sheriff for "necessary expenses," under the statute, covers reasonable help and expenses in transporting and delivering convicts and lunatics to the penitentiary and asylum. *Lenhart v. Cambria County*, 64 Atl. 876, 216 Pa. 25.

#### Of state

Under Const. art. 5, §§ 30, 31, requiring the general appropriation bill to embrace nothing but appropriations for the "ordinary" expenses of government, and prohibiting the appropriation of money except in specified cases, among which is included defraying the "necessary" expenses of government, unless by a two-thirds vote of the Legislature, extraordinary expenses may be "necessary," and may be authorized by a majority vote. *State v. Moore*, 88 S. W. 881, 883, 76 Ark. 197, 70 L. R. A. 671.

#### NECESSARY FOOD

Rev. St. 1909, § 4492, provides that if any father without lawful excuse neglects to provide such infant with "necessary" food,

etc., he shall be punished. Defendant and his wife separated, the wife going to her father's house, taking with her one child of the marriage, and another was born at the house of the wife's father, and both the children were there supplied with all necessary food, etc. Defendant after the separation contributed nothing to their support. Held, that "necessary" food, clothing, and lodging, as used in the statute, is food, etc., which the infant actually needed at the time; and that as the infant children were receiving necessary food, etc., defendant was not guilty. *State v. Thornton*, 134 S. W. 519, 520, 232 Mo. 298, 32 L. R. A. (N. S.) 841.

### NECESSARY FOR THE JOURNEY

See Money Necessary for the Journey.

### NECESSARY FURNITURE

The words "necessary furniture," as used in Illinois Administration Act, § 74 (Starr & C. Ann. St. 1896, c. 3, par. 74), allowing the widow certain articles of property, such as bedsteads, bedding, and household and kitchen furniture, necessary for herself and family, must be construed with reference to the circumstances and mode of life of the parties, and mean the ordinary and appropriate furniture for such homesteads. *Gillett v. Gillett*, 69 N. E. 942, 945, 207 Ill. 136 (quoting *Strawn v. Strawn*, 53 Ill. 263).

### NECESSARY IMPLICATION

Plain implication synonymous, see Plain Implication.

By "necessary implication" as used in the rule that it is possible for a testator to dispose of property by necessary implication from his will, taken as a whole, is meant so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed. *Coberly v. Earle*, 54 S. E. 336, 339, 60 W. Va. 295 (citing *Bartlett v. Patton*, 10 S. E. 21, 33 W. Va. 71, 5 L. R. A. 523; *Graham v. Graham*, 23 W. Va. 36, 48 Am. Rep. 364; *Beard v. Beard*, 22 W. Va. 130; *Irwin v. Zane*, 15 W. Va. 646).

"Necessary implication" means, not natural necessity, but so strong a probability of an intention that an intention contrary to that which is imputed to the testator cannot be imposed. *Galloway v. Durham*, 81 S. W. 650, 660, 118 Ky. 544, 111 Am. St. Rep. 300 (quoting 1 Ves. & B. 468).

"Necessary implication," in cases on the construction of instruments, means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed cannot be supposed. *Tuttle v. Woolworth*, 77 Atl. 684, 686, 74 N. J. Eq. 310.

The phrases "plain implication" and "necessary implication" have exactly the same meaning, when used in reference to the

construction of deeds. By these is not meant a physical necessity, but a logical necessity. Where a clause is enlarged in its effect beyond the import of the words used on the theory of an intent established by an implication, it must be necessary to so enlarge it in order to give effect to the plain and express provisions of other clauses, or the probability of intent must be so strong that the contrary thereof cannot be supposed. *Griffin v. Fairmont Coal Co.*, 53 S. E. 24, 65, 59 W. Va. 480, 2 L. R. A. (N. S.) 1115.

### NECESSARY INDEBTEDNESS

The word "necessary," as used in the Constitution and laws of Montana, providing for the extension of the constitutional limit of municipal indebtedness when such increase is "necessary" to construct a sewerage system or procure a supply of water, on ratification by a vote of the taxpayers, defines the condition of affairs which requires the additional indebtedness. The condition must be such as to create the necessity. If a municipality is not indebted in any amount at all, or if it has the necessary funds in its treasury, no additional indebtedness can be incurred; nor can it be said that any necessity has arisen demanding it. A city could only avail itself of the privilege of extension when the financial condition of the city required a resort to it, and could not arbitrarily declare a debt to be in the extended limit when the city was not indebted to the constitutional limit. *Butler v. Andrus*, 90 Pac. 785, 786, 35 Mont. 575.

### NECESSARY INJURY

"The 'necessary injury' resulting to a parent from the negligent killing of his minor child, within the meaning of the damage act (Rev. St. 1899, § 2866), consists in the loss of services of the deceased during minority, the cost of nursing, surgical and medical attendance, and appropriate funeral expenses." *Coleman v. Himmelberger-Harrison Land & Lumber Co.*, 79 S. W. 981, 987, 105 Mo. App. 254 (quoting and adopting definition in *Rains v. St. Louis, I. M. & S. Ry. Co.*, 71 Mo. 164, 36 Am. Rep. 459).

The term "necessary injury," as used in Rev. St. 1899, § 2866, relating to damages in death actions, authorizing damages not exceeding \$5,000, as may be deemed fair and just with reference to the "necessary injury" resulting to the surviving parties, etc., does not include more than pecuniary injury. *Brunke v. Missouri & K. Telephone Co.*, 87 S. W. 84, 85, 112 Mo. App. 623.

Under Rev. St. 1899, § 2865, authorizing an action for the death of a person caused by wrongful act, etc., and section 2866, providing that the jury may give such damages as they may deem fair and just with reference "to the necessary injuries resulting from" such death, the measure of damages in an action by a parent for the wrongful death of his



minor son does not include loss of comfort and society of the son; the words "necessary injury" meaning "pecuniary injury," and confining damages to property loss. *Marshall v. Consolidated Jack Mines Co.*, 95 S. W. 972, 973, 119 Mo. App. 270.

### NECESSARY LITIGATION

Litigation to determine doubtful questions as to the liability of transferees for the inheritance tax, and delays occasioned thereby, is "necessary litigation or other unavoidable delay," within Laws 1903, p. 69, c. 44, § 6, providing that in such case the penalty of 10 per cent. interest for nonpayment of the tax shall not be imposed. *State v. Pabst*, 121 N. W. 351, 361, 139 Wis. 561.

### NECESSARY PARTIES

#### See Not a Necessary Party.

Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience, are "necessary parties." *Disbrow v. Creamery Package Mfg. Co.*, 115 N. W. 751, 752, 104 Minn. 17; *Perkins v. Hendryx*, 149 Fed. 526, 528.

The words "necessary" and "indispensable" have sometimes been considered synonymous, and parties in equity have been classified as "necessary parties" and "proper parties." *Railroad Commission of Georgia v. Palmer Hardware Co.*, 53 S. E. 193, 195, 124 Ga. 633.

A distinction has been recognized between necessary and indispensable parties, to ascertain whether some of those, who under the established rules of equity pleading and practice were deemed necessary, may not, under such rules, be dispensed with as parties, that equitable relief in a given case may not wholly fail. *Mathieson v. Craven*, 164 Fed. 471, 475.

"Necessary parties," when the term is accurately used, are those without whom no decree at all can be effectively made determining the principal issues in the cause." *Leonard v. Pierce*, 75 N. E. 818, 815, 182 N. Y. 431, 1 L. R. A. (N. S.) 161 (quoting and adopting definition in *Pomeroy's Remedies & Remedial Rights*, § 829).

All persons who are interested in the subject-matter of a suit, and who will be affected by the results thereof, are "necessary parties." *Sweeney v. Foster*, 71 S. E. 548, 550, 112 Va. 499. Such as beneficiaries and trustees. *Mitau v. Roddan*, 84 Pac. 145, 147, 149 Cal. 1, 6 L. R. A. (N. S.) 275; *Benton v. Benton*, 115 Pac. 535, 536, 84 Kan. 691. Or the owners in proceedings to condemn land. *Kansas City Interurban Ry. Co. v. Davis*, 95 S. W. 881, 884, 197 Mo. 669, 114 Am. St. Rep. 790. Or the persons in whom the title vested

on the death of the grantee in a deed sought to be set aside for fraud. *Hagan v. McDermott*, 115 N. W. 188, 140, 134 Wis. 490. But not an agent to whom a deed absolute in form was executed as security for a debt to the principal. *In re Russell's Estate*, 84 Pac. 155, 156, 148 Cal. 768.

"Necessary parties" are all those who have an interest in the subject and object of the action, and all persons against whom relief must be obtained to accomplish the object of the suit. *McLean v. Farmers' High-line Canal & Reservoir Co.*, 98 Pac. 16, 19, 44 Colo. 184.

"Parties in equity are: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine, the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed 'necessary parties'; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court, without injuriously affecting the rights of such absent party." *United States v. Allen*, 179 Fed. 13, 21, 103 C. C. A. 1 (quoting and adopting definition in *Shields v. Barrow*, 17 How. [58 U. S.] 130, 139, 15 L. Ed. 158; *Waterman v. Canal-Louisiana Bank & Trust Co.*, 30 Sup. Ct. 10, 215 U. S. 33, 49, 54 L. Ed. 80).

The use of the word "indispensable," as distinguished from "proper" or "necessary," parties is stated in the citation of a case holding that an indispensable party is one whose interest in the subject-matter of the controversy is such that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Defendants who were joined in a suit in a state court to recover an interest in lands only as trustees holding the paramount title in trust, and whose title as such was not disputed, held not indispensable parties, whose citizenship and residence in the same state as complainant would prevent a removal of the cause by the other defendants, who were the

real parties in interest. *Lawrence v. Southern Pac. Co.*, 165 Fed. 241, 243 (citing *Rogers v. Penobscot Min. Co.*, 154 Fed. 606, 83 C. A. 380).

#### Proper parties distinguished

Persons legitimately made parties to suits in equity may belong to three classes: first, proper parties; second, necessary parties; and, third, indispensable parties. The phrases "proper parties," "necessary parties," and "indispensable parties," in their technical sense, are distinguishable from one another; each denoting a separate and independent class. But in a broader sense the first is the most, and the last the least, comprehensive class, for "proper parties" may or may not be either necessary or indispensable, and "necessary parties" may or may not be indispensable. In the same broad sense an indispensable party is both a necessary and a proper party, and, though a necessary party may or may not be indispensable, he is nevertheless a proper party. The distinction between a necessary and an indispensable party, while doing violence to the English language in its usual acceptance, has been recognized for the purpose of determining the question whether some of those who, under the well-established rules of equity pleading and practice, were deemed necessary parties may not, under existing rules governing pleading and practice in equity, be dispensed with as parties in order that equitable relief in a given case may not wholly fail. *Mathieson v. Craven*, 164 Fed. 471, 475.

"Necessary parties" to a suit are parties who are so vitally interested in the subject-matter that a valid decree could not be rendered without their presence, whether there was an objection to a failure to make them parties or not; but where they are only "proper parties," the right to complain that they were not made parties may be waived by delay. *Biggs v. Miller (Tex.)* 147 S. W. 632, 637.

#### NECESSARY POLICE ORDINANCES

City and Village Act (Hurd's Rev. St. 1903, p. 291) art. 5, § 1, subds. 4, 9, 15, 20, 41, 66, 78, 96, empowering cities to regulate traffic on the streets and sidewalks, to license, tax, regulate, suppress, and prohibit peddlers, to make all regulations which may be necessary for the promotion of health, and to pass all ordinances and make all regulations necessary to carry into effect the powers granted to such cities, etc. Held, that by the word "necessary" indispensable was not intended, but power was conferred on the city to pass all ordinances which would be conducive to the promotion of the health, safety, and welfare of its inhabitants, which power may reasonably be held to include the power to pass an ordinance regulating in a reasonable manner the handling of oils in tank wagons, or other wagons or vehicles

on the streets of the city. *Spiegler v. City of Chicago*, 74 N. E. 718-721, 216 Ill. 114.

#### NECESSARY POWERS

##### Of corporation

The power given to a railway company to do all acts incidental to the maintenance of the road includes the right to lay conduits in its right of way to conduct water to its buildings, whether the right of way traverses private property or a city street, being a reasonably "necessary" incident to the maintenance of the road. *Mayor, etc., of City of Canton v. Canton Cotton Warehouse Co.*, 36 South. 266, 272, 84 Miss. 268, 65 L. R. A. 561, 105 Am. St. Rep. 428.

#### NECESSARY PURPOSES

Furnishing light and water for public purposes is a "necessary purpose," and the cost thereof is a "necessary expense" of municipalities furnishing the same. *Wadsworth v. City of Concord*, 45 S. E. 948, 950, 133 N. C. 587.

#### NECESSARY REPAIRS

A covenant by a tenant to make "necessary repairs" means only such repairs as the tenant finds necessary for his use of the premises, and does not require him to put the premises in better condition than they were at the beginning of the tenancy. *Tinsley v. Smith*, 101 N. Y. Supp. 382, 385, 115 App. Div. 708 (citing and construing *White v. Albany Ry. (N. Y.)* 17 Hun, 98).

The words "necessary repairs," in an order enjoining county officers from doing road work or spending money under a certain resolution, and from expending money after an annual levy was exhausted, excepting for the making of necessary repairs to roads, legally designated for expenditure of money in their repair, means emergency repairs or such repairs on roads as were necessary to make travel safe, so that the duty of the county to travelers upon its highways might still be discharged. *Webster v. Douglas Co.*, 77 N. W. 885, 888, 102 Wis. 181, 72 Am. St. Rep. 870.

A party wall agreement, providing that each party shall contribute equally if it shall become "necessary" to repair and rebuild, cannot be defeated by either party saying it is not necessary to repair or rebuild. *Mau-pai v. Jackson*, 118 N. Y. Supp. 513, 517, 64 Misc. Rep. 407.

##### To vessel

Although the master of a ship in a foreign port has authority to procure all supplies and repairs "necessary" for the safety of the ship and the due performance of the voyage, on the credit of the owner, he must be restricted to such repairs and supplies as are in a just sense necessary for the ship under the actual circumstances of the voyage, and a suit against the owner for their value

cannot be maintained without proof that such repairs and supplies were necessary. *Whitten v. Tisdale*, 43 Me. 451, 452.

### NECESSARY RISK

Laws 1902, p. 1750, c. 600, § 3, providing that an employé, by entering on or continuing in the employer's service, shall be presumed to have assented to the necessary risks of the employment, such risks including those inherent in the nature of the business, after the employer has exercised due care for the safety of employés, and complied with laws regulating such business, distinguishes between "necessary risk" and "obvious risk," which latter may be due to the master's failure to perform his duty. *Hurley v. Olcott*, 119 N. Y. Supp. 430, 435, 134 App. Div. 631.

The New York statute defining "necessary risks" as those "inherent in the nature of the business, which remain after the employer has exercised due care in providing for the safety of his employés," is but declaratory of the common law. *Logerto v. Central Bldg. Co.*, 108 N. Y. Supp. 604, 607, 123 App. Div. 840 (citing *Benzling v. Steinway*, 5 N. E. 449, 101 N. Y. 547). See, also, *O'Neill v. Karr*, 97 N. Y. Supp. 148, 150, 110 App. Div. 571; *Wynkoop v. Ludlow Valve Mfg. Co.*, 98 N. Y. Supp. 1076, 1077, 112 App. Div. 729.

The risk of injury to a servant who, at the suggestion of his foreman, thrust his hand into a wooden box, in which a screw with sharp blades was rapidly revolving, in order to loosen cement in a chute leading into the box, knowing the cement was liable to fall in such quantities as to drive his arm against the screw, was not a "necessary risk" of the business, which are the only risks that an employé is conclusively presumed not to assume, as provided by Employers' Liability Act (Laws 1902, p. 1750, c. 600, § 3). *Vaughn v. Glens Falls Portland Cement Co.*, 98 N. Y. Supp. 979, 980, 105 App. Div. 136.

### NECESSARY ROAD

The term "necessary plantation roads," as used in Code 1906, § 4053, requiring their construction and maintenance by railroads, means roads necessary to the plantation to which they are annexed, and, while an occasional and isolated use of the crossing by others would not relieve the company from liability to maintain it, the company is not bound to maintain the crossing in good condition and make repairs necessitated by constant heavy driving, done by others than the owner with his consent. *Illinois Cent. R. Co. v. McGowan*, 46 South. 55, 56, 92 Miss. 603; *Bentley v. Cavallier*, 46 South. 55, 56, 92 Miss. 603.

Where a proposed railroad, only 12 miles in length, to be built as an independent road, would serve only a small locality, would probably not earn running expenses, and would be financially disabled from the start, a finding by the board of railroad commission-

ers that it was "necessary and convenient" was erroneous. *People ex rel. Potter v. Board of Railroad Com'rs of State of New York*, 108 N. Y. Supp. 288, 289, 124 App. Div. 47.

### NECESSARY SELF-DEFENSE

See Self-Defense.

### NECESSARY SUPPLIES

Food supplies ordered by the master of a fishing schooner, who was also managing owner, for the use of the crew on a fishing voyage, under the usual lay contracts, in the absence of any showing of bad faith on his part, will be presumed to be supplies "necessary" for the employment of the vessel, within the meaning of the Maine statute giving a lien for such supplies, and the court will not undertake to determine that certain of the articles were "luxuries" for which the vessel is not liable. The term "luxuries" is an entirely relative term. *The Mary F. Chisholm*, 133 Fed. 598, 600.

Ky. St. § 4426a, subd. 9, provides that the board of education shall lay before the fiscal court the educational needs of the county, and the county shall levy a tax for school purposes, not exceeding 20 cents on each \$100, and the proceeds of the tax shall be turned over to the county superintendent, and the county board shall expend the money for certain designated purposes, including the purchase of "necessary supplies" and the "extension of the school term" in the subdistricts; and that upon petition of 10 voters of a subdistrict the board of education shall submit to a vote the question whether an additional tax shall be levied, and when levied it shall be the duty of the sheriff to collect it and hold it, subject to the order of the county board, for the benefit of the subdistrict voting such tax. Held, that such additional tax was to be expended, under the order of the board of education, for the sole use of the subdistrict levying it, and for the purposes enumerated in the statute, and the board had no power to use an additional tax levy for the purpose of transporting children to and from school; such purpose not being mentioned in the statute and not coming within the terms "necessary supplies" or "extension of school term." *Shanklin v. Boyd*, 142 S. W. 1041, 1042, 1043, 146 Ky. 460, 38 L. R. A. (N. S.) 710.

### NECESSARY TO HOLD MINING CLAIM

Comp. Laws, § 231, provides that certificates of location and of labor and improvements necessary to hold claims need not be sworn to, but must truly state the required facts. Held, that the words "necessary to hold claims" did not refer to "certificates of location," but only to the words "labor and improvements," which referred to the provisions of the federal statutes requiring the expenditure of \$100 annually in labor or improvements in order to hold a mining claim

prior to the issuance of patent. *Ford v. Campbell*, 92 Pac. 206, 209, 29 Nev. 578.

### NECESSARY TRAVELING EXPENSE

The use of automobiles by commissioners of appraisal in condemnation proceedings is not a "necessary expense" or "necessary traveling expense," which under Laws 1905, c. 725, § 5, and chapter 724, § 32, is to be allowed them, there being railroads, on which many trains run, going very near all parts of the lands, and livery teams being accessible; the statute contemplating the ordinary method of travel. In *re Bensei*, 124 N. Y. Supp. 716, 723.

### NECESSARY VEGETABLES

The term "necessary," as used in Code Civ. Proc. § 1390, providing that all "necessary vegetables" actually provided for family use should be exempt from levy, is a word of qualification, and qualifies the extent of the exemption. *McCarthy v. McCabe*, 115 N. Y. Supp. 829, 832, 131 App. Div. 396.

### NECESSARY WAY

See Way of Necessity.

## NECESSITIES

See Actual Necessities; As Their Necessities Might Require.

Plumbers' supplies are "necessities" of life and a staple commodity, and a combination controlling such supplies to the extent that it either does, or tends to, prevent or restrain competition may be prohibited. *Knight & Jillson Co. v. Miller*, 87 N. E. 823, 832, 172 Ind. 27, 18 Ann. Cas. 1146.

## NECESSITY

See Inevitable Necessity; Law of Necessity; Paramount Necessity; Public Necessity; Way of Necessity.

The word "necessity," in common use, connotes different degrees of necessity. It sometimes means indispensable; at others, needful, requisite, incidental, or conducive. In its primary sense, it signifies a thing or act without which some other thing or act cannot be done or exist. The word "necessary," as applied to the determination of an agent's power to do an incidental act, should be held to mean an act or measure requisite to enable him to discharge his main duty—something more urgently required than is signified by the words, "appropriate," "suitable," or "expedient." *St. Louis Gunning Advertising Co. v. Wanamaker & Brown*, 90 S. W. 737, 743, 115 Mo. App. 270.

### For class legislation

By "necessity," which permits legislation on a subject to be divided into classes, is meant practical, and not absolute, necessity. *Pepin Tp. v. Sage*, 129 Fed. 657, 665, 64 C. C. A. 169 (citing *State ex rel. Board of Court-*

*house and City Hall Com'rs of City of Minneapolis and County of Hennepin v. Cooley*, 58 N. W. 153, 56 Minn. 551).

### For conduct of business and transaction of affairs by corporation

"When it comes to determining what is 'necessary' for the conduct of the business and transaction of the affairs for which a corporation has been chartered, it must, of course, be understood that what is meant is a due and profitable prosecution of its lawful purposes; that the 'necessity' contemplated is a relative one, having reference to economy, convenience, efficiency, and success; and that some latitude is to be allowed to the discretion of the corporation itself in deciding what, from time to time, is or is not, in that sense, 'necessary.'" *Folk v. State Capital Savings & Loan Ass'n*, 63 Atl. 1013, 1016, 214 Pa. 529.

### For easement to enjoy property

Under the rule that all continuous and apparent quasi easements as are reasonably necessary to the enjoyment of the property granted pass to the grantee, mere inconvenience will not constitute such necessity. The test of such necessity is held to be the question whether the grantee might at a reasonable expense procure for himself an enjoyment of a similar easement. Two persons, owning in common land on which were two houses, partitioned it by deed, giving each one of the houses, the boundary line being in an alley between the houses and providing that the alley should be kept open for the use and benefit of the owners of the lots, forever, but making no mention of the drain and stairway on the dividing line. Held that, it not being reasonably necessary that either grantee should have the part of the drain or stairway on the land of the other maintained, no easement was to be implied. *Gaynor v. Bauer*, 39 South. 749-751, 144 Ala. 448, 3 L. R. A. (N. S.) 1082 (citing *Tied. Real Prop.* § 609; *Walker v. Clifford*, 29 South. 588, 128 Ala. 74, 86 Am. St. Rep. 74; *Washb. Easem.* [4th Ed.] 107).

### For forwarding shipment by any carrier

Plaintiff shipped two cars of phosphate rock from a point on defendant's railroad to a point in another state, the rate stated in the bills of lading being that fixed by a joint schedule filed by defendant and other connecting carriers. The bills of lading, however, contained a provision that the carrier should have the right "in case of necessity" to forward by any carrier, and that in such case plaintiff should bear the additional risk and cost. Defendant delivered the cars at Cincinnati to a railroad which was not a party to the through schedule, and plaintiff was required to pay a substantially higher rate. Held, that the fact that there was a congestion of traffic at Cincinnati because of which the connecting carrier refused to

receive the cars and their retention by defendant would have brought about a congestion and blockade of its own line did not create a "necessity" within the meaning of the bills of lading which authorized defendant to subject plaintiff to the increased cost, being due to insufficiency of equipment on its own part and that of its connecting carrier. *Dickerson v. Louisville & N. R. Co.*, 187 Fed. 874, 879.

#### For private way

Cases of necessity, contemplated in that provision of the Constitution which declares that 'in cases of necessity' private ways may be granted upon just compensation first being paid, do not arise except where the way sought to be laid out is absolutely indispensable to the applicant as a means of reaching his property. If there is in existence a way suitable for all the purposes for which the property is to be used, a "case of necessity" does not arise, even though such way may be less convenient than the one proposed. *Charleston & W. C. Ry. Co. v. Fleming*, 45 S. E. 664, 666, 118 Ga. 699 (quoting and adopting *Chattanooga, R. & S. R. Co. v. Philpot*, 37 S. E. 181, 112 Ga. 153).

#### For suit by administrator

Where an administrator, being an attorney, finds it necessary to institute a suit in behalf of the estate and associates another attorney with him, and he and the other attorney jointly render professional services to the estate, the administrator is entitled to a credit on the settlement of the administration in the probate court to the extent of the reasonable value of such services. *Tyson, J.*, in a dissenting opinion, said: "The 'necessity' spoken of in our cases, authorizing an allowance for compensation upon proof of it for professional services rendered by an administrator in a case like this, is one arising out of the duty of the administrator to enforce the collection of the claim by suit, and not out of any contract he may make with counsel to render him assistance in its collection." *John v. Sharpe*, 41 South. 635, 638, 148 Ala. 665.

#### NECESSITY (Sunday Labor)

The term "necessity," as employed in the Sunday statutes, is not an absolute, unavoidable, physical necessity, but rather an economic and moral necessity, and the necessity may grow out of or be incident to a particular trade or calling. *Lane v. State (Tex.)* 150 S. W. 637, 638 (quoting 5 Words and Phrases, p. 4729).

By the word "necessity," as it relates to the exemption of work of necessity on a day when work is forbidden, we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work done, under the circumstances of each particular case. *State v. Lewis*, 72 Pac. 121, 123, 31 Wash. 515.

The word "necessity" in Rev. St. 1899, § 2240, prohibiting labor on Sunday, excepting works of necessity, should be construed reasonably and neither too literally nor too liberally. *State v. Chicago, B. & Q. R. Co.*, 143 S. W. 785, 787, 239 Mo. 193.

The word "necessity," in Kirby's Dig. § 2030, making it unlawful to work on Sunday except to perform "customary household duties of daily necessity, comfort, or charity," does not mean an absolute unavoidable physical necessity, but rather an economic and moral necessity. *Barefield v. State*, 107 S. W. 393, 85 Ark. 134.

The sending of a telegram by a husband to his wife, notifying her that he would not return as expected, is a "work of necessity," within *Burns' Ann. St.* 1908, § 2364, prohibiting any work on Sunday, save that of charity and necessity. *Western Union Telegraph Co. v. Pulling*, 96 N. E. 967, 49 Ind. App. 172.

The fact that in gathering a crop it is somewhat less expensive and more convenient to work seven days in the week, rather than six, does not make such gathering a "work of necessity," within *St.* 1904, p. 477, c. 460; § 2, making it a criminal offense to do any manner of labor, business, or work, except works of necessity and charity, on Sunday. *Commonwealth v. White*, 77 N. E. 636, 637, 190 Mass. 578, 5 L. R. A. (N. S.) 320.

*Gen. St.* 1902, § 1369, prohibits any secular business or labor except works of necessity or mercy, or engaging in any sport between midnight of Saturday and midnight of Sunday. Section 1870 makes it a penal offense to be present at any concert of music, dancing, or other public diversion on Sunday. Held, that the act of selling tickets on Sunday to a moving picture show to be held in an opera house on that day, and thereby promoting attendance at a place of public diversion, where it was unlawful for any one to be present, was not a "work of necessity or mercy." *State v. Ryan*, 69 Atl. 536, 537, 80 Conn. 582.

*Pen. Code* 1895, § 420, has made it legal to operate passenger and mail trains on Sunday. Therefore any work necessary to the running of such trains is a "work of necessity," within *Pen. Code* 1895, § 422, prohibiting the pursuing of business or work on the Lord's day. *Kellam v. State*, 67 S. E. 683, 7 Ga. App. 575.

*Pen. Code* 1895, § 420, making it a misdemeanor to run freight or excursion trains on Sunday, but allowing regular trains carrying mail or passengers to run on that day, is an expression of public policy as to the legality of running the excepted trains on Sunday, and a legislative construction that the running of mail and passenger trains is within the exception to section 422, making it a misdemeanor to pursue one's business on Sunday, if not a "work of necessity or char-

ity." *Southern Ry. Co. v. Wallis*, 66 S. E. 370, 372, 133 Ga. 553, 30 L. R. A. (N. S.) 401, 18 Ann. Cas. 67.

Courts, in construing the term "necessity" as used in statutes relating to the statute prohibiting work on the Sabbath excepting work of necessity, is given a liberal rather than a literal interpretation, and it is "not an absolute, unavoidable, physical necessity that is meant, but rather an economic and moral necessity." Where a belt in a mill employing 200 persons broke on a Saturday through an unexpected defect, and could not be repaired that day because gasoline could not be procured in a town of 3,000 inhabitants, the repairing of it Sunday morning, without which the mill would have to be shut down Monday, as, after the belt was glued, it had to dry 18 hours before it could be used, was a work of necessity, within the statute. *State v. Collett*, 79 S. W. 791, 792, 72 Ark. 167, 64 L. R. A. 204 (quoting *Shipley v. State*, 32 S. W. 489, 33 S. W. 107, 61 Ark. 216, 219).

St. 1898, § 4595, provided that any person who shall keep open his shop, warehouse, or workhouse on Sunday, or shall do any manner of labor, business, or work, except only works of necessity and charity, should be punished. Held, that the exception of "works of necessity and charity" related to "labor, business, or work" only, and hence it was no defense to a prosecution for keeping open a shop, warehouse, or workhouse that it was done for necessity or charity. *Stark v. Backus*, 123 N. W. 98, 101, 140 Wis. 557.

#### **Repairing belt in mill**

Courts, in construing the term "necessity" as used in the statutes which forbid work and labor on the Sabbath, have generally given it a liberal, rather than a literal, interpretation. It is not an absolute, unavoidable, physical necessity that is meant, but rather an economic and moral necessity. Where a belt in a mill employing 200 persons broke on a Saturday, through an unexpected defect, and could not be repaired that day, because gasoline could not be procured in a town of 3,000 inhabitants, the repairing of it Sunday morning, without which the mill would have to be shut down Monday, as, after the belt was glued, it had to dry 18 hours before it could be used, was a "work of necessity," within the exception of the law against Sabbath breaking. *State v. Collett*, 79 S. W. 791, 792, 72 Ark. 169, 64 L. R. A. 204 (citing *Shipley v. State*, 32 S. W. 489, 33 S. W. 107, 61 Ark. 219).

#### **Keeping barber shop open and shaving**

It is not a "work of necessity," within the exception to the Sunday law, for a barber to ply his usual avocation on that day by cutting the hair of and shaving a customer. *State v. Kuehner* (Mo.) 110 S. W. 605.

The shaving of a customer by a barber is worldly labor in the course of his ordinary

calling, and is not a "work of necessity," permitted by Pen. Code 1895, § 422, to be done on the Lord's day. *McCain v. State*, 58 S. E. 550, 551, 2 Ga. App. 389 (citing *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555).

#### **Sale of ice or fresh meat**

"Necessity" is an elastic term. It does not mean that which is indispensable, but it means something more than that which is merely needful or desirable. No doubt a thing which is merely needful or desirable to the residents of a town might be a "necessity" to the residents of a great city. So, also, that which was a luxury a century ago may have become now a "necessity." There is always, however, a tendency to claim accustomed luxuries as necessities falling within the exception of the Sunday law as to work of necessity. The obvious intention of a statute making it an offense for a person to do work on Sunday, unless such work is a work of "necessity," is to set apart one day for rest from ordinary labor, so as to give opportunity to all for leisure and the contemplation of the higher things of life. This purpose would be defeated if the courts should hold every work a "necessity," the interruption of which would break into the ordinary habits of the community, or produce a degree of public inconvenience or discomfort. The continuance on Sunday of ordinary sales or deliveries of ice or fresh meat is not a work of "necessity" in a town. *State v. James*, 62 S. E. 214, 81 S. C. 197, 18 L. R. A. (N. S.) 617, 128 Am. St. Rep. 902, 16 Ann. Cas. 277.

### **NECKTIES**

The word "neckties," in Tariff Act July 24, 1897, § 1, Schedule I, par. 314 (30 Stat. 178, c. 11), relating to articles of wearing apparel of every description, including neckties not specially provided for, is not a term of commercial designation. *Goldenberg Bros. & Co. v. United States*, 124 Fed. 1003, 1004.

### **NECKWEAR**

The word "neckwear," in Tariff Act July 24, 1897, § 1, Schedule I, par. 314 (30 Stat. 178, c. 11), relating to articles of wearing apparel of every description, including neckwear not specially provided for, is not a term of commercial designation. *Goldenberg Bros. & Co. v. United States*, 124 Fed. 1003, 1004.

### **NEED**

See *If Needed*.

The word "need," as used in a clause in a will providing that, "if at my decease any of said heirs are not 21 years of age, I will that the money going to them be invested by the trustees in good city bonds or in some good savings bank, and if said heirs are not in need of the money it shall remain invested until they become of age," imports something

different from mere desire for the payment of a specified sum at a specified time. The main purpose is to preserve the legacies until the beneficiaries attain majority, and advancement may be made from time to time as a sound judgment and wise discretion may dictate, in the light of all attendant circumstances. *Smith v. Haynes*, 89 N. E. 158, 160, 202 Mass. 531.

The words, "the ties you may need" during 1899, or "ties as needed," as used in a contract for the furnishing of ties for the construction of a railroad, though plain in their ordinary meaning, are susceptible of various meanings, accordingly as the context in which they appear may throw light upon them or the subject-matter with respect to which they are used. *Laclede Const. Co. v. T. J. Moss Tie Co.*, 84 S. W. 76, 90, 185 Mo. 25.

The word "needed," as used in *Ballinger's Ann. Codes & St. § 4156*, declaring that the right given to condemn the use of water shall not extend further than to the riparian rights of persons to the natural flow of water through lands on or abutting on streams or lakes as the same exists at common law, and is not intended to allow the taking of water from any person that is used by the person himself for irrigation or that is needed for that purpose, meant water necessary to irrigate the land of a littoral or riparian owner which he has under irrigation at the time his rights are sought to be condemned, or which he intends to and will place under irrigation within a reasonable time, and that, as to such water, no condemnation could be had. *State ex rel. Liberty Lake Irr. Co. v. Superior Court for Spokane County*, 91 Pac. 968, 969, 47 Wash. 310.

A request for bids for coal for a city asked for coal to be delivered "as needed" and also as fast as "required." The bids offered to deliver at such times and in such quantities as the city might direct, and the body of the contract stated in one place that the coal should be delivered promptly "as ordered," and in another, that on failure to make delivery "as ordered," the city might either forfeit the contract or buy coal at the contractor's expense in the open market. Held, that the words "order" and "direct" should be construed as synonymous with the word "require," and that the word "require" was used as the substantial equivalent of "need." *McLean County Coal Co. v. City of Bloomington*, 84 N. E. 624, 627, 234 Ill. 90.

Defendants, who were operators of a brewery, contracted for 6,000 bushels of malt to be delivered "as needed," and at the end of the contract plaintiff granted defendants an option to receive 2,000 bushels more at the same rate "in case same is needed." Held, that the word "needed" was not used in the sense of "desired" or "wanted," disconnected with the conduct of defendants' business, but meant required for defendants' brewery busi-

ness, and hence, the market having advanced, defendants could not exercise the option that they might sell the malt at a profit. *Hettiger v. Davenport Malt & Grain Co.*, 139 S. W. 1072, 1073, 145 Ky. 39.

#### NEEDED REPAIRS

If one county resolves upon such a course, and proceeds to replace three wooden spans with steel at three times the cost necessary to rebuild them as originally constructed, there being seven or eight times that many spans in the entire bridge, it cannot recover from the other county as for "needed repairs." *Platte County v. Butler County*, 135 N. W. 439, 440, 91 Neb. 132.

#### NEEDFUL BUILDINGS

Post offices are among the other "needful buildings," for the erection of which, as well as of "forts, magazines, arsenals, dockyards," it is assumed that land will be bought, and for which land has been bought, by the government all over the United States, pursuant to Const. art. 1, § 8, cl. 17. *Battle v. United States*, 28 Sup. Ct. 422, 423, 209 U. S. 86, 52 L. Ed. 670.

#### NEEDS

See *Buyer's Needs*.

#### NEEDLE

See *Hand Sewing Needle*.

Manufactures of, see *Manufactures—Manufactured Articles*.

#### NEEDLE CASES

Not dutiable as articles composed in part of steel, see *Articles within Tariff Act*.

### NEGATIVE

#### NEGATIVE EASEMENT

A "negative easement" is a right in the owner of the dominant tenement to restrict the owner of the servient tenement in respect of the tenement in the exercise of general and natural rights of property, such as rights of light and air. *Bernero v. McFarland Real Estate Co.*, 114 S. W. 531, 534, 134 Mo. App. 290.

The right of an owner of a dominant tenement to restrict the owner of the servient tenement in the exercise of general and natural rights of property, is sometimes called a "negative easement." Such an easement was created where the owner of a building conveyed three inches of land to an adjoining owner, with the right to use his party wall, in consideration of a covenant by the grantee, stipulated to run with the land, that she would not during a specified time use the building to be erected for a saloon. *Uihlein v. Matthews*, 64 N. E. 792, 793, 172 N. Y. 154.

**NEGATIVE KNOWLEDGE**

Testimony that a fact did not occur, founded on a witness' failure to hear or see a fact, which he could supposedly have heard or seen if it had occurred, is based on what is called "negative knowledge." *Cotton v. Willmar & Sioux Falls Ry. Co.*, 109 N. W. 835, 837, 99 Minn. 366, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935 (citing 1 Wigmore, Ev. § 664; 2 Elliott, Ev. § 969; 6 Thomp. Neg. § 7865; 5 Current Law, 1869).

"Negative knowledge" is the testimony that a fact did not occur, founded on the witness' failure to hear and see a fact which he would supposedly have heard or seen if it had occurred, and the only requirement is that the witness should have been so situated that, in the ordinary course of events, he would have heard or seen the fact, had it occurred. *Hoffard v. Illinois Cent. Ry. Co.*, 110 N. W. 446, 449, 138 Iowa, 543, 16 L. R. A. (N. S.) 797 (quoting and adopting definition in Wigmore, Ev. § 664).

**NEGATIVE PREGNANT**

A "negative pregnant" is such form of a negative expression as may carry with it an affirmative. *Lemke v. Lemke*, 111 N. W. 138, 139, 78 Neb. 525.

A "negative pregnant" in a pleading is a negative implying also an affirmative, and is such a form of negative expression as may carry with it an affirmative. *Nobach v. Scott*, 119 Pac. 295, 297, 20 Idaho, 558.

A "negative pregnant" is a denial pregnant with an admission of a substantial fact which is apparently controverted, or one which, though in form of a traverse, really admits the important fact contained in the allegation. *Electrical Accessories Co. v. Mittenenthal*, 87 N. E. 684, 685, 194 N. Y. 473.

Under the system of code pleading, a general denial is as broad as the allegations denied, and a general denial of an allegation of value or damages cannot be treated as a "negative pregnant," and an admission of any value or damages less than the sum alleged. *McGrath v. Valentine*, 167 Fed. 473, 476, 93 C. C. A. 109.

A denial that the defendants are indebted to plaintiff in the precise sum charged in the petition, and that the use and occupation of the premises is worth the sum mentioned in the petition, is a "negative pregnant," and is no denial at all; and where such a pleading is filed by way of an answer the allegations of the petition are treated as admitted. *Jackson v. Green*, 74 Pac. 502, 503, 13 Okl. 314.

Where a plaintiff alleges that he is and has been for the last 10 years the owner and in possession of land, an answer denying that plaintiff is and has been for the last 10 years the owner and in possession of the land, is

in form a "negative pregnant." *J. I. Porter Lumber Co. v. Hill*, 77 S. W. 905, 906, 72 Ark. 62.

A finding by a jury that a sheriff had not neglected and failed to present and have approved his official bond as sheriff, and take the oath of office, within the time prescribed by law, amounts to a "negative pregnant," and should be treated as an admission of the implied fact. *State ex rel. Russell v. Box*, 78 S. W. 962, 984, 34 Tex. Civ. App. 435.

Under Municipal Court Act (Laws 1902, p. 1538) § 150, providing that the answer must contain a denial of each material allegation of the complaint controverted, a complaint alleging that in the month of April, 1904, plaintiff did work, etc., for defendants, is not sufficiently denied by an answer denying that in the month of April, 1904, plaintiff did work, etc., for defendants, but failing to deny that he did so at any other time; it constituting a "negative pregnant." *Levin & Meyer Contracting Co. v. Jackson*, 92 N. Y. Supp. 307, 308, 46 Misc. Rep. 445.

**NEGATIVE TESTIMONY**

Where one of two witnesses, having equal facilities for seeing or hearing a thing, swears that it occurred, and the other that it did not, the testimony of neither is negative, within the rule that the existence of a fact testified to by a positive witness is rather to be believed than that of one who swears that it did not occur. *Civ. Code 1895, § 5165*. *Hunter v. State*, 62 S. E. 466, 4 Ga. App. 761.

Where the witnesses of the state testified that defendant drew his pistol and had it in his hand during the difficulty, and defendant's witnesses testified that they did not see him have any pistol, it was error to charge that if some witnesses were present and had opportunity to know the facts, and there was another class of witnesses who testified that they did not know, the law requires the jury to believe the positive testimony, and that "positive testimony" is that of witnesses who know the facts, and "negative testimony" is that where the witness "doesn't know the facts, or didn't see it." *Daniel v. State*, 62 S. E. 539, 4 Ga. App. 843.

On an issue whether a gong of defendant's street car, by which plaintiff was struck, was sounded as the car approached a crossing, a police officer on the car, who saw the motorman set the brake when the accident occurred, testified that no gong was sounded, because as soon as the accident happened he remembered the fact, and knew that the question of warning by bell or gong was an important one; that he supposed the injury was caused by car going in the opposite direction, because no gong was sounded on the one he was on; that his hearing was good, and his attention was not diverted. Plaintiff testified that he was listening for a



car coming in the opposite direction from the one from which he had alighted just prior to his injury, because he knew one might be coming at any time, and that he heard no gong or bell. *Held*, that such testimony was not negative in the sense that it was overborne, as a matter of law, by testimony of defendant's employes that the gong was sounded. Testimony is negative only when it tends to prove the nonexistence of a fact by reason of a mere failure of a witness to observe and remember its existence, but, if the evidence asserts such an observation as to the existence of the fact and the recollection of what that observation was, denial of its existence based thereon is affirmative evidence that the fact does not exist. *Coel v. Green Bay Traction Co.*, 133 N. W. 23, 25, 147 Wis. 229.

In a prosecution for homicide, the court properly defined and distinguished positive and negative testimony: "The testimony of those witnesses who swore positively that they saw the pistol in the hand of the prisoner, and that he fired the fatal shot while the pistol was in his hand, is what the law terms 'positive testimony.' They swear positively that they saw the existence of a fact. The testimony of the witnesses who said that they saw the prisoner and the deceased in a struggle at the time when the last shot was fired, but they did not see the pistol, and did not know in whose hand the pistol was, is what the law terms 'negative testimony.' The reason the law gives greater weight to positive testimony than to negative testimony is because the witnesses who swore to positive testimony swore to what is a fact, an existing fact, or else they deliberately swore to a falsehood, while those who swore to negative testimony may be telling the truth, and yet the fact may exist which they did not see. If one witness swears that he saw Sheriff Markham in the courthouse in Durham on a certain date, the sheriff was there, or else the witness told a lie. Another witness might say: 'I was in the courthouse on that occasion, but I did not see Sheriff Markham in there.' That witness may be telling the truth and may be conscientious, and yet it may be a fact, notwithstanding, that Sheriff Markham was in the courthouse. And for that reason the law says you must attach greater weight to positive testimony than to negative testimony." *State v. Murray*, 51 S. E. 775, 139 N. C. 540.

## NEGLECT

See Culpable Neglect; Excusable Neglect; Failed and Neglected; Inadvertence, Surprise, and Excusable Neglect; Omissions, Neglects, and Defaults; Ordinary Neglect; Wanton Neglect; Willful Neglect.

Gross neglect, see Gross Negligence.

"The word 'neglect,' as sometimes used, imports an absence of care or attention in the doing or omission of a given act, or it may be used in the sense of an omission or failure to perform some act. To neglect is not always synonymous with to omit. Whether the use of the term is intended to express carelessness or lack of attention required by the circumstances, or to express merely a failure to do a given thing, depends upon the connection in which the term is used and on the meaning intended to be expressed. \* \* \* In Webster's Dictionary the verb 'neglect' is defined as meaning 'not to attend to with due care or attention; to forbear one's duty in regard to; to suffer to pass unimproved, unheeded, undone.' In the Standard Dictionary the word is defined as meaning 'to fail to perform through carelessness'; and in the Century Dictionary: '(1) To treat carelessly or heedlessly; forbear to attend to or treat with respect; be remiss in attention or duty toward. (2) To overlook or omit; disregard. (3) To omit to do or perform; let slip; leave undone; fail through heedlessness to do or in doing (something).' As defined in the penal statutes of several of the states, the word 'neglect' is said to import 'a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in action in his own concerns.'" *H. Hackfeld & Co. v. United States*, 25 Sup. Ct. 456, 458, 197 U. S. 442, 49 L. Ed. 826 (quoting 5 Words and Phrases, p. 4740).

The absence of "ordinary diligence," defined by Civ. Code 1895, § 2893, as that care which every prudent man takes of his own property of a similar nature, is termed "neglect." Objection has sometimes been made to the qualifying words "slight," "ordinary," and "gross," as applicable to negligence, and the courts of some jurisdictions have preferred to use the term "ordinary neglect," or "negligence," as applicable to a want of due care under the circumstances, maintaining that at last "ordinary diligence" in the light of the circumstances is all that is required. *Southern Railway Co. v. Davis*, 65 S. E. 181, 132 Ga. 812.

The word "neglect," as used in Rev. St. Idaho, § 4100, providing that, when a person's death is caused by the wrongful act or neglect of another, his heirs and personal representatives may maintain an action for damages against the person causing the death, stands in the same category with wrongful act, and implies some omission of duty. The death of a free passenger on a railway train, not due to the omission on the part of the railway company of any duty owing to deceased, cannot be considered as caused by the neglect of the railroad company, and hence the heirs or personal representatives of the deceased cannot maintain an action under the section. *Northern P. R. Co. v.*

Adams, 24 Sup. Ct. 408, 409, 192 U. S. 440, 48 L. Ed. 513.

"Care" and "carefulness" are antonyms for "neglect" and "negligence." Negligence is a conclusion of law, and so also are statements in the findings by the jury that work was done carefully. *Avery v. Nordyke & Marmon Co.*, 70 N. E. 888, 893, 34 Ind. App. 541.

The "neglect" mentioned in the statute defining the liability of a city for injuries to pedestrians on defective sidewalks means the want of ordinary care, and the city must, to escape liability, use ordinary care to keep defects out of its streets. *Berry v. City of Greenville*, 65 S. E. 1030, 1031, 84 S. C. 122, 19 Ann. Cas. 978.

An instruction in an action against a town for injuries to a traveler, caused by a defective bridge, that it was the duty of the town to keep the bridge reasonably safe for the amount and kind of travel that might be expected to pass over it, and that, if the town was chargeable with any fault in respect of such duty, the liability attached, and the town was liable for accidents caused by reason of defects existing through the fault of the town, "and this without notice to it or regardless of the question of 'neglect,'" etc., was not erroneous because of the use of the quoted phrase; the word "neglect" therein being used in its ordinary legal sense, and it being apparent that the part of the charge quoted was intended to mean that the liability of the town was not to be made to depend on the question whether or not it had exercised ordinary care in the maintenance of the bridge. *Graves v. Town of Waitsfield*, 69 Atl. 137, 140, 81 Vt. 84.

Since in this state the liability of a municipal corporation for injuries caused by defects in street and sidewalks is absolute, an instruction that this was a latent defect, for which the defendant was responsible by reason of its neglect in not repairing the sidewalk, the word "neglect" could not have been used in its ordinary legal sense, and must be deemed to have been used to signify mere failure to repair, although it did not appear that the corporation had had any knowledge of the defect. *Campbell v. City of Elkins*, 52 S. E. 220, 222, 58 W. Va. 308, 2 L. R. A. (N. S.) 159.

R. L. 1905, § 3696, in limiting the time within which the priorities of right of administration thereby conferred must be asserted, uses the word "neglect" synonymously with "fail." In *re Lis' Estate* (Minn.) 139 N. W. 300, 307.

The words "fail," "refuse," and "neglect," as used in St. 1903, §§ 795, 797, providing that any railroad company which "shall fail, refuse and neglect to comply with the provisions" of the act shall be guilty of a misdemeanor, are used interchangeably,

and mean something more than an unavoidable and accidental violation of the statute. *Chesapeake & O. R. Co. v. Commonwealth*, 84 S. W. 566, 568, 119 Ky. 519.

The purpose of Rem. & Bal. Code, § 8631, providing that if any railroad company shall "refuse or neglect" to obey any order of the Railroad Commission, the company shall be subject to a penalty, is to impose a penalty for neglect or refusal, and where a company fails to perform an act required by an order within the time specified therein, it is immaterial whether the failure resulted from willful refusal or neglect, or from mere mismanagement; the word "neglect" meaning omission, or forbearance to do a thing that can be done, or that is required to be done, and it does not generally imply carelessness or imprudence, but simply an omission to perform. *State ex rel. Railroad Commission of Washington v. Great Northern Ry. Co.*, 123 Pac. 8, 12, 68 Wash. 257.

As used in Gen. St. 1902, § 2499, authorizing an action by a wife against her husband for support when he neglects to support her, "neglect" means more than a mere omission or failure without fault. It imports omission accompanied by some kind of culpability in the conduct of the husband; the design of the statute being to compel the unwilling, and not to constrain those who have acted fairly and reasonably in the performance of the duty. *Lathrop v. Lathrop*, 63 Atl. 514, 515, 78 Conn. 650.

"Neglect," within Rev. St. 1890, § 2228, declaring that every able-bodied married man who shall "neglect" or "refuse" to support his family shall be deemed a "vagrant," arises from an inattentive state of mind, want of care for, and utter disregard of the obligation resting on the husband to support his family, whereas the word "refuse" imports a willful disavowal or disregard of such obligation; and hence where a physician of good habits endeavored to establish a practice, maintained an office where he waited for patients, and attended to such calls as he had, contributing his entire income from his practice to the support of his wife and himself, he was not a "vagrant," so as to entitle his wife to a divorce under section 2921, declaring that when the husband shall be guilty of such conduct as to constitute him a "vagrant," within the meaning of the law respecting "vagrants," the wife may be divorced, though he did not succeed in earning enough to support both of them, and she was compelled to contribute to their support from her separate means. *Gallimore v. Gallimore*, 91 S. W. 406, 410, 115 Mo. App. 179.

#### Of official duty

Under Rev. St. 1895, art. 790, providing that no county shall be sued unless the claim on which such suit is founded shall have first been presented to the county commissioners' court for allowance, and such court

shall have neglected or refused to audit the same, "neglect" is sufficiently shown by evidence that the court has been given a reasonable time within which to act, and has failed to allow the claim. *Williams v. Bowie County (Tex.)* 123 S. W. 199, 200.

Under a statute providing that, if any commissioner or other county officer shall "neglect" to perform any act which it is his duty to perform, he shall forfeit his office and be removed, the duty must be personal, and the act must be one which the officer has the legal capacity and authority to perform, or he cannot be guilty of neglect. The purpose of the statute is to prevent persons from continuing to hold office whose inattention to duty endangers the public welfare, and the "neglect" contemplated must disclose either willfulness or indifference to duty so persistent or in affairs of such importance that the safety of public interests is threatened. Irregularities in the publication of statements of sums of money allowed and in advertisements for bids for bridge repair work, failure to publish estimates of expenditures upon which tax levies were made, and failure to advertise for bids for the repair of a bridge do not constitute legal causes for the removal of a county commissioner from office on the ground of neglect of duty. *State v. Kennedy*, 108 Pac. 837, 841, 82 Kan. 373.

A sheriff, who, notwithstanding public feeling against a negro charged with murder, failed to order the jail doors closed, or to take any precaution to prevent a lynching, being under Code 1907, §§ 132, 7191, the legal custodian of the jail chargeable with the duty of excluding intruders, was subject to impeachment under Const. 1901, § 138, providing that, when any prisoner is taken from jail and killed owing to the neglect of the sheriff, the sheriff may be impeached, for "neglect," as applied to a public officer, means a failure on his part to perform some of the duties of his office. *State ex rel. Garber v. Cazalas*, 50 South. 296, 162 Ala. 210, 19 Ann. Cas. 886 (quoting 5 Words and Phrases, p. 4740).

#### Omission distinguished

Code Civ. Proc. § 1511, provides that, "if an executor \* \* \* neglects for two months after his appointment to give notice to creditors as prescribed, \* \* \* the court must revoke his letters" and appoint another executor. Pen. Code, § 7, subd. 2, provides that the term "neglect" imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily uses in acting in his own concerns. Held that, construing section 1511 in view of the policy of the law to effectuate testator's expressed will as far as possible, it gave the court a wide discretion in removing executors thereunder, and an executor should not be removed if the failure to publish the notice within the required

time is satisfactorily excused; the terms "to neglect" and "to omit" not being synonymous, since to neglect is to omit by carelessness or design, while an omission may be involuntary and inevitable. In *re Chadbourne's Estate*, 114 Pac. 1012, 1013, 15 Cal. App. 863.

#### As surprise

See Surprise.

#### NEGLECT AND REFUSAL

See, also, Refuse—Refusal.

Plaintiff contracted to procure consignment to defendant of some of the product of silk mills, and defendant agreed to pay commissions on the sale of the product consigned. The contract was to continue for a year, and thereafter from year to year until terminated by notice, and it provided that on "neglect and refusal" of plaintiff to perform his agreement, and at the expiration of the agreement, defendant might sell the goods on hand. The company owning the mills refused to consign any product to defendant so long as plaintiff was retained as sales agent, and defendant was so notified. Held, that plaintiff, on being unable to continue to consign goods, was guilty of a breach of contract, the inability to continue not being "neglect and refusal," and defendant was justified in canceling the contract for the future, and might enter into a contract with the company for the consignment of future goods. *Napier v. Spielmann*, 111 N. Y. Supp. 1009, 1016, 127 App. Div. 711.

#### NEGLECT TO TAKE OATH

Under Const. art. 1, § 7, which provides that an officer who refuses or neglects to take the oath or affirmation of office shall be deemed to have refused the office, and a new selection shall be made, and under Code 1912, art. 20, § 1, which requires constables to so qualify within 30 days after their appointment, neglect of a constable to take the oath, etc., within that time, deprives him of the office; the term "neglect to take the oath," as used in the Constitution, meaning neglect of an appointee to take the oath within the time required by law. *Little v. Schul*, 84 Atl. 649, 653, 118 Md. 454.

#### NEGLECTED CHILD

The words "neglected children," as used in Act No. 82, p. 134, of 1906, entitled "An act defining the power of the district courts of this state and the city courts, with reference to the care, treatment, and control of dependent, neglected, incorrigible, and delinquent children, under the age of 16 years," mean any children who are destitute, homeless, abandoned, or depending on the public for support, or who have not proper care or guardianship. In *re Parker*, 43 South. 54, 55, 118 La. 471.

Laws 1907, c. 41, § 1 (*Burns' Ann. St.* 1908, § 1642), defines a "dependent child" as one under the age stated who is dependent

upon the public for support, or who is destitute, homeless, or abandoned, and section 2, Burns' Ann. St. 1908, § 1643, defines a "neglected child" as one who has not proper parental care or guardianship. Held, that children were neither "dependent" nor "neglected," so as to charge their father for contributing to their neglect under the statute, where their mother, after unsuccessfully attempting to procure a divorce, had taken them to her sister's and refused to bring them to the home which the father offered to furnish on condition that she return to it. *Wheeler v. State* (Ind.) 100 N. E. 25, 26.

## NEGLIGENCE

See Actionable Negligence; Comparative Negligence; Concurrent Negligence; Confession of Negligence; Constructive Negligence; Contributory Negligence; Criminal Negligence; Culpable Negligence; Discovered Negligence; Gross Negligence; Hazardous Negligence; Imputed Negligence; Intentional Negligence; Legal Negligence; Notice of Negligence; Ordinary Negligence; Proximate Contributory Negligence; Slight Negligence; Wanton Negligence; Willful Negligence.

Negligence or otherwise, see Otherwise.

"Negligence" has been variously defined by the courts of this state; but, after all, the different definitions mean substantially one and the same thing. It has been termed the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. It has been termed the failure to observe, for the protection of the interests of another, that degree of care, prudence, and vigilance which the circumstances justly demand, whereby such other person suffers injury. *Lenkewicz v. Wilmington City R. Co.* (Del.) 74 Atl. 11, 13, 7 Pennewill, 64.

"Negligence" is a failure to observe, for the protection of another, that degree of care which the circumstances justly demand. *Warren v. Harlan & Hollingsworth Corp.* (Del.) 84 Atl. 215, 219; *Gatta v. Philadelphia, B. & W. R. Co.* (Del.) 83 Atl. 788, 2 Boyce, 551; *Temple v. Gilbert*, 85 Atl. 380, 382, 86 Conn. 335; *Florida R. Co. v. Sturkey*, 48 South. 34, 35, 56 Fla. 196.

"Negligence" is thus defined by the text-writers: 'Negligence,' in its civil relations, is such an inadvertent imperfection by a responsible human agent in the discharge of a legal duty as immediately produces, in an ordinary and natural sequence, a damage to another. The inadvertency or want of due consideration of duty is the *injuria*, on which, when naturally followed by the *damnum*, the suit is based. 'Negligence,' constituting a cause of civil action, is such an omission by a responsible person to use that

degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury, as in a natural and continuous sequence, causes unintended damage to the latter. 1 *Thompson on Negligence* (1st Ed.) p. 135, approved the following definition of 'negligence' by *Willes, J.*, in *Vaughan v. Railroad*, 5 Hurl. & N. Exch. 678, in which it is said: 'Now, the definition of negligence is the absence of care according to circumstances.' In *McMahon v. Pacific Express Co.*, 84 S. W. 478, 182 Mo. 641, our Supreme Court said: 'Negligence consists in doing something which a reasonably prudent man would not have done under the circumstances, or in failing to do something which a reasonably prudent man, under the circumstances, would have done.' *Holden v. Missouri R. Co.*, 84 S. W. 133, 136, 108 Mo. App. 665 (citing *Wharton*, Neg. § 3; 1 *Shearman & Redfield*, Neg. § 8).

The component parts of "negligence" are (1) a legal duty to exercise due care; (2) a breach of that duty; (3) the absence of distinct intention to produce the precise damage, if any, which actually follows. *Richmond v. Missouri Pac. Ry. Co.*, 118 S. W. 708, 710, 133 Mo. App. 463 (citing *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 463).

The law of "negligence," which means the law of actionable negligence, as applied in most jurisdictions, embraces the doctrine of the assumption of risks on the part of an employé and the doctrine of contributory negligence; also the doctrine announced in *Billings v. Breinig*, 7 N. W. 722, 45 Mich. 65, 71, that although disobedience of a statute may be conclusive evidence of negligence, a condition of recovery by one urging disobedience is that such disobedience must be the proximate cause of the injury complained of, or that it contributed to the injury. *Syncewski v. Schmidt*, 116 N. W. 1107, 1108, 153 Mich. 438.

"Negligence" in its essence is always concrete. Hence its proof must always rest upon testimony that tends to the establishment of concrete acts either of omission or of commission. There is no such thing as negligence at large. *Wyckoff v. Birch*, 71 Atl. 243, 246, 76 N. J. Law, 646 (citing *Bien v. Unger*, 46 Atl. 593, 64 N. J. Law, 596).

"If a property owner exercises his right to connect his premises by a private drain with a public sewer, he not knowing of a defect therein which, by reason of such connection, will produce injury to such property, and such injury is caused before he knows of the danger, or, knowing thereof, has reasonable time to guard against the same, his instrumentality in the matter will not preclude him from recovering compensation for the injury, if it is referable to 'negligence' on the part of the city. 'Negligence' in such an action may consist of a failure to adopt a plan for the sewer, failure to exercise ordi-

nary care in constructing the same, or failure to act with reasonable promptness to remedy defects in the plan, causing direct injuries to abutting property after notice of such defects." *Hart v. City of Neillsville*, 104 N. W. 699, 703, 125 Wis. 546, 1 L. R. A. (N. S.) 952, 4 Ann. Cas. 1085.

In an action for injuries to a passenger alleged to have been occasioned by a lurch of the train as he alighted, an instruction to find for plaintiff, if, inter alia, defendant "negligently or carelessly gave the [train] a sudden or violent jerk," defines "negligence" in language not susceptible of criticism by defendant, not requesting a definition of such term. *Louisville & N. R. Co. v. Deason* (Ky.) 96 S. W. 1115, 1118.

"Negligence" of a railroad company, whereby fire is communicated to adjacent premises, may consist in not being provided with the best appliances to prevent the unnecessary escape of fire from its locomotives, in not keeping such appliances in repair, in not keeping its right of way free from combustible material, in operating its locomotives so as to unnecessarily scatter fire, and in not arresting the spread of fire after it has been set by its engines from its negligence on its right of way. *Louisville & N. R. Co. v. Fort*, 80 S. W. 429, 434, 112 Tenn. 432 (citing *Thomp. Neg.*).

#### As act of commission or omission

"Negligence" may consist in the omission to act as well as in acting. *Lewy Art Co. v. Agricola*, 53 South. 145, 150, 169 Ala. 60.

"Negligence" implies some act of omission or commission wrongful in itself. *Whitworth v. Shreveport Belt R. Co.*, 36 South. 414, 420, 112 La. 363, 65 L. R. A. 129 (citing *Eckert v. Long Island R. Co.*, 43 N. Y. 503, 3 Am. Rep. 721).

"Negligence" is doing what the ordinary man is not accustomed to do, not what he is in the habit of doing. *Goodale v. York*, 69 Atl. 525, 526, 74 N. H. 454.

"Negligence" may be active or passive, consisting in heedlessly doing an improper thing or in heedlessly refraining from doing the proper thing. *Basler v. Sacramento Gas. & Electric Co.*, 111 Pac. 530, 532, 158 Cal. 514, Ann. Cas. 1912A, 642.

"Negligence" is the failure to do something which in the exercise of ordinary care ought to have been done, or the doing of something which in the exercise of ordinary care ought not to have been done. *Lewis v. Koller & Smith, Inc.*, 186 Fed. 403, 405.

"Negligence" consists in the doing or omitting to do some act which a person in the exercise of ordinary care and prudence would not do or omit to do, and which act, if done or omitted by him, contributed and helped to produce the injury complained of.

*Evansville & T. H. R. Co. v. Mills*, 77 N. E. 608-612, 37 Ind. App. 598.

"Negligence" is the failure to do what a prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the circumstances would not have done. The duty is indicated and measured by the exigencies of the occasion. *International & G. N. R. Co. v. Trump*, 94 S. W. 903, 906, 42 Tex. Civ. App. 536 (quoting and adopting the definition in *Houston & T. C. R. Co. v. Milam* [Tex.] 58 S. W. 736).

Even an expert may be guilty of "negligence" in doing what, at the time, his judgment approves. *Oceanic Steam Nav. Co. v. Aitken*, 25 Sup. Ct. 317, 318, 196 U. S. 589, 49 L. Ed. 610.

"Negligence" by a physician consists in doing something which he should not have done in the treatment of a case, or in omitting to do something he should have done. *McGraw v. Kerr*, 128 Pac. 870, 873, 23 Colo. App. 163.

#### Same—Cautious and prudent person

"Negligence," in actions for personal injury, means the doing of some act which a cautious and prudent man would not do, or neglecting to do some act which a cautious and prudent man would not neglect. Prudent men often depart from common usage in the performance of duty without overstepping the boundaries of reasonable care. If they did not, there would be little, if any, progress made in any craft. The law does not call a man careless because he refuses to place himself in bondage to custom. The advancement of art, science, trade, or handicraft requires that human effort be given a wider field of operation than that already occupied. Therefore a given act is denominated as negligent, not that it is violative of custom, but because it is a thing no prudent man would do. *Brunke v. Missouri & K. Telephone Co.*, 90 S. W. 753, 754, 115 Mo. App. 36.

#### Same—Ordinarily careful person

"Negligence" is a failure to do that which a man of ordinary care would do under the same or similar circumstances, or doing that which such a man would not do under such circumstances. *Missouri, K. & T. Ry. Co. of Texas v. Parrott*, 92 S. W. 795, 100 Tex. 9; *Houston & T. C. R. Co. v. Beard*, 93 S. W. 532, 42 Tex. Civ. App. 427.

#### Same—Person of highest degree of care and prudence

Where, in an action for injuries to a passenger, the court, in one paragraph of its charge, defined negligence as follows: "The word or term 'negligence,' as applied to a person or corporation engaged in the transportation of passengers for hire, is the failure to do anything which a person of the highest degree of care and prudence engaged in

the same kind of employment would have done or performed under similar circumstances, or the doing of anything which a person possessed with the highest degree of care and prudence engaged in the same kind of business would have refrained from doing under like or similar circumstances"—and a paragraph immediately preceding stated that "the term 'a very high degree of care' means that degree of care which a person possessed of the highest degree of care and prudence engaged in the same kind of employment, would exercise under like circumstances," it was held that, when the definition of the term "very high degree of care" was read into the paragraph defining negligence, it was in perfect harmony with the principle announced by the Supreme Court in *International & G. N. Ry. Co. v. Welch*, 24 S. W. 390, 86 Tex. 204, 40 Am. St. Rep. 829. *Central Texas & N. W. R. Co. v. Smith* (Tex.) 73 S. W. 537, 538.

**Same—Person of ordinary care, prudence, and caution**

In an instruction that "negligence" is a failure to do that which a person of ordinary care, prudence, and caution would do under like or similar circumstances, or the doing of that which a person of like prudence and caution would not do under the same circumstances, the words "like prudence" meant "ordinary prudence." *St. Louis Southwestern R. Co. v. Dixon* (Tex.) 91 S. W. 626, 627.

**Same—Person of ordinary prudence and care**

An instruction that "negligence" consists in doing something which a person of ordinary prudence and care would not have done or would not have omitted to do under the same or similar circumstances is not as clear as it might be, but is not reversible error. *Dubois v. Luthmer*, 126 N. W. 147, 149, 147 Iowa, 315.

**Same—Person of ordinary prudence and intelligence**

While the ordinary test of "negligence" is whether a man of ordinary intelligence and prudence would have done or omitted the act in question under the circumstances, yet there are circumstances under which the law does not permit an act or its omission to be excused because some persons would have been willing to undertake it, for the hazard may be apparent and serious. *Stone v. Union Pac. R. Co.*, 100 Pac. 362, 35 Utah, 305.

It is not strictly accurate, but not reversible error, to instruct that "negligence" is the failure to do that which a person of ordinary prudence and intelligence would do under the same or similar circumstances, or the doing of that which a person of ordinary prudence and intelligence would not do under the same or similar circumstances. *Houston & T. C. R. Co. v. Gray*, 85 S. W. 838, 839, 38 Tex. Civ. App. 249 (citing *Houston & T. C. Ry. Co. v. Brown*, 85 S. W. 44, 37 Tex.

*Civ. App.* 595; *Houston & T. C. Ry. Co. v. Kothmann*, 84 S. W. 1089, 37 Tex. Civ. App. 548).

**Same—Ordinarily prudent person**

"Negligence" is the failure to exercise such care as ordinarily prudent persons exercise under like or similar circumstances. *Kentucky & I. Bridge & R. Co. v. Shrader* (Ky.) 80 S. W. 1094, 1095.

"Negligence" is the failure to do what an ordinarily prudent person would do under the circumstances. *Brown v. Oregon-Washington R. & Nav. Co.*, 128 Pac. 38, 41, 63 Or. 396.

"Negligence" is the doing of something which one of ordinary prudence would not have done, or the omission of something which such person would have done, under like circumstances. *Houston & T. C. R. Co. v. Alexander*, 132 S. W. 119, 120, 103 Tex. 594.

One is not guilty of "negligence" by reason of an act or omission which would not lead an ordinarily prudent man, giving the matter thought, to apprehend danger from it. *Cowett v. American Woolen Co.*, 80 Atl. 703, 704, 100 Me. 65.

What a person of ordinary prudence would or would not do under the particular circumstances is the true test of "negligence." *Houston & T. C. R. Co. v. Everett* (Tex.) 86 S. W. 17, 18.

The test of "negligence" is what a person of ordinary prudence would or would not do, and not what ordinarily intelligent and prudent men would or would not do. *Houston & T. C. R. Co. v. Brown*, 85 S. W. 44, 45, 37 Tex. Civ. App. 595.

An instruction that "negligence" is the doing of an act which an ordinarily prudent person would not do in like circumstances is erroneous, as ignoring the fact that negligence may consist in careless omission to act. *Stokes v. Sac City*, 130 N. W. 786, 788, 151 Iowa, 10.

Assuming the existence of a duty, and where only ordinary care is required, "negligence" is properly defined as the failure to do what an ordinarily prudent person would have done under the circumstances, or the doing of that which an ordinarily prudent person would not have done. *Alabama City, G. & A. Ry. Co. v. Bullard*, 47 South. 578, 580, 157 Ala. 618 (citing 5 Words and Phrases, p. 4744).

"Negligence" is not a mere technical term, but means "a lack of due diligence or care; omission of duty; heedlessness," and in a legal sense is no more nor less than the failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury; and as applied to an act done in discharge of a duty imposed,

It is a failure to do what an ordinarily prudent person would have done under the circumstances of the situation, or a doing of that which such a person, under the existing conditions would not have done. *St. Louis & S. F. R. Co. v. Franklin (Tex.)* 123 S. W. 1150, 1155.

An instruction that "negligence," as used in the charge, meant the failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or the doing of that which such a person would not have done under such circumstances, that "ordinary care," as used in the charge, meant that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances, properly stated the jury's duty to look to the facts and circumstances as they existed at the time the act was done as the standard by which the act was to be judged. *Houston & T. C. R. Co. v. Johnson*, 127 S. W. 539, 541, 103 Tex. 320.

The question of "negligence" is determinable by what an ordinarily prudent person would have done under the same or similar circumstances. If a person of ordinary prudence, standing in the place of an engineer, would have kept a lookout and discovered the burning bridge in time to have stopped the engine or slackened its speed, so that plaintiff, the fireman, could have alighted with reasonable safety before reaching the bridge, the failure of the engineer to do what such person of ordinary prudence would have done would constitute negligence. *Missouri, K. & T. R. Co. v. Keaveney (Tex.)* 80 S. W. 387, 339.

#### Same—Reasonable and prudent man

"Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances would not have done. *Gefselman v. Schmidt*, 68 Atl. 202, 204, 106 Md. 580; *Birsch v. Citizens' Electric Co.*, 93 Pac. 940, 942, 86 Mont. 574. (quoting and adopting definition in *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506); *Flaherty v. Butte Electric Ry. Co.*, 107 Pac. 416, 418, 40 Mont. 454, 135 Am. St. Rep. 630; *Thompson v. Chicago, M. & St. P. Ry. Co.*, 139 Fed. 723, 725, 111 C. C. A. 261; *International & G. N. R. Co. v. Trump*, 94 S. W. 903, 906, 42 Tex. Civ. App. 536 (quoting and adopting the definition in *McDonald v. International & G. N. R. Co.*, 22 S. W. 339, 86 Tex. 1, 40 Am. St. Rep. 803); *Western Union Telegraph Co. v. Catlett*, 177 Fed. 71, 76, 100 C. C. A. 489.

"Negligence" is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situations. *L. W. Pomerene Co. v. White*, 97 N. W. 232, 233, 70 Neb. 171 (citing *Omaha St. Ry. Co. v. Craig*, 58 N. W. 209, 39 Neb. 601).

"Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The duty is dictated and measured by the exigencies of the occasion. *Klenk v. Oregon Short Line R. Co.*, 76 Pac. 214, 215, 27 Utah, 428; *Mason & Perkins v. Post*, 54 S. E. 311, 313, 105 Va. 494, 11 L. R. A. (N. S.) 1038 (quoting and adopting the definition in *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506).

"Negligence" has been defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident which careful and prudent men are accustomed to take under similar circumstances." *Globe Navigation Co. v. Maryland Casualty Co.*, 81 Pac. 826, 829, 39 Wash. 299 (quoting the *Nitroglycerine Case*, 15 Wall. 524, 21 L. Ed. 206).

"Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. *Washington Mills v. Cox*, 157 Fed. 634, 640, 85 C. C. A. 154 (quoting and adopting definition in *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506).

"Negligence" is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. *Rodgers v. Missouri Pac. Ry. Co.*, 88 Pac. 885, 75 Kan. 222, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441.

"Negligence" is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances." *Southern Ry. Co. v. Chatman*, 53 S. E. 692, 697, 124 Ga. 1026, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675.

"Negligence" is "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do." A reasonable man can be guided only by a reasonable estimate of probabilities. *Southern R. Co. v. Carter*, 51 South. 147-149, 164 Ala. 103.

"Negligence" is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care." *Northern P. R. Co. v. Adams*, 24 Sup. Ct. 408, 409, 192 U. S. 440, 48 L. Ed. 513 (quoting *Pollock, Torts*, p. 355).

*Bouv. Law Dict.* defines "negligence" to be the omission to do something which a reasonable man, guided by the considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. Proof that a telegraph company failed to transmit a message correctly is *prima facie* evidence of its negligence. *Strong v. Western Union Tel. Co.*, 109 Pac. 910, 916, 18 Idaho, 389, 30 L. R. A. (N. S.) 409, *Ann. Cas.* 1912A, 55 (citing 4 *Words and Phrases*, p. 3168).

An instruction defining "negligence" as the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do, is substantially correct. *Perryman v. Chicago City R. Co.*, 89 N. E. 980, 983, 242 Ill. 269.

**Same—Reasonable, careful, and prudent man**

"Negligence" is the want of ordinary care, viz., such care as a reasonably prudent and careful person would exercise under similar circumstances. It is never presumed but must be proved; and the burden of proving it rests on the party alleging it. It may arise from overt acts, or from the failure to perform a duty. *Bowen v. Baltimore & P. Steamboat Co. (Del.)* 84 Atl. 1022, 1025.

"Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done. *Chicago, R. I. & P. Ry. Co. v. Watson*, 127 Pac. 693, 694, 36 Okl. 1.

"Negligence" may be defined in a general way as the doing of a thing which the dictates of common prudence or foresight would indicate ought not to be done, or which a reasonably careful and prudent man would not have done, having in mind the attending

conditions and circumstances of the occasion, or the omission to do a thing which the same prudence and foresight would say ought to be done, considering again the attending conditions and circumstances. *San Francisco & P. S. S. Co. v. Carlson*, 161 Fed. 851, 852, 99 C. C. A. 45.

**Same—Reasonable person**

"Negligence" is the doing of something which under the circumstances a reasonable person would not do, or the omission to do something, in the discharge of a legal duty, which under the circumstances a reasonable person would do, and which act of commission or omission, as a natural consequence directly following, produces damages to another. *Williams v. Belmont Coal & Coke Co.*, 46 S. E. 802, 804, 55 W. Va. 84 (quoting *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190).

**Same—Reasonably prudent person**

"Negligence" is the omitting to do something that a reasonably prudent person would do, or the doing of something that such person would not do. *Illinois Cent. R. Co. v. O'Neill*, 177 Fed. 328, 333, 100 C. C. A. 658.

"Negligence" is the omission to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The duty thus imposed is dictated and measured by the particular exigencies of the occasion, and the essence of the fault is either in omission or commission; negligence being either active or passive. Negligence is also defined as the juridical cause of the injury, and therefore actionable or followed by liability to another when it consists of such an act or omission on the part of a responsible person as in ordinary sequence immediately results in such injury; but it should be added that the party complained of must by the exercise of ordinary care have been able to foresee that harm or injury would result." *Fuller v. Atlantic Coast Line R. Co.*, 53 S. E. 297, 298, 140 N. C. 480 (citing *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506; *Carter v. Cape Fear Lumber Co.*, 39 S. E. 828, 129 N. C. 203; *Basnight v. Atlantic & N. C. R. Co.*, 16 S. E. 323, 111 N. C. 592; *Wharton's Neg.* § 73).

**Same—Reasonably prudent and careful person**

"Negligence" is the failure to observe, for the protection of the interests of another, that degree of care, prudence, and vigilance which the circumstances justly demand, whereby such other person suffers injury. It is the want of such care as a reasonably prudent and careful person would exercise under similar circumstances. *Gatta v. Philadelphia, B. & W. R. Co. (Del.)* 83 Atl. 788, 791, 2 *Boyce*, 551.

"Negligence" is the omission to do something which a reasonably prudent and care-



ful person would, or the doing something which such a person would not, do under like circumstances. *Arkansas & Louisiana Ry. Co. v. Sanders*, 99 S. W. 1109, 1110, 81 Ark. 604 (adopting definition in 1 *Thompson, Neg.* § 1, 2; citing *Hot Springs R. Co. v. Newman*, 38 Ark. 607).

**As the breach or omission of a legal duty**

"Negligence" consists in doing or permitting an act by which a legal duty or obligation has been violated. *Glaser v. Rothschild*, 80 S. W. 332, 334, 106 Mo. App. 418 (citing *Sweeny v. Old Colony & N. R. Co.*, 92 Mass. [10 Allen] 372, 87 Am. Dec. 644).

"Negligence," to be actionable, must occur in breach of a legal duty arising out of contract or otherwise, owing to the person sustaining the loss." *Minneapolis General Electric Co. v. Cronon*, 186 Fed. 651, 662, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816 (quoting and adopting definition in *Cleveland, C., C. & St. L. R. Co. v. Ballentine*, 84 Fed. 935, 28 C. C. A. 572; citing *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Kahl v. Love*, 37 N. J. Law, 5).

A necessary element of actionable negligence is the existence of a duty on the part of defendant to protect plaintiff from the injury complained of. "Negligence" is the breach or omission of a legal duty; it includes two subordinate ideas—duty and the performance of that duty. *Todd v. Pacific Ry. & Nav. Co.*, 117 Pac. 300, 59 Or. 249 (citing 5 *Words and Phrases*, pp. 4743-4746).

"Negligence" is a breach of legal duty. It must be shown. It will not be presumed. The burden of proof rests with the party asserting or charging 'negligence.'" *Meyers v. Ruddock Orleans Cypress Co.*, 43 South. 448, 450, 118 La. 805 (quoting and adopting statement in *Black, Law & Prac. Acc. Cas.*).

An essential ingredient to any conception of "negligence" is that it involves the violation of some legal duty which one person owes another—a duty to take care for the safety of the person or property of the other. This duty may be assumed by contract, or it may be imposed by implication of law. *Phoenix Light & Fuel Co. v. Bennett*, 74 Pac. 48, 50, 8 Ariz. 314, 63 L. R. A. 219.

An essential ingredient of any conception of the law of "negligence" is that it involves the violation of a legal duty which one person owes another, the duty to take care for the safety or property of the other; and the converse proposition is that, where there is no legal duty to exercise care, there can be no actionable negligence. *Saylor v. Parsons*, 98 N. W. 500, 502, 122 Iowa, 679, 64 L. R. A. 542, 101 Am. St. Rep. 283 (quoting *Thomp. Neg.* § 3).

"Negligence" is a shortage of legal duty that causes injury. The fact that an act is in violation of law does not dispense with an inquiry as to the relation which that act sus-

tains to the injury complained of, and if it is not an efficient cause of injury there is no liability. Where a train was obstructing a highway crossing in violation of law, and plaintiff, mistaking a signal for an invitation to cross, attempted to cross between two cars and was injured, the proximate cause of the accident was not the obstruction, and the railroad company was not liable. *Corbin v. Grand Trunk R. Co.*, 63 Atl. 138, 139, 78 Vt. 458.

"Negligence" which is actionable is the infringement of the legal right of another, or in other words the violation of a duty imposed by law in respect to another. The mere neglect of a railroad company to cut down trees on its right of way in the vicinity of a grade crossing is not in itself such "negligence," in the absence of any statute requiring it to keep its right of way free from unnecessary obstruction to a view of the tracks by persons using an adjacent highway, although it may be considered with other circumstances in determining whether the company exercised care in the operation of its cars at a particular time. *Cowles v. New York, N. H. & H. R. Co.*, 68 Atl. 1020, 1021, 80 Conn. 48, 12 L. R. A. (N. S.) 1067, 10 Ann. Cas. 481.

"Negligence" is the breach or omission of a legal duty. Defendant, an electric light company, furnished its linemen with several pike poles (long poles having an iron ferule and an iron pike in the end) of the character and construction customarily used in bracing electric light poles while removing the same. One of these pike poles had become dull at the point and unfit to be used with safety. While plaintiff was on an electric light pole, stripping the wires, one of his fellow servants picked up and used the blunt pike pole, which did not fix the electric light pole so as to properly hold the same, and in consequence fell, whereby plaintiff was injured. Held, that defendant had properly fulfilled its duty of furnishing suitable tools and appliances, and the injury was in no way the result of its negligence. *Towne v. United Electric Gas & Power Co.*, 81 Pac. 124, 125, 146 Cal. 766, 70 L. R. A. 214, 2 Ann. Cas. 906.

"Negligence" is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring exercise of ordinary care not to injure another, or is imposed by statute designed for the protection of others. The only difference is that in the one case the measure of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence per se. The sale of kerosene in violation of *Laws 1903, p. 103, § 2*, requiring the names and grades of distillates of petroleum to be marked on the receptacles in which they are sold, and making it a misdemeanor not to do so, is

"negligence" per se. *Peterson v. Standard Oil Co.*, 106 Pac. 337, 340, 55 Or. 511, Ann. Cas. 1912A, 625 (quoting and adopting definition in *Osborne v. McMasters*, 41 N. W. 543, 40 Minn. 103, 12 Am. St. Rep. 698).

**Carelessness distinguished**

"Negligence" implies an omission to do a thing which a person ought to do, while "carelessness" implies heedlessness or inattention. *Larkin v. Taylor*, 5 Kan. 433, 445.

**Degrees of negligence**

There are three degrees of "negligence": First, slight negligence involving an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use; second, ordinary negligence, involving failure to exercise in any given situation such care as the great mass of mankind ordinarily exercise under the same or similar circumstances; and, third, gross negligence involving a failure to exercise any care to avoid inflicting injury to the person or property of others, recklessly or wantonly acting or failing to act to avoid such injury, evincing such utter disregard of consequences as to suggest a willingness, substantially equivalent to intent, to injure and denominated such constructively, and classable with actual intent as regards duty to compensate for the injury. *Astrin v. Chicago, M. & St. P. R. Co.*, 128 N. W. 265, 268, 143 Wis. 477, 31 L. R. A. (N. S.) 158.

A classification of "negligence" as "slight," "ordinary," and "gross" has been quite generally abandoned, and the more rational view adopted that any want of ordinary care constituted actionable negligence. *Sherwood v. Home Savings Bank*, 109 N. W. 9, 12, 131 Iowa, 528.

In Iowa actionable "negligence" does not depend on its degree, and the differentiation into gross, ordinary, and slight negligence means little more than a matter of comparative emphasis in the discussion of testimony. *Denny v. Chicago, R. I. & P. Ry. Co.*, 130 N. W. 363, 364, 150 Iowa, 460.

Under Ky. St. 1903, § 6, giving a cause of action for a death caused by another's "negligence," gross negligence need not be shown. *Cincinnati, N. O. & T. P. Ry. Co. v. Evans' Adm'r*, 110 S. W. 844, 848, 129 Ky. 152.

An instruction as to the division of "negligence" into slight, ordinary, or gross cannot be usefully applied in trials of cases; their signification varying according to the circumstances, until there are so many real exceptions that the words can scarcely be said to have any real application. *Oregon Co. v. Roe*, 176 Fed. 715, 718, 100 C. C. A. 269.

Degrees of negligence are not recognized; for, though the terms "wanton, willful, and reckless" are sometimes used in characterizing conduct, yet the law applies only the word "negligence," which is a failure to per-

form a duty, and, though the law recognizes degrees in care, very high care, and ordinary care, the failure to exercise the highest degree of care required is only negligence, though failure to exercise ordinary care is also negligence. *Young v. St. Louis, I. M. & S. Ry. Co.*, 127 S. W. 19, 26, 227 Mo. 307.

**As want of diligence**

Negligence is not a thing, but a relation. "The word 'negligence' implies a duty to use due diligence, and such a duty may be owed to one person, and not to another." *Boston & M. R. R. v. Sargent*, 57 Atl. 688, 691, 72 N. H. 455 (quoting *Mowbray v. Merryweather*, [1895] 2 Q. B. Div. 640, 647).

"Negligence," relatively to the safety of any particular person, is the breach of some diligence due to that person. Where no duty of diligence appears relatively to the person injured, there can be no presumption of its breach. "Negligence" causing an injury does not give a right of action to the person injured, unless there is some diligence due to such person at the time with reference to the particular conduct in question. *Southern R. Co. v. Cash*, 62 S. E. 823, 825, 131 Ga. 537.

**As doing what a prudent man would not do**

If one does what the great body of other prudent men do, under a like situation, he is not "negligent." *Tallman v. Nelson*, 125 S. W. 1181, 1183, 141 Mo. App. 478.

**As a fact**

"Negligence" in one sense is a quality attaching to acts dependent on and arising out of the duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of such duties and relations. *Patton-Worsham Drug Co. v. Drennon* (Tex.) 123 S. W. 705, 708.

"Negligence," in one sense, is a quality attaching to acts dependent upon and arising out of the duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of such duties and relations. \* \* \* It is not a conclusion to be testified to by witnesses, but an inference to be deduced from the facts and circumstances disclosed by the evidence." *Tiborsky v. Chicago, M. & St. P. Ry. Co.*, 102 N. W. 549, 550, 124 Wis. 243 (citing *Townley v. Chicago, M. & St. P. Ry. Co.*, 11 N. W. 55, 53 Wis. 633; *Kaples v. Orth*, 21 N. W. 633, 61 Wis. 533; *Hart v. West Side R. Co.*, 57 N. W. 91, 86 Wis. 489, 490, 21 L. R. A. 743, 39 Am. St. Rep. 877).

**As an inference of fact**

"Negligence" is something invisible, intangible, and, for the most part, incapable of direct proof, like sensible facts or physical events. It is, in general, a matter of inference from other facts and circumstances which admit of direct proof, and which may

raise a presumption of the truth of the main fact to be proved. These facts and circumstances must be such as would warrant a jury in inferring from them the fact of negligence by reasoning in the ordinary way, according to the natural and proper relation of things and consistently with the common sense and experience of mankind." *Beebe v. St. Louis Transit Co.*, 103 S. W. 1019, 1026, 206 Mo. 419, 12 L. R. A. (N. S.) 760 (quoting and adopting the definition in *Callahan v. Warne*, 40 Mo. 136).

#### As failure of duty

"Negligence" is a failure of duty. *Shawnee Light & Power Co. v. Sears*, 95 Pac. 449, 455, 21 Okl. 13 (citing *Haynes v. Gas Co.*, 19 S. E. 344, 114 N. C. 203, 28 L. R. A. 810, 41 Am. St. Rep. 786).

Failure to do a duty is "negligence." *Beyer v. Hamburg-American S. S. Co.*, 171 Fed. 582, 583.

"Negligence" must depend on a duty owed by one person to another which is negligently performed. *Southern Ry. Co. v. Smith*, 50 South. 390, 392, 163 Ala. 174; *Coin v. John H. Talge Lounge Co.*, 121 S. W. 1, 6, 222 Mo. 488, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 888; *Hufft v. St. Louis & S. F. R. Co.*, 121 S. W. 120, 222 Mo. 286; *Cohen v. Koester*, 118 N. Y. Supp. 142, 144, 133 App. Div. 570; *Kennedy v. Hawkins*, 102 Pac. 733, 734, 54 Or. 164, 25 L. R. A. (N. S.) 606.

Every action of "negligence" depends upon a duty owing by defendant to protect plaintiff, failure to perform such duty, and a resulting injury to plaintiff. *City of Laporte v. Osborn*, 86 N. E. 995, 996, 43 Ind. App. 100.

In the absence of a duty violated, there can be no "negligence." *Missouri, K. & T. Ry. Co. of Texas v. Byrd (Tex.)*, 124 S. W. 738, 739.

"Negligence" may result from omission respecting duty. *Randle v. Birmingham Ry., Light & Power Co.*, 53 South. 918, 921, 169 Ala. 814.

"Negligence" is the antithesis of duty. Where there is no duty, there cannot be negligence. *Thomas v. Cincinnati, N. O. & T. P. R. Co.*, 105 S. W. 379, 380, 127 Ky. 159.

There can be no "negligence" where there is no breach of duty. It must appear that defendant owed a duty and also that he did not perform it. *Roanoke Ry. & Electric Co. v. Sterret*, 62 S. E. 385, 387, 108 Va. 533, 19 L. R. A. (N. S.) 316, 128 Am. St. Rep. 971.

Broadly speaking, "negligence" is a breach of duty. *Harrington v. Butte, A. & P. Ry. Co.*, 95 Pac. 8, 10, 37 Mont. 169, 16 L. R. A. (N. S.) 395.

"Negligence" implies a failure to do something which duty or prudence requires should have been done. *Gill v. Fugate*, 78 S. W. 188, 191, 117 Ky. 257.

"The word 'negligence' implies a duty as well as its breach, and the fact of negligence can never be found in the absence of a duty." *Robbins v. Baltimore & O. R. Co.*, 59 S. E. 512, 513, 62 W. Va. 535; *Huchingson v. Texas Cent. R. Co.*, 118 S. W. 1123, 1126, 55 Tex. Civ. App. 229 (quoting *Little Rock & Ft. S. Ry. Co. v. Lawton*, 18 S. W. 543, 55 Ark. 428, 15 L. R. A. 434, 29 Am. St. Rep. 48).

"Negligence" presupposes the existence of a duty to protect from injury, and failure to perform that duty, from which an injury results. *St. Louis, I. M. & S. Ry. Co. v. Rhoden*, 123 S. W. 798, 800, 93 Ark. 29, 137 Am. St. Rep. 73, 20 Ann. Cas. 915.

The first element of "negligence" is a duty. If there is no duty, there can be no negligence. If the defendant owed a duty, but did not owe it to the plaintiff, the action will not lie. *Texas Cent. R. Co. v. Harbison*, 85 S. W. 1138, 1139, 98 Tex. 499.

"Negligence" is the failure to discharge a duty, and may consist of the omission of a duty, or the doing of that which is contrary to a duty. Where there is not a duty, there is no negligence. *Cincinnati, N. O. & T. P. Ry. Co. v. Harrod's Adm'r*, 115 S. W. 699, 701, 132 Ky. 445.

"Negligence" is a breach of that duty which one person owes to another by reason of the relation existing between them, the duty in each particular case being tested by what an ordinarily prudent person would do in a like situation. *Chilberg v. Standard Furniture Co.*, 115 Pac. 837, 838, 63 Wash. 414, 34 L. R. A. (N. S.) 1079.

"Negligence" is negative in its character. It is the omission to perform some duty. It implies nonfeasance, and is contradistinguished from misfeasance. *Davenport v. Southern R. Co.*, 124 Fed. 983, 984.

"Negligence" is the violation of duty by omission or commission, which creates a menace, and when it becomes effective by causing injury to a blameless person liability follows. *Birch v. City of New York*, 106 N. Y. Supp. 104, 105, 121 App. Div. 395.

"Negligence" consists in the violation of a duty owed by one person to another, whether the duty arises from relations of the parties, or is created by statute under the police power of the state. *Wells v. Joslin Mfg. Co.*, 82 Atl. 258, 260, 33 R. I. 498.

The burden is on plaintiff, in an action for negligent injuries, to show that defendant owed him a duty and failed to perform it. *Mehler v. Fisch*, 120 N. Y. Supp. 807, 809, 65 Misc. Rep. 549.

Where there is a breach of a duty due to all persons, the liability of the wrongdoer does not depend on privity between himself and the person injured. *Hasbrouck v. Armour & Co.*, 121 N. W. 157, 160, 139 Wis. 357, 23 L. R. A. (N. S.) 876.

"Negligence" is the breach of some duty which a person owes to another, and where, by such breach of duty, injury is caused as a proximate result thereof, then such negligence is actionable, and the injured person may recover damages therefor, provided he himself did not contribute thereto materially by negligence on his part. *Indianapolis & M. Rapid Transit Co. v. Edwards*, 74 N. E. 533, 534, 36 Ind. App. 202.

To constitute a good cause of action for injuries through "negligence," there should be stated a right on plaintiff's part, a duty on defendant's part, respecting such right, and a breach of such duty resulting in plaintiff's injury. *City of Havre De Grace v. Fletcher*, 77 Atl. 114, 116, 112 Md. 562.

"Negligence" is a breach of duty. Where there is no duty, or no breach, there is no negligence. An injury that is a natural and probable consequence of an act of negligence is actionable. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act or omission is not actionable, and such an act or omission is either the remote cause, or no cause whatever, of the injury. *Kreigh v. Westinghouse, Church, Kerr & Co.*, 152 Fed. 120, 122, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684 (citing *Cole v. German Savings & Loan Soc.*, 124 Fed. 113, 115, 59 C. C. A. 593, 595, 63 L. R. A. 416).

"Negligence," among workmen, is a breach of the duty which each owes to the others, and not a breach of the master's duty, if he has exercised the care that is required of him." *Atchison & Eastern Bridge Co. v. Miller*, 80 Pac. 18, 29, 71 Kan. 13, 1 L. R. A. (N. S.) 682.

"Negligence" has been defined to be a failure of duty." On proof that a live wire, carrying a deadly current, fell into a public street, it might well be said that some one has failed in his public duty. *Booker v. Southwest Missouri R. Co.*, 128 S. W. 1012, 1016, 144 Mo. App. 273.

The elements involved in a cause of action for "negligence" are the existence of a duty to protect plaintiff from injury, failure to perform such duty, and resulting injury. *J. M. Pace Mule Co. v. Seaboard Air Line Ry. Co.* (N. C.) 76 S. E. 513, 515.

"Negligence" is a breach of duty. In order for it to exist, there must be both a duty and a breach of it. It is the duty of the court in its instructions to advise the jury of the duties which the law imposes upon the parties, and, where there is conflict in the evidence, it is the function of the jury to determine whether these duties imposed by law have been violated. The jury is the judge of the fact, and not of the law. *Midland Valley R. Co. v. Bailey*, 124 Pac. 987, 988, 34 Okl. 193.

"Negligence" is a failure to perform a duty which one owes to another, as where a railway company fails to make due inspection of a public sidewalk maintained by it across its right of way and to make it reasonably safe for pedestrians, as the need thereof might be discoverable by means of such inspection." *Wabash R. Co. v. De Hart*, 65 N. E. 192, 194, 32 Ind. App. 62.

"Negligence" constitutes no cause of action, unless it expresses or establishes some breach of duty." There can be no recovery from a railroad company for personal injuries from the negligent collision of its cars, which overturned, crashing into plaintiff's house, causing her great fright, on the allegations of mere fright alone, as the company owed plaintiff no duty to protect her from fright. *Ewing v. Pittsburgh, C. & St. L. Ry. Co.*, 23 Atl. 340, 147 Pa. 40, 14 L. R. A. 666, 30 Am. St. Rep. 709.

"The law of 'negligence' is based on the relative duties of one person to another. To establish negligence, a breach of some duty of this kind must be shown." Where a telegraph agent delivered a telegram to a person other than the addressee, but having a similar name, and the discrepancy was noticed by the person to whom it was delivered, the telegraph company was not chargeable with negligence. *Bowyer v. Western Union Tel. Co.*, 106 N. W. 748, 130 Iowa, 324, 5 L. R. A. (N. S.) 984.

#### Same—Legal duty

"Negligence" consists in doing, or omitting to do, an act by which a legal duty or obligation is violated. *Monroe v. Atlantic Coast Line R. Co.*, 66 S. E. 315, 316, 151 N. C. 374, 27 L. R. A. (N. S.) 193.

"Negligence" in its technical sense embraces failure to discharge a legal duty to an injured person. *Goodwin v. Columbia Telephone Co.*, 138 S. W. 940, 943, 157 Mo. App. 596.

There can be no "negligence" where there is no legal duty. *Cumberland Telegraph & Telephone Co. v. Martin's Adm'r*, 77 S. W. 718, 116 Ky. 554, 63 L. R. A. 469, 105 Am. St. Rep. 229.

"Negligence," as used in the law, may be defined as the failure to discharge a legal duty, whereby injury occurs. There can be no negligence where there is no duty imposed. *Franklin v. Tracy*, 77 S. W. 1113, 1115, 117 Ky. 267, 63 L. R. A. 649.

Failure to perform a duty imposed by statute or ordinance is "negligence." *Fenn v. Clark*, 103 Pac. 944, 945, 11 Cal. App. 79.

"Negligence," as distinguished from the common-law definition, may arise from the failure to discharge a duty imposed by a statute or municipal ordinance. *Strottman v. St. Louis, I. M. & S. Ry. Co.*, 109 S. W. 769, 788, 211 Mo. 227 (dissenting opinion).

The measure of legal duty is usually expressed positively, by stating what constitutes due care, rather than negatively, by stating what constitutes "negligence," which is the unintentional failure to perform the duty imposed by law. *Raymond v. Portland R. Co.*, 62 Atl. 602, 606, 100 Me. 529, 3 L. R. A. (N. S.) 94.

"Negligence" is defined as "the unintentional failure to perform a duty implied by law, whereby damage naturally and proximately results to another." *Southern Ry. Co. v. Chatman*, 53 S. E. 692, 697, 124 Ga. 1026, 6 L. R. A. (N. S.) 283, 4 Ann. Cas. 675.

"Negligence" is the failure to perform a duty imposed by law, or to exercise that care which a man of ordinary prudence would have exercised under existing circumstances, and, where conditions change, the degree of care required changes with them. *Pritchett v. Southern Ry. Co.*, 72 S. E. 828, 834, 157 N. C. 88.

"Negligence" in its civil relations is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. The inadvertency, or want of due consideration of duty, is the *injuria*, on which, when naturally followed by the *damnum*, the suit is based." *Wharton, Neg. § 3*. In *Hoepper v. Southern Hotel Co.*, 44 S. W. 257, 142 Mo. loc. cit. 389, the following language of *Caunnell, B.*, in *Smith v. Railroad*, L. R. 6 C. P. 20, is approvingly quoted, to wit: "I quite agree that where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering the question whether there is evidence of negligence for the jury or not; but when it has been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." *Foley v. McMahon*, 90 S. W. 113, 114, 114 Mo. App. 442.

In an action for injuries to a servant, the burden is on plaintiff to establish defendant's "negligence," viz., failure to discharge its legal duties toward him. *Smith v. Philadelphia, B. & W. R. Co.*, 73 Atl. 818, 819, 111 Md. 274.

A railroad company must give the statutory signals when approaching a highway crossing, and a failure to do so is "negligence," within *Kirby's Dig. § 6595*, providing that railroad companies are liable for damages caused by the omission to give statutory signals. *Kansas City Southern Ry. Co. v. Drew*, 147 S. W. 50, 53, 108 Ark. 374.

#### Same—Knowledge of duty

"Negligence" is ordinarily predicated in terms of knowledge, and liability attaches only in case the defendant knows, or by the exercise of ordinary care could know. In an

action for injuries received in a street by being struck by a bottle that was thrown by W. from the roof garden of a hotel, there was no evidence to show that W. was boisterous, or that he threatened any one, and no evidence from which it could be inferred that he would throw the bottle in question. An instruction as to the liability of the hotel company that if the jury believed that W. threw the bottle from the roof garden, and plaintiff was injured thereby, and if at the time he was intoxicated, and his behavior was such as would indicate to a man of average prudence that he might throw a bottle to the street below, and that these facts were known, or by ordinary care could have been known, to the defendant or its agents, then it became the duty of the defendant and its agents to remove W. from the roof garden or otherwise control him, and that the law in that event is for the plaintiff, is not erroneous, as basing the liability of defendant on knowledge rather than on belief, or reasonable grounds for belief. *Bruner v. Seelbach Hotel Co.*, 117 S. W. 373, 376, 133 Ky. 41, 19 Ann. Cas. 217.

#### As failure to exercise care justly demanded by circumstances

"Negligence" is the failure to observe for the protection of another that degree of care which the circumstances justly demand, whereby such other person suffers injury. *Fisher v. City of New Bern*, 53 S. E. 342, 345, 140 N. C. 506, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857; *McCartney v. People's R. Co.* (Del.) 78 Atl. 771, 772, 2 Boyce, 191; *Walls v. People's R. Co.* (Del.) 80 Atl. 355, 358; *Morgan v. Oronogo Circle Min. Co.*, 141 S. W. 735, 740, 160 Mo. App. 99; *Valente v. American Bridge Co.*, 73 Atl. 895, 400, 6 Pennewill, 556; *Florida R. Co. v. Sturkey*, 48 South. 34, 35, 56 Fla. 196 (quoting and adopting definition in *Jacksonville St. Ry. Co. v. Chappell*, 21 Fla. 175); *Smith v. Detroit United Ry.*, 119 N. W. 640, 644, 155 Mich. 466; *Linthicum v. Truitt* (Del.) 80 Atl. 245, 248, 2 Boyce, 338; *Columbia Box & Lumber Co. v. Drown*, 156 Fed. 459, 462, 84 C. C. A. 269 (quoting and adopting definition in *Cooley, Torts*, p. 630); *Buchanan v. Philadelphia, B. & W. R. Co.*, 75 Atl. 872, 876, 1 Boyce, 83; *Weldon v. People's R. Co.* (Del.) 65 Atl. 589, 590; *Black's Adm'r v. Va. Portland Cement Co.*, 51 S. E. 831, 104 Va. 450 (quoting and adopting definition *Cooley, Torts*, p. 630); *Queen Anne's R. Co. v. Reed* (Del.) 59 Atl. 860, 862, 5 Pennewill, 226, 119 Am. St. Rep. 301 (quoting *Cooley Torts*).

"Negligence" in a legal sense is a failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. While the obligation to exercise care in the conduct of one's business varies under different circumstances, there always remains the duty to exercise

such reasonable care as should be exercised by a person of ordinary prudence under like circumstances. *Szymanski v. Blumenthal*, 56 Atl. 674, 675, 4 Pennewill, 511, 103 Am. St. Rep. 132 (citing *Tully v. Philadelphia, W. & B. R. Co.*, 47 Atl. 1019, 2 Pennewill, 537, 82 Am. St. Rep. 425).

"Negligence," in a legal sense, has been defined to be the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. In an action for injuries to a servant while riding on a private railroad by derailment of the cars and the fall of a car frame, caused by a defective bolt used to fasten the same, defendant was not guilty of negligence, in failing to promulgate rules for the government of its servants in the operation of cars on the railroad in question. *Jemnienski v. Lobdell Car Wheel Co.*, 63 Atl. 935, 937, 5 Pennewill, 385.

"Negligence," in a legal sense, is 'failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.' Any failure upon the part of the master to observe for the protection of his servant that reasonable degree of care which the circumstances of the particular case justly demand is actionable 'negligence,' and is not within the influence of the doctrine of assumed risks." *Black v. Virginia Portland Cement Co.*, 51 S. E. 831, 832, 104 Va. 450 (quoting and adopting *Cooley, Torts*, p. 630).

Under Code 1906, § 1985, providing that, in all actions against railroad companies for injury to persons or property, proof of injury inflicted by the running of locomotives or cars shall be prima facie evidence of a lack of reasonable skill and care on the part of the servants of the company, proof of an injury raises a presumption of negligence, casting the burden of proof on the railroad company; and as "negligence" is a failure to observe, for the protection of another person, that degree of care which the circumstances justly demand, proof that the equipment of a train was proper and that the servants of the company kept a vigilant lookout is, in the absence of any proof as to the condition of the person injured, insufficient to rebut the statutory presumption. *New Orleans, M. & C. R. Co. v. Cole*, 57 South. 556, 558, 101 Miss. 173.

#### As failure to use greatest care

In an action for injuries to a passenger, alleged to be due to the negligence of defendant's employes, the court properly instructed that "negligence" meant the failure to use the utmost care that would be used by a very prudent person under like circumstances.

*Contreras v. San Antonio Traction Co. (Tex.)* 83 S. W. 870.

#### Fault synonymous

See Fault.

#### Foreseeing effect

Failure to guard against that which has never occurred and which is very unlikely to occur, and which does not naturally suggest itself to prudent men as something which should be guarded against, is not "negligence." *Ryan v. Cortland Carriage Goods Co.*, 118 N. Y. Supp. 56, 57, 133 App. Div. 467.

"Negligence" in law is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonably probable result thereof. *Johanson v. Webster Mfg. Co.*, 120 N. W. 832, 833, 139 Wis. 181.

"Negligence" cannot exist unless there is a duty to the person injured, and it ought not be deemed negligence to do or to fail to do an act when it was not anticipated, and should not have been anticipated, that it would result in injury to any one. *Murphy v. Galveston, H. & N. Ry. Co. (Tex.)* 96 S. W. 940, 945 (citing *St. Louis S. W. Ry. Co. of Texas v. Pope*, 86 S. W. 5, 98 Tex. 535; *Texas & P. Ry. Co. v. Bigham*, 38 S. W. 162, 90 Tex. 226, 227; *Brush Electric Light & Power Co. v. Le Fevre*, 57 S. W. 640, 93 Tex. 607, 49 L. R. A. 771, 77 Am. St. Rep. 898).

"Negligence" involves not only knowledge of a defect, but an appreciation of the danger to be apprehended therefrom. Hence it is that, if the danger attending the use of a sidewalk is not so open and obvious as to suggest itself in an appreciative way to the mind of an ordinarily prudent person, an entry upon such walk cannot be said to amount to 'negligence' as matter of law." *Arnold v. City of Waterloo*, 104 N. W. 442, 443, 128 Iowa, 410.

An act cannot be held to be negligent when there was no reasonable ground for supposing that it would cause injury to any one. "Negligence" cannot be imputed because of the failure to perform a duty so suddenly and unexpectedly arising that there is no opportunity to comprehend the situation and act according to the exigency. *McKee v. Harrisburg Traction Co.*, 60 Atl. 498, 499, 211 Pa. 47.

"Negligence" consists of conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. *Schlemmer v. Buffalo, R. & P. R. Co.*, 27 Sup. Ct. 407, 409, 205 U. S. 1, 12, 51 L. Ed. 681.

"Negligence" is the proximate cause of an injury when one of ordinary sense ought to have foreseen that the act would probably

result in such injury or some like injurious consequence, and whether one of ordinary sagacity ought to have foreseen the probable consequences of the act is to be inferred from a consideration of all the facts and circumstances surrounding the case, and is a question for the court, and not a proper subject of an interrogatory addressed to a jury; and hence, in an action against a street railway company for injury to a passenger while alighting, a question whether it was reasonably probable in the circumstances that she would, after the conductor gave the signal to stop the car leave her seat and take a position that would be rendered perilous by the stopping of the car in the manner in which it was stopped, could not properly be decided by an answer to an interrogatory. *Richmond Street & Interurban Ry. Co. v. Beverley*, 84 N. E. 558, 559, 85 N. E. 721, 43 Ind. App. 105.

"Negligence" consists in conduct which common experience or the special knowledge of the action shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended or foreseen. "Railroad companies, like natural persons, must so use their property and privileges as not to injure the rights of others, and in running and operating their cars must exercise care proportionate to the danger of injury to others. When, in the exercise of such care, ordinary caution and prudence requiring the giving of signals or warning, the failure to do so is 'negligence.'" Where trainmen, in charge of a train obstructed a crossing, in the exercise of ordinary care ought to have anticipated that persons in the act of crossing might be on or between or about the cars, and that not to give warning before moving the train would result in injury, their failure to give such warning was "negligence." *Gessas v. Oregon Short Line R. Co.*, 93 Pac. 274, 278, 33 Utah, 156, 13 L. R. A. (N. S.) 1074 (quoting and adopting definition in *Schlemmer v. Buffalo, R. & P. R.*, 27 Sup. Ct. 407, 205 U. S. 1, 51 L. Ed. 681).

#### **Fraud distinguished**

"Negligence" is to be carefully distinguished from 'fraud'; the distinction arising in the element of inadvertence. 'Fraud' is invariably intentional, either actually or constructively; 'negligence' is never so." *Standard Marine Ins. Co., Limited, of Liverpool, Eng. v. Nome Beach Lighterage & Transp. Co.*, 133 Fed. 636, 648, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

#### **Intent distinguished**

"Negligence" is not a matter of intention, and it is proper to refuse to permit a witness to state why a particular act was not done; the not doing of such act being the basis of the charge of negligence. *Walker v. Chicago & A. R. Co.*, 149 Ill. App. 406, 411.

Purpose or design is foreign to "negligence." *Pittsburgh, C., C. & St. L. Ry. Co. v. Ferrell*, 78 N. E. 988, 989, 39 Ind. App. 515 (citing *Parker v. Pennsylvania Company*, 34 N. E. 504, 134 Ind. 673, 23 L. R. A. 552).

"Negligence" excludes the idea of intention. A count in a complaint alleging that defendant was a common carrier, and that it so negligently conducted its business that by reason of such negligence plaintiff's intestate, who was a passenger on one of its trains, received personal injuries which caused his death, states a cause of action for simple negligence. *Louisville & N. R. Co. v. Perkins*, 44 South. 602, 604, 152 Ala. 133.

#### **Intentional wrong distinguished**

The distinction between "negligence" and intentional wrong, as relating to the liability for the sale of dangerous or harmful articles, is important as bearing on the civil liability for consequences for injuries. If a vendor sell a machine, knowing it defective and dangerous, he is liable; but, if he sell without knowledge of the defect or danger, he is not liable, though he be careless or negligent. *Kuelling v. Roderick Lean Mfg. Co.*, 75 N. E. 1098, 1101, 183 N. Y. 78, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124.

"Negligence," generally speaking, whether it be ordinary or gross, is merely an omission to perform a duty, and is not an affirmative wrongful act, though there may be instances where gross negligence is of an affirmative character, and amounts to an intentional wrong, or a reckless disregard of the rights of others. *Schulte v. Louisville & N. R. Co.*, 108 S. W. 941, 943, 128 Ky. 627.

#### **Malice distinguished**

The doing of an act without that ordinary prudence and discretion which persons of mature mind and sound judgment are presumed to have constitutes "negligence," but will not alone warrant an inference of "malice." Malice is distinguishable from mere negligence, in that it arises from some purpose, while negligence arises from absence of purpose. The characteristic of negligence is inadvertence, or an absence of an intent to injure. This does not imply that the act was done involuntarily or unconsciously, but merely that the person doing it was not conscious that the act constituted a want of reasonable care. *Jenkins v. Gilligan*, 108 N. W. 237, 238, 131 Iowa, 176, 9 L. R. A. (N. S.) 1087 (citing *Pickens v. South Carolina & G. R. Co.*, 32 S. E. 567, 54 S. C. 498).

#### **Misfeasance distinguished**

"Negligence" is negative in its character. It is the omission to perform some duty. It implies nonfeasance, and is contradistinguished from misfeasance. *Davenport v. Southern R. Co.*, 135 Fed. 960, 967, 68 C. C. A. 444.

#### **Mismanagement distinguished**

Gen. St. 1901, § 5858, providing that railroad companies shall be liable for damages

to any employé of said companies in consequence of any negligence of their agents, or of any mismanagement of their engineers or other employés to any person sustaining such damage, does not make a distinction between agents on the one hand, and engineers and other employés on the other, nor between "negligence" and mismanagement, but by the act a company is made responsible for any mismanagement of its engineers or other employés to any person sustaining damage thereby. *Missouri, K. & T. Ry. Co. v. Kellerman*, 87 S. W. 401, 404, 39 Tex. Civ. App. 274.

**Nuisance distinguished**

See Nuisance.

**As ordinary negligence**

"The term 'negligence,' without any qualification, means ordinary negligence." *Chicago, R. I. & P. Ry. Co. v. Lacy*, 97 Pac. 1025, 1027, 78 Kan. 622 (citing *Kansas Pac. Ry. Co. v. Pointer*, 14 Kan. 37).

**As question of fact or law**

"Negligence," as well as contributory negligence, in the great majority of cases, is a mixed question of law and fact. *Ewing v. Lanark Fuel Co.*, 65 S. E. 200, 205, 65 W. Va. 726, 29 L. R. A. (N. S.) 487.

The burden is on plaintiff of proving actionable negligence, notwithstanding the rule making "negligence" for the jury where reasonable men might differ on the question. *Baughter v. Harman*, 66 S. E. 86, 87, 110 Va. 316.

The rule of *res ipsa loquitur* not being invoked, it is error to authorize a jury in an action for personal injuries to render a verdict for the plaintiff without proof of "negligence." *White v. Illinois Collieries Co.*, 145 Ill. App. 417, 419.

In absence of proof of negligence by defendant in permitting the stairway in its store to be in a faulty or dangerous condition, "negligence" cannot be imputed as a matter of law from the happening of an accident on the stairway. *Belaky v. Fourteenth Street Store*, 121 N. Y. Supp. 321, 322.

"Negligence" is in the main a question of fact, or rather whether it exists or not in a special case is a question of fact for the jury. All that the law has ever determined on the subject is that it consists in failing to bestow due care to the matter in hand—failing to do that which due care requires to be done, or doing that which such care forbids. Whether a trolley car conductor was negligent in failing to assist a passenger onto the car is a question of fact, depending upon all the circumstances as they appeared to the conductor at the time, or as they should have appeared to a person in the exercise of that degree of care which the law requires him to exercise. *Richardson v. Augusta & A. R. Co.*, 61 S. E. 83, 84, 79 S. C. 535 (citing *Simms v. South Carolina Ry. Co.*, 3 S. E. 301, 27 S. C. 288).

**As relative term**

"Negligence" is a relative term, to be determined on the facts of each case. *Quinn v. West Jersey & S. R. Co.*, 74 Atl. 456, 73 N. J. Law, 539.

"Negligence" is a relative term, and what would be negligence in one situation might not be in another. *Gallagher v. City of Tipton*, 113 S. W. 674, 675, 676, 133 Mo. App. 557.

"Negligence" is a relative term, and where there is no duty there can be no actionable negligence. *Coin v. J. H. Talge Lounge Co.*, 121 S. W. 1, 6, 222 Mo. 488, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 888.

"Negligence" is a relative term, and implies the neglect of some duty. *Cole v. Jones*, 141 S. W. 689, 690, 159 Mo. App. 472.

"Negligence" is not absolute or intrinsic, but is always relevant to some circumstance of time, place, or person. *Connell v. New York Cent. & H. R. R. Co.*, 129 N. Y. Supp. 666, 669, 144 App. Div. 664.

There can be no "negligence" where there is no duty to use care, for negligence is the breach of some duty that one person owes to another, and consequently it is a relative term, and varies with the circumstances of each particular case. *West Virginia Cent. & P. Ry. Co. v. State*, 54 Atl. 689, 671, 96 Md. 652, 61 L. R. A. 574.

"Negligence" can neither be affirmed nor denied until the conditions under which the act was performed are known. Negligence primary and contributory is essentially relative and comparative and not absolute. *State, to Use of Hall, v. Trimble*, 64 Atl. 1026, 1028, 104 Md. 317 (citing *United Railways & Electric Co. of Baltimore v. Watkins*, 62 Atl. 234, 102 Md. 267).

"Negligence" is a relative term, and depends upon the circumstances of each particular case. What might be negligence under some circumstances, at some time or place, may not be negligence under other circumstances, at another time and place. *Johnson v. Yazoo & M. V. R. Co.*, 47 South. 785, 786, 94 Miss. 447, 22 L. R. A. (N. S.) 312 (citing 29 Cyc. p. 417).

"Negligence" is a relative term, and its existence must be determined in view of the surrounding circumstances; the test being whether the person charged acted as an ordinarily prudent man would have done in the same or similar circumstances. *Lyman v. Dale*, 136 S. W. 760, 761, 156 Mo. App. 427.

"Negligence" is a comparative and not a positive term, and its use is relative, whether applied to the negligence of the defendant or that of the plaintiff. For this reason in most cases it becomes a question of fact for the jury to determine who was negligent under the circumstances of the case. The degree of care which in one case is insufficient to relieve from a charge of



negligence in another might constitute more than ordinary prudence and caution." *King v. Green*, 94 Pac. 777, 778, 7 Cal. App. 473.

"Negligence" is essentially relative and comparative, not absolute. It is not even an object of simple apprehension, apart from the circumstances out of which it grows. As these circumstances necessarily vary in their relations to each other, under different surroundings, they inevitably change their original signification and import. Hence it is intrinsically true that those things which would not, under one condition, constitute negligence would, on the other hand, under a different, though not necessarily an opposite, condition, most unequivocally indicate its existence. *Mattingly v. Montgomery*, 68 Atl. 205, 206, 106 Md. 461 (quoting and adopting definition in *Cooke v. Baltimore Traction Co.*, 31 Atl. 328, 80 Md. 554).

"Negligence" cannot be defined and measured by any precise standard. It is always relative to particular facts and circumstances upon which it is sought to be predicated. As a general rule, it is a question for the jury to determine, from the facts and the logical inferences therefrom. It is only in cases where the facts are without dispute, or the deduction inevitably that of no negligence, that the court can say, as a matter of law, that no negligence was proven. *Wikberg v. Olson Co.*, 71 Pac. 511, 512, 138 Cal. 479.

"Negligence" is a relative term. What would be negligence under one set of circumstances might be due care under another. The degree of care varies with the circumstances. The greater the danger, or the greater the importance of the matter in hand, the greater the degree of care required to constitute due care; that is, such as a person of ordinary care and prudence would exercise." *Bolton v. Western Union Tel. Co.*, 65 S. E. 937, 938, 84 S. C. 67.

"Negligence" is essentially relative. In the abstract it is nullity. It does not, and it cannot in the nature of things, exist. It is metaphysically impossible to evolve a concept of negligence apart from the facts which give rise to it, and independently of some imposed or implied correlative duty. The duty must be essentially related to the particular circumstances, and a variance in the circumstances necessarily begets either a modification of the duty or else extinguishes it altogether. Thus the duty which a railroad company owes to a passenger whom it is carrying on its train is widely different from the duty it owes to a trespasser on its tracks; not only because the rights of the two are different, but because the attendant circumstances and facts creating the reciprocal rights in each instance are dissimilar. This difference in rights and in duties springs from a divergence in the circumstances out of which they respectively grow. Consequently a condition which would in one case

give rise to an inference of negligence would be wholly insufficient to justify its deduction in the other. *United States Exp. Co. v. Everest*, 88 Pac. 817, 820, 72 Kan. 517 (quoting and adopting definition in *City Pass. Ry. Co. v. Nugent*, 38 Atl. 779, 781, 86 Md. 349, 356).

"Negligence" is essentially relative and comparative, not absolute. It is not even an object of simple apprehension, apart from the circumstances out of which it grows. As these circumstances necessarily vary in their relations to each other, under different surroundings, they inevitably change their original signification and import. \* \* \* The existence of 'negligence' is therefore to be sought in the facts and surroundings of each particular case. \* \* \* Where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as matter of law." *Sheridan v. Baltimore & O. R. Co.*, 60 Atl. 280, 282, 101 Md. 50 (quoting and adopting definition in *Cooke v. Traction Co.*, 31 Atl. 327, 80 Md. 551; citing *Fitzpatrick v. Baltimore & O. R. Co.*, 35 Md. 32; *Baltimore & O. R. Co. v. State*, to Use of Dougherty, 36 Md. 366; *Same v. State*, to Use of Miller, 29 Md. 252, 96 Am. Dec. 528).

The degree of caution, both by a carrier and a passenger, is to be estimated in a measure by the hazard to life and limb. "Care" and "negligence" are relative terms, and mean such care and vigilance as a prudent, rational person would exercise under like circumstances. *Dougherty v. Missouri R. Co.*, 81 Mo. 325, 331, 51 Am. Rep. 239 (citing *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo. 195, 47 Am. Rep. 99).

#### Recklessness distinguished

See Reckless—Recklessly—Recklessness.

#### As want of care

"Negligence" is the want of care under the circumstances. But there can be no recovery of damages, unless there has been a breach of legal duty. *Welch v. Carlucci Stone Co.*, 64 Atl. 392, 393, 215 Pa. 34, 7 Ann. Cas. 299.

"Want of care is 'negligence,' not assumption of risk." *Lee v. St. Louis, M. & S. E. R. Co.*, 87 S. W. 12, 21, 112 Mo. App. 372.

"Carefulness" is an antonym for "negligence." Negligence is a conclusion of law, and so also are statements in the findings by the jury that work was done carefully. *Avery v. Nordyke & Marmon Co.*, 70 N. E. 888, 893, 34 Ind. App. 541.

Where a child employed in a factory was injured, "negligence" on his part meant his failure to exercise such care as a boy of his

intelligence, capacity, and experience, as shown by the evidence, would have usually exercised in the same situation and circumstances. *Morgan v. C. Hager & Sons Hinge Mfg. Co.*, 97 S. W. 638, 642, 120 Mo. App. 590.

**Same—Careful and prudent person**

"Negligence" is the failure to exercise such care as is ordinarily exercised by careful and prudent persons under the same or similar circumstances in the same or similar business." *Louisville & N. R. Co. v. Carter* (Ky.) 112 S. W. 904, 906.

"Negligence" in respect to the duties of a youthful employé in the operation of a machine means a want of that degree of care which the majority of careful and prudent persons of his age, intelligence, and discretion are accustomed to exercise for their own protection under like or similar circumstances. *Cohankus Mfg. Co. v. Rogers' Guardian* (Ky.) 96 S. W. 437, 439.

**Same—Person of common sense and prudence**

"Negligence" is defined as a want of that care which a man of common prudence and of common sense ordinarily exercises in like employment. To constitute it, there must be a disregard of some duty or rule of conduct prescribed beforehand, or arising so manifestly from the facts as to leave no doubt of its existence, and it is of the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of omission or commission as might, within the domain of probability, cause some such an injury as that complained of. *Lincoln Gas & Electric Light Co. v. Thomas*, 104 N. W. 153, 154, 74 Neb. 257 (citing *Whart. Neg.* § 3; *Deering, Neg.* § 2).

**Same—Man of ordinary care and prudence**

"Negligence," in reference to the maintenance of a track in a mine, means the absence of that care to keep and maintain it in a reasonably safe condition for service that a man of ordinary care and prudence, under the circumstances of the business, considering its perils, dangers, and necessities, would have used. *Western Coal & Mining Co. v. Honaker*, 96 S. W. 361, 364, 79 Ark. 629.

**Same—Man of ordinary prudence**

By "negligence" is meant a failure to use such care and precaution as a person of ordinary prudence would use under like circumstances. *Missouri, K. & T. Ry. Co. of Texas v. Wood* (Tex.) 81 S. W. 1187, 1188.

"Negligence" is the failure to exercise that degree of care under given circumstances which one of ordinary prudence would exercise under similar circumstances, and the circumstances considered are those which are known to the actor, but he will be charged with knowledge of what he could have known by exercising ordinary care. *Sted-*

*man v. O'Neill*, 72 Atl. 923, 926, 82 Conn. 199, 22 L. R. A. (N. S.) 1229.

"Negligence," such as to preclude a recovery for injuries, is merely the absence of such care as a person of ordinary prudence would exercise under similar circumstances. *Meyers v. Chicago; R. I. & P. R. Co.*, 77 S. W. 149, 151, 103 Mo. App. 268.

An instruction that "by 'negligence' is meant the failure to exercise that degree of care which a person of ordinary prudence usually exercises under like or similar circumstances," given in an action for death by coming in contact with a live wire, was erroneous; the duty of those manufacturing and using electricity being to use the utmost care to protect others from danger. *Mangan's Adm'r v. Louisville Electric Light Co.*, 91 S. W. 703, 704, 122 Ky. 476, 6 L. R. A. (N. S.) 459 (citing and adopting *Schweitzer's Adm'r v. Citizens' General Electric Co.* [Ky.] 52 S. W. 830; *Thomas v. Maysville Gas Co.*, 56 S. W. 153; 108 Ky. 244, 53 L. R. A. 147; *Macon v. Paducah St. Ry. Co.*, 62 S. W. 496, 110 Ky. 680).

**Same—Person of ordinary reason and prudence**

When, in order to determine whether one has been guilty of "negligence," his conduct is compared with that of reasonable persons under similar circumstances, the comparison must be directed to a person of ordinary reason and prudence. The standard of duty is not the foresight and caution which some particular man is capable of exercising, but the foresight and caution of the average prudent man, or of a reasonable man standing in the shoes of the person charged with negligence. *Hoard v. State*, 95 S. W. 1002, 1003, 80 Ark. 87 (citing *Webb's Pollock, Torts* [Am. Ed.] 540).

**Same—Ordinarily careful and prudent person**

"Negligence" is the failure to use such care as ordinarily careful and prudent persons ordinarily exercise under the same or similar circumstances. *Cornelius v. South Covington & C. St. Ry. Co.* (Ky.) 93 S. W. 643, 644; *Felver v. Central Electric Ry. Co.*, 115 S. W. 980, 983, 216 Mo. 195; *City of Covington v. Whitney* (Ky.) 99 S. W. 337, 338.

**Same—Ordinarily prudent man in his own affairs**

"The terms 'neglect,' 'negligence,' 'negligent,' and 'negligently,' when so employed, import a want of such attention to the nature or probable consequences of the act or omission as a prudent person ordinarily displays in acting in his own concerns." *Ladow v. Oklahoma Gas & Electric Co.*, 119 Pac. 250, 257, 28 Okl. 15 (quoting and applying *Comp. Laws Okl.* 1909, § 2830).

"Negligence," for which a tug is liable, "consists in the want of ordinary skill in navigation and of the exercise of such care

and diligence in handling the tow as a man of ordinary prudence would exercise in the preservation of his own property." The duty imposed upon a tug is to use the caution and skill which belong to prudent navigators. *The Samuel E. Bouker*, 141 Fed. 480 (citing *The Niagara*, 20 Fed. 152; *The Florence*, 88 Fed. 302).

An instruction defining "negligence" as the failure to exercise that degree of care and diligence that an ordinarily prudent person would exercise in his own affairs under like or similar circumstances, was not objectionable as eliminating acts of commission. *German Ins. Co. v. Chicago & N. W. Ry. Co.*, 104 N. W. 361, 363, 128 Iowa, 386.

An instruction that the terms "negligence," "negligent," and "negligently" import a want of such attention to the natural or probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concerns, being in the exact language of Rev. Codes 1905, § 9522, is sufficient, especially where no more specific instruction was asked. *Zilke v. Johnson*, 132 N. W. 640, 644, 22 N. D. 75, Ann. Cas. 1913E, 1005.

#### Same—Ordinarily prudent person

"Negligence" is the omission of the care that ordinarily prudent men will exercise under similar circumstances. *Heinz v. Baltimore & O. R. Co.*, 77 Atl. 980, 983, 113 Md. 582; *International & G. N. R. Co. v. Schubert* (Tex.) 130 S. W. 708, 709.

"Negligence" in a particular case is the failure to exercise such care as an ordinarily prudent person would exercise under the same or similar circumstances. *Boyles v. Texas & P. R. Co.* (Tex.) 86 S. W. 936, 937.

"Negligence," as applied to a passenger suing for injuries, means the failure to use that degree of care that would be exercised by an ordinarily prudent person under the same circumstances. *Williams v. Galveston, H. & S. A. R. Co.*, 78 S. W. 45, 47, 34 Tex. Civ. App. 145.

"Negligence" is the want of that care which ordinarily prudent men use in the same circumstances, and as even ordinarily prudent men, when caught in a trap where they must act instantly, miscalculate and misjudge, that one caught in a passage near a railroad with a frightened team mistakenly concluded that the safest course would be to try to cross the track, and so came nearer to the track than he otherwise would, would not necessarily be negligence. *Moore v. Maine Cent. R. Co.*, 76 Atl. 871, 875, 106 Me. 297.

"Negligence" is the omission to exercise such care as an ordinarily prudent man would exercise in the same or like circumstances. To choose, under all circumstances, the safer of two courses of action, is not expected or required of any one. If two alter-

native courses requiring prompt choice and action are put before a man, and either appears to be reasonably safe, if he chooses the one that turns out to be less safe than the other, he is not to be convicted of negligence for choosing the course which proved, by subsequent events, to be less safe than the other." *Shroeder v. St. Louis Transit Co.*, 85 S. W. 968, 971, 111 Mo. App. 67.

A railroad track in active use is per se a warning of danger, admonishing every one that a train is liable to pass over it at any time, and no one, whether passenger, licensee, or trespasser, can approach such a track so near as to be hit by a passing train without first both looking and listening to ascertain whether a train is approaching which might injure him, nor can he frequent or walk over a private railroad yard covered by many tracks, employed constantly for through travel, switching, etc., without looking and listening and exercising the utmost degree of vigilance; the term "negligence" under such circumstances meaning the want of such care as ordinarily prudent persons usually exercise under similar circumstances. *Hart v. Northern Pac. R. Co.*, 196 Fed. 180, 185, 116 C. C. A. 12.

"Negligence" is the want of such care and caution as an ordinarily prudent man would exercise under the same circumstances. An instruction defining negligence to be the want of such care and caution as an "ordinary" prudent man would exercise under the circumstances was not erroneous because of the use of the word "ordinary," instead of the "ordinarily." *Ft. Worth & D. C. Ry. Co. v. Partin*, 76 S. W. 236, 237, 33 Tex. Civ. App. 173.

The test of "negligence" is: Did the human agent in charge of the instrumentality causing the injury complained of act with the care that an ordinarily prudent person under the same circumstances would have exercised, and, if he did, there is no actionable negligence. *Wilkerson v. St. Louis & S. F. R. Co.*, 124 S. W. 543, 546, 140 Mo. App. 306.

An instruction that by the term "negligence" is meant the want of that degree of care that an ordinarily prudent person would have exercised under the same or similar circumstances is correct. *Meng v. St. Louis & S. Ry. Co.*, 84 S. W. 213, 215, 108 Mo. App. 553.

Where an instruction defining "negligence" as the want of such care "as a prudent person would exercise," instead of "an ordinarily" prudent person was the only instruction in the case defining negligence, and was referred to by defendant in its instructions as giving the definition of negligence, defendant thereby adopted it, and could not complain on appeal that it was erroneous. *Spaulding v. Metropolitan St. Ry. Co.*, 107 S. W. 1049, 1051, 129 Mo. App. 607.

**Same—Person of ordinary intelligence and prudence**

"Negligence" is failure to use that degree of care which one of ordinary intelligence and prudence might reasonably be expected to use in the particular circumstances. *Lundy v. Southern Bell Telephone & Telegraph Co.*, 72 S. E. 558, 564, 90 S. C. 25.

**Same—Prudent and just man**

"Negligence" is the absence of such care and regard for the rights of others as a prudent and just man would and should have in the same situation." *Long v. Louisville & N. R. Co.*, 107 S. W. 203, 205, 128 Ky. 26, 13 L. R. A. (N. S.) 1063, 16 Ann. Cas. 673.

**Same—Reasonably prudent person**

"Negligence" is the failure to use such care as a reasonably prudent man would or should use under similar circumstances. *Heidelberg v. People's R. Co. (Del.)* 65 Atl. 587, 6 Pennewill, 209.

"Negligence" is the failure to use such care as a reasonably prudent person would exercise under similar circumstances. *Riccio v. People's R. Co. (Del.)* 82 Atl. 604, 606.

"Negligence" is a failure or the neglect by one to exercise that same care and caution that a reasonably prudent person would exercise at the same place and under the same circumstances. *Jennett v. Louisville & N. R. Co.*, 162 Fed. 392, 393.

**Same—Reasonably prudent and careful person**

"Negligence" is the failure to use such care as a reasonably prudent and careful person would exercise under similar circumstances. *Baldwin v. People's R. Co.*, 76 Atl. 1088, 1093, 7 Pennewill, 81; *Welch v. Baltimore & O. R. Co.*, 76 Atl. 50, 7 Pennewill, 140; *Louft v. C. & J. Pyle Co.*, 75 Atl. 619, 622, 1 Boyce, 192; *Benson v. Wilmington City R. Co.*, 75 Atl. 793, 794, 1 Boyce, 202; *Louisville & N. R. Co. v. Lynch*, 126 S. W. 362, 365, 137 Ky. 696; *Dungan v. Wilmington City R. Co. (Del.)* 58 Atl. 868, 869, 4 Pennewill, 458; *Eaton v. Wilmington City R. Co. (Del.)* 75 Atl. 369, 370, 1 Boyce, 435; *Garrett v. People's R. Co. (Del.)* 64 Atl. 254, 256, 6 Pennewill, 29.

"Negligence" is the want of such care as a reasonably prudent and careful person would use under similar circumstances. *Freeman v. Wilmington & P. Traction Co. (Del.)* 80 Atl. 1001, 1002; *Braunstein v. People's R. Co. (Del.)* 78 Atl. 609, 611, 2 Boyce, 55.

"Negligence" is the failure to use such care as a reasonably prudent and careful person should exercise under similar circumstances. *Robinson v. Huber (Del.)* 63 Atl. 873, 874, 6 Pennewill, 21.

"Negligence" is the want of such care as a reasonably prudent and careful person

would exercise under similar circumstances. Certain things are negligence in law, whether active or positive negligence is proved or not. A violation of a statute providing that no person shall operate a motor vehicle on the public highways unless he has obtained a license is negligence per se, and renders the wrongdoer liable for an injury resulting from such misconduct. *Cecchi v. Lindsay (Del.)* 75 Atl. 376, 377, 1 Boyce, 185.

**Same—Very cautious, prudent, and competent person**

"Negligence," as applied to a defendant railroad company, sued for injuries to a passenger, only means a failure to use that high degree of care that would be exercised by a very cautious, competent, and prudent person under similar circumstances. *Williams v. Galveston, H. & S. A. R. Co.*, 78 S. W. 45, 47, 34 Tex. Civ. App. 145.

"Negligence," when applied to a railroad company and its employees and servants while receiving and transporting passengers, means the failure to use that degree of care which very cautious, prudent, and competent persons usually exercise. *St. John v. Gulf. C. & S. F. Ry. Co. (Tex.)* 80 S. W. 235, 236.

**Same—Very prudent person**

"Negligence" of a motorman toward an alighting passenger is a failure to use that high degree of care that a very prudent person would have used under like circumstances. *San Antonio Traction Co. v. Warren (Tex.)* 85 S. W. 26, 27.

**Same—Required by circumstances**

"Negligence" is the absence of care, according to the circumstances. *Martin v. City of Williamsport*, 57 Atl. 1063, 208 Pa. 590; *Drinkwater v. Quaker City Cooperage Co.*, 57 Atl. 1107, 208 Pa. 649; *Anderson v. Hays Mfg. Co.*, 56 Atl. 345, 348, 207 Pa. 106, 63 L. R. A. 540; *James McNeil & Bro. Co. v. Crucible Steel Co. of America*, 56 Atl. 1067, 1069, 207 Pa. 493 (citing *Anderson v. Hays Mfg. Co.*, 56 Atl. 345, 207 Pa. 106, 63 L. R. A. 540).

"Negligence" is absence of care according to the circumstances. There was no negligence on the part of a contractor in placing a mortar bed on the side of a street, near which he was erecting a building, where the city, under its powers, had granted him such privilege. *White v. Roydhouse*, 60 Atl. 316, 211 Pa. 13.

"Negligence" is a failure to observe, for the protection of another, that care which the circumstances demand. *Culbert v. Wilmington & P. Traction Co. (Del.)* 82 Atl. 1061, 1063.

"Negligence" is failure to exercise the degree of care which prudence requires under the circumstances of each particular case. *Campbell v. United Rys. Co. of St. Louis*, 147 S. W. 788, 791, 243 Mo. 141.

"Negligence" is the failure to exercise the care appropriate to the circumstances of the particular case. *George N. Pierce Co. v. Wells Fargo & Co.*, 189 Fed. 561, 562, 110 C. C. A. 645.

"Negligence" is a failure to use in the performance of a duty owing to the individual that degree of care, skill, and diligence which the circumstances of the case reasonably demand." *State, to Use of Cardin v. McClellan*, 85 S. W. 267, 268, 113 Tenn. 616, 3 Ann. Cas. 992.

The test of "negligence" is not what an ordinarily prudent person would do or omit to do generally, but what an ordinarily prudent person would do or omit to do under circumstances like and similar to those surrounding the person whose conduct is under test. In other words, "negligence" is the want of care required by the circumstances. *Olmstead v. City of Olympia*, 109 Pac. 602, 604, 59 Wash. 147.

"Negligence" is merely a failure to bestow the care and skill the situation demands, and hence it is more accurate to call it simply negligence. The classification of negligence into three degrees is no longer recognized in this state." *Missouri Pac. Ry. Co. v. Walters*, 96 Pac. 346, 347, 78 Kan. 39 (quoting and adopting definition in 21 A. & E. Enc. of Law [2d Ed.] 459).

"In each case the 'negligence,' whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities. \* \* \* In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is 'negligence.' It needs no epithet properly and legally to describe it." *Chicago, R. I. & P. R. Co. v. Hamler*, 74 N. E. 705, 710, 215 Ill. 525, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 8 Ann. Cas. 42 (quoting and adopting definition in *New York O. R. Co. v. Lockwood*, 17 Wall. 857, 21 L. Ed. 627).

#### Same—Required by duty

Many definitions have been given of "negligence," among others, that it is a violation of the duty to exercise care. "Negligence" implies a voluntary act or omission. *Weeks v. Auburn & Syracuse Electric Ry. Co.*, 113 N. Y. Supp. 636, 638, 60 Misc. Rep. 400 (citing *Dowd v. New York, O. & W. R. Co.*, 63 N. E. 541, 170 N. Y. 169).

"Negligence" is a breach of duty to exercise reasonable care under the circumstances. *Vaughn v. Wm. J. Lemp Brewing Co.*, 132 S. W. 293, 296, 152 Mo. App. 48.

"Negligence" involves the violation of a legal duty which one owes to another in respect

to care for the safety of the person or property of that other. *Sharkey v. Skilton*, 77 Atl. 950, 952, 83 Conn. 503.

"Negligence" is the violation of an obligation to exercise care. That obligation may inhere in the relations into which parties have been brought by contract, but it is not an incident to the making of the contract. *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 67 N. E. 715, 717, 68 Ohio St. 328.

"Negligence" consists in a legal duty to use care, and its breach, without intention to produce the precise damage which follows, and, in order to be "actionable negligence," must be followed by damage to plaintiff, resulting in a natural and continuous sequence. *Interstate R. Co. v. Tyree*, 65 S. E. 500, 501, 110 Va. 88.

"Negligence" is the violation of the duty enjoining care and caution in what one does, but the duty is a relative one, and where it has no existence toward a particular party, there can be no such thing as negligence in the legal sense of the term. *Hickey v. Chicago City Ry. Co.*, 148 Ill. App. 197, 207.

An instruction in a personal injury action that "negligence" means the failure to use "that degree of care which the law requires; that is, ordinary care, or the doing of that which ordinary care \* \* \* would dictate should not be done," is not open to the objection that matters of omission are excluded from consideration. *Struble v. Burlington, C. R. & N. Ry. Co.*, 103 N. W. 142, 144, 128 Iowa, 158.

"Negligence," constituting a cause of action, is such an omission by a responsible person to use that degree of care, diligence, and skill, which it was his legal duty to use for the protection of another person from injury, as in a natural and continuous sequence causes unintended damages to the latter. *Pullman Co. v. Caviness*, 116 S. W. 410, 411, 53 Tex. Civ. App. 540; *Chesapeake & O. Ry. Co. v. Farrow's Adm'r*, 55 S. E. 569, 570, 106 Va. 137, 10 Ann. Cas. 12.

The words "negligence" and "wrongful act" are sufficiently broad to embrace every degree of tort that can be committed against the person. Negligence, constituting a cause of civil action, has been defined as such an omission by a responsible person to use that degree of care, diligence, and skill, which it was his legal duty to use for the protection of another person from injury, as in a natural and continuous sequence causes unintended damage to the latter. The word implies a breach of duty, and a person cannot be legally negligent, so as to subject him to damages, except in respect to others to whom he owes a duty. *Howard's Adm'r v. Hunter*, 104 S. W. 723, 724, 126 Ky. 685.

"Negligence," constituting a cause of civil action, is such an omission by a responsible person to use that degree of care, dili-

gence, and skill, which it was his legal duty to use for the protection of another person from injury, as in a natural and continuous sequence, causes unintended damage to the latter. An essential element of negligence, as is shown from this definition, is, as in all other species of tort, a legal duty. Without such legal duty, and a breach of it, there can be no negligence or any other species of tort." Where an employer fails to furnish an employé medical attendance, as he has agreed to do, the employé's cause of action is not in tort for negligence, but is for breach of contract. *Galveston, H. & S. A. Ry. Co. v. Hennegan*, 76 S. W. 452, 454, 33 Tex. Civ. App. 314.

"There can be no 'negligence' in a legal sense unless there is a violation of a legal duty to exercise care." Therefore a railroad company, owning real property abutting on a street, is not required to construct a fence sufficiently strong to provide against the contingency of a crowd of trespassers going on the inclosed property and pushing the fence over on a person walking in the street; such injury not being the reasonable and proximate result of the defective fence. *Grogan v. Pennsylvania R.*, 62 Atl. 924, 925, 213 Pa. 340.

"Negligence" can in law only be predicated upon a failure to use the degree of care required by law in the discharge of a duty imposed thereby." Where a car cleaner, attempting to climb over a string of cars likely to be moved at any minute, was knocked off and killed through the cars being pushed in the ordinary way in switching operations under the charge of other employés, who had no reason to expect that he was on the cars or intended to try to cross over between them, and could not see him, they were not negligent. *Hall v. Houston & T. C. R. Co.* (Tex.) 125 S. W. 946, 949.

"Negligence" on the part of a railroad company is the omission on its part to do something which persons conducting a railroad with reasonable care and caution should do. *McCormick v. Detroit, Grand Haven & M. R. Co.*, 104 N. W. 390, 391, 141 Mich. 17 (citing *Flagg v. Chicago, D. & C. G. T. J. Ry. Co.*, 55 N. W. 444, 96 Mich. 30, 24 L. R. A. 835).

It is the duty of a carrier of passengers to exercise the highest degree of care that would be used by every prudent person under the same or similar circumstances to avoid and prevent injury to passengers upon its cars, and a failure to exercise such high degree of care constitutes "negligence." *Galveston, H. & S. A. Ry. Co. v. Norton*, 119 S. W. 702, 706, 55 Tex. Civ. App. 478.

"Negligence," when applied to carriers of passengers, means the failure of a performance of duty, imposed by law for the protection of others, to exercise that high degree of care in acting and refraining from

acting which very competent and prudent persons would usually exercise under the same or other similar circumstances. *St. Louis Southwestern Ry. Co. v. Harrison*, 73 S. W. 38, 32 Tex. Civ. App. 368.

The degree of care required by a carrier of passengers and the precise duty which it owes to them is clearly defined in the law. The carrier owes to the passenger the exercise of the utmost care and diligence which human foresight can use, though not an insurer of the safety of the passenger. A breach of that duty is "negligence," and if any injury results therefrom, and is the consequence thereof, an action will lie at the suit of the person thus injured. It is the breach of the duty which is owed that constitutes the cause of action. *Philadelphia, B. & W. R. Co. v. Allen*, 62 Atl. 245, 246, 102 Md. 110 (citing *Baltimore City Pass. Ry. Co. v. Nugent*, 38 Atl. 779, 86 Md. 349, 39 L. R. A. 161).

#### As want of due, proper, and ordinary care

Due care defined, see *Due Care*.

Ordinary care defined, see *Ordinary Care*.

"Negligence" is the want of due care. *Wofford v. Clinton Cotton Mills*, 51 S. E. 918, 919, 72 S. C. 346 (quoting and adopting definition in *Carter v. Columbia & G. R. Co.*, 19 S. C. 24, 45 Am. Rep. 754).

"Negligence" is but the absence of due care." *Cornovski v. St. Louis Transit Co.*, 106 S. W. 51, 56, 207 Mo. 263.

The simplest definition of "negligence" is absence of due care under the circumstances. *Nord v. Boston & M. Consol. Copper & Silver Min. Co.*, 75 Pac. 681, 684, 30 Mont. 48.

"Negligence" is the want of due care; that is, of such care as an ordinarily prudent man would exercise under the same or similar circumstances. *Seininski v. Wilmington Leather Co.* (Del.) 83 Atl. 20, 24.

"Negligence" is the opposite of due care: where due care is found there is no negligence. If there is a want of due care, then there is negligence." *Raymond v. Portland R. Co.*, 62 Atl. 602, 605, 100 Me. 529, 3 L. R. A. (N. S.) 94.

"Negligence" rests in tort. It is the absence of due care which is a duty lying at the root of the social compact. *Charlton v. St. Louis & S. F. R. Co.*, 98 S. W. 529, 535, 200 Mo. 413.

"Negligence" is the failure to exercise the proper degree of care in the performance of some legal duty which one owes another and causing unintended damages. *Foot v. Seaboard Air Line Ry.*, 54 S. E. 843, 844, 142 N. C. 52.

There are no degrees of "negligence." There are degrees of care, and a failure to exercise that proper degree of care as the law requires is "negligence." *Rattan v. Cen-*

tral Electric Ry. Co., 96 S. W. 735, 737, 120 Mo. App. 270 (quoting and adopting definition in *Magrane v. St. Louis & S. R. Co.*, 81 S. W. 1158, 183 Mo. 119).

Where an accident proceeds from an act of such a character that when due care is taken in its performance no injury ordinarily ensues from it in similar cases, it will be presumed to be "negligent." *Pratt v. Missouri Pac. Ry. Co.*, 122 S. W. 1125, 1127, 139 Mo. App. 502.

While the term "negligence" is popularly used to mean an act or omission which is wrongful under the circumstances, as resulting from the failure to exercise the proper care for the protection of others, without regard to resulting injury to any particular person, the legal conception of "actionable negligence," for which recovery may be had, is such an omission to use the degree of care for the protection of another from injury as should have been used under the circumstances and which in a natural and continuous sequence causes damage to the latter. *Cresswell v. Wainwright*, 134 N. W. 594, 599, 154 Iowa, 167.

One lawfully using electricity to operate a street railroad system in a city must exercise such constant care as a man of reasonable prudence would exercise, considering the obligation to protect persons from danger, and the care must be commensurate with the danger; "negligence" consisting in the want of proper care, in view of the circumstances. *Birmingham Ry., Light & Power Co. v. Murphy*, 56 South. 817, 819, 2 Ala. App. 588.

"Negligence" has been defined to be the "absence of care, according to the circumstances." Also in "its civil relations is such an inadvertent imperfection by a responsible human agent in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. The inadvertency, or want of due consideration of duty, is the *injuria* on which, when naturally followed by the *damnum*, the suit is based." According to another work, "negligence" consists of "an omission by a responsible party to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury, as, in a natural and continuous sequence, causes unintended damage to the latter." Again, "negligence consists in doing something which a reasonably prudent man would not have done under the circumstances, or in failing to do something which a reasonably prudent man, under the circumstances, would have done." All these definitions mean the same thing, viz., that "negligence" is the absence of due care, and due care is a care adjusting itself to the circumstances of the case. *Dean v. Kansas City, St. L. & C. R. Co.*, 97 S. W. 910, 917, 199 Mo. 386 (quoting in order *Wharton*, Neg. § 3; *Shearman & Red-*

*field*, Neg. § 3; and *McMahon v. Pacific Exp. Co.*, 34 S. W. 478, 182 Mo. 641).

#### As want of ordinary care

Ordinary care defined, see Ordinary Care.

"Negligence" is the lack or want of ordinary care. *Tobias v. People's R. Co. (Del.)* 80 Atl. 358, 360; *Murray v. St. Louis Transit Co.*, 75 S. W. 611, 612, 176 Mo. 183.

"Negligence" is the failure to use or exercise ordinary care. *Addisson's Adm'r v. Louisville, H. & St. L. R. Co. (Ky.)* 110 S. W. 284, 286; *Louisville & N. R. Co. v. Joshlin (Ky.)* 110 S. W. 382, 385; *Louisville & N. R. Co. v. Logsdon*, 71 S. W. 905, 906, 114 Ky. 746; *Cross v. Illinois Cent. R. Co. (Ky.)* 110 S. W. 290, 292; *Louisville Ry. Co. v. Bouterlier (Ky.)* 110 S. W. 357, 360; *Cincinnati, N. O. & T. P. Ry. Co. v. Evans' Adm'r*, 110 S. W. 844, 848, 129 Ky. 152; *Louisville & N. R. Co. v. Roth*, 114 S. W. 264, 268, 130 Ky. 759; *Nashville, C. & St. L. R. Co. v. Russell*, 110 S. W. 317, 319, 129 Ky. 14; *Galveston, H. & S. A. Ry. Co. v. Hubbard*, 76 S. W. 764, 83 Tex. Civ. App. 343; *Reyburn v. Missouri Pac. Ry. Co.*, 86 S. W. 174, 176, 187 Mo. 565.

"Negligence" consists of the failure to use ordinary care under the circumstances. *Smith's Adm'r v. Norfolk & P. Traction Co.*, 68 S. E. 1005, 1006, 109 Va. 453.

"Negligence" is the failure to do something that the doer in the exercise of ordinary care should have done. *Shemwell v. Owensboro & N. R. Co.*, 78 S. W. 448, 449, 117 Ky. 556.

"Negligence" is the absence of ordinary care, and ordinary care is that degree of care which an ordinarily prudent person would exercise under circumstances like or similar to those shown. *Louisville, H. & St. L. Ry. Co. v. Stillwell*, 134 S. W. 202, 204, 142 Ky. 330.

"Negligence" is a want of the care ordinarily exercised by the great mass of persons under like circumstances. *Bandekow v. Chicago, B. & Q. Ry. Co.*, 117 N. W. 812, 813, 136 Wis. 341.

"Negligence" is the want of the ordinary care which a reasonably prudent man would exercise under like circumstances. *Butler v. Wilmington City R. Co. (Del.)* 78 Atl. 871, 872, 2 Boyce, 262.

"Negligence" is a want of "ordinary care"; that is, such care as persons of ordinary prudence usually exercise under similar circumstances. *Dorris v. Warford*, 100 S. W. 312, 313, 124 Ky. 768, 9 L. R. A. (N. S.) 1090, 14 Ann. Cas. 602.

"Negligence" is the want of ordinary care; want of such care as a reasonably prudent and careful man would exercise under the circumstances. *Short v. Philadelphia, B. & W. R. Co.*, 76 Atl. 363, 364, 7 Pennewill, 108.

"Negligence" has been defined to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. *Boudwin v. Wilmington City R. Co.* (Del.) 60 Atl. 865, 4 Pennewill, 381; *MacFeat v. Philadelphia, W. & B. R. Co.* (Del.) 62 Atl. 898, 905, 5 Pennewill, 52; *Campbell v. Walker* (Del.) 78 Atl. 601, 603, 2 Boyce, 41.

"Negligence" is the want of ordinary care, or such care as persons of average prudence would exercise under the same circumstances. A mere error in judgment is not necessarily negligence. *Carney v. Concord St. Ry.*, 57 Atl. 218, 222, 72 N. H. 364.

"Negligence" is defined to be 'injury occasioned to another by want of ordinary care,' etc." *Bacon v. Kearney Vineyard Syndicate*, 82 Pac. 84, 85, 1 Cal. App. 275.

"Negligence" was properly defined as a want of ordinary care and failure to exercise that care which a man of ordinary prudence would have exercised under the circumstances, or a failure to perform some duty imposed by law. *Jones v. American Warehouse Co.*, 51 S. E. 106, 108, 138 N. C. 546.

Want of ordinary care is "negligence," but want of extraordinary care, or that care which is customarily exercised by extraordinarily careful people, is "slight negligence," and the latter does not affect the rights of parties injured. *Hackett v. Wisconsin Cent. Ry. Co.*, 124 N. W. 1018, 1022, 141 Wis. 464.

"By the term 'negligence' is meant the failure to observe ordinary care." *Postal Telegraph Cable Co. v. Terrell*, 100 S. W. 292, 293, 124 Ky. 822, 14 L. R. A. (N. S.) 927.

Statement in a charge that "negligence," as that term is used in this charge, means the failure to exercise ordinary care," is sufficient, in connection with the preceding paragraph, defining "ordinary care" to be "the exercise of that degree of care which a person of ordinary prudence would exercise under like or similar circumstances." *Rapid Transit Ry. Co. v. Miller* (Tex.) 85 S. W. 439.

"Negligence" is the failure to exercise the ordinary care of prudent men under all the attending circumstances. *Stephenson v. Corder*, 80 Pac. 988, 939, 71 Kan. 475, 69 L. R. A. 246, 114 Am. St. Rep. 500 (quoting *Thomp. Neg.* § 50).

"Negligence" is the failure to exercise ordinary care, such care as a reasonable man under like circumstances would exercise. *International Mercantile Marine Co. v. Smith*, 145 Fed. 891, 893, 76 C. C. A. 423.

"Negligence" is the failure to use ordinary care, which is such care as an ordinarily prudent person would usually exercise under circumstances similar to those proven in the case under investigation. *Henderson City Ry. Co. v. Lockett* (Ky.) 98 S. W. 303.

"Negligence" is the failure to exercise ordinary care. And "ordinary care" is that

degree of care which an ordinary, prudent, and careful person would exercise under the same or similar circumstances. *Gulf, C. & S. F. Ry. Co. v. Hays*, 89 S. W. 29, 32, 40 Tex. Civ. App. 162.

"Negligence" is properly defined in an instruction as a failure to use ordinary care, and ordinary care which ordinarily prudent persons are accustomed to exercise under like or similar circumstances. *Louisville & N. R. Co. v. Lynch*, 126 S. W. 362, 363, 365, 137 Ky. 696.

"Negligence" is a failure to exercise ordinary care, or a degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. *Moore v. Lindell Ry. Co.*, 75 S. W. 672, 674, 176 Mo. 528.

"Negligence" has been termed the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. It has been termed the failure to observe, for protection of the interest of another, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. *Goldstein v. People's R. Co.* (Del.) 60 Atl. 975, 976, 5 Pennewill, 306.

"Ordinary care" means such care and prudence as an ordinarily prudent person would exercise under the circumstances detailed in evidence, and "negligence" means the failure to exercise ordinary care. *Heberling v. City of Warrensburg*, 103 S. W. 36, 39, 204 Mo. 604 (quoting and adopting the definition in *Cohn v. Kansas City*, 18 S. W. 973, 108 Mo. 392).

The word "negligence," as used in an instruction for the wrongful death of an employé, means the failure to use ordinary care. *Illinois Cent. R. Co. v. Cane's Adm'r* (Ky.) 90 S. W. 1061, 1064.

Defining "negligence" as a failure to exercise ordinary care was held to state the proper test of "negligence," though the case involved the life of an infant four years old. *Hanley v. Ft. Dodge Light & Power Co.*, 107 N. W. 593, 594, 133 Iowa, 326.

"Negligence" has been termed the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. It has been termed the failure to observe, for the protection of the interests of another, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. *Di Prisco v. Wilmington City R. Co.* (Del.) 57 Atl. 906, 909, 4 Pennewill, 527; *Bowring v. Wilmington Malleable Iron Co.* (Del.) 66 Atl. 369, 371, 5 Pennewill, 594.

Where the charge of negligence is a general one, and plaintiff shows that the injury complained of occurred under such circumstances that it may be reasonably inferred



that, if ordinary care had been used by defendant, the injury would not have resulted, he thereby makes a prima facie case, and casts on defendant the burden of proving due care. *Freeman v. Freeman*, 125 S. W. 524, 526, 141 Mo. App. 359.

"Negligence" is the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under like circumstances. What constitutes "negligence" is a question of law for the court, but whether "negligence" existed in the particular case is a question of fact for the jury. *Neal v. Wilmington & N. C. Electric R. Co. (Del.)* 53 Atl. 338, 339, 3 Pennewill, 467.

"Negligence" is the want of ordinary care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs is one thing, and the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons from whom he receives any compensation." *Mason v. Moore*, 76 N. E. 932, 937, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240 (quoting and adopting definition in *Swentzel v. Penn Bank*, 23 Atl. 405, 414, 147 Pa. 140, 15 L. R. A. 305, 30 Am. St. Rep. 718).

Where strict accuracy of expression required an instruction that an employer must exercise ordinary care to furnish his employees with reasonably safe places in which to work, the omission of the words "exercise ordinary care" is not ground for reversal, where the jury were told that the employer is liable only for his negligence, and that negligence is the failure to use ordinary care. *Kamera v. Missouri Boiler Works*, 108 Pac. 806, 807, 82 Kan. 432.

An instruction that "ordinary care," as used in instructions given in an action against a railroad for the death of a traveler in a collision with a train at a crossing, meant such care as ordinarily prudent persons would exercise under circumstances similar to those proven in the case, and that "negligence" was the failure to exercise ordinary care, was correct. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)* 98 S. W. 308, 313.

"Negligence" on the part of a railroad company is the failure on its part to use ordinary care; "that is, such degree of care as an ordinarily careful and prudent person would have used under the circumstances." Where the court defined "negligence" of a railroad company to be the failure to use such care as an ordinarily prudent person would use under similar circumstances, the refusal of a charge containing substantially the same definition, and the qualification that, in determining whether an act is neg-

ligence, the jury will take into consideration all the circumstances and will not view the situation from a retrospective point of view, was not erroneous. *Galveston H. & N. Ry. Co. v. Olds (Tex.)* 112 S. W. 789, 792.

Since the term "negligence" has been construed to mean "want of ordinary care," it would have been the better practice had the trial court used the latter term instead of the former word in his submission of questions to the jury, under Laws 1907, c. 254, providing that in an action for injuries against a railroad company the judge should submit to the jury the questions, first, as to whether the company, or any officer, other than the person injured, was guilty of negligence, and, second, if that question is answered in the affirmative, whether the person injured was guilty of negligence, etc. *Jensen v. Wisconsin Cent. Ry. Co.*, 128 N. W. 982, 985, 986, 145 Wis. 326.

"Negligence" is the want of "ordinary care." As applied to a street car motorman in the case of a collision with a vehicle, it means the neglect to use "ordinary care" in observing it or to check the car so as to avoid hitting it. *Petersen v. St. Louis Transit Co.*, 97 S. W. 860, 863, 199 Mo. 331.

A charge that "negligence" as applied to a passenger is a failure to exercise ordinary care for his own safety—that is, such care as an "ordinarily prudent person" would exercise under the same or similar circumstances—was not erroneous in failing to require the passenger to use such care as a "person of ordinary prudence" would exercise. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 90 S. W. 343, 345, 40 Tex. Civ. App. 480.

Defining "negligence" as the want or failure to use ordinary care—that is, that degree of care which an ordinarily prudent person would use under like circumstances to avoid injury or accident—does not define the degree of care required of a carrier in respect to a passenger getting on a car, which is, in substance, "such a high degree of foresight as to possible dangers, and such a high degree of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under similar circumstances." *Green v. Houston Electric Co.*, 89 S. W. 442, 443, 40 Tex. Civ. App. 260 (citing *International & G. N. Ry. Co. v. Halloran*, 53 Tex. 53, 37 Am. Rep. 744; *International & G. N. Ry. Co. v. Welch*, 24 S. W. 390, 86 Tex. 203, 40 Am. St. Rep. 829).

"Negligence" has often been defined by the court to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would use under similar circumstances. Recovery on the ground of negligence may be had for suddenly starting a street car while a passenger is in the act of alighting therefrom, if it is shown to be the fault of the company, and that injuries to the passenger were caused

thereby. *Benson v. Wilmington City R. Co.* (Del.) 75 Atl. 793, 794, 1 Boyce, 202.

In an action against a railroad for injuries to an employé through a defective car step, an instruction that if defendant, through its inspectors and repairers, exercised ordinary care to see that the equipment of the car was in reasonably safe condition, "and were not guilty of negligence," the verdict must be for defendant, was not misleading as adding, by the use of the words "and were not guilty of negligence," something to defendant's duty beyond the exercise of ordinary care; the court having clearly defined "negligence" as the failure to use ordinary care. *El Paso & S. W. R. Co. v. O'Keefe*, 110 S. W. 1002, 1003, 50 Tex. Civ. App. 579.

In an action for delay in delivering a telegram, an instruction defining "negligence" as the failure to use ordinary care to deliver the message, and instructing that if, because of such failure, plaintiff was unable to be with his father before his death, he could recover such damages, if any, as he suffered on account of defendant's negligence, was not objectionable as asserting as a fact that plaintiff was unable to be with his father before his death in consequence of defendant's failure to deliver the telegram promptly. *Western Union Telegraph Co. v. Mack* (Tex.) 128 S. W. 921, 923.

In conducting the affairs of a hospital, its officers and agents are as liable to commit acts of negligence as are the officers and agents of a railroad or other business corporation. Men in general are not uniformly careful. Experience shows that "negligence"—the failure to exercise ordinary care—is to be expected when men engage in industrial pursuits. It may, not inappropriately, be said to be necessarily incidental in the accomplishment of most practical results through the agency of man. *Hewett v. Woman's Hospital Aid Ass'n*, 64 Atl. 190, 193, 73 N. H. 556, 7 L. R. A. (N. S.) 496.

#### As want of reasonable care

"Negligence" is a failure to exercise reasonable care. *Jarrell v. Blackbird Block Coal Co.*, 136 S. W. 754, 756, 154 Mo. App. 552.

"Negligence" is the want of reasonable care, or a failure to use such care as an ordinarily careful man would use in like circumstances. *Klair v. Philadelphia, B. & W. R. Co.* (Del.) 78 Atl. 1085, 1086, 1098, 2 Boyce, 274.

"Negligence" is the absence of reasonable care. What is reasonable care depends on the conditions of danger or lack of danger. In some cases very little care suffices to fulfill the rule of reasonable care, while in others the highest degree of care is required to do so. *Warth v. Kastriner*, 100 N. Y. Supp. 278, 279, 114 App. Div. 766.

#### As want of reasonable care and diligence

An instruction defining "negligence" as "the want or omission of reasonable care and diligence, the failure to do something which a reasonable person guided by those considerations which ordinarily regulate the conduct of human affairs, under the circumstances would do, or the doing of something which such person under such circumstances, would not do," was proper. *Martin v. Des Moines Edison Light Co.*, 106 N. W. 359, 361, 131 Iowa, 724.

#### As want of care and prudence

The degree of negligence necessary to fasten liability upon a person is that degree which is equivalent to lack of such care and prudence as ordinary men habitually exercise for their own personal safety. *The General De Sonis*, 179 Fed. 123, 125.

#### Same—Man of ordinary intelligence

An instruction that the term "negligence" means the want of that care and prudence which a man of ordinary intelligence would exercise under all the circumstances of the situation is erroneous, where the case is bot-tomed on negligence, and defended on the ground of contributory negligence, since it does not correctly define the term, and since the word "intelligence" is not a synonym for either "caution," "prudence," or "care," for a very intelligent man may be a very imprudent one, or an unusually or unnecessarily cautious one, and he is not the man who exercises ordinary care about his own concerns; and therefore the use of the word "intelligence" instead of the term "prudence" furnished the jury no definition of negligence. *Van Cleve v. St. Louis, M. & S. E. R. Co.*, 101 S. W. 632, 634, 124 Mo. App. 224.

#### As want of ordinary care and prudence

"Negligence" consists of the failure to use ordinary care and prudence under the circumstances. One who has a reasonable basis for belief that another is aware of a source of danger may act on the assumption that the latter is aware of it, and will make reasonable efforts to save himself; but a motorman having a reasonable basis for the belief that an adult person on the track is aware of the approach of the car may presume that he will get out of danger as the car approaches; but a motorman sounding his bell cannot assume that all within hearing will take notice that a car is approaching, and he can make no such assumption in justification of his failure to take reasonable precautions until at least he has reasonable grounds for believing that his warning is heeded or the presence of the car recognized, and that the person threatened is competent to protect himself by the exercise of ordinary care. *Riley v. Consolidated R. Co.*, 72 Atl. 562, 563, 82 Conn. 105, 21 L. R. A. (N. S.) 880.

**As want of foresight and prudence**

A charge that "negligence," as applied to railroads engaged in the transportation of passengers, is a failure to exercise such a high degree of foresight as to possible dangers and such a high degree of prudence in guarding against them as would be used by very cautious, prudent, and competent persons under the same or similar circumstances, correctly defines "negligence" as applied to the duty owed by a carrier to its passengers, and is sufficient when taken in connection with a further charge that the railroad does not, by accepting a passenger, become an insurer of his safety, but is only bound to use a high degree of care, etc. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 90 S. W. 343, 345, 40 Tex. Civ. App. 480.

**As want of reasonable diligence, caution, and foresight**

Failure of a master to exercise such reasonable diligence, caution, and foresight as a prudent man would exercise under similar circumstances to guard employes against injuries is "negligence." *Sandidge v. Atchison, T. & S. F. Ry. Co.*, 193 Fed. 867, 872, 113 C. C. A. 653.

**Willfulness distinguished**

Mere "negligence" and "willfulness" are not synonymous terms. *Southern Ry. Co. v. Davis*, 65 S. E. 131, 132, 132 Ga. 812.

An act done willingly and on full information is not done negligently. Negligence is the result of inattention or oversight. *Dean v. St. Louis Woodenware Works*, 80 S. W. 292, 296, 106 Mo. App. 167.

Negligence cannot be of such degree as to become willfulness. *Cleveland, C., C. & St. L. Ry. Co. v. Starks*, 92 N. E. 54, 56, 174 Ind. 345.

There are no degrees of negligence, and negligence, no matter how reprehensible, can never approximate willfulness. *Vandalia R. Co. v. Clem*, 96 N. E. 789, 790, 49 Ind. App. 94.

The term "negligence" suggests only inadvertence or want of ordinary care, and, however great may be the degree of such want of care, so long as inadvertence remains, willfulness is excluded. *Rideout v. Winnebago Traction Co.*, 101 N. W. 672, 674, 123 Wis. 297, 69 L. R. A. 601.

The term "willful negligence" is a misleading and contradictory expression. Conduct cannot be both "willful" and "negligent," as "negligence" involves inattention, and "willfulness," intention. *Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, 114 N. W. 1123, 1126, 103 Minn. 224, dissenting opinion (citing 8 Words and Phrases, pp. 7468, 7835; *Bolin v. Chicago, St. P., M. & O. Ry. Co.*, 84 N. W. 446, 108 Wis. 333, 81 Am. St. Rep. 911; *Louisville & N. R. Co. v. Perkins*, 44 South. 602, 152 Ala. 133; *Lake Shore*

*& M. S. Ry. Co. v. Bodemer*, 29 N. E. 692, 139 Ill. 596, 32 Am. St. Rep. 218).

"Willfulness" implies design. It involves conduct which is quasi criminal. "Willfulness" and "negligence" are held inconsistent. Purpose or design is foreign to negligence. Willfulness cannot be inferred from a mere knowledge on the part of operatives of the presence of the injured party. Before it will be inferred, such operatives must have knowledge also of the inability of the injured party to avoid the injury. *Pittsburgh, C., C. & St. L. Ry. Co. v. Ferrell*, 78 N. E. 988, 989, 39 Ind. App. 515.

"An inadvertent failure to observe due care indicates mere 'negligence,' but an advertent or conscious failure to observe due care passes beyond mere negligence into 'wantonnness' or 'willfulness.'" *Tinsley v. Western Union Telegraph Co.*, 51 S. E. 913, 914, 72 S. C. 350.

In order to constitute willfulness or wantonnness or reckless indifference to probable consequences, the act done or omitted must be done or omitted with a knowledge or a present consciousness that injury will probably result; and this consciousness is not to be implied from mere knowledge of the elements of the dangerous situation a person may be in and negligent and inadvertent acts in respect of the peril. *Duncan v. St. Louis & S. F. R. Co.*, 44 South. 418, 422, 152 Ala. 118.

Where defendant's conduct resulting in an injury is willful, it is no longer negligence, and hence the defense of contributory negligence cannot arise; such defense being only applicable where negligence is charged against defendant. *Hawks v. Slusher*, 104 Pac. 883, 884, 55 Or. 1, Ann. Cas. 1912A, 491.

"Negligence" may result from omission respecting duty. An "act" or "wrongful act" denotes affirmative action or performance, and an expression of will or purpose as distinguished from "omission" or "wrongful omission," which denotes a negative and inaction. *Randle v. Birmingham Ry., Light & Power Co.*, 53 South. 918, 921, 169 Ala. 314.

Negligence and carelessness are generally esteemed as not only not willfulness, but rather the opposite. *Schooler v. Harrington*, 81 S. W. 468, 469, 106 Mo. App. 607 (following *Gibeline v. Smith*, 80 S. W. 961, 106 Mo. App. 545).

"Willfulness" and "negligence" are diametrically opposed; negligence importing inattention, inadvertence, and indifference, while willfulness imports intention, purpose, and design; and there being no negligence with, and no willfulness without, intent. *Barrett v. Cleveland, C., C. & St. L. Ry. Co.*, 96 N. E. 490, 492, 48 Ind. App. 668.

A conscious act or neglect is willful, though there is no evil intent, but willfulness implies something more than mere failure to

use ordinary care; there being a clear distinction between a "negligent omission" and a "willful failure" to act. *Cook v. Big Muddy-Carterville Mining Co.*, 94 N. E. 90, 94, 249 Ill. 41.

"Willfulness" means something more than mere oversight, carelessness, neglect, or even shiftlessness. True, in the legal sense of the word, an intentional act is ordinarily willful; but the intentional act in opening a gate or leaving it open does not necessarily imply an intention that cattle shall pass through such gate on a railroad track. *Claus v. Chicago Great Western Ry. Co.*, 111 N. W. 15, 16, 136 Iowa, 7.

"Willfulness" or "wantonness," as applied in cases of injury to a person by a breach of duty, where the peril of the person injured is known, means a direct intent to inflict injury, or an act done or omitted, with the consciousness that the act or omission will probably eventuate in injury. *Anniston Electric & Gas Co. v. Rosen*, 48 South. 798, 799, 802, 159 Ala. 195, 133 Am. St. Rep. 32.

"Willfulness" is the intentional doing of some act or the failure to do some act, according to one's own will, regardless of the right of others, when the party knows, "or is under legal obligation to know," that the doing or the failing to do such act might cause injury to other persons. *Geddings v. Atlantic Coast Line R. Co.*, 75 S. E. 284, 91 S. C. 477.

"Negligence" and 'willfulness' are the opposites of each other. They indicate radically different mental states. \* \* \* Negligence is also to be carefully distinguished from fraud; the distinction arising in this case, as before, upon the element of inadvertence. Fraud is invariably intentional, either actually or constructively; negligence is never so." *Standard Marine Ins. Co., Limited, of Liverpool, Eng., v. Nome Beach Lighterage & Transp. Co.*, 133 Fed. 636, 647, 648, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

"Willfulness" and 'negligence' are the opposites of each other; the former signifying the presence of intention, and the latter its absence." *Rideout v. Winnebago Traction Co.*, 101 N. W. 672, 675, 123 Wis. 297, 69 L. R. A. 601 (quoting and adopting definition in *Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 49 N. E. 445, 449, 149 Ind. 490-501).

"Willfulness" and 'negligence' are the opposites of each other; the one signifying the presence of intention or purpose, the other its absence. This distinction has not always been observed. Consequently there are cases that use the terms 'gross' or 'willful' negligence to designate willful injuries. Late cases have made the distinction clear. And the principle of the responsibility of the willful wrongdoer for all the consequences of his misconduct is really an old one." *Morrison*

*v. Lee*, 118 N. W. 1025, 1029, 16 N. D. 377, 13 L. R. A. (N. S.) 560.

"Willfulness" and 'negligence' are the opposite of each other; the former signifying the presence of intention, and the latter its absence. Negligence arises from inattention, thoughtlessness, while willfulness cannot exist without purpose or design, \* \* \* and, when willfulness is the essential in the act or conduct charged to the party with a wrong, the case ceases to be one of negligence." *Memphis St. Ry. Co. v. Roe*, 102 S. W. 343, 346, 118 Tenn. 601 (quoting and adopting the definition in *Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 49 N. E. 445, 149 Ind. 490).

The conflict in instructions submitting the issue of negligence of defendant and the issue of a willful wrongful act cannot be harmonized on the theory that the term "negligence," as used in the first instruction, covers willful acts, since "negligence" signifies the absence of care and implies a failure of duty and excludes an idea of intentional wrong, while "willful negligence" implies an intentional failure to perform a manifest duty. *Tognazzini v. Freeman*, 123 Pac. 540, 543, 18 Cal. App. 468.

An instruction that "willful" is what the word implies, it means an act proceeding from a will, done of a purpose, an intention to do it, and that "willfulness" is an act which proceeds from the will so as to make the act a purpose act, was not error, where the court in connection therewith illustrated the difference between "negligence" and "willfulness." *Talbert v. Charleston & Western C. Ry.*, 51 S. E. 564, 72 S. C. 137.

A complaint for willful injury must show that the injurious act was purposely done, with an intent to inflict willfully and purposely the particular injury complained of; "willfulness" being a desire or intent to produce a certain result, and inconsistent with negligence. *Southern Ry. Co. v. McNeeley*, 88 N. E. 714, 715, 44 Ind. App. 126.

## NEGLIGENCE PER SE

The words "per se," when used as descriptive of negligence, merely refer to the method by which its existence is to be ascertained from the facts. *Platt v. Southern Photo Material Co.*, 60 S. E. 1068, 1071, 4 Ga. App. 159.

It is well settled that, in order that an act shall be "negligence per se," it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have committed it. *St. Louis Southwestern R. Co. of Texas v. Hawkins*, 108 S. W. 736, 740, 49 Tex. Civ. App. 545 (quoting *Gulf, C. & S. F. Ry. Co. v. Gasscamp*, 7 S. W. 227, 69 Tex. 545).

It is not negligence per se to rise from a seat and step to the side of a slowly moving open car which is coming to a stop, for the purpose of getting upon the runboard to alight when the car does stop. *Davis v. Camden, G. & W. R. Co.*, 63 Atl. 843, 844, 73 N. J. Law, 415 (citing *Scott v. Bergen County Traction Co.*, 43 Atl. 1060, 63 N. J. Law, 408; *Consolidated Traction Co. v. Thalheimer*, 37 Atl. 132, 59 N. J. Law, 474).

**As omission of acts required by statute or ordinance**

It has been declared that "the omission of specified acts of diligence prescribed by statute or by a valid municipal ordinance is 'negligence per se.'" Generally a court cannot instruct a jury that certain acts constitute "negligence per se," but there is an exception where a statute or municipal ordinance requires the performance of the act. *Southern R. Co. v. Davis*, 65 S. E. 131, 132, 132 Ga. 812 (citing *Central Railroad & Banking Co. v. Smith*, 3 S. E. 397, 78 Ga. 699; 5 Words and Phrases, p. 4764).

"There are certain things which amount to 'negligence in law,' whether any positive or active negligence be proved or not. The violation of an ordinance of this city is of itself (per se, as we may say) an act of negligence, which only requires to be proved to render a wrongdoer liable for any injury resulting from such misconduct. In such case, however, the defendant would not be liable unless the violation of the ordinance—that is, the excessive speed of the train—caused the accident complained of; nor would the defendant be liable if the injury was caused by the negligence of the deceased. The law does not permit any one to recover damages from another for an injury if his own negligence has contributed thereto, or where by the exercise of reasonable care he could have avoided it." *MacFeat v. Philadelphia, W. & B. R. Co.* (Del.) 62 Atl. 898, 905, 906, 5 Pennewill, 52.

A violation of Acts 1905, c. 169, making it an offense for an engineer to run his locomotive across the tracks of any other railroad without first coming to a stop and ascertaining that there is no train approaching, is negligence per se. *Louisville & N. Ry. & Lighting Co. v. Hynes*, 91 N. E. 962, 964, 47 Ind. App. 507.

**NEGLIGENT**

See, also, Negligence.

"A 'negligent act' is an inadvertent act." *Brown v. Boston & M. R. R.*, 64 Atl. 194, 201, 73 N. H. 568.

The phrase "act of negligence," as applied to the conduct of servants, includes any conduct whether evinced by movement of the organs of speech or some other physical movement, and hence where a conductor told a passenger to jump from a train as it was in

motion, when in fact it was not in motion, and the passenger became excited and jumped and was injured, the statement of the conductor amounted to an "act of negligence." *Staines v. Central R. Co. of New Jersey*, 61 Atl. 385, 72 N. J. Law, 268.

The terms "negligent delay" and "unreasonable delay" are used interchangeably and are of the same meaning. *Chicago, R. I. & P. Ry. Co. v. Gillett* (Tex.) 99 S. W. 712, 713.

If acts are such as an ordinarily prudent person would have committed under the same circumstances, they are not "negligent." *Louisville & N. R. Co. v. Massie's Adm'r*, 128 S. W. 330, 332, 138 Ky. 449.

An instruction that the terms "negligence," "negligent," and "negligently" import a want of such attention to the natural or probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concerns, being in the exact language of Rev. Codes, 1905, § 9522, is sufficient, especially where no more specific instruction was asked. *Zilke v. Johnson*, 132 N. W. 640, 644, 22 N. D. 75, Ann. Cas. 1913E, 1005.

**NEGLIGENT HOMICIDE**

In a prosecution for "negligent homicide," the court should instruct that, in the act of defendant of handling the pistol with which he shot deceased, there must be an apparent danger of causing the latter's death. *Saye v. State*, 99 S. W. 551, 552, 554, 50 Tex. Cr. R. 569.

Broadly speaking, in the case of homicide by shooting, in order to entitle the state to a conviction for "negligent homicide" the jury should be required to find first that the shooting was accidental or unintentional and that it was under circumstances from which the law would raise the imputation of negligence. *Joy v. State*, 123 S. W. 584, 589, 57 Tex. Cr. R. 93.

Under the express provisions of Pen. Code 1895, art. 686, there must be an apparent danger of causing the death of a person killed or another, in order to constitute the offense of "negligent homicide" denounced by article 684, providing that, if a person in the performance of a lawful act shall by negligence and carelessness cause the death of another, he shall be guilty of "negligent homicide in the first degree." *Gorden v. State* (Tex.) 90 S. W. 636, 637.

In view of Pen. Code 1895, arts. 683-689, 693, 694, to constitute "negligent homicide," the act must be unlawful and a misdemeanor, and must be accompanied by want of proper care and caution, and there must be apparent danger of causing the death of the person killed, and no apparent intention to kill. *Talbot v. State*, 125 S. W. 906, 907, 58 Tex. Cr. R. 324.

Defendant, keeper of a bagnio, had trouble with a man therein, and he went out, being immediately followed by deceased and his party. The testimony for the state was that the defendant then called for a pistol, aimed it towards the party, and fired, saying, "Run you, \* \* \* run," and that on her going inside, being asked if they ran, she said, "Yes." She and her witnesses testified that no shot was fired from the house. Held, that "negligent homicide" was not in the case, but manslaughter, of which she was convicted, was the lowest grade of homicide of which she could be found guilty. *Clifton v. State*, 84 S. W. 237, 239, 47 Tex. Cr. R. 472.

#### NEGLIGENT OPERATION

"Negligent" operation is, the failure to use the proper means, at hand in a proper and careful way as persons of ordinary prudence do under like conditions for their own safety. *Central Coal & Iron Co. v. Pearce* (Ky.) 80 S. W. 449, 450.

#### NEGLIGENT OR UNLAWFUL FIRE

Where a fire insurance policy contained an exception that the company would not be liable for loss caused by explosion of any kind unless fire ensued, and in that event for the damages by fire only, a loss occurring solely from an explosion, not by a preceding fire, or an explosion which occurred from the contact of escaping natural gas with a lighted match, are within the exceptions of the policy; the rule being that the ignition of the explosive substance must be caused by an actual combustion involuntarily or illegally started, which is called a negligent or unlawful fire, and not a harmless combustion such as a lighted match, burning gas jets, or a lighted cigar, which are called innocent fires. *Stephens v. Fire Ass'n of Philadelphia*, 123 S. W. 63, 66, 139 Mo. App. 369.

#### NEGLIGENTLY

The words "carelessly" and "negligently" are synonymous. *Southern Ry. Co. v. Horine*, 49 S. E. 285, 121 Ga. 386; *Mascot Coal Co. v. Garrett*, 47 South. 149, 151, 156 Ala. 290 (citing 1 Words and Phrases, p. 974).

An interrogatory as to whether defendant's locomotive was operated properly, the complaint alleging that it was carelessly operated, is improper as calling for a conclusion; the word "properly," as used, being the antonym of "negligently." *Southern Ry. Co. v. De Pauw* (Ind.) 90 N. E. 27, 29.

The word "negligently" means the failure to exercise ordinary care. *Toebbe v. City of Covington*, 141 S. W. 421, 423, 145 Ky. 763.

The term "negligently," when applied to the failure of a carrier of passengers to perform its duty to safely carry its passengers, means the failure to use the highest degree of care; and the "highest degree of care" means the utmost care exercised by prudent and skillful persons in the management and oper-

ation of trains. *Louisville & N. R. Co. v. Kemp's Adm'r*, 149 S. W. 835, 836, 149 Ky. 344.

Under an allegation in a petition against a railroad company for negligent treatment of plaintiff employé at the company's hospital, stating that the surgeon furnished "carelessly and negligently and unnecessarily" performed a specified operation, the words "carelessly and negligently" are not synonymous with "unnecessarily"; the latter term negating necessity for the operation, while the other terms refer to the manner of performing the operation. *Williams v. Union Pac. R. Co.* (Wyo.) 124 Pac. 505, 508.

An instruction that the terms "negligence," "negligent," and "negligently" import a want of such attention to the natural or probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concerns, being in the exact language of Rev. Codes 1905, § 9522, is sufficient, especially where no more specific instruction was asked. *Zilke v. Johnson*, 132 N. W. 640, 644, 22 N. D. 75, Ann. Cas. 1913E, 1005.

The clause of an instruction declaring plaintiff entitled to recover if defendant "negligently failed to stop said automobile soon enough to prevent frightening said horses" does not charge defendant with liability on the mere finding that the horses were frightened by the automobile, the word "negligently" referring to the duty to stop as defined in the instructions, requiring defendant to maintain a vigilant watch and to stop at the appearance of danger, and the instructions requiring, as a condition to recovery, that defendant's failure should have been the proximate cause of the injury. *Sapp v. Hunter*, 115 S. W. 463, 466, 134 Mo. App. 685.

#### NEGOTIABLE

See Not Negotiable.

The term "negotiable" means that an indorsee for value without notice becomes the owner of the paper unaffected by equities and defenses existing between the original parties. *Bank of Sampson v. Hatcher*, 66 S. E. 308, 810, 151 N. C. 359, 134 Am. St. Rep. 969.

#### NEGOTIABLE BILL OF EXCHANGE

An instrument directing the drawee to pay to the order of the payee named a specified sum to be deducted from money due the drawer on loans, and accepted by the drawee, is not a negotiable bill of exchange within Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 210, defining a bill of exchange as an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer, but is only an equitable assignment of moneys

due or to become due from the drawee to the drawer, and liability arises either if the proceeds of the moneys to be advanced on the loans come into the drawee's hands, or if through some act on his part performance of the contract out of which such funds might have otherwise arisen was prevented, and the payee may not recover on the instrument in the absence of evidence establishing either of such facts or an estoppel. *Tisdale Lumber Co. v. Piquet*, 137 N. Y. Supp. 1021, 1022, 153 App. Div. 266.

### NEGOTIABLE IN FORM

The term "negotiable in form," as applied to a participation receipt issued by the agent of a corporation to holders of its bonds, would not imply that the receipts would be negotiable in the sense of the law merchant so as to pass to an innocent holder for value. It would imply that such receipt would be transferable by the holder to a third party, who would acquire the rights of the original holder, no more and no less. *Cella v. Brown*, 144 Fed. 742, 757, 75 C. C. A. 608.

### NEGOTIABLE INSTRUMENT

Bona fide holder of, see Bona Fide Holder.

Fictitious name in, see Fictitious Name.  
Issue of negotiable instruments, see Issuance—Issue.

A "negotiable instrument" is a written promise or request for the payment of a sum certain in money to order or bearer. *Cornish v. Woolverton*, 81 Pac. 4, 7, 32 Mont. 456, 108 Am. St. Rep. 598 (citing Civ. Code, § 3991).

A provision for payment to order or bearer is in general necessary to create "negotiable paper." *Wettlaufer v. Baxter*, 125 S. W. 741, 743, 137 Ky. 362, 26 L. R. A. (N. S.) 804.

A "negotiable instrument" is one that is simple, certain, and unconditional, and is so defined by the law merchant. It has always been held, both at the common law and by the decisions of most states, that any instrument which does not come within this definition should not be construed to be a negotiable instrument. *Randolph v. Hudson*, 74 Pac. 946, 948, 12 Okl. 516.

An instrument in writing, signed by the drawer and containing an unconditional order to pay a sum certain in money at a fixed future date to the order of a specified person, and addressed to a drawee named therein, was a "negotiable instrument." *Bothwell v. Corum*, 123 S. W. 291, 292, 135 Ky. 766.

As defined by sections 4626 and 4627, Comp. Laws 1909, a "negotiable instrument" is a written promise or request for the payment of a certain sum of money to order or bearer, and must be made payable in money only, and without any condition not certain

of fulfillment. *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 122 Pac. 125, 126, 32 Okl. 277, 40 L. R. A. (N. S.) 177.

A writing providing that for value received the signers jointly and severally promise to pay another or order a certain sum at a certain bank with interest and without any relief from valuation of appraisement law, being duly signed and dated, was a negotiable instrument within Revisal 1905, § 2151, and the following sections. *Myers v. Petty*, 69 S. E. 417, 153 N. C. 462.

To constitute a "negotiable instrument," the fact of the maturity of the instrument at some time must be morally certain, and a written agreement to pay money upon the confirmation by Congress of a land grant was not negotiable. *Joseph v. Catron*, 81 Pac. 439, 442, 18 N. M. 202, 1 L. R. A. (N. S.) 1120.

A mere contract of employment specifying compensation for services is not a negotiable instrument within Act June 30, 1841 (Laws 1841, p. 527, c. 601, as extended by Gen. St. 1867, c. 230, § 21; Pub. St. 1901, c. 245, §§ 21, 22), specifying the negotiable paper subject to trustee process. *Steer v. Dow*, 71 Atl. 217, 218, 75 N. H. 95, 20 L. R. A. (N. S.) 263.

Checks issued to employes payable only in merchandise at the employer's store are not negotiable instruments payable to bearer, and possession of them by a third person raises no presumption that he is entitled to the rights of the employes, and, in the absence of evidence that the third person has acquired such right, he cannot recover. *Attoyac River Lumber Co. v. Payne*, 122 S. W. 278, 280, 57 Tex. Civ. App. 327.

An instrument acknowledging receipt of an automobile chassis to be delivered only on return of the receipt properly indorsed was not negotiable, a "negotiable instrument" being a written promise or request for the payment of money to order or to bearer, the word "indorsed" as there used not being as if used with reference to commercial paper. *Manny v. Wilson*, 122 N. Y. Supp. 16, 18, 137 App. Div. 140.

Under Negotiable Instruments Law (Consol. Laws 1909, c. 38) §§ 20, 27, providing that an instrument to be negotiable must be in writing, and signed by the maker and payable to order or to bearer, and providing that an instrument is payable to order when it is drawn to the order of a specified person, or to him or his order, an instrument whereby a person agrees to pay a specified sum at a designated place without mentioning any person to whom the payment shall be made, or without making the payment to bearer, is not a negotiable instrument. *Hilborn v. Pennsylvania Cement Co.*, 129 N. Y. Supp. 957, 960, 145 App. Div. 442.

Civ. Code 1895, § 3991, provides that a "negotiable instrument" is a written promise or request for the payment of a certain

sum of money to order or bearer. Section 3992 provides that a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment. Section 3996, as amended by Laws 1899, p. 124, provides that a negotiable instrument may contain a pledge of collateral security, with the authority to dispose thereof, also a provision for reasonable attorney fee, or both. Section 3997 provides that a negotiable instrument must not contain any other contract than such as is specified in this article. Laws 1903, p. 238, § 3, subd. 2, provides that an unqualified order or promise to pay is "unconditional" within the meaning of this act, though coupled with a statement of the transaction which gives rise to the instrument. Held, that a paper containing an order or contract for goods, and a note promising to pay for them, is not a negotiable instrument, where, if the note be detached, the order for goods would be destroyed. *State v. Mitton*, 96 Pac. 926, 927, 928, 37 Mont. 366, 127 Am. St. Rep. 732.

An instrument in the form of a letter, addressed to the general agent of an insurance company, acknowledging receipt of a life insurance policy, and requesting him "to place the said policy in force from this date, and I promise to pay to you or to your order the first annual premium amounting to \$256.55, as follows: Check inclosed, \$125.00. On Dec. 1, 1904, \$131.55. *Thomas R. Were*" —is a "negotiable instrument." *Equitable Trust Co. v. Were*, 132 N. Y. Supp. 351, 352, 74 Misc. Rep. 469.

Under Negotiable Instruments Law (Laws 1897, c. 612, § 20), which provides that an instrument, to be negotiable, must be in writing and signed by the maker or drawer, must contain an unconditional promise or order to pay a sum certain in money, must be payable on demand at a fixed or determinable future time, and must be payable to order or to bearer, and section 22, which declares that "an unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with \* \* \* a statement of the transaction which gives rise to the instruments," an instrument in the form of a letter, addressed to the general agent of an insurance company, dated April 19, 1905, which, after acknowledging receipt of a life insurance policy requested him "to place the said policy in force from this date, and I promise to pay you or your order the first annual premium, amounting to \$53.10, as follows:

Cash paid W. E. Watts.....	\$21.24
On July 10th, 1905.....	10.00
On Sept. 10th, 1905.....	10.00
On Nov. 10th, 1905.....	11.86

—————  
\$53.10

"Arthur N. Taylor,"

— is a "negotiable instrument"; the mere fact that its language shows that the con-

sideration for the promise was an indebtedness for an unpaid balance of a premium upon a policy of insurance upon defendant's life which had been delivered to him not operating to make it nonnegotiable, under the statute or the customs and usages of merchants. *Equitable Trust Co. of New York v. Taylor*, 131 N. Y. Supp. 475, 476, 146 App. Div. 424; *Same v. Newman*, 131 N. Y. Supp. 1113, 146 App. Div. 953.

A claim against a county for services is not a "negotiable instrument," and a purchaser thereof takes it subject to the defense of payment, or any other defense the county might have had against the assignor. *Perry County v. Eversole (Ky.)* 98 S. W. 1019, 1020.

#### **Bill of lading**

See Bill of Lading.

#### **Certificate of deposit**

See Certificate of Deposit.

#### **Certificate of stock**

See Certificate of Stock.

#### **Checks**

Checks are "negotiable instruments" both at common law and under the express provisions of Ky. St. 1903, § 478. *Boswell v. Citizens' Sav. Bank*, 96 S. W. 797, 799, 123 Ky. 485.

A postdated check is a "negotiable instrument," subject to the laws relative to negotiable paper. *Symonds v. Riley*, 74 N. E. 926, 188 Mass. 470.

#### **As chose in action**

See Chose in Action.

#### **County bonds**

A statute creating a county sanitary commission for Jefferson county, authorized the issuing of "negotiable bonds of Jefferson county," due at the time designated therein and requiring the levy of a special annual tax, the proceeds to be held exclusively as a sanitary fund and applied exclusively to the payment of interest on the bonds and for keeping in repair this county sanitary system; any surplus to be used for payment of the principal of the bond. Held, that a negotiable bond of Jefferson county was merely the general obligation of the county to pay at all events and out of any funds. *Birmingham Trust & Savings Co. v. Jefferson County*, 34 South. 398, 400, 137 Ala. 375.

#### **Municipal bonds**

Municipal bonds payable to bearer are negotiable instruments, and the rights and liabilities of the makers and holders of such of them as have come into existence since the passage of the Negotiable Instruments Act (3 Comp. St. 1910, p. 3732) are determinable by the provisions of that act. *Linbarger v. Board of Education of West New York*, 85 Atl. 235, 237, 83 N. J. Law, 446.



**Postal money order**

In the establishment and operation of the postal money order system, the government is not engaging in commercial transactions, but exercises a governmental power for the public benefit; and it follows that money orders are not negotiable instruments, subject to the defenses permitted to bona fide holders for value by the law merchant. The statute also imposes limitations and restrictions inconsistent with negotiability. *Bolognani v. United States*, 189 Fed. 335, 337, 111 C. C. A. 67, 36 L. R. A. (N. S.) 143.

**Promissory note**

See Promissory Note.

**Warrants**

Village warrants are not "negotiable instruments" in such a sense that defenses available against the original payee are cut off by transfer to a bona fide holder. *Field v. Village of Highland Park*, 104 N. W. 393, 394, 141 Mich. 69 (citing *Wall v. Monroe Co.*, 103 U. S. 77, 26 L. Ed. 430).

Under the Negotiable Instrument Act of Iowa (Acts 1902, c. 130, § 2; Code Supp. Iowa 1907, § 3060a2), which provides that the sum payable by an instrument shall be a sum certain within the meaning of the act, "although it is to be paid \* \* \* with exchange, whether at a fixed rate or at the current rate," an obligation of a county, negotiable in form and issued under a statute permitting it to be made negotiable, is not nonnegotiable because it is made payable "in New York or Chicago exchange." *Security Trust Co. of Rochester, N. Y., v. Des Moines County, Iowa*, 198 Fed. 331, 334.

**NEGOTIABLE NOTE**

A "negotiable promissory note" is an unconditional promise in writing to pay a sum certain in money to order or to bearer. *Wettlauffer v. Baxter*, 125 S. W. 741, 743, 137 Ky. 362, 26 L. R. A. (N. S.) 804 (citing *Negotiable Instrument Law* [Ky. St. § 3720b; *Russell St. § 1897*] §§ 1, 184).

Revisal N. C. 1905, § 2334, provides that a "negotiable promissory note," within the meaning of the chapter, is an unconditional promise in writing, made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable time a certain sum in money to order or to bearer. *J. W. Perry Co. v. Taylor Bros.*, 62 S. E. 423, 148 N. C. 362.

Any uncertainty in any of the essential elements of a note to make it negotiable destroys its negotiability as an inland bill of exchange. A note is not negotiable as an inland bill of exchange, unless on its face its date is certain, and contains an unconditional promise to pay a certain sum of money at a fixed time in a bank of the state. A note dated "Mount Ayr, Indiana," payable on a designated future date to a person

named "at the Bank of Mount Ayr," is a negotiable note within *Burns' Ann. St. 1908, § 9076*, declaring a note payable to order of bearer in a bank in the state is negotiable, since it will be presumed that the bank named in the note is a bank in the town named. *Halstead v. Woods*, 95 N. E. 429, 431, 48 Ind. App. 127.

A note payable to a corporation is a "negotiable instrument," capable, when indorsed in blank, of being transferred from hand to hand, and against which the maker's trustee in bankruptcy can avail himself of only such defenses as were available to the maker, not including collateral issues between the indorsers subsequent to delivery. In *re Schwarz*, 200 Fed. 309, 310.

A "negotiable promissory note" generally is made payable to a person or order and is for a comparatively short period of time, while a bond generally is made payable to bearer, and has a long time to run. Owing to the distinction between bonds and notes, county commissioners authorized to issue new bonds and exchange them for outstanding ones are not authorized to exchange them for promissory notes. *Commissioners of Muskingum County v. State*, 85 N. E. 562, 567, 75 Ohio St. 287.

By the law merchant, in order to be "negotiable" a note must be payable to the order of some person or to bearer. Under *Comp. St. Neb. 1901, § 3380*, which provides that "all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or assigns, shall be negotiable by indorsement thereon so as absolutely to transfer and vest the property thereof in each and every indorsee successively," as construed by the Supreme Court of the state, a written guaranty, signed by the payee on the back of a note payable to his order, constitutes an indorsement with an enlarged liability, and transfers the legal title free from equities between the maker and payee. *Leahy v. Haworth*, 141 Fed. 850, 856, 73 C. C. A. 84, 4 L. R. A. (N. S.) 657.

The essential requisites of a "negotiable note" by the law merchant "are a date and an unconditional promise to pay money in a certain sum, at a certain time, and at a certain place." The negotiability of a note is not destroyed by a recital of the consideration and that the title of the property for which it is given shall remain in the payee until it is paid, and, if not paid at maturity, then the property shall be sold and the proceeds applied to the debt, but a further stipulation that partial payments to any amount less than the principal shall be considered as rental for the property renders the amount payable uncertain and destroys its negotiability. *Gilpin v. People's Bank*, 90 N. E. 91, 92, 45 Ind. App. 52.

Under Negotiable Instrument Law, Laws 1897, p. 755, c. 612, § 320, providing that a "negotiable note" is an unconditional written promise by one to another, signed by the maker, to pay to order or bearer, and that where a note is drawn to the maker's order it is not complete till indorsed by him, the complaint in an action on a note payable to the maker must allege its indorsement by him. *Edelman v. Rams*, 109 N. Y. Supp. 816, 817, 58 Misc. Rep. 561.

A writing signed by a party, and stating that a certain amount is due a person mentioned therein without reciting that it was executed "for value received," is not a "negotiable note," for under Rev. St. 1899, § 457, an instrument to be a negotiable instrument must contain the quoted words. *Locher v. Kuechenmeister*, 98 S. W. 92, 97, 120 Mo. App. 701.

Under Negotiable Instrument Law, St. 1898, § 1675, subd. 2, as amended by Laws 1899, p. 684, c. 356, making a note negotiable if "the sum payable is a sum certain, \* \* \* although it is to be paid \* \* \* with costs of collection or an attorney's fee in case payment shall not be made at maturity," a note is negotiable which provides for an attorney's fee only on collection by attorney after dishonor. *First Nat. Bank of Shawano v. Miller*, 120 N. W. 820, 821, 139 Wis. 126, 131 Am. St. Rep. 1040.

A note, properly signed by the maker, containing an unconditional promise to pay a sum certain in money at a specified future time, to the order of a specified person, is a "negotiable instrument." *Mechanics' & Farmers' Sav. Bank v. Katterjohn*, 125 S. W. 1071, 1072, 137 Ky. 427, Ann. Cas. 1912A, 439.

A provision in an interest-bearing note that if the interest be not paid semiannually it shall become as principal and bear the same rate of interest does not make the amount of the note uncertain, so as to render it nonnegotiable, and such note is a "negotiable instrument." *Brown v. Vossen*, 87 S. W. 577, 578, 112 Mo. App. 676.

Under a statute defining a "negotiable instrument" and providing that it must be made payable in money only, without conditions not certain of fulfillment, and must not contain any other contract than that specified, a note providing that, if not paid when due, both principal and interest shall bear an increased rate of interest, is not negotiable. *Cornish v. Woolverton*, 81 Pac. 4, 6, 8, 32 Mont. 456, 108 Am. St. Rep. 598.

Under Acts 1899, c. 94, relating to "negotiable instruments" and providing that an instrument to be negotiable must be in writing, and must be payable to order or bearer, etc., a note not payable to either order or bearer is not a "negotiable instrument." *Gilley v. Harrell*, 101 S. W. 424, 425, 118 Tenn. 115.

A note given December 16, 1908, payable in installments three months apart, which contains a stipulation that, if it is paid within 15 days from date, a discount of 5 per cent. will be allowed, being uncertain as to the amount necessary to satisfy it at the time of its execution, is nonnegotiable. *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 122 Pac. 125, 126, 32 Okl. 277, 40 L. R. A. (N. S.) 177.

A note containing a stipulation whereby the sureties, guarantors, indorsers, and makers waive notice of the granting of any extension of time for payment, and waive the right of defense on the ground that extension has been made without notice to them or either of them, is not a "negotiable promissory note," within the meaning and intent of the negotiable instrument law of this state. *Union Stockyards Nat. Bank of South Omaha v. Bolan*, 93 Pac. 508, 510, 14 Idaho, 87, 125 Am. St. Rep. 146 (citing Sess. Laws 1903, p. 380).

Rem. & Bal. Code, § 3392, declares that an instrument, to be negotiable, must contain an unconditional promise to pay a sum certain in money, must be payable on demand or at a fixed or determinable future time, and must be payable to order or to bearer. Section 3394 declares that an unqualified order to pay is unconditional, though coupled with an indication of a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount or a statement of a particular transaction which gives rise to the instrument, but that an order or promise to pay only out of a particular fund is not unconditional. Held that, where a note was payable on demand, it was not rendered nonnegotiable because it contained a statement that it was given to take up the freight and rehandling of a certain car, the proceeds from resale of such car to apply on the note, there being nothing therein making payment dependent on the sufficiency of the proceeds of the resale of the material on the car or preventing a demand for full payment independent of such proceeds at any time; the test being whether the general credit of the maker accompanies the instrument. *First Nat. Bank of Snohomish v. Sullivan*, 119 Pac. 820, 821, 66 Wash. 375, Ann. Cas. 1913C, 930.

Under the statute providing that a "negotiable instrument" must be made payable in money only, and without any condition not certain of fulfillment, one of the essential qualities of a "negotiable promissory note" is absolute certainty as to the sum of money to be paid, a certainty which must appear on the face of the note. Therefore, if any part of the amount is dependent on any contingency, or where it is necessary to offer proof other than the instrument itself, the negotiable character of the instrument is destroyed. *Cotton v. John Deere Plow Co.*, 78 Pac. 821, 14 Okl. 605.

Under Negotiable Instruments Act 1897 (Acts 1897, p. 783, c. 74, § 1; Gen. St. c. 234, §§ 4171, 4176), an instrument, signed by the maker, and dated, promising to pay a stated amount at a certain bank one year after date, was a "negotiable promissory note." *St. Paul's Episcopal Church v. Fields*, 72 Atl. 145, 149, 81 Conn. 670.

A "negotiable promissory note" is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. *Baumelster v. Kuntz*, 42 South. 886, 887, 53 Fla. 340.

B. & C. Comp. §§ 299-302, provide in effect that all property not exempt from execution shall be subject to attachment, and that personal property capable of manual delivery, and not in possession of a third person, shall be attached by the sheriff taking it into his possession, and garnishment proceedings are provided to reach personal property not capable of manual delivery and in possession of a third person. Section 4586 defines a negotiable promissory note as an unconditional promise in writing engaging to pay on demand, or at a fixed or determinable time, a certain sum in money. Held, that a negotiable promissory note belonging to defendant, in his possession, and bearing no indorsements, was subject to attachment and sale under execution. *Fishburn v. Londershausen*, 92 Pac. 1060, 1061, 50 Or. 363, 14 L. R. A. (N. S.) 1234, 15 Ann. Cas. 975.

Court and Practice Act 1905, § 601, subd. 11, provides that debts secured by bills of exchange or negotiable promissory notes shall be exempt from attachment on any warrant of distress or any other writ, original, mesne, or judicial. Held, that an overdue promissory note is still negotiable within the statute, and hence the amount due thereon is exempt from process of foreign attachment. *Oakdale Mfg. Co. v. Clarke*, 69 Atl. 681, 29 R. I. 192.

A note reciting that the principal and interest are payable at a designated place, but if any part of the principal or interest is not paid at maturity it shall bear interest, and if the note is placed in the hands of an attorney for collection or suit is brought thereon an attorney's fee of 10 per cent., including interest, shall be taxed as costs or included in the judgment, is a "nonnegotiable instrument." *Dickerson v. Higgins*, 82 Pac. 649, 650, 15 Okl. 588.

## NEGOTIABLE PAPER

See Current Negotiable Paper.

## NEGOTIABILITY

The first requisite to the "negotiability" of a paper is that it should be a "note," and, as a "note" must be an obligation for the payment of a certain sum of money, a

provision that if collection is made through an attorney, or by legal process, the maker will pay all costs and expenses including 10 per cent. of the amount collected as attorney's fees, renders the note nonnegotiable. *Green v. Spires*, 50 S. E. 554, 555, 71 S. C. 107, 4 Ann. Cas. 261.

## NEGOTIATE

To "negotiate" means to treat with another or others; to arrange for or procure by negotiation; to put into circulation by transference and assignment; to conclude by bargain, treaty, or agreement; to transfer, to pass, to sell; or to procure by mutual intercourse and agreement with another. *Aurora State Bank v. Hayes-Eames Elevator Co.*, 129 N. W. 279, 280, 88 Neb. 187 (quoting 5 Words and Phrases, pp. 4771, 4772).

The word "negotiate," as used in a petition, which alleges that defendant authorized plaintiff to negotiate a sale of a lease for defendant, should be construed to mean conversation in arranging the terms of a contract. *Northrup v. Diggs*, 106 S. W. 1123, 1125, 128 Mo. App. 217.

"An instrument is 'negotiated' when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof." *Wettlaufer v. Baxter*, 125 S. W. 741, 743, 137 Ky. 362, 26 L. R. A. (N. S.) 804.

"Negotiated," in the usual technical and legal sense used by law-writers in speaking of commercial paper, means to transfer for a valuable consideration under rules of commercial law. The term is sometimes used as meaning to discuss or arrange for a sale or bargain, or the preliminaries of a business transaction; also, to sell or discount negotiable paper, or assign or transfer it by indorsement or delivery. The term as used in Rev. St. 1909, § 1275, which provides that before a school bond shall be negotiated it shall first be presented to the State Auditor for registry, means the selling and putting in circulation by delivery in consummation of the sale. *State ex rel. Carrollton School Dist. v. Gordon*, 133 S. W. 44, 47, 231 Mo. 547 (quoting and adopting definitions in Webster's New Unabridged Dict. and Black's Law Dict.).

Where an order authorized a city finance committee to "negotiate" notes for the city's benefit, the term "negotiate" was sufficient to include the entire transaction of asking for bids, or ascertaining the discount by private inquiry, and deciding upon the amounts, the rate, and the time on which the notes should be given. *Brown v. City of Newburyport*, 95 N. E. 504, 508, 209 Mass. 259, Ann. Cas. 1912B, 495.

Under the provisions of the negotiable instruments law (Comp. St. 1909, c. 41) that every person negotiating an instrument by

delivery warrants that it is genuine, and that he has good title, and article 3, § 30, of such law, providing that an instrument is negotiated when it is transferred to another so as to make the transferee the holder, the word "negotiating" means putting into circulation by assignment of a claim, by indorsement, to dispose of by sale, and in 5 Words and Phrases, p. 4771, it is said: "To 'negotiate' means to conclude by a bargain, treaty, or agreement, to transfer, to sell; and the power to negotiate a bill or note is said to be the power to indorse and deliver it to another, so that the right of action shall also pass, and negotiation means the act by which a bill of exchange or note is put into circulation by being passed by one of the original parties to another person." *National Bank of Commerce of Lincoln v. Farmers' & Merchants' Bank*, 128 N. W. 522, 523, 87 Neb. 841.

Where a broker's contract of authority authorized him to negotiate for the sale of the lands in question at \$5 an acre for 30 days, and the owners bound themselves to execute good conveyances to such purchaser as the brokers might produce on payment of the price, the term "negotiate" imported authority on the part of the brokers to make a binding sale agreement, and the contract did not therefore limit their authority to finding a purchaser ready and able to pay the price. *Combes v. Adams*, 63 S. E. 186, 188, 150 N. C. 64.

Rev. St. 1909, § 1275, provides that before any school bond "shall obtain validity or be negotiated, such bond shall first be presented to the State Auditor, who shall register the same," etc. Held, that the term "obtain validity" meant to become clothed with validity as a present and subsisting obligation, and the term "negotiated" meant that the bonds should have been sold and put in circulation by delivery in consummation of the sale; and officers of a school district, after bonds have been voted, may advertise for bids and accept a bid for bonds before they have been registered by the State Auditor; and hence such acts of the officers furnish no reason for refusing registration. *State ex rel. Carrollton School Dist. No. 1*, Tp. 53, R. 23, v. Gordon, 133 S. W. 44, 47, 231 Mo. 547.

According to the express terms of Negotiable Instruments Law, § 60 (Laws 1897, p. 728, c. 612), "an instrument is 'negotiated' when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery." "The popular meaning of 'negotiate' is the same." *Rogers v. Morton*, 95 N. Y. Supp. 49, 50, 46 Misc. Rep. 494.

Voting trust certificates of a corporation were turned over to a committee, which was

authorized "to negotiate in behalf of the owners for the sale of the pooled stock." Further authority was given to sell not less than two-thirds of such stock at such prices as might be approved in writing by the owners. The committee made an agreement for sale, the terms of which were not onerous, and the price was adequate. The agreement for sale may have been optional; but, if so, the purchasers proposed to execute it fully when the agreement was questioned by the stockholder. It was made by the committee in good faith. The sale was within the express authority of the committee. *Weitz v. Burrage*, 76 N. E. 508, 190 Mass. 287.

Acts Mo. 1905, pp. 247, 248, § 30, provides that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee holder thereof: if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery. Section 31: "The indorsement must be written on the instrument itself or upon a paper attached thereto." Under this statute a negotiable note payable to order will not pass by mere delivery. *Sublette v. Brewington*, 122 S. W. 1150, 139 Mo. App. 410.

## NEGOTIATION

"Negotiation" means traffic or conclusion by bargain or agreement. *Everson v. General Accident Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 88 N. E. 658, 660, 202 Mass. 169.

"Negotiations" is a very broad term. It embraces everything from the first approach of the one who desires to purchase to the one from whom the purchase is to be made to the final consummation of the contract of purchase. No interest either legal or equitable, in the subject-matter of the negotiations, is acquired by merely beginning them, and no right is vested in the negotiator until the negotiations reach a stage where the person desiring to purchase could compel a conveyance of the property from the owner, and until such state is reached the purchaser has no right which can be the subject of bargain. *Allen & Holmes v. Powell*, 54 S. E. 137, 138, 125 Ga. 438.

"Negotiation" means the act by which a bill or note is put into circulation by being passed by one of the original parties to another; and presentation of the check for payment is not a negotiation of the check within the meaning of the negotiable instruments law. *Aurora State Bank v. Hayes-Eames Elevator Co.*, 129 N. W. 279, 280, 88 Neb. 187.

"Negotiation" means the act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person." Payment by a bank of a check drawn upon it

does not constitute the bank a holder within the meaning of Negotiable Instruments Law, providing that an instrument is negotiated when it is transferred, so as to constitute the transferee a holder thereof. *National Bank of Commerce of Lincoln v. Farmers' & Merchants' Bank*, 128 N. W. 522, 523, 87 Neb. 841 (quoting and adopting the definition in 5 Words and Phrases, p. 4771).

To make one a holder in due course of a negotiable note payable to order, it must have been indorsed to him; *Revisal*, 1905, § 2178, defining negotiation of such a note as being by the indorsement of the holder and completed by delivery, and, without proof of indorsement, the note is held subject to any valid defense which the maker has, including that of fraud. *Woods v. Finley*, 69 S. E. 502, 503, 153 N. C. 497.

In an admission that a note sued on was indorsed by the several defendants "on or before negotiation," the words "on or before" excluded "after," and the word "negotiation" signified delivery, that term being generally descriptive of all those acts by which a note or bill is put into circulation or passed in its circulation, including delivery in issue, transfer by delivery, or transfer by indorsement. *Edward Knapp & Co. v. Tidewater Coal Co.*, 81 Atl. 1063, 1066, 85 Conn. 147.

In an affidavit for continuance because of inability to obtain counsel to prepare the case and to represent him on the trial, reciting that the negotiations for the employment of counsel had been commenced but never consummated, the word "negotiations" has a well-defined professional meaning. *Carpenter v. Commonwealth (Ky.)* 92 S. W. 552.

## NEGRO

As citizen, see Citizen.

See, also, Colored Person.

A "negro" is defined as a "black man, especially one of the race who inhabit tropical Africa, and who are distinguished by crisped or curly hair, flat noses and protruding lips," and the word also includes their descendants in America and elsewhere, but the word is also loosely applied to other dark and black-skinned races and to mixed breeds. The word "negro" of itself, unqualified, does not necessarily include within its meaning persons possessed of only an admixture of negro blood, notably those whose admixture is so slight that even an expert cannot be positive. An octoroon is not a "person of the negro or black race" within Act No. 87 of 1908, § 1, making concubinage between a person of the Caucasian or white race and a person of the negro or black race a felony. *State v. Treadaway*, 52 South. 500, 511, 126 La. 300, 139 Am. St. Rep. 514, 20 Ann. Cas. 1297.

## NEGRO CHILD

Child as including, see Child—Children (In Statutes).

## NEIGHBORHOOD

See Same General Neighborhood.

The phrase "general locality" and the word "neighborhood" imply a considerable territory, and cannot be used in a legal sense as describing a circle on a street of a diameter of about six feet. *Moriarty v. City of New York*, 116 N. Y. Supp. 323, 324, 132 App. Div. 10.

Etymologically and by common understanding 'in the vicinity' means in the neighborhood, and 'neighborhood,' as applied to place, signifies nearness. 'In the vicinity' does not even mean adjoining to or abutting on, but merely close by, or neighboring country." *Jones v. Rogers*, 88 South. 742, 745, 85 Miss. 802.

Where the value of land is of necessity to be deduced from a consideration of the price of properties in the neighborhood, with reference to comparative locations, improvements, and other incidents, the court cannot say that a "neighborhood" has reference only to adjacent property, or attempt to fix a standard of measurement, and say as a matter of law that the similar property concerning which inquiry may be made is such only as may be found within a given number of feet, yards, or blocks of the property condemned; that being a matter as to which the trial court is vested with discretion to draw the line in each case as shall seem just under all the circumstances developed by the testimony, and that, unless abuse of such discretion is shown, its ruling will not be held reversible error. *Yontzy v. City of Cedar Rapids*, 129 N. W. 351, 150 Iowa, 53.

The market value of a particular piece of realty sought to be condemned is to be measured by the price usually given for such property in that neighborhood, making due allowance for differences of positions, soil, and improvements, and in large cities the word "neighborhood" is a relative one, so that the field which a witness may take into consideration in forming an opinion of the selling price of land in the vicinity of certain property sought to be taken should be reasonably adjacent thereto and of the same general character as the immediate locality in which the property sought to be taken is situated. *Rea v. Pittsburg & C. R. Co.*, 78 Atl. 73, 79, 229 Pa. 106, 140 Am. St. Rep. 721.

Act approved February 23, 1907 (St. 1907, p. 16, c. 25), provides that whenever 50 or a majority of the owners, who are also the owners of a majority of the lands of any farming or other community or neighborhood within this state, which lands lie in one body, and are liable to overflow or damage from the waters of any unnavigable stream,

and may be protected by the same system of works, desire to provide for the protection of such lands, they may petition the board of supervisors in the county in which the lands of the community or neighborhood and within the proposed district or the greater portion thereof are situated for the organization of such protection district. Held, that these provisions do not limit the area of any district to a territory which might afterwards be determined by a court to be a single community or neighborhood, or give the court power to declare the district organization invalid if it should find that the boundaries included two or more such communities or neighborhoods, as the term "community" refers rather to the people who reside in a given locality, in more or less proximity, than to the territory which includes them, and the term "neighborhood" describes a territory of indefinite size and without fixed limits, and therefore a district may be organized which embraces two or more communities or neighborhoods, provided the lands lie in one body, and are liable to damage from the same stream and may be protected therefrom by the same system of works. *Keech v. Joplin*, 106 Pac. 222, 227, 157 Cal. 1.

**As range of acquaintanceship or business**

The term "neighborhood," in the rule that a person called to impeach the reputation of a witness must reside in the neighborhood of the residence of the witness, comprises the natural radius of repute, and includes the territory wherein one resides, moves, circulates, does business, and has intercourse with his fellows; and it is not confined to the same village, town, or city, and a person residing in a town less than 14 miles distant from a town in the same county in which a witness resides may testify as to the reputation of the witness, especially where he does business in the latter town. *People v. Loris*, 115 N. Y. Supp. 236, 237, 238, 131 App. Div. 127 (citing *Greenl. on Ev.* [15th Ed.] 451; *State v. Henderson*, 1 S. E. 225, 29 W. Va. 147; *Peters v. Bourneau*, 22 Ill. App. 177; *Chess v. Chess* [Pa.] 1 Pen. & W. 32, 21 Am. Dec. 450; *Hadjo v. Gooden*, 13 Ala. 718; *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *State v. McLaughlin*, 50 S. W. 315, 149 Mo. 19; *Wallis v. White*, 15 N. W. 767, 58 Wis. 26; *Burr-Jones*, *Ev.* [2d Ed.] 1097; *Best*, *Ev.* [International Ed.] p. 255).

The general rule is that, to impeach a witness by proof of bad character, the predicate is a knowledge of his character in the community or neighborhood in which he resides, the terms "community" and "neighborhood" meaning in a general way where the witness is well known and has established a reputation, and the inquiry is not necessarily confined to his domicile; and hence, where it appeared that, though a witness resided in Baltimore, he had an estab-

lished business in Mobile, and spent much of his time there, evidence as to a knowledge of his character in Mobile was admissible as a predicate for impeaching testimony. *Richard P. Baer & Co. v. Mobile Cooperage & Box Mfg. Co.*, 49 South. 92, 93, 96, 159 Ala. 491.

**NEIGHBORHOOD ROAD**

As highway, see Highway.

**NEIGHBORING**

The word "neighboring," in Act March 14, 1879 (P. L. p. 316), is sufficiently extensive in its meaning to make the act applicable to municipalities in the same county to which gas may conveniently be conveyed from a central plant. The word "neighboring" is of indefinite meaning, and it has been construed in some cases as possessing a narrow signification, while in others it is given a broad construction. Its meaning must depend upon the circumstances and the subject-matter with which we have to deal. With the improvement in means of communication, municipalities which were remote became in a fair sense "neighboring" municipalities. When used in respect to a commodity which may be distributed as readily and as advantageously as gas, the term cannot be limited to adjoining municipalities. It may at least be held to be broad enough to include municipalities within the same county to which gas may conveniently be conveyed from a central plant. *Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co.*, 67 Atl. 1005, 1006, 75 N. J. Law, 410 (distinguishing *Madison v. Morristown Gaslight Co.*, 54 Atl. 439, 65 N. J. Eq. 356).

**NEIGHBORS**

Louisiana Rev. Civ. Code, art. 670, provides that every one is bound to keep his buildings in repair so that neither all nor any part of the material composing them may injure the "neighbors or passengers" under penalty of all losses and damages that may result from the owner's negligence in such respect. Held applicable only to persons "outside" the building, such as neighbors or passers-by injured by the fall of the building or some part thereof, and does not apply to persons lawfully in the building as guests, tenants, etc. *Frank v. Suthon*, 159 Fed. 174, 176.

**NEITHER PARTY, ETC.**

The entry of "Neither party, no further action, same cause," means that by agreement neither party further appears in court in that suit, and it also involves a stipulation that the plaintiff shall maintain no further action for the same cause. The plaintiff's cause of action is extinguished. *Gerdron v. Hovey*, 56 Atl. 583, 98 Me. 139.

## NEPHEW

The word "nephew" is defined as "the son of a brother, or sister; or of the brother-in-law or a sister-in-law"; "the son of a brother or sister. But in a bequest would not include, without special mention, nephews and nieces by marriage"; "in English law the son and niece, the daughter, of a brother or sister; and great-nephews or great-nieces are not embraced by the terms, and, as a gift is naturally to blood relatives, a nephew or niece by marriage—that is, the nephew or niece of the testator's husband or wife—is *prima facie* excluded, as also would be the wives or widows of a blood nephew." *Boyd v. Perkins*, 118 S. W. 95, 96, 130 Ky. 77 (citing Webster's Dict.; Bouv. Law Dict.; Schouler, Wills [2d Ed.] § 536).

**As brother**

See Brother.

**Grandnephew**

Testator gave a legacy to his niece Kate, daughter of Dr. H. W., and to Dr. H. W. a specified sum for himself and his other children, and he gave legacies to any niece or nephew whom he had omitted, excepting the children of Dr. H. W., for whom he had made provision. Testator was a widower, who had never had any children, and left surviving him a number of nieces and nephews, and grandnieces and grandnephews, descendants of sisters who died before the execution of the will. There were two Drs. H. W., father and son; the father being the father of the niece Kate. Testator had a niece Mrs. P., who was omitted from the will, and the legacy to her was on her death paid to her children. Held, that the words "niece or nephew" did not embrace grandnieces and grandnephews. *White v. Old*, 75 S. E. 182, 184, 113 Va. 709.

The testator was a widower, and left no children or descendants. He left surviving 1 brother, and 16 nephews and nieces, and several grandnephews and grandnieces. Many of the nephews and nieces had married and had children, and some had died leaving children. The will contained bequests in favor of all his nephews and nieces with one exception. It also contained legacies to a number of grandnephews and grandnieces, children of deceased nephews and nieces, and, after making provisions for the surviving brother and various other persons, provided that all the rest of the property not thereinbefore disposed of should be given to his "nephews and nieces," to be divided among them in the proportion which the previous gifts made to them bore to each other. Held, that the words "nephews and nieces" contained in the residuary clause included grandnephews and grandnieces. *Leask v. Richards*, 101 N. Y. Supp. 652, 116 App. Div. 274; *Leask v. Hoagland*, 80 N. E. 919, 920, 188 N. Y. 291.

## NERVE FOOD

On motion for a preliminary injunction in a suit by the manufacturer of a secret preparation alleged in the bill to be a beverage and "nerve food," or compound for the nervous system, and a restorative agent of value in restoring lost nervous energy, and also of value as a stomachic, to restrain infringement and unfair competition, on which affidavits were presented by defendants to the effect that the expression "nerve food" as applied to a compound of such character was a misrepresentation, not only being scientifically a meaningless phrase, but as importing the possession of nerve nourishing or stimulating properties which it could not possess, and complainants in reply produced affidavits that its actual formula had been submitted to physicians who testified that it was properly described as a nerve food, the weight of the evidence showed that complainants had a reasonable basis for believing their representations made to the public that it was a "nerve food." *Moxie Nerve Food Co. of New England v. Modox Co.*, 158 Fed. 487, 488.

## NERVOUS

The word "nervous" is a generic term having many different meanings, and evidence that ever since the accident plaintiff had been "nervous," without any particular indication as to what was meant by that term, where counsel disclaimed an intention to show injury to the nervous system as an item of damage, simply means that the plaintiff was excitable and easily agitated or annoyed as the result of her physical injury, not that she was suffering from a nervous disease caused by the accident. *Adcock v. Oregon R., etc., Co.*, 77 Pac. 78, 79, 45 Or. 173.

## NET

See Gill Net; Trammel Net; Wing Nets.

Use of the word "net" indicates that something is being deducted. *Georgia R. & Banking Co. v. Wright*, 132 Fed. 912, 914.

Where furs were sold "net," that expression means that the seller was required to defray the cost of delivery. *Fleet v. Hirtz*, 66 N. E. 858, 861, 201 Ill. 594, 94 Am. St. Rep. 192.

"Net" means free from charges or deductions obtained after deducting all expenses; the words "net to us," in a telegram sent by plaintiff offering to sell butter to defendant for 17 cents per pound "net to us," means that the price is to be 17 cents, free from all charges and deductions. *Floral Creamery Co. v. Dillon*, 75 Atl. 82, 85, 83 Conn. 65.

Where one states to a broker that he will sell land for a certain sum "net" to him, the broker on procuring a purchaser is entitled to no commission unless the sum receiv-

ed exceeds the specified net price; the word "net" meaning that which remains after deducting all charges and outlay. *Wolverton v. Tuttle*, 94 Pac. 961, 963, 51 Or. 501.

Testator gave personal property in trust, the income of which was to be paid to certain legatees during their lives, and devised the remaining four-fifths of the estate in trust to pay a certain part of the "net rents, interest, or income" to each of his three nieces, and upon their death payment of the "rents, interests, or income" of their respective shares was to be paid over to their respective children during their lives. Two of the three nieces, to whom the bulk of the estate was given, were made executrices and trustees, with a provision for their successors, but without any express provision for their compensation. Held, that the word "net," used to qualify the "rents, interest, or income" payable to the residuary legatees, if not inadvertent, did not show any intention of the testator to impose upon their interests the burden of bearing all the expenses of the trust. *Leach v. Cowan*, 140 S. W. 1070, 1075, 125 Tenn. 182, Ann. Cas. 1913C, 188.

Where a contract employing plaintiffs to sell defendants' property provided that it must be sold at a price to net the owners not less than \$125 per acre, and that the commission must be added to that amount, the contract did not authorize the brokers to retain as their commission all of the price above \$125 per acre obtained, but only entitled them to a reasonable compensation. *Allen v. J. A. Clopton Realty Co. (Tex.)* 135 S. W. 242, 248.

#### NET ASSETS

Under a statute providing that "net assets" means the funds of an insurance company available for the payment of its obligations in the commonwealth after deducting therefrom losses and "claims for losses," an insurance company whose assets exceed by about \$80,000 its liabilities, not including claims against it aggregating \$300,000, based on policy holders disputing the validity of settlements for losses, is insolvent, and the insurance commissioner may apply for a receiver and enjoin the company from carrying on further business as authorized by the statute; the phrase "claims for losses" including all pending claims, whether finally adjudged valid or invalid. *Cutting v. American Ins. Co.*, 83 N. E. 396, 397, 197 Mass. 131.

#### NET CASH

"Net cash" as between buyer and seller means that the buyer shall pay the "net price" to seller. Plaintiff procured a contract authorizing him to sell defendant's timber land on a 5 per cent. commission; and, having found a purchaser, presented to defendant for his signature an option giving the grantee the right to purchase within 60 days. Defendant, before signing the option, but

without any conversation with plaintiff, changed the same so as to read that the price was "net cash" to him. Held, that such alteration meant that the price was net cash to defendant as between himself and the purchaser and had not reference to defendant's contract with plaintiff for commissions. *Love v. Scatterd*, 146 Fed. 1, 8, 77 C. C. A. 1.

#### NET CREDITS

As credits, see Credits.

#### NET EARNINGS

The "net earnings rule" is a method of determining the value of a special franchise by ascertaining its earning capacity; the franchises being assumed to be worth that sum which, if placed at interest at a determined rate, will produce the amount which the franchise earns. In determining the taxable value of a waterworks franchise, losses due to functional as well as physical depreciation should be charged as an expense of operation. Earnings in an adjoining borough from the sale of about one-half of the company's output are properly included. A gross sum, covering uncollectible accounts, less than 1 per cent. of the gross earnings, was properly deducted. An item for farming expenses should not be deducted as a cost of operation. The amount of land necessary for proper operation and for preservation of the water supply is largely a question for determination by the directors; but land purchased to prevent its acquisition by someone else should not be included. One of the factors of the net earnings rule governing the taxable value of a waterworks franchise is the amount of capital invested in land. The net earnings rule for determining the value of a special franchise requires an ascertainment of the gross earnings, the gross operating expenses deductible therefrom, as well as a fair and reasonable return on the portion of the capital invested in tangible property, and the balance, if any, capitalized at a fair rate, represents the value of the special franchise. *People ex rel. Queens County Water Co. v. Woodbury*, 128 N. Y. Supp. 522, 523, 143 App. Div. 618.

*Burns' Ann. St.* 1901, §§ 8496-8499, 8503, 8538, 8555, requiring railroads to make statements giving the amount of the capital stock, annual gross and net earnings, etc., when considered in the light of the history of legislation on the subject of railroad taxation and the construction placed on such legislation, require the ascertainment of the value of railroad property for taxation, which valuation includes all the property of the railroad, except that specifically exempt, and the state board of tax commissioners in assessing the property of a railroad must take into consideration its money on hand or on deposit, and the money on hand cannot be retaxed as money; the word "earnings" signifying money, and "net earnings" the sum received in excess of operating expenses.



Clark v. Vandalia R. Co., 86 N. E. 851, 854, 172 Ind. 409.

Dividends can lawfully be declared and distributed only out of the actual, legitimate net earnings of the corporation; and the difference between the present value of all the corporate assets and the amount of all losses, expenses, and liabilities, including the capital stock, constitutes "net earnings" for the purpose of dividends. It follows that an insolvent corporation cannot have net earnings out of which dividends can be lawfully declared and paid. Mangham v. State, 75 S. E. 508, 510, 11 Ga. App. 440.

## NET INCOME

### Of estate

An executrix, under the authority of a will and the contract constituting a partnership, carried on the business of the decedent and earned a profit. The will directed the executors to sell the residuum of the estate and receive the profits, and also the profits of the partnership business when wound up, and the "net income" thereof, and also provided for its distribution among certain trusts. Held, that the profits of the partnership made by the executrix were a part of the fund to be distributed. In re Marx's Estate, 99 N. Y. Supp. 384, 386, 49 Misc. Rep. 280.

Testator devised to his executors in trust for the benefit of his widow for life \$200,000, the "dividends, rents and profits" thereof to go to and belong to the widow, to her sole and separate use during her natural life, with reversion after her death to the uses and appointments recited in the will. Held, that the words "dividends, rents, and profits," as so used, were synonymous with "net income," and hence the accretions to the fund during the widow's life, determined on the basis of the market value of the securities in which the fund was invested, passed to the remaindermen on the termination of the life estate, and not to the estate of the widow. Boardman v. Mansfield, 66 Atl. 169, 170, 79 Conn. 634, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178.

Where a will created a trust, giving the trustee authority "to manage, invest, alter the investments, and reinvest the assets \* \* \* in trust as he may deem best, and the 'net income' of said estate" to be applied to the use and benefit of the trustee for life, with remainder over, and the trustee invested funds of the estate in real estate which was nonproductive, the trustee was entitled to any increase in the value of the real estate after the investment. Billings v. Warren, 74 N. E. 1060-1063, 216 Ill. 281.

Where a testator gave his wife and unmarried daughters the use of his residence, together with the total income of his estate after deducting taxes, the total income in view of the deduction of taxes meant the

"gross income," which is the entire amount that the use of the principal yields, as contradistinguished from "net income," which means what is left of gross income after all expenses on behalf of up-keep are deducted. Schmidt v. Schmidt, 84 Atl. 629, 631, 80 N. J. Eq. 364.

### Of railroad

The net income of a railroad for purposes of taxation is the difference between the gross receipts and expenses as they would have been under reasonably economical and prudent management. State v. Nevada Cent. R. Co., 81 Pac. 99, 102, 28 Nev. 186, 113 Am. St. Rep. 834.

Laws 1867, p. 1275, c. 489, authorized a corporation to construct an elevated railroad in New York City, and section 9 provided the corporation should pay 5 per cent. of its "net income" from passenger traffic upon Manhattan Island to the city in such manner as the Legislature might thereafter direct as compensation for use of the streets. Laws 1868, p. 2034, c. 855, § 2, provided that the company pay quarterly to the city comptroller 5 per cent. of its net income for the improvement of the streets through which the road was constructed. Sections 2 and 3 also provided that such payments should be the legal compensation in full for the use and occupancy of the streets, and the claims of the city should constitute a prior lien on the railway. Held, that it was the legislative intention that the compensation to the city be actual and substantial, and by "net income" was meant the gross passenger traffic receipts, less the general expenses of operating the road, and the amounts paid for general taxes, the rental damages to abutting owners for trespass upon their interests in the streets, and interest on the corporation's mortgage bonds are not to be deducted in determining the "net income"; they being general charges against the corporation, and not against the passenger traffic. City of New York v. Manhattan Ry. Co., 104 N. Y. Supp. 609, 119 App. Div. 240; Id., 84 N. E. 745, 746, 192 N. Y. 90.

## NET PERSONAL ESTATE

Under Sanb. & B. Ann. St. § 2172, declaring that the widow, on filing her election to take the provisions made for her by law, instead of the provisions made by her husband's will, is entitled to the same share of his personal estate as if he had died intestate, provided that such share shall not exceed a third of his "net personal estate," there is deducted from the personal estate, before her share is taken out, not only the expenses of administering an intestate estate, but the additional ones of probating and carrying out the provisions of the will. Ford v. Ford, 59 N. W. 464, 466, 88 Wis. 122.

## NET PROCEEDS

As proceeds, see Proceeds.  
Earnings as, see Earnings.

Where the owner of a mining property gave an option to purchase, with privilege of prospecting and mining ore, and it was agreed that all ore found which might be susceptible of milling should be sold by such owner, and the net proceeds applied on the purchase price, the "net proceeds" in such case is synonymous with "net profits." *Hall v. Abraham*, 75 Pac. 882, 884, 44 Or. 477.

Where defendant gave D. a permit to cut logs upon his land for an agreed price per thousand to be holden to pay stumpage, and all supplies furnished by the former, and D. employed plaintiff to cut under the permit, and, after the latter had labored two months, the defendant gave him a memorandum in writing, agreeing to pay him his wages out of the net proceeds of the lumber when sold, and, where the logs sold for more than enough to pay the stumpage and not enough to pay for both stumpage and supplies, the term "net proceeds" in the memorandum meant the proceeds of the lumber after deducting pay for the stumpage, but without any deduction having been made for the supplies. *Warren v. Thatcher*, 12 Me. 351, 352.

Where a will providing that, "after the payment of debts and legacies above named, I direct that a division of the 'net proceeds' into parts, one for each of my children, as follows," etc., and the question was whether the will manifested an intention to have the real estate sold and the proceeds divided, it was held that the term "net proceeds," as used therein, referred to the money which would come from a sale of the property. *May v. Brewster*, 73 N. E. 546, 547, 187 Mass. 524.

A contract between an inventor and a manufacturer, which recites that the inventor has invented an improvement in kilns for drying lumber, for which an application for a patent has been filed, that the manufacturer is desirous of acquiring an undivided half interest in the invention and patent to be obtained therefor, to be issued to the parties as owners, and which declares that the inventor sells to the manufacturer an undivided half interest in the invention, and gives to the manufacturer the right, free of royalty, to manufacture and use kilns at plants controlled by him, that the manufacturer may license others to build for their own use kilns, or may himself build and sell to others, in either case charging "such royalty, license fee, or other consideration" as to him may seem best, and shall, immediately on the receipt thereof, pay to the inventor one-half of the net proceeds, and that the manufacturer shall use his best endeavors to introduce the kilns into the market and sell licenses to others to use the same, and to keep accounts of licenses granted and the proceeds thereof, creates a joint adventure, and the inventor is entitled to an accounting with the manufacturer to determine the amount of net profits, after deducting losses on sales and

expenses incurred, including attorney's fees and costs in making collections; the term "net proceeds" being equivalent to "net profits." *Williams v. Walsh Mfg. Co.*, 135 N. W. 954, 957, 169 Mich. 676. (Per Moore, C. J., and McAlvay, Steere, and Brooke, JJ.; contra, Ostrander, Blair, Stone, and Bird, JJ).

## NET PROFITS

See First Net Profits.

"Net profits" have been defined as the gain that accrues on the investment, after deducting the losses and expenses of the business. *City of Erie v. Erie Gas & Mineral Co.*, 97 Pac. 468, 469, 78 Kan. 348.

"Net profits" are the clear gain of a venture, after deducting from the net value of all assets on hand the capital invested and all outstanding liabilities. *Thurston v. Hamblin*, 85 N. E. 82, 83, 199 Mass. 151.

The "net profits" of a business, a percentage of which an employé shall receive for his services, is what remains after all legitimate expenses thereof have been paid. *Arthur Jordan Co. v. Caylor*, 76 N. E. 419, 421, 36 Ind. App. 640.

Net profits may be construed to mean what is left after deducting from the selling price the actual cost price, together with all expenses incidental to the procurement of the property. *Cooke v. Cain*, 77 Pac. 682-684, 35 Wash. 353.

Under exceptional circumstances showing an intended distinction there may be a difference in the meaning of the term "net profits" and "profits," but usually they mean the same thing. *Thomas v. Columbia Phonograph Co.*, 129 N. W. 522, 523, 144 Wis. 470.

"Net profits" is defined as what remains as the clear gain in a business after deducting the capital invested, the expenses incurred, and the losses sustained. *Crawford v. Calkins*, 136 N. W. 369, 370, 170 Mich. 587; *Di Palma v. Weinman*, 121 Pac. 38, 40, 16 N. M. 302.

"Net profits" of a corporation are the net gains which have been actually realized and which could be quickly distributed without loss by sale of assets. *Stevens v. United States Steel Corp.*, 59 Atl. 905, 906, 912, 68 N. J. Eq. 373 (citing and adopting definition in *Park v. Grant Locomotive Works*, 3 Atl. 162, 40 N. J. Eq. 114).

In determining whether the books of a malting company showed a "net profit," so as to justify the declaring of a dividend, an increase of 15 per cent. in the bulk of barley which takes place when it is manufactured into malt was properly inventoried as having the value of barley, it appearing that this was the trade custom. Estimated profits to be made by a manufacturing company on orders for the future delivery of goods to be made from raw material not yet purchased are not "net profits" within Stock Corpora-

tion Law, § 23 (Laws 1892, p. 1829, c. 688), and New Jersey General Corporation Law, § 30 (P. L. p. 286), both declaring that dividends shall be made only from net profits. *Hutchinson v. Curtiss*, 92 N. Y. Supp. 70, 72, 45 Misc. Rep. 484.

In ascertaining the "net profit" derived from carrying on any ordinary manufacturing business, the gross profit to be derived therefrom is to be divided, first, into a fair rental for the factory, based on the cost of its reproduction; second, interest on the working capital; third, cost of operating and administration; and the balance, if any, is "net profit." See *v. Heppenheimer*, 61 Atl. 843, 847, 69 N. J. Eq. 36.

The term "net profits," as used in P. L. 1904, p. 275, providing that a corporation shall not pay dividends except from its surplus or from the net profits arising from its business, is not synonymous with "surplus," nor used in the sense of an excess of the value of its present assets over the par value of its outstanding capital stock, and "it does not necessarily follow that net profits mean the difference between net earnings and what may be called operating expenses. Such profits may be called annual profits, and it may be that by net profits the Legislature meant the net profits upon the whole of the company's business from its organization. If either of these meanings is adopted, the declaration of the present dividend is justified. There was an excess of gross earnings over the operating expenses of the current year, and the value of the present assets exceeded the value of the actual assets with which the company began business." *Goodnow v. American Writing Paper Co.*, 69 Atl. 1014-1016, 73 N. J. Eq. 692.

A contract between a corporation engaged in the manufacture of wire cloth, and another for the establishment of the new business of manufacturing and selling wire rope, provided that the corporation should furnish capital to the extent of \$50,000, if the sales did not exceed \$100,000 a year, represented by proper buildings with power and machinery, and by the amount of capital necessary to purchase or provide the wire necessary for the production of rope to the amount named per annum. The contract further provided that the parties were each to receive one-half of the net profits, and, in ascertaining net profits, taxes on the capital employed and other charges as usual were to be made. *Held*, that charges for the depreciation of buildings and machinery, for power furnished by the corporation to the wire department, for repairs, for insurance, and for loss of finished product destroyed while in a warehouse hired, maintained, and managed by the wire rope department, were proper charges against the gross earnings for the purpose of determining the net profits.

*Stone v. Wright Wire Co.*, 85 N. E. 471, 472, 473, 199 Mass. 306.

Where the owner of a mining lease sold two-thirds interest therein to be paid for out of the first "net profits" out of the mine, such profits comprised the first excess of current receipts for ore taken out of the ground over and above the current expenses for producing the ore and the necessary charges for repairs and betterments, and the purchasers were not to be reimbursed for moneys expended in the development of the mine, sinking of shaft, erection of mill, purchase of machinery, etc., which constituted capital before an account of the first "net profits" was estimated. *Crocker v. Barteau*, 110 S. W. 1062, 1066, 212 Mo. 359.

"Net profits," participation in which constitutes a person a partner, contemplates a sharing of the loss as well as the profits, while gross profits mean the aggregate sales made after deducting cost, import duties, and carriage, and participation therein would not raise a presumption of partnership. *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462, 469, 470, 66 C. C. A. 336.

The term "net profits," in a contract employing one to take charge of departments in a mercantile establishment for an annual salary and a per cent. of the net profits of the departments in his charge, means the profits realized in the departments, without deduction for interest on the capital invested therein. *Daintrey v. Evans*, 132 N. Y. Supp. 126, 128, 148 App. Div. 275.

The term "net profits" in a contract, applied to a course of dealing involving successive transactions, implies an element of time, and, unqualified by custom, usage, or other words, refers to termination of the particular venture, or it may refer to expiration of a fiscal period at the end of which profits are to be computed, less than the period of adventure, but if the business covers several fiscal periods provided for computing compensation, losses, and gains arising from matters covered by an earlier fiscal period, but occurring after ascertainment of the profits for that period, are carried into and increase or diminish the net profits for the next or some succeeding fiscal period, though the parties may at the end of any fiscal period draw profits thus computed. *Thomas v. Columbia Phonograph Co.*, 129 N. W. 522, 523, 144 Wis. 470.

In an action for failure to deliver a purchased machine, where it appeared that the purchase price was to be paid partly on shipment, partly on installment, and the remainder in 12 months from shipment, with interest, in arriving at the "net profits" which plaintiff was prevented from making by failure of defendant to deliver the machine, the interest on the investment, at least on the deferred payment, together with all neces-

sary expenses (including insurance provided for in the contract), should be taken into account. *Fred W. Wolf Co. v. Galbraith*, 87 S. W. 390, 391, 39 Tex. Civ. App. 351.

An accident insurance contract provided for commissions to the agent consisting of all policy fees collected and 33½ per cent. of the "net profits" on the monthly premium business of the agency to be ascertained by crediting the gross premiums received from the collectors in the territory on monthly premium business, to the account, and charging the same with the sums paid in losses and claims on monthly premium business in such territory and taxes and, after deducting the total debits from credits, the balance remaining shall constitute the "net profits." Held, that losses for disability beginning before the date the contract was terminated and continuing to a later date were properly chargeable against the business of the agency in ascertaining the "net profits." *C. B. Perry & Sons v. United States Health & Accident Ins. Co.*, 63 Atl. 489, 490, 73 N. H. 608.

A hotel lessee's measure of damage for wrongful dispossession is such amount as will compensate him for the injury, not exceeding the net profits of the business for the unexpired portion of the term, and in arriving at such profits it is proper to deduct the gross expenses from the gross receipts for the period in which the business was run, and from the average profits thus ascertained estimate the lessee's loss for the remainder of the term, but it is improper to credit uncollectible accounts as profits. *Orange Hotel Co. v. Townsend (Tex.)* 130 S. W. 701, 702.

#### As income

See Income.

### NET RECEIPTS

The phrase "net receipts," as used in Laws 1869, p. 228, as amended by Laws 1879, p. 179, providing that agents of foreign insurance companies shall return to the county, town, etc., where the agency is situated, the amount of the "net receipts" of such agency for the preceding year, which amount shall be subject to taxation as is other personal property, means the amount remaining after the operating expenses of the company have been deducted from the gross receipts; and the company is not entitled to have fire losses paid in the county, etc., deducted from gross receipts. *National Fire Ins. Co. v. Hanberg*, 74 N. E. 377, 378, 215 Ill. 378.

### NET SUCCESSION

While the inheritance tax prescribed by St. 1905, c. 314, is not a tax on property as such, but upon the privilege of succession, the amount of the tax as to any beneficiary is to be determined according to the value of the "net succession"; that is, the value of

such property as remains to him after satisfying lawful charges. In *re Hite's Estate*, 113 Pac. 1072, 1073, 159 Cal. 392, 32 L. R. A. (N. S.) 1167, Ann. Cas. 1912C, 1014.

### NET TO US

The words "net to us," in a telegram sent by plaintiffs offering to sell butter to defendants for 17 cents per pound "net to us," meant that the price was to be 17 cents free from all charges and deductions. *Floral Creamery Co. v. Dillon & Douglass*, 75 Atl. 82, 84, 83 Conn. 65.

### NET VALUE

There is a distinction between "net value" and the "cash surrender value" of a life insurance policy. *Penn's Mut. Life Ins. Co. v. Barnett's Adm'r*, 99 S. W. 228, 232, 124 Ky. 266.

In construing Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), which provides that policies shall not be forfeited by reason of non-payment of premiums where three-fourths of the net value of the policy is sufficient to secure temporary insurance, etc., "net value" is a technical term, and is to be taken in its technical sense. The "net value" of an insurance policy, as computed under Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), is the excess of the total premiums paid, plus 4 per cent. compound interest, over the actuarial cost of insurance. *Rose v. Franklin Life Ins. Co.*, 132 S. W. 613, 614, 153 Mo. App. 90.

"Net value" of a policy within the meaning of the statute is a sum which, with compound interest at the rate of 4 per cent per annum and with the addition of future net premiums, will provide for the payment of the policy when it matures according to the combined experience of actuaries' table of mortality. *Westerman v. Supreme Lodge Knights of Pythias*, 94 S. W. 470, 490, 196 Mo. 670, 5 L. R. A. (N. S.) 1114.

The term "net value," as used in Rev. St. 1899, §§ 7897, 7898, 7899, 7900, relating to insured's rights in life policies after default in payment of premium, is to be determined by construing such sections together. The term does not mean the provision for the amount of paid-up insurance that insured would be entitled to if demanded, but is an arbitrary apportionment arrived at in the method prescribed by section 7897, which "net value" is the same referred to in section 7900, so that where insured, after having paid more than three annual premiums on an endowment policy, payable on a specified date or at death, made default in the payment of premiums, and at the date of default three-fourths of the net value, computed as directed by section 7897, amounted to \$47.86, while the net value of the paid-up insurance provided in the policy was only \$42.79, and the sum of \$47.86 would purchase

extended insurance under section 7897 for a term extending beyond the date of insured's death, the amount of paid-up insurance so stipulated in the policy was not sufficient under section 7900 to make section 7897 inapplicable, and hence insured's beneficiary was entitled to recover the full amount of the policy. *Fahle v. Connecticut Met. Life Ins. Co. of Hartford, Conn.*, 134 S. W. 60, 63, 155 Mo. App. 15.

### NET WEIGHT

The "net weight" of a cargo of lumber means the weight of the lumber only, exclusive of standards, supports, etc., used in piling the lumber on the car. *State ex rel. Washington Mill Co. v. Great Northern Ry. Co.*, 86 Pac. 1056, 1057, 48 Wash. 658, 6 L. R. A. (N. S.) 908, 117 Am. St. Rep. 1084.

### NETTING

See Cotton Netting.

### NEURALGIA

See Coccyx Neuralgia.

### NEURASTHENIA

See Traumatic Neurasthenia.

"Neurasthenia" is a somewhat indefinite term, applied to certain nervous conditions, while 'myelitis' is a diseased condition, or degeneration of the spinal cord, and is regarded as a much more serious ailment than that of 'neurasthenia.' In a personal injury action, the weight of the evidence showing that the injuries had produced a condition of neurasthenia rather than myelitis, as claimed by plaintiff, a verdict for \$8,000 was excessive by at least \$3,000; plaintiff being 23 years old and earning \$70 to \$85 per month. *Robinson v. Spokane Traction Co.*, 91 Pac. 972, 973, 47 Wash. 303.

### NEURITIS

As disease, see Disease.

### NEUROSIS.

See Traumatic Neurosis.

### NEUTRAL SPIRITS

"Neutral spirits," as the term suggests, is a colorless liquid which has neither flavor nor character, and is not a beverage at all. It may be produced from any fermented substance, such as corn, potatoes, and sugar beets. It was formerly used exclusively in the arts, but with the advent of cheaper methods of production it has been palmed off on the public as a beverage with something to give it flavor and character. *Levy v. Uri*, 31 App. D. C. 441, 445.

"Neutral spirits" are made at very high temperature for the purpose of carrying off

so far as possible every property except alcohol and water, and, while whisky is aged and matured for not less than four years in charred oak barrels, neutral spirits require no aging, but may be immediately consumed, and, as the name signifies, they contain neither taste, smell, nor color, and no amount of aging such spirits will change it without the aid of foreign matter. "Whisky," within the Food & Drugs Act June 30, 1906, 34 Stat. 768, c. 3915, is the product of sound grain, distilled at a low temperature so as to retain in the distillate the congeneric properties of the grain, which give to the liquor, when matured by aging in charred casks, its desirable potable character. "Neutral spirits," which are distilled at a high temperature, may be made from different materials and do not contain such properties, and which are not rendered potable by aging, although reduced by water to potable strength and from which most of the fusel oil has been removed, are not whisky nor a like substance with whisky. *Woolner & Co. v. Renick*, 170 Fed. 662-664.

### NEW

#### NEW B/L

The words "New B/L" mean a certain form of a bill of lading known as the "new bill of lading," containing a special clause as to the time to be given for unloading a vessel after arrival in port, and as to the amount of demurrage for its detention beyond the day specified in the bill of lading. *Kenyon v. Tucker*, 28 Atl. 61, 17 R. I. 529.

#### NEW ACQUISITION

Land is to be considered an ancestral estate where it has come from or by or on the part of the father or mother of the owner by gift, devise, or descent either mediately or immediately from them or from any person in their respective lines, and will be a "new acquisition" if derived from any source other than by descent, devise, or gift from any relative in the paternal or maternal line, as by a son from father or mother for a valuable consideration. *Martin v. Martin*, 135 S. W. 348, 349, 98 Ark. 93.

An allotment acquired by a Creek citizen by selection and certificate of allotment or by patent is a new acquisition within Mansf. Dig. Ark. § 2531 (Ind. T. Ann. St. 1899, § 1839), providing that where intestate shall die without descendants, if the estate be a new acquisition, it shall descend to the father for his lifetime, with remainder to the collateral kindred of intestate in the manner provided by that act. *Shulthis v. MacDougal*, 162 Fed. 331, 337.

The heirs who take under such provision and their estate are determined by Mansf. Dig. Ark. c. 49, which provides that, on the death of a person intestate, unmarried, and leaving no children, the estate, if it

came from the father, shall go to the father, and if from the mother shall go to the mother, "but if the estate be a new acquisition it shall ascend to the father for his lifetime and then descend in remainder to the collateral kindred of the intestate." A child whose father was a member of the Creek Tribe, but whose mother was not, was born May 6, 1901, and died in November of the same year. He thus became entitled to enrollment in the tribe, but had not received his allotment at the time of his death. Held that, technically, the Arkansas statute did not apply to the situation, since the land to which the decedent was entitled and which was the common property of the tribe did not, strictly speaking, come to him by grant, inheritance, or purchase, but by a division of lands held in effect by a tenancy in common, to an interest in which he was born as a member of the tribe entitled to enrollment therein; but that, applying the statute by analogy, such land was not a "new acquisition," but came to him by the blood of his tribal parent, or, within the meaning of the statute, "from his father," and that therefore, on his death and the subsequent allotment his father took the full title, and not merely a life estate. *Shulthis v. MacDougal*, 170 Fed. 529, 533, 95 C. C. A. 615.

#### NEW ACTION

See Commencement of New Action.

The words "new action," in Wilson's Rev. & Ann. St. 1903, § 4221, providing that where any action is commenced within due time and a judgment for plaintiff is reversed, etc., plaintiff may commence a "new action" within one year after the reversal, means an action for the same cause as that of the former action; the statute only intending to save to plaintiff the right to commence a new action for the same causes as in his original action. *Hatchell v. Hebeisen*, 82 Pac. 826, 827, 16 Okl. 223.

#### NEW AND ADDITIONAL SOURCES

Laws 1905, p. 2023, c. 723, § 2, requires the submission of maps and profiles and approval of the State Water Commission before taking or condemning lands for new or additional sources of water supply. Held, that the word "source" may refer to a lake, etc., as a source of supply, or to any well-defined watershed from which percolating water might be taken, and the statute did not exclude a whole territory in which a city has incidentally procured some part of its supply, the limitation on "new and additional sources" meaning sources which had not been appropriated at the time of the statute. *Queens County Water Co. v. O'Brien*, 115 N. Y. Supp. 495, 498, 131 App. Div. 91.

#### NEW AND USEFUL ART

A system of transacting business disconnected from the means for carrying out the system is not within the most liberal inter-

pretation of the term "art," and, unless the means used are novel and disclose invention, the system is not patentable as a "new and useful art," within the provisions of Rev. St. § 4886. *Hotel Security Checking Co. v. Lorraine Co.*, 160 Fed. 467, 469, 87 C. C. A. 451, 24 L. R. A. (N. S.) 665.

#### NEW ASSESSMENT

The term "new assessment" and the term "reassessment," in St. Paul City Charter, § 57, refers to a new apportionment of the benefits, and in making a "new assessment" or "reassessment" the board of public works has authority to establish an entirely new district and to include therein all property benefited by the improvement, whether embraced within the original district or not. *State ex rel. Eaton v. District Court of Ramsey County*, 104 N. W. 553, 556, 95 Minn. 503.

#### NEW ASSETS

Where land conveyed by testatrix under a deed absolute on its face, but held under a court decree for the executrix to be a mortgage, was redeemed by her, it was "new assets," within Rev. Laws, c. 141, § 11, providing that, if new assets come to an executor after two years from the time of his giving bond, he shall be held to account therefor in an action of a creditor, the same as if the assets had been received within two years, if the creditor's action is commenced within one year after notice of the receipt of the assets and within two years after they are actually received; and a creditors' suit, commenced within one year after reconveyance of the redeemed property to the executrix, was not barred. *Horton v. Robinson*, 98 N. E. 681, 682, 212 Mass. 248.

Where a debtor conveyed property to trustees, reserving the right to any surplus remaining after payment of creditors named, and at his death this possible right was supposed to be of no value, and was not inventoried, but 12 years thereafter the beneficiaries accepted certain stock in a real estate trust then formed, in satisfaction of their claims, and it was then found that there was a surplus, it was held that this surplus was "new assets" within Pub. St. c. 136, § 11, making an administrator liable to suit by a creditor on account of assets received after two years from the time of giving bond, provided the suit be commenced within two years after the assets are actually received and within one year after plaintiff has notice of their receipt. *Quincy v. Quincy*, 46 N. E. 108, 109, 167 Mass. 536.

Rev. Laws, c. 142, § 10, relating to insolvent estates, provides that a creditor who does not present his claim for allowance to the commissioners, or to the court where no commissioners are appointed, within the time prescribed by that court, shall be barred, but that, if "further assets" come into the hands of executor or administrator after the decree

of distribution, the claim may be proved and paid. Held, that the term "further assets" is substantially the same as "new assets," which belated creditors are permitted to reach under chapter 141, § 11, relating to solvent estates, and in general does not include property for which the administrator has been charged, or the property into which such property, or any part thereof, has been changed, or the natural increment of such property; and where an administrator did not include in the inventory, nor in his first nor second and final account, certain land, or the proceeds of the sale thereof, if he knew that the land belonged to his intestate long before the decree of distribution, and had it in his control well within the two-year period from his appointment, neither the land nor the proceeds of its sale would be "further assets," but, if his knowledge of intestate's interest in such tract did not come to him until after two years from his appointment, the proceeds of their sale would be "further assets." *Fay v. Haskell*, 93 N. E. 641, 643, 207 Mass. 207.

### NEW BILL

If the amendment or substituted bill presents a measure that has no relation to the bill as originally introduced, it cannot stand, for it is in substance a new measure or bill. If the substitute has a clear relation to the subject of the original bill, it can be said to be germane, and will not be treated as a new bill. A bill to provide for a board of county auditors for a designated county was introduced and referred to a committee. The committee reported the bill, with a substitute identically like the original bill, except that another county was substituted for that of the county mentioned in the original bill. Under the definition this change made the substitute a new bill. *People ex rel. Board of Sup'rs of Kent County v. Loomis*, 98 N. W. 262, 265, 135 Mich. 556, 3 Ann. Cas. 751.

### NEW BOOK

Under the copyright statutes as they stood prior to Act March 4, 1909, c. 320, 35 Stat. 1075, as well as by the express provision of section 6 of such act, the addition of new matter to a copyrighted book in a second or subsequent edition makes it a "new book" subject to copyright as an original work. *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833, 837, 100 C. C. A. 303.

### NEW BUILDING

Building a one-story kitchen in the rear of another building is the erection of a "new building" within the meaning of an ordinance prohibiting the erection of wooden buildings. If a building be so changed in plan, structure, dimensions and general appearance that it might in common parlance be called a "new building," it is a violation of

the ordinance. *State v. Long Branch Com'rs*, 25 Atl. 274, 275, 55 N. J. Law, 108.

Within a city ordinance making it unlawful to construct any wooden building within the fire limits, no fixed rule can be laid down stating what is to be deemed a "new building" and what a "repairing." Where a building, 42 feet long, 24 feet 8 inches in width, and about 10 feet in height at the highest part outside of a raised part at one end with a skylight which was about 17 feet high at its highest point, had the roof with the skylight removed and the building raised in height except in the front, and on the rear 16 feet of the upper part was an addition with a peaked roof 16 feet long and about 17 feet to the peak and about 12 feet to the base of the roof, thus making the building all of the same height without any change in its height or appearance in front and with no change in appearance at the sides, except by reason of the increased height, it was not a "new building" and was not within the ordinance. *Mayville v. Rosing*, 123 N. W. 393, 394, 19 N. D. 98, 26 L. R. A. (N. S.) 120.

### NEW BUSINESS

*Kirby's Dig.* § 6969, makes it the county assessor's duty whenever any person shall commence any new business after the regular assessment to assess the value of such business and make an extra assessment and file it with the clerk who shall extend the taxes thereon. On May 1, 1909, plaintiffs owned a stock of merchandise at a building on M. street consisting of dry goods, etc., purchased for \$18,000. In June, 1909, they were assessed for personalty in the sum of \$10,000, and in October they leased the F. building and carried into it some shopworn goods from their store on M. street which were sold at a sacrifice by the plaintiffs' regular employes, and no separate books were kept, the money received each day being taken over to the M. street store, and no new goods were purchased for the F. building. Held, that the business at the F. building was not a "new business" within the statute. *Froug-Smullion & Co. v. Pulaski County*, 147 S. W. 72, 73, 103 Ark. 397.

### NEW CAUSE OF ACTION

The expression "new cause of action" can be taken, when used on the subject of amendment, as intending nothing more than a new right or claim arising out of the same transaction. If it were not so—that is, if the new cause of action was one arising out of a wholly different transaction from that laid in the complaint—then it would constitute what we have sometimes designated as an entirely new cause of action, and one which could not be introduced into the complaint by amendment, if objected to. Identity of transaction is therefore the basis for the introduction by way of amendment of counts on new claims or rights arising out of the

same. *Nelson v. First Nat. Bank*, 36 South. 707, 709, 189 Ala. 578, 101 Am. St. Rep. 52.

Within the statute of limitations, an amended complaint sets up a "new cause of action" composed of the right of plaintiff and the obligation, duty, or wrong of defendant, where the new allegation deprives defendant of any defense he had to the original action, where the evidence that would have proved the original complaint will not prove the new, where the new allegations, if in reply, would have amounted to a departure, where the amended complaint sets up a title not before asserted, or where a judgment on the first complaint would be no bar to a judgment on the amended complaint. Where the original complaint in an action for injuries to a lineman of an electric light and power company alleged a negligent failure to properly insulate live wires, an amended complaint, alleging the negligent failure to turn off the electric current passing through the wires, sets forth an additional charge of negligence, but did not set up a new cause of action so as to make the statute of limitations applicable, since the facts alleged in either the original or amended complaint would bar another action for the same cause. *Raley v. Evansville Gas & Electric Light Co.*, 90 N. E. 783, 784, 45 Ind. App. 649.

#### NEW CONSTRUCTION

Under Rev. Codes, § 2419, authorizing directors of irrigation districts to fix rates of tolls and charges for water against persons using its canals, or to levy assessments to defray expenses of the operation, repair and improvement of such portion of its works as are in use, the laying of a pipe line caused by the lawful removal of a ditch by municipal authorities is a repair or improvement, the funds for defraying which may be included in a maintenance assessment or in increased toll rates, and is not a new construction which must be defrayed by a special assessment under section 2391, or a bond issued under section 2396. *City of Nampa v. Nampa & Meridian Irr. Dist.*, 115 Pac. 979, 982, 19 Idaho, 779.

#### NEW COUNTY

When a county is changed in its territory by the addition of territory, it becomes a "new county," although the name be unchanged, and although it be accomplished by a law which in terms attaches the territory to the old county. Taking territory from one county and adding to another is within the provision of Const. art. 10, § 2, that no organized county shall ever be reduced by the organization of "new counties" to less than 16 townships, except on the decision of a majority of electors residing in each county to be affected thereby. *Board of Sup'rs of Bay County v. Edmunds*, 102 N. W. 998, 999, 139 Mich. 466.

Authority granted by the Constitution to grant new counties does not mean to reorganize an old county under a new name. It must mean a new county, an additional county, and not a reorganization, rebounding, or renaming of an old county. *McDonald v. Doust*, 81 Pac. 60-63, 11 Idaho, 14, 69 L. R. A. 220.

#### NEW DEBT

See Creation of New Debt.

#### NEW FUNCTION

A claim under the patent laws for a "new function" cannot be sustained in the absence of an element of novelty or unexpectedness. *General Electric Co. v. West Electric Mfg. Co.*, 139 Fed. 568, 570, 71 C. C. A. 552.

#### NEW INN

P. L. 1891, p. 311, providing that after a license has once been granted to keep an inn or tavern, or to sell spirituous liquors, the filing of a petition for a renewal signed by applicant shall confer power upon the licensing board to renew the license for one year in cities of the fourth class, and that the freeholders who may have recommended the former application shall not be eligible as signers for a new application for one year from the granting of such renewal, and that the act shall not affect applications for new inns and taverns, saloons or victualling houses in such cities, applies only to the licensing of places which had been already licensed when the act was approved. *Leeds v. Atlantic City*, 79 Atl. 312, 313, 80 N. J. Law, 557.

#### NEW MATTER

##### In pleading

A defense can consist only of "new matter," that is, matter which, taking all of the allegations in the complaint to be true, is nevertheless a defense to the action, such as payment, a general release, fraud, the truth of a libelous publication, etc. *Leonowitz v. Ott*, 82 N. Y. Supp. 880, 40 Misc. Rep. 551.

"New matter" in a pleading is matter for defense not provable under a general denial. *Schultz v. Greenwood Cemetery*, 93 N. Y. Supp. 180, 182, 46 Misc. Rep. 299.

The term "new matter," in Rev. Codes, N. D. 1899, § 5273, subd. 2, requiring the answer of defendant to contain a statement of any "new matter" constituting a defense or counterclaim, means matter extrinsic to the matters set up in the complaint as a basis of the cause of action; a defense which concedes that a cause of action once existed, but has been determined by some subsequent transaction. The distinction between defenses admissible under a denial and those which are new matter depends primarily upon the structure of the complaint and the material



avermments of fact which it contains. All facts which directly tend to disprove any one or more of these averments may be offered under the general denial. All facts which do not thus directly tend to disprove some one or more of these averments, but tend to establish a defense independently of them, cannot be offered under the denial. They are new matter, and must be specially pleaded. *Hogen v. Klabo*, 100 N. W. 847, 849, 13 N. D. 319 (citing *Manning v. Winter* [N. Y.] 7 Hun, 482; *Greenway v. James*, 34 Mo. 328; *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Churchill v. Baumann*, 30 Pac. 770, 95 Cal. 541; *Pom. Rem. & Rem. Rights*, § 673).

"New matter constituting a defense," within the rule requiring such matter to be pleaded, is matter not embraced within the statement of facts made by the plaintiff, but existing outside of the narrative which he has given and such that proving it to be true does not disprove a single averment of fact in the complaint or petition, but merely prevents or destroys the legal conclusion as to the plaintiff's right and the defendant's duties which would otherwise have resulted from all those averments admitted or proved to be true. *Montgomery v. Seaboard Air Line Ry.*, 53 S. E. 987, 989, 73 S. C. 503.

Where the complaint was so drawn that it could be claimed that the action was brought for damages under a common-law liability as well as under the Employer's Liability Act (Consol. Laws 1909, c. 31, §§ 200-204), the defendant, under a general denial, could prove failure to serve the 120-day notice, under the Employer's Liability Act, and failure to bring the action within one year after date of accident; and hence these were not "new matters" proper to be set up as a defense under authority of Code Civ. Proc. § 500. *Kellihier v. New York Cent. & H. R. R. Co.*, 136 N. Y. Supp. 256, 259, 77 Misc. Rep. 330.

#### NEW OR ADDITIONAL

If a change simply adds to a mail contractor's service it is "new or additional service," being of the same kind within a provision in his contract providing for performance of such service without additional compensation. *Proffit v. United States*, 42 Ct. Cl. 248, 259.

The phrase "new or additional service," in a contract for the carrying of mails requiring the contractor to perform new or additional services that the Postmaster General may order, etc., is not one of exact meaning, and the court must give to it a reasonable construction with a view of doing justice between the parties. An increase in the service required on a mail route, as the result of the establishment of a new distributing station in the city of New York, amounting to more than 300,000 miles of additional

transfer service, and involving an additional expenditure of nearly \$10,000 for ferry tolls, cannot be required by the Postmaster General without extra compensation, under the authority reserved to him in the contract to call for new, additional, mail messenger, or transfer service without additional compensation. *United States v. Utah, N. & C. Stage Co.*, 26 Sup. Ct. 69, 72, 199 U. S. 414, 50 L. Ed. 251.

A statute providing that no municipal corporation shall have power to condemn lands "for any new or additional sources of water supply, until it has first submitted the maps and profiles therefor" to the state water supply commission, does not apply to a proceeding by a municipal corporation to condemn an established and fully equipped plant of a water company; such plant not being a "new and additional" source of supply. *Village of Waverly v. Waverly Water Co.*, 101 N. Y. Supp. 1070, 1071, 117 App. Div. 336.

#### NEW PLACE

The words any "new place," as used in an act regulating the sale of liquors (P. L. 1905, p. 42), means a place for which a license has not previously been granted upon a direct application. The mere transfer of a license to a place leaves it still a "new place" for the purposes of this act. *Wright v. Board of Excise of City of Elizabeth*, 66 Atl. 1061, 75 N. J. Law, 28.

In order to constitute a place for which a license to sell intoxicating liquors is applied for a "new place," within the meaning of the act of 1906 (C. S. 2908, pl. 84), it must appear, in cases where the premises had for some years previously been used continuously for such purpose, that there has been a substantial abandonment of the business. *Parnes v. Board of Excise Com'rs of City of Elizabeth*, 82 Atl. 313, 314, 82 N. J. Law, 285 (quoting and adopting definition in *Eckersly v. Abbott*, 74 Atl. 313, 79 N. J. Law, 157).

An inn or tavern in which the occupants have for many years retailed liquor under a license granted annually did not become a "new place" within P. L. 1906, p. 199, forbidding the granting of a license to a "new place" within 200 feet of a church merely because an occupant was refused a license, where he again applied, at the first opportunity, for a license, and it was granted. *Eckersly v. Abbott*, 74 Atl. 313, 314, 79 N. J. Law, 157.

#### NEW PROMISE

See, also, Acknowledge—Acknowledgment.

A direct admission by a debtor within six years prior to the commencement of the action of a subsisting debt which he is liable and willing to pay is sufficient evidence of a "new promise" to bar limitations. *Barker v. Heath*, 67 Atl. 222, 224, 74 N. H. 270.

A writing acknowledging the receipt of \$500 as belonging to a person named, but which contains no statement of any fact from which the law implies an obligation or promise, is not an agreement, contract, or "promise" in writing within the saving clause of the statute of limitations. *Lewis v. Norris*, 103 Pac. 134, 135, 80 Kan. 620.

A "new promise" to remove the bar of the statute of limitations should be in its terms unequivocal and determinate, and, when a promise is to be implied from an acknowledgment, the acknowledgment ought to contain an unqualified admission of a previous subsisting debt, which the party is liable and willing to pay. *Reed v. Interstate Oil Co.*, 92 Pac. 911, 912, 41 Colo. 463 (citing *Bell v. Morrison*, 1 Pet. 351, 7 L. Ed. 174, and other cases).

An oral promise made by the decedent to compensate one for past services by giving him a legacy was an independent and substituted contract, and not a new promise within St. 1898, § 4243, providing that no promise shall be sufficient evidence of a new contract so as to take the cause out of the operation of the statute of limitation, unless in writing and signed by the party to be charged. *Murtha v. Donohoo*, 136 N. W. 158, 160, 149 Wis. 481, 41 L. R. A. (N. S.) 246.

That an inventory filed with a bill brought by testator's brother and others to construe the will listed a debt as due the estate from the brother did not constitute a "new promise in writing," removing the bar of limitations, under Code 1904, § 2922, where the inventory was not signed by him or his agent, and the bill was not signed by him, but by counsel. *Walter v. Whitacre*, 73 S. E. 984, 986, 113 Va. 150.

### NEW ROAD

That the original line of a street railway company was but about 3 miles long, while a proposed additional line is about 15 miles long, is insufficient of itself to constitute such addition a "new road," and not an "extension," within Railroad Law, Laws 1890, p. 1108, c. 565, § 90, permitting a street surface railway company to "extend" its lines without obtaining a certificate of the board of railroad commissioners that public convenience and necessity require the same. *Roberts v. Huntington R. Co.*, 105 N. Y. Supp. 1031, 1032, 56 Misc. Rep. 62.

### NEW ROUTE

Rev. St. Ohio, §§ 2501, 2502, provide for the granting of original street railway franchises, after advertisement on public bids, to the corporation which will agree to carry passengers at the lowest possible rates of fare, and shall have previously obtained the written consent of a majority of the property holders on the several streets along the proposed route, provided that no street rail-

way grant, or renewal of a grant, shall be valid for a longer period than 25 years. Section 2505 authorizes the city council to grant any street railway corporation power "to extend its track," subject to the provisions of sections 3437-3443, none of which, however, relates to the establishment of a route or a renewal of a grant, and did not require such extensions to be on competitive bidding, etc. Held, that an extension granted under such sections is not a "new route," having an independent life, but depends for its existence on the original line, and expires with the franchise thereof. *Cleveland Electric R. Co. v. City of Cleveland*, 137 Fed. 111, 130.

### NEW SEWER

Under Act Mass. 1899, c. 450, § 3, providing that the board of street commissioners at any time within two years after any "new sewer" is completed shall assess on the several estates especially benefited a proportional part of the cost thereof, where a sewer was completed in April, 1898, in a street where there was an old sewer on the opposite side, which was broken down and useless and which was in no way connected with the new sewer, the sewer constructed constituted a "new sewer" within the meaning of the statute. *Hall v. Street Commissioners of Boston*, 59 N. E. 68, 69, 177 Mass. 434.

### NEW STRUCTURE

Where the owner of a building remodelled and reconstructed internally, and also reconstructed with new material some or all of its walls, so as to substantially enhance the value of the premises, such new parts and the remodeling and improvements of the old may be returned by the assessor as "new structures," within Rev. St. 1892, § 2753, requiring the assessor to make and return a list of all new structures of any kind. *Lewis v. State*, 69 N. E. 980, 982, 69 Ohio St. 473.

### NEW TRIAL

See Motion for New Trial; Rule Absolute For New Trial.

Application for new trial, see Application.

A "new trial" is a trial anew, with as little prejudice to either party as if the cause had never been heard before. *Star Bottling Co. v. Louisiana Purchase Exposition Co.*, 144 S. W. 776, 777, 240 Mo. 634.

A "new trial" in a criminal prosecution is the re-examination of the facts under the same plea of not guilty on the same information or indictment. *State v. Keerl*, 53 Pac. 862, 865, 33 Mont. 501.

According to Code Civ. Proc., a "new trial" is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee. *Hamilton v. Murray*, 74 Pac. 75, 76, 29 Mont. 80; *State*

ex rel. Carleton v. District Court of Lewis & Clark County, 82 Pac. 789, 793, 33 Mont. 138, 8 Ann. Cas. 752.

A "new trial" is a re-examination of an issue of fact, and the sufficiency of the pleadings to support a plaintiff's cause of action or maintain any particular defense relied on by defendant is not involved, and cannot be considered on an appeal from an order granting a new trial. *Clark v. Van Torchiana*, 127 Pac. 831, 833, 19 Cal. App. 786.

A "new trial" as defined by statute is a re-examination in the same court of an issue of fact after a verdict or report of referee or master, or a decision of the court. *Todd v. Peterson*, 81 Pac. 878, 881, 13 Wyo. 513.

A new trial is a re-examination of an issue of fact in the same court after a trial and decision. *Caldwell v. Wells*, 101 Pac. 812, 813, 16 Idaho, 459.

A "new trial" is defined by Kirby's Dig. § 6215, to be a re-examination in the same court of an issue of fact after verdict by a jury or decision by the court. *Texas & P. Ry. Co. v. Smith*, 121 S. W. 282, 284, 91 Ark. 362.

"A 'new trial' is a re-examination of an issue of fact after verdict of a jury, report of a referee or master, or decision by the court." A new trial as thus defined refers to a re-examination of an issue of fact on the pleading where a fact or conclusion of law is maintained by one party and controverted by the other. *Anderson v. Englehart*, 105 Pac. 571, 18 Wyo. 196, Ann. Cas. 1912c, 894 (citing Rev. St. 1899, § 3746; *First Nat. Bank of Cheyenne v. Swan*, 23 Pac. 743, 3 Wyo. 356).

A "new trial" recognizes a completed trial which for some sufficient reason has been set aside so that the issues may be litigated de novo, as distinguished from a "mistrial," which is a nugatory trial. A "new trial" results from the exercise of discretion, while a mistrial is a matter of law. *Stern v. Wabash R. Co.*, 101 N. Y. Supp. 181, 182, 52 Misc. Rep. 12.

A "new trial," defined by the Code as a re-examination of the issue of fact or some part or portion thereof, differs from the examination of all the issues involved in an action. And a mere trial of fact or of law is included within the latter. *Bevering v. Smith*, 96 N. W. 1110, 1111, 121 Iowa, 607.

Primarily, the office of a motion for a "new trial" is to afford the court an opportunity to correct errors in its own proceedings without subjecting parties to the expense and inconvenience of appeal or petition in error. *Chadron Loan & Bldg. Ass'n v. Scott*, 96 N. W. 220, 4 Neb. (Unof.) 694 (citing *Weber v. Kirkendall*, 63 N. W. 35, 44 Neb. 766).

A "new trial" is a re-examination of an issue of fact. Hence there can be no new trial of the cause in the superior court on appeal from justice court unless there has been a trial of issues of fact in the justice's court. *Smith v. Clyne*, 97 Pac. 40, 42, 15 Idaho, 254 (citing *Maxson v. Superior Court of Madera County*, 57 Pac. 379, 124 Cal. 468; *Southern Pac. R. Co. v. Superior Court of Kern County*, 59 Cal. 471; *People ex rel. Jones v. El Dorado County Court*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Rickey v. Superior Court of Nevada County*, 59 Cal. 661; *Myrick v. Superior Court*, 8 Pac. 648, 68 Cal. 98).

Civ. Code Prac. § 340, provides that a "new trial" is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by a court. The question of granting a new trial, where plaintiff was ill, and neither she nor her counsel appeared, and the action was dismissed, is not governed by Civ. Code Prac. § 344, providing for a "new trial" if grounds are discovered after the term at which the decision is rendered, or the term at which the decision is rendered, or by section 240, providing for a new trial after a verdict or a decision by the court, or by section 342, providing for the time for making the application, but comes under section 518, subsec. 7, authorizing the granting of a new trial for unavoidable casualty or misfortune preventing the party from appearing. *Ray v. Arnett (Ky.)* 106 S. W. 828, 829.

Under Code Civ. Proc. § 656, defining a "new trial" as a re-examination of an issue of fact in the same court after a trial, and section 657, subd. 6, authorizing a new trial to be granted for insufficiency of evidence to justify the decision, or on the ground that it is against the law, an objection that a judgment entered was not the correct legal conclusion from the facts found, which sections 663 and 663½ authorize to be urged in the trial court on motion or by an appeal from the judgment, cannot be reviewed on appeal from an order denying a new trial. *Kaiser v. Dalto*, 73 Pac. 828, 829, 140 Cal. 167.

Under Comp. Laws, § 7503, providing that the state may sue out a writ of error from a judgment for defendant on demurrer to the indictment, from an order arresting judgment, and from an order granting "new trial," the "new trial" refers to the new trial defined in section 5087 as a re-examination of an issue of fact in the same court after a trial and decision by jury, court, or referees; and hence the state cannot bring error upon the county court's mere reversal of a conviction had before a justice of the peace. *State v. Finstad*, 93 N. W. 640, 16 S. D. 422.

B. & C. Comp. § 1485, defines a "new trial" as a re-examination of an issue of fact in the same court after a trial and decision

or verdict by a court or jury. Where a judgment of conviction is reversed on the ground of error, overruling a demurrer to the indictment, a new trial will be ordered, subject to the discretion of the trial court as to resubmitting the cause to the grand jury. *State v. Eddy*, 82 Pac. 707, 46 Or. 625.

The term "issue of fact" in Rev. Codes, § 6793, defining a new trial as a re-examination of an issue of fact after a trial, when considered in connection with section 6723, refers only to an issue arising on formal pleadings, and though, under section 7712, the provisions as to new trials apply to probate proceedings, a motion for new trial in such proceedings does not lie in the absence of formal pleadings raising an issue of fact. Where two ex parte applications for letters of administration are heard together as authorized by Rev. Codes, § 7441, and no issue is joined as to the competency of either of the persons seeking to act as administrator, a motion for new trial, after granting one of the petitions and denying the other, does not lie. In *re Antoniolli's Estate*, 111 Pac. 1033, 1034, 42 Mont. 219.

Under Code Civ. Proc. § 656, defining a "new trial" as a re-examination of an issue of fact, and section 657, providing that a verdict or other decision of fact may be reviewed on an appeal from an order denying a new trial, the question whether the judgment is authorized by the pleadings cannot be raised or reviewed on an appeal from an order denying a new trial, irrespective of the issues presented by the pleadings, and notwithstanding the findings may be at variance with such issues. *Schroeder v. Mauzy*, 118 Pac. 459, 461, 16 Cal. App. 443.

Under a statutory definition that a "new trial" is the re-examination in the same court of an issue of fact, after a verdict, report of a referee, or decision by the court, a motion for a new trial is not proper unless an issue of fact has been fully determined by a jury verdict or its equivalent, and there can be no "new trial" on issues of law, as such issues can be investigated on appeal without previous re-examination by the trial court. On motion for a new trial, only those errors of law which vitiate the conclusions of fact need be called to the trial court's attention, and, if the facts have been agreed to or have been eliminated so that the controversy depends upon a question of law, a motion for a "new trial" is not necessary. *Wagner v. Atchison, T. & S. F. Ry. Co.*, 85 Pac. 299, 73 Kan. 283.

Rev. St. 1892, § 6436, provides that a new trial shall be granted for cause only, and when it is granted it shall take place in same court as the first trial was had and shall be conducted in accordance with the provisions of this chapter for the first trial, so far as the same are applicable. Held, that the words "new trial" mean the rehearing

of the case from the beginning. *Dayton & U. R. Co. v. Dayton & M. Traction Co.*, 74 N. E. 195, 196, 72 Ohio St. 429, following *State v. Judges of Court of Common Pleas of Hamilton County*, 69 N. E. 659, 69 Ohio St. 372.

Under B. & C. Comp. § 159, providing that the findings of the court shall be deemed a verdict, and may be set aside in the same manner and for the same reasons, and section 173, defining a new trial as a re-examination of an issue of fact after a trial and decision, and section 174, specifying the manner in which a verdict or other decision may be set aside and a new trial granted, and providing that a new trial may be granted "on the motion of the party aggrieved," the court cannot on its own motion set aside its filed findings after the filing by a party of a motion for judgment; the court not having been imposed on by fraud or collusion of the parties or otherwise. *Scott v. Ford*, 97 Pac. 99, 101, 52 Or. 288.

A judgment for one of the defendants, a corporation, was reversed on appeal on the ground that the findings were not justified by the evidence, without any specific directions as to the further proceedings in the case. After remand plaintiff, having recovered against the other defendants, moved for judgment against the corporation defendant, which the court granted, the order reciting that the cause came on to be heard on plaintiff's motion for judgment against defendant corporation on remittitur from the Court of Appeals, and it appearing to the court that all questions of fact were finally adjudicated by the judgment against the other defendants, and, good cause being shown therefore without objection, it was ordered that judgment be rendered against the corporation. Held, that such proceedings did not constitute a new trial, to which the corporation defendant was entitled, as defined by Code Civ. Proc. § 656, and that the judgment was therefore erroneous. *Riley v. Loma Vista Ranch Co.*, 89 Pac. 849, 850, 5 Cal. App. 25.

Under Code Civ. Proc. § 656, defining a new trial as a re-examination of an issue of fact in the same court, where the case was tried on an agreed statement of facts which the parties stipulated was to be considered as the court's findings in the case, a motion for new trial would not lie on the ground that the decision was contrary to law, as that point could only be raised on appeal. *Quist v. Hill*, 99 Pac. 204, 207, 154 Cal. 748.

Code Civ. Proc. § 1012, provides that in a case specified in the section where the parties consent to a reference, and a new trial of the action tried by the referee designated is granted, the court must upon application of either party appoint another referee. Held, that where the court refuses to confirm the referee's report, and refers

the matter to be again heard and determined, it in effect grants a new trial within the meaning of the section, and the re-reference should be to a new referee. *White v. White*, 122 N. Y. Supp. 885, 886, 138 App. Div. 272.

As defined by Code Civ. Proc. § 265 (Gen. St. 1905, § 5160), a "trial" is a judicial examination of the issues, whether of law or fact, in an action; and a "new trial" (Code Civ. Proc. § 306 [Gen. St. 1905, § 5202]) is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision of a court. The same section provides that the former verdict, report, or decision shall be vacated, and a new trial granted on the application of the party aggrieved (which section 309 [section 5205] provides must be by motion on written grounds) for certain causes specified affecting materially the substantial rights of such party. Some of the causes specified are any order of the court by which the party is prevented from having a fair trial; that the decision is not sustained by sufficient evidence, or is contrary to law; error of law occurring at the trial and excepted to at the time. Code Civ. Proc. § 306 (Gen. St. 1905, § 5202). Strictly construed, then, as defined by the Code, a "trial" involves the judicial examination of all the issues of law and fact in an action, while a "new trial" involves only the re-examination of an issue of fact. That this strict construction is not applicable to new trials of ordinary actions in which the law applicable varies to the varying facts pleaded or proven is apparent, when we consider the grounds for which new trial "shall be granted" as prescribed, some of which involve only a question of law. These must be re-examined both on the hearing of the motion for the new trial and upon the new trial, if granted. Issues of law are not ordinarily framed in an action by the petition and answer or by the answer and reply in the sense that a proposition of law is asserted in one pleading and denied in another; but such issues may arise in many ways at almost every stage of the action, and are sometimes determinative of the action and sometimes not. Sometimes they arise in the course of the trial, and sometimes before the trial is commenced. It goes without saying that there can be no new trial until there has been a trial; and, by a fair construction of the Code, it must be such a trial as results or should result in a verdict, a report of a referee, or a decision by the court which involves and determines the facts in issue. Otherwise there could be no new trial "of the issue of fact." It follows therefore that whenever a trial has been had upon issues of fact, which trial results in a verdict, report of a referee, or a decision which determines such facts, either party who feels himself aggrieved may file his

motion for a new trial on the grounds and within the time prescribed, and, until such motion is disposed of, the action is still pending, and the statutory time for preparing a case-made for an appeal does not begin to run. *Darling v. Atchison, T. & S. F. Ry. Co.*, 93 Pac. 612, 613, 76 Kan. 893.

#### Default judgment

An order vacating a default decree of divorce and allowing defendant to answer in accordance with L. O. L. § 59, is not an appealable order within section 548, providing that appeals will lie from final judgment and decrees, in effect determining the action and orders setting aside the judgment and granting a new trial, for the order is not a final one determining the suit, and neither is it an order granting a new trial which is defined by section 173 as a re-examination of an issue of fact in the same court after judgment, for this order only vacates a default, and there has been no trial which is defined by section 113 as the judicial examination of the issues between the parties. *Taylor v. Taylor*, 121 Pac. 431, 432, 61 Or. 257.

#### Degree of offense

A "new trial" is defined by St. 1893, art. 14, c. 68, as a re-examination of the issue in the same court before another jury after verdict has been given, and the granting of a new trial places the parties in the same position as if no trial had been had, and therefore one who has been convicted of manslaughter under an indictment charging murder may, on being granted a new trial, be tried for murder. *Turner v. Territory*, 82 Pac. 650, 651, 15 Okl. 557.

Under Const. art. 1, § 1, par. 8 (Civ. Code 1895, § 5705), providing that no person shall be twice put in jeopardy for the same offense, save on his own motion for a new trial, a person indicted for murder and convicted of manslaughter obtaining a new trial may be again tried for murder, and cannot successfully interpose a plea of former acquittal of murder. *Brantley v. State*, 64 S. E. 676, 678, 132 Ga. 573, 22 L. R. A. (N. S.) 959, 131 Am. St. Rep. 218, 16 Ann. Cas. 1203.

#### Directed verdict

Under Code, § 3755, defining a "new trial" as a re-examination in the same court of an issue after a "verdict of a jury," or a decision of the court, the court may grant a new trial after a directed verdict for error in directing the verdict. *Bottineau Land & Loan Co. v. Hintze*, 125 N. W. 842, 843, 150 Iowa, 646.

#### NEW WATER

Benefits of an irrigation system were classified under two heads; one of "old water," and the other of "new water." The term "old water" referred to existing water

rights at the time of the purchase of the canal, and "new water" referred to rights yet to be acquired by the enlargement of the canal. No benefits under the head of "old water" were apportioned to plaintiff's land, and the canal had not been enlarged so as to acquire any "new water." Held, that until such enlargement occurred, or it was made to appear that the canal company had sufficient water to supply plaintiff's demand without interfering with prior users, he could not acquire a perpetual water right by the temporary use of water from the canal when prior users were not demanding their full rights. *Gerber v. Nampa & Meridian Irr. Dist.*, 100 Pac. 80, 87, 16 Idaho, 1.

### NEWLY DISCOVERED EVIDENCE

"Newly discovered evidence" is evidence in existence at the time of the trial but which could not by reasonable diligence have been procured. *Cassidy v. Johnson*, 84 N. E. 835, 837, 41 Ind. App. 696.

Evidence is not newly discovered which at the time of the trial is known to the plaintiff in interest, who had taken upon herself the prosecution of the case, and which any inquiry of her would have made known to the nominal plaintiff. *Emmet v. Perry*, 60 Atl. 872, 873, 100 Me. 139.

Where, on the issue of payment, plaintiff testified that receipts offered in evidence were forgeries, he was not entitled to a new trial on the affidavit of a handwriting expert that the signatures to the receipts were forgeries, since the proffered testimony was not "newly discovered evidence" but was merely newly made evidence which could easily have been produced on the original trial. *Heintze v. Graham*, 116 N. Y. Supp. 548, 550.

Under *Burns' Ann. St.* 1901, § 568, subd. 7, providing that a new trial may be granted for newly discovered material evidence which could not with reasonable diligence have been produced at the trial, where evidence was discovered by a party some time before the court made its finding, but no attempt was made to have the court consider the evidence before the finding was announced, it was not "newly discovered evidence" so as to constitute a ground for a new trial. *Burk v. Matthews Glass Co.*, 81 N. E. 88, 89, 40 Ind. App. 81.

By "newly discovered evidence" warranting a new trial is meant testimony that comes to a party's knowledge after trial, and hence, where during the trial defendant obtained knowledge of the importance of an absent witness and did not ask leave to withdraw its announcement of ready for trial, and ask a continuance to secure his attendance, but proceeded with the trial, it could not claim a new trial on the ground of newly discovered evidence. *El Paso*

*Southwestern R. Co. v. Barrett*, 101 S. W. 1025, 1029, 46 Tex. Civ. App. 14.

### NEWS

#### NEWS AGENT

As passenger, see Passenger.

#### NEWSBOY

As passenger, see Passenger.

#### NEWSPAPER

See Daily Newspaper; Some Newspaper; Weekly Newspaper.

Publication of newspaper, see Publication.

See, also, General Circulation.

A "newspaper," in the popular sense, is a publication issued at regular stated intervals, containing, among other things, the current news, or the news of the day. *Times Printing Co. v. Star Pub. Co.*, 99 Pac. 1040, 1041, 51 Wash. 687, 16 Ann. Cas. 414.

A "newspaper" is defined as a publication issued at regular stated intervals, containing, among other things, the current news or news of the day. A publication printed daily, except Sundays, and legal holidays, and devoted to the dissemination of news on a great variety of topics of interest to the general reader, but giving special prominence to legal news, including the proceedings in the Supreme Court of the state and of the local courts sitting in the state, is a newspaper. *Puget Sound Pub. Co. v. Times Printing Co.*, 74 Pac. 802, 804, 33 Wash. 351 (citing 21 Am. & Eng. Enc. Law [2d Ed.] p. 533).

A weekly publication, printed and circulated in a city, containing the current news and matters of general interest, as well as the local happenings, is a "newspaper," within the meaning of the statute requiring the publication of city ordinances, although its circulation may be very limited. *Kansas City v. Overton*, 75 Pac. 549, 550, 68 Kan. 560.

A paper regularly published in a certain city for 20 years, and in general circulation, having among its subscribers, bankers, real estate agents, rental agents, architects, bonding companies, public and private contractors, public service corporations, and attorneys, and containing a large and varied advertising list covering many lines of business, and publishing news concerning city ordinances, resolutions of the city council, building improvements, transfers of real and personal property, building permits, court proceedings, and probate matters, public sales, together with brief items of local and foreign news of general interest and miscellaneous items of interest to the general reading public on political, social, moral, religious and other subjects, is a newspaper. *Merrill v. Conroy*, 109 N. W. 175, 77 Neb. 228.

A "newspaper," in the popular acceptance of the word, is a publication issued at stated intervals, containing, among other things, the current news (citing 21 Am. & Eng. Encyc. of Law, p. 533). A 4-page, 6-column, publication containing local and general news and correspondence, and also legal, professional, and business advertising, and apparently intended for general circulation, and entered in the United States mails as second-class matter, was a "newspaper," where the evidence showed that it had been published for ten years, and had a circulation in four counties of the state and in a majority of the states of the Union. The general circulation of a newspaper is necessarily comparative. No fixed number of subscribers is required to constitute general circulation. A newspaper's circulation does not necessarily mean that it is read by all of the people of the county or township. *Ruth v. Ruth*, 79 N. E. 523, 524, 39 Ind. App. 290 (citing *Lynn v. Allen*, 44 N. E. 646, 145 Ind. 534, 33 L. R. A. 779, 57 Am. St. Rep. 223).

"Finance and Commerce," a daily paper published in Minneapolis, is a newspaper qualified as a medium of official and legal publications, under R. L. 1905, § 5515. *Olson v. Bibb Co.*, 135 N. W. 385, 117 Minn. 214, Ann. Cas. 1913D, 877.

Under Code, § 3535, providing that publication of an original notice required for commencing an action must be in some "newspaper" printed in the county where the petition is filed, publication in a daily paper published regularly in the city where suit is brought for four years, with an actual paid subscription of more than 200 copies per day, not made up of subscribers of one class, containing advertising covering many lines of business, publishing the latest news, and reporting items of local and foreign news and others of interest, including transfers of property, and all news relating to court proceedings, and that has for more than three years been admitted to the mails under rules governing admission of all other newspapers, and is the official paper of the district court of the county, is sufficient, as such paper is a "newspaper." *Brice v. Graves*, 121 N. W. 504, 505, 142 Iowa, 722.

Under St. 1888, c. 390, § 35, requiring tax sale advertisements to be published in "a" newspaper, and under section 43, requiring tax deeds to state "the newspaper" in which the advertisement was published, a tax sale based on cost of advertising in two newspapers is void, the word "newspapers" in St. 1889, c. 334, § 3, authorizing a charge for advertising in "newspapers," meaning copies of the newspaper in which the advertisement was published. *Shurtleff v. Potter*, 92 N. E. 331, 206 Mass. 286.

Printers' affidavits as to the publication of notices of tax sales declaring that the pa-

per had been published in the county for the legal period, one stating its publication for a period of more than three years, and the other for more than two years, sufficiently showed that the newspaper was a legal newspaper within the description specified by St. 1818, § 1130. *Bouchier v. Hammer*, 123 N. W. 132, 134, 135, 140 Wis. 648.

#### As paper in English

Where a notice is required to be published by printing in a newspaper, the notice must be published in English in a newspaper printed in English. A publication in English of a notice in a French newspaper is insufficient. *Connors v. City of Lowell*, 95 N. E. 412, 415, 209 Mass. 111, Ann. Cas. 1912B, 627.

Considering the object designed and the practical means of accomplishing the object, the manifest legislative intent in the requirement of section 788 of the General Statutes of 1906 that the notice "shall be published in the several newspapers printed in the county" was to include only such "news papers" as are devoted to the publication of current news in general and are circulated among all classes of the people, and not to include publications designed chiefly or wholly for the purposes of only a portion of the entire public. The English language is the means recognized by our law for communication and information; and, while a paper printed in a foreign language may be a "newspaper," it may not be within the purview of a statute requiring the publication of legal notices designed for the information of all the people, where the statute contains nothing to indicate an intention to include such publication. *Tyler v. Hyde*, 52 South. 968, 969, 60 Fla. 389.

#### NEWSPAPER OF GENERAL CIRCULATION

Pol. Code, § 4459, defines "newspaper of general circulation" as a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed, and published, in the state, county, city, and county, or town, where such publication, notice of publication, or official advertising is given or made, for at least one year. A newspaper devoted to the interests, or published for the entertainment, of a particular class, profession, trade, calling, race, or denomination, or any number thereof, is not a newspaper of general circulation. In *re Malone*, 74 Pac. 991, 992, 141 Cal. 331.

Evidence held to show that a certain newspaper was a "newspaper of the county having general circulation therein" within *Wilson's Rev. & Ann. St. 1903, § 4006*, so that a certificate of partnership required to be published by *Wilson's Rev. & Ann. St. 1903,*

§ 3901, was properly published therein. *Hesler v. Coldron*, 116 Pac. 787, 29 Okl. 216.

A daily noon publication was an 8-page paper, 18 by 23 inches in size, with 8 columns to the page, and contained telegraphic, sporting, political, and theatrical news and advertisements with an editorial column. The company also published an evening paper by another name, and the noon publication in question had formerly been known as the noon edition of the evening paper, and was principally devoted to sporting news. The publishers of the noon paper bid for the city printing to be published therein. The paper at that time had no regular subscription list, but about 1,000 copies were sold daily by newsboys. Subsequently the paper had a subscription list of 360 and an average daily circulation of 1,083. Held, that the paper, at the time the bid was submitted, was a "newspaper" within Seattle City Charter, art. 4, § 31, requiring that the city official newspaper be a daily newspaper of general circulation, etc., though it sometimes contained news published the day before in the evening paper. *Times Printing Co. v. Star Pub. Co.*, 99 Pac. 1040, 1041, 51 Wash. 667, 16 Ann. Cas. 414.

Under Pol. Code, § 4460, defining a "newspaper of general circulation" as one which shall have been established, printed, and published at regular intervals for at least one year preceding the date of publication, where a newspaper had been published weekly for part of a year, and daily for the balance of the year preceding the filing of a petition to have it declared a newspaper of general circulation, it was published at "regular intervals" for one year within the statute, which does not require the interval between the dates of publication to be equal from beginning to end, but only to be regular and not spasmodic or occasional. In re *Tribune Pub. Co.*, 108 Pac. 667, 12 Cal. App. 754.

#### NEWSPAPER OF OPPOSITE POLITICAL FAITH

Under Laws 1903, p. 435, c. 182, § 1, subsec. 29, amending Laws 1898, p. 371, c. 182 (Second-Class Cities Law), providing for the designation by the common council of two daily newspapers having the largest circulation and of opposite political faith as official newspapers of the city, a newspaper which supports no party, and advocates the principles or candidates of no party, but which is the personal organ of its publishers and proprietors, at times supporting the candidates and principles of either the Republican or Democratic parties, as its officials may determine, is not a "paper of opposite political faith" to any regular party paper. *People ex rel. Troy Press Co. v. Common Council of City of Troy*, 99 N. Y. Supp. 1045, 1047, 114 App. Div. 354.

## NEXT

### As nearest

There is a shade of difference between the words "next" and "nearest." The word "next" in a certificate of membership of a mutual benefit society, providing for payment of a benefit on the death of a member to the beneficiary named, who under the by-laws must be either the wife, children, adopted children, parents, etc., and, if the member outlived the beneficiary named and died without naming another beneficiary, the benefit was to go to the member's "next" living relation in the order named, is used as a synonym of "nearest" and refers to the member and not to the beneficiary. Therefore where a member named his wife as beneficiary and she died and he married again, leaving a second wife without having changed the beneficiary, the second wife and not his children took the benefit. *Speegle v. Sovereign Camp of Woodman of the World*, 58 S. E. 435, 436, 77 S. C. 517.

Gen. St. 1902, § 788, provides that, when a final judgment is rendered in any cause in which a party may be entitled to a writ of error to the Supreme Court, he may appeal from such judgment to the next term of court which would have cognizance of the writ of error. Accused was convicted on November 11, 1911, and the next term of the Supreme Court was January 16th. Section 563 provides that the writ of error, which is an independent action begun by the filing of a complaint in the Supreme Court, and the suing out of the writ as civil process must be returned at least 30 days before the sitting of the court. Held that, as the word "next" means nearest in order and immediately following, the writ of order in this case was returnable to a term beginning January 16th, and an appeal cannot be filed to a later term. *State v. Caplan*, 84 Atl. 280, 283, 85 Conn. 618.

### As referring to same month

The word "next," in a writ of venire issued June 12, 1908, commanding the sheriff to serve the writ upon the jury commissioners, and requiring them to summon the jurors to appear before the common pleas court held on the 22d of June next, at 10 o'clock, etc., meant the next 22d day of June in that year, especially in view of the fact that the next term of the court after June 12th was June 22d. *State v. Washington*, 64 S. E. 386, 387, 82 S. C. 341. (citing 5 Words and Phrases, p. 4795).

## NEXT CAUSE

As proximate cause, see Proximate Cause.

## NEXT ELECTION

Const. art. 10, § 5, providing that in case of vacancy in the Supreme Court the office may be filled by the grand committee until



the next annual election, refers to the next annual election of public officers. In re Opinion of Judges, 51 Atl. 221, 222, 23 R. I. 635.

The words "next election," as used in P. L. 1901, p. 333, § 18, providing that acceptance or rejection of the act should be submitted to a popular vote at the "next election" whether general, municipal, or special, etc., did not refer to the "next election" held after the passage of the act. Had such been the intention of the Legislature, it was comparatively easy to specify a date for a special election, or to designate a general election. Therefore, in support of the constitutionality of the act, it is fair to take the words "next election" as applying to the first general election that shall be held in any county, not at the time possessing the distinctive features, after it shall thereafter acquire those features. Albright v. Sussex County Lake & Park Commission, 53 Atl. 612, 616, 68 N. J. Law, 523.

#### NEXT EVENTUAL ESTATE

See Eventual Estate.

#### NEXT FRIEND

As party, see Party.

Guardian ad litem distinguished, see Guardian Ad Litem.

"A 'next friend' is one who, though not regularly appointed, represents in a suit a party thereto who is not sui juris." Jackson v. Counts, 54 S. E. 870, 871, 106 Va. 7.

The office of next friend is to represent a person under disability in the litigation, being authorized to appear only when there is no legal and statutory representative discharging that duty. Upton's Committee v. Bush, 121 S. W. 1005, 1008, 135 Ky. 102.

The guardian and next friend, in conducting a civil action, are a "species of attorney, whose duty it is to bring the rights of the infant to the notice of the court," and the authority of each is limited to the proceeding in which he is appointed. Williams v. Cleaveland, 56 Atl. 850, 853, 76 Conn. 426.

Rev. St. 1895, art. 3498u, provides that any minor having a sufficient cause of action and who has no legal guardian can bring suit in any of the courts by "next friend," and such next friend shall have the same rights concerning such suit as if he were guardian, etc. The "next friend" is merely a trustee who voluntarily assumes the task of representing the minor in the litigation and in the suit stands as the representative of the minor. Biggins v. Gulf, C. & S. F. R. Co. (Tex.) 110 S. W. 561, 563.

The relation of "proche in ami" to the action is that of an officer of the court specially appointed to enforce and preserve the rights of the infant in whose behalf he acts. He may employ an attorney, carry the suit on to judgment, and may, if there is no regularly constituted guardian of the infant, re-

ceive the money recovered of the defendant, and thereupon may enter a valid satisfaction of the judgment. State ex rel. Lane v. Ballinger, 82 Pac. 1018, 1020, 41 Wash. 23, 3 L. R. A. (N. S.) 72.

#### NEXT GENERAL ASSEMBLY

Act Oct. 14, 1879 (Laws 1878-79, p. 125), authorizing the Governor to suspend a railroad commissioner, and providing that the Governor shall report the fact of suspension and the reason therefor to the "next" General Assembly, means the General Assembly nearest in point of time, and, if the General Assembly is in session when the suspension is made by the Governor, it is his duty to make his report to that General Assembly. Gray v. McLendon, 67 S. E. 859, 873, 134 Ga. 224.

#### NEXT GENERAL ELECTION

The phrase "next general election," as used in Wilson's Rev. & Ann. St. 1903, § 3750, which provides that a person appointed to fill a vacancy shall serve until the next general election, means the next regular election at which that particular class of officers is to be chosen. Wainwright v. Fore, 97 Pac. 831, 833, 22 Okl. 387.

The term "next general election," as used in Laws 1905, p. 18, § 10, providing that all officers appointed by the act should hold their respective offices until after the "next general election," so far as the office of clerk of the district court is concerned, means the "next general election" held to fill that office in the judicial district, and a person holding such office is not ousted by the election of a successor at a general election called by the Governor for the election of other officers than clerk of the district court. State ex rel. Livesay v. Smith, 90 Pac. 750, 751, 35 Mont. 523, 10 Ann. Cas. 1138.

#### NEXT HIGHEST BIDDER

The phrase "next highest bidder," as used in Act Cal. March 11, 1901, relating to the granting of a street railway franchise by a municipality to the next highest bidder on the failure of a successful bidder to make the requisite deposit within a specified time, refers to bids already made, and not to a bid or bids to be made. It expresses the relation between bids in existence—those already made and pending before the council. It is only in comparison with the next highest of those that the words have significance. Pacific Electric R. Co. v. Los Angeles, 24 Sup. Ct. 586, 589, 194 U. S. 112, 48 L. Ed. 896.

#### NEXT MUNICIPAL ELECTION

The words "next municipal election," as used in an act concerning the government of cities, and requiring that the act be submitted to the voters at the municipal election after its approval, means the next election after the municipality comes into the class

affected by the legislation. *Seymour v. City of Orange*, 65 Atl. 1033, 1034, 74 N. J. Law, 549 (citing *Ross v. Board of Chosen Freeholders of Essex County*, 55 Atl. 310, 69 N. J. Law, 291; *Fagan v. Payen*, 59 Atl. 568, 75 N. J. Law, 851).

The phrase "next municipal or charter election," in P. L. 1894, relative to cities of the first class and providing that members of certain municipal bodies shall be elected at the "next municipal or charter election," would as to existing cities be the first election after the passage of the act and as to any future cities the first election held in the same. *Fagan v. Payen*, 59 Atl. 568, 569, 75 N. J. Law, 851.

### NEXT OF KIN

"The term 'next of kin' is used to signify the relatives of a person, sometimes in the sense of nearest blood relatives and at other times in the sense of relatives entitled to take under the statute of distribution." *Graham v. Whitridge*, 57 Atl. 609, 617, 58 Atl. 36, 99 Md. 248, 66 L. R. A. 408.

The words "next of kin," as used in Code Civ. Proc. § 2643, relating to letters of administration with will annexed, where there is no executor qualified to act, and providing in subdivision 3 that where the residuary, principal, or specified legatee, or the guardian of a minor, entitled to letters, either do not exist or will not accept administration, letters shall issue to one or more of the next of kin, must be limited to such of the next of kin as are entitled to share in the unbequeathed assets of the estate, and who are therefore persons interested therein; and a person having no such right is to be excluded. In *re Goggin's Estate*, 88 N. Y. Supp. 557, 559, 43 Misc. Rep. 233.

In Rev. St. c. 70, § 2, giving a right of recovery for wrongful death to the wife and "next of kin," the quoted words mean those standing in that relation in a technical sense. *Dukeman v. Cleveland, C., C. & St. L. R. Co.*, 86 N. E. 712, 714, 237 Ill. 104 (quoting and adopting definition in *Chicago, P. & St. L. R. Co. v. Woolridge*, 51 N. E. 701, 702, 174 Ill. 330, 334).

The words "next of kin" as used in the statute relating to wrongful death mean those who inherit from the deceased under the statutes of descent and distribution. *Bolinger v. Beacham*, 106 Pac. 1094, 1096, 81 Kan. 746.

*Burns' Ann. St. 1908*, § 285, giving a right of action to the personal representative for death by wrongful act, provided that the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, recognizes two classes of beneficiaries, the widow and children and next of kin; and, if there are persons of the first class entitled to damages, they will take exclusively,

and grandchildren are not "children" within the statute, but come within the second class, and may take as beneficiaries if there are none of the first class, nor are minor children "next of kin" within the statute, though they are in fact decedent's next of kin. *Pittsburg, C., C. & St. L. Ry. Co. v. Reed*, 88 N. E. 1080, 1082, 44 Ind. App. 635.

Under a statute providing that "when the title to any real estate of inheritance as to which the person having such title shall die intestate, came by descent, gift or devise, from the parent or other kindred of the intestate and such intestate die without children, such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended if any there be," property devised by testatrix to her grandchildren who are children of her daughter, with the provision that at the death of one of the grandchildren, a granddaughter, the property should vest in her heirs, the property vested in equal parts on her death in her mother, and her brother as the "next of kin" to the exclusion of her father. *Pierce v. Pierce*, 14 R. I. 514, 517.

In the absence of a contrary intent, a gift to "next of kin" is a gift to the nearest of kin in the strictest sense, excluding persons who might take by representation under the statute of distribution; e. g., a brother or sister takes to the exclusion of children of a deceased brother or sister. *Clark v. Mack*, 126 N. W. 632, 634, 161 Mich. 545.

### As kin living at time

A devise to "heirs" or "next of kin" is construed as referring to those who answer that description at the time of the testator's death or who would have taken, by descent, had he died intestate, unless a different intention is plainly manifested by the will. *Suman v. Harvey*, 79 Atl. 197, 201, 114 Md. 241.

"Next of kin," in the statute fixing the order of preference in which letters of administration shall be granted, means persons who are next of kin at the death of the intestate, and who inherit the estate left by the decedent, and the addition of the words "having an inheritable interest in the estate" adds nothing. In *re Ellis' Estate*, 88 N. E. 341, 342, 43 Ind. App. 620.

Under a will giving the residuary estate to the executors, in trust to pay the income to B. for life, and providing, "From and after the death of B., I direct my executors and trustees to convey my entire residuary estate, with all accumulations of interest then on hand, to my heirs at law and next of kin, whomsoever they may be," the gift over after the death of the life tenant is to testator's next of kin living at the death of the life tenant. In *re Cooper's Will*, 96 N. Y. Supp. 562, 564, 109 App. Div. 566.

**As nearest blood relations**

Primarily a decedent's "next of kin" are the persons nearest in degree of blood surviving him. If a decedent leaves neither parent nor lineal descendant surviving, brothers and sisters are "next of kin." In practical use in public statutes, "next of kin" ordinarily means those who take personal estate under the statute of distributions. In *re Weaver's Estate*, 119 N. W. 69, 70, 140 Iowa, 615, 22 L. R. A. (N. S.) 1161, 17 Ann. Cas. 947.

**Adopted child**

Under a statute providing that an action for death shall be for the exclusive benefit of the widow and "next of kin" of the deceased person, the "next of kin" of a child adopted under the statute concerning infants (2 Gen. St. p. 1714) are the "next of kin" by blood. *Heidecamp v. Jersey City H. & P. St. R. Co.*, 55 Atl. 239, 69 N. J. Law, 284, 101 Am. St. Rep. 707.

It is only as to the adopting parent that the adopted child is made heir or next of kin by the statute Comp. Laws 1897, § 8780, providing that an adopted child shall become the heir at law of the person adopting it; and the adopted child, therefor, is not heir by right of representation of the kindred of the person who adopted it. *Van Derlyn v. Mack*, 100 N. W. 278, 280, 137 Mich. 146, 66 L. R. A. 437, 109 Am. St. Rep. 669, 4 Ann. Cas. 879 (quoting *Helms v. Elliott*, 14 S. W. 930, 89 Tenn. 446, 10 L. R. A. 535).

**As descendant**

See *Descendant*.

**Father**

Where decedent leaves no widow or child, but is survived by a father, mother, and younger sister, the father is the sole "next of kin." *Swift & Co. v. Johnson*, 138 Fed. 867, 870, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161 (citing Gen. St. 1894, § 4477 [cl. 6] § 4471 [cl. 3]).

**As heirs**

See *Heirs*.

**Heirs at law**

The common-law distinction between "next of kin" and "heirs at law" does not exist in our statutes of descent, but heirs at law are also the next of kin. *L. T. Dickason Coal Co. v. Diddil*, 94 N. E. 411, 413, 49 Ind. App. 40.

"Those who take personalty by inheritance are technically 'next of kin' and not heirs." *Kalbach v. Clark* (Iowa) 110 N. W. 599, 602, 12 L. R. A. (N. S.) 801 (citing and adopting *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1).

The term "next of kin" at least includes those entitled to take the personal estate in case of intestacy. While it is doubtless used sometimes as synonymous with the broad

signification of "heirs at law," the term "heirs at law" is often used in its popular sense of including heirs in the legal sense, those on whom the law casts title to realty possessed by the intestate at the time of his death, and next of kin as well. Treating the latter term and the former only in their legal sense, the one refers to those who take the personalty of an intestate and the other to those in whom the title to the realty possessed by the intestate vests immediately on his death. In *re Scaife's Will*, 105 N. W. 920, 921, 126 Wis. 405.

Where a will directed that, on the death of testator's widow, all his estate then remaining should be divided into three equal parts, one to go to his son W. or to his heirs should he have died, the word "heirs" should be construed to mean "next of kin," or those related by blood, entitled to take the personal estate of one dying intestate, and did not include W.'s widow. *Hess v. Zahn*, 107 N. Y. Supp. 951, 953, 954, 57 Misc. Rep. 515.

Since the courts of Kansas have construed the words "next of kin" in Gen. St. Kan. 1897, c. 95, §§ 418, 419, authorizing an action for negligent death for the benefit of decedent's next of kin, to mean those who inherit from decedent under chapter 109, § 19, providing that, where an intestate leaves no issue nor wife, his estate shall go to his parents, a father and mother may sue for the death of their son, dying intestate, without wife or issue, in consequence of an injury received in Kansas. *Charlton v. St. Louis & S. F. R. Co.*, 98 S. W. 529, 535, 200 Mo. 413.

Testatrix, by the fifth clause of her will, bequeathed money to be invested and the interest paid to testatrix's sister for life, and on her death, to testatrix's daughter, and, on the death of the daughter, the principal to be divided between the issue of the daughter, and, if no issue, then to testatrix's next of kin. The sixth clause devised the homestead to the executors, the rent thereof to be paid to the daughter during her life, and at her death the homestead to be conveyed to the child of such daughter, or the issue of such child, and, in the event of the failure of issue, then to testatrix's heirs at law. The seventh clause bequeathed the residue of the estate in trust, to be divided into two parts, and the income of one part paid to the daughter during her life, and, on the death of such daughter, the principal to be paid to her issue, and, if she leave no issue, to testatrix's next of kin. Held, that testatrix did not intend that her daughter should, in any event, take a vested remainder in the corpus of the trusts, subject only to her own life estate; the words "heirs at law" and "next of kin" not being used in their strict and primary meaning, viz., the persons who, in case of intestacy, would at the moment of testatrix's death succeed to her property.

*Salter v. Drowne*, 98 N. E. 401, 402, 205 N. Y. 204.

Code Pub. Gen. Laws 1904, art. 46, providing by sections 6, 14, and 21 for the descent of real estate, declares by section 27 that if, in the descending or collateral line, any parent shall be dead, a child or children shall, by representation, be considered in the same degree as the parent would have been if living, and shall have the same share of the estate as the parent would have been entitled to if living, "provided that there is no representation admitted among collaterals after brother's and sister's children"; and article 93, § 129, provides: "After children, descendants, father, mother, brothers and sisters of the deceased, and their descendants, all collateral relations in equal degree shall take, and no representation among such collaterals shall be allowed." Testatrix directed her estate to be converted into cash and distributed among her "heirs at law and next of kin, who should be entitled thereto under the laws of Maryland." Held, in a contest between the first cousins of the deceased and the children of a deceased first cousin, that the children of the deceased first cousin were not within the class described by the will and took nothing thereunder. *Suman v. Harvey*, 79 Atl. 197, 201, 114 Md. 241.

#### Illegitimate children

The term "blood relatives" or "heirs" or "next of kin" may include illegitimate offspring, and where testator left his property to his nearest blood relatives, and it appears with reasonable certainty that when he made the will he knew or ought to have known that he had no blood relatives other than illegitimates, he used the terms to refer to such persons. In *re Sander's Estate*, 105 N. W. 1064, 1066, 126 Wis. 660, 5 Ann. Cas. 508.

The administrator of an illegitimate child brought action for his wrongful death under *Burns' Ann. St.* 1908, § 285, for the benefit of his "next of kin," consisting of his mother, his half-brothers, and his half-sister by his mother's subsequent marriage. *Burns' Ann. St.* 1908, § 2998, provides that illegitimate children may inherit from the mother as if legitimate, and through the mother, if dead, any property or estate which she would, if living, have taken by gift, devise, or descent, and by section 3002 the mother of an illegitimate child dying intestate without issue or other descendants inherits his estate; and, if such mother be dead, her descendants or kindred shall inherit. Held, that the "next of kin" included such persons as were entitled to inherit the personal property of the decedent, and that, under sections 2998 and 3002, the mother and the half-brothers and the half-sister were the next of kin, and that the administrator's action could be maintained for their benefit.

*L. T. Dickason Coal Co. v. Liddell*, 94 N. E. 411-418, 49 Ind. App. 40.

#### Marriage connections

The phrase "next of kin," whether used in a statute, will, or contract, includes only relations by blood, and not connected by marriage, not even a husband and wife. *De Graffenreid v. Iowa Land & Trust Co.*, 95 Pac. 624, 635, 20 Okl. 687 (citing Supreme Council of Order of Chosen Friends v. Bennett, 19 Atl. 785, 47 N. J. Eq. 39).

The phrase "next of kin," whether used in a statute, will, or contract, has by a perfectly uniform course of decisions been held to include only relations by blood, and not connections by marriage, not even a husband and wife. *Boyd v. Perkins*, 113 S. W. 95, 96, 130 Ky. 77 (citing *Huting v. Fenner*, 9 R. I. 411; 2 Jarm., Wills, 661; *Schouler, Wills*, § 537).

The term "next of kin" does not include the widow of testator, in the absence of any evidence of an intent to include her in the class which the term is employed to designate. *United States Trust Co. v. Miller*, 109 N. Y. Supp. 938, 940, 57 Misc. Rep. 500.

The surviving husband is, within Civ. Code, § 422, next of kin to his wife, and entitled to recover damages for her wrongful death. *Atchison, T. & S. F. Ry. Co. v. Townsend*, 81 Pac. 205, 206, 71 Kan. 524, 6 Ann. Cas. 191.

The words "next of kin" do not include a widow or husband. *Hess v. Zahn*, 107 N. Y. Supp. 951, 953, 57 Misc. Rep. 515.

Neither husband nor wife of a nephew or niece of a testator were his "next of kin" or of blood relationship, and hence must be excluded in seeking those indicated by "heirs and representatives" of nephew or niece surviving him. In *re Nelson's Estate*, 74 Atl. 861, 867, 862, 9 Del. Ch. 1.

A husband is his wife's "next of kin," where she dies intestate and without children or direct descendants, within Code Civ. Proc. Kan. § 422a, providing that certain actions for wrongful death may be brought by deceased's "next of kin." *Joplin & P. Ry. Co. v. Payne*, 194 Fed. 387, 389, 114 C. C. A. 305.

Rev. St. Ohio 1892, § 4176, provides that when a person dies intestate and leaves no children or their legal representatives, the widow or widower shall be entitled as "next of kin" to all the personal property, etc.; but, if the intestate leaves any children, the widow or widower shall be entitled to the first \$400 and one-third of the remainder of the personal property subject to distribution. A policy of insurance payable to the insured's heirs was by its terms to be governed and construed according to the laws of Ohio. Held that, though in New York "heirs" when applied to successors to personal estate

means "next of kin," and "next of kin" does not include a widow, under the policy and laws of Ohio, the widow is entitled to personal property as "next of kin," and should share in the insurance with the insured's children. *Burns v. Burns*, 82 N. E. 1107, 1108, 190 N. Y. 211.

Code Civ. Proc. § 1908, provides that damages recovered in an action for wrongful death are exclusively for the benefit of the decedent's husband or wife and next of kin, to be distributed as unbequeathed assets; section 1904 declares that the damages may be such as the jury deems just compensation for the pecuniary injuries resulting from the decedent's death to the person for whose benefit the action was brought; and sections 1905 and 1870 define "next of kin" to include all persons entitled under the statutes of distribution of personal property to share in unbequeathed assets of the decedent other than a surviving husband or wife. Held, that in an action for wrongful death of a married woman living apart from her husband, leaving no descendants, the damages recoverable were only such as resulted from the pecuniary injury caused by her death to her husband. *Austin v. Metropolitan St. Ry. Co.*, 95 N. Y. Supp. 740, 741, 108 App. Div. 249.

#### Nonresident alien

A statute giving the "next of kin" of one wrongfully killed a cause of action does not apply to nonresident aliens. *Zelger v. Pennsylvania R. Co.*, 151 Fed. 848, 852.

Under Code Civ. Proc. § 1902, providing that an executor or administrator of decedent, who has left surviving a husband, wife, or "next of kin," may maintain an action to recover damages for wrongful death, section 1905, providing that the term "next of kin," as used in the foregoing sections has the meaning specified in section 1870, and section 1870, providing that the term "next of kin" includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife, the administrator of a decedent whose "next of kin" are aliens may bring such an action. *Alfson v. Bush Co.*, 75 N. E. 230, 231, 182 N. Y. 393, 108 Am. St. Rep. 815.

#### As relative

See Relation—Relative.

#### As representative

See Legal Representative; Representative.

### NEXT OF KIN IN EQUAL DEGREE

Testatrix devised half of the residue of her estate to the heirs of her late husband. There were living 11 nieces and nephews and 8 grandnieces and grandnephews of the said

husband at the death of testatrix. Held, that his "next of kin in equal degree" within Rev. St. 1903, c. 77, § 1, rule 6, are his 11 nieces and nephews living at the death of testatrix, taking the residue so devised per capita and not per stirpes. *In re Ruggles' Estate*, 71 Atl. 933, 935, 104 Me. 333.

The statute of distributions having been amended by the repeal of the proviso limiting representation among collaterals to the children of deceased brothers and sisters, held, that the words, "and in case there be no child, then to the next kindred of equal degree of or unto the intestate and their legal representatives," are to be read in connection with a prior clause directing distribution to the next of kindred "in equal degrees or legally representing their stocks," and in the distribution of personal property among collaterals representation is limited to the descendants of the stock represented by the surviving "next of kin," as the words "next of kin" must mean living persons. *Smith v. McDonald*, 61 Atl. 453, 455, 69 N. J. Eq. 765.

### NEXT OF KINDRED

The words "next of kindred," as used in a will limiting a remainder on a trust estate after the beneficiary's death to her next of kindred, include the beneficiary's nephew and niece in preference to her grandnephews and grandnieces. *Graham v. Whitridge*, 57 Atl. 609, 617, 58 Atl. 86, 99 Md. 248, 66 L. R. A. 408.

The words "next of kindred," in Orphans' Court Act 1898, § 168 (P. L. p. 715), directing disposition to the next of kindred of equal degrees or legally representing their stocks, mean representatives of those dead, who if living would answer the same description as the actually living next of kindred. *Smith v. McDonald*, 65 Atl. 840, 842, 71 N. J. Eq. 261.

### NEXT PRECEDING

The words "during the year next preceding," as used in Gen. St. 1905, c. 54, § 8, providing that in making a selection of persons to serve as jurors "each person who shall have served as a juror in any capacity at any term of court during the year next preceding such selection shall be excluded from the list of jurors for the then ensuing year," clearly means the preceding year, counting back from the time of the making of the list. *State v. Hamilton*, 87 Pac. 363, 365, 74 Kan. 461.

Code 1906, § 333, requiring notice of a proposal to issue county bonds for three weeks "next preceding," does not mean that, if the board fails to issue the bonds at the meeting next after the publication of the notice, it may not do so at a future time, but jurisdiction is acquired, and may be exercised in the discretion of the board. *Weston v. Hancock County*, 54 South. 307, 309, 98 Miss. 800.

**NEXT REGULAR TERM**

See, also, Next Term.

Defendant was given until the last day of the next term of court to file a bill of exceptions. The next term should have been held in February, and the following term in May. Owing to the absence of the judge, the February term was not held. Held, that she had until the last day of the May term within which to file her bill of exceptions, since the order extending her time did not give her to any particular day of the year, but to a certain day in the "next regular term," which meant a term at which the court was legally open for the transaction of business, and not the time at which it could and should have been open, but was not because of the absence of the judge. *Grant City v. Simmons*, 151 S. W. 187, 188, 187 Mo. App. 183.

**NEXT SESSION**

The words "at its next session," in Const. art. 5, § 14, authorizing the Legislature to pass bills over the Governor's veto, and providing that, when the Governor within five days after the adjournment of the Legislature vetoes a bill and files it in the office of the Secretary of State, the latter shall lay the same before the Legislature "at its next session" as if it had been returned by the Governor, mean the first session following, whether regular or special, and a bill vetoed by the Governor after the adjournment of the Legislature must be acted on at the following special session, and the action of the Legislature in acting on it at the regular session following the special session and passing it over the Governor's veto is ineffectual. *Woessner v. Bullock*, 93 N. E. 1057, 1058, 176 Ind. 166.

**NEXT SUCCEEDING**

Where a demand for trial was made in the superior court at the term at which the indictment was found, and subsequently during the term the indictment was transferred to a city court for trial, the demand being made and the indictment transferred during a concurrent term of the city court, the next term of the city court, and not the concurrent term, was the "next succeeding term" after the demand, within the meaning of section 983 of the Penal Code. *Castleberry v. State*, 76 S. E. 74, 75, 11 Ga. App. 757.

In Act May 23, 1889 (P. L. 277, art. 1), § 3, as amended by Act June 21, 1911 (P. L. 1102), providing that officers of a borough shall hold their respective offices until the first Monday in December of the first odd-numbered year next succeeding the issuing of letters patent to the borough as a city of the third class, the words "next succeeding" qualify the words "the first odd-numbered year," and not the word "December." *Commonwealth v. Langley*, 82 Atl. 56, 58, 233 Pa. 222.

**NEXT TERM**

See, also, Next Regular Term.

An order that the action abate if the heirs are not made parties by the "next term" refers to the next civil term, and not to an intervening criminal term; and where process is served on them within that time, and within two years from defendant's death, the refusal to abate the action is not an abuse of discretion. *Moore v. Moore*, 66 S. El. 598, 599, 151 N. C. 555.

Const. art. 1, § 10, declares that justice shall be administered without delay; B. & C. Comp. § 1559, provides that if a defendant whose trial has not been postponed on his application, or by his consent, be not brought to trial at the next term of the court in which the indictment is triable, after it is found, the court must order the indictment dismissed, except for cause; and B. & C. Comp. § 1379, gives the court authority to postpone a criminal case to another term on the statement of the district attorney. Held, that the words "next term," as used in section 1559, excluded the current term at which the indictment was found, and hence defendant was not entitled either to a trial or dismissal at that term. *State v. Breaw*, 78 Pac. 896, 45 Or. 586.

Va. Code 1904, p. 1633, § 3060, provides, in section 3062, that there may be tried at special term any civil case not tried at the last preceding term, any motion cognizable by the court, any criminal case which could be tried at a regular term, and any controversy ready for hearing at law or in chancery, though it could not have been heard at the preceding term; and section 3024, p. 1612, provides that, where the reasons stated in a petition for quo warranto are legally sufficient, the writ shall be returnable to the next term of the court. Held, that a writ of quo warranto may not be returned to a special term, the phrase "next term" in section 3024 referring to a regular term, and the matter not being within section 3062. *Stults v. Pratt*, 49 S. E. 654, 103 Va. 536.

Under section 27 of the act creating the city court of Camilla (Acts 1905, p. 189), providing that if a defendant stands mute, etc., then the judge shall commit him for trial at the next regular term, or special term, a contention that the word "next" means nearest, and that the nearest term is the one already in session, is too strained to be tenable. *Heywood v. State*, 54 S. E. 187, 125 Ga. 262.

The phrase "next term," in a bail bond containing incorrect recitals as to the day, month, or year in which the court will convene or accused appear, coupled with a condition for accused to appear at the "next term," operates to render the bond valid. *Territory ex rel. Thacker v. Conner*, 87 Pac. 591, 592, 17 Okl. 135 (citing *State ex rel. Gibson v. Lay*, 29 S. W. 999, 128 Mo. 609;

State v. McElhaney, 20 Mo. App. 584; Gay v. State, 7 Kan. 394; 5 Oyc. p. 96; Mooney v. People, 81 Ill. 134; Hunter v. State, 21 Ind. 351; Curry v. State, 39 Miss. 511; People v. Welsh [N. Y.] 47 How. Prac. 420; People v. O'Brien, 41 Ill. 303; Proseck v. State, 88 Ohio St. 606).

The word "subsequent," in the act requiring commissioners appointed by the Orphans' Court to set off dower to make their report at the next or subsequent term after their appointment, has the same meaning as "next," and, if either word had been used alone, it would have expressed the same idea. Osborn v. Rogers, 19 N. J. Eq. 429, 431.

Accused was indicted at the October, 1909, term of the district court, which ended February 4, 1910. On February 8th a special term of the court was convened at the request of accused to hear his motion to quash the indictment. Another special term was convened on February 28th, and on March 7th the next regular term convened which was to continue until May 31st, but the Legislature by Act March 25, 1910, provided that the regular term of such district court should commence on the first Monday in January, May, and October each year. Held, that accused was not entitled to a dismissal because he had not been brought to trial at either of such terms, since the "next term of court" within Comp. Laws 1909, § 7047, providing that, if an accused prosecuted for a public offense whose trial has not been postponed upon his application is not brought to trial at the next term of court in which the indictment is triable, the court must order the prosecution dismissed, etc., refers to the next regular term of the court as distinguished from a special term held for a special purpose, and the law becoming effective while the March term was being held, operating to terminate such term on April 30th, was sufficient cause for not trying him during such term, so that accused's right to a speedy trial guaranteed by Bill of Rights, § 20, was not violated, as his constitutional right to a speedy trial was not contravened by delay necessitated by the law itself. State ex rel. Eubanks v. Cole, 109 Pac. 736, 744, 4 Okl. Cr. 25.

#### NEXT THING TO AN IMPOSSIBILITY

"Next thing to an impossibility," as used in the testimony of an engineer with reference to the construction of a bridge so as to prevent debris from being swept therefrom either by the city's employes or by air currents onto the houses below, meant that any further or additional construction to remedy the alleged defect was almost impossible or impracticable. Sadlier v. New York, 93 N. Y. Supp. 579, 583, 104 App. Div. 82.

#### NFY.

Where a bill of lading read "consignee J. B. S. Nfy. W. H. J. & Co." the legend

"Nfy." is equivalent to "notify" and imposes on the railroad company the duty to notify W. H. J. & Co., and evidence to show such meaning is admissible. Stoner v. Zacharay, 97 N. W. 1098, 1100, 122 Iowa, 287.

#### NICE

The word "nice" is defined as "characterized by discrimination and judgment, acute, discerning, exactly fitted or adjusted, accurate, apt, delicately constructed, hence easily disarranged or injured; fragile, tender, agreeable or pleasant in any way, pleasing to the senses." Brophy v. Idaho Produce & Provision Co., 78 Pac. 498, 495, 31 Mont. 279 (quoting Standard Dict.).

#### NICKEL

Manufactures of, see Manufactures—Manufactured Articles.

A "nickel" means 5 cents. Sims v. State, 57 S. E. 1029, 1 Ga. App. 776.

#### NICKNAME

"Mike" is not a universally recognized abbreviation of "Michael," but is, strictly speaking, a mere diminutive or nickname. Ohlmann v. Clarkson Sawmill Co., 120 S. W. 1155, 222 Mo. 62, 28 L. R. A. (N. S.) 432, 133 Am. St. Rep. 506.

#### NIECE

To constitute incest under Burns' Ann. St. 1908, § 2352, punishing sexual intercourse between uncle and niece when construed in connection with section 8357, making males and females not nearer of kin than second cousins competent to marry, the uncle and niece must be related by blood; the word "niece" in its primary sense including relationship by consanguinity. State v. Tucker, 98 N. E. 3, 4, 174 Ind. 715, 31 L. R. A. (N. S.) 772, Ann. Cas. 1913A, 100.

##### As brother

See Brother

##### Grandnieces

The words "nephews and nieces," as contained in the residuary clause of a will giving to testator's "nephews and nieces" the residue of his estate, included grandnephews and grandnieces, and this, whether the previous bequests in the will to them had been absolute or in trust. Leask v. Richards, 101 N. Y. Supp. 652, 656, 116 App. Div. 274.

Testator gave a legacy to his niece Kate, daughter of Dr. H. W., and to Dr. H. W. a specified sum for himself and his other children, and he gave legacies to any niece or nephew whom he had omitted, excepting the children of Dr. H. W., for whom he had made provision. Testator was a widower, who had never had any children, and left surviving him a number of nieces and nephews, and

grandnieces and grandnephews, descendants of sisters who died before the execution of the will. There were two Drs. H. W., father and son; the father being the father of the niece Kate. Testator had a niece Mrs. P., who was omitted from the will, and the legacy to her was on her death paid to her children. Held, that the words "niece or nephew" did not embrace grandnieces and grandnephews. *White v. Old*, 75 S. E. 182, 184, 113 Va. 709.

## NIGGER

A "nigger" is a part of the machinery of a sawmill, and consists of a piece of timber with iron spikes along the upper side, and is used in striking and pushing heavy logs onto the carriage and for turning them thereon when desired. *O'Brien v. Page Lumber Co.*, 82 Pac. 114, 39 Wash. 537.

## NIGGERHEAD

The falling of a "niggerhead," which is a large, hard substance found in coal, or partly in the coal, and partly in the walls, is such a caving in as the statute requires mine-owners or operators to furnish timbers to guard against. *Pachko v. Wilkeson Coal & Coke Co.*, 90 Pac. 436, 437, 46 Wash. 422.

## NIGHT—NIGHTTIME

### As after sundown

An instruction defining "nighttime burglary" should give a definition of "nighttime" as 30 minutes after sundown, and not before, as provided by statute. *Moray v. State*, 135 S. W. 569, 570, 61 Tex. Cr. R. 547.

### As between darkness and dawn

"Nighttime" is that period of time between the termination of daylight on the evening of one day and the earliest dawn of the next morning. *United States v. Southern Pac. Co.*, 157 Fed. 459, 461.

### As between sunset and sunrise

Pen. Code, § 824, in relation to burglary, defines "nighttime" as meaning the period between sunset and sunrise. *State v. Copenhaver*, 89 Pac. 61, 62, 35 Mont. 342.

Under Rev. St. 1898, § 4334, defining "burglary" as entering "in the nighttime," etc., and section 4338, defining "nighttime" as the period between sunset and sunrise, a larceny, to constitute burglary, must be committed in the nighttime, and affirmative proof that it was so committed must be adduced; but such proof need not be direct, but may be circumstantial, in character. *State v. Richards*, 81 Pac. 142, 29 Utah, 310.

On a prosecution for burglary, an instruction that if defendant made the entry charged "in the nighttime, between sunset and sunrise," he should be convicted, was not erroneous on the ground that it took from

the jury the question whether the burglary was effected in the nighttime, but the instruction was proper as declaring as a matter of law the meaning of "nighttime" as defined by Pen. Code, § 463. *People v. Higgins*, 98 Pac. 683, 684, 9 Cal. App. 267.

Evidence that a building was entered by accused "in the evening some time after dark" was sufficient to establish burglary in the "nighttime" within Pen. Code, § 463, making burglary in the "nighttime" burglary in the first degree and defining "nighttime" as the period between sunset and sunrise. *People v. Mendoza*, 118 Pac. 964, 965, 17 Cal. App. 157.

### Discernment of features as test

Under Rev. Code 1893, p. 737, c. 97, § 29, providing that search warrants shall not authorize the searching of any dwelling house in the nighttime, the term "nighttime" means that space of time during which the sun is below the horizon, except that space which precedes its rising and follows its setting, during which, by its light, the countenance of a man may be discerned. *Petit v. Colmary (Del.)* 55 Atl. 344, 345, 4 Pennewill, 266.

## NIGHT WALKER

See Common Night Walker.

## NIGHT WATCHMAN

As laborer, see Laborer.

## NISI JUDGMENT

As judgment, see Judgment (In Law).

## NITROCELLULOSE

"Nitrocellulose," as referred to in the Von Freeden patent, No. 429,516, for a process for making smokeless gunpowder from "nitrocellulose," is an explosive nitrate of cellulose, commonly known as gun cotton. It is made by digesting clean cotton in a mixture of nitric and sulphuric acid. There are other nitrates of cellulose made with weak acids and a short period of digestion, which are not gun cotton. Nitrocellulose, or gun cotton, is soluble in certain liquids, such as ethyl-ether, methyl-ether, a solution of camphor in ether, etc. *Wolff v. E. I. Du Pont De Nemours & Co.*, 122 Fed. 944, 945.

## NITROGEN PEROXIDE

"Nitrogen peroxide" is a dark brown gas, deepening in color as the temperature is increased. It has a peculiarly repulsive odor, and is poisonous when inhaled. While it sometimes bleaches, it more frequently imparts color, especially as to proteids, which are an important constituent of flour. It will turn cornmeal and other corn products and rice products yellow, while tobacco is made darker by it. *Naylor v. Alsop Process Co.*, 168 Fed. 911, 917, 94 C. C. A. 315.



## NITROGLYCERIN

An information for the malicious placing of an explosive near a dwelling house, describing the explosive as "nitroglycerin," commonly known as "dynamite" or "giant powder," was not objectionable for indefiniteness as to the explosion charged, the substances all being nitroglycerin explosives. *People v. Swalle*, 107 Pac. 134, 136, 12 Cal. App. 192.

## NO

The single answer, "No," to the issue, was it a sale of goods for the purpose of defrauding creditors? or was it to secure the payment of a valid debt? leaves it uncertain as to the answer intended. *Riske v. Rotan Grocery Co.*, 84 S. W. 243, 244, 37 Tex. Civ. App. 494.

In an application for employers' liability insurance, the question and answer: "Q. No explosives or chemicals used except as herein stated? A. No"—do not constitute a double negative, amounting to an affirmative. *Columbian Exposition Salvage Co. v. Union Casualty & Surety Co.*, 77 N. E. 128, 220 Ill. 172.

## NO CAUSE OF ACTION

The direction of a verdict of "no cause of action" at the close of plaintiff's proof, on motion for nonsuit on the ground of failure to prove absence of contributory negligence, is equivalent to a nonsuit because of insufficiency of the evidence, and not because of the insufficiency of the complaint. *Romaine v. New York, N. H. & H. R. Co.*, 86 N. Y. Supp. 248, 249, 91 App. Div. 1.

## NO CHANGE

See *There is No Change*.

## NO EFFECT

See *Of No Effect*.

## NO FURTHER ACTION

See *Neither Party, Etc.*

## NO INTEREST TO MISREPRESENT

The term "no interest to misrepresent," as used with reference to conditions requisite to the admission of declarations of a deceased person respecting a boundary, means freedom from selfish motive or self-interest or personal advantage; disinterested, not merely in the sense of having no pecuniary interest, but in the broader sense of being absolutely impartial and indifferent to the controversy on trial. *Turgeon v. Woodward*, 78 Atl. 577, 579, 83 Conn. 537.

## NO LABORER NOT A CITIZEN OF THE UNITED STATES

The phrase "no mechanic or unskilled laborer not a citizen of the United States," as used in a city charter, providing that no

such laborer who has not declared his intention to become such, and who has not resided within the city for one year next before entering thereon, shall be employed by the city, applies only to laborers not citizens of the United States. *Landswick v. Lane*, 90 Pac. 490, 491, 49 Or. 408.

## NO-LICENSE TERRITORY

The term "no-license territory" is defined by statute as all parts of the state except the premises actually occupied by licensees. This definition makes clear the legislative understanding that the prohibitory law is in force generally in license towns, except in so far as it is rendered inapplicable by the special license legislation. *State v. Langdon*, 64 Atl. 1099, 1101, 74 N. H. 50.

Under Acts 1910, c. 190, § 30, requiring shipments of ardent spirits into local option or no-license territory to be plainly marked, showing the kind and quantity of spirits and the consignee of the package, and section 19c, defining "local option territory" as territory which, by vote under the local option law, has declared against the issuance of licenses for the sale of ardent spirits, and "no-license territory" as territory in which, under the provisions of that or some other act, no license for the sale of such spirits can be granted, a conviction cannot be sustained for failure to mark as specified a shipment into a magisterial district, where licenses may be issued under certain conditions, and which voted against local option at the last local option election, although no licenses are actually in effect. *Armstead v. Commonwealth*, 74 S. E. 399, 400, 113 Va. 765.

## NO OTHER

A provision in an election statute that "no other names shall be placed upon the ballot" than the names of those who have filed a statement of their candidacy was not intended to forbid voting for persons other than those named on the ballot by inserting their names in writing. *Eckerson v. City of Des Moines*, 115 N. W. 177, 190, 137 Iowa, 452.

Code Civ. Proc. § 2476, provides that the Surrogate's Court of each county has exclusive jurisdiction to grant letters testamentary where a nonresident decedent dies without the state leaving personal property in that county and "no other." Subdivision 4 gives such exclusive jurisdiction where decedent was not a resident of the state, and a petition for probate of his will or for a grant of letters of administration has not been filed in any Surrogate's Court, but real property of the decedent, to which the will relates, or which is subject to sale for his debts, is situated within that county and "no other." Section 2477 provides that, where personal property of a decedent is within two or more counties, under the circumstances specified in section 2476, subd. 3, or real estate of

the decedent is situated in two or more counties under the circumstances specified in subdivision 4, § 2476, the Surrogates' Courts of such counties have concurrent jurisdiction to issue letters testamentary. Held that, where a nonresident decedent left personal property in several counties and left real estate in another county, and no letters of administration had been issued in the state, the Surrogates' Courts of the counties in which there was personal property had concurrent jurisdiction to issue letters. The words "no other," as used in section 2476, relate to exclusive jurisdiction, and do not affect the concurrent jurisdiction which section 2477 confers upon Surrogate Courts, where personal property is in two or more counties. In *re Arnold's Estate*, 99 N. Y. Supp. 740, 742, 114 App. Div. 244.

### NO PERSON

The words "no person" in a criminal statute are to be given their literal meaning, and, when a statute provided that no person should practice dentistry without having complied with its provisions, there was no implied exception of persons holding certificates entitling them to practice as a physician or surgeon. *State v. Taylor*, 118 N. W. 1012, 1013, 106 Minn. 218, 19 L. R. A. (N. S.) 877, 16 Ann. Cas. 487.

### NO PERSON BID

The words, "No person bid," in a tax deed, imply that the land "could not be sold" to a private bidder. They express the precise idea to be conveyed by the statutory recital, and are therefore 'equally good.' The deed is not void on its face because it substitutes the words "no person bid" for the words "said property could not be sold" in stating the necessity of a sale to the county. *Baughman v. Harvey*, 93 Pac. 146, 150, 76 Kan. 767 (citing and adopting *Bowman v. Cockrill*, 6 Kan. 311).

### NO PROPERTY

The words "no property," in Ballinger's Ann. Codes & St. § 5248, providing that "no property" shall be exempt from execution issued on a judgment against an attorney or agent on account of any liability incurred for failure to account for money or other property coming into his hands belonging to his principal, are applicable only to personal property, and the section does not apply to homestead exemptions. *Erray v. Hill*, 90 Pac. 590, 592, 46 Wash. 457.

### NO PROPERTY FOUND

A return of "no property found" means that defendant has no goods or chattels whereof to levy the execution within Rev. St. 1890, § 4019, declaring that the circuit clerk may not issue execution on a transcript judgment until after the justice has issued an execution and the constable has made return that the defendant had no goods or chattels

whereof to levy the same. *Bick v. Paris*, 101 S. W. 716, 717, 124 Mo. App. 341.

### NO UNDUE INFLUENCE WAS HAD

Where the validity of assignments from testatrix to defendant is questioned, a finding that "no undue influence was had or exercised" is equivalent to a finding that the transaction was not the result of undue influence, and does not negative merely the direct employment of undue influence, without taking into consideration the effect of the influence naturally arising from testatrix's reliance on defendant's protection and her appreciation of his kindness. *Hobart's Adm'r v. Vall*, 66 Atl. 820, 823, 80 Vt. 152.

### NOBILITY

See Confer Title of Nobility.

### NOBLESSE OBLIGE

"The French have a maxim, 'Noblesse oblige,' which means that those in comfortable circumstances and possessed of means should set the example of obedience to the laws." *State v. Colonial Club*, 69 S. E. 771, 777, 154 N. C. 177, 31 L. R. A. (N. S.) 387, Ann. Cas. 1912A, 1079.

### NOLLE PROSEQUI

A "nolle prosequi" amounts to neither an acquittal nor a pardon. It is simply a discharge of the particular indictment as to which it is entered, and is no bar to a future indictment for the same offense. *State v. Brackin*, 37 South. 863, 113 La. 879.

A "nolle prosequi" is not a demurrer, general or special, nor is it an amendment in the broadest sense of the term. It embraces only the withdrawal or abandonment of a count. *Hudson v. McNear*, 59 Atl. 546, 547, 99 Me. 406.

A nolle prosequi in criminal proceedings is merely a declaration on the part of the solicitor that he will not then prosecute the suit farther, and is not an acquittal, although its effect is to discharge the defendant without day. *Wilkinson v. Wilkinson*, 74 S. E. 740, 741, 159 N. C. 265, 39 L. R. A. (N. S.) 1215.

A "nolle prosequi" in criminal proceedings does not amount to an acquittal of the defendant, but he may again be prosecuted for the same offense, or fresh process may be issued to try him on the same indictment at the discretion of the prosecuting officer. Under a statute providing that a "nolle prosequi" with leave shall be entered in all criminal actions in which the action has been pending for two terms of court, and the defendant has not been apprehended, the prosecution of an indictment for maintaining a nuisance at April term, 1906, was not ended by the entering of a nolle prosequi with leave

to issue a *capias*, entered at November term, 1906, for which defendant was arrested in January, 1909, so that the prosecution was upon the original indictment, and was barred by the statute. *State v. Williams*, 65 S. E. 908, 909, 151 N. C. 660 (quoting and adopting definition in *State v. Thornton*, 35 N. C. 257).

## NOLO CONTENDERE

"The 'plea of *nolo contendere*' is an implied confession of the offense charged. The judgment of conviction follows that plea as well as the plea of guilty." *State v. Herlihy*, 66 Atl. 643, 646, 102 Me. 310.

Under the common-law rule, which governs in the federal courts, to authorize the court to entertain a plea of *nolo contendere* the case must be within the class of misdemeanors for which punishment may be imposed by fine alone, although the offense may as well be punishable by imprisonment, at the discretion of the court, either as an alternative of fine or in addition thereto, or to enforce payment of the fine; and such plea cannot be accepted either in cases of felony requiring infamous punishment to be imposed on conviction, or in cases of misdemeanor for which the punishment must be imprisonment for any time, with or without fine. The so-called plea of "*nolo contendere*" is not a plea in the strict sense of that term in the criminal law. It is not one of the pleas general or special, open to the accused in all criminal prosecutions and is allowable only under leave and acceptance by the court. When accepted by the court, it becomes an implied confession of guilt, and for the purposes of the case only equivalent to a plea of guilty, but distinguishable from such plea in that it cannot be used against the defendant as an admission in any civil suit for the same act. Where a plea of *nolo contendere* was tendered to an indictment containing counts some of which charged offenses which required punishment by both fine and imprisonment, while on others a fine alone might be imposed, the action of the court in hearing evidence, making a finding of guilty as charged and sentencing defendant to both fine and imprisonment, was inconsistent with the acceptance of such plea, and the judgment of conviction without a jury trial was without jurisdiction and void. When an indictment contains counts charging offenses for which the statute requires the imposition of punishment by both fine and imprisonment and others for offenses which may be punished by fine alone, the court has authority to allow a tendered plea of *nolo contendere*; but in such case the further proceedings and punishment must be confined to the latter class of counts to which alone the plea is applicable. *Tucker v. United States*, 196 Fed. 260, 262, 266, 267, 116 C. C. A. 62, 4 L. R. A. (N. S.) 70.

### As conviction.

The plea of "*nolo contendere*" is an implied confession of the offense charged, and the judgment of conviction follows that plea as well as the plea of guilty, and it is not necessary that the court should adjudge that the party was guilty, for that follows by necessary legal inference from the implied confession. *State v. Herlihy*, 66 Atl. 643, 646, 102 Me. 310.

"Plea of '*nolo contendere*,' when accepted by the court, is, in its effect on the case, equivalent to the plea of guilty. \* \* \* The judgment of conviction follows upon such a plea, as well as upon a plea of guilty, and such a plea, if accepted, cannot be withdrawn and a plea of not guilty entered, except by leave of court." *State v. Siddall*, 68 Atl. 634, 635, 103 Me. 144 (quoting and adopting definition in *Commonwealth v. Ingersoll*, 14 N. E. 449, 145 Mass. 381).

## NOMINAL

### NOMINAL DAMAGES

"Nominal damages" is defined as some small amount, sufficient to cover and carry the costs. *Batson v. Higginbotham*, 68 S. E. 455, 457, 7 Ga. App. 835.

"Nominal damages" is some very small sum, as a farthing, a penny, or a sixpence. *Hasselbusch v. Mohmking*, 73 Atl. 961, 962, 76 N. J. Law, 691 (citing *Sedg. Dam. p. 44*).

A new trial will not, as a general rule, be granted to enable the defeated party to recover "nominal damages," which are such as are to be awarded in a case where there has been a breach of contract, and no actual damages can be shown. *Beattie v. New York, N. H. & H. R. R. Co.*, 80 Atl. 709, 710, 84 Conn. 555.

The term "nominal damages," like "exemplary damages," is purely relative, and carries with it no suggestion of certainty as to amount, though it generally refers to a trivial sum awarded. Where a mere breach of duty or infraction of right is shown with no serious loss sustained, the amount may, according to the circumstances of each particular case, vary almost indefinitely, depending largely on the amount involved, a recovery being properly classified as nominal damages where the violation of a right issue is shown, substantial damages claimed, and some actual loss proved, and yet the damages are not susceptible of reasonable certainty of proof as to their extent. *Western Union Telegraph Co. v. Glenn*, 68 S. E. 881, 8 Ga. App. 168.

"Nominal damages are a small and trivial sum, awarded for a technical injury, due to a violation or invasion of some legal right, and as a consequence of which some damages must be awarded to determine the right. They are not given as an equivalent for the wrong, but in recognition of a tech-

nical injury. There need be no actual damage, however small. They are called nominal damages, in contradistinction to actual, substantial, or compensatory damages. They are damages in name only, not in fact. They have been described as a peg on which to hang costs; but they are still recognized as the subject of a substantial legal claim, and the party is entitled to them if he can show any injury to his right. If he establishes a cause of action—that is, an injury in its technical sense—and fails to show any damnnum, or damage, he can recover nominal damages." *Chaffin v. Fries Mfg. & Power Co.*, 47 S. E. 226, 228, 135 N. C. 95.

Where a legal right has been invaded and real injury done, the damages, though small, are actual, and not nominal, nominal damages being those so small in amount as to show that they were not intended as any equivalent or satisfaction to the party recovering them; the term being a relative one, and carries no suggestion of certainty as to amount. *Moore v. Duke*, 80 Atl. 194, 197, 84 Vt. 401.

#### NOMINAL PARTNER

The term "nominal partner," as commonly understood, means "a person who is not a partner at all, but allows the use of his name in the firm, generally to give it additional credit or to attract custom, thus incurring all the liabilities while deriving none of the benefits of the association." *Lasher v. Colton*, 80 N. E. 122, 123, 225 Ill. 234, 8 Ann. Cas. 367 (quoting and adopting definition in 2 Bates, Partn. § 11).

#### NOMINATE

See, also, Appoint—Appointment; Primary Election.

The term "nominate" means to designate by name, and not merely to refer to some place where the name can be found. In re Hopper, 132 N. Y. Supp. 730, 731, 73 Misc. Rep. 369.

The terms "nominate" and "appoint" are not synonymous, though there are some instances where the terms may be used to mean the same thing, and under St. Cal. 1887, p. 67, c. 57, providing for the appointment of certain trustees by the Governor with the advice and consent of the Senate, an appointment is not completed by the transmission of the nomination by the Governor to the Senate and the confirmation of the nomination by the Senate. The appointment is not made until the commission is issued, and issuing the same is the last act, and in issuing the commission the Governor is performing an executive and not a ministerial act, and is therefore acting under his discretionary powers, and may or may not issue the commission, although the Senate may have advised it and consented that he should make the appointment. *Harrington v. Par-*

*dee*, 82 Pac. 83, 84, 1 Cal. App. 278 (citing *Marbury v. Madison*, 1 Cranch [5 U. S.] 137, 2 L. Ed. 60).

#### NOMINATION

See Certificate of Nomination; Party Nomination.

The provision in Laws 1911, c. 649, amending Election Law, § 331, that the names of candidates chosen by more than one political party or independent body shall not appear more than once on the printed official ballot, discriminates against the political parties nominating a candidate also nominated by another party in whose column alone his name appears, and violates the Constitution, notwithstanding the definition in such amending law of the term "nomination," which limits the right of all parties to nominate candidates to a selection in accordance with the act, and so does not include the right to have the candidates' names appear on the official ballot in the column of a particular party. In re Hopper, 132 N. Y. Supp. 730, 731, 73 Misc. Rep. 369.

The act incorporating the city of Cranston, providing for caucuses for the selection of candidates to be voted for at the first election, and that all "certificates of nomination" of candidates shall be filed at least nine days before the first election, merely provides for the filing of certificates of nomination at caucuses; and Gen. Laws 1909, c. 11, § 18, providing for the filing of "certificates of nomination" and "nomination papers," governs as to the filing of nomination papers, since the statutes by long usage make certificates of nomination refer to nominations by caucuses, while nomination papers relate to nominations by individual voters. *Greenough v. Waterman*, 75 Atl. 865, 866, 30 R. I. 447.

#### NOMINEE

As officer, see Officer.

A candidate becomes a "nominee" for public office only upon filing the certificate of nomination with the proper officers, within the meaning of Election Law (Consol. Laws, c. 17) § 136. In re O'Brien, 125 N. Y. Supp. 269, 140 App. Div. 467.

In St. 1898, § 34, pertaining to general elections, and providing that if the nominee die after the ballots are printed and no nomination shall be made as herein provided the votes cast for him shall be counted and returned, the "nominee" is the person who has received the party nomination for an office. *State ex rel. Bancroft v. Frear*, 128 N. W. 1068, 1075, 144 Wis. 79, 140 Am. St. Rep. 902.

Comp. St. 1903, c. 26, § 32, provides that in no case shall the candidate of any political party be entitled to be designated on the official election ballot as the candidate of more than one political party, and shall be designated on the "official ballot" as the nom-

nee of the party in whose nomination his name appears as the political party with which he affiliates. Held, that the words "candidate of any political party" and the "nominee of the party" mean a person who has been selected by a party as its candidate for public office, and do not refer to one who is desirous of becoming a candidate and whose name is submitted to the choice of the voters at a primary election. A party's candidate and its nominee cannot be determined until after a choice has been made at a primary. *State ex rel. Adair v. Drexel*, 105 N. W. 174, 177, 74 Neb. 776.

## NON

### NON COMPOS MENTIS

See Mind of a Non Compos.

The words "non compos mentis" mean a total deprivation of reason. *Slaughter v. Heath*, 57 S. E. 69, 71, 73, 127 Ga. 747, 27 L. R. A. (N. S.) 1.

One is "non compos mentis" as to his contracts when he does not possess understanding sufficient to comprehend the nature, extent, and consequences of them. *Nichols v. Nichols*, 66 Atl. 161, 165, 79 Conn. 644.

"The term 'non compos mentis,' used by the Code, embraces not only lunatics and idiots, but also all persons of unsound mind." Under the rule that, for the assumption of continued maintenance of control, by a court of chancery over the person and estate of one alleged to be of unsound mind, it is not necessary to prove the entire absence of reason, understanding, or memory, but only to show incapacity to contract, evidence held sufficient to sustain an order dismissing a petition for the discharge of the committee of the person and estate of a person of unsound mind." *Johnson v. Safe Deposit & Trust Co. of Baltimore*, 65 Atl. 333, 334, 104 Md. 460 (quoting and adopting definition in *Greenwade v. Greenwade*, 43 Md. 815).

### NON DETINET

A plea of the "general issue" in detinue is the equivalent of a plea of "non detinet" at common law, and puts in issue the plaintiff's right of recover. *Ryall v. Pearson Bros.*, 41 South. 673, 148 Ala. 668 (citing *Carlisle's Case*, 26 South. 115, 122 Ala. 446).

### NON EST FACTUM

"A plea of 'non est factum' properly tenders the issue whether the specialty was lawfully sealed by the commissioners and, if so, whether it is the deed of the defendants." *English v. Mayor, etc., of City of Jersey City*, 42 N. J. Law, 275, 278.

In an action on a policy of life insurance, a plea that "the defendant did not enter into the alleged contract sued on" was not a plea of "non est factum," within Code 1896,

§ 3353, form 33. *Manhattan Life Ins. Co. v. Verneulle*, 47 South. 72, 73, 156 Ala. 592.

### NON OBSTANTE VEREDICTO

A motion for judgment notwithstanding the verdict is not proper, where no motion for a directed verdict was made at the close of plaintiff's case. *Landis Mach. Co. v. Konantz Saddlery Co.*, 116 N. W. 333, 834, 17 N. D. 310.

A "judgment non obstante" is usually a judgment entered by order of the court for the plaintiff in an action at law notwithstanding a verdict for the defendant. At common law a judgment non obstante veredicto could be entered only when the plea confessed the cause of action and set up matters in avoidance which were insufficient, although found true, to constitute either a defense or a bar to the action. In such case the plaintiff was entitled to a judgment in his favor notwithstanding a verdict for the defendant. The practice was adopted, says Judge Pearson, to discourage sham pleas by the defendant. Hence it follows that at common law a judgment non obstante could only be granted upon motion of the plaintiff, never for a defendant, and that its use was consequently very restricted. This rule, however, has been relaxed in many jurisdictions, especially where counterclaims are pleaded, and where the code system prevails, and it is held that such judgment may be rendered on the pleadings for either party entitled to it irrespective of the verdict. In no case, however, can such a judgment be rendered for any party, except when the pleadings entitle the party against whom the verdict was rendered to a judgment. Where the court in an action for personal injuries refused a motion of nonsuit, and a motion to render judgment on the issues, whether plaintiff contributed to his injury by negligence, and the amount of damages, judgment could not be appropriately rendered for defendant notwithstanding the jury's negative answer to the first issue and its finding of \$3,000 damage on the second issue. *Shives v. Eno Cotton Mills*, 66 S. E. 141, 142, 151 N. C. 200 (citing and adopting *2 Tidd, Pr. 922*; *Rap. & L. Law Dict.*; *Black Law Dict.*; *Cotton Mills v. Abernathy*, 20 S. E. 522, 115 N. C. 403; *Walker v. Scott*, 11 S. E. 364, 106 N. C. 57; *Riddle v. Town of Germanton*, 23 S. E. 332, 117 N. C. 387; *Moye v. Petway*, 76 N. C. 329).

"A motion for a judgment 'non obstante veredicto'—that is, that judgment be given in the mover's favor, without regard to the verdict obtained by his adversary—is made in cases where, after a pleading by the adversary in confession and avoidance, and issue joined thereon, and verdict for the adversary, the unsuccessful party, in retrospective examination of the record, conceives that such pleading was bad in substance, and might have been made the subject of demurrer on that ground. \* \* \* In such a case, there-

fore, the court will give judgment for such opposite party without regard to the verdict." *N. Frank & Sons v. Gump*, 51 S. E. 358, 104 Va. 306 (quoting and adopting definition in 4 Min. Inst. [8d Ed.] pt. 1, p. 946).

### NON SUI JURIS

The words "non sui juris," as applied to a child, means that the child has not yet arrived at what is called the age of adult discretion, so that the burden of proof is on the party claiming that the child was, as a matter of fact, sui juris. *Grealish v. Brooklyn, Q. C. & S. R. Co.*, 114 N. Y. Supp. 582, 583, 130 App. Div. 238 (citing *Gerber v. Boorstein*, 99 N. Y. Supp. 1091, 113 App. Div. 808).

The phrase "non sui juris," as used in an instruction in a personal injury suit submitting it to the jury to determine whether or not the person injured, who was under six years of age, was non sui juris, means that the child was not of sufficient age and discretion to care for his own safety, so that it would be imprudent to go about alone. *Kostenbaum v. New York City R. Co.*, 105 N. Y. Supp. 65, 67, 120 App. Div. 160.

### NONCONTINUOUS EASEMENT

A right of way is "noncontinuous" because to its use the act of man is essential at each time of enjoyment. *Dee v. King*, 59 Atl. 839, 841, 77 Vt. 230, 68 L. R. A. 860.

### NONEXPLOSION

A "constant pressure engine" is one in which the cylinder pressure remains the same during the outward travel of the piston while the volume of flame increases. The pressure is applied continuously. This mode of operation is also called "slow combustion" and "nonexplosion." *Columbia Motor Car Co. v. C. A. Duerr & Co.*, 184 Fed. 893, 898, 107 C. C. A. 215.

### NONFEASANCE

"Nonfeasance" is the omission of an act which a person ought to do." It is the neglect or refusal without sufficient excuse to perform an act which it is an officer's legal duty to the individual to perform. *State, to Use of Cardin, v. McClellan*, 85 S. W. 267, 268, 113 Tenn. 616, 3 Ann. Cas. 992.

"Nonfeasance" is the nonperformance of some act which ought to be performed." The directors of a county fair association are not liable for the admission fee, for mere nonfeasance in failing to more securely protect patrons in the grand stand from injuries from a wild ball pitched or batted in the game, which resulted in injury to one admitted to the grand stand. *Williams v. Dean*, 111 N. W. 931, 933, 134 Iowa, 216, 11 L. R. A. (N. S.) 410 (citing and adopting *Ill. Cent. Ry. v. Foulkes*, 60 N. E. 890, 191 Ill. 57).

Under Civ. Code Cal. § 2629, providing that "an insurer is not liable for a loss caused by the willful act of the insured, but he

is not exonerated by the negligence of the insured, or of his agents or others," expressly made a part of a marine policy on cargo, there can be no recovery for loss or damage resulting directly from the act of the master in designedly undertaking to force the vessel through floating ice on a voyage to Alaska, with knowledge of the dangers to be encountered and with ample time to have avoided them, in order to arrive more quickly at his destination and secure a better market for his cargo. Such conduct is not mere negligence, but is a willful omission to perform his legal duty and an intentional commission of a wrongful act. The court, speaking through Chief Justice Shaw, in *Chandler v. Worcester Mutual Fire Ins. Co.*, 3 Cush. (57 Mass.) 328 (an action on a fire policy) said: "By an intent to burn the building we understand a purpose manifested and followed by some act done tending to carry that purpose into effect, but not including a mere 'nonfeasance.' Suppose the assured, in his own house, sees the burning coals in the fireplace roll down onto the wooden floor, and does not brush them away. This would be mere 'nonfeasance.' It would not prove an intent to burn the building; but it would show a 'culpable recklessness' and indifference to the rights of others. \* \* \* To what extent such negligence must go, in order to amount to 'gross misconduct,' it is difficult by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law, that 'crassa negligentia' was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the consideration that, although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose, to commit such injury." *Standard Marine Ins. Co., Limited, of Liverpool, Eng., v. Nome Beach Lighterage & Transp. Co.*, 133 Fed. 636, 648, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

### Misfeasance distinguished

"Nonfeasance" is doing nothing, while "misfeasance" is doing improperly. *Stiewel v. Borman*, 37 S. W. 404, 105, 63 Ark. 30.

"Nonfeasance" is the omission of an act which a person ought to do, as distinguished from "misfeasance," which is the improper doing of an act which a person might lawfully do. *Southern Ry. Co. v. Rowe*, 59 S. E. 462, 466, 2 Ga. App. 557.

"Nonfeasance" is the total omission or failure of the agent to enter upon the performance of a distinct duty or undertaking which he has agreed with his principal to do. 'Misfeasance' means the improper doing of an act which the agent might lawfully

ly do." *Southern Ry. Co. v. Miller*, 57 S. E. 1090, 1092, 1 Ga. App. 616 (quoting and adopting the definitions in *Southern Ry. Co. v. Grizzle*, 53 S. E. 244, 124 Ga. 735, 110 Am. St. Rep. 191).

"Misfeasance" is the performance of an act, which might lawfully be done, in an improper manner, resulting in injury to another, while "nonfeasance" is the nonperformance of an act which should be performed. *Haynes' Adm'rs v. Cincinnati, N. O. & T. P. R. Co.*, 140 S. W. 176, 179, 145 Ky. 209, Ann. Cas. 1913B, 719.

"Misfeasance" and "nonfeasance," as used in connection with the acts of agents, is often difficult of determination. "Misfeasance" means a positive wrong. It may involve also, to some extent, the idea of not doing, as where the agent while engaged in the performance of his undertaking does not do something which it was his duty to do under the circumstances. The distinction to be observed between mere nonfeasance and misfeasance was considered in *Osborne v. Morgan*, 130 Mass. 103 (39 Am. Rep. 437), where the court said: "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing, but it is misfeasance, doing improperly." Where an agent has complete control of a tenement house, and constructs a new walk in the court, leaving a large hole in the walk, and plaintiff, a new tenant, without previous knowledge of the existence of the hole, stepped into it after dark and was severely injured, it is misfeasance of the agent rendering him liable, and not a mere nonfeasance. *Carson v. Quinn*, 105 S. W. 1088, 1091, 127 Mo. App. 525.

"A distinction ordinarily is taken between acts of 'misfeasance,' or positive wrongs, and 'nonfeasance,' or mere omissions of duty. The master is always liable to third persons for the misfeasances of his servants in all cases within the scope of his employment. The principal is also liable to third persons for like misfeasances of his

agent. The agent is also liable to third persons for his own misfeasances and positive wrongs, but he is not liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability in such cases is to his principal. The distinction between misfeasance and nonfeasance, between acts of direct positive wrongs and mere neglects of duty, as to their personal liability, seems to be founded on this ground. No authority whatever from a superior to an inferior can furnish the latter a just defense for his own positive wrongs or trespasses, for no man can authorize another to do a positive wrong. But in respect to nonfeasance, or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation except to those to whom he has become directly bound or amenable for his conduct." *Bryce v. Southern R. Co.*, 125 Fed. 958, 962 (quoting and adopting definitions in *Story, Ag.* [9th Ed.] §§ 308, 309).

"There is a distinction between 'nonfeasance' and 'misfeasance' or 'malfeasance'; and this distinction is often of great importance in determining an agent's liability to third persons. In this connection, 'nonfeasance' means the total omission or failure of an agent to enter upon the performance of some distinct duty or undertaking, which he has agreed with his principal to do. 'Misfeasance' means the improper doing of an act which the agent might lawfully do, or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons; and 'malfeasance' is the doing of an act which he ought not to do at all. It is not every omission or failure to perform a duty that will constitute a nonfeasance, but only an omission to perform such distinct duties as he owes to his principal, as distinguished from those which he owes to third persons, or the public in general as a member of society. Nonfeasance does not extend to the omission or failure to do some act, whereby a third person is injured after he has once entered upon the performance of his contractual obligations. For example, if an agent undertakes to perform certain acts for another, and he refuses or fails to enter upon such performance, it is nonfeasance; but if he once begins the performance of such acts, and, in doing so, fails or omits to do certain acts which he should have done, whereby a third person is injured, it is not a nonfeasance, but a misfeasance. Misfeasance may involve the omission to do something which ought to be done; as where an agent, engaged in the performance of his undertaking, omits to do something which it is his duty

to do under the circumstances, as when he does not exercise that degree of care which due regard for the rights of others requires." Where the owner of a building executed a deed of trust thereon to secure bonds issued by the owner, and the trustee was made an attorney in fact, irrevocable, to rent the building, collect rents, pay taxes, and all expenses connected with the management of the building, and the trustee was to retain a certain per cent. of the moneys collected in payment of such services, and the trustee also assumed management of the building, employed all servants connected with the building, and paid them their wages, it was held that the trustee was liable, as for a "misfeasance," for injuries to one riding on an elevator in the building owing to negligence in the maintenance and repair of the elevator, or the negligence of the operator. *Orcutt v. Century Bldg. Co.*, 99 S. W. 1062, 1063, 1068, 201 Mo. 424, 8 L. R. A. (N. S.) 929 (quoting and adopting definition in *Clark & S. Law of Agency*, § 596).

The failure of a gas company operating as an agent of a city under contract for the illumination of the city streets to perform its duty to keep service pipes from its mains to the city lamps in repair involves an affirmative element of negligence amounting to misfeasance, and it is liable to any one injured in consequence thereof, for an agent who undertakes and enters on the execution of a particular work, must use reasonable care in the manner of executing it, and he cannot by abandoning its execution, exempt himself from liability to any person suffering injury by reason of his act, because that act is not "nonfeasance," but is "misfeasance." *Consolidated Gas Co. of Baltimore City v. Connor*, 78 Atl. 725, 729, 114 Md. 140, 32 L. R. A. (N. S.) 809.

The term "nonfeasance" refers to an agent's omission to perform a duty which he owes to his principal by virtue of the agency and for which he is responsible to his principal only; but, whenever the agent's omission consists of failure to perform a duty which he owes to third persons, then, as to such persons, his omission is "misfeasance" for which he is responsible. *Hagerty v. Montana Ore Purchasing Co.*, 98 Pac. 643, 645, 38 Mont. 69, 25 L. R. A. (N. S.) 356.

The distinction between "nonfeasance" and "misfeasance" has been expressed by the courts of this state as follows: "If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While, if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable." Delay of the sole transfer agent in issuing new stock at the in-

stance of an executor to certain designated persons in lieu of stock held by decedent on account of failure of the comptroller to give consent pending determination whether the stock was subject to the transfer tax law, was not a "misfeasance," though it was not in fact taxable and the comptroller's consent was unnecessary. *Dunham v. City Trust Co. of New York*, 101 N. Y. Supp. 87, 89, 90, 115 App. Div. 584 (quoting and adopting *Van Antwerp v. Linton*, 35 N. Y. Supp. 318, 89 Hun, 417, 419).

### NONFINANCIAL

The term "nonfinancial," as used in a fraternal insurance policy, means that the policy holder is not in good financial standing with the order. *Morgan v. Independent Order of Sons & Daughters of Jacob of America*, 44 South. 791, 792, 90 Miss. 864.

### NONFORFEITABLE

Where a policy of insurance provides that if insured, after paying two full annual premiums, should fail to pay any semiannual premiums when due, its entire net reserve by the American Experience Mortality, and interest at 4 per cent. yearly, less any indebtedness to the company on the policy, shall be applied by the company as a single premium, at the company's rates to the purchase of nonparticipating insurance for the full amount insured by the policy, is called a "nonforfeitable" policy. *Mutual Ben. Life Ins. Co. of Newark, N. J., v. First Nat. Bank (Ky.)* 69 S. W. 1.

### NONINTERVENTION WILL

Under what is known in Washington as a "nonintervention will," by which full powers were conferred on the executors to take possession of and wind up the estate of the testator without any judicial proceedings whatever, except those necessary to establish the will, and which devised and bequeathed all of testator's property absolutely to his executors as trustees, with instructions to sell the same and use the proceeds as therein directed, the legal title to the testator's real estate was vested in such trustees regardless of the validity of the disposition made of the proceeds. *Korsstrom v. Barnes*, 156 Fed. 280, 283.

### NONINTOXICATING LIQUORS

The words "nonintoxicating liquors and beverages," as used in Acts 31st Leg. c. 20, § 2, considered in connection with the evil intended to be corrected and with the history of the legislation upon the same subject, have reference to alcoholic or spirituous fluids, either distilled or fermented, and do not include liquids such as water, milk, etc. *Ex parte Flake (Tex.)* 149 S. W. 148, 151.

### NONJOINDER OF PARTIES

"A nonjoinder, or, as expressed in the Code, 'a defect, of parties plaintiff or defend-



ant,' means sufficient parties, and has no application to a case of too many parties, or the joining of a person having no interest in the litigation." *Mader v. Plano Mfg. Co.*, 97 N. W. 843, 845, 17 S. D. 553.

#### NONMAILABLE MATTER

A newspaper without a wrapper, the address being written on the paper itself, though containing scurrilous and defamatory matter, marked with blue pencil and so folded as to expose the same to view, is not "non-mailable matter," within Cr. Code (Act March 4, 1909, c. 321) § 212, which provides that all matter otherwise mailable, on the "envelope or outside cover or wrapper" of which language of a libelous or scurrilous character may be written, is nonmailable, and which prohibits the sending thereof through the mails. *United States v. Higgins*, 194 Fed. 539, 541.

#### NONNAVIGABLE

To constitute a nonnavigable lake, no particular depth is essential, nor is it necessary that the water cover the entire bed at all seasons, and it is enough if the body of the water has well-defined banks, filled during portions of the year. *State v. Jones*, 122 N. W. 241, 242, 143 Iowa, 398.

In Kentucky, all rivers are nonnavigable within the meaning of that term as used in connection with riparian ownership. *Robinson v. Wells*, 135 S. W. 317, 318, 142 Ky. 800.

#### NONNEGOTIABLE

See Negotiable.

Under Rev. St. 1909, § 3392, providing that for every loan made by a building and loan association a "nonnegotiable note" secured by a first mortgage on real estate shall be given, accompanied by a transfer of the stock of the member, notes executed by stockholders of a building and loan association are not, while the association is a going concern, assignable; the word "nonnegotiable" meaning "nonassignable." *Layton v. Hough*, 152 S. W. 410, 415, 169 Mo. App. 213.

#### NONOCCUPANCY

##### Vacancy synonymous

In an action on an insurance policy providing that it was to become void if the buildings became vacant or unoccupied, the answer alleged that the possession and occupancy of the buildings described and of the insured premises was changed, and said premises ceased to be occupied as provided in the policy. Held, that the answer was sufficient to raise the question of a vacancy, for the terms "vacancy" and "nonoccupancy" are used interchangeably and are equivalent in meaning. *Cone v. Century Fire Ins. Co.*, 117 N. W. 307, 308, 189 Iowa, 205.

#### NONPECUNIARY DAMAGES

Nonpecuniary damages are those the amount of which cannot be determined by

any known rule, but depend upon the enlightened judgment of an impartial court or jury. In this class are included damages for pain, suffering, loss of reputation, impairment of faculties, etc. *L. W. Pomerene Co. v. White*, 97 N. W. 232, 234, 70 Neb. 171.

#### NONRESIDENCE—NONRESIDENT

As person, see Person.

To be a "nonresident" within the meaning of the statute authorizing removal of causes, defendant must be a citizen of another state. *Parker v. Vanderbilt*, 136 Fed. 246, 249 (citing *Martin v. Baltimore & O. R. Co.*, 14 Sup. Ct. 534, 151 U. S. 676, 38 L. Ed. 311).

A nonresident, within Code Pub. Gen. Laws 1904, art. 16, § 123, providing that where it is unknown whether a nonresident is living a bill may be filed against him as if living, etc., is one who does not reside in the state as defined in the law relating to attachment. *Hollander v. Central Metal & Supply Co. of Baltimore City*, 71 Atl. 442, 448, 109 Md. 131, 23 L. R. A. (N. S.) 1135.

A "nonresident" is one who is not a resident of a particular place, and the term may be used indiscriminately to describe one who does not reside in a particular country, or state, or county, or any of the smaller subdivisions of territory made for governmental purposes, and the word may as well refer to one not residing in a county as to one residing outside of the state. *Watson v. Coon*, 93 N. E. 289, 290, 247 Ill. 414.

The term "nonresident," as used in Civ. Code Prac. § 616, requiring a nonresident, before commencing an action, to give a bond for costs, and section 617, providing that if the bond is not given the action shall be dismissed, means a person whose legal residence is not in this state but another state; and does not include a person whose legal residence is in this state, though he is temporarily an actual resident of another state. *Erwin v. Allen*, 99 S. W. 322, 323, 124 Ky. 458.

A citizen of another state is not necessarily a "nonresident," as a person may reside in one state and be a citizen in another. An allegation in a petition for removal that defendant is a citizen of a state other than that in which the suit is pending is not equivalent to an allegation that he is a "nonresident of that state" and does not show his right to a removal. *Irving v. Smith*, 132 Fed. 207.

The words "nonresidents of that state," as used in Act March 3, 1867, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433, providing that any suit of a civil nature at law or in equity, of which the Circuit Courts of the United States are given jurisdiction, may be removed into the Circuit Court of the United States for the proper district, by the defendant or defendants therein, being nonresidents of that state, are

equivalent to the words "not being citizens of that state." *Madisonville Traction Co. v. St. Bernard Min. Co.*, 130 Fed. 789, 791 (citing *Martin v. Baltimore & O. R. Co.*, 14 Sup. Ct. 583, 151 U. S. 676, 677, 38 L. Ed. 811).

The words "nonresident defendant," as used in Ann. St. Mo. 1906, § 384, providing that no property or wages declared by statute to be exempt shall be attached except in the case of a "nonresident defendant" or a defendant who is about to move out of the state with intent to change his domicile, has reference to one whose domicile is out of the state, and classed nonresident defendants with defendants about to move out of the state with intent to change their domiciles. *McDowell v. Friedman Bros. Shoe Co.*, 115 S. W. 1028, 1032, 135 Mo. App. 276.

In an action to quiet title, certain defendants, by their cross-complaints, sought to recover possession of the property, and to redeem from a mortgage. These defendants never resided in this state. Held, that these causes of action were not saved from the bar of the statute of limitations by Burns' Ann. St. 1908, § 299, providing that the time during which a defendant is a nonresident shall not be computed in any period of limitation, since this does not apply to persons who at all times have been nonresidents, and only applies where the person against whom, and not in favor of whom, the cause of action exists, is a nonresident. *Sinclair v. Gunzenhauser (Ind.)* 98 N. E. 37, 54.

Under Rev. St. 1899, §§ 575, 577, providing that if the plaintiff shall allege in his petition, or at any time thereafter shall file an affidavit stating, that part or all of the defendants are nonresidents, or have absconded or absented themselves from their usual place of abode in this state, and that where the return on any summons issued is that defendant cannot be found, service may be had by publication, an affidavit in a tax action, where the petition was silent as to that matter, and where summons issued as against a resident defendant, which only alleged that defendant had absconded and absented himself from his usual place of abode in this state, did not authorize service by publication on the ground that defendant was a "nonresident," since it appeared, both affirmatively and negatively, that defendant was a resident and not a nonresident. *Parker v. Burton*, 72 S. W. 663, 664, 172 Mo. 85.

Ky. St. § 3014, provides that the agent or agents of nonresident proprietors shall be civilly responsible for the license tax and criminally responsible for carrying on business in like manner as if they were proprietors. Held, that the word "nonresident," as used in a city ordinance reproducing such section and requiring every person, etc., engaged in posting bills as a business to pay a license fee, means one living without the corporate limits of the city, though within the

state. *Loges v. City of Louisville*, 132 S. W. 565, 567, 141 Ky. 367.

A person traveling about the country, wandering from place to place and from state to state, who took employment with a railroad company in Texas as a member of a gang taking up old and laying down new steel, which employment he intended to keep only until he had raised \$50, when he intended to leave the state, who slept in a boarding car and had his washing done there, and who was injured while in the railroad's employ, was not a resident of the county in which he received his injury or of the state of Texas, but was a nonresident within the meaning of the venue law (Acts 27th Leg. [Laws 1901, p. 31, c. 27]), providing that, in case plaintiff in a personal injury suit against a railroad is a nonresident of the state, his suit may be brought in any county in which the railroad may operate its road or have an agent. *Ft. Worth & D. C. Ry. Co. v. Monell*, 110 S. W. 504, 507, 50 Tex. Civ. App. 287.

Evidence that a husband left his wife in another state, went to Nebraska, and concealed his residence from her for nine years, represented himself to be an unmarried man, and conveyed land as such, that he subsequently moved to another state, where he died, his wife never living in Nebraska till after his death, is sufficient to sustain a finding that she was a nonresident, within Comp. St. 1903, c. 23, § 20, limiting dower right of a nonresident to lands of which her husband dies seised. *Miner v. Morgan*, 119 N. W. 781, 782, 83 Neb. 400.

Municipal Court Act (Laws 1902, c. 580) § 25, subd. 3, provides that no person having a place in the city for the regular transaction of business is deemed a "nonresident" under the provisions of the act, and section 32 permits the order for service of summons upon a defendant residing within the city after an alias summons has been issued, upon satisfactory proof that diligent effort has been made to serve the summons and that the place of his sojourn cannot be found, or, if he is within the city, that he evades service, so that personal service cannot be made. Defendant had an office in the city at a certain address, and plaintiff's attorney made affidavit that defendant called upon him at his office before the action was begun. Five alias summonses were secured, and numerous efforts were made to serve defendant, and plaintiff wrote him several letters at his New Jersey residence, stating that suit would be brought, and plaintiff was informed by attorneys, who appeared specially, but did not accept service, that they were attorneys for defendant, though plaintiff had requested defendant's attorney to enter an appearance, and defendant's son stated to the process server that his father came to the office sometimes once a week, and sometimes not so often. Held, that an order for substituted

service was properly issued under the circumstances; the facts justifying the belief that defendant was seeking to evade personal service. *Tricoli v. McKenzie*, 123 N. Y. Supp. 211, 212.

#### Absence distinguished

A mere casual or temporary absence of a debtor from the state on business or pleasure will not render him a "nonresident," within the meaning of the statute relating to attachments. *Flemister Grocery Co. v. Wright Mercantile & Lumber Co.*, 73 S. E. 1077, 10 Ga. App. 702 (citing *Stickney v. Chapman*, 42 S. E. 68, 115 Ga. 761).

#### Foreign corporation

In the absence of a statute making a foreign corporation, for purposes of litigation, a resident of every county in which it does business, a foreign corporation is a "nonresident," within Comp. Laws, § 719, requiring the service of a short summons, in an action in justice's court against a nonresident, and the service of a long summons does not give the court jurisdiction. *Wells v. United States Fidelity & Guaranty Co. of Baltimore, Md.*, 125 N. W. 57, 59, 160 Mich. 213.

A corporation is "resident," irrespective of its domicile, when it does business in a state and its officers reside there, upon whom process may be served at their homes. Conversely, a corporation, no matter where incorporated, which does not do business in the state and does not have officers residing there upon whom process may be served, is "nonresident." *Brand v. Auto Service Co.*, 67 Atl. 19, 20, 75 N. J. Law, 230.

A corporation organized under the laws of any one of the United States is in contemplation of law a "citizen" and "resident" of the state in which it is incorporated. Act March 3, 1887, c. 373, 24 Stat. 552, as corrected and amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433, provides for the removal of causes in which there shall be controversy between citizens of the state and foreign states, citizens, or subjects, and section 2 declares that all such suits may be removed to the Circuit Court of the United States for the proper district by the defendant or defendants therein being "nonresidents" of that state. Held that, where defendant was an alien insurance corporation, it was a nonresident of California within such act, though it had a branch office within the state for the transaction of business. *Baumgarten v. Alliance Assur Co.*, 153 Fed. 301, 302, 303, 304 (citing *Shaw v. Quincy Mining Company*, 12 Sup. Ct. 935, 145 U. S. 444, 36 L. Ed. 768; *Miller v. Eastern Oregon Gold Min. Co.*, 45 Fed. 348; *Gilbert v. New Zealand Ins. Co.*, 49 Fed. 884, 15 L. R. A. 125; *Barrow S. S. Co. v. Kane*, 18 Sup. Ct. 526, 170 U. S. 100, 42 L. Ed. 964; *In re Keasbey & M. Co.*, 16 Sup. Ct. 273, 160 U. S. 221, 40 L. Ed. 402; *Howard v. Gold Reefs of Georgia*, 102 Fed. 657; *Shat-*

*tuck v. North British & Mercantile Ins. Co.*, 58 Fed. 609, 7 C. C. A. 886).

#### Fugitive from justice

One may be a "nonresident of the state" and also a fugitive from justice or a fugitive from justice and still a resident of the state. *State v. Miller*, 87 S. W. 484, 486, 188 Mo. 370.

#### Intention

A person domiciled within the state, who temporarily leaves it for medical treatment for injuries, intending to return, is not a "nonresident." *Taylor v. Norris*, 93 N. Y. Supp. 356, 357, 104 App. Div. 21.

If petitioner has been out of the state for a year and a half with no intention of returning or with the intention of returning at some indefinite future time, he is a "nonresident" within Code Pub. Gen. Laws 1904, art. 16, § 123, providing that, where it is unknown whether a nonresident is living or dead, a bill may be filed against him as if living, etc., and he may be proceeded against as such, though he may not intend to abandon his domicile in the state. *Hollander v. Central Metal & Supply Co. of Baltimore City*, 71 Atl. 442, 448, 109 Md. 181, 23 L. R. A. (N. S.) 1135.

A person who has acquired under the provisions of Code 1899, c. 41, the right to have personal property exempted from forced sale, does not forfeit it on the ground of nonresidence until he begins to remove his personalty from his place of abode in the state to another state or country with intent to fix his residence in such other state or country, although he may intend to leave the state permanently and has made complete preparation so to do, and delivered his personal property and effects for shipment to a point outside the state. *Brown v. Beckwith*, 51 S. E. 977, 978, 58 W. Va. 140, 1 L. R. A. (N. S.) 778, 112 Am. St. Rep. 955.

Defendant, after the judgment sued on, went to Idaho, where she lived with her daughter in a rented house, and taught school continuously, except during vacations, when she generally returned to Washington, always intending to return to Idaho before the next school year. Her visits to Washington were not to the place of her previous residence; the house there having been deserted, wrecked by the wind, and finally burned. Held, that defendant became a nonresident within Ballinger's Ann. Codes & St. § 4808 (Pierce's Code, § 292), providing that the time that a person shall reside out of the state shall not be a part of the time limited for the commencement of the action. *Dignam v. Shafr*, 98 Pac. 1113, 1114, 51 Wash. 412, 22 L. R. A. (N. S.) 996.

#### Nonresident domestic corporation

Code W. Va. 1906, c. 32, § 124, defines a nonresident domestic corporation as one

whose principal place of business or chief works is located without the state, and chapter 124, § 8a, declares that the State Auditor shall be, and is constituted, the attorney in fact for and on behalf of every nonresident domestic corporation which by power of attorney shall appoint such Auditor and his successors in office attorney in fact to accept service of process. Held, that the State Auditor by virtue of the statute alone without act on the part of the corporation is authorized to accept service of process for it, and hence where the corporation was chartered in West Virginia, but none of its officers resided there, jurisdiction was properly obtained by service of process on the State Auditor. *Wylie Permanent Camping Co. v. Lynch*, 195 Fed. 386, 396, 115 C. C. A. 288.

### NONRESIDENT ALIEN

A "nonresident alien," within Code, § 3368, providing that, as against a purchaser from a nonresident alien, the survivor shall not be entitled to a distributive share in the estate of deceased, if at the time of the purchase the survivor was also a nonresident alien, is a nonresident of the state, though a resident of a sister state. In re *Kennedy's Estate*, 135 N. W. 53, 55, 154 Iowa, 460.

### NONSUIT

See Involuntary Nonsuit; Motion for Nonsuit; Voluntary Nonsuit.  
Suffer nonsuit, see Suffer.

The term "nonsuit," as used in a court rule providing that if service of a bill of particulars is not effected on defendant by the succeeding term a nonsuit shall be awarded, is to be taken in the sense of the non pros. of the English practice or the dismissal of the practice in this state. *Souders v. Carolina Portland Cement Co.*, 59 S. E. 467, 468, 3 Ga. App. 99.

A "nonsuit" is a judgment given against the plaintiff when he is unable to prove his case or when he refuses to proceed to the trial of the cause after it has been put at issue, without determining the issue. A voluntary nonsuit is an abandonment of his cause by the plaintiff, who suffers judgment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict. An involuntary nonsuit takes place when the plaintiff on being called when his case is before the court for trial neglects to appear, or when he has given no evidence on which a jury could find a verdict. *Wise v. Cohen*, 99 N. Y. Supp. 663, 665, 113 App. Div. 859 (citing *Deeley v. Heintz*, 62 N. E. 158, 169 N. Y. 129).

A judgment for want of prosecution is a nonsuit within the meaning of that term as understood in the Virginias. *Henry Marcus & Son v. McClure*, 59 S. E. 1055, 63 W. Va. 215.

The rule that a "judgment of nonsuit" is not a judgment on the merits is so well set-

tled that discussion is unnecessary. Such a judgment is no bar to another suit. *Guthell v. Gilmer*, 76 Pac. 628, 631, 27 Utah, 496.

A "judgment of nonsuit" is a decision by the court that the plaintiff has produced no evidence upon which facts may be found. Hence the dismissal of an action against an insurance company on motion of defendant after plaintiff had established his application for a paid-up policy within six months after default in payment of the premium, that he had complied with all the other requirements of the policy authorizing such issue except the surrender of the policy itself, which he had failed to find after a diligent search, that he had tendered to the company a release of all liability under such policy, and that it refused to accept the release and issue a paid-up policy, is a "nonsuit." *Lindenthal v. Germania Life Ins. Co.*, 66 N. E. 629, 630, 174 N. Y. 76.

A "judgment of nonsuit," within *Ballinger's Ann. Codes & St. § 5085*, authorizing the court to enter a nonsuit on motion of defendant when on the trial plaintiff fails to prove a sufficient cause for the jury, is the judgment rendered against plaintiff in a legal proceeding on his inability to maintain his cause in court or when he refuses or neglects to proceed to trial after issue joined, and without determination of the issues. *McGuire v. Bryant Lumber & Shingle Mill Co.*, 102 Pac. 237, 238, 53 Wash. 425.

A nonsuit is a judgment based on the process or pleading, but, when rendered, the person nonsuited remains a party to the process or pleading as before, and it is not available to cure a misjoinder of parties plaintiff. *Gowan v. Stevens*, 76 Atl. 147, 148, 83 Vt. 358.

Where defendant rested at the close of plaintiff's case and moved for a dismissal of the complaint, and plaintiff moved for judgment, a judgment for defendant was not one of "nonsuit," but one involving a determination that plaintiff was not entitled to recover on the facts as submitted to the court. *M. Zimmerman Co. v. New York City R. Co.*, 95 N. Y. Supp. 598, 599.

Where both parties introduced their evidence, and plaintiff's evidence supported a judgment for him, and defendant made no motion for a judgment of dismissal, a judgment, though termed a dismissal, was a "final" decision, and deemed excepted to, within Code Civ. Proc. § 647, and not a judgment of "nonsuit," within section 581, authorizing a nonsuit, on motion of defendant, on plaintiff failing to prove a case. *Saul v. Moscone*, 118 Pac. 452, 454, 16 Cal. App. 506.

Where the county court disallowed a claim against the estate of a decedent, indorsing the disallowance on the back of the claim and entering an order disallowing the claim and taxing costs against the claimant, the

judgment was not one of nonsuit, obviously being intended as a final judgment, and not falling within Code Civ. Proc. § 183, defining nonsuit, and is appealable. *Tucker v. Tucker*, 121 Pac. 125, 126, 21 Colo. App. 94.

"It has been said that 'a nonsuit is but like the blowing out of a candle, which a man at his own pleasure may light again.' This is an apt illustration, but it does not mean that the plaintiff may re-enter the court when he has once abandoned the further prosecution of his case, and avail himself of what had already been done at a former trial. That he will be entitled to the full benefit of the legal principle settled by the appellate tribunal, if he has been driven to a nonsuit and appeals, and that his adversary will be concluded by it, so far as it is applicable to the facts as established at the next trial, is undeniable, but this is all he has accomplished. He cannot enjoy any greater advantage otherwise than if he had taken a voluntary nonsuit and brought a new suit for the same cause of action." *City of Hickory v. Southern Ry. Co.*, 50 S. E. 683, 685, 138 N. C. 311.

"Nonsuit" is a process of legal mechanics. The case is chopped off. Only in a clear, gross case is this mechanical treatment proper. Where there is any doubt, another method is to be used—a method involving a sort of mental chemistry; and the chemists of the law are the jury. They are supposed to be able to examine every molecule of the evidence, and to feel every shock and tremor of its probative force." *Corcoran v. Merchants' & Miners' Transportation Co.*, 57 S. E. 962, 964, 1 Ga. App. 741 (quoting from *Vickers v. Atlanta & W. P. R. Co.*, 64 Ga. 307).

#### **Retraxit distinguished**

See *Retraxit*.

#### **NONTENANT**

The plea of "nontenant" and an avowry for rent in replevin puts in issue the demise and tenancy as stated in the avowry or cognizance and requires the defendant to prove them, while the plea of "nothing in arrear" admits the tenancy as stated in the avowry or cognizance and puts in issue the fact of the rent being in arrear. *Middleton v. Quigley*, 12 N. J. Law, 352, 356.

A denial in the answer in partition of the allegations of the petition that petitioner is a tenant in common with defendant, and is seised in fee, raised an issue of fact, being equivalent to a plea of non tenant insinul by which defendant denies that he and plaintiff are tenants in common. *Gregory v. Plinnix*, 73 S. E. 814, 815; 158 N. C. 147.

#### **NONTRADING PARTNERSHIP**

"In partnerships not commercial in their nature, such as those of lawyers, doctors, and others, called 'nontrading,' one partner

cannot bind the other by the execution of promissory notes, unless authority is expressly given or recognized by all the parties, or implied from their general business habits. The issue of negotiable paper by such partnerships is generally neither customary nor necessary, and there is no implied authority from the existence of the partnership. The partners can only be bound upon proof of authority, and the burden of proof to establish such authority is upon the plaintiff." *Teed v. Parsons*, 66 N. E. 1044-1048, 202 Ill. 455 (citing *Ulery v. Ginrich*, 57 Ill. 531; *Pars. Partn.* 199, note).

Partnerships, when considered with reference to the business in which they are engaged, may generally be divided into two classes, one of which is known as "trading" or commercial partnerships, and the other as "nontrading" or noncommercial partnerships. Any member of an ordinary trading partnership can bind the firm by the signing of the firm name in the usual course of business as a part of the usual routine of their affairs, irrespective of restrictions in the articles of partnership not brought to the knowledge of the payee. In a "nontrading partnership," however—that is, a partnership engaged in some occupation which is not of a commercial character—a partner does not generally possess the power to bind the firm, and the extent of his powers is not fixed by the rules of law. The general rule is that the partners in such a firm have no implied power to bind the partnership, but each case is left to be decided upon its particular facts, and one who seeks to hold the firm bound upon a contract made by a single member must be able to show such acts as will warrant the conclusion that the partner had been invested by his copartner with the requisite authority to make the contract. *Smallhouse v. Morris* (Ky.) 107 S. W. 708, 709 (quoting and adopting definition in *Alsop v. Central Trust Co.*, 38 S. W. 510, 100 Ky. 375).

#### **NONUSER**

Abandonment of an easement necessarily implies nonuser, but nonuser does not create abandonment, however long continued. *Adams v. Hodgkins*, 84 Atl. 530, 532, 109 Me. 361, 42 L. R. A. (N. S.) 741.

#### **NONE**

See *If None*.

#### **NONES**

What is now known as noon, or 12 o'clock in the daytime, originally represented the ninth hour of the day after sunrise, or about 3 o'clock p. m., and was the canonical hour of "nones," at which was celebrated a religious rite. *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.*, 87 S. W. 1115, 120 Ky. 752, 1 L. R. A. (N. S.) 364, 9 Ann. Cas. 324 (adopting definition in *Webst. Dict.*).

**NOON**

In exact use "noon" means 12 o'clock, midday. *Andrecsik v. New Jersey Tube Co.*, 63 Atl. 719, 720, 73 N. J. Law, 664, 4 L. R. A. (N. S.) 913, 9 Ann. Cas. 1006 (quoting Cent. Dict.).

In the state of New York "noon" is 12 o'clock m. standard time, as fixed by Laws N. Y. 1892, p. 1491, c. 677, § 28. *Globe & Rutgers Fire Ins. Co. of New York v. David Moffat Co.*, 154 Fed. 13, 21, 83 C. C. A. 91.

The word "noon" in an insurance policy means noon by sun time. *Meler v. Phoenix Ins. Co.*, decision of lower court of Ohio, affirmed in the Supreme Court on an equal division, 65 N. E. 1129, 66 Ohio St. 659. See 32 Ins. Law J. 192.

In construing a policy of insurance on a vessel, ending at "noon" of a certain date, it is held that the parties must be considered as regarding the meridian of the place where the contract is made, unless some other one is mentioned in it. *Walker v. Protection Ins. Co.*, 29 Me. 317, 321.

"Noon" is midday, and is merely a shorter expression than "12 o'clock in the day time." Where a policy expired on a certain day at "noon," parol evidence was admissible to establish that by a well-known custom of the place where the contract was made the word "noon" was used to mean 12 o'clock midday standard time, and was so intended by the parties to the contract, instead of 12 o'clock sun time; and so an instruction that if, at the time the policy was issued, there existed at the place where the contract was made a custom or usage with reference to the meaning of the word "noon" so well settled and uniformly acted on, and of such continuance, as to raise a presumption that the parties knew thereof and entered into the contract with reference to it, such usage would govern in determining whether the policy had expired, was proper. The insurer is not liable for a loss which was inevitable at the time the policy expired, provided the fire had not then attacked the building. *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.*, 87 S. W. 1115, 1118, 120 Ky. 752, 1 L. R. A. (N. S.) 364, 9 Ann. Cas. 324.

**NOON HOUR**

As used in a promise to repair machinery during the "noon hour," it meant the time from 12 o'clock noon to 1 o'clock p. m. *Andrecsik v. New Jersey Tube Co.*, 63 Atl. 719, 720, 73 N. J. Law, 664, 4 L. R. A. (N. S.) 913, 9 Ann. Cas. 1006.

**NOR**

The word "nor," in a will whereby testator empowered the trustee to sell real estate, with a proviso that no sale should be made during the lifetime of either of the daughters of testator without their consent, "nor"

unless it is necessary to pay debts, is used in the sense of "or." *Reed v. Longstreet (N. J.)* 63 Atl. 500, 501.

**Or construed as nor**  
See Or.

**NORI**

As seaweed, see Seaweed.

**NORMAL OUTAGE OR WANTAGE**

See Outage.

**NORMALLY**

The word "normally" is defined "as a rule; regularly; according to a rule, general custom," etc. *Palmer v. Jordan Mach. Co.*, 186 Fed. 496, 504.

**NORTH**

The term "north" has two meanings; one common, and the other technical. Unprofessional men generally mean, in stating courses, the lines indicated by the compass, without making any allowance for variation in the needle; and even professional surveyors, as appears from the evidence, would not consider the true meridian as intended, unless specially so informed. *Jenny Lind Co. v. Bower*, 11 Cal. 194, 197.

**NORTH HALF**

The words "the north half," used in the conveyance of a part of a platted block of land, mean the half of the block lying north of an east and west line drawn through the block, unless the surrounding facts require that these words be given a different meaning. *Lavis v. Wilcox*, 183 N. W. 563, 116 Minn. 187.

Under a conveyance of the "north half" of a tract of land, the east line of which is of such a shape that the north line is less than one-half the length of the south line, the grantee is entitled to one-half of the area of the tract, and not merely to one-half of the north and south length of the tract. *Robinson v. Taylor*, 123 Pac. 444, 445, 68 Wash. 351, Ann. Cas. 1913E, 1011.

**NORTH RIVER**

The words "North river," as used in a marine policy on a scow, containing the following provision: "Warranted by the assured to be employed exclusively in the freighting business, and to navigate only the waters of the bay and harbor of New York, the North and East rivers, and inland waters of New Jersey"—cannot be extended by construction to include tributaries of the Hudson in the state of New York, and there can be no recovery under the policy for an injury to the scow received while she was lying in a dock in Rondout Creek, 2½ miles from the

Hudson. *Hastorf v. Greenwich Ins. Co.*, 132 Fed. 122, 124.

### NORTHERLY

Where a notice of the opening of a new road described it as running with a "northerly" course across the property of another, the fact that it ran 5 degrees 50 minutes west of north was immaterial. *Riggs v. Winterode*, 59 Atl. 762, 765, 100 Md. 439.

### NORTHERNLY

"The term 'northerly' in a grant, where there is no object mentioned to direct the inclination of the course toward the east or west, means due north." *State ex rel. Chandler v. Huff*, 79 S. W. 1010, 1012, 105 Mo. App. 354 (quoting and adopting definition in *Brandt ex dem. Walton v. Ogden* [N. Y.] 1 Johns. 156).

### NORTHWEST

See N. W.

## NOSCITUR A SOCIIS

"Noscitur a sociis"—It is known by its associates. Thus, in 92 Ohio Laws, p. 44 (Act Feb. 27, 1896), forbidding the prescribing of any drug, medicine, or other agency for the treatment of disease by a person who has not obtained from the board of medical registration and examination a certificate of qualification, the word "agency" should be limited by the associated words "drug" and "medicine," and therefore did not include the system of healing known as "osteopathy," which consists of rubbing or kneading the body. *State v. Liffing*, 55 N. E. 168, 169, 61 Ohio St. 39, 50, 46 L. R. A. 334, 76 Am. St. Rep. 358.

Under Rev. St. Wis. § 1564, providing that any tavern keeper or other person selling liquor on Sunday or election day shall be guilty of a misdemeanor, the general words "other person" must, under the familiar rule "noscitur a sociis," be taken to mean a similar class of persons and not be extended so as to include all persons, and hence includes only persons whose business, at least in part, is to sell intoxicating liquors. *Jensen v. State*, 19 N. W. 374, 375, 60 Wis. 577.

The words "estate" and "alimony," in Rev. St. Wis. § 2364, authorizing the court in divorce actions to adjudge to the wife alimony out of the husband's estate, are not only associated within the rule "noscitur a sociis" and to be understood in a kindred sense, but are correlatives dependent one on the other for effect and should be understood in a corresponding sense. *Blake v. Blake*, 43 N. W. 144, 145, 75 Wis. 339 (citing *Campbell v. Campbell*, 37 Wis. 219).

The doctrine of "noscitur a sociis" applied to a mercantile instrument contemplates the ascertaining of the meaning of general words by reference to preceding special

words therein. A fire policy covering a steamboat provided that "if gunpowder, camphene, spirit gas, naphtha, benzine, or benzole, chemical, crude or refined coal or earth oils, should be kept or used on the premises without written consent," the policy should be void. In an action on the policy it appeared that kerosene oil was used to light the cabin and saloon of the boat after such policy was issued. Held, that this will not prevent a recovery. Applying the maxim "noscitur a sociis," and other rules of construction, the provision above recited is held to refer to "crude or refined coal or earth oils," similar to the coal or earth oils and other substances specifically named, in respect to their dangerous and inflammable character. *Morse v. Buffalo Fire & Marine Ins. Co.*, 30 Wis. 534, 537, 11 Am. Rep. 587 (quoting and adopting definition in *Broom*, Leg. Max. p. 451).

## NOT

See Whether or Not.

### NOT A NECESSARY PARTY

The term "not a necessary party" means that the suit can proceed just as well without him, and in that event, if his presence has the effect to hinder or burden the case, he may be dropped. *Jones v. Kansas City, Ft. S. & M. R. Co.*, 77 S. W. 890, 893, 178 Mo. 528, 101 Am. St. Rep. 434.

### NOT A RESPECTABLE WOMAN

An indictment alleging that accused imputed to a married woman that she "was not a respectable woman," without containing innuendo averments alleging what the language meant, and that as spoken and intended it meant that she was unchaste, does not state an offense under Pen. Code 1895, art. 750, making a person falsely imputing to a female a want of chastity guilty of slander. *Woods v. State*, 124 S. W. 918, 58 Tex. Cr. R. 103.

### NOT BE PAYABLE

Where testator directs his executor to pay all the collateral inheritance taxes on the devises and legacies in the will as soon as the same can be conveniently done, and the executor pays the tax on the entire estate at the time of its valuation, the commonwealth cannot, on the death of the life tenant, impose any tax upon the remainderman under Act May 6, 1887 (P. L. 79), providing that the tax on estates in remainder shall not be payable until the person liable for the same shall come into actual possession; the words "not be payable" meaning only "shall not be demandable." In re *De Borbon's Estate*, 61 Atl. 244, 245, 211 Pa. 623.

### NOT BEING

The term "without," as used in an averment that building material was suffered to remain in a street after night "without" be-

ing guarded, is a direct averment that no guards or lights were placed around the obstruction, and the pleading did not merely recite such facts; the word "without" being synonymous with "not being." *City of LaPorte v. Osborn*, 86 N. E. 995, 997, 43 Ind. App. 100.

#### NOT COMPLETED

A contract which has never been begun is a contract "not completed" within the time specified," within *Cobbey's Ann. St. 1903, § 5519*, providing for re-estimating and reletting drainage contracts. *Gutschow v. Washington County*, 104 N. W. 602, 603, 74 Neb. 378.

#### NOT DOUBTING

The words "desire," "request," "recommend," "hope," "not doubting" used by testator in a will to express his desire that the executor will conduct a fund in a specified manner, testator having power to command, will not be construed as precatory only, but as commands clothed in the language of civility, and to impose on the executor an enforceable duty, sufficient to create a trust. *Trustees of Pembroke Academy v. Epsom School Dist.*, 75 Atl. 100, 101, 75 N. H. 408, 37 L. R. A. (N. S.) 646.

#### NOT ENOUGH

Under a statute providing that no appeal shall be dismissed for insufficiency of the undertaking, if a good and sufficient undertaking be filed before the hearing on motion to dismiss, the term "insufficient," as applied to an undertaking on appeal, must be construed as meaning such a one as has some efficiency, but "not enough" to meet the necessary requirements, and bears the ordinary meaning of "not enough"; that is, importing degree in quantity or quality, and not total absence. *Pirrie v. Moule*, 81 Pac. 390, 392, 33 Mont. 1.

#### NOT EXEMPT

The words "not exempt from attachment by law," in the poor debtor's act, requiring an assignment of all the debtor's estate, both real and personal, not exempt from attachment by law, except only from the assignment only such property as is expressly exempted from attachment by statute relating to that subject, and an assignment by debtor in the language of the statute is sufficient to include every equitable as well as legal interest in the real or personal property of the assigning debtor. *Tillinghast v. Bradford*, 5 R. I. 205, 212.

The phrase "not exempt from execution," used in Rev. St. 1898, § 3035, authorizing application to the judgment of any property of the judgment debtor not exempt from execution, is equivalent to the expression "not exempted by express statute from execution," and so the income from personal property held in trust may be

reached; there being no statute exempting it. *Williams v. Smith*, 98 N. W. 464, 466, 117 Wis. 142.

#### NOT GUILTY

A plea of "not guilty" puts in issue every fact which the commonwealth must establish to secure a conviction. *Frazier v. Commonwealth (Ky.)* 114 S. W. 268, 269.

By a plea of "not guilty" defendant denied every fact essential to his guilt, including his identity with the person who committed the homicide. *People v. Wong Sang Lung*, 84 Pac. 844, 845, 3 Cal. App. 227 (adopting definition in *Commonwealth v. Briggs*, 5 Pick. [22 Mass.] 429).

Rev. St. 1898, § 4891, providing that a verdict on a plea of not guilty shall be either "guilty" or "not guilty," which imports a conviction or acquittal on the offense charged, and that on a plea of former conviction or acquittal it shall be either "for the state" or "for defendant," requires a verdict on the latter plea, and, where defendant pleaded not guilty and *autrefois acquit*, it was error to enter judgment on a verdict of guilty. *State v. Creechley*, 75 Pac. 384, 27 Utah, 142.

The plea of "not guilty," in a criminal action, puts in issue every material allegation of the indictment or information, and, like a general denial in a civil action, casts the burden of establishing the facts necessary to convict upon the prosecution. In civil actions, under a general denial, the plaintiff will recover unless his evidence is met and overcome by evidence of equal or greater weight; and if the jury believes from a consideration of all of the evidence in the case that the preponderance, however slight, is in favor of the plaintiff, he will be entitled to a verdict. But in criminal cases, in order to convict, the prosecution is required to prove every material allegation of the indictment or information, every essential element of the crime charged, not only by a preponderance of the evidence, but to the satisfaction of the jury beyond a reasonable doubt. And if, upon consideration of all of the evidence in the case, there exists in the mind of the jury a reasonable doubt as to the existence of any one or more of these essential elements which must be proven to render the act criminal, the defendant is entitled to the benefit of that doubt, and should be acquitted. *State v. Pressler*, 92 Pac. 806, 809, 16 Wyo. 214, 15 Ann. Cas. 93.

A plea of "not guilty" by one accused of crime is an express contention on his part antagonistic to every fact necessary to be proved by the state in order to establish his guilt; and, unless the accused admits one or more of the facts which it devolves upon the state to prove, such fact must be established by evidence. To assume that an important fact in the case on trial has



been admitted, and to so instruct the jury, when no such admission has been made, is reversible error. *Cooper v. State*, 59 S. E. 20, 2 Ga. App. 730.

Under B. & C. Comp. §§ 1336, 1356, a defendant accused of a misdemeanor can appear for arraignment and enter a plea of not guilty by counsel. Held, that a stipulation entered into by the district attorney and counsel for defendant that all the matters alleged in the indictment are true and admitted, and that judgment should be entered according to the facts and the law, was in effect a plea of "not guilty" as it in effect admitted the facts charged, but denied that they constituted a crime. *State v. Sullivan*, 98 Pac. 493, 52 Or. 614.

#### NOT HEREINBEFORE DISPOSED OF

Under a will bequeathing an equal sum to each of six charitable institutions, but providing that, if such bequests should exceed one-half of the personal estate of which he died possessed, such a proportionate amount should be taken from each as would reduce the sum thereof to one-half of his personal estate, but that, if the sum of the bequests should not equal one-half of the personal estate of which he died possessed, such an equal amount should be added to each bequest as would make the sum of the bequests equal to one-half of his personal estate, and directing the executors to divide the remainder of the estate "not hereinbefore disposed of" as therein provided, the words "not hereinbefore disposed of" mean the half of the estate in value at the time of the testator's death, which he had set aside to meet the requirements of the provisions of his will, and do not mean that the residuary legatees should share equally the interest and dividends and any other property which might come to the estate with the specific and general legatees. *In re Barton's Estate*, 118 N. Y. Supp. 1087, 1090, 64 Misc. Rep. 242.

#### NOT HIS OWN

The words "not his own," which are essential to an allegation in a complaint for trespass on inclosed lands or premises, not the property of the person against whom the complaint is made, is an exclusive negative, denying any right, however small, and is intended to include any right of the usufruct, control, occupation, or of entry. A complaint falling to charge that the lands on which defendant was alleged to have trespassed were "not his own" is fatally defective. *Binhoff v. State*, 90 Pac. 586, 587, 49 Or. 419.

#### NOT HITCHED

In an action for injuries to a person on a street from collision with a runaway team, where the petition averred that the team was not hitched, a charge authorizing a recovery for plaintiff against the owner of

the team, if the jury should find that the team was left without any person in charge and without exercising ordinary care to securely hitch it while the driver was absent, was not objectionable as authorizing a recovery for negligence not alleged in the pleading, as the law devolves upon the owner the obligation to exercise ordinary care in hitching the team in some reasonably secure manner, and the allegation that the team was not hitched should be viewed in the sense of the law under which, if the team was insecurely hitched, when considered with respect to the obligation to exercise ordinary care in that behalf, they would be "not hitched" in the eye of the law. *Miller v. United Rys. Co. of St. Louis*, 134 S. W. 1045, 1047, 155 Mo. App. 528.

#### NOT KNOW

See Do Not Know.

#### NOT KNOWING

The words "not knowing," or "having no reasonable grounds to suspect," or "knew," or "know," or "had reasonable grounds to suspect," when used in an instruction in an action for injuries to a passenger while attempting to board a train in consequence of the starting of the train, relating to the knowledge or want of knowledge of the conductor in starting the train before the passenger had boarded it, are legal equivalents. *Choctaw, O. & G. R. Co. v. Hickey*, 99 S. W. 839, 842, 81 Ark. 579.

#### NOT LESS THAN

"When so many 'clear days,' or so many days 'at least,' are given to do an act, or 'not less than' so many days must intervene, both the terminal days are excluded." *In re Gregg's Estate*, 62 Atl. 856, 857, 213 Pa. 260 (quoting and adopting the language of *End. Interp. St.* § 391).

Act April 4, 1870, provides that county commissioners, before contracting for the erection of any buildings, shall by advertisement invite sealed proposals according to specifications kept open for the inspection of all persons for at least four weeks before the time appointed for opening the proposals. Held, that the phrase "not less than four weeks" means at least four weeks and the four weeks during which the advertisement must be published or the same four weeks during which the specifications must be of record. The commissioners of a certain county fixed the time for opening the bids for a new courthouse at July 19, 1903. The specifications were deposited in the office of the county commissioners for a period longer than four weeks to such date, and the advertisements were published in two weekly newspapers in the county on June 16th, June 23d, June 30th, and July 7th. Held, that the advertisements complied with the requirements of the act that the advertisement shall be published for not

less than four weeks before the contract is awarded. *Commonwealth ex rel. Miller & Sons v. Brown*, 59 Atl. 479, 480, 210 Pa. 29.

An ordinance of the town of Central prohibits the sale of intoxicating liquors, except as is now provided by the dispensary law, and for a violation of such ordinance fixes the penalty at "not less than one hundred dollars, or not less than thirty days' imprisonment, or thirty days' labor on the chain gang, or thirty days' labor on the streets of the town, at the discretion of the mayor's court." Const. art. 5, § 21, provides that magistrates shall have exclusive jurisdiction in criminal cases where the punishment does not exceed a fine of \$100 or imprisonment for 30 days. Cr. Code 1902, § 12, provides that magistrates shall have jurisdiction of all offenses where the punishment does not exceed a fine of \$100 or imprisonment for 30 days, and may impose any sentence, within those limits, singly or within the alternative. The charter of the town of Central (Laws 1885, p. 405, § 4) provides that the intendant and wardens shall have the same jurisdiction in criminal matters as trial justices, so far as the same relates to the ordinances of the town. Held, that the words "not less than one hundred dollars," as used in the ordinance, mean "one hundred dollars," and therefore a prosecution for violation of the ordinance was within the jurisdiction of the intendant. *Town of Central v. Madden*, 61 S. E. 1028, 1029, 81 S. C. 7.

#### NOT NAVIGABLE

The phrase "streams not navigable," within a statute providing that the right of eminent domain may be exercised for storing and floating logs and lumber on streams "not navigable," means streams not navigable in fact. *Potlatch Lumber Co. v. Peterson*, 88 Pac. 426, 430, 12 Idaho, 769, 118 Am. St. Rep. 233.

#### NOT NEGOTIABLE

The words "not negotiable," stamped on the face of a bill of lading, do not prohibit transfer of the bill and of the contract represented thereby by indorsement and delivery, as, under Code Civ. Proc. § 449, any contract is transferable and enforceable by suit in the name of the assignee, but the transferor of such a bill has only his common-law rights, and cannot avail himself of Factors' Act (Laws 1830, p. 203, c. 179) § 3, providing that an agent intrusted with the possession of a bill of lading shall be deemed the true owner thereof so far as to give validity to any contract for the sale of goods thereunder. *Gass v. Astoria Veneer Mills*, 118 N. Y. Supp. 982, 986, 134 App. Div. 184.

The words "not negotiable," stamped on the face of the bill of lading, did not destroy its assignability, but the sole effect was to exempt the bill from the statutory provisions relative thereto, and a bill, though not

negotiable, may be transferred by assignment; the assignee taking subject to the equities between the original parties. *National Bank of Bristol v. Baltimore & O. R. Co.*, 59 Atl. 134, 138, 99 Md. 661, 105 Am. St. Rep. 321.

#### NOT OPEN FOR BUSINESS

See Open for Business.

#### NOT OTHERWISE

The words "not otherwise," in Pol. Code, § 3366, providing that county boards of supervisors shall, in the exercise of their police powers, and for the purpose of regulation, and "not otherwise," have power to license all and every kind of business not prohibited by law, transacted, and carried on within the limits of their respective jurisdictions, operate to curtail all power boards of supervisors previously had to issue licenses and charge therefor as a revenue measure. *Plumas County v. Wheeler*, 87 Pac. 909, 910, 149 Cal. 758.

#### NOT OTHERWISE EXCEPTED

Under Const. 1875, art. 5, § 6, conferring on the circuit courts jurisdiction in all matters, civil and criminal, not otherwise excepted, the words "not otherwise excepted" are not words of prohibition on the Legislature, but simply words of description as to what jurisdiction is conferred absolutely on the circuit courts, and hence, when construed with section 7, declaring that the General Assembly should have power to establish courts of chancery, and directed the state to be divided into chancery divisions and districts, and Const. 1901, § 148, declaring that the Legislature may confer upon the circuit court or the chancery court the jurisdiction of both of such courts, Acts 1894-95, p. 881, conferring chancery jurisdiction on the circuit court of Jefferson county, is not unconstitutional. *Ensley Development Co. v. Powell*, 40 South. 137, 139, 147 Ala. 300.

#### NOT OTHERWISE ORNAMENTED OR DECORATED

In the tariff act in a paragraph in relation to articles of glass, the use of the phrase "not otherwise ornamented or decorated," after an enumeration of several processes by which an article may be ornamented or decorated, not only implies, but indicates, an understanding that this result of the enumerated processes is to be an ornament or decoration, in order to bring the article within the terms of such paragraph. *Utard v. United States*, 128 Fed. 422, 63 C. C. A. 164 (citing *Koscherak v. United States*, 98 Fed. 596, 39 C. C. A. 166).

#### NOT OTHERWISE PROVIDED FOR

Code 1896, § 4561, provides for a solicitor's fee of \$50 for securing the conviction of any corporation for violating any law, and another section authorizes a fee of \$7.50 for

each conviction of a misdemeanor not otherwise provided for. Held that, since section 5388 makes the willful obstruction of a public road a misdemeanor, but affixes no penalty, the offense is one "not otherwise provided for," for which the solicitor's fee is but \$7.50. *Birmingham Waterworks Co. v. State*, 48 South. 658, 659, 159 Ala. 118.

The expression "not otherwise provided for," or "not specially provided for," in a tariff provision, does not deprive the general rule as to classification by specific designation of its ordinary application, so that a provision which specifically designates goods, but which is so qualified, shall not prevail over words of a general description in another provision containing no such qualification. *United States v. Schwarz*, 140 Fed. 302, 304.

#### NOT RESTRAINED BY LAW

The term "agreement," in Code Civ. Proc. § 66, providing that the compensation of an attorney for his services is governed by agreement, express or implied, which is "not restrained by law," means an agreement which is recognized by the law as a valid agreement. An agreement obtained for a consideration which is valid, or upon inducement which is expressly prohibited, would not be an agreement which was not restrained by law. *O'Neill v. Campbell*, 103 N. Y. Supp. 150, 152, 118 App. Div. 64.

#### NOT SAFE

The phrase "not safe" is a negation of every degree of safety, and hence an instruction, in an action against a railroad company for injury resulting from a defective track, merely relating to the condition of the track, and not to an imposed duty, which was otherwise covered, stating, "If you believe from the evidence that the track of the defendant at the place of the accident was not in a safe condition," etc., if erroneous in omitting to qualify the phrase "not in safe condition," was to the advantage of defendant, and it had no right to complain. *Galveston, H. & S. A. Ry. Co. v. Roberts (Tex.)* 91 S. W. 375, 384.

#### NOT SO DYING

By the third, fourth, and fifth paragraphs of his will, testator devised in fee simple lands in severalty to his three sons. The seventh paragraph of the will provided that, if any or either of such children should die leaving no issue living at the time of his or her decease, the estate devised to the child so dying was to go to the other and remaining "children or child not so dying in equal proportions in fee simple in remainder forever." Held, that the words "not so dying" meant that the executory devisees should be children of the testator not dying in like manner or under the same circumstances as the deceased child—that is, leaving no child or children, or descendant or descendants living at the time of their decease—and such

words could not be changed so as to read "not having so died," and since by this construction there will be no person who can take under the seventh paragraph, as no living person can fulfill the description, the seventh paragraph must be regarded as ineffective and insufficient to restrain or limit the previous paragraphs of the will, and hence the devisees in such paragraphs take a fee-simple estate. *Mills v. Teal*, 92 N. E. 310, 312, 245 Ill. 488.

#### NOT SPECIALLY PROVIDED FOR

See Not Otherwise Provided For.

#### NOT SUBJECT TO COUNTERMAND

A writing in the form of an order to ship trees, although stated to be a contract and not "subject to countermand," is not a contract, and may be countermanded, where there is nothing in the writing itself to show an agreement to deliver, and the order was not accepted by the person to whom it was directed or by his agent. *Mayo v. Koller*, 28 Pa. Super. Ct. 91, 95.

#### NOT TO BE PERFORMED

The provision in a contract of sale of a machine that the seller would keep at a certain place a stock of all parts of the machine, so that, if any part of it broke, the buyer could get the part needed for repairs within 24 hours of giving an order, is not within the statute of frauds, as an undertaking "not to be performed within a year." *Janney Mfg. Co. v. Banta (Ky.)* 83 S. W. 130, 131.

#### NOT TO BE PREVENTED

Testatrix bequeathed to certain named persons both real and personal property to be divided among them equally, and then provided that such shares should not be paid until the respective donees should become of age, but in the meantime should be deposited in some bank or institution on interest, and that her executor should not be prevented from applying any share during minority of the donee to his maintenance. Held, that the term "not to be prevented" included an implied authorization to the executor to so apply any of such shares. *Weber v. Waldeck (N. J.)* 63 Atl. 495, 496.

#### NOT TO THE LETTER

Where, in response to an issue, the jury found that plaintiff substantially complied with his contract, and the question was submitted twice thereafter, to which the jury replied, "No, not to the letter," such phrase indicated an intent to find a substantial performance. *Carnegie Public Library Ass'n of Brownwood v. Harris*, 97 S. W. 520, 48 Tex. Civ. App. 165.

#### NOT WHOLLY WITHIN

Ordinarily the words "not wholly within" refer to a situation where a part is within.

"Not wholly" is synonymous with "partly." People ex rel. Donegan v. Dooling, 125 N. Y. Supp. 783, 785, 141 App. Div. 81.

## NOTARY

See De Facto Notary.

A "notary" is a public officer whose duty it is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained. He is a public functionary, authorized to receive all acts and contracts to which parties wish to give the character of authenticity, attached to the act of public authority, to secure their date, their preservation, and the delivery of copies. The functions and authority of a notary are defined by law, and he cannot act as the mandatory of a vendor for whom he draws up and passes a deed of sale, since that is not one of the functions conferred upon him by law, and hence the purchaser cannot make a valid payment of the price to him. Nolan v. Labatut, 41 South. 713, 718, 117 La. 431 (citing 2 Abbott's Dig. p. 182; 5 Dict. Droit Civil, p. 27; Breen v. Schmidt, 6 La. Ann. 13; Brown v. Schmidt, 7 La. Ann. 349; Succession of O'Keefe, 12 La. Ann. 246; Lescouzeve & Abry v. Duca-tel, 18 La. Ann. 470).

## NOTARY PUBLIC

See N. P.

As holding an office, see Officer.

As magistrate, see Magistrate.

Notary's paraph, see Paraph.

Section 1750, Rev. St. U. S., confers on consular officers the power "to perform any notarial act which any notary public is required or authorized by law to do within the United States." Held, that such consular officer is a "notary public," within the meaning of our statute, and authorized to take and certify affidavits of depositions for use in the courts of the state. Browne v. Palmer, 92 N. W. 315, 317, 66 Neb. 287.

The office of a notary is of great antiquity, deriving its origin from the early Roman jurisprudence, and has for many centuries been recognized by most, if not all, of the Christian nations. The office is known to international law, to the common law, being concerned more especially with the law merchant branch, and to the civil law. "Black's Law Dictionary defines a 'notary public' as 'a public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents in order to give them credit and authenticity in foreign jurisdictions.'" Gharst v. St. Louis Transit Co., 91 S. W. 453, 455, 115 Mo. App. 403 (quoting and adopting Black, Law Dict.).

## NOTE

See Blue Notes; Field Notes.

## NOTE (In Commercial Law)

See Action on a Note; Approved Note; Bankable Note; Demand Note; Good Note; Less Note; Negotiable Note; Peddler's Notes; Promissory Note; Secure a Note; Secured Bankable Note; Sold Notes; Take up Note.

Bought and sold notes, see Bought and Sold.

Issue of notes, see Issuance—Issue.

Maker of note, see Maker.

Note secured by trust deed as estate, see Estate.

Other notes, see Other.

The first requisite to the "negotiability" of a paper is that it should be a "note," and, as a "note" must be an obligation for the payment of a certain sum of money, a provision that if collection is made through an attorney, or by legal process, the maker will pay all costs and expenses, including 10 per cent. of the amount collected as attorneys' fees, renders the note nonnegotiable. Green v. Spires, 50 S. E. 554, 555, 71 S. C. 107, 4 Ann. Cas. 261.

"Bangor, Sept. 8, 1882. I, James Newcomb, of Carmel, Maine, bought of Lemuel Nichols, Bangor, Maine, one black horse, name Nig, 7 years old, for (\$80.00) eighty dollars and interest on same until paid for, which I agree to pay out of my next quarter's mail pay, which becomes due Jan. 1, 1883, on route 184 from Carmel to Kenduskeag, which he is now carrying. The above horse is to remain said Nichols' until fully paid for. James Newcomb." Held, that the instrument contains a "note" given for personal property bargained and delivered, payable absolutely for a fixed sum in money, within Rev. St. c. 111, § 5, providing that "no agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid is valid unless it is made and signed as a part of the note, nor when so made and signed in a note for more than \$30, unless it is recorded like mortgages of personal property." Nichols v. Ruggles, 76 Me. 25-27.

Since the enactment of Acts 1908, No. 228, providing that makers of tokens, checks, or other devices redeemable in merchandise shall be liable on demand in current money, a trade check in the form of a note payable to bearer in merchandise is a note, within the purview of the statute against the forgery of notes, orders, etc. State v. White 52 South. 238, 126 La. 119.

An instrument signed by E., reciting that on or before a certain day "I promise to pay to the order of H. \$360 rent for 90 acres of land at \$4 per acre of L. plantation, for the year 1901, value received," is not only a "note," but a contract embracing all the terms of the contract between the parties so as to exclude evidence of an agreement by H.

to put a fence around the place to keep cattle out. *Hightower v. Henry*, 87 South. 745, 85 Miss. 476.

A conditional sale contract required payment in 10 days either in cash or notes, declaring that all notes and open accounts shall be drawn payable at Oklahoma City, with 10 per cent. attorney's fees added, and that, on default in the payment of any installment, the seller might consider the entire indebtedness due; that the title to and the ownership of all the goods should be in the seller until the buyer's indebtedness had been paid in money. Held, that the word "money" was used in contradistinction to "notes," and did not include notes, so that the acceptance of notes did not constitute a payment sufficient to vest title to the goods in the buyer. The term "notes" has reference to an evidence of indebtedness. In re Gray, 170 Fed. 638, 643.

**As credits**

See Credits.

**As debt**

See Debt.

**As fund**

See Fund.

**As goods**

See Goods.

**As money**

See Money.

**As property**

See Personal Property; Property.

**As property actually received**

See Property Actually Received.

**As security**

See Security.

**As specialty**

See Specialty.

**NOTE OR MEMORANDUM IN WRITING**

See Memorandum.

**NOTHING IN ARREAR**

Plea of nontenant distinguished, see Nontenant.

The plea of "nothing in arrear" admits the tenancy as stated in the avowry or cognizance, and puts in issue the fact of the rent being in arrear. *Middleton v. Quigley*, 12 N. J. Law, 352, 356.

**NOTICE**

See Actual Notice; Blanket Notice; Constructive Notice; Day's Notice; Due Notice; Explicit Notice; Further Notice; Immediate Notice; Implied Notice; Judicial Notice; Legal Notice; Personal Notice; Purchaser without

Notice; Reasonable Notice; Requisite Notice; Trespass Notice; With Notice; Without Notice.

Date of notice, see Date.

Fifteen days' published notice, see Fifteen.

Four weeks' notice, see Four.

Issue of, see Issuance—Issue.

Of appearance as written instrument, see Written Instrument.

Of materialman's claim as pleading, see Pleading.

Service of notice, see Service (In Practice).

See, also, Knowledge.

The term "notice," as used in Rev. St. 1899, § 3028, requiring weekly publication of notice of local option elections for four consecutive weeks in one paper, and such other "notice" as the county court may think proper, is not restricted to a publication in a newspaper, but may include other legal forms of notice, such as posting hand bills, etc. *State v. Morgan*, 128 S. W. 839, 841, 144 Mo. App. 35.

One who knew of deceased's death, was present in the state during the first two publications of the notice to present claims, returned to the state, and had actual notice of the publication for more than one month prior to the expiration of the time for filing claims, but yet failed to do so until long after that time had expired, was not one who, "by reason of being out of the state," had no "notice," "as provided in this chapter," to present his claim, within the meaning of Code Civ. Proc. § 1493, and his claim was therefore barred. *MacGowan v. Jones*, 76 Pac. 503, 142 Cal. 593.

Though the statute provides that all notices shall be served upon the attorney, and not upon the party, such provision has reference more particularly to notices of motions and other proceedings served during the pendency of the action, and does not exclude the right of plaintiff personally to serve a notice of the dismissal of his action upon defendant, instead of on defendant's attorney. *Nelson v. Nelson*, 126 N. W. 731, 735, 111 Minn. 183, 31 L. R. A. (N. S.) 523, 137 Am. St. Rep. 549.

A request to the chairman of the board of trustees of a graded common school, signed by three members of the board, requesting him to call a meeting at a specified time and place, was not a "notice" to him of a meeting of the board at such time and place. *Saunders v. O'Bannon* (Ky.) 87 S. W. 1105.

Under a statute providing that a materialman shall not be entitled to a lien unless, within 60 days, he shall give notice in writing to the owner or agent of his intention to claim such lien, a "notice" given that claimants claimed and should forthwith file their claim of a mechanic's lien in the office of the

clerk of the circuit court was not fatally defective for failure to recite that they "intended" to claim such lien, as any phraseology which clearly and distinctly apprised the owner of the intention of the materialman to claim the lien will satisfy the terms of the section and effectuate its design, though the word "intention" be not used at all. The intention to claim a lien could not be more definitely expressed than by the statement that the lien is claimed and will be forthwith filed. The owner was just as fully informed by the notice given that the claimants intended to file a lien claim as she would have been had the notice specifically stated that it was the intention of the lienors to claim such a lien. *Fulton v. Parlett & Parlett*, 64 Atl. 58, 59, 104 Md. 62.

A notice by a landlord served on the tenant which demands possession within three days, without stating the ground therefor, and a notice served at the same time which recites that the tenant has forfeited the lease by underletting without the landlord's consent, must be construed as one notice within Rev. St. 1908, §§ 2603, 2605, defining unlawful detainer, and requiring notice in writing specifying the grounds of demandant's right to possession. *Hepp Wall Paper & Mercantile Co. v. Deahl*, 125 Pac. 491, 492, 53 Colo. 274.

Only such substantial compliance with Laws 1899, p. 74, requiring notice to be given to municipal corporations of claims for damages against them, stating the time, place, and extent of such injury as near as practicable, and the negligence which caused it, as will enable the municipality to fully investigate the claim, and determine whether it prefers to adjust it without suit, or to contest its validity, is necessary. The form of notice required to be given to a municipality of a claim for damages against it under Laws 1899, p. 74, requiring such notice to state the time, place, and extent of the injury as near as practicable, and the negligence which caused it, is not amenable to the strict rules of pleading; and a claimant is not required to do more than state definitely and specifically all the facts upon which he bases his claim, so as to enable the municipality to promptly investigate the merits thereof. *Kennedy v. City of Savannah*, 68 S. E. 652, 8 Ga. App. 98.

The phrase "without notice," used in relation to the taking of a note, usually refers to some defense of the maker or to some claim of title to it other than that of the seller, with or without notice of which a purchaser has taken it. *Vansickle v. Watson*, 123 S. W. 112, 116, 103 Tex. 37.

"Notice" to the purchaser of a note may be of two kinds: "Explicit notice" of the fraud or illegality, and "implicit" or "general notice." If the purchaser of notes at the time of buying them had notice or knowledge

of some illegality or knowledge of some illegality or fraud which vitiated them, though he was not apprised of its nature, this would be such "general notice" as would affect his title. Mere negligence, however gross, not amounting to this willful and fraudulent blindness, will not of itself amount to notice; but the jury may and should consider the fact of such negligence as it may tend to prove such "general notice." *Mack v. Starr*, 61 Atl. 472, 473, 78 Conn. 184.

A letter, sent by defendant to plaintiff's attorney giving notice of appeal from the judgment of a justice, but not shown to have been received, nor served as required by statute, did not constitute a "notice of trial" within Rev. St. 1899, § 4074 (Ann. St. 1906, p. 2217), providing that, in order that such an appeal be triable at the first term, if not appealed on the day the judgment was rendered, appellant, 10 days before such term, must give the opposite party notice of the appeal. Knowledge by appellee's attorney of the taking of an appeal from a justice's judgment is not the equivalent of notice under Rev. St. 1899, § 4074 (Ann. St. 1906, p. 2217), requiring the appealing party to give notice thereof, unless the appeal was taken on the day judgment was rendered. *Lombard v. Urban*, 126 S. W. 221, 222, 142 Mo. App. 282.

#### Actual or constructive

"Notice" is defined by Wilson's Rev. & Ann. St. 1903, § 10, as either actual or constructive notice; sections 11 and 12 defining actual notice as express information of a fact, and constructive notice as that imputed by law to a person not having actual notice. *Cooper v. Flesner*, 103 Pac. 1016, 1020, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29.

The word "notice" means actual notice, in Pub. St. 1882, c. 144, § 9, providing that, when an account of a trustee is settled in the absence of a person adversely interested and without notice to him, such account may be opened on the application of such person. *Parker v. Boston Safe Deposit & Trust Co.*, 71 N. E. 806, 807, 186 Mass. 393.

Under Real Property Law (Consol. Laws 1909, c. 50) § 286, which provides that the title of a purchaser for a valuable consideration shall not be affected, unless he had notice of the fraudulent intent of his immediate grantor, the words "notice of the fraudulent intent" refer to actual, and not to constructive, notice. *Cain v. Snyder*, 135 N. Y. Supp. 443, 446, 76 Misc. Rep. 636.

Negotiable Instruments Law Tenn. § 56, provides that, to constitute "notice" of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to

bad faith. *Elgin City Banking Co. v. Hall*, 108 S. W. 1068, 1071, 119 Tenn. 548.

Rev. St. c. 73, § 12, which declares that the title of one who purchases property for a valuable consideration cannot be defeated by a trust affecting the property, unless the purchaser has "notice" of the trust, while it may in peculiar instances mean constructive notice, in cases generally, including a case where the trust reduces an absolute deed to a mortgage, means actual notice; and actual notice as applicable to conveyances, does not necessarily mean actual knowledge; it may be express or implied; it may be proved by direct evidence, or implied from indirect or circumstantial evidence. The statutory actual notice is a conclusion of fact capable of being established by all grades of legitimate evidence. *Knapp v. Bailey*, 9 Atl. 122-124, 79 Me. 195, 1 Am. St. Rep. 295.

Under the statute imposing a liability on a county for damages sustained by reason of a defective bridge constructed by the county, where the chairman of the board of county commissioners has five days' "notice" of the defect, an actual notice is meant. *Parr v. Board of Com'rs of Shawnee County*, 78 Pac. 449, 450, 70 Kan. 111.

To constitute notice of an infirmity in a negotiable bill indorsed before maturity, the indorsee must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith, as provided by Ky. St. § 3720b, subsec. 56 (Russell's St. § 1925). *Bothwell v. Corum*, 123 S. W. 291, 292, 135 Ky. 766.

Notice under Laws 1905, c. 142, § 30, exempting a city from liability for injury caused by defective ways, unless notice of the unsafe condition has been given to the mayor or the city clerk a reasonable time previously, must be actual as distinguished from constructive notice. *Gregorius v. City of Corning*, 125 N. Y. Supp. 534, 535, 140 App. Div. 701.

A notice within a fire policy stipulating for its cancellation on notice and repayment of unearned premiums is a personal notice, and a notice by publication requiring the filing of claims against insurer, a foreign corporation, in the state of its origin in proceedings for its dissolution, is insufficient, and the policy holder in the state may sue the corporation in the courts of the state, and obtain a judgment to be satisfied out of the securities deposited by insurer, as required by Civ. Code 1902, § 1796. *Frink v. National Mut. Fire Ins. Co.*, 74 S. E. 33, 35, 90 S. C. 544, Ann. Cas. 1913D, 221.

Rev. Laws 1905, § 3350, providing that a certified copy of a judgment of a court of record affecting title to realty or any interest therein may be recorded in any county where any of the lands lie, with the same effect as

a conveyance, is a recording act, and does not make the record of such judgment notice of the entry thereof, within the meaning of section 4160, limiting the time within which applications for relief from a judgment may be made to one year from notice thereof. *Foster v. Coughran*, 129 N. W. 853, 854, 113 Minn. 433.

"Recitals in an unrecorded deed in one's chain of title, or with which one is in privacy, are 'notice' to him of the facts therein set out. \* \* \* Constructive notice of recitals in a prior unrecorded deed is as effective as knowledge of such recitals." *Runge v. Gilbough* (Tex.) 87 S. W. 832, 836.

Rev. Codes 1905, § 7205, provides that an appeal must be taken by serving a notice on the adverse party and by filing it with the clerk of the court. Section 7332 provides that service of any notice may be made by mail, where the person making the service and the person upon whom it is to be made reside in different places. Held, that a notice of appeal is a notice within section 7332, service of which may be made by mail, where the parties reside in different places. *Gooler v. Eidness*, 121 N. W. 83, 85, 18 N. D. 838.

A purchaser of real estate is chargeable with notice derived from the recitals of his deed, for anything which will put a prudent man on inquiry is notice. *Adams v. Gossom*, 129 S. W. 16, 20, 228 Mo. 566.

Revisal 1905, § 2205, provides that to constitute "notice" of an infirmity in a note or defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge, or knowledge of such facts that his action in taking the instrument amounted to bad faith. Held, that when a note was transferred before maturity without recourse, it was no defense as against the indorsee that it was given under a contract for territory for the sale of a certain sash lock, and that the locks subsequently furnished pursuant to the contract were not in accordance with the representations of the payee, and that the note had been therefore obtained by fraud; there being nothing to show that the indorsee had any notice of the fraud at the time of the transfer. *Bank of Sampson v. Hatcher*, 66 S. E. 308, 309, 151 N. C. 359, 134 Am. St. Rep. 989.

*Cobbeys Ann. St. 1907, § 9255*, providing that, to constitute notice of an infirmity in an instrument, the person to whom negotiated must have actual knowledge thereof, or knowledge of such facts that his taking the instrument amounts to bad faith does not change the rule that to constitute bad faith by the purchaser of a negotiable instrument, for value, before maturity, he must have acquired it with knowledge of an infirmity, or with a belief based on the circumstances known to him that there was a defense, or he must have acted dishonestly. *Benton v. Si-*

kyta, 122 N. W. 61, 62, 84 Neb. 808, 24 L. R. A. (N. S.) 1057.

Gen. St. Kan. 1909, § 6999, gives an action for death of or injury to a railroad employé by the negligence of a fellow servant, provided notice in writing shall have been given by or on behalf of the person injured to the railroad company within eight months after the injury, and section 7000 provides that such notice may be served by a written copy thereof by the person injured or any one on his behalf, or, if he dies, by the person or persons entitled to recover for the injury, on any person designated by the railroad in the county in which the action is brought, or, if no such person has been designated or appointed, then upon any local superintendent of affairs, freight agents, agent to sell tickets, or station keeper. Held that, while section 6999 makes the giving of notice a condition to a right of action for injuries to or death of a railroad employé occurring in Kansas, the mode of service prescribed by section 7000 is not a condition to such right, and has no extraterritorial force, so that, where an action is brought in Missouri for the wrongful death of a railroad employé in Kansas, the service of notice in any proper way, though not in compliance with section 7000, is sufficient. Plaintiff's decedent, a railroad employé, was killed in Kansas as the result of a railroad's alleged negligence, and within eight months the plaintiff filed a petition for decedent's wrongful death in the courts of Missouri, setting forth in full the negligent occurrence in Kansas resulting in decedent's death, with the time and place, etc. Summons was duly served within the eight-month period, and defendant appeared thereto. Thereafter the suit was dismissed, and another one begun. Held, that the first suit constituted a sufficient "notice" in writing to the railroad company to comply with the requirements of Gen. St. Kan. 1909, § 6999. Gen. St. Kan. 1909, § 6999, requiring notice of injuries to a railroad employé to be given by or on behalf of the person injured as a condition to his right to sue, does not require service of such notice by plaintiff personally. *Husted v. Missouri Pac. Ry. Co.*, 128 S. W. 282, 284, 143 Mo. App. 623.

A suit for specific performance of a contract for the sale of land is notice of the claim that plaintiff sets up from the time it is commenced and docketed, and, if duly prosecuted and not collusive, one purchasing the land pending the suit is affected by the decree therein, though the suit is in a county other than the county in which the land is located, under Civ. Code 1910, § 4533. *Marshall v. Whatley*, 72 S. E. 244, 245, 136 Ga. 805, 36 L. R. A. (N. S.) 552.

#### **Citation distinguished**

See Citation.

#### **As commencement of action**

See Commencement of Action.

#### **Claim of right distinguished**

The term "claim of right," as applied to adverse possession, is not synonymous with the word "notice." *Swope v. Ward*, 84 S. W. 895, 897, 185 Mo. 316 (citing *Whitaker v. Whitaker*, 58 S. W. 5, 157 Mo. 342).

#### **Facts putting on inquiry**

In law, that is "notice" of a fact which would provoke a reasonably prudent man to such inquiries as, pursued with reasonable diligence, would lead to full knowledge. *Hingtgen v. Thackery*, 121 N. W. 839, 840, 23 S. D. 329.

If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids inquiry, he is chargeable with "notice" of the facts which by ordinary diligence he would have ascertained. *Knapp v. Bailey*, 9 Atl. 122-124, 79 Me. 195, 1 Am. St. Rep. 295.

Whatever is sufficient to put a subsequent purchaser on inquiry must be considered "legal notice" to him of the facts inquiry would have disclosed by the exercise of reasonable diligence. *Jennings v. Lentz*, 93 Pac. 327, 329, 50 Or. 483, 29 L. R. A. (N. S.) 584.

"Notice" may be the existence of that which, if looked at or listened to, and then followed up by such inquiry as ordinary prudence would suggest, would result in obtaining the knowledge sought to be charged. *Warden v. Addington*, 115 S. W. 241, 245, 131 Ky. 296.

The word "trustee," following the name of the grantee in a deed, constitutes "notice" and puts one on inquiry. *Flitercraft v. Commonwealth Title Ins. & Trust Co.*, 60 Atl. 557, 559, 211 Pa. 114.

"Notice" to a purchaser of adverse interests need not be actual nor amount to full knowledge, but it should be information exciting apprehension in an ordinary mind, and prompt one of average prudence to make inquiry. Implied notice to a purchaser of adverse interests arises from knowledge of particular facts unless the law charges notice by registry or other token. *Daly v. Rizzutto*, 109 Pac. 276, 278, 59 Wash. 62, 29 L. R. A. (N. S.) 467.

"Whatever puts a party upon inquiry" "amounts in judgment of law to 'notice,' provided the inquiry becomes a duty, as in the case of purchasers and creditors, and could lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding." *Kellogg v. Randolph* (N. J.) 63 Atl. 753, 754 (quoting and adopting definition in *Smallwood v. Lewin*, 15 N. J. Eq. 60).

"Actual possession of land is 'notice' equal to the record of a deed under which



the party in possession claims. A purchaser is bound to inquire by what right or title the party in possession holds, and he will take subject to that title, whatever it may be." *Merchants' & Farmers' State Bank v. Dawdy*, 82 N. E. 606, 607, 230 Ill. 199 (citing *Joiner v. Duncan*, 51 N. E. 323, 174 Ill. 252; *Coari v. Olsen*, 91 Ill. 273).

"Notice" does not mean positive information brought directly home to the parties sought to be charged. Anything that will put a prudent man upon inquiry is notice; and gross negligence in failing to make inquiry when the surrounding facts suggest the existence of others, and that inquiry is to be made, is tantamount in the courts of equity to notice." *Scoggin v. Mason*, 103 S. W. 831, 834, 46 Tex. Civ. App. 480 (quoting and adopting definition in *Connecticut Mut. Life Ins. Co. v. Smith*, 22 S. W. 629, 117 Mo. 261, 38 Am. St. Rep. 656).

#### Good faith distinguished

The terms "good faith" and "notice" are intimately related in jurisprudence, but are not of uniform meaning; the former retaining in some measure the popular sense of honest belief, but its technical significance depends largely on the doctrine of notice, as developed in the progress of the equity system. Considered with reference to and as influenced by "notice," the term "good faith" bears several legal meanings according to the subject-matter of the litigation in which it is used. As applied to the purchase of a parcel of land, the title to which passed from the grantor by a prior recorded deed or incumbrance, the constructive notice of the prior conveyance which the record imparts prevents one taking title subsequently from being a purchaser in good faith. *Rev. St. 1899, § 3080* (Ann. St. 1906, p. 1768), permitting one who claims land in another's possession to bar the occupant from compensation for betterments by notifying him in writing of the claim and its nature, does not make an exception in favor of an occupant who believes the hostile title to be bad and makes betterments regardless of such notice, since "notice" and "good faith" cannot so exist, for it is an equity doctrine of universal recognition that he who takes with notice takes subject to the claim, and the notice which will suffice for this purpose does not mean direct and positive information, but anything calculated to put a prudent man on the alert. *Richmond v. Ashcraft*, 117 S. W. 689, 692, 137 Mo. App. 191.

#### As information or knowledge

"Knowledge" is not the same as "notice," but to constitute "notice," the "knowledge" must be communicated in the prescribed way. *Wade v. Wade's Adm'r*, 69 Atl. 826, 827, 81 Vt. 275.

"Knowledge" and "notice" are not always synonymous. *Field v. Campbell* (Ind.)

67 N. E. 1040, 1041 (citing *Kirkham v. Moore*, 65 N. E. 1042, 30 Ind. App. 549).

"Notice" is equivalent to 'information,' 'intelligence,' or 'knowledge.'" *Bova v. Norigan*, 67 Atl. 326, 327, 28 R. I. 319, 125 Am. St. Rep. 741.

"Notice" means information by whatever means communicated; knowledge given or received. *Metcalf v. Mutual Fire Ins. Co.*, 112 N. W. 22, 24, 132 Wis. 67.

One's knowledge that he has been appointed to an office constitutes "notice" to him, within Code 1912, art. 70, § 11, which provides that an office is forfeited by failure to qualify within 30 days after receiving commission or notice of appointment. *Little v. Schul*, 84 Atl. 649, 655, 118 Md. 454.

"Knowledge" and "notice" are not synonymous, for that which does not amount to actual "knowledge" may constitute "notice." The notice may be of such a character that its effects amount to knowledge. On the other hand, the party may be charged with notice when in utter ignorance of that of which he is presumed to be advised. *Rosenberger v. Hawker*, 103 N. W. 781, 782, 127 Iowa, 521.

The word "notice," as used in *Rev. St. 1899, § 3017*, imposing a penalty for selling liquors to a drunkard after notice from his wife not to do so, is synonymous with information, intelligence, or knowledge, and oral notice to the managing agent of the dramshop keeper is sufficient. *Jackson County ex rel. Farley v. Schmid*, 124 S. W. 1074, 141 Mo. App. 229.

B. & C. Comp. § 108, provides that the court may at any time within one year after notice thereof relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise, or excusable neglect. Held, that "notice," as used in the statute, means "knowledge." *Fildew v. Milner*, 100 Pac. 1092, 1094, 57 Or. 16.

"A 'notice' to a purchaser of a note of fraud, defect in title, illegality of consideration, or other fact which impeaches its validity in the transferror's hands signifies the same as knowledge." *Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co.*, 50 S. E. 880, 882, 57 W. Va. 625, 70 L. R. A. 312 (quoting and adopting definition in *Daniel*, Neg. Instr. § 789).

The word "notice," used in negotiable instrument law, must be understood as meaning actual knowledge as distinguished from implied or constructive notice which arises when a person is put on inquiry, and knowledge is presumed. *Link v. Jackson*, 139 S. W. 588, 593, 158 Mo. App. 63.

A complaint alleging that an act by which plaintiff, a passenger, was injured was done with "knowledge" or "notice" of defendant's agent does not state a cause of action

for wantonness; "notice" not being the equivalent of "knowledge," and the averment in the disjunctive not affirming either. *Birmingham Ry. & Electric Co. v. Butler*, 33 South. 33, 35, 135 Ala. 388.

Where, in an action against a county to set aside a conveyance, a decree was taken by default, the court, under L. O. L. § 103, may, in its discretion, within one year after notice thereof, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and has jurisdiction to entertain a motion to set aside such decree when filed within one year after knowledge of the decree was acquired by the agents or officers of the county, though not until more than one year after the decree was entered; "notice," as used in such statute, being a synonym of "knowledge." *Chapman v. Multnomah County*, 126 Pac. 996, 998, 63 Or. 180.

"Notice," in connection with the rule that purchasers of corporate stock in good faith without "notice" that it is unpaid are not liable for the balance due on it, must be given the ordinary signification of that term, and means knowledge that the stock was unpaid, or knowledge of such facts as would have put an ordinarily prudent man on inquiry, when the inquiry might reasonably be expected to lead him to knowledge that the stock was unpaid. *Gillett v. Chicago Title & Trust Co.*, 82 N. E. 891, 905, 230 Ill. 373.

A distinction is to be observed between knowledge of the pendency of a suit and "notice" thereof. Jurisdiction can be acquired, if one does not submit himself to it, in no other way than by actual notice or by constructive notice. Actual notice is given only by personal service of process; constructive notice by some form of substituted service. Where there is no service there is no notice, irrespective of any knowledge which the defendant may acquire informally. Notice is given only by a service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge on notice or to force him into court to defend himself. *National Metal Co. v. Greene Consol. Copper Co.*, 89 Pac. 535, 537, 11 Ariz. 108, 9 L. R. A. (N. S.) 1062.

The word "notice," as used in L. O. L. § 103, permitting a court in its discretion, at any time within a year after notice thereof, to relieve a party from a judgment taken against him by mistake, etc., means "knowledge" by the moving party of the entry of a judgment. *Evans v. Evans*, 118 Pac. 177, 179, 60 Or. 195.

Rev. Codes 1905, § 6702, providing that constructive notice is notice imputed by law to a person not having actual notice, and section 6703 providing that every person who has actual notice of sufficient circumstances to put a prudent man upon inquiry, and who

omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself, since the enactment of the negotiable instruments law, have no application to actions upon negotiable instruments in the hands of indorsees before maturity, if they ever had such application, being superseded by section 6358, defining notice in such case as actual knowledge of infirmity or defects or knowledge of such facts as to amount to bad faith. *American Nat. Bank v. Lundy*, 129 N. W. 99, 101, 21 N. D. 167.

#### As order

The word "notice," as used in Laws 1903, c. 380, p. 583, providing that, if the party desires more than the 10 days given by statute within which to make and serve his case-made, the court or judge before whom the case was tried may on motion order an extension of that time, which notice of extension shall be filed with the clerk of the court, may well be held that the word "notice" should be read "order." *Howard v. Carter*, 80 Pac. 61, 62, 71 Kan. 85 (citing *Clark v. Board of Com'rs of Mitchell County*, 77 Pac. 284, 69 Kan. 542, 66 L. R. A. 965).

#### As process

See Process.

#### As proof

See Proof.

#### Reasonable notice

There is no difference in the meaning of "notice" and "reasonable notice," and where, in an action against the town for damages resulting from a defect in a highway, counsel for defendant admitted "notice," the admission will have the same effect as though he had admitted "reasonable notice." *Larrabee v. Inhabitants of Searsport*, 42 Me. 202, 203.

#### To officer, agent, or attorney

"Notice" communicated to, or knowledge acquired by, the officers or agents of corporations, when acting in their official capacity or within the scope of their agency, becomes notice to or knowledge of the corporation for all judicial purposes." *Maryland Trust Co. v. National Mechanics' Bank*, 63 Atl. 70, 78, 102 Md. 608 (citing 13 Cyc. pp. 399, 400).

"Notice" to a township trustee of the insolvency of his brother, a defaulting township treasurer, was notice to the township, within Bankr. Act July 1, 1898, c. 541, § 600, 30 Stat. 562, relating to preferences. *Painter v. Napoleon Tp.*, 190 Fed. 637, 639.

In an action by the receiver of a depositor to recover a deposit which the bank had paid out on forged checks, the court refused to admit in evidence the deposition of a deceased officer of the depositor to the effect that he had several interviews with one of the counsel for the bank, who was also a director and a member of its executive committee, within one year after the return to

the depositor of the forged checks, in which he told such counsel that the checks were forged. Held reversible error, since the deposition tended to show that the counsel was acting for the bank, that he had knowledge of facts which it was his duty to communicate to the bank, and which it must be presumed he did communicate, and hence that the bank had notice within the meaning of Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 326, requiring notice to a bank within one year after the return to the depositor of any forged voucher, in order to hold the bank liable. *Shattuck v. Guardian Trust Co. of New York*, 97 N. E. 517, 518, 204 N. Y. 200.

Where an attorney was charged with the duty of having a deed to his client executed and acknowledged, "notice" to him, while engaged in the transaction, that there was in fact a mortgage on the premises, though it did not appear of record, owing to a mistake in the description, was "notice" to the client. *Allison v. Falconer*, 87 S. W. 639, 75 Ark. 343.

#### Verbal or written

Rev. St. Ohio, § 3185, provides that, within 30 days after a principal contractor files an affidavit for a lien, he shall notify the owner, his agent or attorney, that he claims a lien, and, if he fails, the lien shall be null and void. Held, that "notice" as so used meant information by whatever means communicated, knowledge given or received; and, written notice not being expressly required, oral notice was sufficient. In re *Farmers' Supply Co.*, 170 Fed. 502, 505.

#### NOTICE AFFECTING COUNTY AFFAIRS

The list of allowances made by the judges of the several courts, required by Acts 1899, p. 415, c. 186, to be published in one newspaper at a cost not exceeding a fixed sum for each allowance, are required to be published in two newspapers in Acts 1903, p. 360, § 1, providing that, where the law requires the publication of "notices affecting county affairs," the same shall be published in two newspapers. *Cheney v. State ex rel. Risk*, 74 N. E. 892, 893, 165 Ind. 121.

#### NOTICE OF APPEAL

As process, see Process.

As writ, see Writ.

If to appeal is not to institute a new proceeding, a "notice of appeal" cannot be an original process by which parties are brought into court, but is a notice merely by which the parties who are already in court are notified of subsequent and further proceedings in the cause therein pending, and hence, where such notice was served on defendant's attorney and purported to be a notice of appeal as against all of the defendants originally sued, it was not objectionable by reason of the fact that all of the defendants except one were referred to by the abbreviation "et

al." instead of setting out their names in full. *Philadelphia Mortgage & Trust Co. v. Palmer*, 73 Pac. 501, 502, 32 Wash. 455.

The words "notice of the appeal," as used in Rev. Codes N. D. § 7221, refers to notice or knowledge of a perfected appeal as furnished by service of a copy of the undertaking and not merely to the notice in writing provided for by section 7205. *Beddow v. Flage*, 126 N. W. 97, 98, 20 N. D. 66.

#### NOTICE OF APPROPRIATION

A notice of appropriation of water within a United States forest reservation, which states all the matters required by Civ. Code, § 1415, relating to the notice of appropriation of water, and which states the points of diversion as located on a designated section and township which the court judicially knows is within a reservation, is sufficient within section 1422, providing that where the place of intended diversion is within a reservation, and is so shown in the notice of appropriation, the claimant shall have a specified time after the grant of authority to occupy and use the reservation for such intended purpose within which to commence the construction of the works, etc. The form of notice of appropriation of water of a stream is fixed by Civ. Code, § 1415, requiring a person desiring to appropriate water to post a notice stating enumerated facts, and section 1422, relating to diversion of water within any reservation, does not affect the form of notice. *Wishon v. Globe Light & Power Co.*, 110 Pac. 290, 292, 158 Cal. 137.

#### NOTICE OF DISHONOR

Oral notice of dishonor of a check, given to a clerk of an indorsing commercial corporation, is not notice to the corporation, within Negotiable Instrument Law (Acts 1899, c. 94) § 97, authorizing the giving of "notice" to a party or to his agent. *American Nat. Bank v. National Fertilizer Co.*, 148 S. W. 597, 599, 125 Tenn. 328.

If the holder of negotiable paper desires to charge antecedent parties with its payment, it is incumbent on him to give them "notice of dishonor." The notice may be either written or verbal, or it may be written and supplemented by verbal testimony. All that is necessary, says Byles, is to apprise the party liable of the dishonor of the bill in question and to intimate that he is expected to pay it. It is sufficient if, under all the circumstances, the language of the notice imports that the indorser is looked to for payment, and it would seem not unfair to imply such intention from the very fact of sending "notice of dishonor." The weight of authority is that a notice of dishonor is sufficient to charge an indorser, if it comes from the holder or his agent and notifies the indorser that the note was presented and payment was refused. Notice of nonpayment, however, is not sufficient; nor is mere knowledge

of protest all that is required to charge the indorser. "Notice does not mean mere knowledge, but an actual notification. For a man who can be clearly shown to have known beforehand that the bill would be dishonored is, nevertheless, entitled to notice." "Notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that the holder does not intend to give credit to such maker." *Marshall v. Sonne-man*, 64 Atl. 874, 875, 216 Pa. 85 (citing *Byles*, Bill, \*276; 7 Cyc. p. 1109).

#### NOTICE OF INFIRMITY

Under Negotiable Instruments Law (Sess. Laws 1899, p. 350, c. 149) § 56, providing that, in order to constitute "notice of an infirmity" in an instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have actual knowledge of the infirmity, or knowledge of such facts that his action in taking the instrument amounts to bad faith, one who has knowledge of a defect in his transferor's title, or knowledge of such facts that his action in taking the instrument amounts to bad faith, is not a holder in due course. *Keene v. Behan*, 82 Pac. 884, 886, 40 Wash. 505.

Under a statute providing that, to constitute "notice of infirmity" in a negotiable instrument or defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, evidence that the transfer of a check for \$400 by S., the payee thereof, to plaintiff, his brother-in-law, took place near the bank on which the check was drawn, and of which plaintiff was vice president, that no inquiry was made at the bank before purchase, and that plaintiff, went to a hotel, got a blank check, and filled it out to the order of S. for \$400, and gave it to another party for delivery to S., did not show actual knowledge on plaintiff's part of an infirmity in the check. *Matlock v. Scheuerman*, 93 Pac. 823, 824, 826, 51 Or. 49, 17 L. R. A. (N. S.) 747 (citing and adopting *Belmont Branch of State Bank of Ohio v. Hoge*, 35 N. Y. 65-68; *Bowman v. Metzger*, 39 Pac. 3, 44 Pac. 1090, 27 Or. 23).

#### NOTICE OF NEGLIGENCE

There is a clear distinction between a "notice of negligence" and a claim for damages. A mere notice to a telegraph company that its employes have been negligent in the transmission of a message, together with the circumstances of the negligence, is not a presentment of a claim for damages, based on such negligence, within the contract for the transmission of the message providing that the company shall not be liable for

damages where the claim is not presented within a specified time, etc. *Western Union Telegraph Co. v. Moxley*, 98 S. W. 112, 113, 80 Ark. 554.

#### NOTICE OF TRANSFER

Before notice of transfer, see *Before*.

#### NOTICE TO THE WORLD

The "notice to the world," required in Civ. Code 1895, § 2634, which declares that the dissolution of a partnership by the retiring of an ostensible partner must be made known to creditors and to the world, may be given by publication in a public gazette circulated in the locality in which the business of the partnership has been conducted, if such publication is fair and reasonable as to its terms and the number of times it is made. Such publication is not, however, necessary, as any means of fairly publishing the fact of dissolution as widely as possible in order to put the public on its guard, as by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of partnership, etc., are proper to be considered on the question of notice. *Bush & Hattaway v. W. A. McCarty Co.*, 56 S. E. 430, 431, 127 Ga. 308, 9 Ann. Cas. 240 (quoting and adopting definitions in *Askew v. Silman*, 22 S. E. 573, 95 Ga. 681; *Lovejoy v. Spafford*, 93 U. S. 430, 23 L. Ed. 851).

#### NOTIFY

See *Duly Notified*.

To "notify" one of a fact is to "make it known to him," to "inform him by notice." *Huntington v. City of Calais*, 73 Atl. 829, 830, 105 Me. 144.

Under Rev. St. Ohio, § 3185, providing that a person filing an affidavit or a mechanic's lien shall within 30 days thereafter notify the owner of the property, his agent, or attorney that he claimed such lien, verbal notice is sufficient. The word "notify" as generally used does not imply the use of writing; it meaning simply to convey information, knowledge, or notice in whatever way. In *re Boner*, 189 Fed. 93, 94.

#### NOTIFICATION

In Pub. St. c. 172, § 29, relating to sale of land on execution, requiring "notifications thereof to be posted up in some public place in the city or town where the land lies, and also in two adjoining cities or towns, if there are so many in the county," the plural "notifications" would be construed, apart from history, with reference to the several cities or towns in which the notifications are required, notwithstanding the words "and also," and not as requiring two or more notifications in the city or town where the land lies. In fact, however, the plural is a survival from St. 1796, c. 77, § 4, which required

the posting up of notifications in two or more public places in the town where the land lies. Rev. St. c. 73, § 39, substituted "some public place" for "two or more public places," and thereby made one notification sufficient. *Holmes v. Jordan*, 39 N. E. 1005, 1006, 163 Mass. 147.

### NOTIFIED

The word "notified," as used in a certificate and protest by a notary public that he duly notified the indorser of the note of non-payment, there being no qualification of the word as to the mode of notice, must be regarded as meaning verbal notice. *Ticonic Bank v. Stackpole*, 41 Me. 321, 324, 66 Am. Dec. 246.

Where one desiring to ship goods informed the agent of the carrier that he would want two cars in which to transport the goods, an allegation in a complaint, founded on a failure to furnish the cars, that the agent "notified" the shipper that he "would endeavor" to secure the cars was insufficient to show an acceptance of the proposal according to the terms in which it was made, or an unconditional promise to comply with it. It was no more than a promise that the agent "would endeavor" to comply with the order which it was his duty to do without a contract. *Lake Shore & M. S. R. Co. v. Anderson*, 79 N. E. 381, 383, 39 Ind. App. 112.

*Burns' Ann. St. 1901, § 3626a*, providing that, in an action to foreclose a lien for a municipal improvement, it must be shown that 10 days before suit the owner, if found to be the owner, was "notified" of the assessment, the amount thereof, with interest, and where payable, means a notice either verbal or written, and it may be given by any one interested in the claim, or by any municipal officer charged with a duty in connection with the making or collection of the assessment. *Ross v. Van Natta*, 74 N. E. 10, 11, 164 Ind. 557.

The word "notified," in the warrant of a county clerk to the treasurer directing the collection of taxes, reciting, "You are hereby notified to collect the taxes" enumerated in the lists attached, is sufficiently defined to warrant the treasurer to proceed to collect the taxes, pursuant to the statute providing that the county clerk shall attach to the lists his warrant in general terms requiring the treasurer to collect the taxes, and no informality shall render any proceedings for the collection of taxes illegal. *Cadman v. Smith*, 85 Pac. 346, 348, 15 Okl. 633.

### NOTORIETY

"Notoriety" is the state or character of being well known, usually, and, always when applied to crime, in an unfavorable sense. It is often found with words of similar import, such as 'open' and 'flagrant.'" People

*v. Salmon*, 83 Pac. 42, 43, 148 Cal. 303, 2 L. R. A. (N. S.) 1186, 113 Am. St. Rep. 268.

### NOTORIETY OF POSSESSION

See Openness, Notoriety, and Exclusiveness of Possession

### NOTORIOUS

See Open, Notorious, and Continuous Change of Possession.

The word "notorious" is used in the statute relating to the recognition of a child, with the design of emphasizing the thought that the understanding of the father's recognition should be as extensive as the immediate community of his residence and within the common knowledge of the public. *Morgan v. Strand*, 110 N. W. 596, 597, 133 Iowa, 299.

### NOTORIOUS ADULTERY

See Open and Notorious Adultery.

### NOTORIOUS POSSESSION

See Open and Notorious Possession.

"Notorious" possession as an element of title by limitation is possession which is generally known and talked of, and universally recognized, conspicuous, widely, or commonly known. *Long v. Lackawanna Coal & Iron Co.*, 136 S. W. 673, 680, 681, 233 Mo. 713.

Within the rule that to constitute adverse possession it is necessary that the possession be "actual," "continuous," "notorious," and "hostile," "actual" means real, visible; "continuous" means without interruption; "notorious" means open, undisguised, generally known; and "hostile" means opposed and antagonistic to the claims of all others. *Bradbury Marble Co. v. Laclede Gas Light Co.*, 106 S. W. 594, 599, 128 Mo. App. 96.

The elements of title by limitation are uninterrupted possession, actual, visible, notorious, adverse, and hostile under color and claim of right for the statutory period; the words "adverse and hostile" meaning practically the same thing. *Long v. Lackawanna Coal & Iron Co.*, 136 S. W. 673, 680, 681, 233 Mo. 713.

### NOTORIOUS PUBLIC INDECENCY

What is decent and indecent is determined by the sensibilities and moral standards of the people as evolved from generation to generation along with their civilization. Whether an act is decent or indecent depends on the time, place, and the circumstances, including the intention of the actor. When by general consensus of public opinion an act tending to debauch the morals is understood to be offensive to the common instincts of decency if done under particular circumstances, the act, when so done, is in contemplation of law a "notorious act of indecency." A public and intentional or wanton intruding upon the

attention of the opposite sex of the sexual act or other things directly suggestive of it is an act of public indecency, within Pen. Code 1895, § 390, making notorious acts of public indecency a misdemeanor; the barrier erected by social decorum between the sexes being a fundamental of decency. For a man intentionally and wantonly to cause a bull and cow to copulate upon a public highway, knowing that a woman and children are so situated that they can hardly fail to see the act, and that they are likely to be offended by it, constitutes criminal notorious public indecency, within Pen. Code 1895, § 390. *Redd v. State*, 87 S. E. 709, 711, 7 Ga. App. 575.

## NOVATION

A "novation" is the substitution of one obligation for another. *Tilden v. Gordon & Co.*, 74 Pac. 1016, 1017, 34 Wash. 92.

A "novation" presupposes a previous obligation for which the new one is substituted. *Linder Hardware Co. v. Pacific Sugar Corp.*, 118 Pac. 785, 17 Cal. App. 81.

The doctrine of "novation" is derived from the civil law, and a novation can neither be founded on an original claim, which was illegal, nor, under the civil law, be made by one incapable of contracting. *Wadsworth v. Board of Sup'rs of Livingston County*, 115 N. Y. Supp. 8, 18 (citing *Green's Brice's Ultra Vires*, p. 601).

A "novation" is in the nature of a release or discharge and is new matter which must be specially pleaded. There can be no "novation" and substitution in law unless the original creditor and the new debtor all enter into such an agreement. *Temple v. Teller Lumber Co.*, 106 Pac. 8, 9, 46 Colo. 497.

A "novation" is the making of a new contract, its elements being essentially the same as in the first contract, which are, parties, a meeting of the minds, and a consideration. *Davless County Bank & Trust Co. v. Wright*, 110 S. W. 361, 363, 129 Ky. 21, 17 L. R. A. (N. S.) 1122.

The necessary legal elements to establish "novation" are: Parties capable of contracting, a valid prior obligation to be displaced, the consent of all parties to the substitution, based on sufficient consideration, and the extinction of the old obligation and the creation of a new one. *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 131 N. W. 559, 563, 166 Mich. 276.

The essential elements of a "novation" are parties capable of contracting, a valid prior obligation to be displaced, the consent of all of the parties to the substitution, and the extinction of the old obligation and the creation of a new one. *Gillett v. Ivory* (Mich.) 139 N. W. 53, 56.

"Novation" is defined to be the substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished. In *re Ransford*, 194 Fed. 658, 662, 115 C. C. A. 560.

"Novation" consists of a bilateral agreement for the substitution of one obligation for another, and may take place either by the substitution of a new for an old party, or by the substitution of a new agreement between the parties, or by a change of parties and agreement at the same time. *Parsons Mfg. Co. v. Hamilton Ice Mfg. Co.*, 73 Atl. 254, 255, 78 N. J. Law, 309.

To constitute a "novation" by substitution of creditors or debtors, there must be a mutual agreement between three or more persons, whereby a debtor, in consideration of being discharged from his liability to the original creditor, contracts a new obligation in favor of the new creditor, and the new creditor must have consented to the discharge of his original debtor, and have accepted the new debtor. *McAllister v. McDonald*, 106 Pac. 882, 886, 40 Mont. 375.

The doctrine of "novation" cannot apply to an action for use and occupation of land to which plaintiff had no legal title, where neither defendant nor the lessee of the land was indebted to plaintiff, she being a stranger to the transaction, since novation implies a substitution of a debtor of a creditor and of a new contract. *Pennington v. Gartley*, 83 Atl. 701, 703, 109 Me. 270.

That defendant verbally agreed with the payee to pay others' notes, and the payee accepted the promise, and thereafter looked to defendant for payment, and the payee's cashier told a surety on the notes that defendant had agreed to pay them, and that the surety was released, is insufficient to show a "novation" binding defendant, for want of consideration, where it does not appear that defendant was indebted to the makers, or that they paid, or agreed to pay, him anything for assuming the debt, or that the payee formally released the makers or sureties or surrendered any security held under the old notes. *Bank of St. James v. Walker*, 111 S. W. 829, 830, 132 Mo. App. 117.

A broker, acting for several customers, whose orders for goods it had taken and agreed to fill, contracted with a seller for the purchase of the goods in lump. The seller knew that the merchandise was for different customers, and for convenience agreed to ship car load lots to customers and draw direct on them therefor. It shipped goods to a customer and drew against him therefor. The customer sued the seller for failure to deliver goods of a merchantable quality. Held, that he could not maintain the action on the theory that the seller severed the con-

tract, and as to the customer released the broker and looked to him instead. *H. Midwood's Sons Co. v. Alaska-Portland Packers' Ass'n*, 67 Atl. 61, 62, 28 R. I. 303, 13 Ann. Cas. 954.

A "novation" is the substitution of a new obligation for an old one. The requisites of a novation are a valid prior obligation to be displaced, consent of all parties to the substitution, a sufficient consideration, the extinction of the old obligation, and the creation of a valid new one. The substitution may be in the debt or contract, in the debtor, or in the creditor. Where one, to whom wage claims of employes of bankrupts are assigned, exchanges them with the bankrupts for their note and duebill, there is a "novation" of the wage claims, extinguishing the preference given by Bankr. Act July 1, 1898, c. 541, § 64b4, 30 Stat. 563, to claims for wages. In *re Fuller & Bennett*, 152 Fed. 538, 541.

A real estate agent procured the sale of certain premises to defendant, and defendant, in consideration of the agent's release of his claim against the vendors for commissions, paid him \$1,000, and agreed to pay him \$8,600 more on sale of the premises. Later the agent placed his claim in the hands of an attorney for settlement, and negotiations were carried on between the attorney and the defendant. Defendant offered to pay \$2,500 and \$250 counsel fees, for the surrender of the contract, and the delivery of a general release by the agent. The offer was reported to the agent, who said he would accept it; and a day was fixed as the time, and the attorney's office as the place, for closing the transaction, but the transaction was never completed by the payment of the money or surrender of the contract and delivery of the release. At the time of the offer by defendant for surrender of the contract, negotiations had been completed for purchase of the premises by a third person, but the agent had no knowledge thereof. Held, that the transaction did not amount to a "novation" by the substitution of a new contract between the parties. *Bandman v. Finn*, 92 N. Y. Supp. 1096, 1098, 103 App. Div. 322.

"Novation" is effected by the substitution of a new obligation between the same parties with the intention to extinguish the old one, or by the substitution of a new debtor with the intention to release the old one, or by the substitution of a new creditor with the intent to transfer the rights of the old one to him. There must be a mutual agreement among the parties for the substitution of the new debt in place of the old. There must be an extinguishment of the old debt and an agreement to look to the new debtor alone, and the mere taking of a new debtor will not, standing alone, amount to a "novation." The taking by a creditor of a note from one who has assumed the debt is not a "novation,"

releasing the old debtor; there being no agreement to this effect. *M. Gimbell & Sons v. King*, 95 S. W. 7, 8, 43 Tex. Civ. App. 188 (citing *Beach*, Mod. Con. § 786; Add. Cont. p. 530; *Pimental v. Marques*, 42 Pac. 159, 103 Cal. 406; *Jackson Iron Co. v. Negaunee Concentrating Co.*, 65 Fed. 298, 12 C. C. A. 636; *Stowell v. Gram*, 69 N. E. 342, 184 Mass. 562; *Western White Bronze Co. v. Portrey*, 70 N. W. 383, 50 Neb. 801; *Piehl v. Piehl*, 101 N. W. 628, 138 Mich. 515).

Where by a written contract plaintiff sold land to defendant, with the agreement that plaintiff should receive one-third of profits above that amount when the property could be sold for as much as \$19,000, and subsequently defendant asserted that she would not take less than \$21,000 for her share, and that plaintiff might take any amount received above that sum, and plaintiff attempted to make a sale on such terms but failed to get \$21,000, there was a rescission of the written agreement, and a substitution of the parol contract, constituting a novation, defined by Civ. Code, § 1530, as the substitution of a new obligation for an existing one. *Simmons v. Sweeney*, 109 Pac. 265, 267, 13 Cal. App. 283.

The owner of real estate contracted for its sale for a specified amount; a certain portion of the purchase price to be paid on the execution and delivery of the agreement, another on the delivery of the deed, the balance payable in three years, with interest at 5 per cent. for the first year and 6 per cent. for the balance of the term, to be secured by a purchase-money mortgage. The purchaser paid the agreed sum at the execution of the contract, and on the passing of the deed paid the vendor an amount much greater than the contract required to be paid at that time, and gave the mortgage for the balance. Held, that the receipt by the vendor at the delivery of the deed of an amount in excess of the amount agreed upon, and the acceptance of a mortgage for the balance, constituted a "novation," and that the vendor was not entitled to interest under the terms of the first contract on the excess of the amount received at the delivery of the deed over the amount agreed upon. *Crimmins v. Carlyle Realty Co.*, 117 N. Y. Supp. 434, 435, 132 App. Div. 665.

#### Substitution of new debtor

"Novation" is the substitution of one debtor by mutual agreement for another, whereby the old debt is extinguished. *Chenoweth v. National Bldg. Ass'n*, 53 S. E. 559, 561, 59 W. Va. 653.

Where parties to an executory contract for work, acting with a third person, agree to substitute the third person, by consent of all, in place of the original contractor, there is a species of "novation." *Security Nat. Bank v. St. Croix Power Co.*, 94 N. W. 74, 77, 117 Wis. 211.

The essence of "novation" is that all the three parties assent to or concur in the agreement whereby the new debtor is substituted for the old and the old debt extinguished. *Elliott v. Qualls*, 130 S. W. 474, 476, 149 Mo. App. 482.

Where a corporation, as creditor, accepts in payment of a debt the note of a third person, together with valuable security, a "novation" is effected, and it can thereafter look only to the substituted debtor for reimbursement. *Security Warehousing Co. v. American Exch. Nat. Bank*, 103 N. Y. Supp. 399, 402, 118 App. Div. 350.

A "novation by the substitution of a new debtor" consists of a mutual agreement among three parties, the creditor, his immediate debtor, and the intended new debtor, whereby the liability of the last named is accepted in place of that of the original debtor in discharge of the original debt. *Babbitt v. Chicago & A. Ry. Co.*, 130 S. W. 384, 387, 149 Mo. App. 439.

A "novation" occurs when a debtor makes an arrangement with his debtor, for a valuable consideration, whereby the second debtor assumes and is to pay the first debtor's debt, and if, before passing of the consideration, or completion of the transaction, either of the debtors explains the proposed transaction to the first debtor's creditor, and the creditor consents to the substitution and agrees to accept the new debtor and release the old one, the novation is complete. *Bank of St. James v. Walker*, 111 S. W. 829, 830, 132 Mo. App. 117.

Where a divorced husband and wife entered into an agreement that the wife would pay the husband's attorneys in consideration of his transferring certain property to her, and the husband's attorneys agreed to look to the wife for compensation, and the property was transferred, and the wife drew a check in favor of the attorneys, there was a complete "novation." *Dougherty v. Van Ripper*, 120 Pac. 333, 334, 16 N. M. 600.

Where, after the sale of goods to an individual, the business was incorporated, and the corporation requested the delivery of the goods under the contract to it, and made payment on account of such goods, a "novation" was effected, and the corporation was substituted for the original purchaser, as debtor of the seller. An express agreement is not requisite for a "novation" or substitution of parties to a contract, as it may be implied. *J. H. Lane & Co. v. United Oilcloth Co.*, 92 N. Y. Supp. 1061, 1062, 103 App. Div. 378.

#### Extinguishment of old debt

A "novation" requires the creation of new contractual relations, as well as the extinguishment of old. There must be the consent of all the parties to the substitution, resulting in the extinction of the old obliga-

tion and the creation of a valid new one. *Held v. Caldwell-Easton Co.*, 89 N. Y. Supp. 954, 955, 97 App. Div. 301.

To constitute a contract of "novation," the original indebtedness or obligation must be extinguished, and a mutual agreement made among the parties to the old and new obligations, whereby the new is substituted for the old. *Inman v. F. N. Burt Co.*, 108 N. Y. Supp. 210, 211, 212, 124 App. Div. 73 (citing *Ryan v. Pistone*, 35 N. Y. Supp. 81, 89 Hun, 78).

The essentials of a "novation" are a mutual agreement to which the creditor, the old debtor, and the new debtor assent, by which the old obligation is extinguished and a new and valid obligation is created and takes its place. *Hemenway v. Beecher*, 121 N. W. 150, 151, 139 Wis. 399.

"Novation" is the substitution of one obligation for another, and takes place either by the substitution of a new for an old party, or by the substitution of a new agreement between the old parties, or it may be by a change both of parties and of agreement at the same time." To support the claim of a "novation," the assent of the parties that the new obligation shall be accepted in extinguishment of an old one is an essential element, but the substitution may be accomplished by either an express or an implied agreement. *Illinois Life Ins. Co. v. Benner*, 97 Pac. 438, 439, 78 Kan. 511.

"Novation" takes place by agreement of all the parties concerned, and, where A. undertakes to pay B's debt, the obligation assumed may be collateral to B's obligation rather than substituted therefor, and, if intended as collateral, B's debt continues to exist, and this distinguishes such a case from one of novation in which B's debt would be extinguished. *Hargadine-McKittrick Dry Goods Co. v. Goodman*, 45 South. 995, 997, 55 Fla. 361.

"Novation" is the substitution of a new obligation for an old one, which is thereby extinguished." Where a mortgagee, who had given a loan on security, falsely represented to be a first mortgage, and had brought an action for the deceit, discontinued on the oral promise of the mortgagor's father to pay the debt, but did not release the mortgage or the debt of the mortgagee but only the claim for the deceit, there was no such "novation" as to render the promise of the mortgagor's father binding under the statute of frauds. *Bicknell v. Bicknell*, 62 Atl. 976, 977, 27 R. I. 429 (citing *Bouv. Law Dict.*).

"Novation" is defined as the substitution of one obligation for another, and takes place either by substitution of a new for an old party or by the substitution of a new agreement between the old parties, or it may be by a change both of parties and agreement at the same time. One of the essential



elements to a "novation" is that there should have been an extinguishment of the old debt, and another is that there should have been a mutual agreement between all of the parties that the old debt should become the obligation of a new debtor. *Miles v. Bowers*, 90 Pac. 905, 906, 49 Or. 429.

Where A. purchases a tract of land from B. and gives a purchase-money note therefor, payable to B. "or order," and B. transfers said note by indorsement, together with the reserved title to the land to C., C. becomes thereby a party both to the note and to the contract of purchase, and if said note becomes barred by the statute of limitations, and A. enters into a new agreement with C., whereby A. promises to pay to C. the balance due on said note by installments running through several years, the consideration remaining the same, and no new security being added, the fact that the holder of said note has been substituted as payee, and the time of payment definitely extended, does not constitute such a "novation" between said maker and holder as would extinguish the original debt and create a new one. *American Mortgage Co. of Scotland v. Rawlings*, 56 S. E. 110, 127 Ga. 82 (citing *Wofford v. Gaines*, 53 Ga. 485; *Lott v. Dysart*, 45 Ga. 358; *McDonnell v. Alabama Gold Life Ins. Co.*, 5 South. 120, 85 Ala. 401).

A bankrupt, having purchased certain land and executed a deed of trust thereon to secure a debt, conveyed the land to his father, who did not assume the debt, and later devised the land to his two children, consisting of the bankrupt and his sister. Held, that such transaction did not constitute a novation of the debt secured by the deed of trust, which can occur only when there is a substitution of a valid new obligation for an old one, necessitating the extinction of the old debt. *In re Straub*, 158 Fed. 375, 376.

Directors of a corporation, by vote reciting the inability of subscribers to stock to take and pay for all the shares subscribed for, agreed with such subscribers that in consideration of payment of certain sums in cash they would be released as to one-half of the amount subscribed for. The payments were made, the contract fully executed, the released subscribers thereafter treated as stockholders, the surrendered stock resold to other subscribers, and the whole transaction was in good faith, and was not repudiated by any stockholder. Held, that the agreement was in effect a "novation," which, under Civ. Code, § 1531, is made by the substitution of a new obligation, between the same parties, with intent to extinguish the old obligation; and the fact that payment of a part of the money required to be paid by the released subscribers was deferred did not have the effect of continuing them in their relation as stockholders, for the full amount of their subscription, until the final payment had

been made. *Thomas v. Wentworth Hotel Co.*, 117 Pac. 1041, 1045, 16 Cal. App. 403.

## NOVEL

A complaint, in an action for libel, which alleges that defendant published and circulated a "book or novel" in which he referred to plaintiff in terms set out, does not negative by reason of the use of the word "novel" the allegation that the article complained of referred to plaintiff, though strictly speaking the characters in a novel are fictitious. *Dalley v. Bobbs-Merrill Co.*, 136 N. Y. Supp. 570, 571.

## NOVELTY

"Novelty," as used in its popular sense, means something altogether new and different from any other method and an improvement on any other method. *Imperial Bottle Cap & Machine Co. v. Crown Cork & Seal Co.*, 189 Fed. 312, 321, 71 C. C. A. 442.

The novelty of an article, which will support the issuance of a patent thereon, must be a "novelty" in the means or mechanical device, and not in the use to which the combination is put. *O'Rourke Engineering Const. Co. v. McMullen*, 150 Fed. 338, 349 (quoting and adopting the definition in *Woolensak v. Sargent*, 14 Sup. Ct. 293, 151 U. S. 227, 38 L. Ed. 137).

"A 'patentable novelty' may be found in an improvement which simplifies a complicated train of mechanism by eliminating some of its elements, with the result that defects due to presence of those elements are done away with." *Brown v. Huntington Piano Co.*, 134 Fed. 735, 739, 67 C. C. A. 639.

## NOW

The word "now," as used in a will providing that executors should carry on the testator's business as "now conducted by me," must refer to the time of his death. *Luers v. Luers*, 124 N. W. 603, 604, 145 Iowa, 600 (citing *Appeal of Allen*, 17 Atl. 453, 125 Pa. 544).

A devise of all that part of land which "I now own" should be construed as if made at testator's death. *Garrison v. Garrison*, 29 N. J. Law, 153, 159.

A reference in a will to the "farm on which I 'now' live" refers to the existing state of things at the date of the will. *Mueller v. Buenger*, 83 S. W. 458, 465, 184 Mo. 458, 67 L. R. A. 648, 105 Am. St. Rep. 541 (quoting and adopting definition in *Liggat v. Hart*, 23 Mo. 127; *Gold v. Judson*, 21 Conn. 616).

The word "now," in the phrase "now being on the various tracts," implied present time, and the deed conveyed only the timber of the specified size at the time it was executed. *Crawford v. Atlantic Coast Lumber Co.*, 60 S. E. 445, 447, 79 S. C. 166.

Under General Construction Law (Consol. Laws 1909, c. 22), § 34, providing that the term "now," in a provision referring to laws in force or to facts as existing, relates to the laws in force or to the facts existing immediately before the taking effect of the provision, the word "now," in the constitutional provision referring to the jurisdiction of courts "now" exercised, relates to laws in force at the adoption of the Constitution, and to the jurisdiction existing immediately before the taking effect of the Constitution. *Leach v. Auwell*, 138 N. Y. Supp. 975, 979, 154 App. Div. 170.

The use of the word "now," in a statute, often precludes the statute from being deemed general, as, for example, certain things confined to cities where a board of assessment and revision "now" exists, or confined to honorably discharged soldiers "now" in office, or confined to cities in which there are "now" by law three members of common council. *P. L. 1906*, p. 192, providing that in all instances where excise commissioners are "now" by law appointed by the mayor or other governing body or any municipality shall be appointed by the court of common pleas in the county, is unconstitutional, because special. *Bumsted v. Henry*, 64 Atl. 475, 477, 74 N. J. Law, 162 (citing *Richards v. Hammer*, 42 N. J. Law, 435; *Pierson v. O'Connor*, 22 Atl. 1091, 54 N. J. Law, 36; *Bennett v. Common Council of City of Trenton*, 25 Atl. 113, 55 N. J. Law, 72).

A mortgage on a woolen mill, running gear, tools, implements, and working stock "now upon said premises" or in any way belonging to the said mills, and the business of the same, did not embrace after-acquired material. *Cunningham v. Alryan Woolen Mills*, 61 Atl. 372, 373, 69 N. J. Eq. 710.

*Priv. Laws 1857*, p. 219, c. 11, divides the city of Joliet into school districts, provides for the election of school inspectors, and gives the city council power to levy taxes for school purposes. *Hurd's Rev. St. 1903*, p. 1714, c. 122, increases the power of the school inspectors, giving them authority to employ teachers, and to fix the amount of their compensation, and to build or purchase buildings, etc., but provides that all moneys necessary for school purposes shall be raised as "now provided by law," and that they shall be held by the treasurer subject to the order of the school inspectors on warrants to be countersigned by the mayor and city clerk. Held, that the latter statute did not give the board of school inspectors authority to levy taxes by repealing the former statute by implication. *People ex rel. Board of School Inspectors of Joliet v. Mottinger*, 74 N. E. 150, 152, 215 Ill. 256.

Under Code, § 3271, providing that "property to be subsequently acquired may be devised when the intention is clear and explicit," a will giving to certain persons, "all

my real estate which is" (describing it) "also including all other real estate now owned by me," devises real estate acquired by testator after execution of the will; "now" being referable to the time of testator's death. *Luers v. Luers*, 124 N. W. 603, 604, 145 Iowa, 600, 139 Am. St. Rep. 453.

*Rev. St. § 2166*, providing for the naturalization of aliens honorably discharged from military service on proof of one year's residence in the United States, requires that the court shall, in addition to such proof of residence and good moral character as "now" provided for by law, be satisfied by competent proof of the applicant having been honorably discharged from service of the United States. Held, that the word "now" is limited to the laws existing at the enactment of the statute, and did not include subsequent enactments. *In re McNabb*, 175 Fed. 511, 513.

An owner of stock contracted with certain parties to turn over to them all the stock in the corporation "now owned" by him. This stock, at the time, had been assigned to one of the proposed purchasers as security for a note given to him. Held, that the seller need not deliver the stock to the purchasers unincumbered. *Fuehrman v. McCord*, 95 N. Y. Supp. 489, 490, 107 App. Div. 12.

2 *Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, § 5*, provides that every will devising in express terms, or by intent, all of testator's real estate, shall be construed to pass all he owned at his death. Testator's will read: "I give \* \* \* to my husband all my real estate \* \* \* of which I am now possessed." She subsequently sold a farm which she then owned and purchased property of which she died seised. Held, that the word "now" in the will did not extend its meaning, and under the statute the property subsequently acquired by the testator went to her husband under the will. *Hodgkins v. Hodgkins*, 108 N. Y. Supp. 173, 174, 123 App. Div. 110 (citing *Lent v. Lent* [N. Y.] 24 Hun, 436; *Schuck v. Shook*, 10 N. Y. Supp. 935; *Heck v. Vois et al.*, 14 N. Y. St. Rep. 409, affirmed 24 N. E. 1104, 120 N. Y. 668).

*Tillamook City Charter*, art. 4, § 2, subsec. 2 (*Sess. Laws 1893*, pp. 551, 552), authorizes the city to collect road taxes from all property of the corporation equal to that "now" levied by law for road purposes, to be expended on highways, streets, and alleys within the corporation, under the supervision of the common council, and exempts citizens and property from the same tax for county road purposes. Held, that the word "now" meant "at the present time," and limited the city's right to levy taxes for street purposes to the amount the county was authorized to levy for road taxes when the charter took effect, and this amount was not changed or increased by subsequent statutes, raising the county rate, either by the same or subsequent Legislature. *Tillamook City v. County Court*

of Tillamook County, 107 Pac. 482, 483, 56 Or. 112.

### NOW ARE

A lease provided that the premises be surrendered at the end of the term of two years "in the same condition as they now are." It covenanted that the "premises are now in good repair." When the lease was executed the premises were in very bad condition, and it was agreed that the property should be put in good condition before the lessee would take possession. The necessary improvements cost a considerable sum, of which the lessee paid a small part. Held, in an action against the lessee for not surrendering the premises in the same condition they were at the time of the rental, that the parties intended the premises to be surrendered at the end of the term in the same condition as they were at the beginning thereof, the words "now are" not referring to the condition of the premises at the time of making the lease. *Chesapeake Brewing Co. v. Goldberg*, 89 Atl. 37, 39, 107 Md. 485, 15 Ann. Cas. 879.

### NOW CONSTITUTED

See As Now Constituted.

### NOW DUE

The phrase "debts now due," in the act of 1848, dividing the town of Windsor into Windsor and West Windsor, is synonymous with the word "liabilities," whether arising *ex contractu* or *ex delicto*. *Hunter v. Windsor*, 24 Vt. 327, 338.

### NOW DUE AND PAYABLE

The allegation of a counterclaim, that plaintiff's indebtedness is "now due and payable," even treated as a statement of fact, does not show that the counterclaim existed at the time of the commencement of the action, as required by Code Civ. Proc. § 438. *Provident Mut. Building Loan Ass'n v. Davis*, 76 Pac. 1034, 1035, 143 Cal. 253.

### NOW FIXED BY LAW

The effect of the act adopting the Code of 1910 was to re-enact into one statute all of the provisions of that Code; and hence the phrase "now fixed by law," as used in section 2788 of that Code, comprehends all the law in the Code applicable to the provisions of that section. The Employer's Liability Act, found in section 2782 et seq., is applicable to a suit brought under authority of section 2788, by an employé against a federal receiver of a railroad operated partially within this state. *Atkinson v. Swords*, 74 S. E. 1093, 1095, 11 Ga. App. 167.

### NOW OR HEREAFTER

The bond of a bank to a county treasurer, though given with express reference to a resolution of the county board authorizing the deposit in the bank by such treasurer of

public funds in his hands, being, in terms, to secure repayment of all said deposits "now or hereafter placed in said bank or under its care or control by said treasurer," covers deposits in said bank of such funds by said treasurer before he was so authorized, the sureties knowing at the time of such deposits. *Sawyer v. Stilson*, 125 N. W. 822, 824, 146 Iowa, 707.

### NOW PROVIDED BY LAW

See As Now Provided.

## NOXIOUS

"Noxious" means hurtful, harmful, injurious, destructive. *Johnson v. Northport Smelting & Refining Co.*, 97 Pac. 746, 747, 50 Wash. 567.

### NOXIOUS ESTABLISHMENT

Any other noxious establishment, see Any Other.

### NOXIOUS PORTION OR SUBSTANCE

"Noxious" means "hurtful, harmful, baneful, pernicious, destructive." "Potion" means "draught used as a liquid, medicine, or dose." (Webster, Dict.). "Poison" has been defined as "any substance which, when applied to the body externally, or in any way introduced into the system, without acting mechanically, but by its own inherent qualities, is capable of destroying life" (Beck, Med. Jur.), and "as a substance having an inherent deleterious property, which renders it, when taken into the system, capable of destroying life" (Wharton & Stillé). The term "noxious potion or substance" is a broader term than "poison." "Poison" would not include powdered glass or boiling water, while "noxious potion or substance" would not only embrace poisons, but the latter. As used in a statute inflicting a punishment on any one mingling "any other noxious potion or substance with any drug, food, or medicine, with intent to kill or injure any person," the word "potion" applies to some hurtful or baneful liquid; and the words "noxious substance" means some solid of hurtful or baneful character. The phrase "noxious potion or substance" means some character of poison. *Runnels v. State*, 77 S. W. 458, 460, 45 Tex. Cr. R. 446.

## NUISANCE

See Abatable Nuisance; Attractive Nuisance; Continuing Nuisance; Indictable Nuisance; Mixed Nuisance; Permanent Nuisance; Private Nuisance; Public or Common Nuisance.

Abatement of nuisance, see Abatement. Abatement of as within police power, see Police Power.

Other nuisance, see Other.

See, also, Annoy—Annoyance.

"Anything that worketh hurt, inconvenience, or damage to another, or his property, may constitute a nuisance." *Missouri, K. & T. Ry. Co. of Texas v. Anderson*, 81 S. W. 781, 787, 36 Tex. Civ. App. 121 (quoting *Burditt v. Swenson*, 17 Tex. 489, 501, 67 Am. Dec. 665).

A "nuisance" is an annoyance, and, according to Blackstone, it signifies anything that worketh hurt, inconvenience, or damage. *Hamm v. Briant*, 124 S. W. 112, 113, 57 Tex. Civ. App. 614.

A "nuisance" is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort. *Thornton v. Dow*, 111 Pac. 899, 903, 60 Wash. 622, 32 L. R. A. (N. S.) 968.

A "nuisance" is anything which incommodes, annoys, or produces inconvenience or damage. *City of New Orleans v. Lenfant*, 52 South. 575, 577, 126 La. 455, 29 L. R. A. (N. S.) 642.

"At common law a 'nuisance' was anything that worked hurt or inconvenience or damage." *City of Chicago v. Gunning System*, 73 N. E. 1035, 1038, 214 Ill. 628, 70 L. R. A. 230, 2 Ann. Cas. 892 (quoting and adopting definition in *Harmon v. City of Chicago*, 110 Ill. 400, 413, 51 Am. Rep. 698); *Jones v. F. S. Royster Guano Co.*, 65 S. E. 361, 366, 6 Ga. App. 506.

A "nuisance" is defined as an unreasonable, unwarrantable, or unlawful use of one's own property to the annoyance, inconvenience, discomfort, or damage of another. *Pritchard v. Edison Electric Illuminating Co.*, 87 N. Y. Supp. 225, 226, 92 App. Div. 178.

A "nuisance" is anything which works hurt, inconvenience, or damage; anything which essentially interferes with the enjoyment of life or property. *State ex rel. Lyon v. Columbia Water Power Co.*, 63 S. E. 884, 889, 82 S. O. 181, 22 L. R. A. (N. S.) 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343 (citing 29 Cyc. p. 1152; *Addison, Torts*, 370).

The word "nuisance" designates a class of wrongs arising from an unreasonable or unlawful use of property, so as to produce such material discomfort or injury to another that the law presumes damage; every use of property, so as to materially violate the rights of another being, as a rule, an actionable nuisance. *McNulty v. Ludwig & Co.*, 138 N. Y. Supp. 84, 87, 153 App. Div. 206.

"The term 'nuisance' has a well-defined legal meaning. A thing cannot be declared a nuisance which is in fact not a nuisance." *Boyd v. Board of Councilmen*, 77 S. W. 669, 673, 117 Ky. 199, 111 Am. St. Rep. 240.

A "nuisance" consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures,

or endangers the comfort, repose, health, or safety of others. *Town of Colton v. South Dakota Cent. Land Co.*, 126 N. W. 507, 508, 25 S. D. 309, 28 L. R. A. (N. S.) 122.

"A 'nuisance' is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful or such as would affect only one fastidious taste, but it must be such as would affect an ordinary, reasonable man." *Gabbett v. City of Atlanta*, 73 S. E. 372, 373, 137 Ga. 180 (quoting and applying Civ. Code, § 4457).

*Burns' Ann. St.* 1901, § 290, defines "nuisance" as whatever is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life or property. *Russell v. State*, 69 N. E. 482, 483, 32 Ind. App. 243.

"Nuisance" is anything done to the hurt or annoyance of the land or hereditaments of another. The theory is the doing of something intrinsically lawful in a manner damaging to others; it being the resulting damage that creates the wrong. *Henry v. Cherry & Webb*, 73 Atl. 97, 108, 30 R. I. 13, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 923, 18 Ann. Cas. 1006.

When the cause of annoyance and discomfort arising from a nuisance is continuous, equity will restrain it. *Boyd v. Schreiner* (Tex.) 116 S. W. 100, 104.

The question of nuisance *vel non* cannot be determined by reference to the rules of the common law, but each case must be considered on its own facts. A thing may or may not be a nuisance according to the manner in which it is used, the situation in which it is placed, or the time it has been carried on without complaint, when measured by the mind and taste of the average citizen. *Densmore v. Evergreen Camp No. 147*, *Woodmen of the World*, 112 Pac. 255, 61 Wash. 230, 31 L. R. A. (N. S.) 608, Ann. Cas. 1912B, 1206.

To constitute a nuisance, there must be more than a tendency to injure, and there must be something appreciable, tangible, actual, or subsisting, and, in determining whether an injury charged comes within these general terms, regard must be had to the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities, and the nuisance and discomfort must affect the ordinary comfort of existence as understood by the people. *Everett v. Paschall*, 111 Pac. 879, 881, 61 Wash. 47, 31 L. R. A. (N. S.) 827, Ann. Cas. 1912B, 1128.

A "nuisance" is confined to such matters of annoyance as the law recognizes, and for which it gives a remedy by way of redress or abatement, or in a proper case, by restraining

process. *Berger v. Smith*, 75 S. E. 1098, 1100, 160 N. C. 205.

"What is a nuisance is a relative question oftener than it is an abstract fact. Blackstone was wise in not attempting an explicit and invariable definition, and in confining himself to general terms. He said a 'nuisance' is 'anything that worketh hurt, inconvenience, or damage.'" *City of St. Louis v. Galt*, 77 S. W. 876, 879, 179 Mo. 8, 63 L. R. A. 778.

The test of nuisance is not injury and damage simply, but injury and damage resulting from the violation of the legal right of another. There is no nuisance, however much of injury and damage may ensue; but, if a right is violated, there is an actionable nuisance, even though no actual damage results therefrom. *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 78 S. W. 646, 647, 104 Mo. App. 713 (quoting *Wood*, Nuis. 1015).

The word "nuisance" means that which annoys or gives trouble; annoys or disturbs one in the possession of his property, making its ordinary use or occupation physically uncomfortable to him. *Iverson v. Dilno*, 119 Pac. 719, 721, 44 Mont. 270.

Under *Snyder's Comp. Laws*, § 4751, and by the common law, anything which annoys or endangers the comfort, repose, or safety of others is a nuisance. *Ex parte Jones*, 109 Pac. 570, 573, 4 Okl. Cr. 74, 31 L. R. A. (N. S.) 548, 140 Am. St. Rep. 655.

A thing is not a "nuisance" merely because a municipal ordinance declares it to be such, but the state may declare what shall be deemed a "nuisance." *Inhabitants of Houlton v. Titcomb*, 66 Atl. 733, 738, 102 Me. 272, 10 L. R. A. (N. S.) 590, 120 Am. St. Rep. 492.

Under *Civ. Code* 1895, § 3861, a nuisance is not as at common law essentially an injury to real property, but any unlawful use of property whereby another is injured, whether in property, business, person, or otherwise, is an actionable nuisance. *Towaliga Falls Power Co. v. Sims*, 65 S. E. 844, 846, 6 Ga. App. 749.

Irrespective of its public or private nature, a "nuisance" is "literally an annoyance, and signifies in law such a use of property or such a course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." *Johnson v. City of New York*, 96 N. Y. Supp. 754, 756, 109 App. Div. 821; *Acme Fertilizer Co. v. State*, 72 N. E. 1037, 34 Ind. App. 346, 107 Am. St. Rep. 190.

*Code Civ. Proc.* § 731, defines a "nuisance" as anything which is injurious to

health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, and mere depreciation in value of surrounding property has no tendency to prove the cause of the depreciation a nuisance. *Meek v. De Latour*, 88 Pac. 300, 302, 2 Cal. App. 261.

"A 'nuisance' is literally an annoyance, and signifies in law such a use of property or such a course of conduct as \* \* \* transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." The right to have a nuisance on another's property restrained or abated is not based upon an assertion of title to such property, or of any proprietary interest therein, or right or claim to the property itself, but is, on the contrary, based solely upon the breach of a personal duty which the owner of the property owes to his neighbor in its management and use; a breach of duty which may be punished by indictment, where the nuisance is of a public character, and which renders the offender personally liable in damages to the injured neighbor. And therefore the assertion by the neighbor of his right to have the nuisance restrained or abated, being based on the personal wrong and breach of duty on the part of the owner, and seeking merely to enforce the just restrictions which the law imposes upon him, in the use of his property, and prevent misuse, cannot be regarded in any just sense as the assertion on the part of the neighbor of a claim to property within the meaning of the judiciary act. *Ladew v. Tennessee Copper Co.*, 179 Fed. 245, 252.

To determine a nuisance, the criterion is whether the condition is so serious as to interfere with the comfort of life and enjoyment of property, or so threatening as to constitute an impending danger to persons in the enjoyment of their legitimate rights. *Kilts v. Board of Sup'rs of Kent County*, 127 N. W. 821, 823, 162 Mich. 646.

*Burns' Ann. St.* 1908, § 291, defining a nuisance as whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, defines in general language a nuisance, and the court must determine whether facts charged bring a particular case within the statute. *Lake Shore & M. S. Ry. Co. v. Chicago*, L. S. & S. B. Ry. Co., 92 N. E. 989, 990, 48 Ind. App. 584.

"'Nuisance,' in its largest sense, signifies anything that worketh hurt, inconvenience, or damage. It is either public, annoying all the parties in the community, or it is private, injuriously affecting the lands, tenements, or hereditaments of an individual" (*Blackstone*). "A 'nuisance,' in the ordinary sense in which

the word is used, is anything that produces an annoyance, anything that disturbs one or is offensive; but in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage. Indeed, it may be stated as a general proposition that every enjoyment by one of his own property, which violates the right of another in an essential degree, is a nuisance, and actionable as such at the suit of the party injured thereby. While it is true that every person has and may exercise exclusive dominion over his own property of every description, and has a right to enjoy it in all the ways and for all the purposes in which such property is usually enjoyed, yet this is subject to the qualification that his use and enjoyment of it must be reasonable, and such as will not prejudicially affect the rights of others." *Baker v. McDaniel*, 77 S. W. 531, 537, 178 Mo. 447 (quoting *Wood, Nuls.*).

An actionable "nuisance" is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights. To constitute a nuisance, it is not necessary that the annoyance should be of a character to endanger health. It is sufficient if it occasions what is offensive to the senses and which renders the enjoyment of life and property uncomfortable. Even that which does but cause a well-founded apprehension of danger may be a nuisance. The unauthorized or unreasonable use of, or the neglect of property and reasonably using, one's own property, to the detriment, hurt, annoyance, discomfort, injury, or damage of another in his property or legal rights, or of the public, is a nuisance. A use made by one of his own property, which works an irreparable injury to another's property, or which deprives his neighbor of the reasonable and comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endangers or renders insecure the life and health of his neighbor, is a nuisance. It is difficult to define just what degree of injurious annoyance must be reached in order to warrant the court in determining what circumstances constitute a nuisance. A mere tendency to injury is not sufficient. There must be something actually appreciable which of itself arrests the attention, that rests not merely in theory, but strikes the common sense of the ordinary citizen. The determination, however, of the question rests in sound judgment, and depends upon common sense in each case. *Sanders v. Miller*, 113 S. W. 996, 998, 52 Tex. Civ. App. 372 (citing *Black-*

*Com.*; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 685; *Joyce, Nuisances*, §§ 11, 19).

#### Crime distinguished

"Crime" and "nuisance" are not convertible terms. *Hefferon v. New York Taxicab Co.*, 130 N. Y. Supp. 710, 712, 146 App. Div. 811.

#### Negligence distinguished

A "nuisance" involves the element of positive wrongdoing, as distinguished from mere negligence; and the mere "permitting" of a dog to lie in a hallway of an apartment house does not amount to a private nuisance. *McCluskey v. Wile*, 129 N. Y. Supp. 455, 457, 144 App. Div. 470.

#### Injury to health

The "nuisance" contemplated by Health Act (2 Gen. St. 1895, p. 1637) § 28, permitting any local board of health to file a bill in the name of the state for an injunction to prohibit the continuance of a nuisance hazardous to public health, is a nuisance which is hazardous to public health, and hence the subject of indictment. *Board of Health of Pompton Lakes v. E. I. Du Pont de Nemours Powder Co.*, 80 Atl. 998, 1000, 79 N. J. Eq. 31.

The allegations of the petition on a demurrer to which the defendants elected to stand, taken as true, showed that a large number of hogs were kept adjacent to the city in such a manner that odors from the place and from garbage hauled thereto were offensive to the people living in the neighborhood and to those who passed along the streets, and offensive to such an extent as to impair the health of citizens and diminish the value of their property. Held to constitute a nuisance, the continuance of which should be perpetually enjoined. *Kansas City v. Sihler Hog Cholera Serum Co.*, 125 Pac. 70, 71, 87 Kan. 786 (citing 5 Words and Phrases, pp. 4855-4866).

#### Physical injury to property

Anything which causes hurt or damage to the lands or tenements of another, or interferes with the reasonable employment of the same, is a "nuisance." In an action against a railroad company, where the complaint alleges that plaintiff's land was injured by the negligent flow of acids from the tower house, and the testimony shows that defendant's employes constantly poured the contents of vessels containing acids on plaintiff's land, and that such acts had been done within six years before bringing suit, it is error to enter a nonsuit. *Stokes v. Pennsylvania R. Co.*, 68 Atl. 1028, 1080, 214 Pa. 415.

The placing, by a mining company, of slack, copperas, and other deleterious substances in and near a water course on its land, which the ordinary rains washed over the lands of a lower proprietor, thus injuring and rendering them unfit for agriculture constitutes a nuisance; a nuisance being

anything done to the hurt or annoyance of the lands of another. *Nebo Consol. Coal & Coking Co. v. Lynch*, 133 S. W. 763, 764, 141 Ky. 711.

The use of water by an upper riparian proprietor in such a way as to carry sand, gravel, and mining debris over the land of a lower proprietor, rendering it valueless, constitutes a "nuisance," both at common law and under Civ. Code, § 4550, defining a nuisance as anything injurious to health or interfering with the comfortable enjoyment of life or property or unlawfully obstructing the customary use of a river. *Chessman v. Hale*, 79 Pac. 254, 257, 31 Mont. 577, 68 L. R. A. 410, 3 Ann. Cas. 1038.

A "nuisance" is "anything that worketh hurt, inconvenience, or damage to another" (quoting and adopting definition by Blackstone). The discharge of acids and waste from an oil mill, and other offensive matter from outhouses used in connection therewith, into a ditch originally constructed for drainage of the land, and extending through the land of an adjoining owner, by which the latter suffers injury to his crops and from the offensive and unwholesome odors, constitutes a private nuisance. *Exley v. Southern Cotton Oil Co.*, 151 Fed. 101, 103.

Every person is bound to make a reasonable use of his property, so as to occasion no unnecessary damage or annoyance to his neighbor. If he make an unreasonable, unwarrantable, or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort, or hurt to his neighbor, he will be guilty of a "nuisance" to his neighbor. And the law will hold him responsible for the consequent damage. "What is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which under other circumstances would be unlawful, unreasonable, and a nuisance. To constitute a 'nuisance,' the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient." The operation of the works of a cement company, during the season for harvesting ice, in such manner as to throw on the ice cinders, ashes, coal dust, and other substances which might sink into the ice and render it unmerchantable, was a nuisance. *American Ice Co. v. Catskill Cement Co.*, 88 N. Y. Supp. 455, 459, 43 Misc. Rep. 221 (quoting and adopting definition in *Campbell v. Seaman*, 63 N. Y. 568, 577, 20 Am. Rep. 567).

#### Trespass distinguished

See Trespass.

#### Acts or business authorized by law

That cannot be a "nuisance," so as to give a common-law right of action, which

the law authorized. *Casey v. Wrought Iron Bridge Co.*, 89 S. W. 330, 334, 114 Mo. App. 47 (citing *Payne v. Kansas City, St. J. & C. E. Ry. Co.*, 20 S. W. 322, 112 Mo. 6, 17 L. R. A. 628; 5 Words and Phrases, p. 4861; *Transportation Co. v. Chicago*, 99 U. S. 640, 25 L. Ed. 336; *Whitfield v. Town of Carrollton*, 50 Mo. App. 98).

"Nuisances" always arise from unlawful acts. That which is lawful can never be a nuisance. Therefore, where the Legislature, by a proper act, authorizes that to be done which would otherwise be a nuisance, the act is made lawful and is not a nuisance so far as the public is concerned, unless the power given by the Legislature is exceeded. "There are two classes of nuisances, public and private. \* \* \* There is no difference between these two kinds of nuisances except as they affect the public or any certain individuals." A legislative charter to a boom corporation to do work which, without the charter, would be a nuisance absolves it from liability by indictment or otherwise, but does not exempt it from action by an individual injured by its existence as a private nuisance. *Pickens v. Coal River Boom & Timber Co.*, 65 S. E. 865, 866, 66 W. Va. 10, 24 L. R. A. (N. S.) 354 (quoting and adopting 1 Wood, Nuisances, p. 2, note).

If legislative sanction is given to such acts that otherwise would be deemed a "nuisance" (as, for instance, by St. 1894, p. 446, c. 399, licensing the storage of petroleum or any of its products), they cease to be such when properly exercised within the terms of the license which authorizes and permits them. *Commonwealth v. Packard*, 69 N. E. 1067, 185 Mass. 64 (citing *Commonwealth v. City of Boston*, 97 Mass. 555; *Badger v. City of Boston*, 130 Mass. 170; *Aldworth v. City of Lynn*, 26 N. E. 229, 153 Mass. 53, 10 L. R. A. 210, 25 Am. St. Rep. 608; *Bacon v. City of Boston*, 28 N. E. 9, 154 Mass. 100; *White v. Kenney*, 31 N. E. 654, 157 Mass. 12, 13; *Taft v. Commonwealth*, 33 N. E. 1046, 158 Mass. 526-548).

An offensive trade or manufacture may require interference in equity on the ground that it is a nuisance for, though necessary and lawful, it should be exercised in a remote place. *McGill v. Pintsch Compressing Co.*, 118 N. W. 786, 788, 140 Iowa, 429, 20 L. R. A. (N. S.) 466.

A business may become a nuisance, where it is not conducted with due regard to the rights of surrounding property owners, and renders the enjoyment of their property impossible. *Nowak v. Baier*, 77 Atl. 1062, 1063, 78 N. J. Eq. 112.

That crowds of people, with their teams, will congregate at or near a cotton gin when erected, does not render the gin a nuisance, where it is not claimed that the crowds will conduct themselves improperly. *Robinson v. Dale (Tex.)* 131 S. W. 308, 810.

The erection by a railroad company of switch tracks and a freight depot in a residence neighborhood directly across the street from complainant's residence and flat building, and the construction of an elevated driveway from the street to the tracks and depot, but in such a manner as not to cause the traffic to interfere with the use of complainant's property any more than any other constant use of the street would do, cannot be enjoined as a "nuisance"; there being no showing that the depot was not necessary, or that it could have been as conveniently built elsewhere. *Walther v. Chicago & W. I. R. Co.*, 74 N. E. 461-463, 215 Ill. 456.

One may not create a "nuisance" and justify himself in a continuation thereof upon the ground that his establishment is a source of benefit and profit to the community, and, as applied to a water course, a nuisance is created when the use of stream by the first user is unreasonable in character, and such as to produce a condition actually destructive of physical comfort or health, or a tangible, visible injury to property. A riparian proprietor operating a creamery, who deposits refuse therefrom in a stream to such an extent as to produce a condition destructive of physical comfort or health, or to create a tangible, visible injury to property rights of the lower riparian proprietor, is guilty of an act constituting a nuisance. *Bowman v. Humphrey*, 100 N. W. 854, 855, 124 Iowa, 744 (citing *Ferguson v. Firmenich Mfg. Co.*, 42 N. W. 448, 77 Iowa, 576, 14 Am. St. Rep. 319; *Weston Paper Co. v. Pope*, 57 N. E. 719, 155 Ind. 394, 56 L. R. A. 899; *Gould, Waters*, § 206; *Wood, Nuis.* § 640); *Id.*, 109 N. W. 714, 715, 132 Iowa, 234, 6 L. R. A. (N. S.) 1111, 11 Ann. Cas. 131.

Residents of cities, towns, or villages must of necessity submit to consequences resulting from occupations and pursuits carried on in the immediate neighborhood which are lawful and necessary for trade and commerce; and matters which, though in themselves annoying, are in the nature of ordinary incidents of city or town life, cannot be abated as nuisances. Locality is to be considered in determining whether a certain use of property is a nuisance. *Gose v. Coryell (Tex.)*, 128 S. W. 1164, 1168.

The mere imposition of more railway tracks, or the increased use of the tracks beyond what may originally have been thought probable, resulting from the location of defendant's depot on land acquired by it adjoining the avenue, did not constitute a "nuisance." *Oklahoma City & T. R. Co. v. Dunham*, 88 S. W. 849, 850, 39 Tex. Civ. App. 575.

The presumption that a telephone pole in a street, claimed by plaintiff to be a nuisance, was erected with the consent of the city council, arising from the absence of an averment to the contrary in the complaint

to compel the removal of the pole, would not render the complaint bad. *Merchants' Mut. Tel. Co. v. Hirschman*, 87 N. E. 238, 241, 43 Ind. App. 283.

#### Advertising signs

A corporation operating public stages through principal streets of a city, permitting its vehicles to carry advertising signs bearing colors, constituting a disfigurement rather than ornament, but not injuring public comfort, health, or safety, cannot be restrained by injunction from exhibiting such signs on the ground that they constitute a nuisance. *Fifth Avenue Coach Co. v. City of New York*, 111 N. Y. Supp. 759, 761, 58 Misc. Rep. 401.

#### Blasting

Blasting, without reference to the particular locality in which it is carried on, is not so intrinsically dangerous as to be *ipso facto* a "nuisance," so that a blaster would be liable for the injury caused by it, whether or not he was guilty of any negligence in the manner in which the blasting was done. *Houghton v. Loma Prieta Lumber Co.*, 93 Pac. 82, 84, 152 Cal. 500, 14 L. R. A. (N. S.) 913, 14 Ann. Cas. 1159.

Where defendant by blasting caused rock to fall into a stream where plaintiffs were to erect a pier for defendant, the injury was not a nuisance, since the term "nuisance" involves the idea of continuity or recurrence of the acts causing the injury, while a "tort," constituting an invasion of personal or contract right, expends its force in one act, though the injurious consequences may be of long duration. *McCalla v. Louisville & N. R. Co.*, 50 South. 971, 972, 163 Ala. 107.

#### Bowling alley

A person keeping bowling alleys under a license granted under Rev. Laws, c. 102, § 168, is not liable for maintaining a "nuisance," where the alleys are built in the manner such alleys are usually built, with pads and cushions to deaden the noise caused by the rolling of the balls, and where the alleys, as run, make no more noise than would be expected under similar circumstances. *Levin v. Goodwin*, 77 N. E. 718, 191 Mass. 341, 114 Am. St. Rep. 616.

#### Dams

In an action to enjoin a public "nuisance" resulting from a dam, an instruction that before plaintiff could recover the jury must find that the dam caused sewage, etc., to accumulate above the dam so as to actually pollute the water and render the river "materially" unwholesome or offensive to those residing near by, or in some "material" respect added to such offensive condition, was not erroneous as tending to mislead the jury, and as imposing a greater degree of proof than required. *Boyd v. Schreiner (Tex.)*, 116 S. W. 100, 104.



### Dangerous places

Where defendant maintained a stairway leading to a basement, the top of the stairs being over 4½ feet from the sidewalk and in a private alley, the stairway was not a "nuisance," and defendant was not liable to a person who, while walking on the sidewalk and in attempting to avoid a runaway horse, fell down the stairs. *Sheehan v. Bailey Bldg. Co.*, 85 Pac. 44, 45, 42 Wash. 535.

Pen. Code, § 429, requiring one cutting ice to surround the openings with guards to obstruct the free passage of persons into the hole, and making failure to do so a misdemeanor, is a condition to the right to cut ice, and the failure to do so at a place much used for skating would constitute a nuisance within section 385, making it a public nuisance to unlawfully omit to perform a duty which endangers the safety of a considerable number of persons. *Linzey v. American Ice Co.*, 115 N. Y. Supp. 767, 768, 131 App. Div. 333.

A lease limiting the liability of the tenant respecting orders of a city department to those issued for the correction, prevention, and abatement of "nuisances" or "other grievances" does not render the tenant liable for the cost of a fire escape, as the words are to be taken in their natural and usual sense. The absence of a fire escape is not a "nuisance," as that word is commonly used, and the more generic words "other grievances" do not extend the plaintiff's liability so far as to render him liable for the cost of the fire escape. *Kalman v. Cox*, 92 N. Y. Supp. 516, 46 Misc. Rep. 589.

### Dead body

A guest of a hotel, who knowingly permits the body of a dead infant to be concealed in the rooms occupied by him, or causes it to be concealed in any other part of the building, and in either case to remain until it becomes offensive to other guests, commits a nuisance, and may be chargeable with liability for damages resulting to the landlord's business; but, unless he actively causes or participates in the concealment in a place not under his control, he is not chargeable with liability unless the act was done by one for whom he is responsible. *Parkes v. Seasongood*, 152 Fed. 583, 585.

### Drains

Where a drain laid by property owners in a public street, under permission from the city, empties into a natural stream, and thereafter, without express license from the city, is used as a sewer to discharge sewage into the stream to the injury of a lower riparian owner, the drain is a "nuisance," and the city is liable for negligence in not abating it. *Schlesinger v. Gilhooly*, 81 N. E. 619, 631, 189 N. Y. 1, 12 Ann. Cas. 1138.

### Drunkenness

Drunkenness in a public place is a nuisance and disorderly conduct, within Kirby's

Dig. §§ 5438, 5461, authorizing municipal corporations by ordinance to prevent nuisances and disorderly conduct. *Dewitt v. Lacotts*, 88 S. W. 877, 878, 76 Ark. 250.

### Explosives

Whether the maintenance of a powder magazine within 1,000 feet of a dwelling house was a "nuisance" was a question for the jury, in an action for injuries caused by an explosion of the magazine. *H. S. Kerbaugh v. Caldwell*, 151 Fed. 194, 196, 80 C. C. A. 470, 10 Ann. Cas. 453.

To constitute the keeping of gunpowder a nuisance, there must be negligence in the fact or the manner of keeping and storing the gunpowder; and whether the storing of gunpowder is a nuisance depends on the locality, quantity, and surrounding circumstances. Where a powder magazine was imperfectly constructed and improvidently maintained, and its location, manner of construction, and maintenance was dangerous to life and property, the magazine was a nuisance, and the owner thereof was liable for an explosion thereof. *Fisher v. Western Fuse & Explosives Co.*, 108 Pac. 659, 662, 12 Cal. App. 739.

"A 'nuisance,' at common law, may consist in the keeping or manufacture of gunpowder, naphtha, or other explosive or inflammable substances in such quantities and places or in such manner as to be dangerous to the persons and property of the inhabitants of the neighborhood." In a community sparsely settled, a magazine of the capacity of that belonging to defendants, when filled with the quantity of gunpowder shown by the evidence, may not imperil life or property in the vicinity by reason of a possible explosion; but, if located in a more populous neighborhood, it might be found to endanger both. In such an inquiry, the proximity of dwellings or of highways, or of the usual facilities for public travel, or the density of population, may be shown. *Flynn v. Butler*, 75 N. E. 730, 731, 189 Mass. 377 (quoting and adopting definition in *Commonwealth v. Kidder*, 107 Mass. 188, 192).

### Fences

To constitute a fence a private nuisance, within Rev. St. 1902, c. 22, § 6, making a fence unnecessarily exceeding six feet, in height, maliciously kept to annoy another, a private nuisance, it is not required that annoyance shall be the sole purpose, but it is sufficient if it is the dominant one. An adjoining owner may erect a fence as much higher than six feet as may be necessary to protect himself, his family, and his property from annoyances inflicted or threatened by his neighbor; but, if the fence is built higher than six feet for the malicious purpose of, in turn, annoying his neighbor, it is a nuisance within the statute. *Healey v. Spaulding*, 71 Atl. 472, 473, 104 Me. 122.

### Fireworks

The primary meaning of "nuisance" is that which injures. If the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as a matter of fact; but, if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a "nuisance" as a matter of law. The exhibition of fireworks, allowed to be given in a public street, where a large number of people are assembling, is not a "nuisance" as a matter of law, and whether it is a nuisance in fact is a question for the jury. *Melker v. City of New York*, 83 N. E. 565, 567, 190 N. Y. 481, 16 L. R. A. (N. S.) 621, 13 Ann. Cas. 544.

### Grade crossing

A grade crossing or the condition existing by reason of such an intersection of two highways is in the nature of a "nuisance," and can only lawfully exist under state authority. *Cowles v. New York*, N. H. & H. R. Co., 66 Atl. 1020, 1022, 80 Conn. 48, 12 L. R. A. (N. S.) 1067, 10 Ann. Cas. 481.

### Hospital

Hospitals for the treatment of patients suffering from infectious and contagious diseases are nuisances when located in the residential parts of cities and towns, and the danger differs in kind rather than degree. *Shepard v. City of Seattle*, 109 Pac. 1067, 1070, 59 Wash. 363, 40 L. R. A. (N. S.) 647.

A building used as a hospital for the treatment of contagious diseases is not a "nuisance" per se. Where buildings used as a hospital for contagious diseases were located in a sparsely settled neighborhood on land entirely surrounded by highways, and on which there were no other buildings, and with ordinary caution there was no probability of communication of contagious diseases from the hospital unless by transmission through the air, and the buildings were at a greater distance from the highways than smallpox is transmissible in the open air, there was no showing of a "nuisance." *State ex rel. Board of Health of Hamilton Tp. v. Inhabitants of City of Trenton* (N. J.) 63 Atl. 897, 898.

### Jail

*Burns' Ann. St.* 1901, § 290, provides that whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action, thus following the common law, which defines a "nuisance" as anything which causes an injury to lands or houses and renders them useless or even uncomfortable for habitation, but the erection of a jail next to a residence is not the creation of a nuisance. *Pritchett v. Board of Com'rs*

of Knox County, 85 N. E. 32, 35, 42 Ind. App. 3 (citing *Hil. Torts* [4th Ed.] p. 584).

### Keeping disorderly house

The keeping of a disorderly house is a nuisance, both at common law and under the statute, and the offense is a misdemeanor, for which the ordinary remedy is by criminal proceedings. *Weidner v. Friedman*, 151 S. W. 56, 57, 126 Tenn. 677, 42 L. R. A. (N. S.) 1041.

### Noises, odors, gases, and smoke

Noxious gases arising from the carrying on of lawful occupations are not "nuisances" in all situations, but may become such by reason of the trade being carried on in improper localities, or by reason of the gases being negligently suffered to escape. *Loug v. Louisville & N. R. Co.*, 107 S. W. 203, 205, 128 Ky. 26, 13 L. R. A. (N. S.) 1063, 16 Ann. Cas. 673.

Any act, omission, or use of property which pollutes the atmosphere with offensive gases, stenches, or vapor, so as to cause material discomfort, or annoyance, or injury to health or property, is a "nuisance." *Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co.* (S. C.) 63 S. E. 548, 556.

Noise alone, if it be of such a character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility, may create a "nuisance," the subject of a remedy at law or in equity. *Longley v. McGeoch*, 80 Atl. 843, 846, 115 Md. 182.

"Under the statutes anything which produces noxious exhalations, offensive smells, or other annoyances, injurious to the health, comfort, or property of individuals, is a 'nuisance.' It is not necessary that these odors be deleterious to health. It is sufficient if they offend the senses in such a manner as to produce actual discomfort." *Rhoades v. Cook*, 98 N. W. 122, 123, 122 Iowa, 336.

The malicious annoyance of another by loud noises, consisting of screaming and pounding on tin pans, fences, and iron, in consequence of which another is injured in health and business, is a "nuisance," which equity will abate. *Shellabarger v. Morris*, 91 S. W. 1005, 1007, 115 Mo. App. 566.

An authorized business properly conducted at an authorized place is not a "nuisance," for whatever is lawful cannot be wrongful; and the owner of a railroad thus authorized and operated is not liable in damages to one whose residence is permeated by smoke, cinders, and gas emitted from the engines to such an extent as to be injurious to the health and comfort of the inhabitants. *Atchison, T. & S. F. Ry. Co. v. Armstrong*, 80 Pac. 978, 979, 71 Kan. 366, 1 L. R. A. (N. S.) 113, 114 Am. St. Rep. 474.

The operation of a crematory and fertilizer plant, in which ordinary garbage and other waste matter are subjected to a burn-

ing process, and the residue, in the shape of ashes, used in connection with other elements to make a fertilizer, in such a manner that, under certain conditions of the atmosphere and direction of the wind, the smoke arising from the cremation and the odor due to the method of handling the elements of the fertilizer compels those residing within a distance of from 2,000 to 2,500 feet to keep their windows closed, and renders their houses uncomfortable for habitation, and prevents them from sitting out of doors, constitutes a "nuisance." *Laird v. Atlantic Coast Sanitary Co.*, 87 Atl. 387, 388, 73 N. J. Eq. 49.

"While it is true that dancing is frequently an innocent amusement, and drinking may be engaged in without becoming a 'nuisance,' yet if the dancing and drinking are accompanied by swearing and being drunk, making loud noises and otherwise misbehaving, there can be no doubt that such acts will constitute a 'nuisance.'" *Commonwealth v. Cincinnati, N. O. & T. P. R. Co.*, 112 S. W. 613, 614, 139 Ky. 429, 18 L. R. A. (N. S.) 699, Ann. Cas. 1912B, 427 (citing and adopting *Jung Brewing Co. v. Commonwealth*, 96 S. W. 595, 123 Ky. 507, 124 Am. St. Rep. 376).

Noises resulting from the operation of a manufacturing plant, to constitute a "nuisance," must be unreasonable and of such a character as to be of actual physical discomfort to persons of ordinary sensibilities. *McGill v. Pintsch Compressing Co.*, 118 N. W. 786, 788, 140 Iowa, 429, 20 L. R. A. (N. S.) 466.

A creamery discharged its waste on the land of another, and thereby increased the flow of water on the land, and interfered with the proper cultivation thereof. Noisome odors arose from the waste, but these were not noticeable until one got near the point of discharge, and there was no evidence that any one suffered therefrom. Held, that the waste was not a nuisance within Code, § 5078, defining "nuisances." *Ruthven v. Farmers' Co-op. Creamery Co.*, 118 N. W. 915, 916, 140 Iowa, 570.

Noises which are not "nuisances" on a week day may be when made on a Sunday, if disturbing the quiet and rest which a citizen is entitled to have for his recuperation; and the fact that such noises are forbidden by the Sunday laws takes away any defense for making them, though they be but slight. *McMillan v. Kuehnle*, 73 Atl. 1054, 1056, 76 N. J. Eq. 256.

A private park in the residence part of a city, inclosed by a fence and rented to lodges and other bodies for holding entertainments by day and night, is, when permitted to be so conducted that it is a rendezvous for boisterous, dissolute, drunken people, who indulge in music, dancing, and obscenity until very late hours of the night, so as to disturb the sleep of neighboring residents, a

"nuisance." *Palestine Bldg. Ass'n v. Minor* (Ky.) 86 S. W. 695, 696.

"At common law a 'nuisance' was anything that worked hurt or damage. A public or common nuisance was that which affected the public or was an annoyance to the king's subjects at large." An Illinois statute, providing that a city council in cities shall have the power to declare what shall be a nuisance, to abate the same, and to impose fines on parties who may create, continue, or suffer a nuisance to exist, authorized the Chicago city council to pass Ordinance March 23, 1903, § 10, declaring the emission of dense smoke from the stack of any boat, locomotive, or chimney anywhere within the city, with certain exceptions, to be a public nuisance. *Glucose Refining Co. v. City of Chicago*, 138 Fed. 209, 214 (adopting the quotation from *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698).

"It may be laid down broadly as a general rule that any act, omission, or use of property which results in polluting the atmosphere with noxious or offensive effluvia, gases, stenches, or vapors, thereby producing material physical discomfort and annoyance to those residing in the vicinity or injury to their health or property, is a nuisance." The occupant of a dwelling is entitled to an injunction to restrain the operation of a slaughter house adjacent thereto, where such operation causes the dwelling to be filled with noxious smells. *Wright v. Ulrich*, 91 Pac. 43, 44, 40 Colo. 437.

A "nuisance" is defined as an "unreasonable, unwarrantable, or unlawful use of one's own property, to the annoyance, inconvenience, discomfort, or damage of another." Under this definition, the jury was justified in finding that an electric light plant, erected in a residential neighborhood, was a nuisance, where the evidence showed that the machinery produced a vibration of an adjoining hotel, that dirt and cinders came into the rooms of the hotel, that noise and bad odors invaded the premises, and that the income derived from rental of rooms had decreased since the plant was established. *Pritchard v. Edison Electric Illuminating Co.*, 87 N. Y. Supp. 225, 229, 92 App. Div. 178 (quoting and adopting definition in *Bly v. Edison Co.*, 64 N. E. 745, 172 N. Y. 1, 58 L. R. A. 500).

Where it was proven that the owner of a steam mill, to obtain water, made an excavation in a hollow leading down from a suburb of a nearby town, with the assent of most of the inhabitants of the neighborhood, that the filth from the nearby premises corrupted the water, so that it inconvenienced the neighborhood, and that the pond was of too recent origin to have, as yet, injuriously affected the health of the community, instructions that whatever is openly injurious to public health and comfort, is a "nuisance," though not all the members of the commu-

nity are affected thereby, that a "nuisance" must either be in a populous neighborhood, or so contiguous to a highway as to affect those passing thereon, that a "nuisance" was not necessarily detrimental to the public health, it being sufficient if its bad odors affected the public at large, and that, if the defendant maintained a "nuisance" by maintaining a pond wherein was drained a part of the filth of a nearby town, endangering the public health, and likely, in the nature of things, to generate disease, they should convict, were applicable to the evidence. *West v. State*, 71 S. W. 483, 484, 71 Ark. 144.

In determining whether the maintenance of a planing mill, coalyard, and bins in a residence district in a city are a "nuisance," the effect on persons of ordinary sensibilities only, and not on persons of very delicate and fastidious tastes or sensibilities, should be considered. *First Avenue Coal & Lumber Co. v. Johnston*, 54 South. 598, 600, 171 Ala. 470, 32 L. R. A. (N. S.) 522.

It is not essential to the existence of a "nuisance" from offensive odors that they should be calculated to break down or injure health, or that health should be impaired or even threatened by them. It is sufficient that they may be nauseating or physically discomforting or annoying to persons of ordinary sensibilities, "interfering with the ordinary comfort physically of human existence, not merely according to elegant and dainty modes and habits of living, but according to plain and sober and simple notions among the English people." The sound condition of those employed in fish factories and habituated to the smells necessarily generated in their operation is not determinative of the question whether such a factory is a nuisance. It is well known that persons can become accustomed to foul and noisome odors and retain their health. *United States v. Luce*, 141 Fed. 385, 408.

Under Code, § 4302, defining a "nuisance" to be whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, one using his property so as to unwarrantably impregnate the atmosphere with smoke, odors, etc., which would not exist but for his instrumentality, creates a nuisance; but only where an unreasonable amount of smoke or noisome fumes are emitted, or they are emitted in an unreasonable manner, resulting in tangible injury, will the courts interfere. *McGill v. Pintsch Compressing Co.*, 118 N. W. 786, 787, 140 Iowa, 429, 20 L. R. A. (N. S.) 466.

*Burns' Ann. St.* 1908, § 291, makes whatever obstructs the use of property so as to essentially interfere with its comfortable enjoyment a "nuisance," and the subject of an action. The complaint alleged that plaintiffs did a retail clothing and furnishing business

on the first floor of a building, under a lease from one of the defendants, and that such defendant caused and permitted the upper story to be used by the other defendant as a roller skating rink, the noise from which prevented conversation in plaintiffs' store, and annoyed and drove away their customers, thereby causing loss of profits and injury to the business which could not be compensated for by damages, and that if such use is permitted to continue plaintiffs' business will be destroyed, and also alleged facts showing the character and extent of plaintiffs' business, their inability to procure another room, and prayed an injunction. Held, that the complaint showed that the business would be destroyed if the rink was continued, so that plaintiffs were entitled to the injunction; the injury not being susceptible of compensation in damages. *Foor v. Edwards*, 90 N. E. 785, 45 Ind. App. 259.

The use of soft coal in a factory so situated in a country district suitable for country homes that black smoke therefrom, great in volume and dense in quality, envelops and discolors a neighboring dwelling, causing discomfort and financial loss to the occupants, is a "nuisance," where the use of soft coal is not necessary for the running of the factory, and is not a reasonable use of the manufacturer's property. *McCarty v. Natural Carbonic Gas Co.*, 81 N. E. 549, 550, 189 N. Y. 40, 13 L. R. A. (N. S.) 465, 12 Ann. Cas. 840.

By Civ. Code 1895, § 3861, a "nuisance" is anything that worketh hurt, inconvenience, or damage, to another; and the fact that the act done may otherwise be lawful does not keep it from being a "nuisance." The inconvenience complained of must not be trifling, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinarily reasonable man. The employment, by the owner of a ginning plant, of machinery which separates dust and sand from cotton and expels the particles of dust and sand into the air in large volumes, causing the same to be blown into the dwelling house of an adjacent proprietor, to his great discomfort and injury, is an invasion of his property rights, for which an action for damages will lie. *Ponder v. Quitman Ginnery*, 49 S. E. 746, 747, 122 Ga. 29 (citing *Swift v. Broyles*, 42 S. E. 277, 115 Ga. 885, 58 L. R. A. 390; *Farley v. Gate City Gaslight Co.*, 31 S. E. 193, 105 Ga. 331; *Austin v. Augusta T. Ry. Co.*, 34 S. E. 852, 108 Ga. 671, 47 L. R. A. 755).

#### Obstruction of highway

An obstruction in a public highway constitutes a "nuisance." *State v. Southern Indiana Gas Co.*, 81 N. E. 1149, 1150, 169 Ind. 124, 13 Ann. Cas. 908 (citing *Zimmerman v. State*, 31 N. E. 550, 4 Ind. App. 583).

"A permanent encroachment upon a public street for a private purpose is a 'purpos-

ture.' and is in law a 'nuisance.'" *Lacey v. City of Oskaloosa*, 121 N. W. 542, 545, 143 Iowa, 704, 31 L. R. A. (N. S.) 853.

The general rule is that any unauthorized obstruction or excavation in a public street, impairing its safety, constitutes a public "nuisance." *Mixer v. Herrick*, 62 Atl. 1019, 78 Vt. 349.

An obstruction placed within the limits of a public way is a "nuisance" at common law, as well as under Rev. St. 1903, c. 22, § 5. *Smith v. Preston*, 71 Atl. 653, 656, 104 Me. 156.

A temporary obstruction of a street or highway with the consent of the proper public authorities, in the course of construction of a building, sidewalk, or other work, is not a "nuisance." *Malkan v. Carlin*, 93 N. Y. Supp. 378.

A fence obstructing a street, which is a public highway, and thereby rendering its use less convenient, would be an indictable "nuisance." *State v. Godwin*, 59 S. E. 132, 133, 145 N. C. 461, 122 Am. St. Rep. 467.

A spike two inches high in a sidewalk is a "nuisance." *Wile v. Los Angeles Ice & Cold Storage Co.*, 83 Pac. 271, 272, 2 Cal. App. 180.

Civ. Code, § 3479, defines a "nuisance" as anything which obstructs the free use of property or free passage or use of any street. Section 3493 provides that a private person may maintain an action for a public nuisance, if it is specially injurious to him. Held, that the owner of a lot abutting on a street has such an easement over it that he may maintain an action to abate structures erected in the street opposite his lot. *McLean v. Llewellyn Iron Works*, 83 Pac. 1082, 1084, 2 Cal. App. 346.

"At common law any act or obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public is a 'nuisance.'" Where the owner of a building negligently maintained a leader from the roof of a building so as to discharge water on the sidewalk, by which ice accumulated thereon and the walk became dangerous, he was liable to any person injured thereby. *Tremblay v. Harmony Mills*, 64 N. E. 501, 171 N. Y. 598 (quoting and adopting definition in *Ang. Highw. § 223*).

An obstruction is merely matter out of place and that which may be a stepping stone in a position where it is needed and may be used as such becomes an obstruction when occupying a place intended for other use, and where it is not needed and cannot be so used. Where a pavement has been laid, the asphalt surface of which lays smoothly down to the curb, a block of stone placed within the curb is an obstruction and becomes a "nuisance." *McCormack v. Robin*, 52 South. 779, 781, 126 La. 594, 139 Am. St. Rep. 549.

The accumulation of water and ice in a depression in a sidewalk, so as to obstruct the free and safe use of the sidewalk, by water being collected on a roof and cast on the sidewalk by a projecting conductor, constitutes a "nuisance," which it is the duty of the city to prevent or abate, negligent failure to perform which will make it liable to one injured thereby. *City of Muncie v. Hey*, 74 N. E. 250, 251, 164 Ind. 570.

Under Ky. St. § 2885, providing that it shall be the duty of police officers in cities to remove all nuisances in the public streets, parks, and highways, it was the duty of a policeman, on obtaining knowledge of a dangerous cave-in in a street, to guard the same in order to prevent injury thereby, and hence the policeman's knowledge thereof was notice to the city; the word "nuisance," as there used, not being limited to a physical obstruction placed in a street, but including anything that "worketh hurt, inconvenience, or damage." *City of Louisville v. Lenehan*, 149 S. W. 932, 934, 149 Ky. 537.

An owner, collecting surface water into a definite channel and pouring the same on a public highway where the water freezes, creates a "nuisance," and he is liable for the damages ensuing as a probable consequence. *Field v. Gowdy*, 85 N. E. 884, 885, 199 Mass. 568, 19 L. R. A. (N. S.) 236.

Where a trench, dug in a city street for the purpose of supplying heat to the city library building, had been partly filled, but the remainder was left open awaiting material for making pipe connections, such excavation, having been made for a proper purpose, was not a "nuisance" per se, and did not become such unless it was allowed to remain open for an unreasonable length of time. *Garnetz v. City of Carroll*, 114 N. W. 57, 136 Iowa, 569.

The trees, grass, and flowers growing on park strips maintained by a municipality between the curbing and the sidewalk and proper barriers placed around them to protect them are not obstructions or "nuisances," within the meaning of the statute requiring the city council to keep the streets of a municipality open, in repair, and free from nuisance. *Village of Barnesville v. Ward*, 96 N. E. 937, 938, 85 Ohio St. 1, 40 L. R. A. (N. S.) 94, Ann. Cas. 1912D, 1234.

Civ. Code, § 3479, declares anything which unlawfully obstructs the free passage or use of a public street a "nuisance." Section 3480 defines a "public nuisance" as one affecting an entire community or any considerable number of persons. Section 3493 provides that a private person may maintain an action for a "public nuisance" only if it is specially injurious to himself. In an action to enjoin the construction or operation of a railroad in the street in front of plaintiff's premises, the complaint alleged that the

construction and operation of the railroad would greatly obstruct the use of plaintiff's premises and impair the easement of access thereto and egress therefrom, and would greatly hamper plaintiff in carrying on his business on the premises and lessen the value thereof. Held, that the allegations were merely statements of the plaintiff's opinion or conclusions as to the effect of defendant's proposed acts, and hence the complaint was demurrable as not showing a nuisance resulting in some special injury, within the meaning of Civ. Code, §§ 3479, 3480, 3493. *Brown v. Rea*, 88 Pac. 713, 714, 150 Cal. 171 (citing *Aram v. Schallenberger*, 41 Cal. 449; *Bigley v. Nunan*, 53 Cal. 403; *Hogan v. Central Pac. R. Co.*, 11 Pac. 876, 71 Cal. 87).

#### Obstruction of waters

A obstruction in a stream, caused by filling it, and resulting in damages to property through water being set back, is a "nuisance." *Hedrick v. City of St. Joseph*, 122 S. W. 375, 376, 138 Mo. App. 396.

Laws 1905, c. 57, § 4, gives corporations organized for clearing and improving streams for logging purposes, power to build wing dams and sheer booms, etc., for the purpose of holding logs, providing that no such dam, etc., shall be so maintained as to obstruct the outlet of the stream, and that if such dam, etc., is constructed so as to interfere with the use of the stream for any other purpose or injure adjacent land, compensation shall be first determined, and the appropriation of the use made by eminent domain. Held, that the statute contemplated the obstruction of navigation at times by the construction of dams, etc., for driving timber, the only limitation being that the outlet of the stream be not obstructed, so that the fact that a boom built in a river navigable to some extent for three or four miles from its mouth at high tide for floating logs necessarily obstructed navigation above the boom would not be a "nuisance," as defined by Rem. & Bal. Code, § 943 (1 Ballinger's Ann. Codes & St. §§ 3085, 8093 [Pierce's Code, §§ 1870, 1867]), so that the boom company could condemn the privilege of using the river in that manner. *State ex rel. Pealer v. Superior Court of Chehalis County*, 109 Pac. 340, 341, 58 Wash. 565.

Comp. Laws 1909, § 4751, defines a "nuisance" to consist in unlawfully doing an act or omitting to perform a duty, which act or omission, among other things, "unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, or navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway." *McKay v. City of Enid*, 109 Pac. 520, 522, 26 Okl. 275, 30 L. R. A. (N. S.) 1021.

#### Pool room

The maintenance of a place for selling for gain pools upon horses at an exhibition

trial of their speed on a race track and the selling of the pools is punishable as a "nuisance" at common law and under B. & C. Comp. § 1930, providing for the punishment of any person who willfully or wrongfully commits any act which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to the public morals. *State v. Ayers*, 88 Pac. 653, 49 Or. 61, 10 L. R. A. (N. S.) 992, 124 Am. St. Rep. 1036.

A pool room on one of the principal thoroughfares in the city, in which persons daily congregate to bet upon horse races reported to the proprietor by telegraph, is a gaming house, punishable as a "nuisance," at common law and under the statute providing for the punishment of any person who willfully and wrongfully commits any act which grossly disturbs the public peace or health, or which openly outrages the public decency, and is injurious to the public morals. *State v. Nease*, 80 Pac. 897, 898, 46 Or. 433.

#### Roller skating rink

"Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physical, of human existence, is a 'nuisance' that should be restrained." The operation of a roller skating rink, so conducted as to render the appropriate enjoyment of adjacent church property impossible will be enjoined. *First Methodist Episcopal Church of City of Cape May v. Cape May Grain & Coal Co.*, 67 Atl. 613, 614, 73 N. J. Eq. 257 (quoting and adopting definition in *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201, 205).

#### Saloons and other places of sale of liquors

A saloon or tippling house was not a "nuisance" at common law if properly conducted, and therefore a conviction for maintaining a nuisance cannot be sustained by proof of the maintenance of an unlicensed tippling house, in the absence of proof that it was so conducted as to annoy, disturb, or scandalize the people in a community, by showing that drunkards, thieves, prostitutes, or other disorderly persons were permitted to resort there. *State v. Ingram & Adams*, 94 S. W. 790, 791, 118 Mo. App. 323.

Under Rev. St. 1903, c. 22, § 1, a place of resort is a "nuisance" if used by a club either to sell intoxicating liquor to its members, or to distribute among them liquor owned in common, or to procure and dispense to its members liquor bought for and belonging to them individually. *State v. Kapicsky*, 73 Atl. 830, 832, 105 Me. 127, 23 L. R. A. (N. S.) 737.

#### Sanitarium

Under the statute (Rem. & Bal. Code, § 8309) defining a nuisance as an act or omission which either annoys, injures, or endan-

gers the comfort, health, or safety of others, the maintenance in a residential district of a city of a sanitarium for the treatment of tuberculosis patients is a "nuisance," where the fear induced by the proximity of the sanitarium disturbs the "comfortable enjoyment" of adjacent property, whether the fear is founded on scientific facts or not, for "comfortable enjoyment" means mental quiet as well as physical comfort, and the word "comfort" implies whatever is requisite to give security from want and furnish reasonable physical, mental, and spiritual enjoyment. *Everett v. Paschall*, 111 Pac. 879, 880, 61 Wash. 47, 31 L. R. A. (N. S.) 827, Ann. Cas. 1912B, 1128.

#### Surface water

The action of a railroad in permitting surface water from one side of its track to escape to the other side alongside of a highway does not create an actionable "nuisance." *Townsend v. New York Cent. & H. R. R. Co.*, 106 N. Y. Supp. 381, 887, 56 Misc. Rep. 253.

#### NUISANCE PER SE

A "nuisance per se" is a nuisance in itself, and which cannot be so conducted as to be lawfully carried on or permitted to exist. *Cooper v. Whissen*, 130 S. W. 703, 704, 95 Ark. 545.

"A 'nuisance per se' is an act, thing, or omission or use of the property which in and of itself is a nuisance, and hence not permissible or excusable under any circumstances." *Loth v. Columbia Theater Co.*, 94 S. W. 847, 854, 197 Mo. 328.

"A 'nuisance at law' or a 'nuisance per se' is an act, occupation, or structure which is a nuisance at all times, under any circumstances, regardless of location or surroundings." *Swaim v. Morris*, 125 S. W. 432, 434, 93 Ark. 362, 20 Ann. Cas. 930 (quoting and adopting the definition in 29 Cyc. P. 1153).

A "nuisance per se" is an act, thing, or omission, or use of the property, which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances. A lawful business is not generally a "nuisance per se," but may become so by being located in an inappropriate place, or being kept in an improper manner. *Remsberg v. Iola Portland Cement Co.*, 84 Pac. 548, 549, 73 Kan. 66.

A "nuisance" is anything which incumodes, annoys, or produces inconvenience or damage. A "nuisance per se" is one which is always a nuisance in certain localities. A "nuisance in fact" is one which becomes a nuisance by reason of circumstances and surroundings. *City of New Orleans v. Lefant*, 52 South. 575, 577, 126 La. 455, 29 L. R. A. (N. S.) 642.

A "nuisance per se," as the term implies, is a nuisance in itself, and one which

cannot therefore be so conducted or maintained as to be lawfully carried on or permitted to exist. *Sullivan Realty & Improvement Co. v. Crockett*, 138 S. W. 924, 926, 158 Mo. App. 573.

#### Awnings

"'Nuisances' are of three kinds, viz.: Per se, malum in se (that is, naturally evil); malum prohibitum, because forbidden by law; and those which do not fall within the two definitions mentioned, but may be found in fact to be nuisances." Awnings constructed of wood, with roofs covered with metal, extending over and about 15 feet above a street, and attached to substantial brick buildings, the outer edge resting on posts in the sidewalk or curb, did not constitute a public "nuisance per se." *Brown v. Town of Carrollton*, 99 S. W. 37, 39, 122 Mo. App. 276.

#### Cemetery

A public cemetery is not a "nuisance per se." *Sherman v. Crawford (Tex.)* 127 S. W. 1075, 1076.

#### Dead animals

Dead domestic animals are not "nuisances per se," and cannot be made such by legislative declaration. *City of Richmond v. Caruthers*, 50 S. E. 265, 103 Va. 774, 70 L. R. A. 1005, 2 Ann. Cas. 495.

#### Electricity

The transmission of electricity at a high voltage over a right of way, being authorized by law, is not a "nuisance per se," as it is well settled that a lawful business or erection is never a "nuisance per se." *Mull v. Indianapolis & C. Traction Co.*, 81 N. E. 657, 659, 660, 169 Ind. 214.

#### Explosives

The arbitrary rule that the keeping of gunpowder, nitroglycerine, or other explosive substances in large quantities in the vicinity of a dwelling house or place of business is a "nuisance per se" has been modified, and the present rule is that the question whether they are a nuisance depends on the locality, the quantity, and the surrounding circumstances, and the method and manner of keeping and using. The owner of an automobile garage, licensed to store one barrel of gasoline in the building, which is a frame building and adjacent to other frame buildings, will be enjoined from introducing gasoline into the tanks of the automobile inside of the building, and from storing automobiles, with gasoline in the tanks, inside the building. *O'Hara v. Nelson (N. J.)* 63 Atl. 836, 840 (citing, in support of a general rule, *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Rudder v. Koopman*, 22 South. 601, 116 Ala. 332, 37 L. R. A. 489; *Kinney v. Koopman*, 22 South. 593, 116 Ala. 310, 37 L. R. A. 497, 67 Am. St. Rep. 119; *Kleebauer v. Western Fuse & Explosives Co.*, 71 Pac. 617, 138 Cal. 497, 80 L. R. A. 377, 94 Am. St. Rep. 62; *Collins v.*

Alabama G. S. R. Co, 16 South. 140, 104 Ala. 390; High, Inj. [3d Ed.] p. 593, § 776, et seq.; 1 Pom. Equit. Remedies, § 515 et seq.; Barnes v. Zettlemoyer, 62 S. W. 111, 25 Tex. Civ. App. 468; Flynn v. Butler, 75 N. E. 730, 189 Mass. 377.

#### Gaming house

A gambling house, under the statute and as recognized by the courts, is a "nuisance," and even at common law such a nuisance could be enjoined at the instance of any person who was injured thereby. Ex parte Allison, 90 S. W. 492, 494, 48 Tex. Cr. R. 634, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 634.

"A 'nuisance per se' is any act or omission, or use of property or thing, which is of itself hurtful to the health, tranquillity, or morals, or outrages the decency, of the community." Keeping a common gaming house, which is held to include pool rooms where betting on horse races is indulged (Bollinger v. Commonwealth, 35 S. W. 553, 98 Ky. 574; Commonwealth v. Simmonds, 79 Ky. 618; Brown v. State, 13 S. W. 236, 88 Tenn. 566; Swigart v. People, 40 N. E. 432, 154 Ill. 284), to which there is common resort for the purpose of betting, and at which money or other property is bet, won, or lost, is per se a nuisance at common law (1 Hank. P. C. p. 733; Kneffler v. Commonwealth, 22 S. W. 446, 94 Ky. 359). Ehrlick v. Commonwealth, 102 S. W. 289, 290, 125 Ky. 742, 10 L. R. A. (N. S.) 995, 128 Am. St. Rep. 269.

#### Slaughterhouse

Under Wilson's Rev. & Ann. St. 1903, c. 56 (entitled "Nuisance") §§ 1, 3, 8, 10, declaring that a nuisance consists in unlawfully doing any act or omitting to perform a duty, which act or omission annoys, injures, or endangers the comfort, health, or safety of others, and declaring that a public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, though the extent of the annoyance or damage inflicted on the individual may be unequal, etc., a slaughterhouse is not a "nuisance per se," unless it appears from the evidence, independent of the manner in which it is being used and conducted, that its location, proximity, and relationship to the public make it so. Weaver v. Kuchler, 87 Pac. 600, 602, 17 Okl. 189.

#### Steam traction engine

The use of a steam traction engine and trailers in the streets of a city is not a public "nuisance per se."—McCarter v. Ludlum Steel & Spring Co. (N. J.) 63 Atl. 761, 767.

#### Trains

The noises of locomotives, shifting of cars, smoke, offensive odors, loading and unloading of freight, and the like, occasioned by and incident to the use and conduct of a railroad freight and passenger terminal, and resulting in damages to the premises as a place

of religious worship does not constitute an actionable nuisance, where the railroad company conducts its operations with reasonable care. Neither does the running of trains and shifting of cars on Sunday at the time of regular church services constitute a "nuisance per se," since under the express provisions of Revisal 1905, § 2613, a railroad company may operate its trains on Sunday. But, while this is true, it also remains true that a railroad so operated as to needlessly cause injury would be such a nuisance. Taylor v. Seaboard Air Line Ry., 59 S. E. 129, 132, 145 N. C. 400, 122 Am. St. Rep. 455.

#### Undertaking establishment

An undertaking establishment is not a "nuisance per se." The maintenance of an undertaking establishment in a building 3 or 4 feet from the residence of one of the plaintiffs and 35 feet from the residence of the other in a residence district of a city, though the mortician operating the same intended to occupy the upper stories of the building as a residence, constituted a nuisance where it was shown that noxious odors, gases, etc., were likely to permeate the houses of the plaintiffs therefrom, and that there was danger of infection and contagion from the proximity of the morgue, with the possibility of flies passing from one place to the other, etc. Densmore v. Evergreen Camp No. 147, Woodmen of the World, 112 Pac. 255, 61 Wash. 230, 31 L. R. A. (N. S.) 608, Ann. Cas. 1912B, 1206.

#### NUISANCE VALUE

A "nuisance value" is the value of a franchise "because it may be used to hinder or defraud another enterprise, although itself conferring or securing nothing of value." Consolidated Gas Co. v. New York, 157 Fed. 849, 874.

#### NUL TIEL RECORD

"The plea of 'nul tiel record' raises but one question, and that is whether there is such a record as that set out in the writ." Bank of Eau Claire v. Reed, 83 N. E. 820, 821, 232 Ill. 238, 122 Am. St. Rep. 66.

#### NULL AND VOID

The terms "null" and "void" are used interchangeably. "Void" is defined as having no legal force, entirely null, incapable of confirmation or ratification; and "null" is defined as of no legal or binding force or validity, of no efficacy, invalid, void, nugatory, useless, or of no account or significance. Forrester & MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co., 74 Pac. 1058, 1091, 29 Mont. 397 (citing Standard Dict.).

Though a conveyance was, as between the parties, within the statute providing that all fraudulent conveyances shall be "null and void," the fraudulent grantee having convey-



ed the property to a third person, who was not made a party to a suit by creditors of the vendor to subject the land to their claims, he was not bound by a decree in favor of complainant. The words "null and void," as used in this statute, are to be given the sense of "voidable," since the conveyances are good as between the parties and also as against the grantor. As stated by Bacon in his Abridgment, tit. "Void and Voidable": "A thing is void which was done against law at the very time of the doing it, and no person is bound by such act; but a thing is only voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done. \* \* \* Of a void act or deed every stranger may take advantage, but not of a voidable one." Tudor v. Tudor, 67 Atl. 539, 80 Vt. 220, 130 Am. St. Rep. 977 (citing Carpenter v. McClure, 39 Vt. 9, 91 Am. Dec. 370; Merrill v. Englesby, 28 Vt. 150).

In a statute providing that all capital stock or securities of a company purchased of the company by a director thereof for less than the par value thereof shall be "null and void," the term "null and void" should be construed as meaning "voidable." Toledo St. L. & K. C. R. Co., v. Continental Trust Co., 95 Fed. 497, 526, 36 C. C. A. 155.

The words "void," "void and of no effect," and "null and void," are used in statutes and legal documents in the sense of voidable merely—that is, capable of being avoided—and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Code 1896, § 1286, provides that no certificate of incorporation shall issue when the corporate name assumed is that of a person or firm, unless there be joined thereto some name designating the business he carries on, followed by the word "company" or "corporation," and if any corporation shall fail to comply with this qualification its organization is void. Section 1282 provides that, when any corporation fails to comply with the requirements of the statute in its organization, the failure may be remedied by filing with the probate judge who issued the certificate of incorporation a statement setting forth the omission and supplying the same. Failure of a corporation to comply with the qualifications of section 1286, by inserting the word designating the business to be carried on, did not render its incorporation "void," but "voidable" only; such being the evident import of the two sections of Code 1896, which are *pari materia*. State ex rel. Thompson v. Colias, 43 South. 190, 191, 192, 150 Ala. 515 (citing Ewell v. Daggs, 2 Sup. Ct. 408, 108 U. S. 148, 27 L. Ed. 682; Inskeep v. Lecony, 1 N. J. Law, 112; New York & Long Island Bridge Co., 42 N. E. 1088, 148 N. Y. 540; Columbia & P. S. R. Co. v.

Brailard, 40 Pac. 382, 12 Wash. 22; Van Shaack v. Robbins, 36 Iowa, 201; Rheiner v. Union Depot, etc., Co., 17 N. W. 623, 31 Minn. 289; Brown v. Brown, 50 N. H. 538, 552).

## NULLA BONA

A return on an execution "nulla bona" is a return that the execution is uncollectible. Card v. Groesbeck, 124 N. Y. Supp. 372, 373, 140 App. Div. 30.

A return on an execution issued on a justice's judgment, reciting: "Executed the within writ in the county of Stoddard, state of Missouri, on the 2d day of May, 1893. No property found to levy this execution"—constituted a sufficient return of "nulla bona." Scharff v. McGaugh, 103 S. W. 550, 552, 205 Mo. 344.

## NULLUM TEMPUS OCCURRIT REGI

"The maxim 'nullum tempus occurrit regi' only applies in favor of the sovereign power, and has no application to municipal corporations deriving their powers from the sovereign, although their powers, in a limited sense, are governmental. Thus the statute runs for or against towns and cities, and also for or against counties." In an action between a county and an individual, the statute of limitations is applicable to the same extent as though both parties were natural persons. State ex rel. Board of Com'rs of Fountain County v. Stuart, 91 N. E. 613, 615, 46 Ind. App. 611 (quoting Wood, Llm. § 53).

## NUMBER

See Reasonable Number; Street and House Number; Street Number.

Where the evidence showed that the state's witness on "one" occasion stated that he bought the liquor from another, and not from defendant, the court properly refused to instruct the jury to acquit, if they believed from the evidence that such witness made a "number" of statements that he did not purchase the liquor from defendant, but from another. Faulk v. State, 59 South. 225, 226, 4 Ala. App. 177.

## NUMBER OF VOTES

See Greatest Number of Votes.

## NUNC PRO TUNC

An entry "nunc pro tunc" is something different from an entry correcting an oversight or mistake. Such entry assumes that an act was done at a particular time, which never got of record in the proper books; and the entry is finally made now for then. Hofacre v. City of Monticello, 103 N. W. 488, 489, 128 Iowa, 239.

"The court may order 'nunc pro tunc' entries, as they are called, made to supply

some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited and not easily defined. In general, mere clerical errors may be amended in this way." *Evans v. Freeman*, 140 Fed. 419, 424.

The office of a "nunc pro tunc" entry is, not to make an order now for then, but to enter now for then an order previously made; and the fact that a judge in chambers expressed a willingness to make a desired order extending the time for filing a motion for new trial, where no such order was actually made or directed in court, does not warrant the entry of such an order nunc pro tunc at a succeeding term. *Klein v. Southern Pac. Co.*, 140 Fed. 213, 216.

A "nunc pro tunc" entry can only be employed to correct a clerical mistake or misprision of the clerk. It can never correct a mistake or oversight of the judge, nor be used to correct judicial errors, nor to render a judgment different from that actually rendered, even though the judgment actually rendered, was not the judgment the judge intended to render. *Burnside v. Wand*, 71 S. W. 337, 339, 170 Mo. 531, 62 L. R. A. 427.

A "nunc pro tunc" entry can only be made upon evidence furnished by the papers and files in the cause, or something of record, or in the minute book or judge's docket, as a basis to amend by. The stenographer's notes of proceedings in an action do not constitute a paper or file in the cause, which can be made the basis of an amendment of a judgment "nunc pro tunc." A memorandum for a judgment drawn by an attorney to be copied by the clerk does not constitute a record, paper, or file in the action, which can be made the basis of an amendment of a judgment "nunc pro tunc." *Becher v. Deuser*, 69 S. W. 363, 364, 169 Mo. 159 (citing *Missouri, K. & E. Ry. Co. v. Holschlag*, 45 S. W. 1101, 144 Mo. 256, 66 Am. St. Rep. 417; *Young v. Young*, 65 S. W. 1016, 165 Mo. 624, 88 Am. St. Rep. 440).

The purpose of an order "nunc pro tunc" is to make a present record of an order which the court made at a previous term, but which was not then recorded; it being improper to make the record show an order not previously actually made, and hence accused, who was sentenced on a plea of guilty, is not entitled to an order nunc pro tunc setting aside the sentence. *People v. Wilmot*, 98 N. E. 973, 975, 254 Ill. 554.

## NURSE

As servant, see *Servant*.

The mere giving of massage treatments professionally falls within the profession of a trained "nurse," and one who gives such treatments is not required to be licensed. *People, to Use of State Board of Health, v. Hettiger*, 150 Ill. App. 448, 451.

Merely giving massage treatment or bathing a patient falls properly within the profession of a trained "nurse," while administering osteopathic treatment does not. *Witty v. State*, 90 N. E. 627, 630, 173 Ind. 404, 25 L. R. A. (N. S.) 1297 (citing *People v. Gordon*, 62 N. E. 858, 194 Ill. 560, 88 Am. St. Rep. 165).

An agreement to "nurse" an adult implies that the object of the care is sick, and means much more than mere watchfulness, and contemplates such care and attention of the person as will conduce to the comfort and hasten the recovery of the patient; but the practice of medicine, within the statute regulating its practice, implies not only the knowledge of the professional nurse, but implies much more, and includes the application of medical knowledge of disease, and the loss of health, and hence an agreement to nurse a person during his lifetime in consideration of the devise of the patient's property is not an agreement to practice medicine without a license prohibited by the statute, so as to prevent specific performance of the contract. *Oswald v. Nehls*, 84 N. E. 619, 622, 233 Ill. 438.

## NURSING

The word "caring," in an instruction in an action by a parent for injuries to his minor child authorizing a recovery for the services of his wife in nursing, and medical attendance made necessary by the injury, is synonymous with "nursing," and means the usual attendance on sick persons, and the use thereof does not render the instruction misleading. *Johnson v. St. Paul & W. Coal Co.*, 111 N. W. 722, 723, 181 Wis. 627.

## NUTS

Marrons (chestnuts) preserved in syrup are not dutiable as "nuts" under paragraph 272, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172. *Schall & Co. v. United States*, 154 Fed. 1005, 83 C. C. A. 329.

Apricot stones come within the common definition of "nuts," and apricot kernels are dutiable as "nuts \* \* \* not specially provided for," under paragraph 272, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172. *United States v. Spencer & Co.*, 151 Fed. 1022, 81 C. C. A. 683.

## NUT OIL OR OIL OF NUTS

"Nut oil" derived from the fruit of aleurites vernica of China, which is similar to the so-called *Jatropha* nuts, is properly subject to classification of "nut oil or oil of nuts," not otherwise specially provided for under the provisions of the Free List in Tariff Act July 24, 1897, c. 11, § 2, par. 626, 30 Stat. 199. *Edward Hills, Sons & Co. v. United States*, 127 Fed. 970.

**NUTGALLS**

"Extract of nutgalls," an article which is made by grinding nutgalls, digesting the powder in water, and filtering to remove impurities, a chemical being added as a preservative without working any chemical change, is not dutiable as tannin or tannic acid, under paragraph 1, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 151, nor as a chemical compound under paragraph 3, Schedule A, § 1, c. 11, 30 Stat. 151, but either directly or by similitude as "drugs, such as \* \* \* nutgalls, \* \* \* ad-

vanced in value or condition," under paragraph 20, Schedule A, § 1, c. 11, 30 Stat. 152. *W. N. Proctor & Co. v. United States*, 139 Fed. 586, 588.

**NUTRINE**

"Nutrine," which is made out of crushed grain, corn, and wheat sifted, mixed with cotton seed meal and molasses, is not flour, within article 230 of the Constitution of 1898, in reference to exemption from taxation. *Atlas Feed Products Co. v. City of New Orleans*, 37 South. 531, 533, 113 La. 611.

## O

## O. F. B. A.

Where a writ was indorsed "Dr. Peter Brudgeman, O. F. B. A.," it was held clear from the remainder of the writ that "Odd Fellows' Building Association" was meant. *Odd Fellows' Bldg. Ass'n v. Hogan*, 28 Ark. 261, 264.

## O. K.

"O. K." may have no title to be classed as elegant English, but in the business life of this country it has for many years been in common use, and has acquired a meaning which is not all obscure or uncertain. Webster's International Dictionary defines it as "all correct." The Century Dictionary gives its meaning as "all right; correct; now commonly used as an indorsement, as on a bill." It is neither more nor less than a brief, but expressive, certificate of the correctness of the bill or claim on which it is indorsed. Hence mere "O. K." indorsements on bills by architects are a sufficient compliance with a contract for the erection of a building requiring an estimate to be given by the architect for 85 per cent. of work and materials, and providing that payments shall be made on written certificates of the architects, without designating any particular form of certificate. *Getchell & Martin Lumber & Mfg. Co. v. Petterson & Sampson*, 100 N. W. 550, 554, 124 Iowa, 599.

Under Rev. St. 1908, § 3437, requiring each water commissioner to keep an account of the time of each assistant employed by him, and to certify it to the board of county commissioners, accounts of deputies containing "O. K. George Hider, Water Commissioner, District No. 40," are sufficiently certified by the commissioner; the abbreviation "O. K." meaning "all right," "correct." *Board of Com'rs of Gunnison County v. Hider*, 107 Pac. 1068, 1069, 47 Colo. 443.

## As indicating consent

The court, on plaintiff's motion for the direction of a verdict, discharged the jury, and directed plaintiff's counsel to prepare the findings and judgment. Thereupon defendant's attorney, in open court, stated, "And we can have an exception to each and every finding." Findings and conclusions, with form of judgment, were prepared and served on defendant's counsel. In the transcript, below the findings, conclusions, and judgment entry, was the abbreviation "O. K.," followed with the signature of defendant's counsel. Held, that the abbreviation "O. K." did not show that defendant's counsel assented to the findings, conclusions, and judgment. *Humphries v. Sorenson*, 74 Pac. 690, 692, 33 Wash. 563.

## O N

A bill of lading declared that, if the word "Order," was written thereon immediately before or after the name of the party to whose order the property was consigned, the surrender of the bill of lading, properly indorsed, should be required before delivery of the property. An organ blower was shipped by plaintiff under a bill of lading, reciting: "Consigned to Organ Power Company. P. R. M. Co. Notify Patton-Rubush Music Company. Via Merchants Dispatch." The freight bill contained the following: "Consignee Organ Power Company, O N Patton-Rubush M. House." Held that, as the court would take judicial notice that the letters "O N" signified "order notify," the carrier was chargeable as for a misdelivery in delivering the blower to the person to be notified without surrender of the bill of lading and payment of the draft thereto attached. *Alabama Great Southern R. Co. v. Organ Power Co.*, 46 South. 254, 92 Miss. 781.

## O. R.

"O. R.," as used in a contract of shipment, indicates that the shipment is made on the owner's risk. *Nairn v. Missouri, K. & T. R. Co.*, 106 S. W. 102, 126 Mo. App. 707.

## OAK

See White Oak.

## OAR

In mechanics an oar is but a lever. The oarlock is the fulcrum; so that, given a loose oar, the distance from the fulcrum to the power or weight is liable to shift or vary between the oars, and result in an uneven or unsteady stroke, and prevent, in such contingency, true and safe rowing. Where an employer furnished a safe boat with which to row its employes to their place of work, the fact that the boat was provided with tight oars did not render the employer liable for the death of a servant, who was drowned by the overturning of the boat. *Chrismer v. Bell Telephone Co.*, 92 S. W. 378, 384, 194 Mo. 189, 6 L. R. A. (N. S.) 492.

## OATH

See Corporal Oath; General Oath; Suppletory Oath.

See, also, Swear—Sworn.

An "oath" is an outward pledge, given by the person taking it, that his attestation or promise is made under an immediate sense of his responsibility to God. *Pumphrey v. State*, 122 N. W. 19, 20, 84 Neb. 636, 23 L. R. A. (N. S.) 1023, 18 Ann. Cas. 979.

An "oath" is a solemn adjuration to God to punish the affiant if he swears falsely, and its sanction is a belief that the Supreme Being will punish falsehood. *Birmingham Ry., Light & Power Co. v. Jung*, 49 South. 434, 440, 161 Ala. 461, 18 Ann. Cas. 557.

The word "oath" does not necessarily imply perjury, for an oath may be taken outside of judicial proceedings, or by other lawful authority, and, although false, would not be perjury, but only false swearing. *United States v. Howard*, 132 Fed. 325, 338.

Comp. Laws 1909, § 2177, defines "oath" as including every mode of attesting the truth of that which is stated which is authorized by law. *Town of Checotah v. Town of Eufaula*, 119 Pac. 1014, 1017, 31 Okl. 85.

The requirement of Civ. Code 1910, § 5049, that exceptions to the award of arbitrators be made "on oath," is not met by affidavit of the party filing such exception that they are true to the best of his knowledge and belief. *Winn v. Miller*, 71 S. E. 658, 659, 136 Ga. 388.

#### OATH OF OFFICE

See Neglect to Take Oath.

#### OATH-BOUND FRATERNITY

"Oath-bound" and "secret," as used in St. 1909, p. 332, prohibiting "secret, oath-bound" fraternities in the public schools, are synonymous. *Bradford v. Board of Education of City and County of San Francisco*, 121 Pac. 929, 932, 18 Cal. App. 19.

#### OATS

See Country Run Oats; Texas Red Rust-Proof Oats.

As provisions, see Provisions.

The word "oats" is defined as "provisions laid in large for man and beast." *Kansas City, Ft. S. & M. R. Co. v. Graham*, 74 Pac. 232, 233, 67 Kan. 791 (citing Dr. Johnson's Dict. and Cent. Dict.).

#### OAT FEED

Since the term "oat feed" in its ordinary acceptation does not mean the whole oat grain, either crushed or ground, but instead means that part of the grain which remains after the miller subtracts the portions useful for human food, consisting of nubbins, middlings, hulls, and oat dust, a compound substance sold in packages under the name "Corno Horse and Mule Feed," and described on the package as a "mixture of ground alfalfa, oats, corn, alfalfa, oat and hominy feeds," with the name of the manufacturer and place of manufacture, followed by an analysis of its contents, was not misbranded in violation of the food and drugs act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768), because it contained an excess of oat hulls in compound and not the whole ground oats.

*United States v. One Car Load of Corno Horse and Mule Feed*, 188 Fed. 453, 457.

#### OAT HULLS

A by-product in the manufacture of oatmeal, which consists merely of the broken hulls of the oats, and is known as "oatmeal feed," is dutiable as "oat hulls," under the Tariff Act of July 24, 1897. *United States v. McGettrick*, 139 Fed. 304.

#### OBITER DICTUM

See Dictum.

#### OBJECT

See Natural Object of His Bounty.

"Object" is the end to be attained by a given action or effort. *Sawter v. Shoenthal*, 80 Atl. 101, 81 N. J. Law, 197.

##### Of action

"The 'object' of an action is the relief demanded; the recovery of damages or the land or personality sued for; the restraint or other relief demanded." *Lassiter v. Norfolk & C. R. Co.*, 48 S. E. 642, 643, 136 N. C. 89, 1 Ann. Cas. 456.

##### Of conspiracy

Under Rev. St. § 5440, making criminal a conspiracy to commit an offense against the United States or to defraud it, where one or more of the conspirators do some act to effect the "object" of the conspiracy, it is not enough that the conspiracy be directed to the attainment of some unlawful object, but it must be directed to the attainment of such an object as brings the conspiracy within the class made criminal, and, when that object is attained, "the object of the conspiracy" is effected, and there can be no further overt act. *Lonabaugh v. United States*, 179 Fed. 476, 481, 103 C. C. A. 56.

##### Of statute or ordinance

The "object" of a law is the aim or purpose of the enactment. *State v. De Hart*, 33 South. 605, 606, 109 La. 570.

"The object of an act," as used in Const. art. 4, § 7, par. 4, requiring that every law shall embrace but one "object," and that shall be expressed in its title, means the end or aim of the subject. There must not be mixed in one and the same act such things as have no proper relation to each other. To except from an act one of the class which the act would otherwise interdict is not to intermingle subjects having no relation to each other, but to legislate on a subject covered by the statute and germane to its provisions, and to give expression in the one act to the legislative purpose covering all the subjects embraced within the object of the statute. The act entitled "An act for the protection of pigeons and other fowl and constituting the violation of its provisions a misdemeanor," approved April 12, 1904 (P.

L. p. 515) is not in conflict with such constitutional provisions. *State v. Davis*, 61 Atl. 2, 3, 72 N. J. Law, 345.

Under the requirement of the Constitution that the "object" of an act must be expressed in its title, the true rule is that the object expressed must give notice of the effect of the legislation to one conversant with the existing state of the law. The validity of the title is not to be determined by nice distinctions of etymology or definition of words, but by the facts of the case and the history of the legislation. *Sawter v. Shoen-thal*, 83 Atl. 1004, 83 N. J. Law, 499; *Harris v. American Casualty Co. of Reading, Pa.*, 85 Atl. 194, 83 N. J. 641, 44 L. R. A. (N. S.) 70.

### OBJECTION

As proceeding, see Proceeding.

Exception synonymous, see Exception.

Subject to objection, see Subject To.

Cases on appeal are tried from a bill of "exceptions," not a bill of "objections." It is true that the word "object" in certain connections may have the same meaning as "except." In the course of a trial an objection is made to the end that a ruling of the court may be had. This ruling is not upon what the court itself has done, but upon what the parties are doing or offering to do. The objection goes to the act of persons other than the court and is made to get action from the court. When the court acts, the error is preserved by an exception to the ruling. Thus the origin of the term "bill of exceptions." *Harding v. Missouri Pac. Ry. Co.*, 134 S. W. 641, 643, 232 Mo. 444, Ann. Cas. 1912B, 1221.

### OBJECTIONABLE JUROR

An "objectionable juror" is one against whom exists some ground or cause, such as the formation of opinion or some prejudice, which might be ground, of challenge, and would tend to show that the jury was not absolutely fair and impartial. *Carter v. State*, 76 S. W. 437, 439, 45 Tex. Cr. R. 430.

### OBJECTIVE SYMPTOM

"Objective symptoms" are those which the surgeon discovers from a physical examination of his patient, while subjective symptoms are those he learns from what his patient tells him. *Dean v. Wabash R. Co.*, 129 S. W. 953, 957, 229 Mo. 425.

## OBLIGATE

### OBLIGATION

See Civil Obligation; Existing Obligations; General Obligation; Imperfect Obligation; Joint Obligation; Moral Obligation; Natural Obligation; Original Obligation; Pecuniary Obligation; Personal Obligation; Right Arising Out of an Obligation; Several

Obligation; Single Obligation; Statutory Obligation.

Other obligation by which debt is secured, see Other.

"The word 'obligation' \* \* \* imports an existing moral or physical necessity." *Fletcher v. Peck*, 6 Cranch (10 U. S.) 87, 144, 3 L. Ed. 162 (Johnson, J., dissenting).

The term "obligation," as used in Louisiana, is in its general and most extensive sense synonymous with "duty." Obligations are of three kinds, imperfect, natural, and civil, or perfect, obligations. *Morgan's Louisiana & T. R. & S. S. Co. v. Stewart*, 44 South. 138, 143, 119 La. 392.

The term "obligation," as used in Rev. St. 1895, art. 1194, subd. 5, providing that, when one has contracted in writing to perform an obligation in a particular county, suit may be brought therein or in the county of defendant's domicile, means such an obligation that its breach would deprive the other party of some appreciable right or cause him some actionable damage; and where a written contract for the sale of lumber did not provide that the price was to be paid in H. county, or provide where the lumber was to be delivered, merely providing that the seller should pay the freight to a point in that county, there was no obligation to be performed in H. county which was breached by the buyer's refusal to order and receive the remainder of the lumber, whether the contract of sale be considered as executed or executory; the refusal to pay the full contract price being the only material obligation breached in the first instance, and the seller's measure of damages not being affected by such refusal, if the contract was executory. *Ogburn-Dalchau Lumber Co. v. Taylor (Tex.)* 126 S. W. 45, 52.

Under Burns' Ann. St. 1901, § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all the conditions on his part, an allegation that plaintiff fully performed all the obligations required of her was a sufficient compliance; for, while "obligation" and "condition" are not synonymous terms, the effect of a valid condition is to impose upon the party to whom it applies the obligation of performance. *Security Accident & Sick Ben. Ass'n v. Lee*, 66 N. E. 745, 160 Ind. 249.

In an action on notes, defendant interposed a counterclaim for damages through violation of instructions by plaintiff's former firms as factors, alleging that plaintiff assumed and agreed to pay the "obligations" of such firms. Held, that while the word "obligations" has been limited on the one hand to sealed instruments of a certain kind only and extended on the other to include all legal duties, though as commonly used it im-

piles no more than a cause of action evidenced by a writing, and would not extend to an unliquidated liability sounding in tort, it would on demurrer be assumed that the pleader used the word in its larger sense, and the remedy for indefiniteness being by motion under Code Civ. Proc. § 546, the counterclaim would be held to state a cause of action on contract. *Carroll v. Sharp*, 122 N. Y. Supp. 694, 697, 67 Misc. Rep. 254.

Rev. Codes, § 4965, defines a "contract" as an agreement to do or not to do a certain thing. Section 4966 provides that to a contract there should be parties capable of contracting, their consent, a lawful object, and a sufficient cause of consideration. Section 4892 defines an "obligation" as a legal duty by which a person is bound to do or not to do a certain thing. Section 4893 provides that an obligation arises either from the contract of the parties or by operation of law. Section 6446 provides that an action upon a contract, account, or promise not founded upon an instrument in writing must be commenced within five years. Section 6447 provides that an action upon an obligation or liability not founded upon an instrument in writing other than a contract, account, or promise must be commenced within three years. Defendant, acting as agent to sell real property to plaintiff, received \$5,000 on the purchase price. The sale was not completed, and but \$4,000 was returned to plaintiff. Held, in an action for the balance that the terms "contract" and "obligation," as used in sections 6446 and 6447, were defined by sections 4965, 4966, 4892, and 4893, and as there was no contract between the parties for the return of the money an action to enforce its return was not an action upon a contract as defined by the Codes, or as used in the statute of limitations, but the duty to return the money was an "obligation" or legal duty, and the action being upon an obligation, not founded upon an instrument in writing within the statute of limitations, and not being brought within three years, was barred. *Schaeffer v. Miller*, 109 Pac. 970, 973, 41 Mont. 417, 137 Am. St. Rep. 746.

#### Agreement in writing

The words "obligation executed," as used in P. L. 1902, p. 459, prohibiting any corporation from pleading usury on any obligation executed by it, refers to corporate obligations such as bonds, mortgages, and the like, and does not apply to an agreement to pay a usurious commission to an agent. *Mazarin v. Hudson County Real Estate & Building Co.*, 76 Atl. 322, 323, 80 N. J. Law, 35.

#### Check

A bank check is not an "obligation for the payment of money," within the legal meaning of such term as used in Rev. St. § 5451, providing for the punishment of bribery of United States officers. The definitions of the word "check" as given in 1 Bouv.

Law Dict. 225, 1 Abb. Law Dict. 214, 2 Daniel, Neg. Inst. (4th Ed.) § 1566, Bish. St. Crimes (2d Ed.) p. 299, § 328, and *People v. Howell* (N. Y.) 4 Johns. 301, do not support the proposition that a "check" is an "obligation for the payment of money," within the meaning of the statute. The definitions of the word "obligation" as found in 2 Bouv. Law Dict. 254, Whart. Law Dict., 2 Abb. Law Dict. 193, *Strong v. Wheaton* (N. Y.) 38 Barb. 616, *Crandall v. Bryan* (N. Y.) 15 How. Prac. 48, *Rippon's Ex'rs v. Townsend's Ex'rs* (S. C.) 1 Bay, 445, and *Basehore v. Rhodes*, 85 Pa. 44, are not sufficiently broad to cover the case of a "check." A "check" is a representation by the drawer that he has money on deposit with the drawee subject to his order. The law implies a consideration for the check, and a promise on the part of the drawer to pay the amount of the check in case it is not paid or accepted by the bank or banker on which it is drawn. The giving of a check is not the creation of an obligation, but is merely the admission by the drawer of the existence of an obligation to pay a certain sum of money. If payable to bearer, or to the order of the payee, it is negotiable and passes by delivery or indorsement; but the check imposes no obligation on the drawee to pay the same, at least as between the drawee and payee; but if the bank refuses to pay the check, having funds with which to pay the same, the payee cannot maintain an action in law or in equity against the bank unless the bank has accepted the check. A check is neither a draft or bill of exchange, although it has many of the features of a bill of exchange and some of the features of a draft. It is not a bond or a promissory note. It is not a contract, for it contains no promise by the drawer to any person. *United States v. Green*, 136 Fed. 618, 645, 650 (citing *Bull v. First Nat. Bank*, 8 Sup. Ct. 62, 123 U. S. 110, 111, 31 L. Ed. 97; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. [77 U. S.] 604, 19 L. Ed. 1008; *Chapman v. People*, 39 Mich. 357, 359; *In re Richter*, 100 Fed. 295, 297; *U. S. v. Royall*, 3 Cranch, C. C. 618, 27 Fed. Cas. 906; *Elsasser v. Haines*, 18 Atl. 1095, 52 N. J. Law, 10; *Sinton v. Carter County*, 23 Fed. 535, 537, 538; *Regina v. Reed*, 8 Carrington & Payne, 623; *Merchants' Nat. Bank v. State Bank*, 10 Wall. [77 U. S.] 604, 19 L. Ed. 1008; *Bull v. First Nat. Bank*, 8 Sup. Ct. 62, 123 U. S. 110, 111, 31 L. Ed. 97; *People v. Howell* [N. Y.] 4 Johns. 296, 301).

#### Debt or liability

Obligation as debt, see Debt.

Rev. St. Ohio 1892, § 3300, authorizes any railroad company to purchase a railroad constructed by another company, and declares that after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion, and operation of such railroad, and shall be subject to all the duties,

"obligations," and restrictions of the former company. Held, that a claim for breach of a contract to transport plaintiff's stone for a specified rate, existing against a railroad company whose line was purchased by defendant, was not an "obligation" which defendant was bound to perform under such section; defendant never having agreed to assume such liability. *Rice v. Norfolk & W. Ry. Co.*, 153 Fed. 497, 498, 82 C. C. A. 447.

Where testator paid the secured debt of his insane nephew in order to preserve the security for the nephew in case he regained his reason, the nephew's liability to reimburse testator was an "obligation" within Rev. St. 1909, § 1889, declaring that actions on contracts, obligations, or liabilities, express or implied, shall be barred in five years, and hence an action to enforce testator's right to subrogation must be brought within that time. *Petty v. Tucker*, 148 S. W. 142, 144, 166 Mo. App. 98.

Rev. Codes 1899, § 5047, relating to attachment, defines "debtor" as one who by reason of an existing obligation has or may become liable to pay money to another, whether such liability is certain or contingent, and, so defined, the term "debtor" has its usual signification; that is, one from whom a debt is due, using the word according to its common meaning. Section 3782 defines an "obligation" as a legal duty by which a person is bound to do or not to do a certain thing. The several sections quoted make it plain that the Legislature has broadened the common meaning of the words "debtor" and "creditor," so as to include all persons from whom or to whom obligations are due, whether arising from contract or imposed by law; but none of these provisions define the term "debt," or furnish ground for the contention that "debt" and "obligation" are synonymous. It will be conceded that the common and ordinary meaning of the term "debt," in legal acceptance of the term, is an obligation resting upon contract, either express or implied. Under the statutory definitions of a debtor, it is not necessary to owe a debt. It is sufficient if one owes an obligation imposed by law. Every debt, however, is an obligation; but every obligation is not a debt. "Obligation" is the broader term; "debt," the narrower. The term "obligation" includes all debts. The term "debt" does not include all obligations, but only that particular kind of obligations known as debts. The statement, therefore, that the Legislature has specifically defined the term "debt," and that the term "debt" is synonymous with the word "obligation," is not sustained by the statute. *Sonnesyn v. Akin*, 97 N. W. 557, 560-563, 12 N. D. 227.

#### **Deed or sealed instrument**

Under Rev. Code 1852, amended to 1893, p. 745, c. 99, § 12, providing that to an obligation for the payment of any sum not

exceeding \$200 there may be an extra warrant, duly executed, authorizing any justice of the peace to enter judgment thereon by confession, the word "obligation" imports an instrument under seal, as does the warrant; and hence a note and warrant attached, neither of which were under seal, do not give a justice authority to enter judgment by confession. *Slaughter v. Provident Sav. Bank of Preston, Md. (Del.)* 80 Atl. 243, 244, 2 Boyce, 333.

#### **Duty as obligation**

See Duty.

#### **Enforceable obligation**

A promise founded upon a good consideration rendered at the time is obligatory and enforceable. A loan of money and simple contract debts are familiar instances of the kind. The promise to repay the money or to discharge the debt becomes binding and obligatory by reason of the promisor having received a consideration for making it. When, however, a promise, by whatsoever reason, has become binding, it is more aptly termed an "obligation." But a promise of material import will support a counter promise, and vice versa. When mutually entered into, they operate one as a consideration for the other; thus constituting an agreement binding and obligatory upon both parties. Where the agreement is wholly executory, it is essential that the obligation be mutual; else there is no consideration for its support, and it is but a mere nudum pactum. *Livesley v. Johnston*, 76 Pac. 948, 948, 45 Or. 30, 65 L. R. A. 783, 106 Am. St. Rep. 647.

#### **Liability enforceable against homestead**

The meaning of the word "obligations" as used in Const. 1885, art. 10, § 1, providing that an exemption of a homestead shall not apply to obligations contracted for the purchase of the property or for improvements thereon, means a debt contracted to be paid, or a duty to be performed by the purchaser as a consideration of the purchase. *Platt v. Platt*, 39 South. 536, 537, 50 Fla. 594 (quoting and adopting definition in *Whitaker v. Elliott*, 73 N. C. 186, and citing *Fox v. Brooks*, 88 N. C. 234).

A loan to the owner of a homestead, to pay a note due for the purchase money of the homestead, the lender taking the owner's note, with an indorsement of a third person thereon to whom he looks for payment, is not an "obligation," within a constitutional exception rendering a homestead liable for an obligation contracted for the purchase thereof. *Wilhelm v. Locklar*, 35 South. 6, 46 Fla. 575, 110 Am. St. Rep. 111.

#### **Should implying**

Should implying, see Should.

#### **Tax**

In reference to the payment of taxes, the terms "obligation" and "duty" are used



in two senses; the first being in reference to individuals, and the second being in reference to the sovereign imposing the tax. The matter of obligation to individuals arises from the legal or equitable relation of the parties; the matter of duty to the sovereign is fixed by the legislative enactments imposing the tax. In neither case is the measure of obligation fixed by the mere fact of an interest or an estate in the land. It is settled by the authorities that the party under obligation to pay taxes cannot acquire a title at a tax sale. *Shrigley v. Black*, 71 Pac. 301, 303, 66 Kan. 213 (dissenting opinion, quoting *Spratt v. Price*, 18 Fla. 289).

#### Tort

An order of the federal court directing its receiver of a railroad to restore to the railroad its property in his hands on the agreement of the railroad to assume "all lawful liabilities and obligations of" the receiver existing on a designated date and save the receiver harmless against the payment of any liabilities incurred by him, imposes on the railroad the payment of liabilities incidental to the receiver's operation of the road, including the liability for injuries to a passenger through the negligence of the receiver's servants; the word "obligations" meaning duties arising out of a contract or from an actionable tort, and the word "liabilities" including any form of legal obligation measured by money valuation, whether arising from contract, express or implied, from duty imposed by law or judgment of court, or in consequence of a tort. *Vandalla R. Co. v. Keys*, 91 N. E. 173, 175, 46 Ind. App. 353 (quoting 6 Words and Phrases, p. 4873).

#### OBLIGATION BY WHICH DEBT IS SECURED

Const. art. 13, § 1, permits provision, except in case of credits secured, for a deduction from credits of debts due to bona fide residents. Pol. Code, § 3617, subd. 3, provides that a mortgage, or other "obligation" by which a debt is secured, when land is pledged, shall, for the purposes of taxation, be deemed as interest in the land so pledged, and by subdivision 6 the term "credits" means those solvent debts not secured owing to the person assessed, and the term "debt" means those unsecured liabilities owing by the person assessed to bona fide residents and section 3628, provides that, in assessing solvent credits not secured, a reduction shall be made of debts due bona fide residents, and section 3650, subd. 15, provides that in entering assessments containing solvent credits, subject to deduction, the assessor must enter in the proper column the value of debts and deduct them therefrom. Const. art. 13, § 4, provides that a mortgage, or other obligation by which a debt is secured, shall, for the purpose of taxation, be deemed an interest in the property affected. Pol. Code, § 3627, contains the same provision. Held,

that a collateral security of credits by a loan on personalty was not a mortgage, etc., or "other obligation by which a debt is secured," within Const. art. 13, § 4, that section applying only to liens on land; nor was it a "mortgage or trust deed," within section 1, so that the person assessed on such credits was entitled to have his debts deducted therefrom; and Pol. Code, § 3629, subd. 6, directing the assessor to require each person assessed to show separately all solvent credits unsecured, is not applicable, not referring to the assessor's duty in making the assessment, but only prescribing the form of the taxpayer's return for the assessor's information. *Bank of Willows v. Glenn County*, 101 Pac. 13, 155 Cal. 352.

#### OBLIGATION FRAUDULENTLY INCURRED

A debtor, who by fraudulent representations procures an extension of time within which to pay a debt, fraudulently incurs an "obligation," within Rev. St. § 2731, subd. 4, and renders his property subject to attachment. *First Nat. Bank of Stevens Point v. Rosenfeld*, 28 N. W. 370, 371, 66 Wis. 292.

#### OBLIGATION OF CONTRACT

See Impairing Obligation of Contract.

"The 'obligation of a contract,' within the meaning of the Constitution is a valid subsisting obligation, not a contingent or speculative one." *Ochiltree v. Iowa Railroad Contracting Co.*, 21 Wall. (88 U. S.) 249, 252, 22 L. Ed. 546.

The "obligation of a contract" is its engaging quality, the attribute of binding force upon the parties to it. *State ex rel. Coleman v. Pullman Co.*, 90 Pac. 319, 321, 75 Kan. 664.

The "obligation of a contract" consists of the binding force of its stipulations upon those who make them, and depends upon the continued existence of the means of enforcing its stipulations; otherwise a contract would be without obligation, and would have only such effect as the parties should choose to give it, and a state law which unreasonably restricts the time to sue in its own courts to enforce the judgment of a sister state on an existing contract impairs the obligation of the contract and is invalid. *Lamb v. Powder River Live Stock Co.*, 132 Fed. 434, 439, 65 C. C. A. 570, 67 L. R. A. 558.

"The 'obligation of a contract' consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the

law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." "The obligation of a contract in the constitutional sense is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." *Harrison v. Remington Paper Co.*, 140, Fed. 385, 391, 392, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314 (quoting and adopting the definitions in *McCracken v. Hayward*, 2 How. [43 U. S.] 608, 611, 612, 11 L. Ed. 397, and *Louisiana ex rel. Ranger v. New Orleans*, 102 U. S. 203, 206, 26 L. Ed. 132); *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 115, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171 (adopting definition in *McCracken v. Hayward*, 2 How. [43 U. S.] 608, 611, 11 L. Ed. 397).

#### Remedy as part of

The remedy, where it affects substantial rights, is included in the terms "obligation of a contract," and the remedy cannot be altered so as to materially impair such obligation. *Welsh v. Cross*, 81 Pac. 229, 230, 148 Cal. 621, 106 Am. St. Rep. 63, 2 Ann. Cas. 796 (citing *Edwards v. Kearzey*, 96 U. S. 600, 24 L. Ed. 793).

"The 'obligation of a contract' includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement; that is the breath of its vital existence. Without it a contract, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. \* \* \* The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement." *Blakemore v. Cooper*, 106 N. W. 566, 569, 15 N. D. 5, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574 (quoting and adopting definitions in *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793).

"The 'obligation of a contract,' in the constitutional sense, is the means provided by

law by which it can be enforced, by which the parties can be obliged to perform it." *Ex parte Folsom*, 131 Fed. 496, 503; *Herman & Grace v. Board of Chosen Freeholders of Essex County*, 64 Atl. 742, 745, 71 N. J. Eq. 541 (quoting *Louisiana ex rel. Ranger v. New Orleans*, 102 U. S. 203, 206, 26 L. Ed. 132). Thus a constitutional amendment intended to impair the means provided by law for the payment of municipal bonds is obnoxious to the federal Constitution. *Ex parte Folsom*, 131 Fed. 496, 503 (quoting and adopting definition in *Louisiana ex rel. Ranger v. New Orleans* 102 U. S. 206, 26 L. Ed. 132).

#### OBLIGATION OF UNITED STATES

United States treasury checks, or orders issued for interest accrued upon registered bonds of the United States, where intended for immediate payment, may be taxed by a state, in the hands of the owner, without violating Rev. St. U. S. § 3701, exempting "obligations of the United States" from state taxation. *Hibernia Savings & Loan Society v. City and County of San Francisco*, 26 Sup. Ct. 265, 266, 200 U. S. 310, 50 L. Ed. 495, 4 Ann. Cas. 934.

#### OBLIGATORY WRITING

See Writing Obligatory.

What constitutes a writing, see Writing—Writings.

#### OBLIGEE

As creditor, see Creditor.

#### OBLITERATE—OBLITERATION

##### OBLITERATED CORNER

Section 2 of a circular of the United States General Land Office relative to the restoration of lost or obliterated corners defines an "obliterated corner" as one where no visible evidence remains of the work of the original surveyor in establishing it; and defines a "lost corner" as one, the position of which cannot be determined beyond reasonable doubt, either from original or reliable marks or reliable external evidence. *Craven v. Lesh*, 126 Pac. 774, 775, 22 Idaho, 463.

#### OBSCENE—OBSCENITY

The word "obscene," when used, as in the statute, to describe the character of a book, pamphlet, or paper, means containing immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt the minds of those into whose hands the publication might fall, whose minds are open to such immoral influences. *United States v. Moore*, 129 Fed. 159, 161 (citing *United States v. Clarke*, 38 Fed. 732).

The word "obscene" means "offensive to senses; repulsive; disgusting; foul; filthy; offensive to modesty or decency; impure; unchaste; indecent; lewd." *Holcombe v. State*, 62 S. E. 647, 648, 5 Ga. App. 47.

In Rev. St. § 3893, as amended in 1888, making it a misdemeanor to mail any obscene writing, the word "obscene" should be given fully as broad a significance as it had at common law. *Knowles v. United States*, 170 Fed. 409, 412, 95 C. C. A. 579.

A letter held not to contain matter which was "obscene, lewd or lascivious," within the meaning of Rev. St. § 3893, so as to render its mailing an indictable offense thereunder. *United States v. O'Donnell*, 165 Fed. 218, 220.

The word "vulgar," as used in the act of May 6, 1893 (Gen. Laws, p. 177, c. 121), as amended by the act of April 27, 1901 (Gen. Laws, p. 314, c. 136), requiring a bond by liquor dealers to keep an orderly house, and providing that it must not contain any vulgar or obscene pictures, conveys such meaning as, with its companion word "obscene," will accomplish the purpose of the statute, which was to prevent the exhibitions in saloons of immoral and indecent pictures. The word "obscene" in the statute is not limited to pictures suggestive of lewdness or lasciviousness. An instruction defining "obscene" as "offensive to chastity and decency, impure, expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed," is erroneous. *Raley v. State*, 105 S. W. 342, 344, 47 Tex. Civ. App. 426.

#### Insulting language

A remark to a married woman; "Look me in the eye. Are you satisfied with the man you married?"—will not sustain a conviction for using "obscene and vulgar language" in the presence of a female, where there is nothing in the evidence to indicate that the remark was intended to convey an obscene and vulgar meaning. *Roberts v. State*, 47 S. E. 511, 512, 120 Ga. 177.

The phrase "obscene and vulgar language," as used in Pen. Code 1895, § 396, making a person who shall use obscene and vulgar language in the presence of a female guilty of a misdemeanor, includes any foul words which would reasonably offend the sense of modesty and decency of a woman in whose presence the words are spoken, under all the circumstances of the case. *Holcombe v. State*, 62 S. E. 647, 648, 5 Ga. App. 47.

"Language" is a generic term, and includes any words or speech by which thought may be conveyed, and language may be "obscene and vulgar" when used in the presence of a female without the use of a single word which could be intrinsically classified as being obscene and vulgar. *Morris v. State*, 65 S. E. 58, 59, 6 Ga. App. 395.

#### Sexual impurity

As used in Rev. St. § 3893, declaring every obscene, lewd, or lascivious book, pamphlet, print, or other publication of an indecent character, or notices giving information for obtaining such publications, to be

nonmailable matter, and prescribes a punishment for the use of the mails to transmit or circulate the same, the word "obscene" signifies that form of immorality which has relation to sexual impurity, having the same meaning as is given them at common law in prosecutions for obscene libel. *Hanson v. United States*, 157 Fed. 749, 750, 85 C. C. A. 325.

## OBSCURE

"Obscure" means not clear, full, or distinct; clouded; imperfect. "Obscurement of reason" is not synonymous with "dethronement of reason" as a definition of "heat of passion." *Dillon v. State*, 119 N. W. 352, 356, 137 Wis. 655, 16 Ann. Cas. 913.

### OBSCUREMENT OF REASON

Dethronement of reason distinguished, see Dethronement of Reason.

## OBSERVE

The word "observe" is defined to mean "to notice with care; to be on the watch respecting." An employé has the right to assume that a machine is safe, and is chargeable with notice of dangers or defects that are plain and obvious to view, but is not bound to make an inspection to ascertain if the machine is free from defects; that is, he is not required "to take notice with care" and "to be on the watch" for defects or imperfections, which would be implied from the use of the word "observe" in an instruction that the law required him to be observing, and that his failure to observe what he should have observed would defeat a recovery. *Rock Island Sash & Door Works v. Pohlman*, 71 N. E. 428, 430, 210 Ill. 138.

Where, by defendant's constitution, benefits were restricted to members in good standing who had paid all dues, and who faithfully observed the laws, rules, commands, and regulations then in force, or which might thereafter be added to the constitution, by-laws, and rules, and in taking his obligation of membership, without which admittance was impossible, decedent agreed in writing to abide by the constitution as it then was, or might thereafter be amended, the words "to observe" and "to abide by" meant to obey and to accept the consequences of, and, so far as amendments were concerned, were not restricted to amendments of those laws and rules as related entirely to disciplinary and social regulations, but extended as well to amendments affecting decedent's right to benefits. *Order of United Commercial Travelers of America v. Smith*, 192 Fed. 102, 104, 112 C. C. A. 442.

#### Sunday

Unless an individual ceases from labor on Sunday, he does not "observe" the day, within the meaning of Cr. Code, § 241, and if he does on every Sunday, or the seventh

day of the week, refrain from labor, he observes that day. *Ex parte Caldwell*, 118 N. W. 133, 135, 82 Neb. 544.

## OBSTACLE

### As obstruction of highway

The word "obstacle," as used in a statute making it a misdemeanor to cut or place a tree, brush, or other obstacle across a public road, so as to impede travel, and not remove the same within six hours, should be construed as referring to obstructions of a temporary character, which, if not willful, do not become criminal unless they remain for as long as six hours. *Central of Georgia Ry. Co. v. State*, 40 South. 991, 992, 145 Ala. 99.

## OBSTETRICS

As practice of medicine, see *Practice of Medicine*.

## OBSTINATE DESERTION

See, also, *Desertion*.

"'Obstinate' means determined, fixed, persistent." "Even if a wife deserts without cause, and afterwards realizes that she has acted hastily or foolishly, and would return if the way was opened for her, but the husband refrains from doing anything to induce her to return, for the purpose of making her absence a ground for divorce, her desertion is not 'obstinate,' and not, therefore, a ground for divorce." A husband is not bound to attempt to induce his wife to return, when it is clear any effort in that direction would be unavailing. *Hudson v. Hudson*, 51 South. 857, 858, 859, 59 Fla. 529, 29 L. R. A. (N. S.) 614, 138 Am. St. Rep. 141, 21 Ann. Cas. 278 (quoting and adopting definition in *Trall v. Trall*, 32 N. J. Eq. 231).

A desertion can only be adjudged "obstinate" within the statute relating to divorce when it has resisted such efforts or concessions as the party alleging desertion ought, under the particular circumstances, to have made to prevent it or to bring it to an end, though the conduct of the deserting party may be of such a nature that the desertion will be deemed obstinate without any effort on the part of the deserted party to prevent or terminate it. *Kipp v. Kipp*, 78 Atl. 682, 77 N. J. Eq. 585.

## OBSTRUCT—OBSTRUCTION

See *Lawful Obstructions*; *Temporary Obstruction*; *Wrongful Obstruction*.

See, also, *Obstacle*.

### Of due administration of justice

Since the United States commissioner, after having held a person accused to answer to the federal courts, has no further duty to perform in the matter, a subsequent

assault committed by such accused on the commissioner, induced by the latter's act, does not constitute an "obstruction of justice," within Rev. St. § 5399, providing for the punishment of every person "who corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice" in any court of the United States. *United States v. McLeod*, 119 Fed. 416, 418.

A bare attempt, without success, to induce a third person to do what he could to influence jurors in a pending case in a federal court, did not obstruct or impede the administration of justice, so as to constitute a contempt, punishable under Rev. St. § 725, under the rule that, to constitute such contempt, the act done by the accused must naturally and directly tend to such obstruction. As stated in *United States v. Seeley*, 27 Fed. Cas. 1010, "to 'obstruct,' independent of the acceptance the word has obtained in the criminal law, would seem to stand *ex vi termini* a direct and positive interposition, which prevented or tended to prevent the action of the officer or court in respect to a matter then to be proceeded in. 'Impede' must necessarily bear a similar import, and, if there be any discrimination between the two terms, it can only be that the same direct and positive interference may, without amounting to a complete obstruction, become an impediment to the action intended to be intercepted. The intention of the Legislature to give these terms an application only to direct acts of violence or menace is inferable from the construction that the endeavor is made equally criminal with the entire completion of the purpose. An endeavor to obstruct or impede, etc., by threats or force, would necessarily imply the effort to put forth some act which in its natural, if not necessary, consequence must be attended with an obstruction, and with a forced and compelled interruption of further progress in the administration of justice." *United States v. Carroll*, 147 Fed. 947, 953 (citing *United States v. Bittinger*, 24 Fed. Cas. 1149; *Ex parte McRae*, 77 S. W. 211, 45 Tex. Cr. R. 285).

### Of highway

As injury to property, see *Injury to Property*.

As public nuisance, see *Public Nuisance*.

The term "obstruction," used with reference to a street or highway, means the placing of obstacles or impediments in the way, so as to prevent free passage along it and render it difficult for travel. *People v. Eckerson*, 117 N. Y. Supp. 419, 422, 133 App. Div. 220.

A street railway company's act in permitting its cars to stand upon its tracks for a reasonable length of time does not constitute an "obstruction of a highway." *Pe-*

land v. United Traction Co., 95 N. Y. Supp. 498, 500, 107 App. Div. 561.

An "obstruction" is a blocking up; filling with obstacles or impediments; impeding; embarrassing or opposing the passage along and over a street. *Meservey v. Gulliford*, 93 Pac. 780, 786, 14 Idaho, 133 (citing *Chase v. City of Oshkosh*, 51 N. W. 560, 81 Wis. 313, 15 L. R. A. 553, 29 Am. St. Rep. 898; 6 Words and Phrases, p. 4891).

An "obstruction" is an obstacle in the way, or an impediment or hindrance which impedes, embarrasses, opposes, or interferes with the free passage along the highway. A petition in an action for damages for the removal of a cattleway across a public highway, which alleges that the cattleway was not a direct obstruction, does not negative the inference that it was an obstruction within Code Supp. 1907, § 1560, requiring the road supervisor to remove all obstructions in the road. *Davis v. Pickerell*, 117 N. W. 276, 277, 139 Iowa, 186.

A "street" is a public way, from side to side and end to end, so that any private use which in any degree hinders or prevents its free use as a public way to its full extent is an "obstruction" or "incumbrance" within the meaning of the law. *Lacey v. City of Oskaloosa*, 121 N. W. 542, 544, 143 Iowa, 704, 31 L. R. A. (N. S.) 853.

An "obstruction" is merely matter out of place, and that which may be a stepping stone in a position where it is needed and may be used as such becomes an obstruction when occupying a place intended for other use, and where it is not needed and cannot be so used. Where a pavement has been laid, the asphalt surface of which lays smoothly down to the curb, a block of stone placed within the curb is an "obstruction," and becomes a nuisance. *McCormack v. Robin*, 52 South. 779, 781, 126 La. 594, 139 Am. St. Rep. 549.

An embankment in a street dedicated to public travel and traveled as a public street, is an "obstruction," and under the Vrooman Act (St. 1885, p. 160, c. 153) the superintendent of streets is liable for failing to take steps to protect against the danger to public travel caused thereby. *Merritt v. McFarland*, 88 Pac. 369, 370, 4 Cal. App. 390.

The placing of a fence across a public road constitutes an "obstruction," within Rev. Code 1852, as amended 1893, p. 501, c. 60, § 31, declaring that, if any person shall obstruct a public road, he shall be deemed guilty of a misdemeanor. *State v. Southard* (Del.) 66 Atl. 872, 373, 6 Pennewill, 247. But a fence permitted by a city to remain across an unopened street after the land had been acquired for street purposes is not an illegal "obstruction," so as to entitle one to recover damages caused by surface flood water turned back over his land by the fence; such permission being expressly authorized by the

city's charter. *Parsons Bros. v. City of New York*, 95 N. Y. Supp. 131, 133, 107 App. Div. 324.

A barbed-wire fence intentionally placed nearly lengthwise the traveled portion of a public highway; *Bartlett v. Beardmore*, 46 N. W. 494, 497, 77 Wis. 85; or a structure within the limits of the highway which impedes or seriously inconveniences travel thereon, constitutes an "obstruction" within the meaning of St. 1898, § 1326, imposing a penalty therefor, *Jones v. Tobin*, 115 N. W. 807, 808, 135 Wis. 236; and a post set between two large stones already in a highway may be an "obstruction" within this statute. *Neale v. State*, 120 N. W. 345, 346, 138 Wis. 484.

Any object unlawfully placed within the limits of a highway is an "obstruction," if it impedes or seriously inconveniences public travel or renders it dangerous, and it is unnecessary that such object should stop travel in order to be an obstruction. *Jennings v. Johonnott*, 135 N. W. 170, 171, 149 Wis. 660.

The trees, grass, and flowers growing on park strips maintained by a municipality between the curbing and the sidewalk and proper barriers placed around them to protect them are not "obstructions" or nuisances within the meaning of the statute requiring the city council to keep the streets of a municipality open, in repair, and free from nuisance. *Village of Barnesville v. Ward*, 96 N. E. 937, 938, 85 Ohio St. 1, 40 L. R. A. (N. S.) 94, Ann. Cas. 1912D, 1234.

A step 4½ inches high and 10½ inches wide, close up to a building in front of which it is placed, and used as a means of access to it from the street, does not constitute an unlawful "obstruction," and does not interfere to an appreciable or unreasonable extent with the use of the sidewalk, so as to sustain an action by a pedestrian injured by stumbling over it. *City of Richmond v. Lambert*, 68 S. E. 276, 111 Va. 174, 277, 28 L. R. A. (N. S.) 380.

The lawful change of the grade of a street is not a "use or obstruction of the street," within the meaning of Laws 1889, c. 255, making municipal and other corporations liable for the use or obstruction of streets, so as to materially interfere with their usefulness as such, etc. *Smith v. Eau Claire*, 47 N. W. 830, 831, 78 Wis. 457.

#### Of navigation

A barge negligently moored to the bank of a canal, which because of such negligence floats out into the channel of the canal causing a collision with a passing vessel, is clearly within the meaning of the term "obstruction." *Gillikin & Gaskell v. Lake Drummond Canal & Water Co.*, 60 S. E. 654, 147 N. C. 39.

Act Cong. March 3, 1899, c. 425, § 9, 30 Stat. 1151 relating to the "obstruction" of navigable streams, declares that it shall not be lawful to construct or commence the con-

struction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States, unless the consent of Congress to such structures shall have been obtained, and until the plans for the same shall have been approved by the chief of engineers and the Secretary of War, with certain provisos. Section 10 prohibits the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. Held, that section 10 not only includes the kind of structures specifically referred to in section 9, but all others that may be an obstruction to the navigable capacity of the waters of the United States, without reference to whether the obstruction is but slight, and only temporary. *Hubbard v. Fort*, 188 Fed. 987, 997.

#### Of officer

Pen. Code 1895, § 306, making it a misdemeanor to "obstruct," resist, or oppose an officer serving or attempting to execute any lawful process, implies force as a necessary element of the resistance. *Moses v. State*, 64 S. E. 699, 6 Ga. App. 251.

An officer was sent into a saloon to arrest one S., who was in a fight. The defendant, a one-armed man, who had known the officer for some 30 years and was a friend of the belligerent, put his arm on the officer's shoulder, and told him to let S. go, and he would take him home and take care of him. The officer struck the defendant, who then desisted from any further act. An information was filed, alleging that the defendant had unlawfully obstructed an officer in the discharge of his duty. Penal Code, under which this information was based, provides that any one who willfully delays or obstructs an officer in the discharge of his duty is guilty of a misdemeanor. Held, that acts of the defendant did not constitute an obstruction of the officer, as "obstruction" usually means "to impede, hinder, or stop." *State v. Knudson*, 131 N. W. 400, 401, 27 S. D. 400.

#### Of prosecution of action

The term "obstruct or hinder" in the statute of limitations imports resistance and obstruction of rights, and unless acts complained of by a creditor are in point of fact such as would hinder or prevent him bringing suit, notwithstanding his desire to do so, they cannot properly be said to obstruct or hinder him. *Ky. St. 1903, § 2552*, provides that if judgment be rendered for plaintiff in any case provided in the four preceding sections (which refer only to sureties), and the same be afterward reversed or arrested, or if the judgment be obstructed by appeal, supersedeas, or injunction, the time of such obstruction shall also be disallowed, does not apply where an appeal is made in an action against the principal, and so does not suspend

the statute of limitations in favor of the sureties. *McGovern v. Rectanus (Ky.)* 105 S. W. 965, 967, 14 L. R. A. (N. S.) 380 (citing *Reid v. Hamilton*, 18 S. W. 770, 92 Ky. 619; *Coleman v. Walker*, 3 Metc. [60 Ky.] 68, 77 Am. Dec. 163; *Kennedy v. Foster's Executor*, 14 Bush [77 Ky.] 479).

#### Of railroad track or train

A statute which requires warnings to be given by a locomotive when an "obstruction" appears on a railroad track extends to persons appearing on the track, or so near thereto as to be within striking distance. One does not pass "beyond striking distance," so as to absolve the railroad from the duty of stopping the train, so long as he was still so close to the track that, having due regard for the instinct of self-preservation and the involuntary movements of the body, there was still a reasonable probability or likelihood that he might fall or be thrown against the side of the engine or train as it passed him. *Southern Ry. Co. v. Sutton*, 179 Fed. 471, 474, 103 C. C. A. 51.

The word "obstruction," in Code 1907, § 5473, requiring a railroad engineer, on perceiving any "obstruction" on the track, to stop the train, is not to be construed in the sense of "object," and the statute does not require the stoppage of a train on the engineer perceiving any object on the track, as a chicken, turkey, or buzzard. *Smith v. Central of Georgia Ry. Co.*, 51 South. 792, 793, 165 Ala. 407.

The condition of the atmosphere and the hour of the day do not constitute "obstructions," such as will excuse a traveler from exercising his sense of sight and hearing in crossing a railroad track. On the contrary, the darker it is, the more careful he should be. *Morrow v. North Carolina R. Co.*, 59 S. E. 158, 159, 146 N. C. 14.

An object does not appear on the "road," within Shannon's Code, §§ 1574, 1575, requiring railroads to maintain a lookout on the locomotive, and when any person or other "obstruction appears on the road" to sound the alarm whistle, etc., until the object is near enough to be struck by a passing train. *Rogers v. Cincinnati, N. O. & T. P. Ry. Co.*, 136 Fed. 573, 574, 69 C. C. A. 321 (citing *Louisville, N. & G. S. R. Co. v. Reidmond*, 11 Lea [79 Tenn.] 205).

#### Of sidewalk

Plaintiff was injured by falling over a plank left by a city contractor across a sidewalk. The court charged that plaintiff in the complaint alleged that defendants had notice of the obstruction in time to have prevented the injury to plaintiff, that notice of the condition might be either actual or constructive, and might be inferred from the length of time the obstruction existed, together with all the other facts and circumstances concerning the same, and in determining

whether defendants knew of the obstruction the jury should take into account when it was placed, the length of time it existed, the condition of the street and sidewalk as to whether there was much or little travel, or otherwise, and from all the facts determine whether defendants knew it. Held, that the court did not err in referring to the plank as an "obstruction," since anything which to any extent obstructs the free use of a street or sidewalk is an "obstruction" though every obstruction is not of such a character as to render the street or sidewalk unsafe for use, and that the instruction was not misleading as either assuming or intimating that the obstruction was dangerous or of such a character as to indicate that defendants were negligent in placing it there or permitting it to remain. *City of Evansville v. Pifer* (Ind.) 100 N. E. 110, 112.

## OBTAIN

"Obtain" is defined as follows: "I. trans. 1. To get; procure; secure; acquire; gain; as to obtain a month's leave of absence; to obtain riches. \* \* \* II. intrans. 1. To secure what one desires or strives for; prevail; succeed." An indictment under the federal statute for mailing a letter giving information where and how and of whom and by what means articles and things designed and intended for the procuring of an abortion might be "obtained" states an offense, where it sets out a letter written to defendant inquiring for some medicine or other means for accomplishing such result, and a letter, alleged to have been mailed by defendant in reply, which, when read in connection with the letter of inquiry, in effect offers for a stated consideration to effect the desired result by some treatment or operation, although the particular means is not specified; the word "thing," as used in the statute, being a comprehensive term, which includes any kind of treatment or operation. *United States v. Somers*, 164 Fed. 259, 262 (quoting and adopting definition in Cent. Dict.).

### As acquire possession of

"Obtain" means "to get hold of by effort," "to get possession of," or "to have in possession." On an indictment for obtaining money under false pretenses, it appeared that defendant, in Pennsylvania, to establish a financial credit, made written statements to a company in New York, which relied on the same, and accepted his order for goods, and delivered them to a carrier, and they were received in Pennsylvania by the person making the order. Held that, such statements being false and fraudulent, defendant was guilty of "obtaining" goods in Pennsylvania under false pretenses. *Commonwealth v. Schmunk*, 56 Atl. 1068, 1069, 207 Pa. 544, 99 Am. St. Rep. 801.

## OBTAIN VALIDITY

As used in Rev. St. 1909, § 1275, providing that before any school bond "shall obtain validity or be negotiated, such bond shall first be presented to the state auditor, who shall register the same," the term "obtain validity" means to become clothed with validity as a present and subsisting obligation; and the term "negotiated" means sold and put in circulation by delivery in consummation of the sale; and officers of a school district, after bonds have been voted, may advertise for bids and accept a bid for bonds before they have been registered by the state auditor; and hence such acts of the officers furnish no reason for refusing registration. *State ex rel. Carrollton School Dist. v. Gordon*, 133 S. W. 44, 47, 231 Mo. 547.

## OBTAINABLE

The word "obtainable," in a contract providing that scrip exchangeable for tickets will not be honored for passage on trains except from stations where tickets are not obtainable, cannot be given its full natural meaning, but must be restricted to mean that scrip cannot be used for fare on trains, except from stations where tickets are not kept on sale or for exchange for scrip. *Kozminsky v. Oregon Short Line R. Co.*, 104 Pac. 570, 572, 36 Utah, 454, 24 L. R. A. (N. S.) 758.

## OBTAINING CREDIT ON FALSE STATEMENT

A financial statement, made by a bankrupt to a mercantile agency in response to a request therefor stating that "this information is asked for and received in strict confidence for commercial use only," is not within Bankr. Act July 1, 1898, c. 541, § 14b (3), as added by Act Feb. 5, 1903, c. 487, § 4, making it a ground for refusal of a discharge if a bankrupt has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit," as respects a creditor who sold goods to the bankrupt more than a year after such statement was made, and such creditor has no standing to oppose a discharge under such provision. *Novick v. E. P. Reed & Co.*, 192 Fed. 20, 112 C. C. A. 408.

## OBTAINING PROPERTY BY FALSE PRETENSE

See False Pretense.

## OBVIOUS

The word "obvious" means easily discovered, plain, manifest, evident. *The Sikh*, 175 Fed. 869, 871; *State v. Kauffman*, 108 N. W. 246, 20 S. D. 620 (quoting Webster's Dict.).

A charge that the rules of a railway company are to be strictly construed against the company, and will not be held to en-

join upon an employé a particular duty with respect to a particular subject, unless such duty be comprehended within the clear and "obvious" meaning of the rule itself, and that the violation of a rule by an employé will not forfeit his right to recover unless there has been a negligent violation of the rule; according to its plain and "obvious" meaning, nor unless such violation of the rules has been a contributing cause for his injury, is not erroneous because of the use of the word "obvious," which is a pretty strong sounding word. Its chief juridic employment is by judges of courts of review, who generally pronounce obvious those propositions which they are able to support with but sparse array of precedent and which they are unwilling to put forth as an original dictum without the supporting influence of some strong, impressive, faith-bearing word; for a proposition weak in substance is oft aided in appearance by the strength of sonancy, and "obvious" is a sonant word. However, this word is not absolutely interdicted to the trial judges; and in proper cases they may use it cautiously, if the facts are sufficient to justify it. *Georgia, F. & A. Ry. Co. v. Sasser*, 61 S. E. 505, 508, 4 Ga. App. 276.

The word "obviously," as used in the rule that the employer will not discharge his duty by furnishing the ordinary place or appliance, if such ordinary place or appliance be obviously dangerous, does not apply to any person, no matter how unskilled or ignorant, but to the ordinarily careful employer who is charged with the duty of furnishing the place or appliance, or to a person possessing equal skill and judgment and opportunity for examination as such an employer. *Yazdewski v. Barker*, 111 N. W. 689, 690, 691, 131 Wis. 494, 120 Am. St. Rep. 1059.

The word "obviously," before the word dangerous, in an instruction that, where an employé has two ways of performing a duty, one of which is dangerous and the other safe, and he knowingly and voluntarily, or through negligent ignorance, seeks the dangerous one, thereby bringing on himself an injury which probably would not have befallen him if he had selected the other one, merely emphasizes the notion that, to impute contributory negligence to the employé as a matter of law, the danger of the means or methods must have been known to him, or the circumstances must have been such that it ought to have been known to him, and the use of the word does not render the instruction erroneous. *Johnson v. Maletta*, 87 Pac. 447, 450, 34 Mont. 477.

### OBVIOUS DANGER

Exposure to, see *Exposure*.

Obvious risk of danger, see *Obvious Risks*.

### OBVIOUS DEFECT

See *Open and Obvious Defect*.

### OBVIOUS ERROR

The act of the board in making a gross increase in the aggregate valuation was an "obvious error" within Kirby's Dig. § 7003, providing that, where there has been an obvious error discovered in the assessment of personal property, the owner may have it adjusted upon proper showing to the county court. *Board of Equalization of Saline County v. Hughes*, 105 S. W. 577, 84 Ark. 347.

### OBVIOUS RISKS

An "obvious danger," with reference to the character of an employment, is one that is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety. *Hardy v. Chicago, R. I. & P. Ry. Co.*, 115 N. W. 8, 11, 139 Iowa, 314, 19 L. R. A. (N. S.) 997 (citing *Newbury v. Getchel & Martin Lumber & Mfg. Co.*, 69 N. W. 743, 100 Iowa, 451, 62 Am. St. Rep. 582; *Hanson v. Hammell*, 77 N. W. 839, 107 Iowa, 171).

"Obvious danger," as applied to assumption of risk by a servant, is that danger which would have been seen and observed by reasonably prudent men. *James Ramage Paper Co. v. Bulduzzi*, 147 Fed. 151, 154, 77 C. C. A. 393.

Stepping from a moving train, irrespective of the speed at which it was moving, is not, as a matter of law, an "obvious danger," within an accident insurance company's policy relieving the company from liability for death resulting from exposure to an obvious risk. *National Life & Accident Ins. Co. v. Lokey*, 52 South, 45, 47, 166 Ala. 174.

The term "obviously dangerous" means plainly dangerous. If a carrier's station platform is obviously dangerous, the carrier is guilty of the grossest negligence. *Randolph v. Chicago, M. & St. P. Ry. Co.*, 79 S. W. 1170, 1171, 106 Mo. App. 646.

A flagstone in a sidewalk 6 feet wide, which projected at the highest point 2½ inches above the other stones, and gradually decreased till it was level with the other stones at the outside of the walk, was not an "obviously dangerous" defect, rendering a city liable for injuries to one tripping and falling over it. *Davidson v. City of New York*, 117 N. Y. Supp. 185, 186, 133 App. Div. 352.

A clause in an accident policy limiting recovery, in case of death "due to unnecessary exposure, to obvious risk of injury or obvious danger," must be deemed to include all cases of exposure to unnecessary danger attributable to negligence on the part of the insured; and it is proper to charge the word "obvious," as used in the policy, means "appar-



ent," "perceivable," or whether or not a thing can be seen. *Price v. Standard Life & Acc. Ins. Co.*, 99 N. W. 887, 888, 92 Minn. 238.

An "obvious risk" is such as would instantly appeal to the senses of an intelligent person familiar with the business, and about which there can be no difference of opinion in the minds of intelligent persons; and it is not required that the servant make close scrutiny into all the details of the instrumentalities with which he deals to determine the risk involved. *Millen v. Pacific Bridge Co.*, 95 Pac. 196, 199, 51 Or. 538; *Gentzkow v. Portland Ry. Co.*, 102 Pac. 614, 619, 54 Or. 114, 135 Am. St. Rep. 821 (quoting and adopting definition in *Johnston v. Oregon S. L. & U. N. Co.*, 31 Pac. 283, 286, 23 Or. 94, 105, and citing and adopting *Stevens v. United Gas & Electric Co.*, 60 Atl. 848, 850, 73 N. H. 159, 163, 70 L. R. A. 119; *Bergin v. Southern New England Tel. Co.*, 38 Atl. 888, 70 Conn. 54, 39 L. R. A. 192; *Law v. Central Dist. Printing & Telegraph Co.*, 140 Fed. 558; *Anderson v. Inland Telephone & Telegraph Co.*, 53 Pac. 657, 19 Wash. 575, 41 L. R. A. 410; *Wood, Master & Servant*, 763).

Risks which are incident to the business must not be confounded with such as are denominated "obvious." The former sort comprises those which accompany or arise from the natural or usual method of conducting the particular business, and has more special relation to perils which attend the business generally, while the latter include such as are manifest as to the sense of observation, open, and readily discernible, whether they arise from the nature of the business, the particular manner in which it is conducted, or the use of defective and unsafe appliances. *New Omaha Thomson Houston Elec. L. Co. v. Rombold*, 106 N. W. 213, 218, 73 Neb. 259.

Laws 1902, p. 1750, c. 600, § 3, providing that an employe, by entering on or continuing in the employer's service, shall be presumed to have assented to the necessary risks of the employment, such risks including those inherent in the nature of the business, after the employer has exercised due care for the safety of employes, and complied with laws regulating such business, distinguishes between "necessary risk" and "obvious risk," which latter may be due to the master's failure to perform his duty. *Hurley v. Olcott*, 119 N. Y. Supp. 430, 435, 134 App. Div. 631.

In a dissenting opinion in *Logerto v. Central Bldg. Co.*, 108 N. Y. Supp. 604, 123 App. Div. 840, the term "obvious risk" is defined as such a risk "as is apparent, and it must be apparent to the person who is claimed to have assumed the risk." *Ward v. Edison Electric Illuminating Co.*, 108 N. Y. Supp. 608, 610, 124 App. Div. 22.

An instruction that a servant, in entering on his employment, "assumed all the ob-

vious and ordinary risks or dangers incident to the employment, and that, if the injury arose out of such obvious risks and dangers, defendant was not liable," was not improper for failure to separate "obvious and ordinary risks" from "the obvious and the ordinary risks"; the case having been tried on the theory that the risk was an ordinary one. *Thomas v. Boston & M. Consol. Copper & Silver Min. Co.*, 87 Pac. 972, 973, 34 Mont. 870.

## OCCASION

See Privileged Occasion; Special Occasion.

The word "occasion," as used in an averment in a pleading of estoppel that S. had full time, occasion, and opportunity in which to notify the plaintiff of a forgery, held to mean, not only time and opportunity, but such conditions and circumstances as required him to speak, or otherwise be forever estopped from denying his signature. *Shinew v. First Nat. Bank*, 95 N. E. 881, 883, 84 Ohio St. 297, 36 L. R. A. (N. S.) 1006, Ann. Cas. 1912C, 587.

The statute providing that any telegraph company within the state shall be liable for all damages "occasioned" by the negligence of their operators in receiving, copying, transmitting, or delivering messages, does not render telegraph companies liable for damages other than the proximate result of its negligence. The word "occasioned" is used with reference to settled rules of legal responsibility for breach of duty constituting actionable negligence. *Fisher v. Western Union Telegraph Co.*, 96 N. W. 545, 547, 119 Wis. 146.

"Webster defines 'occasion' as follows: 'To cause or to bring about by furnishing the condition or occasion needed for the action of a principal cause; to cause accidentally or incidentally, or simply to cause or bring about.'" A fire insurance policy provided that the company should "not be liable for loss caused, directly or indirectly, by invasion, \* \* \* or by order of any civil authority, or for loss or damage occasioned 'by or through \* \* \* earthquake.'" Held, that the words "directly or indirectly" did not apply to the provision respecting earthquake; that, construing such provision most strongly against the insurer, in accordance with the established rule, the word "occasioned" was equivalent to "caused," and related to the origin of the fire, and the provision exempted the company from liability for loss only where an earthquake was the immediate, direct, and proximate cause of the fire which destroyed the property. *Baker & Hamilton v. Williamsburgh City Fire Ins. Co.*, 157 Fed. 280, 283. See, also, *Williamsburgh City Fire Ins. Co. of Brooklyn v. Willard*, 164 Fed. 404, 406, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103.

Under a fire insurance policy which exempted the insurer from liability for any loss "occasioned by or through earthquake," there can be no recovery if it is shown by a preponderance of the evidence that if there had been no earthquake, and, but for the earthquake, the fire which destroyed the insured property would not have started, and a fire thus started by an earthquake in another building, which spread to and destroyed the insured property, is one occasioned "by or through earthquake" within the meaning of such provision. *Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co. of Brooklyn*, 157 Fed. 285, 286.

### OCCASIONAL DRINK

A life policy was issued on an application wherein insured stated that he had no daily habit as to the use of liquor, but took an occasional drink of whisky, and that he had always been in the habit of so doing. Insured drank more or less frequently for weeks at a time, or not at all. His intervals for drinking were not regular. He was never so intoxicated as to be incapable of doing business. Held, that insured's statements were not wilfully and intentionally false, and he could recover on the policy; the word "occasional" meaning occurring more or less frequently, but not at fixed or regular intervals. *Arlis v. Mutual Life Ins. Co. of New York*, 103 Pac. 50, 52, 54 Wash. 269.

An "occasional" glass of beer may mean anything from a glass once a month to one every 15 minutes, according to the capacity of the individual, or, perhaps, according to the "liberality" of his views. A statement in an application for life insurance that the applicant drinks a "glass of beer occasionally" is sufficient to suggest to a discreet person the advisability of further inquiry. *Biermann v. Guaranty Mutual Life Ins. Co.*, 120 N. W. 963, 965, 142 Iowa, 341.

### OCCUPANCY

See During Occupancy of Building.

In relation to building insured, see Unoccupied; Vacancy—Vacant—Vacate.

"Occupancy" does not necessarily include residence. Webster defines "occupancy" as "the act of taking or holding possession," and an "occupant" as "one who occupies or takes possession; one who has the actual use or possession, or is in possession of a thing." *Twiggs v. State Board of Land Com'rs*, 75 Pac. 729, 731, 27 Utah, 241.

### OCCUPANCY — OCCUPATION — OCCUPY (Of Land)

See Action for Use and Occupation;

Actual Occupant; Physical Occupancy. Ready for occupancy, see Ready.

"Occupation" is to hold or keep for use, to possess, to cover or fill. So to say that one occupies or has occupied land continu-

ously is tantamount to saying that he has or has had actual possession of the same. *Hall v. Roberts (Ky.)* 74 S. W. 199, 200 (citing *Webst. Dict.*).

The phrase "occupy and use," in a lease which binds the lessee to expend a certain sum for improvements on the premises, and which stipulates that in default of the payment of the rent the lessor may re-enter and "occupy and use" for its benefit all improvements thereon, shows that it was not intended that the improvements should be removed, or that they were in any manner severable from the land, and the improvements made by the lessee are part of the real estate. *In re Long Beach Land Co.*, 91 N. Y. Supp. 503, 506, 101 App. Div. 159.

### Actual occupancy or residence

"Occupied" implies actual possession, not constructive possession. A testator gave to his housekeeper for life the use of certain premises occupied by him. A portion of the premises was at the time of his death occupied by him as a residence, and a portion by a bank paying a monthly rental. The housekeeper acquired the use of the portion of the premises occupied as a residence only. *In re Handley's Estate*, 57 Atl. 755, 757, 208 Pa. 388.

A tract of 250 acres of timber land was "occupied," within Tax Law (Laws 1896, p. 801, c. 908) § 9, allowing land to be assessed as nonresident land only where there is not an owner or occupant of it residing in the tax district, and section 134, providing that the term "occupant" shall be construed to mean a person who has lawfully entered upon the land so occupied, and is in possession of the same to the exclusion of every other person, and that the term "occupancy" shall mean the actual, lawful and exclusive use and possession of such lands and premises by such an occupant, where the owners had marked its exterior lines by blazing away part of them, and left a larger quantity on the skids, and, at the time the assessors were on their annual rounds, were erecting on it a substantial shanty large enough to house them and their bark peelers. *Clark v. Kirkland*, 118 N. Y. Supp. 315, 319, 133 App. Div. 826.

The relator owned lots bordering on Lake Placid, on which it had built an inn, and also owned the greater parts of two lots situated in part on Moose Island in the lake and in part under the water of the lake, the parts of which nearest to the inn were from 2¼ miles to 2¾ miles distant, and which made, with the other lots, a fairly compact tract owned and cared for by the relator. The lots sold were connected with the inn and with relator's boathouse by the waters of the lake, and were used in connection with the tract of land for picnics and camping, and for the purposes of enjoyment by the

members of the Lake Placid Boat Club, and there were boat landings on the two lots, and relator had expended money in repairing and improving the approaches to the lots and had put up signs forbidding shooting, etc. Held, that "occupancy," as defined by Tax Law (Consol. Laws 1909, c. 60) § 134, did not require that the owner should build a house and reside upon the particular part of the lands sold for taxes, and that relator, upon the occupancy shown, was entitled to redeem the lots from a tax sale. *People ex rel. Lake Placid Co. v. Williams*, 129 N. Y. Supp. 767, 770, 145 App. Div. 34.

An owner of a preserve purchased additional land to straighten the boundary line thereof. The additional land was subsequently used in connection with the preserve. The owner's superintendent actually resided on the preserve, and controlled the same, including the additional land which was not inclosed, cultivated, or improved. The owner expended large sums in improving the other portion of the preserve, and also continuously kept domestic animals thereon. He also maintained on the premises metal notices warning persons against trespassing. The notices were placed along the boundary of the preserve, including the additional land. Held, to show an actual occupancy and possession by the owner of the entire premises, including the additional land within Tax Law (Consol. Laws, c. 60) § 134, defining an "occupant" as one who has lawfully entered on land and is in possession thereof to the exclusion of others, and "occupancy" as the actual, lawful, and exclusive use and possession of land by the occupant, and the owner was entitled to notice to redeem the premises from a tax sale. *People ex rel. Moynehan v. Gaus*, 118 N. Y. Supp. 756, 757, 134 App. Div. 80.

Under the Constitution, requiring occupancy as well as intention to create a homestead, intention without occupancy is insufficient to create a homestead, and there must be some acts which, coupled with intention, constitute the necessary occupancy. Where a widow purchased a vacant lot, which for three years she used only for the raising of vegetables, being without sufficient means to erect a house, there was no "occupancy" sufficient to entitle her to claim the lot as a homestead. *Ware v. Hall*, 101 N. W. 47, 138 Mich. 70, 67 L. R. A. 313, 110 Am. St. Rep. 301.

"To 'occupy' means to hold in possession; to hold or keep for use; as to occupy an apartment." Act Cong. Aug. 14, 1848 (establishing the territorial government of Oregon) § 1, contains the proviso that the title to the land, "not exceeding 640 acres, now occupied as missionary stations" among the Indian tribes in said territory, together with the improvements thereon, be confirmed and established in the several religious societies

to which said missionary stations respectively belong. Held, that such statute was not a grant certain of 640 acres to each religious society having a missionary station on public lands within such territory, but was a grant only of so much land as was actually occupied by such station, not exceeding 640 acres. *Bishop of Nesqually v. Gibbon*, 15 Sup. Ct. 779, 784, 158 U. S. 155, 168, 39 L. Ed. 931.

#### Operation of mine

"In the primary and most familiar sense of the word, 'occupy' is the equivalent of the word 'possess.' It implies the conception of permanent tenure for a period of greater or less duration." As used in a deed relating to the occupation of a coal bed, the word "occupy" is synonymous with "work" or "operate." *Hoysradt v. Delaware, L. & W. R. Co.*, 151 Fed. 321, 330 (citing *Lacy v. Green*, 84 Pa. 520).

#### Possession

As commonly used and understood, the word "occupation" is synonymous with "possession." *Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594, 599.

"Possession" does not imply "occupation." *United States v. De la Maza Arredondo*, 6 Pet. (31 U. S.) 691, 743, 8 L. Ed. 547.

"Possession" means actual control of property by physical occupation. *Collar v. Ulster & D. R. Co.*, 131 N. Y. Supp. 56, 60, 72 Misc. Rep. 274.

The word "possession," in *Wilson's Rev. & Ann. St. 1903*, § 4787, providing that an action may be brought by any person in "possession," by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest, is not equivalent to the word "occupancy," and one who temporarily vacates a homestead owned in fee simple, for the purpose of giving educational advantages to minor children, does not so abandon the possession as to forfeit his right to maintain an action to remove a cloud from the title. *Womble v. Pike*, 87 Pac. 427, 429, 17 Okl. 122.

The ordinary meaning of the word "possession" is the same as "occupancy." It is defined as the act of possessing; a having and holding or retaining of property in one's power or control. *Nathan v. Dierssen*, 79 Pac. 739, 740, 146 Cal. 63; *Iler v. Miller*, 111 N. W. 589, 590, 78 Neb. 675, 14 L. R. A. (N. S.) 289 (citing *Cent. Dict.*).

Mere occupancy or personal presence of complainant on the ground does not constitute such possession as to sustain an action of forcible entry, and a mere trespasser cannot by the very act of trespass immediately and without excuse give himself what the law understands by possession against the person whom he ejects. *Schwinn v. Perkins*,

78 Atl. 19, 21, 79 N. J. Law, 515, 32 L. R. A. (N. S.) 51, 21 Ann. Cas. 1223.

The words "occupation" and "possession" are frequently used synonymously, especially in leases and like instruments. Thus where a guaranty for the payment of rent recited that the landlord had exacted from the lessees a guaranty that they would pay the rent that might become due under the lease while they were "in the occupation" of the premises, and stipulated that the guarantor would, on default for such months as the lessees were "in occupation" of the premises pay the rent, it was held that, to make the instrument effective, the words "in occupation" will be construed to mean "in possession." *Woods v. Broder*, 113 N. Y. Supp. 335, 336, 129 App. Div. 122.

Where an indictment for burglary charged an entry without the consent of the occupant of a house, "occupancy" is equivalent to "possession," and embraced a chicken house on the premises of prosecutor. *Moore v. State*, 88 S. W. 230, 48 Tex. Cr. R. 400.

#### Right of way

An owner of land adjoining a railroad location may acquire by prescription during 20 years an easement of travel longitudinally over a part of the location, notwithstanding St. 1861, c. 100, now St. 1906, c. 463, pt. 2, § 80, providing that no length of occupancy of land of a railroad corporation by an occupier of adjoining land shall create in him a right to such land, which, when considered in connection with St. 1892, c. 275, prohibiting the acquisition by prescription of a right of way across any railroad location, refers only to titles in fee and not to an easement; the word "occupancy" meaning a permanence and continuity of possession greater than that required in the establishment of a right of way. *Hall v. Boston & M. R. R.*, 97 N. E. 914, 915, 211 Mass. 174.

#### Tenancy

The word "occupation," as used in a statute providing that every contract or agreement for the leasing, rent, and occupation of buildings, not in writing, shall be a tenancy from month to month, terminable only by a month's written notice, does not mean a mere possession of premises by any one who happens to be in them or get in them, but means an occupation pursuant to an agreement between the owner and the occupier, sufficient to create the relation of landlord and tenant. Permission of a landlord to a tenant, on moving out, to leave boxes in the building for a few days, on the understanding that the tenant would turn the premises over clean and in good condition, is not such an occupation. *Sterling v. Helmann*, 82 S. W. 539, 540, 108 Mo. App. 40.

#### Use

The occupancy contemplated by Pub. St. c. 11, § 5, cl. 3, as amended by St. 1899, c.

465, exempting from taxation property of literary, benevolent charitable, and scientific institutions, "occupied by them or their officers for the purposes for which they were incorporated," must tend directly to promote the purposes for which the institution was incorporated. The occupation of premises belonging to a college by the president and the professors, and the officers of the institution and their families, is not necessarily inconsistent with the intent of the statute. *Phillips Academy v. Inhabitants of Andover*, 55 N. E. 841-843, 175 Mass. 118, 48 L. R. A. 550.

Dormitories furnished by a college without rent or lease, for the use of its students, who club together for the purpose of obtaining board at cost, are "occupied" for the purposes for which the college was incorporated, within the meaning of this statute; and so is a house built with public funds on the college grounds for its president, and occupied by him and his family as a dwelling, and also used as a place for commencement and holding other receptions incident to his functions, faculty and committee meetings, etc.; and so are houses belonging to, and kept in repair by, the college, and used partly for its convenience and partly for uses incident to the duties of professors, who occupied them for dwelling purposes, without rent or lease, except that the value of their use as dwellings was taken into account when the professors' salaries were voted. *Harvard College v. Assessors of Cambridge*, 55 N. E. 844, 846, 175 Mass. 145, 48 L. R. A. 547.

#### OCCUPANT—OCCUPIER

See Actual Occupant; Bona Fide Occupant.

In a prosecution for breaking and entering a storage room in the custody of C, an instruction that, if C had the key and exclusive right and means of entry, then he in law would be the "occupant," was correct and was not objectionable as charging that C was in fact the occupant of the room burglarized. *Kinney v. State (Tex.)* 148 S. W. 783, 785.

The words "the occupant thereof," as used in a statute providing that, if the property is actually occupied, the occupant thereof must be made defendant, may be read as meaning "an occupant" and not "all the occupants." *Glos v. Patterson*, 68 N. E. 443, 445, 204 Ill. 540 (quoting *Hennessey v. Paulsen*, 41 N. E. 516, 147 N. Y. 255).

#### Of land

Ordinarily the "occupant" or "actual occupant" of land is one in actual possession. "Occupant" is defined in the Century Dictionary as: "One who occupies; an inhabitant; especially one in actual possession, as a tenant, who has actual possession, in distinction from the landlord, who has legal or

constructive possession." The Standard definition is: "One who occupies; especially a tenant in possession of property, as distinguished from the actual owner. \* \* \*"  
*Parsons v. Prudential Real Estate Co.*, 125 N. W. 521, 523, 86 Neb. 271, 44 L. R. A. (N. S.) 666.

The word "occupant," as ordinarily used in statutes, means one in actual possession of land, as distinguished from constructive possession thereof; that is, one who holds possession and exercises dominion over it. There may be occupancy of land, without actual residence thereon. Thus the owner of a farm, of which he is in actual possession, though he resides in a village near by, is an "occupant" within Rev. Laws 1905, § 1172 requiring notice of hearing on a petition for a highway to be served on the occupants of the land. *McCauley v. Town of McCauleyville*, 127 N. W. 190, 191, 111 Minn. 423, 20 Ann. Cas. 828.

Under Comp. Laws 1907, § 20, providing that if any cattle shall trespass or do damage upon the premises of another, the aggrieved party, whether he be the owner or occupant, may recover against the owner of the cattle, plaintiff, who purchased lucerne seed from the owner of land and left it in an inclosed field to dry, was an "occupant" within the purview of the statute, and might support an action against the owner of cattle which trespassed upon the field, and ate and ruined the seed, without pleading or proving negligence; the statute apparently warranting a recovery for injury to personalty, as well as to real estate. *Peterson v. Petterson*, 117 Pac. 70, 71, 39 Utah, 354.

A tract of 250 acres of timber land was occupied, within Tax Law (Laws 1896, p. 901, c. 908) § 9, allowing land to be assessed as nonresident only where there is not an owner or "occupant" of it residing in the tax district, where the owners had marked its exterior lines by blazing trees, had made roads, cut and skidded a large quantity of logs, drawn away part of them, and left a larger quantity on the skids, and, at the time the assessors were on their annual rounds, were erecting on it a substantial shanty large enough to house them and their bark peelers. *Clark v. Kirkland*, 118 N. Y. Supp. 315, 319, 133 App. Div. 826.

An owner of a preserve purchased additional land to straighten the boundary line thereof. The additional land was subsequently used in connection with the preserve. The owner's superintendent actually resided on the preserve, and controlled the same, including the additional land which was not inclosed, cultivated, or improved. The owner expended large sums in improving the other portion of the preserve, and also continuously kept domestic animals thereon. He also maintained on the prem-

ises metal notices warning persons against trespassing. The notices were placed along the boundary of the preserve, including the additional land. Held, to show an actual occupancy and possession by the owner of the entire premises, including the additional land within Tax Law (Consol. Laws, c. 60) § 134, defining an "occupant" as one who has lawfully entered on land and is in possession thereof to the exclusion of others, and "occupancy" as the actual, lawful, and exclusive use and possession of land by the occupant, and the owner was entitled to notice to redeem the premises from a tax sale. *People ex rel. Moyneham v. Gaus*, 118 N. Y. Supp. 756, 757, 134 App. Div. 80.

Laws 1900, p. 62, c. 20, § 220, gives to the commission of the forest preserve the care and control of the forest preserve, and by its wardens, foresters, and protectors it actually occupies the preserve, so that it is an "occupant," within the meaning of Laws 1896, p. 842, c. 908, § 134, requiring that, where land shall be sold for taxes, notice shall be given to the occupant to redeem before a deed is given. *People ex rel. Turner v. Kelsey*, 72 N. E. 524, 525, 180 N. Y. 24.

#### Same—Landlord

"An 'occupant' is defined by Webster as 'one who occupies or takes possession; one who has the actual use or possession, or is in possession of a thing.' Bouvier defines 'occupant' as 'one who has actual use or possession of a thing.' Shumaker & Longsdorf in their Law Dictionary, in defining 'occupant,' say: 'One who has the actual possession or use of a thing; occupancy implies the exclusion of every one else from enjoyment. Tenant in possession.'" Under the statute providing that forcible detainer involves entry during the absence of the "occupant," an owner of land in actual possession of a tenant cannot maintain forcible detainer against one dispossessing the tenant. *Chezum v. Campbell*, 85 Pac. 48, 49, 42 Wash. 560, 7 Ann. Cas. 921.

#### Same—Tenant

Lessees in possession are "occupants" of land, so that they may object to the granting of a liquor license. *American Woolen Co. v. Town Council of North Smithfield*, 69 Atl. 293, 294, 29 R. I. 93, 16 Ann. Cas. 1227 (citing *Lonsdale Co. v. Board of License Com'rs, of Town of Cumberland*, 25 Atl. 655, 18 R. I. 7).

As used in St. 1898, § 1391, providing that respective "occupants" of adjoining lands used for farming shall maintain partition fences, and that "owners" of land who do not maintain lawful partition fences cannot recover for trespass by animals, the term "owners" includes a tenant as the occupant of the land, so that his failure to maintain the partition fence precludes him

from recovering for trespass. *Peterson v. Johnson*, 111 N. W. 659, 132 Wis. 280 (citing 6 Words and Phrases, pp. 4904, 5134).

### Of public land

Rev. St. U. S. § 2387, provides that the judge of the county court may enter at the proper land office land occupied as a town site of an unincorporated town, in trust for the "occupants"; the execution of the trust to be under regulations prescribed by the Legislature of the state or territory. Rev. St. Ariz. 1901, pars. 4075-4077, 4079, 4080, 4085, 4093, 4094, providing the method of executing the trust, require the payment by the "claimant" to the trustee of the purchase price of \$5 per lot before he is entitled to a deed. Held, that this requirement applies to actual occupants, and not only to those who merely claim the right to possession, and an occupant, to be entitled to his deed, must be a claimant, file his statement, and pay to the trustee the purchase price. *Robertson v. Martin*, 76 Pac. 614, 615, 8 Ariz. 422.

Rev. St. U. S. § 2387, provides that, whenever any portion of the public lands have been occupied as a town site, it is lawful for the judge of the county court, in case the town is unincorporated, to enter the lands so occupied in trust for the benefit of the occupants thereof, the execution of which trust shall be regulated by the legislative authority of the territory, etc. Held, that the "occupants" for whom the trustees took the legal title under the act were those who were such at the time the town site was entered. *City of Globe v. Slack*, 95 Pac. 126, 11 Ariz. 408.

"An 'occupant,' within the meaning of the town-site law, is one who is a settler or resident of the town and in bona fide actual possession of the lot at the time the entry was made. \* \* \* The 'occupancy' must be actual, and cannot be begun by an agent. It must be for residence, or for business, or for use, and the residence, business, or use must be by the claimant. There must be a subjection of the land to his will and control. \* \* \* It follows \* \* \* that there can be no such thing as constructive occupancy under the town-site law, but there must be an actual bodily presence of the claimant, or some one for him, on the lot or lots for which he seeks to acquire title, or a purpose to enjoy, united with or manifested by such visible acts, improvements, or inclosures as will give to the claimant the absolute exclusive enjoyment of it." Where plaintiff staked out a lot in a mining camp in Alaska and built a log cabin thereon, in which he resided for some three years and then left, leaving some tools, a stove, etc., in the cabin, and asking two different persons to look after the property for him, neither of whom took possession of or occupied it, and did not return for three years, and about a year after leaving other persons lo-

cated the lot, and went into continuous possession, and made valuable improvements on the property, and conveyed it, plaintiff, although his title was recorded in the book kept for the benefit of settlers, there having been no steps taken to locate a town site, was not an occupant or in possession, and had no right therein which would ripen into a title under the town-site law (Rev. St. § 2387; Act March 3, 1891 [26 Stat. 1095, c. 561, § 11]) at the time of its location by the grantor, or which would support an action to recover the property from the grantees. *Gordon v. Ross-Higgins Co.*, 162 Fed. 637, 640, 89 C. C. A. 429 (quoting and adopting language in *Bender v. Shimer*, 19 L. D. 363, 367).

### Of right of way

The grantee of a railway right of way is not the owner or "occupant" of the estate over which it is granted. The mere running of trains over a road does not make the company running them an "occupant" of the land. *Kansas & C. P. R. Co. v. Burns*, 79 Pac. 238, 239, 70 Kan. 627 (dissenting opinion) (quoting *Cook County v. Chicago, B. & Q. R. Co.*, 35 Ill. 460).

## OCCUPATION

Of land, see Occupancy—Occupation—Occupy (Of Land).

### Of dwelling house

In relation to building insured, see Unoccupied; Vacancy—Vacant—Vacate.

Under White's Ann. Pen. Code, art. 845c, providing that the term "private residence" shall be construed to mean any building or room "occupied and actually used" at the time of the offense as a residence, it is not necessary, to constitute the offense of burglary of a private residence, that the family be personally present at the time of the burglary, but it is sufficient if the house is actually used at the time as a private residence, though the family are temporarily absent. *Handy v. State*, 80 S. W. 526, 46 Tex. Cr. R. 406.

"The word 'occupation,' as applied to a dwelling house, means living in it; and hence, to become vacated or unoccupied, it must be without an occupant—without any person living in it." *Baggerly v. Lee*, 73 N. E. 921, 923, 37 Ind. App. 139 (citing *Home Ins. Co. of New York v. Boyd*, 49 N. E. 285, 19 Ind. App. 173; *Paine v. Agricultural Ins. Co. [N. Y.]* 5 Thomp. & C. 619; *American Ins. Co. v. Padfield*, 78 Ill. 169).

### OCCUPATION (Vocation)

See Dangerous Occupation

As property, see Property.

As trade, see Trade.

Change of occupation, see Change.

Following occupation, see Follow—Following.

Other occupation, see Other.

Some other occupation, see Some Other.

The term "occupation" is synonymous with calling, trade, business, or profession. *City of Topeka v. Jones*, 86 Pac. 162, 163, 74 Kan. 164.

The word "occupation" is a generic term, and is that to which one's time and attention are habitually devoted, vocation, calling, trade, business, and a "vocation" is an employment, occupation, calling, trade, including professions as well as mechanical occupations. *Village of Dodge v. Guldinger*, 127 N. W. 122, 87 Neb. 349, 138 Am. St. Rep. 494.

"Occupation," as commonly understood, signifies vocation, calling, trade, the business which one principally engages in to secure a living or obtain wealth. *Joliff v. State*, 109 S. W. 176, 177, 178, 53 Tex. Cr. R. 61 (citing *Standford v. State*, 16 Tex. App. 331); *Cohen v. State*, 110 S. W. 66, 67, 53 Tex. Cr. R. 422, 426 (quoting and adopting the definitions in *Standford v. State*, 16 Tex. App. 331; *Love v. State*, 20 S. W. 978, 31 Tex. Cr. R. 469; *Koenig v. State*, 26 S. W. 835, 33 Tex. Cr. R. 367, 47 Am. St. Rep. 85; *State v. Austin Club*, 33 S. W. 113, 89 Tex. 20, 30 L. R. A. 500); *Dozier v. State*, 137 S. W. 679, 681, 62 Tex. Cr. R. 258.

"Occupation" is a term of broad significance, and includes the trade, calling, profession, office, employment, or business by which one generally gets his living; and it is not incidental, recreatory, or even necessary suspension of the performance of regular duty which constitutes a "change of occupation" by one insured against accident. *Everson v. General Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 88 N. E. 658, 661, 202 Mass. 169. Thus, where an accident policy insured plaintiff as the manager of a mill and contained a rider that the insurance should not be forfeited by a temporary change of occupation, it was not material that his injury sued for occurred while he was operating a mower as a mere temporary diversion. *Kenny v. Bankers' Accident Ins. Co. of Des Moines*, 113 N. W. 566, 569, 136 Iowa, 140.

The term "occupation," as used in an accident policy, implies simply that which at the time of the accident constitutes the assured's principal business or pursuit; that which engages his attention and time, as distinguished from that which is incidentally connected with the life of men in any or all occupations. Thus, where a party obtains a policy of insurance against injury by accident, specifying the occupation of the assured to be that of a druggist, deemed to be a select risk, and that of a farmer or supervising farmer only is specified as a more hazardous risk, calling for a larger premium, and thereafter the drug store of the assured was destroyed by fire, whereupon the assured mov-

ed upon a tract of land entered as a homestead, into a house built by him thereon, which he thereafter occupied with his family as his home, and superintended the construction of a barn thereon, and caused to be fenced and broken and cultivated 40 acres of the land thereof, under his supervision, for a period of six months, and was preparing for further cultivation of the land at the time of his injury, and for eight months prior to such injury had no connection with the business of a druggist, his occupation was that of a supervising farmer, and not that of a druggist, within the meaning of the policy. *Aetna Life Ins. Co. v. Dunn*, 188 Fed. 630, 633, 71 C. C. A. 79. And so, where the application for a life policy stated that assured's occupation was "dealer in pumps and well supplies," and the policy stipulated that enumerated occupations, such as "blasting, mining, and handling or transporting of inflammable or explosive substances" were risks not assumed by the insurer during the first year, and the assured died within the year by reason of an explosion during an attempt to blow out a well casing with dynamite in the course of his designated business, it was held that the risk of using the dynamite did not constitute a risk not assumed by the insurer; the stipulation in the policy relating to an occupation different from that named in the application as assured's occupation. *Mortensen v. Central Life Assur. Ass'n*, 99 N. W. 1059, 124 Iowa, 277.

A by-law of a fraternal benefit order which bars from admission to the order persons "engaged" in blasting, coal mining, manufacturing explosives, etc., or who are engaged in any other occupation deemed extra-hazardous, or who are engaged either as principal, agent, or servant in the sale of liquor as a beverage, and which provides that any member who shall engage in any of the prohibited occupations shall thereby render his certificate void, is violated by a member who with his son opened a saloon as copartners, the license therefor being issued in their joint names, and the member being pecuniarily interested therein, though he performed no labor in or about the saloon and took no active part in the business, the word "engaged" being the equivalent of the words "carry on," and the word "occupation" meaning "business." *Graves v. Knights of the Maccabees of the World*, 92 N. E. 792-794, 199 N. Y. 397, 139 Am. St. Rep. 912.

A by-law of the defendant, a fraternal insurance company, provided that if a member should enter into the business or occupation of selling at retail intoxicating liquors as a beverage his membership should cease, and the insurance certificate and all rights thereunder should become forfeited. Plaintiff's husband, a common laborer, while a member, accepted work in a village saloon as a temporary substitute for the bartender

for five or six weeks, during which time he paid an assessment that came due on the membership certificate. This assessment was accepted and retained by the officers of the local lodge. Three days after the insured quit the said temporary employment he died. After his death, and with knowledge of his said employment, defendant's grand recorder requested further proofs, not only as to his "occupation," but as to burial. Assuming that the temporary employment forfeited the insurance, it is held that the trial court's finding that there was a waiver of the forfeiture is sustained by the evidence. *Hendrickson v. Grand Lodge A. O. U. W.*, 138 N. W. 946, 950, 120 Minn. 36.

"Occupation" is correctly defined, in an action on a benefit certificate, in which the defense is a wrong statement in the application as to insured's occupation, by an instruction stating that it means that which practically takes up one's time and energies, especially one's regular business or employment, and that the word does not necessarily mean the present occupation, but it means that which principally takes up one's time, thought, and energy, especially one's regular business or employment, so that one might have a regular occupation, such as that of a painter, and be out of employment, and might temporarily engage in other business, yet, if he was questioned as to what was his occupation, he would give it as a painter, that being his general occupation. *Supreme Lodge Knights and Ladies of Honor v. Baker*, 50 South. 958, 960, 163 Ala. 518.

An accident policy provided that, if the insured was injured while engaged in any "occupation or exposure" more hazardous than that against which he was insured, his insurance shall be so much as the premiums paid will purchase at the rates fixed for such increased hazard. "Occupations" were classified, with an explanation that merely riding a bicycle for pleasure is not an "occupation," and that one insured as a proprietor of a manufacturing industry does not change his status by incidentally riding a bicycle. Held, that the fact that an insured is injured while incidentally riding a bicycle does not place him in a different class as to hazards from the "occupation" named in the policy. *Comstock v. Fraternal Accident Ass'n*, 93 N. W. 22, 25, 116 Wis. 382.

Where defendant, a farmer, had provided himself with the necessary equipment to operate a flying jenny, an occupation taxed by law, and to operate the same for profit, he was guilty of pursuing an occupation without paying the occupation tax provided therefor; the word "occupation," as used in the statute, meaning vocation, calling, trade, or the business which one engages in to procure a living or obtain wealth. *Robbins v. State*, 123 S. W. 695, 696, 57 Tex. Cr. R. 462.

In a prosecution under Acts 29th Leg. (Gen. Laws 1905, p. 91) c. 64, providing for the punishment of any one, or the agent or employé of any one, engaged in the "business or occupation" of keeping or storing intoxicants for others in any county, etc., in which the sale of intoxicants had been prohibited, who permits another to drink intoxicants within such place of business, an instruction defining "business or occupation" to be that which engages one's time and attention or labor, or that about which one is engaged or employed, was misleading, where accused claimed that the intoxicants shown to have been drunk on the premises were not kept for hire or profit, nor as a business or calling, but that such keeping was casual and incidental; the terms "business" and "occupation," as used in the statute, meaning a calling, trade, or vocation in which one engages to make a living or obtain wealth. *Cohen v. State*, 110 S. W. 66, 67, 53 Tex. Cr. R. 422.

Under Act April 15, 1909 (Acts 31st Leg. c. 15), making it a felony to pursue the occupation of selling intoxicating liquor in local option territory, the word "occupation" does not necessarily mean principal business, but may mean a business carried on by the defendant as a side line, and hence a charge, in a prosecution under that law, that in order to constitute and engage in or pursue the occupation of selling intoxicating liquor it is necessary for the state to prove beyond a reasonable doubt that the defendant unlawfully followed that business, places a greater burden on the state than the law requires, and was not prejudicial to defendant. *Clark v. State*, 136 S. W. 260, 264, 61 Tex. Cr. R. 597.

An instruction that it was not necessary that a party should make a profit in his business in order to be guilty of pursuing the occupation of selling intoxicating liquors was not an improper limitation on the meaning of the words, "occupation" or "business," as used in the statute, and was proper where the evidence showed that accused would order whisky for his store customers, and charge it in their store account at cost to be paid when the rest of the account was paid, since each of these transactions constituted a sale. And a further charge that the state was not required to show that such "business" or "occupation" was accused's principal "business" or "occupation," or that he gave the whole or the greater part of his time to such business, but that if, although engaged in his usual occupation, he secretly sold intoxicating liquors when the opportunity presented, he would be guilty, was not objectionable on the grounds that it did not properly define "business" or "occupation." *Dickson v. State* (Tex.) 146 S. W. 914, 919.

#### OCCUPATION RENTAL

One occupying real property under a lease which is subsequent and subject to a



mortgage under foreclosure, in an action wherein a receiver has been appointed, must answer to such receiver for rent which may be due or which may accrue after such receiver's appointment; or, if the occupant claims to have a defense to the landlord's claim for rent as such, then the occupant must pay to the receiver as custodian of property which is security for a mortgage—and to safeguard such security—a reasonable amount for the use and occupation of such mortgaged premises, called "occupation rental," during the pendency of the action. *Derby v. Brandt*, 90 N. Y. Supp. 980, 981, 99 App. Div. 257.

## OCCUPATION TAX

License or occupation tax, see License Tax.

Laws 1903, c. 176, § 19, requiring itinerant physicians to pay an annual sum for a license to practice as such, imposes an occupation tax within Const. art. 6, § 17, requiring that taxation shall be equal and uniform. *State v. Doran*, 134 N. W. 53, 56, 28 S. D. 486.

A specific tax upon agents and representatives of packing houses and of dealers in packing house goods and products having a place of business or stock of merchandise in a city and selling to customers therein is a vocation or occupation tax. *City of Savannah v. Cooper*, 68 S. E. 138, 139, 140, 131 Ga. 670.

The fees imposed by a city to pay the cost of necessary inspection of the installation of electrical appliances inside and outside of buildings in the city are not taxes within Const. art. 8, § 1, providing that persons engaged in mechanical and agricultural pursuits shall not be required to pay an occupation tax. License and inspection fees levied under the police power of a city are not an "occupation tax" within this constitutional provision. *Ex parte Cramer*, 136 S. W. 61, 62, 62 Tex. Cr. R. 11, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588.

A tax levied on a corporation for the exercise of the privilege of carrying on its business is an occupation tax within Const. art. 8, § 1, authorizing the Legislature to impose occupation taxes on persons and corporations doing business in the state. *State v. Galveston, H. & S. A. Ry. Co.*, 97 S. W. 71, 77, 100 Tex. 153.

Laws 1907, c. 65, imposing on every insurance company doing business in the state, except domestic mutual insurance companies, an annual tax of 2½ per cent. of the gross amount of premiums received in the state during the preceding year, etc., when construed in the light of the history of the legislation on the subject, imposes an "occupation tax" and not an "ordinary tax" within the Constitution relating to taxation. *Queen City Fire Ins. Co. v. Basford*, 130 N. W. 44, 46, 27 S. D. 164.

## OCCUPIED AS DWELLING HOUSE

A landlord who rents the second story of a store building, to be used by the lessee for printing and publishing a newspaper therein, in the absence of an agreement in the lease, is not bound to put the building in a condition fit for such occupation, and repair future dilapidations thereof, as the property leased is not intended "for occupation of human beings" within the meaning of *Wilson's Rev. & Ann. St. 1903*, §§ 863, 864. *Tucker v. Bennett*, 81 Pac. 423, 424, 15 Okl. 187.

## OCCUPIED AS FACTORY

Defendant insured an ice manufacturing plant after its operation had been abandoned, the policy describing the property as a building "occupied as an ice factory," and described the personal property as appurtenances and appliances necessary to be used in plaintiff's business, all while contained in such building. The policy also declared that if the subject of insurance was a manufacturing establishment, and it should cease to be operated for more than 10 consecutive days without the insurer's consent, the policy should be forfeited. Held, that the policy being construed most strictly against the insurer did not insure an ice manufacturing plant in operation, but merely a building and appliances therein that had been used for that purpose, and that the policy was therefore not forfeited by a continued failure to operate the plant without insurer's consent. *Home Ins. Co. v. North Little Rock Ice & Electric Co.*, 111 S. W. 994, 996, 86 Ark. 538, 23 L. R. A. (N. S.) 1201.

## OCCUPIED AS SALOON

In a fire insurance policy, the words, "occupied as a saloon," are words of description only, and do not mean that the building insured shall be at all times conducted as a saloon. *Silver v. London Assur. Corporation*, 112 Pac. 666, 668, 61 Wash. 593.

## OCCUPIED AS A STEAM LAUNDRY

The phrase "occupied as a steam laundry" in a fire policy on property described as a two-story basement and brick building, and additions adjoining and communicating, including foundations, "occupied as a steam laundry," renders a boiler house connected with the building within the policy. *Guthrie Laundry Co. v. Northern Assur. Co. of London*, 87 Pac. 649, 651, 17 Okl. 571, 10 Ann. Cas. 936.

## OCCUPIED BY ITS TRACKS

The phrase "occupied by its tracks," in Pub. St. 1882, c. 118, §§ 32, 33, requiring every street railway company to keep in repair the paving of the portion of the street occupied by its tracks, refers to the rails and the space between them over which the cars pass. *City of Boston v. Boston Elevated R. Co.*, 71 N. E. 295, 186 Mass. 274.

Under a city ordinance, requiring a street railway company operating a line within the corporate limits to keep in good repair all that part of the street occupied by it, whenever the street car company took possession of that portion of the street for the purpose of laying a track, it was "occupied by it." *Montgomery St. Ry. Co. v. Smith*, 39 South. 757, 761, 146 Ala. 318.

### OCCUPIED EXCLUSIVELY AS A DWELLING

The owner of a two-story building having two show windows with an entrance between them conducted a laundry therein from July until September, when the sign was taken down and not replaced until the following June or July, when the business was resumed. Held that, though the owner lived in a part of the building, it was not "occupied exclusively for a dwelling" within Liquor Tax Law requiring consents to the granting of liquor licenses, and therefore could not be counted in ascertaining assent of the owners of the surrounding homes to the proposed application for a liquor tax certificate, though on the date of the application the sign was down and the laundry had been suspended for the season. *In re Bennett*, 136 N. Y. Supp. 910, 911, 76 Misc. Rep. 310.

### OCCUPIED FOR SCHOOL PURPOSES

In a legal and technical sense, a public school building in which a public school is being conducted is "occupied for common school purposes" from the beginning to the ending of the term, including school days, Saturdays, Sundays, and nights. The term "unoccupied for common school purposes," as used in *Burns' Ann. St. 1901*, §§ 5920a-5981, relating to the duration of school terms in school townships; and section 5990, granting the right to use a public school building for other than school purposes when "unoccupied for common school purposes," has reference only to the time intervening between terms of school, and the statute does not authorize a religious organization to use a schoolhouse on Sundays and evenings during a school term, when the school was not actually in session. *Baggerly v. Lee*, 73 N. E. 921, 923, 37 Ind. App. 139.

### OCCUPY

See Cease to Occupy; Occupancy—Occupation—Occupy (Of Land).

In relation to insurance, see Unoccupied; Vacancy—Vacant—Vacate.

"To occupy" is generally defined to be to take and hold possession of, have in possession and use, to take possession of, to keep in possession, to possess, to hold and use, as to occupy a house or a farm. *Thieme v. Niagara Fire Ins. Co.*, 91 N. Y. Supp. 499, 501, 100 App. Div. 278 (quoting in support of definitions, *Stand. Dict.*; *Imperial Dict.*).

An ordinance which makes it unlawful to "occupy" or allow to be occupied any portion of a house to be used as a house of ill fame or disorderly house in the city of Atlanta means that occupancy which contributes in some manner to the unlawful character of the house, and does not preclude an innocent and lawful occupancy of a room or a portion of a house which may in other parts thereof be used for disorderly and immoral purposes. *Dannie v. City of Atlanta*, 73 S. E. 684, 685, 10 Ga. App. 471.

"Occupy," within Rev. St. c. 9, § 13, subsec. 1, providing that personality employed in trade shall be taxed in the town where it is employed April 1st, if the owner occupies a landing place, etc., means having control in whole or a part, having a special right to use. *Inhabitants of Georgetown v. William E. Hanscome & Co.*, 79 Atl. 379, 380, 106 Me. 131.

Appropriate as synonymous

See Appropriate—Appropriation.

### OCCUR

If a political party at its primary makes no nomination of a candidate for election to an office, a vacancy has "occurred," within the meaning of the statute (*Cobbey's Ann. St. 1911*, § 5888); and the proper party committee may fill that vacancy. *State ex rel. Curry v. Wells*, 138 N. W. 165, 167, 92 Neb. 337, 41 L. R. A. (N. S.) 1088.

Acts 1909, c. 103, § 3, amending Acts 1907, c. 435, provides that all vacancies in the State Board of Elections shall be filled by joint vote of the General Assembly, except vacancies occurring when it is not in session, when, if the office of only one member is vacant, the remaining members of the board shall fill the vacancy, and if they fail to do so it shall be filled by the Secretary of State, Comptroller, and Treasurer, and that if there be more than one vacancy it shall be filled by appointment by such officers. Held, in view of the meaning of "vacant," which meant "without an incumbent," regardless of when or how it became vacant, and of the words "occur" and "happen," which were synonymous and meant "existing" or "to be found," that the Comptroller, Secretary of State, and Treasurer were authorized to fill two or more vacancies in the board of elections during recess of the Legislature, whether such vacancies occurred during recess or while the Legislature was in session. *Richardson v. Young*, 125 S. W. 664, 684, 122 Tenn. 471.

### OCCURRENCE

See Exceptional Occurrence; Extraordinary Occurrence.

The word "transaction" is not synonymous with "occurrence." *Excelsior Clay*

*Works v. De Camp*, 80 N. E. 981, 983, 40 Ind. App. 26 (citing *Lake Shore & M. S. Ry. Co. v. Van Auken*, 27 N. E. 119, 1 Ind. App. 492).

## OCEAN

### OCEAN FRONT

P. L. 1894, p. 146, an act to enable cities located near the ocean and embracing within their limits any beach or ocean front to open and lay out a public park, defines in its title "ocean front" as meaning as much of such front as is within the territorial limits of such city. *Crossan v. Ventnor City*, 78 Atl. 12, 80 N. J. Law, 511.

## OCTOROON

As negro, see Negro.

## OCTROI TAX

The "droit de ville" and an "octroi tax" are internal revenue impositions of France which are not general in their application, but vary with the locality and are not collected if the merchandise is exported. *United States v. R. F. Downing & Co.*, 131 Fed. 653, 654.

## ODD WITNESSES

The term "odd witnesses," used in a recital that 60-odd witnesses were introduced in an eminent domain proceeding, referred to number rather than to singularity. *St. Louis, M. & S. E. R. Co. v. Aubuchon*, 97 S. W. 867, 869, 199 Mo. 352, 9 L. R. A. (N. S.) 426, 116 Am. St. Rep. 499, 8 Ann. Cas. 822.

## OF

The preposition "of," as used in an act establishing a city police court with jurisdiction to enforce any penalty for the violation of any regulation of such city "or any board thereof," should be construed to denote source, creation, or authorship, as distinguished from mere existence or possession. *Board of Health of City of Asbury Park v. New York & L. B. R. Co.*, 71 Atl. 259, 77 N. J. Law, 15.

Rem. & Bal. Code, § 6119, requiring the publication of annual statements of insurance companies in "two daily papers of the largest general circulation to be designated by the Insurance Commissioner," requires the publication in any two papers belonging to the class having the largest circulation, which class may consist of more than two papers, and the commissioner has discretion to designate any one of the papers belonging to the class, and to determine what papers belong to the class having the largest circulation, though the difference in the circulation may be considerable; the word "of" indicating the aggregate or whole of which the limited word denotes a part, or of, which a part

is referred to, etc. *State ex rel. Cowles v. Schively*, 114 Pac. 901, 903, 63 Wash. 103.

Under a statute authorizing a town to take "of" the waters of a certain pond and so much as may be necessary for certain specified purposes, such town did not have the exclusive right to the water as against a railroad company that had been authorized by statute to use the water of the pond. *Framingham Water Co. v. Old Colony R. Co.*, 57 N. E. 680, 681, 176 Mass. 404.

### As belonging to

The words "of the United States," in Act Cong. August 1, 1892 (27 Stat. 340, c. 352), relating to hours of labor of laborers or mechanics employed upon any of the public works of the United States, means belonging to the United States. Dredging a channel in Boston Harbor is not a public work of the United States, within the meaning of the act forbidding a contractor under penalty of fine or imprisonment to permit or require employes on public work to work more than eight hours each day. *Ellis v. United States*, 27 Sup. Ct. 600, 602, 206 U. S. 248, 51 L. Ed. 1047, 11 Ann. Cas. 589.

The validity of an indictment for larceny is not affected by the omission of the preposition "of" between the words "goods and chattels" and the name of the prosecutor. *Bennett v. State*, 84 S. W. 483, 73 Ark. 386.

The word "of," where it precedes the words "all existing steam railroads" in an elevated railroad franchise regulating the height of the superstructure over the "tracks of all existing steam railroads," was not intended to denote ownership or possession, and that the right of way and tracks referred to therefore are only those owned by "existing steam railroads," but was evidently intended only to identify the right of way and tracks mentioned in the ordinance by indicating the character of the road of which they formed a part. *Peabody Coal Co. v. Northwestern Elevated R. Co.*, 82 N. E. 573, 575, 230 Ill. 214.

### As in

The preposition "of," as used in Code Pub. Gen. Laws 1904, art. 23, § 366, relating to the "streets or highways of Baltimore city," and the granting of franchises for their use to electric light and power companies, is not descriptive of or relating to title or ownership, but refers to location and municipal jurisdiction; and the expression quoted embraces streets or roads within the city limits which are currently traversed without objection by its citizens, whether the municipality has or has not acquired the legal title to the land lying under them. *Patapsco Electric Co. v. City of Baltimore*, 72 Atl. 1039, 1041, 110 Md. 306.

Lands "of" the state, as used in the title of an act to promote public health, etc., by

draining the lands "of" the state, means lands "within" the state. *Sisson v. Board of Sup'rs of Buena Vista County*, 104 N. W. 454, 458, 128 Iowa, 442, 70 L. R. A. 440.

#### As portion of part of

A marine policy insured "in port and at sea, \* \* \* at all times, in all places and on all occasions, \* \* \* upon the hull, spars, sails, materials fittings, boats (including launches, steam or otherwise, if any), furniture, provisions, stores, \* \* \* boilers, etc., of and in the schooner yacht *Rosemary*," against all manner of marine perils, and the furniture and boats against fire when laid up on shore. Held, that a naphtha launch, part of the equipment of the yacht, carried on davits when she was under way, and used as a means of communication with the shore when in port, while being so used in the usual way between the yacht and shore was "of and in" the yacht, and covered by the policy. *Dennis v. Home Ins. Co.*, 136 Fed. 481, 482.

#### As or

See Or.

#### As to

Defendant employed plaintiff as a traveling salesman, agreeing to pay a salary of \$1,800 per year, to allow \$1,200 for traveling expenses, and to pay a commission of 5 per cent. in excess "to \$40,000" sales made by plaintiff and shipped by defendant. Held, that the use of the word "to" was a mere grammatical error, the intention of the parties being that plaintiff was only to receive commissions on sales made by him in excess of \$40,000, and that the preposition "to" should give place to "of" with which it was synonymous. *Ettenson v. Mendelson*, 133 N. Y. Supp. 283, 284, 75 Misc. Rep. 307.

#### OF COUNSEL

Where the judge before whom defendant was brought for trial on an indictment for suborning a witness at a hearing in bankruptcy to commit perjury while conducting a hearing in a bankruptcy case to discover assets, appeared to be angry and said in the presence of accused: "This is a nasty piece of business. This estate has been looted by some one"—and then turned to an officer of the court and directed that he use what was left of the estate, even to the last penny, to investigate the matter, and if any one, whoever he might be, had committed any act that could be reached and punished under the law, to institute proceedings against him, the judge merely performed his duty to direct an official inquiry of what appeared to be a criminal offense, and did not thereby become disqualified to try accused therefor, as being either "concerned in interest" or "of counsel" for the prosecution, within the meaning of the statute. *Epstein v. United States*, 196 Fed. 354, 355, 116 C. C. A. 174.

#### OF COURSE

See Continued of Course; Costs as of Course.

The term "of course," as employed in Code Civ. Proc. §§ 1229, 1774, providing that in an action for divorce, judgment cannot be taken "of course" upon the decision or report, etc., and declaring that after the expiration of three months final judgment shall be entered as "of course" upon the decision, etc., means, without special direction or provision or pursuant to settled rule for which there need be no further direction or authority. *Petit v. Petit*, 91 N. Y. Supp. 979, 981, 45 Misc. Rep. 155.

#### OF GRACE

A chancellor is said to act "of grace." That grace sometimes becomes a matter of right to the suitor, and, when it is clear that the law cannot give protection and relief to which the complainant in equity is admittedly entitled, the chancellor cannot withhold his grace any more than the law can deny protection and relief, if able to give them. This is often overlooked when it is said that in equity a decree is of grace and not of right. The phrase "of grace" had its origin in an age when kings dispensed their royal favors at the hands of chancellors, but has no rightful place in the jurisprudence of a commonwealth. *Sullivan v. Jones & Laughlin Steel Co.*, 57 Atl. 1065, 1071, 208 Pa. 540, 66 L. R. A. 712. See, also, *American Smelting & Refining Co. v. Godfrey*, 158 Fed. 225, 237, 89 C. C. A. 130, 14 Ann. Cas. 8 (from the opinion of Marshall, District Judge, in the Circuit Court, quoting from *Walters v. McElroy*, 25 Atl. 125, 151 Pa. 549).

#### OF NO EFFECT

The phrase "of no effect," as used in rule 40 of the Supreme Court, providing that all rules, whether granted by the court or by a justice, shall be entered in the minutes within ten days and in default thereof shall be "of no effect," is synonymous with "void" and not with "voidable." *Jersey City v. Davis*, 76 Atl. 969, 80 N. J. Law, 609.

#### OF OR CONCERNING

See Concern.

#### OF RECORD

The rule that unsurveyed land within the bounds of a railroad grant, which was occupied by a bona fide settler intending to homestead the land, acquires a superior right founded on the terms of the statute granting certain alternate sections, provided they were free from pre-emption or other claims or rights, was not altered by an opinion of the Supreme Court referring to such claim by a homesteader as "of record," as the court did not intend to require that all such claims or rights must be of record, but intended to describe only one class of claims which were

excepted from the granting act. *Northern Pac. Ry. Co. v. Trodick*, 31 Sup. Ct. 607, 609, 221 U. S. 208, 55 L. Ed. 704 (citing *United States v. Chicago, M. & St. P. R. Co.*, 31 Sup. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015).

## OFF

See **Cut Off**; **Marked Off**; **Paid Off**; **Put Off**; **Sign Off**.

On a contract not to become interested in the business of catching certain kinds of fish, other than the business to be conducted by the other party, or the business of manufacturing fish into oil or guano, "upon, along, or 'off' the Atlantic seaboard" the word "off" adds to and enlarges the meaning of the words "upon" and "along," and carries the prohibition out into the deep water more distant from the coast, and includes all the waters adjacent to the eastern coast of the United States, and does not exclude bays or other indentations along the coast. *American Fisheries Co. v. Linnen*, 118 Fed. 869, 874.

## OFFAL

"Offal" is defined in *Cent. Dict.* as "that which is suffered to fall off as of little value or use; waste meat; waste or refuse of any kind." Under a city ordinance providing that "no person shall go about collecting any house 'offal' consisting of animal and vegetable substances, or carry the same through any of the streets, lanes or courts of the city," except the person appointed for that purpose by the sanitary committee, the term "house offal" is held to include refuse food from the table, discarded victuals, and swill consisting of refuse from the table, though none of it be in a decayed condition. *State v. Robb*, 60 Atl. 874, 875, 100 Me. 180, 4 Ann. Cas. 275.

A libel for condemnation of catsup, alleging that it was misbranded, in that it was made in part from tomato pulp screened from peelings and cores, as the "offal" of tomato canning factories, and not from choice ripe tomatoes, etc., as stated in the labels, did not charge a violation of the provision of the pure food law (Act Cong. June 30, 1906, c. 3915, § 7, par. 6) relating to preparations consisting in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance; the words "as the offal of tomato canning factories" being of no exact signification, and the word "offal" not the equivalent of a charge that the tomato pulp was a filthy, decomposed, or putrid vegetable substance. *United States v. Six Hundred and Fifty Cases of Tomato Catsup*, 106 Fed. 773, 774.

## OFFENDER

See **First Offender**; **Pursuit of Offender**.

## OFFENSE

See **Body of the Offense**; **Continuing Offense**; **Criminal Offense**; **Different Offenses**; **Each Offense**; **Lesser Offense**; **Minor Offense**; **Petty Offense**; **Public Offense**; **Same Offense**; **Second Offense**; **Separate Offense**; **Specific Criminal Offense**; **State Prison Offense**.

**Merger of offenses**, see **Merger**.

"An 'offense,' in its legal signification, means the transgression of a law." *Town of Neola v. Reichart*, 109 N. W. 5, 7, 131 Iowa, 492 (quoting and adopting definition in *Moore v. State of Illinois*, 14 How. [55 U. S.] 19, 14 L. Ed. 306; *Grafton v. United States*, 27 Sup. Ct. 749, 754, 206 U. S. 333, 353, 51 L. Ed. 1084, 11 Ann. Cas. 640).

"'Offense' signifies a public wrong which subjects the perpetrator to legal punishment." An attempt to commit suicide is not an indictable offense in the state of Maine. *May v. Pennell*, 64 Atl. 885, 887, 101 Me. 518, 7 L. R. A. (N. S.) 286, 115 Am. St. Rep. 334, 8 Ann. Cas. 351.

In Code Cr. Proc. 1895, art. 114, providing that, whenever a magistrate is informed on oath that an offense is about to be committed against the person or property of the informant or of another, "or if any person has threatened to commit an offense," he must issue a warrant for the arrest of accused, the word "offense," as used in the clause "or if any person has threatened to commit an offense," has the same meaning and is used in the same sense as the word "offense" in the preceding part of the same article, and should be limited in its meaning to offenses against person or property. *Ex parte Muckenfuss*, 107 S. W. 1131, 1132, 52 Tex. Cr. R. 467.

An "offense" is a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights. The word is used as a genus, comprehending every crime and misdemeanor, or as a species, signifying a crime not indictable but punishable summarily or by the forfeiture of a penalty. *Laws Okl. T. 1903*, p. 168, c. 15, § 4, providing that it shall be unlawful for any carrier to receive any of the game mentioned in section 1 of the act, for the purpose of carrying it to any of the places within or beyond the territory, and that any carrier so doing shall forfeit a certain sum with costs, creates an offense within the meaning of Organic Act (Act Cong. May 2, 1890, c. 182, 26 Stat. 87) § 10, and a civil action brought for the recovery of the penalty must be tried within the county where the violation is alleged to have occurred. *Chicago, R. I. & P. Ry. Co. v. Territory of Oklahoma*, 105 Pac. 677, 679, 25 Okl. 238.

"Offense" is used synonymously with "misconduct," which is defined as "wrong conduct; bad behavior; mismanagement." *Ball-*

ey v. Examining and Trial Board of Police Department of City of Helena, 122 Pac. 572, 574, 45 Mont. 197.

"Offense" is now used synonymously with "crime." United States v. Zarafonitis, 150 Fed. 97, 101, 80 C. C. A. 51, 10 Ann. Cas. 290 (quoting and adopting Burr. Law Dict. verbo "Offense"). And while the words "offense" and "crime" are in certain cases considered synonymous, the "offenses" specified by New York Military Code, § 95, for the most serious of which the punishment is dismissal from the service with a small fine, and no one of which is designated as a "crime," are not "crimes." People v. Wendel, 112 N. Y. Supp. 301, 302, 59 Misc. Rep. 354.

The word "offense" implies a violation of a law by which alone it can be denounced. Thomas v. United States, 156 Fed. 897, 900, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720.

An "offense" which is pursued at the discretion of the injured party or his representative is a civil injury, while an offense which is pursued by the sovereign or the subordinate of the sovereign is a crime. Jernigan v. Commonwealth, 52 S. E. 361, 362, 104 Va. 850.

"An 'offense' which may be the subject of criminal procedure is an act committed or omitted in violation of a public law, either forbidding or commanding it." Dent v. United States, 71 Pac. 920, 922, 8 Ariz. 138 (quoting and adopting definition in United States v. Eaton, 12 Sup. Ct. 764, 144 U. S. 677, 36 L. Ed. 591).

An action by the state for penalties imposed by the anti-trust act of Texas, declaring that corporations violating the act shall be guilty, and when convicted, shall be subject to penalties recoverable by "suit" where the "offense" is committed, is not a criminal prosecution, within the statute prescribing the time for the institution of criminal prosecutions, but is a civil suit; the word "offense" having reference to violations of the acts, and not being equivalent to the words "felony" or "misdemeanor." Waters-Pierce Oil Co. v. State, 106 S. W. 918, 48 Tex. Civ. App. 162.

The word "offense," as used in Const. art. 5, § 13, giving the Governor power to grant reprieves, commutations, and pardons after convictions for all offenses, is equivalent to "crimes," and the Governor cannot pardon an offense until after conviction by the judgment of the court. Ex parte Campion, 112 N. W. 585, 588, 79 Neb. 364, 11 L. R. A. (N. S.) 865, 126 Am. St. Rep. 607, 16 Ann. Cas. 319.

The term "offense," as used in Rev. St. §§ 4364-20a, 4364-20b, which provide for an election in any municipality to determine whether or not the sale of intoxicating liquors as a beverage shall be permitted, and which declare that whoever shall sell where

sales are prohibited shall be guilty of a misdemeanor, and which prescribe the punishment for the first offense and for a second offense, embraces the entire charge, though there may be a number of counts, and means a conviction. Hence an affidavit charging three separate sales to different persons on the same day, without alleging a previous conviction, is in legal effect a charge of a first offense only. Carey v. State, 70 N. E. 955, 956, 70 Ohio St. 121.

Driving an automobile at a prohibited rate not being an offense against the police of towns, fines imposed by a justice of the peace for violations of the speed limit, in the absence of special provision to the contrary, belong to the county under Pub. St. 1901, c. 256, § 2, providing that, unless otherwise specially provided, all fines and forfeitures imposed by a justice of the peace for "offenses against the police of towns," and violations of by-laws of towns, and fines and forfeitures imposed by a police court, shall be for the use of the town, and all other fines and forfeitures shall be for the use of the county. The phrase "offenses against the police of towns," refers to the offenses enumerated under that title in Pub. St. 1901, c. 264. Rockingham County v. Chase, 71 Atl. 634, 635, 75 N. H. 127.

#### Violation of city ordinance

A violation of a city ordinance is an "offense" against the city. The violation is termed a petty offense and constitutes a crime in the broad sense of that word. Pearson v. Wimblish, 52 S. E. 751, 755, 124 Ga. 701, 4 Ann. Cas. 501 (citing *McRae v. Mayor*, etc., of City of Americus, 59 Ga. 170, 27 Am. Rep. 390).

A grand juror is not rendered incompetent because charged with a violation of a municipal sanitary ordinance; which is not a "crime or offense" within the intentment of section 1, Act No. 135, p. 216, of 1898. State v. Calhoun, 41 South. 360, 361, 117 La. 82 (citing *State v. Thibodeaux*, 19 South. 680, 43 La. Ann. 600; *State v. Nicholas*, 33 South. 92, 109 La. 84).

#### Nuisance

B. & C. Comp. § 1830, punishing any person committing any act which grossly injures the person of another, or which grossly disturbs the public peace or health, or openly outrages the public decency and is injurious to public morals, not otherwise made punishable, covers offenses against the public peace, health, and morals not otherwise made punishable, and known at common law as indictable nuisances; and at common law whatever tends to corrupt society is an "offense against good morals," and is punishable as a nuisance, and such act need not be a continuous one, but may consist of a single act, and it may not affect the public at large, but only such as come in contact with it. State

v. Waymire, 97 Pac. 46, 47, 48, 52 Or. 281, 21 L. R. A. (N. S.) 56, 132 Am. St. Rep. 699.

## OFFENSE AGAINST THE UNITED STATES

A conspiracy to violate the "bucket shop" law of the District of Columbia is an "offense against the United States," within the statute, providing for the removal of offenders against the United States and the statute relating to conspiracies to commit offenses against the United States. *United States v. Campbell*, 179 Fed. 762, 764.

In Rev. St. § 4540, relating to conspiracies, the words "offenses against the United States" have the same meaning as the words "offenses against the laws of the United States" in the original act of March 2, 1867 (14 Stat. 484, c. 169) the change being merely one of phraseology made by the revision commission, and such section denounces conspiracies to commit offenses created by any of the statutes of the United States. *Thomas v. United States*, 156 Fed. 897, 901, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720.

Assisting the importation of alien contract laborers is an "offense against the United States," within the meaning of Rev. St. U. S. § 5440, providing for the criminal punishment of persons conspiring to commit such offenses, since Congress, in making it a misdemeanor, by Act Feb. 20, 1907, c. 1134, § 4, 34 Stat. 900, to assist the immigration of such persons, has made such action a crime, indictable as such, although, by section 5 of that act, it has provided a remedy in the nature of a civil action for the recovery of a penalty for a violation of the act. *United States v. Stevenson*, 30 S. Ct. 37, 38, 215 U. S. 200, 54 L. Ed. 157.

## OFFENSE INVOLVING MORAL TURPITUDE

See Moral Turpitude.

## OFFENSIVE

Where a restriction in a deed forbade the erection on the land of "any tavern, drinking saloon, slaughterhouse, skin-dressing establishment, or any other building for offensive purpose or occupation," it includes a public garage for hire, storage, and repair of automobiles and the furnishing of needed supplies. *Hibberd v. Edwards*, 84 Atl. 437, 458, 235 Pa. 454.

The owner of land divided it into building lots, and in each deed inserted a restriction that the property should not be used for any business "offensive to the neighborhood for dwelling houses." In a suit by one of the grantees to restrain the erection of an automobile garage, it appeared that the building was designed to accommodate about 125 large automobiles, a part of one story being designed for a repair shop, and it being intended to place in the building a portable forge; that demonstration cars were to be

kept, with demonstrators to run them; and that about 75 or 100 customers were expected to store automobiles there, such machines to go in and out on an average of once a day. Held, that a finding that the maintenance of such building would constitute a violation of the restriction was warranted. *Evans v. Foss*, 80 N. E. 587, 589, 194 Mass. 513, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171.

## OFFENSIVE ESTABLISHMENT

Any other offensive establishment, see Any Other.

## OFFER

See, also, Proposal.

Const. art. 5, § 7, provides that one who shall offer or promise to pay to another any money as an inducement for the giving or withholding of such other's vote at an election shall be guilty of a misdemeanor. Held, that the words, "If you will vote the Republican ticket, I will pay you \$20 after the polls have closed," constitute an offer to pay within the Constitution, and render the person making the offer guilty of a misdemeanor; no acceptance of the offer being required, and no tender being needed to make an offer. *State v. Barr* (Del.) 79 Atl. 730, 733, 7 Pennewill, 340.

In an action for rescission and cancellation of a deed fraudulently obtained, an allegation that plaintiffs are ready and willing to execute a deed to the land traded for to defendants is a sufficient offer to restore within Wilson's Rev. & Ann. St. 1903, § 827. *Clark v. O'Toole*, 94 Pac. 547, 552, 20 Okl. 319.

The word "offered," in a charge against a member of the Brotherhood of Locomotive Engineers that he had "offered" his advice and service to railroad officials in their proposed plan to run engineers through from one city to another, means that he had volunteered his advice and service. *Fritz v. Knaub*, 103 N. Y. Supp. 1003, 1008, 57 Misc. Rep. 405.

## As attempt

As respects an attempt or offer to cast a ballot and vote, the terms "offer" and "attempt" are practically the same in meaning. One of the definitions given by Mr. Webster of the word "offer" is "attempt." *State v. Fielder*, 109 S. W. 580, 583, 210 Mo. 188.

To support a conviction for a violation of a statute punishing every person who shall corrupt or attempt to corrupt a juror, by offering to give any gift with intent to bias the juror, it is not necessary to prove an actual tender of the gift offered as a bribe, so as to enable the juror to at once accept or reject the same. Evidence showing a proposal or a willingness to give a bribe to bias the juror's verdict is sufficient. *State v. Woodard*, 81 S. W. 857, 861, 182 Mo. 391, 103 Am. St. Rep. 646.

In 2 Bouvier's Law Dictionary, p. 327, the definition of "offer" is "a proposal to do a thing." To prove the commission of the offense created by Rev. St. 1899, § 2043, punishing every person who shall corrupt or attempt to corrupt a juror by "offering to give any gift \* \* \* with intent" to bias the juror, it is not necessary to show an actual tender of the bribe, but evidence showing a proposal and declaration of a willingness to give a bribe or gratuity to bias the juror's verdict is sufficient. *State v. Miller*, 81 S. W. 867, 872, 182 Mo. 370.

Where a verdict found defendant guilty of an "attempt" to bribe, it sufficiently showed a violation of the statute prohibiting "an offer" to bribe an officer; the words "offer" and "attempt" in such connection being synonymous. *Johnson v. State*, 92 S. W. 257, 49 Tex. Cr. R. 250.

#### As contract

See Contract.

#### As tender

The word "offer" is frequently used by courts and text-writers as synonymous with "tender," and it may be properly so used with reference to articles capable of manual delivery and actually produced. But with respect to heavy articles of merchandise, situated at a distance from the place to which they must be transported, if restored to the vendor, the phrase "offer to return" is more commonly and aptly applied to express a willingness, or to make a proposal to rescind the contract and return the goods. In order to work a rescission, it is not sufficient for the purchaser, who has taken delivery of the goods at the vendor's place of business, to give notice to the vendor that he holds the goods subject to his order, or that the goods are at a designated place subject to his disposal. The goods must be returned to the place where accepted, unless, upon an "offer to return," such offer is refused by the vendor. *Mundt v. Simpkins*, 115 N. W. 325, 326, 81 Neb. 1, 129 Am. St. Rep. 670 (quoting and adopting definition in *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77).

Under Rev. St. § 3627, providing that, at the joining of issue in an action for involuntary trespass before a justice, defendant may "offer in writing" to permit plaintiff to take judgment against him for damages and costs, and section 3628, providing that if plaintiff fails to recover a more favorable judgment he shall not recover costs made after such offer, the oral answer of defendant entered by the justice in his docket, that "defendant tenders judgment for six cents and costs up to day," is sufficient to satisfy the statute. It bound defendant just as effectually as though he had himself written and subscribed it, and then served it on the plaintiff. *Williams v. Ready*, 39 N. W. 779, 72 Wis. 408.

#### Medical treatment

A will devising and bequeathing property to trustees to convert into securities, and pay specified sums and the balance to some hospital "offering" to treat tubercular patients, makes a gift to a hospital bestowing free treatment to tubercular patients, and hence is a public charity, as distinguished from a private enterprise for profit; the word "offering" without any condition annexed and connected with a hospital implying bestowing free treatment to those suffering from disease. *French v. Calkins*, 96 N. E. 877, 881, 252 Ill. 243.

#### OFFER AND REFUSAL

A statement by a seller contracting to repurchase at the expiration of one year on the buyer desiring it, made before the expiration of the year in response to the buyer's demand to repurchase that he could not do it, is the legal equivalent of an "offer and refusal" within Civ. Code, § 1515, providing that a refusal to accept performance made before an offer thereof is equivalent to an offer and refusal, unless before performance is actually due he gives notice of his willingness to accept it, and the seller desiring to hold plaintiff to performance must show that prior to the expiration of the year he expressed a willingness to repurchase, and, unless the statement is withdrawn before the expiration of the year, the buyer need not make demand and offer at the exact expiration of the year. *Howard v. Galbraith*, 109 Pac. 889, 890, 13 Cal. App. 373.

#### OFFER FOR SALE

Announcement that property will be sold at auction to the highest bidder is a mere declaration of intent to hold an auction, and not an offer to sell becoming binding, even conditionally, on the owner when a bid is made. *Anderson v. Wisconsin Cent. Ry. Co.*, 120 N. W. 39, 46, 107 Minn. 296, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.

A merchant has "offered or exposed for sale" an adulterated or misbranded article of food, in violation of Agricultural Law, §§ 164, 165, added to Laws 1893, c. 338, by Laws 1903, c. 524, by having the adulterated or misbranded article in stock for the purpose of sale, without actually making a sale. *People v. Lewis*, 122 N. Y. Supp. 1025, 1026, 138 App. Div. 673.

The uncontradicted testimony of two state agents that defendant delivered a can of adulterated milk at a lunchroom, taking a receipt therefor from the person in charge, is sufficient evidence of "sale," or "offer for sale," in violation of Consol. Laws, c. 1, § 32, making it unlawful to sell or offer for sale adulterated milk. *People v. McDermott Dairy Co.*, 122 N. Y. Supp. 294, 295.



Under a contract with receivers by which a broker was authorized to "offer and sell" the stock of salmon of a canning company, with a provision that the sales were to be subject to the receivers' instructions and confirmation, he was not required to procure an offer but a purchaser, and was entitled to the stipulated commission if he was the efficient means of procuring a purchaser whose offer, made directly to the receivers, was accepted, and to whom a sale was made. *Colonial Trust Co. v. Pacific Packing & Navigation Co.*, 158 Fed. 277, 279, 85 C. C. A. 539.

#### OFFER OF COMPROMISE

Admission distinguished, see Admission.

#### OFFER OF REWARD

See Reward.

#### OFFER OF SETTLEMENT

Admission distinguished, see Admission.

#### OFFER TO GIVE

##### As convey

A bill for specific performance of a contract for the conveyance of land, which alleges that defendant "offered to give" plaintiff certain land, provided plaintiff would not erect a building in a certain place and manner, and that plaintiff accepted the offer, changed the plan of the building, took possession of the land, and erected the building in accordance with the agreement, states a cause of action as against a demurrer; the allegation of an agreement "to give" being construed as an agreement "to convey." *Shipley v. Fink*, 62 Atl. 360, 361, 102 Md. 219, 2 L. R. A. (N. S.) 1002.

## OFFICE

See Business Office; Maintenance (Of Office); Post Office; Usual Business Office.

As public place, see Public Place.

Student in office of attorney, see Student.

To have an "office," in ordinary or technical parlance, implies to have that control of an office which an owner or lessee, or at least a licensee, would exercise. *Althause v. Guaranty Trust Co. of New York*, 137 N. Y. Supp. 945, 947, 78 Misc. Rep. 181.

The word "office," as used in Code Civ. Proc. § 3160, providing that a plaintiff in an action brought in the City Court of New York, who has an office for the regular transaction of business in person within the city of New York, is deemed a "resident" of that city, within the meaning of sections 3268 and 3269, which provide that a defendant may require security for costs where plaintiff is not a resident, means a place where service is rendered or business is done. *Brassack v. Interborough Rapid Transit Co.*, 121 N. Y. Supp. 215, 216, 66 Misc. Rep. 190.

An "office" in Missouri, within Rev. St. 1899, § 3862, authorizing service on a foreign corporation having no office or place of business in Missouri, by service on any agent or employé in any county or state where such service may be obtained, means an ordinarily established office, and not a mere casual place of meeting, and hence a return of service on such a corporation was not objectionable in that it recited that the corporation had no "regular office" or place of business within the state. *Stegall v. American Pigment & Chemical Co.*, 130 S. W. 144, 153, 150 Mo. App. 251.

Where a majority of the board of directors of a corporation met pursuant to a regular call for a special meeting of the board, and were unable to obtain access to the office of the corporation, and convened as a board in the hallway of the building just outside of the office, and then adjourned the meeting to a designated date, the meeting of the board was valid as against the objection that the board did not meet at the office, within Civ. Code, § 319, requiring the holding of meetings of boards of directors at the corporation's office. *Seal of Gold Mining Co. v. Slater*, 120 Pac. 15, 17, 161 Cal. 621.

The word "office" as used in Civil Code 1910, § 2259, is synonymous with "place of business." An action upon a contract with a mining corporation, which was made or was to be performed in a county where the corporation maintained a plant, together with a superintendent who was in control of its business and a large force of laborers, and a place for the transaction of such business as was necessary to the operation of the plant, may be brought in the county where the plant is located, notwithstanding the principal office of the corporation was by its charter located in another county, where its board of directors met and its financial operations were carried on. *General Reduction Co. v. Tharpe*, 75 S. E. 339, 340, 11 Ga. App. 334 (citing 6 Words and Phrases, p. 4921).

Under a petition alleging that plaintiff was lawfully occupying a room or "office" in the northwest part of the courthouse, when defendants assaulted, struck, and wounded him and forcibly ejected him from the room to his damage, but containing no allegation that plaintiff was entitled to maintain possession of such room as clerk of the county court or of the records thereof, whether he was the lawful county clerk and as such official entitled to possession of the room and records was not in issue; the word "office" in the connection in which used signifying a room or apartment. *Morgan v. Owen*, 91 S. W. 1055, 1056, 193 Mo. 587.

An ordinance directing the corporation counsel to bring an action to collect and recover on the bond of a city official such money paid to him and belonging to the city "as may be shown to have been stolen from or

misappropriated in the office of the city treasurer and not duly accounted for," did not contemplate that the moneys for which a recovery was sought should be shown to have been actually stolen from the room in which the treasurer held his office, or misappropriated in that particular room, but included moneys of the city stolen or misappropriated by the treasurer or his subordinates in such a way that the treasurer was liable therefor. *City of Syracuse v. Roscoe*, 123 N. Y. Supp. 403, 411, 66 Misc. Rep. 317.

A foreign stock corporation, leaving its blank stock certificates and its stockbook with a trust company in this state, which acted as a transfer agent, cannot be said to have an "office for the transaction of business" in this state, within Stock Corporation Law (Consol. Laws 1909, c. 59) § 33, providing that every foreign corporation having an office for the transaction of business in this state shall keep therein a stockbook, and that, if any such foreign stock corporation has in this state a transfer agent, such stockbook may be deposited in the office of such agent, for inspection of stockholders. *Althause v. Guaranty Trust Co. of New York*, 137 N. Y. Supp. 945, 946, 78 Misc. Rep. 181.

## OFFICE

See Civil Office; Color of Office; Continuance in Office; Corruption in Office; De Facto Office; Elective Office; Go Out of Office; In Office; In Virtue of His Office; Lucrative Office; Misbehavior in Office; Misconduct in Office; Misdemeanor in Office; Municipal Office; Out of Office; Possession of Office; Principal Administrative Office; Principal Office; Quasi Office; State Office; Successor in Office; Term of Office; Township Office.

Any office, See Any.

Belonging to office, see Belong—Belonging.

His term of office, see His.

Particular positions held to be offices, see Officer.

Vacancy in office, see Vacancy—Vacant—Vacate (Of Office).

An "office," as the term is used in the Constitution, means something to be held, not something to be done. *Ross v. Board of Chosen Freeholders of Essex County*, 55 Atl. 310, 313, 69 N. J. Law, 291.

The term "public office" implies permanence and duties of a public nature. *Reed v. Schon*, 83 Pac. 77, 79, 2 Cal. App. 55.

An "office" is a public charge or employment, and the term comprehends every charge or employment in which the public is interested. *Michael v. State ex rel. Welch*, 50 South. 929, 931, 163 Ala. 425.

An "office" is a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes

charged with the performance of certain duties, public or private, or a place of trust, and emolument is a usual, but not a necessary, element of office. *Wells v. State*, 94 N. E. 321, 322, 175 Ind. 380, Ann. Cas. 1913C, 86.

"Office" implies much more than the right to physically occupy a specified room, to exercise certain powers, and to receive a prescribed emolument. *People v. Ahearn*, 115 N. Y. Supp. 664, 131 App. Div. 30; Id., 89 N. E. 930, 933, 196 N. Y. 221, 26 L. E. A. (N. S.) 1153.

A "public office," while not property, is a position held by right of election or appointment, and courts will protect one in the enjoyment of these rights as quickly and as fully as though it were property. *Christy v. Kingfisher*, 76 Pac. 135, 137, 13 Okl. 585.

An "office" is a trust conferred by public authority for a public purpose and for a definite time. It is "a public station or employment conferred by the appointment of the government. The term embraces the ideas of tenure, duration, emoluments, and duties." *State v. Rose*, 86 Pac. 296, 298, 74 Kan. 262, 6 L. R. A. (N. S.) 843, 10 Ann. Cas. 927 (quoting *United States v. Hartwell*, 6 Wall. [73 U. S.] 385, 393, 18 L. Ed. 830).

"An 'office,' as defined by Blackstone, is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, whether public, as those of a magistrate, or private, as bailiffs, receivers, and the like." In re Opinion of the Justices, 62 Atl. 969, 970, 73 N. H. 621, 5 L. R. A. (N. S.) 415, 6 Ann. Cas. 283 (quoting and adopting definition in *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169, 172).

"The term 'office' is defined as 'a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging.' It embraces the ideas of tenure, duration, emoluments, and duties, and these ideas or elements cannot be separated and each considered abstractly. All taken together, constitute the office." *Tanner v. Edward*, 86 Pac. 765, 766, 31 Utah. 80, 120 Am. St. Rep. 919, 10 Ann. Cas. 1091 (quoting *Kendall v. Raybould*, 44 Pac. 1034, 13 Utah, 226; 2 Bl. Comm. 36).

"An 'office' is defined to be the right to exercise a public or private employment and to take the fees or emoluments thereunto belonging." 2 Bla. Com. 36. (*State v. Ware*, 10 Pac. 885, 13 Or. 385). The office of jury commissioner, created by Sess. Acts 1879, p. 28, embodied in Rev. St. 1899, §§ 6539, 6541 (Ann. St. 1906, p. 3272), relating to the appointment of jury commissioner in cities having a specified population, is not an "office" within Const. art. 9, § 14, limiting the term of office of county, township, and municipal officers to four years. *State ex inf. Hadley v. Corcoran*, 103 S. W. 1044, 1048, 206 Mo. 1, 12 Ann. Cas. 565.

An "office" is a public charge or employment, and he who performs the duties of an office is an "officer." Blackstone says: "An 'office' is the right to exercise a private or public employment and to take the fees and emoluments thereunto belonging. An office implies an authority to exercise some portion of the sovereign power of the state, either in making, administering, or executing the laws." The power and jurisdiction of an office constitute the "office" and are inseparable from it. The true test of a public office seems to be that it is a part of the administration of government, civil or military. A usurper is not an "officer" at all, or for any purpose; for there cannot be a *de facto* officer when a *de jure* officer already fills the office. *Commonwealth v. Bush*, 115 S. W. 249, 251, 252, 131 Ky. 384 (quoting and adopting definition in *United States v. Maurice*, 2 Brock. 103, 26 Fed. Cas. 1211; *Olmstead v. City of New York*, 42 N. Y. Super. Ct. 481; *Opinion of the Judges*, 3 Me. 481; *Commonwealth v. Gamble*, 62 Pa. 343, 1 Am. Rep. 422; *Ellason v. Coleman*, 86 N. C. 235; citing *Eubank v. Commonwealth*, 103 S. W. 368, 126 Ky. 348; *United States v. Alexander*, 46 Fed. 728; *McCahon v. Leavenworth Co.*, 8 Kan. 437; *Matter of Gunn*, 32 Pac. 470, 948. 50 Kan. 155, 19 L. R. A. 519).

"Office" is an incorporeal right and consists in the right to execute a public trust and to take the emoluments belonging to it, and an injury to the right is an injury to a private right for which there ought to be a remedy. *Maloney v. Collier*, 83 S. W. 667, 672, 112 Tenn. 78 (citing *Dodd v. Weaver*, 2 Sneed [34 Tenn.] 670).

"An office is an incorporeal right, and consists in the right to execute a public trust and to take the emoluments belonging to it." Act March 27, 1907, art. 8, § 8, declares that all offices existing under the charter of the city of Memphis and acts in amendment thereof are thereby vacated and abolished. Under the charter there was a city tax assessor, city attorney, and assistant attorney, judge, and clerk of the city court, mayor, and vice mayor; and Act March 27, 1907, provides for a city assessor, city counselor, president, and vice president, whose duties are respectively substantially the same as those of the corresponding officers under the city charter. Held, that the act could not have the effect to remove the officers holding under the city charter and create a vacancy to be filled by appointment, since, though purporting to abolish the offices, it restored them under other names, and the rule being that, while an office may be abolished, yet the officer cannot be legislated out of office without an abolishment thereof. *Malone v. Williams*, 103 S. W. 798, 818, 118 Tenn. 390, 121 Am. St. Rep. 1002 (quoting and adopting the definition in *Dodd v. Weaver*, 2 Sneed [34 Tenn.] 670).

That a board of revision of a city is not a quasi corporation, as some boards are, and that there is attached to the duty no emolument has no effect as to such board constituting an office. Neither of such characteristics is an essential element. The most essential characteristic of an office is that the incumbent in his independent capacity is clothed with some part of the sovereignty of the state to be exercised in the interest of the public and required by law, and that the duties are of a continuous character as opposed to a mere temporary employment. *Barker v. State*, 68 N. E. 575, 576, 69 Ohio St. 68 (citing *State v. Brennan*, 29 N. E. 593, 49 Ohio St. 83; *State ex rel. Armstrong v. Halliday*, 55 N. E. 175, 61 Ohio St. 171).

"Public office," as used in the Constitution, has respect to a permanent trust to be exercised in behalf of the government or of all citizens who may need the intervention of a public functionary or officer and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law. *People v. Ahearn*, 89 N. E. 930, 937, 938, 196 N. Y. 221, 26 L. R. A. (N. S.) 1163 (concurring opinion of Edw. T. Bartlett, J.; quoting *Matter of Hathaway*, 71 N. Y. 238, 244).

"A 'public office' is the right, authority, and duty created and conferred by law by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public" (quoting and adopting definition in *Mechem on Public Officers*, as approved in *Kimbrough v. Barnett*, 55 S. W. 120, 93 Tex. 301). "As said by Chief Justice Marshall, 'although an office is an employment, it does not follow that every employment is an office.' Mr. Mechem, in his work on *Public Officers*, says: 'The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions or government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.' Now, while the fact that the position of stenographer is designated in the act providing for its creation as an office, and that it declares that the person who may be called to perform its duties 'shall be a sworn officer of the court,' affords some reason for deter-

mining it to be such, still it is believed the place possesses none of those sovereign functions of the judicial department of the government to which it relates, to distinguish it from a mere employment to perform a species of service, under public authority, for the assistance and convenience of the court and parties litigant therein, in which no judicial discretion or judgment is involved. The creation of the position, as shown by the very terms of the act, was designed for no other purpose than to provide some one by whom the oral evidence offered, and other proceedings involving objections made to the admissibility of testimony, the ruling of the court, and exceptions thereto, might be taken in shorthand as a method of preserving those matters as they occurred, without delaying trials, to be afterwards transcribed and furnished the court and parties to the suit, to aid them in an accurate and prompt preparation of the record. The report or transcript of the proceedings by the stenographer is not binding, however, upon the court, and may be adopted or rejected at his discretion. No act which he is authorized to do is independent of the control of others, or vested in him as a supreme power to be exercised as a right or prerogative of a judicial office. We conclude, that while the position of a stenographer, under the statute in this state, may be, in a sense, an office, and the term thereof may continue for a longer period than two years, yet there is no such sovereign function of government embraced in the powers conferred upon the individual performing its duties as brings it within the meaning of the word 'office' as used in the section of the Constitution quoted." *Robertson v. Ellis County*, 84 S. W. 1097, 1098, 1099, 38 Tex. Civ. App. 146.

#### Agency, duty, or trust

A public office is an agency of the state. *State ex rel. Le Blanc & Railey v. Michel*, 36 South. 869, 870, 113 La. 4.

"The words 'office of public trust' are equivalent to 'public office.'" *State v. Monahan*, 84 Pac. 130, 133, 72 Kan. 492, 115 Am. St. Rep. 224, 7 Ann. Cas. 661.

An "office" is a public agency, and an "officer" is a mere agent of the public, entitled to exercise the functions and perform the duties of the office for the public benefit, and not for his own. *Goodrich v. Mitchell*, 75 Pac. 1034, 1035, 68 Kan. 765, 64 L. R. A. 945, 104 Am. St. Rep. 429, 1 Ann. Cas. 288.

An "office" has been defined as "a special trust or charge created by competent authority"; more tersely still "a public office is a public trust." The general doctrine is that the idea of office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers, as well as that of duty. The true test of public office is "that it is a parcel of the administration of government." *Gracey v. City of St. Louis (Mo.)*

111 S. W. 1059, 1163 (citing *State ex rel. Walker v. Bus*, 36 S. W. 636, 135 Mo. 331, 33 L. R. A. 616; 6 Words and Phrases, p. 4923; 2 Bouv. L. Dict. tit. "Officer").

A "public office" is a personal public trust created for the benefit of the state without any element of property. *Scheuing v. State (Ala.)* 59 South. 160, 161.

"A 'public office' is an agency for the state, and the person whose duty it is to perform this agency is a public officer. The essence of it is the duty of performing an agency; that is, of doing some act or acts, or a series of acts, for the state." *Malone v. Williams*, 103 S. W. 798, 820, 118 Tenn. 390, 121 Am. St. Rep. 1002 (quoting and adopting the definition in *Clark v. Stanley*, 66 N. C. 63, 8 Am. Rep. 488; adopted in *Wood v. Bellamy*, 27 S. E. 115, 116, 120 N. C. 212); *Martin v. United States*, 104 S. W. 678, 684, 7 Ind. T. 451.

"Though the word 'office' may be used in varying senses, the term in any proper sense implies, as indicated by its etymology, a duty or duties to be performed. Other elements, such as the public nature of the duty and its permanence, may be necessary to constitute a public office; but this element—that is, duty or service to be performed—is an essential part of the definition." Though the word may, like other terms, be used in an improper sense, it will be presumed, unless the contrary appears, that the proper sense was intended. "The term 'officer' and 'office' are, indeed, paronymous, and in their original and proper sense are to be regarded as strictly correlative. But both terms, like most other terms, are used in various senses; nor do the variations of the one always correspond with the other." *Reed v. Schon*, 83 Pac. 77, 79, 2 Cal. App. 55.

An "office or place of trust," within a constitutional provision prohibiting persons holding any office or place of trust under the United States or under the state from holding or exercising any other office or place of trust under the authority of the state, means a public position involving a delegation to the individual of some part of the sovereign functions of the government to be exercised for the public benefit. The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the government. In this respect the terms "office" and "place of trust" as used in such constitutional provisions are synonymous. The position of a public administrator is not an office within such constitutional provisions, but is a mere administrative agency. *Wooton v. Smith*, 59 S. E. 649, 650, 145 N. C. 476.

A "public office" is a personal public trust created for the benefit of the state and not for the benefit of the individual citizens

thereof, and it has in it no element of property. Therefore a statute providing for preference of honorably discharged soldiers of the Civil War in appointment, employment, and promotion in public service over others of equal qualification does not violate Const. art. 1, § 6, declaring that the General Assembly shall not grant to any citizen or class of citizens privileges or immunities not equally belonging to all; the right to hold a public office or to be employed by the state in any capacity not being a privilege. *Shaw v. City Council of Marshalltown*, 104 N. W. 1121, 1124, 131 Iowa, 128, 10 L. R. A. (N. S.) 825, 9 Ann. Cas. 1039.

"A 'public elective office' is a public agency, which barring any constitutional inhibition, express or implied, may be abolished, curtailed, or regulated by legislative enactment." *State ex rel. Henson v. Sheppard*, 91 S. W. 477, 481, 192 Mo. 497.

A public office embraces more than the right to physically occupy a specified room, exercise certain powers, and receive a prescribed emolument. It means the right to exercise generally and in all proper cases the functions of a public trust or employment, to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law. *People v. Ahearn*, 115 N. Y. S. 664, 667, 131 App. Div. 30.

A public office is a mere public agency created by the people for the purpose of the administration of the necessary functions of organized society, and the agency may at any time be terminated by the power which created it. As between the office holder and individuals in their private capacity, and perhaps as against any authority except the sovereign power itself acting in pursuance of a power of removal expressly reserved or necessarily implied from the nature of office, the officer is entitled to the full protection of the law in his right to hold the office, practically to the same extent as if it were private property. *In re Carter*, 74 Pac. 997, 141 Cal. 316.

In the most general and comprehensive sense, a "public office" is an agency for the state, and a person whose duty it is to perform this agency is a "public officer." Stated more definitely, a "public office" is a charge or trust conferred by public authority for a public purpose, the duties of which involve, in their performance, the exercise of some portion of sovereign power, whether great or small. A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law. A parish superintendent is an officer. *State ex rel. Smith v. Theus*, 38 South. 870, 872, 114 La. 1097.

### Compensation

An "office" may be only one of honor without perquisites or profits. Some employments of a private nature are considered public offices, if connected with the public, as a bank or railroad president, secretary, treasurer, or director. *Rouse v. Thompson*, 81 N. E. 1109, 1120, 228 Ill. 522 (dissenting opinion by Carter, J.; citing *People ex rel. Koerner v. Ridgley*, 21 Ill. 65; *Dickson v. People ex rel. Brown*, 17 Ill. 191).

The position of city surveyor of the city of New York is not perhaps strictly speaking an "office," for it does not carry a salary, yet inasmuch as the surveyor is appointed and is required to take an oath of office, and because by virtue of his appointment under the authority of law and the taking of such oath eligible to certain employment in the nature of public service for which he is entitled to receive compensation which compensation in turn is to be assessed upon the property, the amount thereof depends upon the law at the time the service is rendered. *Pepole ex rel. Crane v. Ahearn*, 110 N. Y. Supp. 306, 310, 125 App. Div. 795.

### Continuance regardless of incumbency

An office is a legal entity, and may exist, though it be without an incumbent. *Childs v. State*, 113 Pac. 545, 548, 4 Okl. Cr. 474, 83 L. R. A. (N. S.) 568.

### Created and duties prescribed by law

An office is a place in a governmental system created or recognized by the law of the state which either directly or by delegated authority assigns to the incumbent thereof the continuous performance of certain permanent public duties. *Fredericks v. Board of Health of Town of West Hoboken*, 82 Atl. 528, 82 N. J. Law, 200.

### Election or appointment

"An 'office' is a public station of emolument conferred by the appointment of government. The term embraces the idea of tenure, duration, emoluments, and duties." *State ex rel. Mosconi v. Maroney*, 90 S. W. 141, 146, 191 Mo. 531.

### Employment distinguished

Apart from the statute, the distinction between a public officer and an employé is that the former is charged with duties involving an exercise of some part of the sovereign power in the performance of which the public is concerned, and which are continuing and not occasional, while one merely performing duties required of him by persons employing him under an express contract or otherwise, though the employer is a public officer and the employment be a public work or business, is a mere employé. *Sanders v. Belue*, 58 S. E. 762, 763, 78 S. C. 171.

An employment differs from both an office and a position, in that its duties, which are nongovernmental, are neither certain nor

permanent. *Fredericks v. Board of Health of Town of West Hoboken*, 82 Atl. 528, 529, 82 N. J. Law, 200.

While generally speaking an "officer" is one employed on behalf of a government in a strict legal sense, the term implies employment in some fixed and permanent capacity; those engaged in mere transient or occasional employment being more properly employés than officers. *Bilger v. State*, 116 Pac. 19, 24, 63 Wash. 457.

In Const. art. 7, § 8, providing for the appointment of officers whose offices shall be created by law, the word "office" differs in its legal signification from "employé," an employé being a mere agent. *Blue v. Tetrick*, 72 S. E. 1033, 1035, 69 W. Va. 742.

An "office" is a public station or employment conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument, and duties. A government "office" is different from a government contract. The latter is necessarily limited in its duration and specific in its object. An act of the council of the Muskogee Nation, empowering the chief thereof to employ an attorney until the dissolution of the tribal relations and until a specified date, with prescribed duties, at an annual salary, payable from the general funds of the nation, does not create an "office"; but the attorney is an employé under contract. *Porter v. Murphy*, 104 S. W. 658, 669, 7 Ind. T. 395.

"The distinction is plainly taken between a person acting as a 'servant' or 'employé' who does not discharge independent duties but acts by the direction of others, and an 'officer' empowered to act in the discharge of a duty or legal authority in official life." *Padden v. City of New York*, 92 N. Y. Supp. 926, 928, 45 Misc. Rep. 517 (quoting and adopting definition in *Olmstead v. City of New York*, 42 N. Y. Super. Ct. 481; citing *People ex rel. Gilchrist v. Murray*, 73 N. Y. 535).

"Although an office is an 'employment,' it does not follow that every employment is an 'office.' A man may certainly be employed under a contract express or implied to do an act or perform a service without becoming an officer." An "office" is defined as "an employment on behalf of the government in any station of public trust not merely transient, occasional, or incidental." It is a "special trust or charge created by competent authority. The officer is distinguished from the employé in the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the liability of being called to account as a public offender for misfeasance or nonfeasance in office and usually, though not necessarily, in the tenure of his position. *United States v. Schillerholz*, 137 Fed. 616, 622 (quoting and

adopting definition in *United States v. Marice*, 26 Fed. Cas. 1211, 2 Brock. 96; *In re Attorneys' Oaths* [N. Y.] 20 Johns. 482; *People ex rel. Throop v. Langdon*, 40 Mich. 673).

The use of the word "employed" in section 1, c. 114, Laws 1891 (section 4643, Gen. St. 1909), providing that eight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons employed on behalf of any city of the state, excludes officers; an office being distinguished from an employment, in that it implies tenure, duration, emolument, and duty. *State v. City of Ottawa*, 113 Pac. 391, 394, 84 Kan. 100.

#### Investment with functions of government

"'Office' is generally defined as a public charge or employment, through which the incumbent discharges a part of the functions of government for the benefit of the public." *State v. Peake*, 120 N. W. 47, 55, 18 N. D. 101 (dissenting opinion of Morgan, J.).

A "public office" is a right, authority, and duty created and conferred by law, by which an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public. It implies a delegation of a portion of the sovereign power to and possession of it by the person filling the office. *State v. Mackie*, 74 Atl. 759, 761, 82 Conn. 398.

"A 'public office' is one whose duties are in their nature public—that is, involving in their performance the exercise of some portion of the sovereign power, whether great or small—and in whose proper performance all citizens, irrespective of party, are interested, either as members of the entire body politic or of some duly established division of it." *Greenough v. Lucey*, 66 Atl. 300, 28 R. I. 230.

"The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging to one of the three great departments, and sometimes to another: still it is a legal power which may be rightfully exercised, and in its effects will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state." *In re Opinion of the Justices*, 62 Atl. 969, 970, 73 N. H. 621, 5 L. R. A. (N. S.) 415, 6 Ann. Cas. 283 (quoting and adopting definition in *Re Opinion of the Justices* [Me.] 3 Greenl. 481, 482).

A "public office" is the right, authority, and duty created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with

some portion of the sovereign functions of the government, either executive, legislative, or judicial, to be exercised for the benefit of the public; and unless the powers conferred are of this nature the individual is not a public officer. *Guthrie Daily Leader v. Cameron*, 41 Pac. 635, 639, 3 Okl. 677.

The true test of "public office" is in itself a parcel of the administration of government. An "office" has been defined as a special trust or charge granted by competent authority. A "public office" is a public trust. The general definition is that the idea of office clearly embraces the idea of tenure, duration, fees, or emoluments, rights and powers, as well as that of duty. *Gracey v. City of St. Louis*, 111 S. W. 1159, 1163, 213 Mo. 384 (citing 6 Words and Phrases, p. 4923; 2 Bouv. Law Dict. tit. "Officer"; *People ex rel. Throop v. Langdon*, 40 Mich. 682; *State ex rel. Cannon v. May*, 17 S. W. 660, 106 Mo. 488).

The individual invested with the "right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, or invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public," is a "public officer." *State ex rel. Mosconi v. Maroney*, 90 S. W. 141, 146, 191 Mo. 531 (quoting and adopting the definition in *Mechem*, Pub. Off. § 1).

As used in Const. art. 14, § 7, providing that no person, who shall hold any office or place of trust or profit, under the United States, or any department thereof, or under the state, etc., shall hold or exercise any other office or place of trust or profit under the authority of the state, provided, etc., the terms "office" and "place of trust" are synonymous, and have reference to a public position, involving a delegation to the individual of some part of the sovereign functions of the government, to be exercised for the public benefit. *Wooten v. Smith*, 59 S. E. 649, 650, 145 N. C. 476.

An administrator belongs to that class of officers represented by curators, guardians, receivers, referees, and the like, whose duties are private, and whose acts concern private rather than public interests. An administrator is vested with no portion of the sovereign functions of the state to be exercised by him for the benefit of the public, and he is therefore not a "state officer" within the meaning of Const. art. 8, § 12, providing that "no person shall be elected or appointed to any 'office' in this state, civil or military, who is not a citizen of the United States, and who shall have resided in this state one year next preceding his election or appointment." A "public office" is a right and authority created by law by which an individual is invested with some portion of the functions of government to be exercised by him for the benefit

of the public for a given period of time, either fixed by law or enduring at the pleasure of the creating power. The word "office," as here used, is to be distinguished from its application to such positions as are at most quasi public only, as the charge of an executor, administrator, or guardian, and from the offices of a private corporation. *Stevens v. Larwill*, 84 S. W. 113, 118, 110 Mo. App. 140 (citing *Mechem*, Pub. Off. § 1; *In re Hathaway*, 71 N. Y. 238).

#### As license

A license to keep a dramshop is not an "office," which can be tested or vacated by quo warranto. *Hargett v. Bell*, 46 S. E. 749, 750, 134 N. C. 394.

#### Position distinguished

A position is analogous to an "office," in that the duties that pertain to it are permanent and certain, and it differs from an office in that its duties may be nongovernmental and not assigned to it by public law. *Fredericks v. Board of Health of Town of West Hoboken*, 82 Atl. 528, 529, 82 N. J. Law, 200.

A "public office" is a place created, or at least recognized, by the law of the state, and to which certain permanent duties are assigned either by the law itself or by regulations adopted under authority of law. A "position," within the purview of the veteran act of 1895 (3 Gen. St. 1895, p. 3702), is a place, the duties of which are continuous and permanent, analogous to those of an office, and which pertain to the position as such. *Hart v. City of Newark*, 77 Atl. 1086, 1087, 80 N. J. Law, 600.

#### As property

See Private Property; Property.

#### As privilege of citizen

See Privileges and Immunities.

#### As public office

The word "offices," as used in the general tax law of 1903 (P. L. 1903, p. 396, § 3, par. 8), cannot be deemed to refer to other than public "offices." *North Jersey St. Ry. Co. v. Jersey City*, 67 Atl. 33, 35, 74 N. J. Law, 761.

The word "office," in *Mansf. Dig. Ark. c. 151, §§ 6464, 6466*, providing that in lieu of the writs of scire facias and quo warranto actions by proceedings at law may be brought to vacate or repeal charters and prevent the usurpation of an office or franchise, and declaring that when a person usurps an office or franchise to which he is not entitled by law an action by proceedings at law may be instituted against him either by the state or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise, means a public office, and does not include the offices of a private corporation. *Le Bosquet v. Myers*, 103 S. W. 770, 771, 7 Ind. T. 75.

**OFFICE COPY**

An "office copy" of a record is "a copy authenticated by an officer intrusted for that purpose, and it is admitted in evidence upon the credit of the officer" (quoting and adopting definition in 1 Greenleaf on Evidence, § 507). Under Rev. St. 1899, § 3098, providing that records kept in any public office of a sister state, not appertaining to a court, shall be evidence in this state, if attested by the keeper of said records and the seal of his office, it is necessary to show, as a basis for the introduction of an alleged certified copy of articles of incorporation granted by a sister state, that the laws of that state required the articles to be kept or recorded by the officer certifying the copy. *Florsheim & Co. v. Fry*, 84 S. W. 1023, 1024, 109 Mo. App. 487 (citing 6 Thomp. Priv. Corp. § 7712).

**OFFICE FOR THE REGULAR TRANSACTION OF BUSINESS IN PERSON**

The expression "office for the regular transaction of business in person," as used in Code Civ. Proc. § 3160, does not necessarily mean one who carries on some business at some particular place of which he is proprietor; hence the place where one is regularly employed to render services, where he attends every business day, is a place or office for the regular transaction of business, regardless of the character of the business transacted. *Brassack v. Interborough Rapid Transit Co.*, 121 N. Y. Supp. 215, 216, 66 Misc. Rep. 190.

**OFFICE FOUND**

A legislative act directing the possession and appropriation of public land which had been granted "is equivalent to 'office found,'" and "before a forfeiture or reunion with the public domain could take place a judicial inquiry should be instituted, or, in the technical language of the common law, 'office found' or its equivalent." *Spokane & B. O. R. Co. v. Washington & G. N. R. Co.*, 95 Pac. 64, 67, 49 Wash. 280 (quoting *United States v. De Repentigny*, 5 Wall. [72 U. S.] 211, 267, 268, 18 L. Ed. 627).

An alien purchasing lands or taking them by devise may not be divested of his estate even by the state until after a formal proceeding called "office found," and until that is done he may sell and convey or devise the lands, and pass a good title to the same. Though during the life of an alien the state, by proper proceedings, could have declared an escheat of land held by her in contravention of Const. art. 2, § 33, on her death it lost that right; the land descending to her heirs. *Abrams v. State*, 88 Pac. 327, 329, 45 Wash. 327, 9 L. R. A. (N. S.) 186, 122 Am. St. Rep. 914, 13 Ann. Cas. 527.

"Inquisition" or "office found," as relating to a trial for or declaration of forfeit-

ture, etc., have no relation to the ordinary common-law trial by jury, and the jury there summoned was not the common-law jury before whom a citizen has a right to demand a trial where his peace or his rights were in question. Blackstone defines "inquisition" or "office found" to be "an inquiry made by the king's officer, his sheriff, coroner, or escheator, virtute officii, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitled the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number, being either twelve, or less, or more. \* \* \* These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he, in general, can neither take nor part from anything." For "it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury." It was a procedure peculiarly adapted for the king's use, and the important thing about it was that a record might be made and entered whereon the king could base his right to possess himself of the lands, goods, and chattels of his subject; and, as it respects lands, the office found put him into immediate possession, without the necessity of a formal re-entry. Although its frequent use was for the determination of attainder, escheats, and breaches of conditions annexed to grants, and the like, the record was not conclusive, and the subject was yet entitled to a trial suitable at common law for the final determination of his rights. A good illustration is found in escheats. "The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the Court of Chancery, but was really proceeding at common law; and, if it resulted in favor of the king, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of that court, file a traverse, in the nature of a plea or defense to the king's claim, and not in the nature of an original suit. \* \* \* The inquest of office was a proceeding in rem; when there was a proper office found for the king, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the king's favor." *United States v. Oregon & C. R. Co.*, 186 Fed. 861, 926 (quoting 3 Bl. Comm. 258, 259; *Hamilton v. Brown*, 16 Sup. Ct. 585, 587, 161 U. S. 256, 263, 40 L. Ed. 691).

**OFFICE FURNITURE**

By a mortgage bill of sale of all the desks, chairs, trunks, and "office furniture" in a certain office, the mortgagor intended



all the articles of use in the office at the time should pass; and an iron safe, which was then used there, would be embraced as an article of office furniture. *Skowhegan Bank v. Farrar*, 46 Me. 293, 296.

### OFFICE HOURS

See Business Hours.

Under Rev. St. 1895, art. 1222, authorizing the service of citation upon a corporation by leaving a copy of the same at the principal office of the company during "office" hours, a return showing service during "business" hours is sufficient. *El Paso & S. W. Ry. Co. v. Kelly* (Tex.) 83 S. W. 855, 860.

### OFFICE OF HONOR OR PROFIT

Service as a grand juror is not an "office of honor or profit," within Const. art. 2, § 2, providing that no person shall hold two offices of honor or profit at the same time. *State v. Graham*, 60 S. E. 431, 432, 79 S. C. 116.

### OFFICE OF TRUST

The chairman of the executive committee of a political party does not hold an office of trust, etc., within Terrell election law (Sayle's Ann. Civ. St. Supp. 1906, p. 183), providing that no holder of an office of profit or trust, etc., shall be a judge of election. *Walker v. Mobley* (Tex.) 105 S. W. 61, 62.

The office of a commissioner of the United States Centennial Commission is an "office of trust" under Const. U. S. art. 2, § 1, disqualifying the holder of an office of trust under the United States for the office of elector of president and vice president of the United States. In re Corliss, 11 R. I. 638, 640, 23 Am. Rep. 538.

### OFFICE UNDER THE STATE

Civil office under the state, see Civil Officer.

The provision of the Constitution that "no Senator or Representative shall hold an 'office under the state' \* \* \* the emoluments of which have been increased during the session of the Legislature of which he was a member, until one year after the expiration of his term of office in the Legislature," does not prohibit a member of a Legislature that has increased the emoluments of members of the Legislature from being a member of the next Legislature, as an "office under the state" does not include the legislative office. *State ex rel. Olson v. Scott*, 117 N. W. 1044, 1045, 105 Minn. 513.

### OFFICEHOLDING

"Officeholding" is a political privilege and the matter of appointment to office is not affected by the fourteenth amendment or other provision of the federal Constitution, and, as has been said, the power of the Legislature is supreme in respect to appoint-

ments, save as the Constitution has limited it. *Goodrich v. Mitchell*, 75 Pac. 1034, 1036, 68 Kan. 765, 64 L. R. A. 945, 104 Am. St. Rep. 429, 1 Ann. Cas. 288.

### OFFICER

See Army Officer; Chief Officer; Civil Devant Officer; City Officer; Civil Officer; Collecting Officer; Competent Officer; Constitutional Officer; Consular Officer; County Officer; De Facto Officer; De Jure Officer; District Officer; Election Officer; Executive Officer; Ex-Officer; Financial Officer; Fiscal Officer; General Officer; Judicial Officer; Legislative Officer; Local Officer; Ministerial Office—Officer; Municipal Officer; Peace Officer; Police Officer; Precinct Officer; Proper Officer; Retired Officers; Revenue Officer; Salaried Officer; State Officer; Subordinate Officer; Taken by Public Officers; Town Officer; Township Officer; United States Officer.

All other officers, see All Other.

Any judicial officer, see Any.

Any one appointed as meaning officer, see Any.

Discharge of officer, see Discharge.

Of corporation as employé, see Employé.

Other officers, see Other.

Other taxing officer, see Other.

Proceedings to remove as civil action, see

Civil Action—Case—Suit—etc.

Removal, see Remove—Removal.

Service of officer, see Service.

An "officer" is defined to be "one who is lawfully invested with an office." *State v. Kelly*, 77 S. W. 996, 997, 103 Mo. App. 711 (quoting Bouvier, Law Dict.).

"The terms 'officer' and 'office' are, indeed, paronymous, and in their original and proper sense are to be regarded as strictly correlative. But both terms, like most other terms, are used in various senses; nor do the variations of the one always correspond with the other." Thus it sometimes happens that the word "officer" is used without reference to the original and proper sense. *Reed v. Schon*, 83 Pac. 77, 79, 2 Cal. App. 55.

"A 'public officer' is one who is appointed to discharge a public duty and receive compensation for the same." *People v. Warner*, 104 N. Y. Supp. 279, 282 (quoting and adopting *Conner v. City of New York* [N. Y.] 2 Sandf. 355).

"A 'public officer' is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law." *State ex rel. Mosconi v. Maroney*, 90 S. W. 141, 146, 191 Mo. 531.

"To be an 'officer' one must be chosen or appointed or otherwise invested with the

position. It is not a thing that a person gets merely by fitting himself therefor. It takes the act of some other person or body of persons." *Danforth v. Egan*, 119 N. W. 1021, 1024, 23 S. D. 43, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.

Where either the people or the Legislature create an office or designate a person to perform some function of government, the head of such an office would be a public officer. *People ex rel. O'Toole v. Hamilton*, 90 N. Y. Supp. 547, 549, 98 App. Div. 59.

An officer who exercises important public duties and has delegated to him some of the functions of government, and whose office is for a fixed term, and whose powers and duties and emoluments become vested in a successor when the office becomes vacant, is a "public officer." *Richie v. City of Philadelphia*, 74 Atl. 430, 431, 225 Pa. 511, 26 L. R. A. (N. S.) 289.

When public functions are conferred by law on certain persons elected by the people or appointed by the Legislature, and such functions concern the general interests of the state, and are not merely local or temporary, such persons are public officers, especially if they be paid a salary for their services out of the public treasury, but not so if their duties are merely transient, occasional, or incidental. In re Appointment of Revisor, 124 N. W. 670, 676, 141 Wis. 592, 18 Ann. Cas. 1176 (citing 6 Words and Phrases, pp. 4925-4927).

"Officers," with regard to the public body for which they act, are officers of the general government, state officers, county officers, and municipal officers." *State ex rel. Long v. Rexford*, 109 N. W. 216, 217, 21 S. D. 86.

An "officer" is a mere agent of the public, entitled to exercise the functions and perform the duties of the office for the public benefit, and not for his own. *Goodrich v. Mitchell*, 75 Pac. 1034, 1035, 68 Kan. 765, 64 L. R. A. 945, 104 Am. St. Rep. 429, 1 Ann. Cas. 288.

"A 'public office' is an agency for the state, and the person whose duty it is to perform this agency is a 'public officer.' The essence of it is the duty of performing an agency; that is, of doing some act or acts, or a series of acts, for the state." *Malone v. Williams*, 103 S. W. 798, 820, 118 Tenn. 390, 121 Am. St. Rep. 1002 (quoting and adopting the definition in *Clark v. Stanley*, 66 N. C. 63, 8 Am. Rep. 488; adopted in *Wood v. Bellamy*, 27 S. E. 115, 116, 120 N. C. 212).

An "officer" is simply an agent of the public, whose power of attorney is the law, which prescribes his duties and limits his authority to such acts only as are necessary and incidental to a proper discharge of such duties as it imposes. As the agent of the public, he can no more transcend the power

given by his principal than can the agent of the humblest individual. While this power is sometimes exceeded, an act in excess of it can never be legal. *Callaghan v. McGown (Tex.)* 90 S. W. 319, 327.

Every one who is appointed to discharge a public duty, and receives compensation, in whatever shape, is a "public officer," and if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, it is very difficult to distinguish such a charge or employment from an office, or the person who holds it from an "officer." *Michael v. State ex rel. Welch*, 50 South. 929, 931, 163 Ala. 425 (quoting and adopting definition in *Bac. Abr.* and in *United States v. Maurice*, 2 Brock. 102, 26 Fed. Cas. 1211).

An "office" is a public charge or employment, and he who performs the duties of an office is an "officer." Blackstone says: "An 'office' is the right to exercise a private or public employment and to take the fees and emoluments thereunto belonging. An office implies an authority to exercise some portion of the sovereign power of the state, either in making, administering, or executing the laws." The power and jurisdiction of an office constitute the "office" and are inseparable from it. The true test of a public office seems to be that it is a part of the administration of government, civil or military. A usurper is not an "officer" at all, or for any purpose; for there cannot be a de facto officer when a de jure officer already fills the office. *Commonwealth v. Bush*, 115 S. W. 249, 251, 252, 131 Ky. 384 (quoting and adopting definition in *United States v. Maurice*, 2 Brock. 103, 26 Fed. Cas. 1211; *Olmstead v. City of New York*, 42 N. Y. Super. Ct. 481; *Opinion of the Judges*, 3 Me. 481; *Commonwealth v. Gamble*, 62 Pa. 343, 1 Am. Rep. 422; *Ellison v. Coleman*, 86 N. C. 235; citing *Eubank v. Commonwealth*, 103 S. W. 368, 126 Ky. 348; *United States v. Alexander*, 46 Fed. 728; *McCahon v. Leavenworth Co.*, 5 Kan. 437; *Matter of Gunn*, 32 Pac. 470, 94 S. 50 Kan. 155, 19 L. R. A. 519).

Rev. Codes Mont. § 262, authorizing a board of examiners to employ clerical help for any state officer or board, and prohibiting such "officers" or "boards" from employing clerks without the authority of the board of examiners, does not apply to the employees of the Supreme Court; it not being an "officer" or "board" within the terms of the act. *State ex rel. Schneider v. Cunningham*, 101 Pac. 962, 965, 39 Mont. 165.

A coroner's physician appointed by him, as authorized by Laws 1882, p. 429, c. 410, § 1769, is a subordinate of the coroner and is not a public officer, exercising as he does no part of the sovereign power. In re Flynn, 119 N. Y. Supp. 1079, 1083, 65 Misc. Rep. 233.

### **Administrator, assignee, receiver, or trustee**

An administrator belongs to that class of officers represented by curators, guardians, receivers, referees, and the like, whose duties are private and whose acts concern private rather than public interests. An administrator is vested with no portion of the sovereign functions of the state to be exercised by him for the benefit of the public, and he is therefore not a "state officer" within the meaning of Const. art. 8, § 12, providing that "no person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment." A "public office" is a right and authority created by law by which an individual is invested with some portion of the functions of government to be exercised by him for the benefit of the public for a given period of time, either fixed by law or enduring at the pleasure of the creating power. The word "office," as here used, is to be distinguished from its application to such positions as are at most quasi public only, as the charge of an executor, administrator, or guardian, and from the offices of a private corporation. *Stevens v. Larwill*, 84 S. W. 113, 118, 110 Mo. App. 140 (citing *Mechem, Pub. Off.* § 1; *In re Hathaway*, 71 N. Y. 238).

Though Bankr. Act July 1, 1898, c. 541, § 1, subd. 18, 30 Stat. 544, defines the term "officer" as used in the act as including trustees, a trustee in bankruptcy does not occupy an "office" in the sense in which that term is used in the law which prohibits an alien from being a public officer, since his duties are not general or permanent, and therefore an alien is not disqualified from acting as a trustee in bankruptcy. Section 45 of this act provides that individuals who are competent to perform the duties of a trustee and who reside or have an "office" in the judicial district within which they are appointed may act as trustees. "Individual" is a very broad term and is sufficient to include an alien. *In re Coe*, 154 Fed. 162, 163 (citing *In re Hathaway*, 71 N. Y. 238; *United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482; *Auffmordt v. Hedden*, 11 Sup. Ct. 103, 137 U. S. 310, 34 L. Ed. 674).

An action by a receiver of a national bank to recover assets is one by an officer of the United States suing under authority of an act of Congress, within Rev. St. § 629, cl. 3, of which a Circuit Court of the United States has jurisdiction without regard to the amount involved or the citizenship of the parties. *Murray v. Chambers*, 151 Fed. 142, 143.

Priv. Laws 1851, p. 5, provided for the election of trustees to administer the Kaskaskia commons, and provided for the division and lease of the lands and for the use of the same for school purposes. Section 7 also au-

thorized trustees to appropriate a portion of the proceeds to religious purposes, when asked for by a majority of the voters of the town of Kaskaskia, etc. Held, that the trustees were not "public officers," but trustees of an educational and religious trust, the administration of which was within the jurisdiction of the court of chancery. *Stead v. President, etc., of Commons of Kaskaskia*, 90 N. E. 654, 663, 243 Ill. 239.

### **Attorney at law**

An attorney at law is not a "public officer." *McKannay v. Horton*, 91 Pac. 598, 602, 151 Cal. 711, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146.

An attorney and counselor at law is a public officer appointed by the court to perform duties of a public character, and vested with certain power and authority incidental to the office. *In re Spencer*, 122 N. Y. Supp. 190, 192, 137 App. Div. 330.

A prosecuting attorney is a public officer, because he represents the sovereign power of the people of the state by whose authority and in whose name, under Const. art. 6, § 20, all prosecutions must be conducted, and not because of his relation to the court. *Fleming v. Hance*, 94 Pac. 620, 622, 153 Cal. 162.

In order to constitute an attorney employed to assist the Attorney General an officer of the state, the term of his appointment and continuance in office must be coterminous with the term of office of the Attorney General who appointed him, and of the Governor approving the appointment. *Terrell v. Sparks*, 135 S. W. 519, 521, 104 Tex. 191.

### **Candidate for office**

A candidate nominated at a primary election for a public office is not an "officer" within the statute allowing officers to resign. *State ex rel. Donnelley v. Hamilton*, 111 Pac. 1026, 1029, 33 Nev. 418.

The provision of Code Pub. Gen. Laws 1904, art. 33, § 128, that cases of contested elections of any of the officers not otherwise provided for shall be decided by the judges of the courts therein named, does not apply to primary election contests; the nominee of a political party not being an "officer." *Foxwell v. Beck*, 82 Atl. 657, 658, 117 Md. 1.

### **Corporate officer**

Under Bankr. Act July 1, 1898, c. 541, § 17a (4), 30 Stat. 550, excepting from a discharge in bankruptcy debts created by the bankrupt's fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity, an indebtedness of an officer of a private corporation, created by his misappropriation of the fund of such corporation, is not dischargeable in bankruptcy. *Tatum v. Leigh*, 72 S. E. 236, 238, 136 Ga. 791, Ann. Cas. 1912D, 216.

A director of a trust company is not a "public officer" within Penal Law (Consol. Laws 1909, c. 40) § 1857, punishing omission of public duty by a public officer, and a director guilty of neglect of duty as such is not punishable under the section. *People v. Knapp*, 99 N. E. 841, 844, 206 N. Y. 373.

The bankruptcy acts of 1841 and 1867 excepted from the operation of a discharge debts contracted in consequence of a defalcation as a "public officer." The act of July 1, 1898, c. 541, § 17, cl. 4, 30 Stat. 550, provides that the discharge shall release a bankrupt from all provable debts, except such as were created by fraud, embezzlement, or defalcation, while acting as an "officer." Held, that it must be presumed that the change was intentional, and, by omitting the word "public," officers of private corporations are included within the term "officer." *In re Harper*, 133 Fed. 970, 973.

Officers of a corporation, where they get control, with an attendant fiduciary obligation, of property of the corporation, are "officers," within Bankruptcy Act, exempting from discharge debts created by misappropriation or defalcation while acting as an "officer," so that a continuance of a suit in a state court against corporate officers for the value of corporate property misappropriated by them will not be stayed on the application of the officers who had been adjudicated bankrupt. *In re Gulick*, 186 Fed. 350, 351.

#### County or parish officer or employé

The superintendent of public education in a parish is a public officer. *State ex rel. Smith v. Theus*, 38 South. 870, 872, 114 La. 1097.

The superintendent of a county infirmary, who resides in some apartment of the infirmary or building contiguous thereto, performs such duties as the directors may impose, and is governed in all respects by their rules and regulations, and is not removed except for good and sufficient cause, is not the holder of a "public office" within Rev. St. § 6760, so as to authorize quo warranto to oust him from the same, but is a mere employé. The most general distinction of a "public office" is that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of the state, and it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law to be exercised by the incumbent in virtue of his election or appointment to the office thus created and defined, and not as a mere employé, subject to the direction and control of some one else. To the incumbent of a "public office" are delegated some of the sovereign functions of government, to be exercised by him for the benefit of the public, and some portion of the sovereignty of the country, either legislative or executive or judicial, attaches for the time being, to be ex-

ercised for the public benefit. The office of county warden is a public office, as the incumbent has power to appoint assistants to assist in policing certain reservoirs of the state and territory pertaining thereto in their respective counties, and to arrest all violators of the laws for the protection of fish and game. *Palmer v. Zeigler*, 81 N. E. 234, 238, 237, 76 Ohio St. 210; *Id.*, 81 N. E. 238, 76 Ohio St. 229 (citing *State ex rel. Attorney General v. Kennon*, 7 Ohio St. 547, 557, 558; *State ex rel. Attorney General v. Jennings*, 49 N. E. 404, 405, 57 Ohio St. 415, 424, 63 Am. St. Rep. 723; *State ex rel. Leland v. Mason*, 56 N. E. 468, 61 Ohio St. 513; *State ex rel. Attorney General v. Halliday*, 56 N. E. 118, 61 Ohio St. 352, 49 L. R. A. 427).

An "officer" in the constitutional sense being one who is elected or appointed to an office, and who takes the oath of office and is responsible for the official acts of himself and subordinates, his clerks are not "officers," and the provision in Const. art. 2, § 20, that the General Assembly shall fix the compensation of all officers, is not infringed by Act March 22, 1906 (98 Ohio Laws, p. 89), authorizing the county commissioners to fix the compensation of clerks of county officers. *Theobald v. State*, 30 Ohio Cir. Ct. R. 414, 415.

A janitor is not a county officer, within the constitutional definition of an "office," so that the salary of a janitor cannot be considered in determining whether a certain amount was properly levied for the salary of county officers. *People v. Cincinnati, L. & C. Ry. Co.*, 93 N. E. 421, 247 Ill. 506.

Within Veteran Act March 14, 1895 (3 Gen. St. p. 3702), protecting only those persons who hold an "office" or a "position," a person employed by a board of chosen freeholders to work as a carpenter at daily wages, about the county courthouse, under the direction of the county superintendent, does not hold an "office." *Kreigh v. Board of Chosen Freeholders of Hudson County*, 40 Atl. 625, 62 N. J. Law, 178 (citing and adopting *Lewis v. Jersey City*, 17 Atl. 112, 51 N. J. Law, 240; *Stewart v. Board of Chosen Freeholders of Hudson County*, 38 Atl. 842, 61 N. J. Law, 117).

A comparison clerk in the county clerk's office of the county of New York is a public officer in the civil service of the state. *People ex rel. O'Toole v. Hamilton*, 90 N. Y. Supp. 97, 44 Misc. Rep. 577.

Members of a building committee appointed by a county court to contract for the erection of a courthouse are "public officers," within Acts 1899, p. 353, c. 182, making it a misdemeanor for any "public officer" to award a contract for any public work without requiring the bond provided for in the act. *W. T. Hardison & Co. v. Yeaman*, 91 S. W. 1111, 1115, 115 Tenn. 639.

Burns' Ann. St. 1901, § 6638b, provides that county boards of education shall constitute boards of truancy, who shall appoint one truant officer in each county, and also fixes the duties and compensation of such officer. Held, that such truant officer was a "public officer," and therefore bound to qualify, before entering on the duties of his office, by taking the oath prescribed by section 7523. *Featherngill v. State ex rel. Wright*, 72 N. E. 181, 182, 83 Ind. App. 683.

The term "public officers," as used in Const. art. 12, § 3, providing that the compensation of any public officer shall not be increased or diminished during his term of office, when construed in connection with the provisions that no money shall be paid out of the treasury except on appropriation by law, and on warrant drawn by the proper officer, and that the general appropriation bill shall embrace only appropriations for ordinary expenses of the executive, legislative, and judicial departments, etc., and with article 5, § 19, article 30, §§ 8, 15, and article 21, § 2, providing for the terms and salaries of county judges, and supreme and county judges, applies only to state officers who draw their salaries from the state treasury, and does not include the county judges. *Hauser v. Seeley*, 100 N. W. 437, 438, 18 S. D. 308.

A "public officer," as defined by Act 1901 (23 St. at Large, p. 754), declaring that the term "public officer" shall include all officers of the state previously commissioned, the trustees of the various colleges of the state, members of the various state boards, dispensary constables, and other persons whose duties are defined by law, includes a poorhouse superintendent appointed by a county board of commissioners, under the authority conferred by Civ. Code 1902, §§ 785, 786. *Sanders v. Belue*, 58 S. E. 762-764, 78 S. C. 171.

Under Const. art. 3, § 28, prohibiting the granting of any extra compensation to any public officer, and Code Civ. Proc. § 3280, providing that each public officer on whom a duty is expressly imposed by law, must execute the same without fee, except where a fee is expressly allowed, an agreement to pay a county clerk, a "public officer" under Public Officers Law, § 2, for services imposed by law, is invalid on the ground of public policy. *Wadsworth v. Board of Sup'rs of Livingston County*, 115 N. Y. Supp. 8, 15.

The provisions of section 6 of "an act to reduce the number of members of boards of chosen freeholders," etc. (the Strong Act [P. L. 1902, p. 67]), concerning the terms of office of certain officers, do not apply to a mere clerkship in a county institution. *Walker v. Board of Chosen Freeholders of Essex County*, 85 Atl. 166, 83 N. J. Law, 695.

"Mr. Freeman says that a 'better definition of an office is that it is a right to exercise

a public function or employment and take the fees belonging to it.' Applying the rule or definition thus indicated, we think that, if the person who has been duly selected and authorized to do the official county printing is not to be considered an officer, his position is so analogous to that of an officer that the rules which have been approved with reference to the conflicting claims of officers de facto and officers de jure and their respective claims against the state, county, or other municipality may be held applicable." *Smith v. Van Buren County*, 101 N. W. 186, 188, 125 Iowa, 454.

#### Court officer or employé

Judges are not public officers within Const. art. 3, § 13, providing that no law shall extend the term of a public officer, or change his salary, after his election or appointment. *Commonwealth v. Mathues*, 59 Atl. 961, 980, 210 Pa. 372.

A county judge is a "public officer" within Const. art. 5, § 30, providing that, except as otherwise provided in the Constitution, no law shall extend the term of any public officer or diminish or increase his salary or emoluments after his election or appointment. *Henderson v. Boulder County*, 117 Pac. 997, 998, 51 Colo. 364.

Judges of the superior court of West Florida were "public officers acting under authority of Congress" within the meaning of the proviso in Act June 22, 1860, § 3, prohibiting commissioners from embracing among the Florida land claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." *United States v. Dalcour*, 27 Sup. Ct. 58, 59, 62, 203 U. S. 408, 51 L. Ed. 248.

One appointed court stenographer, though for a single case only, by the judge, under Sess. Laws 1899, pp. 111, 112, c. 72, is in the discharge of his duties a "public officer," so that the contract of the parties to pay him more than provided by the statute for transcribing the testimony is void, as against public policy. *Dull v. Mammoth Min. Co.*, 79 Pac. 1050, 1051, 28 Utah, 467.

"A 'public office' is the right, authority, and duty created and conferred by law by which, for a given period either fixed by law or enduring at the pleasure of the creating power, an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public" (quoting and adopting definition in *Mechem on Public Officers*, as approved in *Kimbrough v. Barnett*, 55 S. W. 120, 93 Tex. 301). "As said by Chief Justice Marshall, 'although an office is an employment, it does not follow that every employ-

ment is an office' Mr. Mechem, in his work on Public Officers, says: 'The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial attaches for the time being, to be exercised for the benefit of the public. Unless the powers conferred are of this nature the individual is not a public officer.' Now, while the fact that the position of stenographer is designated in the act providing for its creation as an office, and that it declares that the person who may be called to perform its duties 'shall be a sworn officer of the court,' affords some reason for determining it to be such, still it is believed the place possesses none of those sovereign functions of the judicial department of the government to which it relates, to distinguish it from a mere employment to perform a species of service, under public authority, for the assistance and convenience of the court and parties litigant therein, in which no judicial discretion or judgment is involved. The creation of the position, as shown by the very terms of the act, was designed for no other purpose than to provide some one by whom the oral evidence offered, and other proceedings involving objections made to the admissibility of testimony, the ruling of the court, and exceptions thereto, might be taken in shorthand as a method of preserving those matters as they occurred, without delaying trials, to be afterwards transcribed and furnished the court and parties to the suit, to aid them in an accurate and prompt preparation of the record. The report or transcript of the proceedings by the stenographer is not binding, however, upon the court, and may be adopted or rejected at his discretion. No act which he is authorized to do is independent of the control of others, or vested in him as a power to be exercised as a right or prerogative of a judicial office. We conclude that while the position of a stenographer, under the statute in this state, may be, in a sense, an office, and the term thereof may continue for a longer period than two years, yet there is no such sovereign function of government embraced in the powers conferred upon the individual performing its duties as brings it within the meaning of the word 'office' as used in the section of the Constitution quoted." *Robertson v. Ellis County*, 84 S. W. 1097, 1098, 1099, 88 Tex. Civ. App. 146.

#### Deputy

Persons who are appointed deputies under a statute are "public officers." *Wells v. State*, 94 N. E. 321, 322, 175 Ind. 380, Ann. Cas. 1913C, 86.

A deputy sheriff, appointed under the authority of Shannon's Code, § 448, to serve process in the portion of the county in which he resides, being required by sections 1079, 1080, to take the constitutional oath of office, is an officer, within Const. art. 2, § 26, declaring that no person shall hold more than one office at the same time. *State v. Slagle*, 89 S. W. 326, 115 Tenn. 336.

A statute making it a misdemeanor for any officer required to keep a court docket, or to keep an account of fees or fines and to pay over the same, to falsify such docket or account, is not restricted to public officers, and applies not only to the clerk of a district court but to the deputy clerk. *State v. Hanlin*, 110 N. W. 162, 164, 134 Iowa, 493.

Under Const. art. 2, § 2, providing for the appointment of officers by the President or heads of departments, a deputy United States surveyor, appointment of whom by a Surveyor General is provided for by Rev. St. § 2223, is not an "officer of the United States" within Act March 3, 1887, c. 359, § 2, 24 Stat. 505, as amended by Act June 27, 1898, c. 503, 30 Stat. 495, withdrawing from the jurisdiction of the Circuit and District Courts suits for fees, salary, or compensation for official services of officers of the United States. *Scully v. United States*, 193 Fed. 185, 186.

Deputy inspectors of boilers and elevators, provided for by the charter of the city of St. Louis, perform public functions. They have a fixed tenure of office of four years, and are required to give bond. Their salaries are fixed at a certain sum per year. Their qualifications are prescribed by law. Their public position is expressly denominated as an office, and their duties as official duties. The charter defines "officers" as those holding situations under the city government or its departments with an annual salary or for a fixed definite term of office, and the forms of official oath and bond prescribed refer to their positions as officers. In view of this, it was held that they are "officers," although *McQuillin's Municipal Code of St. Louis*, § 2197, authorizes the inspectors of boilers and elevators to "employ" deputies; the word "employ" conveying the idea of selecting and intrusting with a duty. *Gracey v. City of St. Louis*, 111 S. W. 1159, 1160, 1161, 1163, 213 Mo. 384 (citing 6 Words and Phrases, p. 4923).

An "officer" in the constitutional sense being one who is elected or appointed to an office, and who takes the oath of office, and is responsible for the official acts of himself and subordinates, his deputies are not "officers," and the provision in Const. art. 2, § 20, that the General Assembly shall fix the compensation of all officers, is not infringed by Act March 22, 1906 (98 Ohio Laws, p. 89), authorizing the county commissioners to fix the compensation of deputies of county of-

**ficers.** *Theobald v. State*, 80 Ohio Cir. Ct. R. 414, 415.

Since the Legislature has not provided for the office of deputy town marshal or delegated to towns the power to create such office, the deputy town marshal of an unincorporated town was not a "public officer" within Pen. Code 1901, § 143, making it a criminal offense to resist a public officer. *Findley v. State* (Ariz.) 127 Pac. 716.

Rev. St. 1899, § 3863, as amended, provides that every justice issuing any process authorized by chapter 43, art. 3, including summons, on being satisfied that process will not be executed for want of an officer to be had in time to execute it, or in all cases where the constable is a party to the pending suit, or is otherwise interested in the result thereof, may empower any suitable person not a party to the suit to execute the same by indorsement thereon, and that the party so empowered shall possess all the authority of the constable in relation to its execution. Section 3864 (page 2143) declares that every constable or "other person" serving any process authorized by the article shall return thereon in writing the time and manner of service, and shall sign his name to such return. Held, that a private person specially deputed to serve a justice's summons is in no sense an "officer," but is in law and fact the agent of the party at whose instance and at whose risk he has been named, and hence, though required to make return of the time and manner of service, such return is subject to impeachment in the action by motion to quash, or plea in abatement, and is not within the rule that the return of an officer is conclusive on the parties, and can be impeached only in a direct action on the officer's bond for a false return. *Stegall v. American Pigment & Chemical Co.*, 130 S. W. 144, 150, 150 Mo. App. 251.

#### **Drainage district director**

The director of a drainage district is in a sense a public officer; but, as his office is not one provided for by the Constitution, nor even one of the same general character, as any that are referred to in that instrument, it must be deemed not to be within the scope of the prohibition; the Kansas Bill of Rights, § 7, prohibiting any religious test or property qualification as a requirement for any office of public trust or for any vote at any election. *State v. Monahan*, 84 Pac. 130, 133, 72 Kan. 492, 115 Am. St. Rep. 224, 7 Ann. Cas. 661.

#### **Election judges or clerks**

The judges and clerks of election, appointed under the authority of Act March 28, 1903 (Laws 1903, p. 170), creating a board of election commissioners in cities having a population of over 300,000, requiring the board to appoint, 90 days prior to the first election after the adoption of the act and each two years thereafter, judges and clerks

of election for each precinct in the city, providing for the removal of the judges and clerks from "office" for grounds specified, prescribing their duties, and fixing their emoluments, are "public officers" holding office for a fixed period. *State ex rel. Mosconi v. Maroney*, 90 S. W. 141, 145, 191 Mo. 531.

A judge of election is a public officer under "An act to regulate elections" (Revision of 1898; C. S. p. 2073), upon whom a duty is imposed, and the depositing by him of a ballot, in the ballot box, of a voter who has been challenged, before the board had by a majority vote decided to receive such ballot, makes him guilty of a misdemeanor under section 197 (C. S. p. 2137). *State v. Lockman*, 83 Atl. 689, 690, 83 N. J. Law, 168; *Same v. Stockwell*, 134 N. W. 767, 770, 23 N. D. 70.

#### **Employé, laborer, or servant**

See *Employé*; *Laborer*; *Servant*.

Distinction between officer and employé generally, see *Office*.

#### **Insurance agent**

An insurance agent, as such, is not a "public officer," nor is his character a matter of public interest; except as the public has an indirect interest in the private character and conduct of every member of society; but this interest is not sufficient to invoke the privilege in libel, granted in case where one holds or is a candidate for some position of public trust. *Morse v. Times-Republican Printing Co.*, 100 N. W. 867, 873, 124 Iowa, 707.

#### **Jailer or other prison keeper**

The office of keeper of a county jail is an "office or franchise" within Revision, p. 905, providing that in case any person shall usurp or intrude into any office or franchise the Attorney General on leave of the Supreme Court may bring information. *State ex rel. Bownes v. Meehan*, 45 N. J. Law, 189, 196.

One employed as an assistant matron of a workhouse is not an officer but a mere employé, although under contract for one year, and on sufficient proof of misconduct or neglect may be summarily removed by the board in control. *Jameson v. City of Cincinnati*, 28 Ohio Cir. Ct. R. 41, 43.

Within the definition of an office as a place in a governmental system created, or recognized, by the law of the state which, either directly or by delegated authority, assigns to the incumbent thereof the continuous performance of certain permanent public duties, the wardenship of the Essex county penitentiary, in view of Act March 22, 1900 (P. L. p. 168) § 6, and the duties imposed on the warden by the board of freeholders of the county, is an office, and not a mere employment, so that quo warranto, and not certiorari, is the proper remedy to determine which of the parties is the lawful incumbent thereof. *Hosp v. Martin*, 84 Atl. 1059, 1060, 83 N. J. Law, 299.

**Juror or jury commissioner**

The qualifications and competency of grand jurors, except as prescribed by Code 1907, § 7239, providing that grand jurors must be male residents of the county, over 21 and under 60 years of age, are for the judgment of the jury commissioners, and a juror need not be a qualified elector, and section 1467, fixing the eligibility to office, has no application to jurors. *Wilson v. State*, 54 South. 572, 574, 171 Ala. 25.

A jury commissioner is an "officer" within Const. art. 160, providing that all officers shall take the oath of office and, unless he takes the oath prescribed by that article, he cannot enter on the discharge of the duties, though he may have sworn to discharge those duties according to acts 1898, p. 216, No. 135, or some other statute. *State v. McClendon*, 43 South. 417, 418, 118 La. 792 (citing *State v. Newhouse*, 29 La. Ann. 824; *State v. Arata*, 32 La. Ann. 193; *State v. Dellwood*, 33 La. Ann. 1229; *State v. Nockum*, 6 South. 729, 41 La. Ann. 689; *State v. Fuselier*, 26 South. 264, 51 La. Ann. 1317; *State v. Scott*, 34 South. 479, 110 La. 371).

Under *Burns' Ann. St. 1901*, § 1449, requiring jury commissioners to take an official oath to honestly perform their duties "during their term of office," and section 1456, declaring that any person appointed a jury commissioner who shall "fail to take upon himself said office," etc., shall be guilty of contempt of court, a person appointed a jury commissioner is an "officer" whose acts are protected by the de facto doctrine. *State v. Sutherland*, 75 N. E. 642, 645, 165 Ind. 389.

The office of jury commissioner, created by *Sess. Acts 1879*, p. 28, relating to the appointment of jury commissioner in cities having a specified population, is not an "office" within Const. art. 9, § 14, limiting the term of office of county, township and municipal officers to four years. *State ex inf. Hadley v. Corcoran*, 103 S. W. 1044, 1045, 206 Mo. 1, 12 Ann. Cas. 565.

A grand juror is not a "public officer" to be commissioned by the Governor, within the statute construing the term "public officers" to mean all officers of the state that have heretofore been commissioned by the Governor, etc. *State v. Graham*, 60 S. E. 431, 432, 79 S. C. 116.

**Municipal officer or employé**

Persons employed in a city hall in managing and conducting the affairs of the municipality are public officers, charged with the performance of public duties; and the doctrine of respondeat superior does not apply to such employments. *Schwalk's Adm'r v. City of Louisville*, 122 S. W. 860, 862, 135 Ky. 570, 25 L. R. A. (N. S.) 88.

An assistant city auditor, whose duty it is to assist the city auditor and to act in his absence, is a "public officer," defined as one

the performance of whose duties involved the exercise of some portion of the sovereign power, and in whose proper performance all citizens are interested, either as members of the entire body politic or of some subdivision of it. *Attorney General v. Tillinghast*, 89 N. E. 1058, 1060, 203 Mass. 539, 17 Ann. Cas. 449.

The superintendent of streets in Oldtown in 1904-05 was not an employé or agent of the city entitled to damages for breach of contract for employment, but was a "public officer" possessing official powers and charged with public duties, and hence can recover only the salary or emoluments established by law for that office to be paid by the city. *Stephens v. City of Oldtown*, 65 Atl. 113, 117, 102 Me. 21.

A teacher in the public schools is not an "officer" of the city within the provisions of original Greater New York Charter, § 1117, relating to the transfer to the service of the consolidated city of those holding office for definite terms. *Bogert v. Board of Education of City of New York*, 94 N. Y. Supp. 180, 183, 106 App. Div. 56.

A "public officer" being one who renders a public service, or service in which the general public is interested, a municipal fireman is a public officer, as he is charged with the public duty of protecting the property in the municipality from fire. *Schmitt v. Dooling*, 140 S. W. 197, 198, 145 Ky. 240, 36 L. R. A. (N. S.) 881, Ann. Cas. 1813B, 1078.

Since *Burns' Ann. St. 1908*, §§ 8684, 8838, providing for the creation of boards of health, recognizes and treats them as one of the executive departments of the city, members of such board are city officers, and not mere employes. *Watts v. City of Princeton*, 96 N. E. 658, 659, 49 Ind. App. 35.

The word "officer," as used in Greater New York Charter, *Laws 1901*, p. 100, c. 466, § 255, providing that the corporation counsel shall be the attorney for the city and each and every officer, and shall conduct all the law business in which the city is interested, and shall be the legal adviser of the mayor and city boards and officers, and shall furnish them such advice and legal assistance as may be required, clearly related to those officers who were on the same general footing as the mayor, city boards, and officers, etc., and not to the subordinate officers. *Donahue v. Keeshan*, 87 N. Y. Supp. 144, 147, 91 App. Div. 602.

A clerk appointed under Greater New York Charter, § 1571, authorizing the coroner to appoint a clerk, etc., who performs routine duties in strict subordination to a public officer, and with no authority under the statute to do anything except where it is authorized and directed by such officer, is not a "public officer," and hence when dismissed in violation of Civil Service Law, § 21 (*Laws 1899*, p. 809, c. 370, as amended by



Laws 1904, p. 1694, c. 697), mandamus is his remedy. *People ex rel. Hoefle v. Cahill*, 81 N. E. 453, 454, 188 N. Y. 480.

Under Rev. St. 1889, § 5777, declaring the term "officers" to include any person holding any situation under the city government or any of its departments, with an annual salary or for a definite term of office, a person appointed to perform certain engineering duties with regard to sewers in a city of the third class, for no definite term, and to receive a per diem wage, is not an "officer," entitled to perform such work under section 5848, requiring the same to be performed by a city engineer or other officer. *Weesner v. Central Nat. Bank*, 80 S. W. 319, 320, 106 Mo. App. 668.

A clerk of the street department is one of the subordinate officers whose appointment by the council is authorized by the charter of the city of Trenton, but his term of office is for one year unless sooner removed, and an appointment for three years is beyond the power of the council. Where the subordinate office of clerk of the street department is created by ordinance under a charter provision authorizing the common council to appoint such subordinate officers as shall be necessary, the incumbent must be selected and appointed by the common council, and the duty cannot be delegated to one of the city officials appointed by the council. The clerk of the street department having no duty to perform other than those directed by the street commissioner, his appointment was not to a public office, but was in the nature of a contract of employment. *McAvoy v. Inhabitants of City of Trenton*, 80 Atl. 950, 951, 82 N. J. Law, 101.

A councilman of an incorporated city is an "officer or agent of a corporation" within a statute prohibiting any "officer or agent of any corporation" or public institution to be interested in any contract to sell or furnish any supplies, etc., to the corporation, etc. *Commonwealth v. Witman*, 66 Atl. 986, 988, 217 Pa. 411.

A city councilman, like a city marshal, is a "public official." His duties are defined by law. He is not the general or private agent of the city, and the councilmen could only bind the city by such construction as they are by law authorized to make, and, since the right of any public officer can exist only by law, the city council is powerless to bind the city in any manner to pay a compensation to the marshal not fixed by a valid ordinance. *O'Dwyer v. City of Montett*, 100 S. W. 670, 671, 123 Mo. App. 184.

A charter provision for a board of apportionment composed of two aldermen and one citizen, to which should be referred all matters pertaining to taxation, does not create a new "office," but confers upon the aldermen, when selected, a power which might have been given to the entire council, and

does not violate Const. art. 16, § 40, providing that no person shall hold at the same time more than one civil "office" or emolument. *City of Houston v. Stewart*, 87 S. W. 663, 665, 99 Tex. 67.

The word "officers," as used in a city charter providing that the mayor shall appoint all officers of a city whose election or appointment is not otherwise provided for in the charter or by-laws, does not cover employes, but only includes such officers whose appointment is not otherwise provided for at the time of the appointment. *MacDonald v. Lane*, 90 Pac. 181, 182, 49 Or. 530.

The secretary of a city board of health is an "officer" within the act for the incorporation of cities, approved March 14, 1867, declaring that no city "officer" shall be in any manner interested in any contract with the city, and a contract made in violation thereof to be void, and hence a contract, between a city and the secretary of the board, whereby the secretary is to care for small-pox patients, is void unless such an emergency exists that it would be manifestly unjust to delay action in order to comply with the strict requirements of the statute. *City of Greenfield v. Black*, 82 N. E. 797, 798, 42 Ind. App. 645.

Under Rev. St. 1899, § 5848, relating to the duties to be performed by a city engineer or other officer and providing that on the completion of any sewer district the city engineer or other officer having charge of the work shall compute the cost thereof, and shall apportion the same against the lots, an officer other than the city engineer may perform the duties in regard to sewers, but an inspector appointed by the city engineer to have oversight of a sewer construction, as agent of the engineer during his temporary absence from the work, is not such an officer. *Ernst v. City of Springfield*, 130 S. W. 419, 423, 145 Mo. App. 89.

The word "officer," in Pen. Code, § 672, punishing one who with intent to defraud presents for allowance or payment to any officer of any city, authorized to audit, allow, or pay bills, fraudulent claims, includes the comptroller of the city of New York, authorized by Greater New York Charter, Laws 1901, p. 50, c. 466, § 149, to adjust claims against the city. *People v. Miles*, 108 N. Y. Supp. 510, 123 App. Div. 862.

The use of the word "officer" in a city charter authorizing the common council to make rules and regulations for the government of all "officers," and to fix the fees and charges for all official services, and to fix salaries and wages not otherwise provided by general laws, or by the charter, and a further provision stating the amount of the annual salaries of the officers of the city, and empowering the council to fix the salaries of all other officers, does not include a charter officer, and the common council was not au-

thorized to create salaries for its members. *Woods v. Potter*, 95 Pac. 1125, 1127, 8 Cal. App. 41.

Village Law (Consol. Laws 1909, c. 64) § 332, providing that an "officer" shall not be interested in a contract which he or a board of which he is a member makes on behalf of the village nor in furnishing work or materials, held not to apply to the street superintendent of the village of Saratoga Springs, as the act creating such office omitted as to him the restriction applicable generally to village officers, so that he may recover for the use of a horse and wagon furnished by him to convey the sewer, water, and street commissioner about the village in the discharge of his duties. *Morrissey v. Sewer, Water & Street Commission of Saratoga Springs*, 133 N. Y. Supp. 365, 366, 73 Misc. Rep. 432.

The office of a city treasurer, appointed by the mayor pursuant to Municipal Code Act (Acts 1907, pp. 799, 811) §§ 17, 33 (Code 1907, §§ 1067, 1171), providing for the determination by ordinance of the officers of a city, their salary, manner of election, and terms of office, and an ordinance thereunder fixing the office of treasurer, defining his duties, requiring him to make bond, etc., is a "public civil office," the title to which may be tried by quo warranto proceedings under Code 1907, § 5453. *Michael v. State ex rel. Welch*, 50 South. 929, 931, 163 Ala. 425.

The treasurer of a village is not an "officer" within Village Law, Laws 1897, p. 451, c. 414, § 313, providing that an officer shall not be interested in a contract which he or a board of which he is a member is authorized to make on behalf of the village, since under section 81 (page 388) the village treasurer is not a member of the board of trustees, and is not authorized to make contracts on behalf of the village, so that a contract for public work entered into between a village and a corporation of which the village treasurer is president is not void. In *re Village of Kenmore*, 110 N. Y. Supp. 1008, 1013, 59 Misc. Rep. 388.

Under Spokane Charter, which established a commission form of government and classified civil service, one entitled to the position of foreman in the water construction department is an "officer," and not a mere subordinate, as affecting his right to maintain quo warranto on wrongful discharge. *State ex rel. Powell v. Fassett*, 125 Pac. 963, 964, 69 Wash. 555.

St. 1865, c. 153, being an act for supplying the city of Cambridge with water, provides, in section 6, that the powers therein granted shall be exercised by such agents as the "city council" shall direct. A water board is not provided for by any subsequent act, but subsequent ordinances of the city, in designating its agents, use the phrase "water

board." St. 1891, c. 364, amending the city charter, recognizes the existence of the water board, but makes no provision for the election of its members, except in section 9, which provides that all "officers" not elected by voters shall be appointed by the mayor, subject to confirmation by the board of aldermen. Held, that members of the water board are "officers," within the meaning of the latter section, and therefore an ordinance providing for their appointment in such manner is valid. *O'Brien v. Thorogood*, 39 N. E. 287, 288, 162 Mass. 598.

The foreman of the yard of health department of a city being one of those engaged in the labor service of the city holds an "employment" rather than an "office." *Garvey v. City of Lowell*, 85 N. E. 182, 185, 199 Mass. 47, 127 Am. St. Rep. 468.

St. Louis City Charter, art. 4, § 43, defines the term "officers" to include "all persons holding any situation under the city government or its departments, with an annual salary or for a definite term." An inspector to assist the commissioner of public buildings in the inspection of private buildings in the course of erection is an officer. *Magner v. City of St. Louis*, 78 S. W. 782, 784, 179 Mo. 495.

An exempt fireman holding the position of assistant building inspector holds a "position" and not an "office." Hence certiorari and not quo warranto was the proper remedy to test the legality of his removal. *McGrath v. City of Bayonne*, 83 Atl. 730, 83 N. J. Law, 224.

Where a fireman wrongfully discharged from the fire department of the city of New York pending reinstatement accepted a position as sergeant at arms to the council of the municipal assembly, he was a mere "employee" of the city and not an "officer," within New York City Charter (Laws 1897, p. 543, c. 378, § 1549), prohibiting "municipal officers from holding two offices." *Padden v. City of New York*, 92 N. Y. Supp. 926, 927, 45 Misc. Rep. 517.

Firemen are not officers within Const. art. 15, § 1, providing that state and county officers shall subscribe to an oath not to receive or use any free pass or free transportation during their term of office. *Oklahoma City v. Oklahoma Ry. Co.*, 93 Pac. 48, 51, 20 Okl. 1, 16 L. R. A. (N. S.) 651.

New Haven city charter provides for the appointment of a director of public works, who shall have necessary clerical assistance to perform the clerical work of the board and examine all transfers of real estate within the city, and preserve such abstracts of title as may facilitate the departmental work. The charter also creates a civil service board to prescribe civil service rules for positions in the city government, including all clerks, copyists, janitors, stenographers, etc. An or-

dinance provided that the clerk of the department of public works shall keep a record of the proceedings of the department and perform other prescribed duties. The director of public works appointed relator to examine the records of transfers of real estate and make and preserve abstracts of title for use of the department, but prescribed no other duties. The position was known as "examiner of records" with an annual salary assigned to it, and the city yearbook contained relator's name, followed by that title. Upon adoption of the civil service rules, relator took the civil service examination, was appointed and continued in the same duties until his removal. Held, that relator's position was not a "public office" to try title to which quo warranto will lie, relator not being invested with part of the sovereign functions of government. *State ex rel. Neal v. Brethauer*, 75 Atl. 705, 706, 83 Conn. 143.

#### Notary public

"The position or place of 'notary public' is clearly a public office." Since, under the common law, women are disabled from holding office, they are disqualified from appointment as notaries public. In re *Opinion of the Justices*, 62 Atl. 969, 970, 971, 73 N. H. 621, 5 L. R. A. (N. S.) 415, 6 Ann. Cas. 283 (citing *People v. Rathbone*, 40 N. E. 395, 396, 145 N. Y. 434, 437, 23 L. R. A. 384).

"A notary public, who receives his appointment and commission from the Governor of the state upon the recommendation of the county court, must be regarded as a public 'officer' of the county." *Gordon v. Gordon*, 15 Ala. 72-75.

A notary public is a "public officer," within the meaning of Const. N. Y. art. 13, § 5, prohibiting the use of free transportation by a public official. *People v. Wadhams*, 68 N. E. 65, 176 N. Y. 9 (citing *People v. Rathbone*, 40 N. E. 395, 145 N. Y. 434, 23 L. R. A. 384).

A "public officer" is one who has some duty to perform concerning the public; and he is not less so when his duty is confined to narrow limits, because it is the duty and the nature of that duty which makes him a public officer, and not the extent of his authority; and, where an employment or duty is a continuing one which is defined by rules or prescribed by law and not by contract, such a charge or employment is an office, and the person who performs it is an officer. A notary public is a public officer. In re *Opinion of the Justices*, 62 Atl. 969, 970, 73 N. H. 621, 5 L. R. A. (N. S.) 415, 6 Ann. Cas. 283 (quoting and adopting definition in *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169, 172).

One who has been commissioned as notary, and has taken the oath of office, and has been acting as notary for many years, and has the reputation of being such in the community in which he lives, but who has failed

to file his oath of office in the offices of the Secretary of State and of the clerk of court, and has also failed to renew his bond every five years, as required by law, is a notary de facto; and acts passed before him have the same validity as acts passed before a notary de jure. The position of a notary public is an "office," and where a person holds a commission as a notary, and acts as one, and has the reputation of being a notary public, he is a "notary public de facto." *Davenport v. Davenport*, 41 South. 240, 241, 116 La. 1009, 114 Am. St. Rep. 575.

#### Officer of political party

The office of Democratic ward committee-man of a city is not a "public office." *Greenough v. Lucey*, 66 Atl. 800, 801, 28 R. I. 230.

The local executive committee of a political party, though required to perform certain duties by Laws 1905, p. 510, c. 93, and required to conduct political campaigns, are not "public officers." *Attorney General v. Barry*, 68 Atl. 192, 74 N. H. 353.

#### Police officer, marshal, or other peace officer

A city marshal elected by the people is a "public officer," within Const. 1890, § 175, providing that such officer shall not be removed from office for willful neglect of duty or misdemeanor in office, except on an indictment and conviction. *Lizano v. City of Pass Christian*, 50 South. 981, 982, 96 Miss. 640.

A city marshal, holding office under Greater New York Charter, § 1424, is a "public officer," within Municipal Court Act, § 333, authorizing increased costs where the successful defendant is a public officer appointed or elected under the authority of the state. *Scherl v. Flam*, 121 N. Y. Supp. 522, 523, 136 App. Div. 753.

"A 'public officer' is one who has some duty to perform concerning the public; and he is not the less a public officer when his duty is confined to narrow limits, because it is the duty, and the nature of that duty, which makes him a public officer, and not the extent of his authority." Policemen are "officers," within Const. § 20, requiring officers to be appointed for a definite time, so that an ordinance authorizing appointment of policemen during good behavior is void. *Monette v. State*, 44 South. 989, 91 Miss. 662, 124 Am. St. Rep. 715 (quoting and adopting definition in *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169).

A special policeman appointed by the Governor at the instance of a railroad company pursuant to Code 1899, c. 145, § 31 (Code 1906, § 4281), and paid by such company for his services, is prima facie a public officer, for whose acts the company is not liable. *McKain v. Baltimore & O. R. Co.*, 64 S. E. 18, 19, 65 W. Va. 233, 23 L. R. A. (N. S.) 289, 131 Am. St. Rep. 964, 17 Ann. Cas. 634.

Policemen are not officers within Const. art. 15, § 1, providing that state and county officers shall subscribe to an oath not to receive or use any free pass or free transportation during their term of office. *Oklahoma City v. Oklahoma Ry. Co.*, 93 Pac. 48, 51, 20 Okl. 1, 16 L. R. A. (N. S.) 651.

A janitor of a police station is not a "public officer." *Sims v. O'Meara*, 79 N. E. 824, 825, 193 Mass. 547 (distinguishing *Ham v. Boston Board of Police*, 7 N. E. 540, 142 Mass. 90).

A janitor of a police station, appointed for a year, is not a public officer, but a mere employé, whose contract gives him no estate for years in the station house, and no right of entry beyond a revocable license. *Wiggin v. City of Manchester*, 58 Atl. 522, 523, 72 N. H. 576.

For the purpose of determining his right to compensation during a period of suspension on written charges which on investigation are found untrue, a policeman appointed subject to the civil service rules as required by the charter of the city of Portland (section 179), who is required to take an oath of office and give a bond for the faithful discharge of his duties, who is made a peace officer by B. & C. Comp. § 1593, and a large part of whose duties are such that he must have authority to act, not as agent for the state or city, but by virtue of the office, is an officer, and, when legally appointed, has title to the office, which can only be terminated in the manner provided by law. *Reising v. City of Portland*, 111 Pac. 377, 378, 57 Or. 295, Ann. Cas. 1912D, 895.

Section 11 of the charter of the city of Portland provides that there shall be elected a mayor, treasurer, municipal judge, city attorney, auditor, and 15 councilmen, who shall be officers of the city. Section 18 prescribes the terms of such officers. Municipal officers embraced in a department, which includes detectives, are subject to the civil service rule found at section 306. Const. art. 6, § 7, provides that such other city officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law. Article 15, § 2, provides that, when the duration of any office is not provided by the Constitution, it may be declared by law, and, if not so declared, the office shall be held during the pleasure of the authority making the appointment, but the legislative assembly shall not create any office, the tenure of which shall exceed four years. Held, that a detective is not an officer within Const. art. 15, § 2. *Reising v. City of Portland*, 111 Pac. 377, 378, 57 Or. 295, Ann. Cas. 1912D, 895.

A duly appointed patrolman of the police department of a city is an "officer," within the meaning of the laws of Ohio. *State v. City of Painesville*, 32 Ohio Cir. Ct. R. 123, 129.

#### **Road commissioner, overseer, or supervisor**

A supervisor of public roads is a public officer. *Mial v. Ellington*, 46 S. E. 961, 962, 134 N. C. 131, 65 L. R. A. 697.

"A road overseer is a public officer, and obstructing him in the performance of his duties as such public officer constitutes a public offense." *Richardson v. Dybedahl*, 98 N. W. 164, 166, 17 S. D. 629.

#### **School or school district officer**

The office of school director is an "office," within Const. art. 6, § 12, conferring exclusive appellate jurisdiction on the Supreme Court in cases involving the title to an office under this state. *State ex inf. Sutton v. Fasse*, 88 S. W. 1, 189 Mo. 532.

A school trustee is an "officer," within the meaning of the word as used in a constitutional provision that all officers shall take a prescribed oath before entering on the duties of their office. *Buchanan v. Graham*, 81 S. W. 1237, 1239, 36 Tex. Civ. App. 468.

Powers in the directors of a school district will be implied when the exercise thereof is necessary to enable them to perform the duties imposed upon them; school directors being "public officers," and subject to the same rules as other public officers in respect to their implied powers. *A. H. Andrews Co. v. Delight Special School Dist.*, 128 S. W. 361, 363, 95 Ark. 28.

Under Rev. Laws, c. 42, § 27, providing that the school committee of a town "shall have the general charge and superintendence of all the public schools," the school committee act, not as "agents" of the town, but as "public officers," intrusted with powers and charged with duties concerning the maintenance of the schools. *Morse v. Ashley*, 79 N. E. 481, 482, 193 Mass. 294.

A "public officer" is a person appointed by the government and not by contract to perform a continuing duty defined by law or governmental rules. The superintendent of the Arkansas State School for the Blind, elected by the state board of trustees of charitable institutions under a statute authorizing such election, whose compensation is fixed by the statute, and whose duties of a public nature are prescribed by law, are continuous and not affected by change of the personnel of the incumbent, and who is required to give a bond for the faithful performance of his duties connected with the institution, is a public officer and not an employé. *Lucas v. Futrall*, 106 S. W. 667, 669, 670, 84 Ark. 540.

Rev. St. § 3899-3, provides that on the third Monday in April, 1896, and biannually thereafter, the school councils shall elect a clerk, who shall not be a member of the council, and who shall be clerk of the board of education. School Code April 25, 1904.

provides that all existing officers of boards of education and school councils shall hold their offices until boards of education are elected and organized under the provisions of this act. On the third Monday in April, 1904, the council neglected to elect a clerk, but elected one on April 25, 1904, after the provisions of the new School Code went into effect. Under certain statutory provisions the clerk of the board of education, outside of his mere clerical duties, which he has to perform for the board and as directed by it, has many statutory duties, for the faithful performance of which he must answer to the people. Held, that the incumbent of the office was a public officer, occupying the office of clerk of the board of education at the time the new Code took effect, and hence there was no vacancy in the office at the time the school council undertook to elect the defendant clerk, and his pretended election was void. *State ex rel. Meyers v. Coon*, 26 Ohio Cir. Ct. R. 241, 242.

Rev. St. 1899, § 4274 (Rev. St. 1889, § 6776), provides the period within which civil actions shall be commenced, after the cause of action has accrued, as follows: "Within three years: First, an action against a sheriff, coroner, or other officer, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise," etc. Section 9864 requires the board of a school district to organize by electing a president and a treasurer. Section 9868 requires the treasurer to give a bond conditioned "that he will render a faithful and just account of all money that may come into his hands as such treasurer, and otherwise perform the duties of his office according to law." Section 9869 provides that the treasurer "shall be responsible on his 'official' bond," etc. Section 9871 requires the treasurer to make annual settlements, and prescribes that "at the expiration of his term of office" he shall deliver over "to his successor in office \* \* \* all moneys or other property in his hands," etc. Held, that a treasurer of a school district is a public officer within the meaning of section 4274. *State ex rel. School Dist. of Sedalia v. Harter*, 87 S. W. 941, 943, 188 Mo. 516.

#### State officer or employé

The state secretary of mine industries provided for in the act creating the State Association of Miners (Gen. St. 1901, § 4178) is *ex officio* state mine inspector, and a public officer. *Titus v. Sherwood*, 106 Pac. 1070, 81 Kan. 870.

The words "public officer" may be synonymous with officer and broad enough to include any person authorized to perform any public duty, but "public officer" is a term not used in the Connecticut Constitution ex-

cept in article 24, providing that neither the General Assembly, nor any county, city, etc., shall pay or grant any extra compensation to any public officer, etc. It is rarely used in legislation unless limited by its context. In article 10, providing a form of oath for members of the General Assembly, executive and judicial officers, the generic word "officer" is dealt with in its broadest meaning, and the classes to which it may apply are defined as members of the General Assembly, executive officers, civil officers, judicial officers, and military officers. Such term, as used in article 24, cannot include members of the General Assembly or legislative officers, the Governor or Lieutenant Governor. *McGovern v. Mitchell*, 63 Atl. 433, 439, 78 Conn. 536.

Laws 1911, p. 18, § 63, in so far as it appropriated \$7,000 for salary and expenses of N. as special agent and expert to the Missouri Waterway Commission he not being an officer of the state, and there being no law creating an office, tenure, or duties which he was required to fill, is unconstitutional as a gift of money to an individual, in violation of Const. art. 4, § 46, and as granting to him a special and exclusive right or privilege, in violation of article 4, § 53, par. 28; but the invalidity of such provision did not invalidate the balance of the law, appropriating \$10,000 to the Commission. *Kavanaugh v. Gordon*, 149 S. W. 587, 592, 244 Mo. 695.

Ky. St. 1903, § 4258, authorizes the auditor of public accounts to appoint revenue agents, whose term of office shall be four years. Section 4259 requires revenue agents to take the oath required of other officers, and to execute a bond to the commonwealth. The duties of such agents are prescribed by law, and in many matters they may act independently of the auditor, as in assessing omitted property under section 4241. Held, that a revenue agent, though an appointee of the auditor, is an "officer of the commonwealth" holding for a fixed term, and is not subject to removal by the auditor under section 140 of the statutes, authorizing the auditor to remove the assistant auditor and auditor's clerk. *Hager v. Lucas*, 86 S. W. 552, 553, 120 Ky. 307.

The commissioners of incorporated ports appointed under Laws Or. 1909, c. 39, § 8, who are vested with the power and authority given to corporations organized under the act, are mere agents for the performance of certain duties defined by the act, and are not "officers," within the meaning of Const. art. 15, § 2, limiting the tenure of officers appointed by the Legislature to four years. *Bennett Trust Co. v. Sengstacken*, 113 Pac. 863, 868, 58 Or. 383 (citing *David v. Portland Water Co.*, 12 Pac. 174, 14 Or. 98; *State v. George*, 29 Pac. 356, 22 Or. 142, 16 L. R. A. 737, 29 Am. St. Rep. 568; *White v. Mears*, 74 Pac. 931, 44 Or. 215).

Under Const. art. 7, § 8, providing for the appointment of "officers," whose offices shall be created by law, the state Tax Commissioner holds an "office" which the Legislature is authorized to create. *Blue v. Tetrick*, 72 S. E. 1033, 1035, 69 W. Va. 742.

#### **Superintendent or employé of state institution**

"A 'public officer' is one who has some duty to perform concerning the public, and he is not the less a public officer because his duty is confined to narrow limits, because it is the duty or the nature of that duty which makes him a public officer and not the extent of his authority." Hence the clerk of the penitentiary board, created by Code 1906, § 3598, which calls the officers therein provided for employes of the penitentiary, is a "public officer," and may maintain quo warranto as such. *Yerger v. State*, 45 South. 849, 850, 91 Miss. 802 (quoting and adopting definition in *Monette v. State*, 44 South. 989, 91 Miss. 662, 124 Am. St. Rep. 715).

#### **Tax collector or assessor**

Include tax collectors within the rule that "public officers," who are required to discharge an official duty and to make a certificate or return thereof, are presumed to have truly done all that is certified and all they are required to do to make the certificate true." *Hughes v. Owens* (Ky.) 92 S. W. 595, 596.

Real estate assessors in counties having a population of 1,000,000 or over are public officers within section 13, art. 3, Const. Pa., providing that "no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment," and they are not entitled to the benefit of Act May 31, 1907 (P. L. 329), which increases the salaries of real estate assessors in counties having a population of 1,000,000 or over from \$2,000 to \$3,000; the term "public officers" not being restricted merely to constitutional offices, but applying to officers who exercise important public duties, have delegated to them some of the functions of government, and whose offices are for a fixed term and whose powers, duties, and emoluments become vested in a successor, when the offices become vacant. *Richie v. City of Philadelphia*, 37 Pa. Super. Ct. 190, 192.

#### **Townsite trustee**

The position of townsite trustee is not an office within the provision of the Constitution prohibiting a judge from accepting any office other than a judicial office during the term for which he is elected. *State ex rel. Jennett v. Stevens*, 116 Pac. 601, 604, 84 Nev. 128.

#### **As trustee**

See *Trustee*.

#### **United States officer or employé**

A post office is an office of profit or trust under the authority of Congress, so as to prevent a postmaster from holding an executive or judicial office while continuing to exercise the office of postmaster. *McGregor v. Balch*, 14 Vt. 428, 434, 39 Am. Dec. 231.

An "officer" of the United States is, as a general rule, one who holds his place by virtue of appointment by the President, by one of the courts of justice, or by the heads of departments authorized by law to make such appointments, and the governor of the National Home for Disabled Volunteer Soldiers, incorporated by act of Congress, holding by appointment of the board of managers, is not an "officer" of the United States. In *re Doe's Estate*, 138 N. W. 97, 99, 151 Wis. 136.

A clerk in the office of the Commissioner of the Five Civilized Tribes in Muskogee, Ind. T., appointed by the Commissioner acting on behalf of the Secretary of the Interior, is an "officer," within the federal statute, providing a punishment for any officer, having the custody of any record filed in his office or deposited with him, who fraudulently takes it away, etc. *Martin v. United States*, 104 S. W. 678, 684, 7 Ind. T. 451.

"Public officer," as used in Civ. Code Prac. § 63, providing that an action against a public officer for an act done by him in virtue of his office shall be brought in the county where the cause of action arose, includes an officer of the United States as well as one of the state. *Layne v. Sharp* (Ky.) 105 S. W. 373.

The cashier of a mint is not a "public officer," within Rev. St. § 3506, providing that the superintendent of each mint shall be a keeper of all bullion or coin therein except when the same is legally in the hands of other "officers." *United States v. Cole*, 130 Fed. 614, 617.

The giving out of information by a clerk of a government department in respect to a matter which it was understood should be kept secret, although for private gain, is not a crime against the United States, unless made so by law, as a mere clerk in a public office is not a "public officer." *United States v. Haas*, 167 Fed. 211, 214.

A government mineral surveyor appointed by the surveyor general under the federal statutes is not an "officer, clerk, or employé" in the General Land Office, within the statute prohibiting such persons from obtaining government land, and hence is not disqualified thereby from locating a mining claim. *Hand v. Cook*, 92 Pac. 3, 5, 29 Nev. 518.

Rev. St. U. S. §§ 1245-1250, provide for the retirement of army officers. Section 1250 authorizes the assignment of retired officers to duty at the Soldiers' Home, and by subsequent enactments retired officers may be

detailed for service with the militia of the several states or in colleges and military schools, and in time of war may be employed on active duty other than in command of troops. Act March 2, 1903, c. 975, 32 Stat. 927, 932; Act April 23, 1904, c. 1485, 33 Stat. 259; Act Nov. 3, 1893, c. 13, 28 Stat. 7; Act Aug. 6, 1894, c. 228, 28 Stat. 233; Act April 21, 1904, c. 1403, 33 Stat. 225. Held, that a retired army officer is not, by reason of such retirement, holding an office within State Const. art. 4, § 20, making any person holding any lucrative office under the United States ineligible to any civil office of profit under the state. *Reed v. Sehon*, 83 Pac. 77, 79, 2 Cal. App. 55.

The acceptance by an army officer on the active list, detached to command a battalion of Philippine scouts, of a small sum from the civil government of the Philippine Islands, to be used by him in connection with his military command in the preparation and display of an exhibit at the Louisiana Purchase Exposition, did not make him a "public official," so as to be amenable to Pen. Code P. I. art. 300, punishing the falsification of a public document by a public official. *Carrington v. United States*, 28 Sup. Ct. 203, 204, 208 U. S. 1, 52 L. Ed. 367.

An expert accountant, who is not an attorney at law, appointed by the Attorney General "a special assistant to" a United States attorney to assist in the investigation and prosecution of a particular case is not an "officer of the Department of Justice," within the meaning of Act June 30, 1906, c. 3935, 34 Stat. 816, and cannot be authorized by the Attorney General to conduct, or assist in conducting, proceedings before the grand jury in connection with such case, nor to be present in the room during the examination of witnesses, to aid the district attorney by suggestions. *United States v. Heinze*, 177 Fed. 770-772.

"A mail carrier is not a 'public officer,' but is a private agent of the contractor for carrying the mail" (and in some cases the contractor himself). *State v. Boone*, 41 S. E. 595, 182 N. C. 1107 (citing *Mechem*, Pub. Off. § 41; *Sawyer v. Corse*, 17 Grat. [58 Va.] 230, 94 Am. Dec. 445; *Throop*, Pub. Off. § 12; *State v. Barnett*, 11 S. E. 735, 34 W. Va. 74; *Hathcote v. State*, 17 S. W. 721, 55 Ark. 181).

A railway postal clerk is not "an officer, clerk, or employe" traveling "under the order or direction of the Postmaster General," within the intent of the Post Office Regulation, § 11. That regulation refers only to officers detailed for special duty. *Hartman v. United States*, 40 Ct. Cl. 133, 137.

A rural mail carrier is merely an employe in the postal department of the United States and is not an "officer" within Pen. Code 1911, arts. 475, 476, punishing any

person carrying any pistol unless he is an officer engaged in the discharge of official duty. *Lattimore v. State (Tex.)* 145 S. W. 588, 589.

United States mail carriers are not "officers" contemplated or included by Const. art. 15, § 1, providing that senators and representatives, and all judicial, state and county officers, shall, before entering upon the duties of their respective offices, take and subscribe an oath not to receive or use any free pass or free transportation during their term of office. *Oklahoma City v. Oklahoma Ry. Co.*, 93 Pac. 48, 51, 20 Okl. 1, 16 L. R. A. (N. S.) 651.

A clerk of the commissioner to the five Civilized Tribes, employed at a salary of \$1,200 a year, under authority granted the Secretary of the Interior, was not an officer of the United States, and punishable under Rev. St. § 5408, providing that any officer having the custody of any record or paper, who fraudulently takes away or destroys any such record or paper, shall suffer the penalties there prescribed. *Martin v. United States*, 168 Fed. 198, 200, 93 C. C. A. 494.

A special agent of the General Land Office, whether appointed by the Secretary of the Interior or by the Commissioner of the General Land Office, is not an "officer" of the United States, within the meaning of article 2, § 2, of the Constitution, or of Rev. St. § 5481, providing for the punishment of "every 'officer' of the United States who is guilty of extortion under color of his office," and is not subject to indictment and prosecution under said section. *United States v. Schlierholz*, 133 Fed. 333, 336.

Under Const. art. 2, § 2, providing that all officers shall be appointed by the President by and with the advice of the Senate but that Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts, or in the heads of departments, no one can be deemed an "officer of the United States," within Rev. St. § 5481, relative to extortion by an officer of the United States, unless appointed by the President, with the advice and consent of the Senate, or by the President alone, by a court of law, or the head of a department; and if by the head of a department Congress must have created the office, if not created by the Constitution itself, and vested the power of appointment in the person making it. A special agent of the Land Department, appointed under an act appropriating money to meet the expenses of protecting timber on public lands, but providing no fixed salary, tenure of office, or person with power to appoint the agents the employment of which is impliedly authorized, was not an officer of the United States. *United States v. Schlierholz*, 137 Fed. 616, 618, 622.

**OFFICER (Of Corporation)**

As officer in general, see *Officer*.  
Misconduct of, see *Misconduct*.

"Officers" are the means, the hands, the head by which corporations normally act. The word "officer" has this precise meaning. Webster gives its etymology as "ops," help, and "facere," to do or make. A corporation, in common, with a natural person, may act either in chief or by an agent. In the former case, being an artificial person, it can act only through the office of some natural person, who is on this account called its officer, and who, being thus inherent in such artificial person, is not, as regards it, an alius or other person, and hence is not an agent, within the meaning of the maxim "Qui facit per alium facit per se." *American Soda Fountain Co. v. Stolzenbach*, 68 Atl. 1078, 1080, 75 N. J. Law, 721, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822.

Rev. St. § 5102, provides that, when a corporation is the party, the verification of the pleading may be made by an "officer thereof, its agent or attorney." The word "officer" is not used in this statute tautologically, but is used in contradistinction to the word "agent," and an officer of a corporation may verify a pleading when an agent can or cannot do so. *Bullock Beresford Mfg. Co. v. Hedges*, 81 N. E. 171, 172, 76 Ohio St. 91.

A councilman of an incorporated city is an "officer or agent of a corporation," within a statute prohibiting any "officer or agent of any corporation" or public institution to be interested in any contract to sell or furnish any supplies, etc., to the corporation, etc. *Commonwealth v. Witman*, 66 Atl. 986, 988, 217 Pa. 411.

**Agent distinguished**

One distinction between officers and agents of a corporation lies in the manner of their creation. An "officer" is created by the charter of the corporation, and the officer is elected by the directors or the stockholders. An agency is usually created by the officers, or one or more of them, and the agent is appointed by the same authority. It is clear that the two terms "officers" and "agents" are by no means interchangeable. One deriving its existence from the other, and being dependent upon that other for its continuation, is necessarily restricted in its powers and duties, and such powers and duties are not necessarily the same as those pertaining to the authority creating it. The officers, as such, are the corporation. An agent is an employé. A mere employment, however liberally compensated, does not rise to the dignity of an office. The term "general agent," as applied to one representing a corporation, does not necessarily import that the person designated is an officer of the corporation. *Vardeman v. Penn.*

*Mut. Life Ins. Co.*, 54 S. E. 66, 67, 125 Ga. 117, 5 Ann. Cas. 221.

**Bookkeeper**

One employed as bookkeeper for a definite period is not an officer or agent of such corporation within Code 1906, § 2281, holding his place during the pleasure of the directors, and removable by them without cause without liability on the corporation for breach of the contract of employment. *Munn v. Wellsburg Banking & Trust Co.*, 66 S. E. 230, 231, 66 W. Va. 204, 135 Am. St. Rep. 1024.

**Director**

A director of a corporation is an "officer," within General Corporation Act, § 57, giving employes of an insolvent corporation priority for wages, but declaring that the word "employé" shall not include any officer, and he is not entitled to priority as an employé for wages as a foreman. In re *Peninsula Cut Stone Co.*, 82 Atl. 689, 9 Del. Ch. 348.

**Foreman**

A foreman acting under the direction of the superintendent of a corporation is not an "officer" of the corporation, and is not a person on whom service of summons on the corporation can be made. *Simmons v. De fiance Box Co.*, 62 S. E. 435, 436, 148 N. C. 344.

**General agent**

A mere employment, however liberally compensated, does not rise to the dignity of an office, and the term "general agent," as applied to one representing a corporation, does not necessarily import that he is an "officer" of the corporation. One distinction between an "officer" of a corporation and an "agent" thereof is that an officer may by mandamus compel the corporation to reinstate him, while an agent may be dismissed without cause, and his only remedy would be compensation in damages. *Vardeman v. Penn. Mut. Life Ins. Co.*, 54 S. E. 66, 67, 68, 125 Ga. 117, 5 Ann. Cas. 221 (citing *Wheeler & Wilson Mfg. Co. v. Lawson*, 15 N. W. 398, 57 Wis. 400; *Farmers' Loan & Trust Co. v. Warring*, 20 Wis. 305; *Thomas F. Meton & Sons v. Isham Wagon Co.*, 4 N. Y. Supp. 215; *Raleigh & G. R. Co. v. Pullmann Co.*, 50 S. E. 1008, 122 Ga. 704; *Commonwealth v. Christian* [Pa.] 9 Phila. 558).

**Manager**

The manager of a corporation is an "officer of the corporation," so that the verification of a complaint by him is the verification by an "officer." *Stockton Lumber Co. v. Blodgett*, 84 Pac. 441, 3 Cal. App. 94.

**As person**

See *Person*.

**Solicitor**

A "solicitor of business" is not within the clause "and other officers," in Rev. St. U. S. § 5136, giving a national bank power to appoint a president, vice president, cashier,



and other officers, and dismiss such officers at pleasure; but under subdivisions 8 and 7 of said section, empowering such a bank to make contracts and to exercise, by duly authorized "officers" or agents, all such incidental powers as shall be necessary to carry on the banking business, it may employ a solicitor of business for a year. *Case v. First Nat. Bank of City of Brooklyn*, 109 N. Y. Supp. 1119, 1120, 59 Misc. Rep. 269.

#### **As workman**

See Workman.

#### **OFFICER DE FACTO**

See De Facto.

#### **OFFICER ELECT**

The term "officer elect" implies a person eligible to hold office, and though a person was chosen at a general election, where he is ineligible to hold office, he is not an "officer elect," within Code 1906, § 3438, which provides for the holding of an election to fill a vacancy created by the failure of an officer elect to qualify. *State v. Hays*, 45 South. 728, 730, 91 Miss. 755.

#### **OFFICER HAVING GENERAL SUPERINTENDENCE**

A treasurer of a corporation is not an "officer having a general superintendence of its concerns," within General Corporation Act (Consol. Laws 1909, c. 23) §§ 90, 91, authorizing a creditor, trustee, director, manager, or other officer of a corporation having a general superintendence of its concerns, to sue to compel officers to account for their official conduct. *Loughlin v. Wocker*, 137 N. Y. Supp. 257, 152 App. Div. 466.

#### **OFFICER OF COURT**

See Court Officer.

Assignee for benefit of creditors as, see Officer.

Attorney at law as, see Attorney at Law.

Clerk of court as, see Clerk of Court.  
Receiver as, see Receiver.

#### **OFFICER OF THE REVENUE**

See Revenue Officer.

#### **OFFICER PRO TEM.**

An "officer pro tem." is one who pro tempore (for the time being) is such officer, fully, completely, and he is, as Revisal 1905, § 2933, provides, authorized "to execute the duties" of such office. *State v. Thomas*, 53 S. E. 522, 523, 141 N. C. 791.

#### **OFFICIAL**

See Defaulting Official.

#### **OFFICIAL ACT**

All acts of officials are not "official acts," but only such as are done under some authority derived from the law, or in pursuance

of prescribed duties. *Chase v. Cochran*, 67 Atl. 320, 322, 102 Me. 481.

A statute authorizing county supervisors to declare a charge against a county, the expenses of a county officer in defending an action against him for an "official act" applies only to official acts in which the public has concern, and does not apply to the act of the sheriff in returning an execution. *Wey v. O'Hara*, 95 N. Y. Supp. 81, 84, 48 Misc. Rep. 82.

"By an 'official act' is not meant a lawful act of the officer in the service of process; if so, the sureties would never be responsible. It means any act done by the officer in his official capacity, under color and by virtue of his office." Where a constable, in levying an execution, committed an assault on the judgment debtor's wife, who was attempting to assist the debtor in making a schedule of his property claimed to be exempt, he was acting under color and by virtue of his office, so as to render his bondsmen liable, under *Hurd's Rev. St. 1905*, p. 1272, c. 79, § 9, providing that the bonds of constables shall be held for the security and benefit of all persons who may be injured by their official acts or misconduct. *Greenberg v. People*, 80 N. E. 100, 102, 225 Ill. 174, 8 L. R. A. (N. S.) 1223, 116 Am. St. Rep. 127 (quoting and adopting the definition in *Turner v. Sisson*, 137 Mass. 191).

Where, when deputy sheriffs were within 250 yards of certain men at night and saw flashes of pistols and heard pistol shots fired in the public street of a town, such acts constituted the commission of an offense against the public peace, so that the officers' acts in attempting to arrest the persons supposed to be guilty of such offense were "official acts," within *Rev. St. 1895*, art. 4897, making sheriffs responsible for the official acts of their deputies. *King v. Brown*, 94 S. W. 328, 329, 100 Tex. 109.

The rendition of a judgment is the "official act" of the court, as distinguished from the ministerial act of spreading it on the records. *Simmons v. Hanne*, 89 South. 77, 78, 50 Fla. 267, 7 Ann. Cas. 322 (quoting and adopting definition in 1 Black, Judg. § 106).

#### **OFFICIAL BALLOT**

The "official election ballot" and "official ballot," in *Comp. St. 1903*, c. 26, § 82, providing that in no case shall the candidate of any political party be entitled to be designated on the official election ballot as the candidate of more than one political party, and shall be designated on the "official ballot" as the nominee of the party in whose nomination his name appears as the political party with which he affiliates, refer to the general election ballot and not to the primary election ballots. *State ex rel. Adair v. Drexel*, 105 N. W. 174, 177, 74 Neb. 776.

Rev. St. 1908, § 5919, requiring persons desiring to be candidates for school director to file a written notice of intention, and requiring the secretary of the school district to prepare ballots containing the names of candidates who have certified such intention, and providing that no other person shall be voted for, cannot be sustained as prescribing an "official ballot," which is a ballot prepared for election by public authority at public expense, and ballots other than those prepared by the secretary cast at the election by duly qualified electors must be counted in the absence of any fraud. *Littlejohn v. People*, 121 Pac. 159, 162, 52 Colo. 217, Ann. Cas. 1913D, 610 (quoting 6 Words and Phrases, p. 4952).

St. 1900, p. 91, c. 133, extending the provisions of the civil service law to the police force of the town of Natick, and providing in section 4 that the act shall take effect on its acceptance by a majority of the legal voters at an annual town meeting or at any meeting called for the purpose, and if the vote thereon is taken at the annual town meeting it shall be by official ballot, etc., could not be accepted by the precinct voting, the provision that the vote shall be by official ballot not warranting the inference that the vote could be taken by precincts; the term "official ballot," as defined by St. 1907, p. 633, c. 560, § 1, meaning "a ballot prepared for any election, caucus, or primary by public authority and at public expense." *Sweeney v. Bigelow*, 88 N. E. 917, 918, 202 Mass. 539 (citing Stat. 1898, p. 541, c. 548, § 1; Rev. Laws, c. 11, § 1; Stat. 1907, p. 633, c. 560, § 1).

#### OFFICIAL BOND

Under Code 1906, § 3463, relating to "official bonds," the bond of the treasurer of a levee board is an "official bond." *Adams v. Williams*, 52 South. 865, 869, 97 Miss. 113, 30 L. R. A. (N. S.) 855, Ann. Cas. 1912C, 1129.

A bond given by a county contractor under Burns' Ann. St. 1908, § 7723, is an "official bond" within section 1278, which provides that defects in official bonds shall not vitiate them. *Holthouse v. State*, 97 N. E. 130, 132, 49 Ind. App. 178.

#### OFFICIAL DOCUMENT

See Foreign Official Document.

#### OFFICIAL DUTY

See While in Discharge of Official Duty.  
Discharge of official duty, see Discharge.

Proceedings instituted by a drain commissioner to enforce payment of his salary were not "official duty" imposed on him by law, but were rather for enforcement of a private right, and hence fees for services of an attorney employed by him in such proceedings were not necessary expenses incurred by him as drain commissioner in the discharge of the duties of his office, to be paid by the county as required by Pub. Laws 1909, c. 9, No. 118, § 5. *Hatch v. Board of*

Sup'rs of Calhoun County, 136 N. W. 350, 351, 170 Mich. 322.

A county treasurer's failure to account to the county and the state, and pay over the revenue in his hands, was an omission of "official duty," within the meaning of Code 1851, § 1659, providing that actions against a public officer, growing out of an omission of an official duty, must be commenced within three years after it accrues. *State v. Dyer*, 17 Iowa, 223, 227 (citing and adopting definition in State, to Use of Mount Pleasant Bank, v. Conway, 18 Ohio, 234; State, to Use of Knox County Com'rs, v. Blake, 2 Ohio St. 147).

#### OFFICIAL ELECTION BALLOT

See Official Ballot.

#### OFFICIAL JOURNAL

The "official journal" of each of the houses of the Legislature is the journal filed in the office of the Secretary of State in accordance with law, and it controls in case of any discrepancy between it and the printed journal. *State ex rel. McKinley v. Martin*, 48 South. 846, 847, 160 Ala. 181.

#### OFFICIAL MISCONDUCT

His own official misconduct, see His.  
Willful official misconduct, see Willful Misconduct.

See, also, Misconduct in Office.

Antedating by a clerk of a court of the filing of a paper, filed out of time, so as to show filing within time, is "official misconduct" warranting his removal under Rev. St. 1895, art. 3531. *Howard v. Gulf, C. & S. F. Ry. Co. (Tex.)* 135 S. W. 707, 709 (citing *Harris v. Hopson*, 5 Tex. 529).

Where the mayor of a city by intoxication voluntarily incapacitated himself for the performance of his duties, but without undertaking official business during such time, and in the case in question owed an official duty to the men from whom he procured the intoxicating liquors unlawfully, he was guilty not only of private, but "official, misconduct," warranting his removal from office for intoxication pursuant to Acts 33d Gen. Assem. c. 78, § 1. *State v. Henderson*, 124 N. W. 767, 769, 145 Iowa, 657.

#### OFFICIAL PROCEEDINGS

See Public Official Proceedings.

#### OFFICIAL SEAL

Nothing short of an impression on the paper will constitute an "official seal." The requirement of Rev. St. § 182, that a commissioner of deeds for Wisconsin in another state shall have a seal of office, by which his official acts shall be authenticated, is not complied with by the use of a seal which does not contain the name of the state, but

in which the space for such name is left blank, and in the impression the word "Wiscousin" is written in such space with a pen. *Oelbermann v. Ide*, 68 N. W. 396, 395, 93 Wis. 669, 57 Am. St. Rep. 947.

### OFFICIAL STENOGRAPHER

Where two stenographers took the testimony at the trial, acting at different times, either of them was the "official stenographer," within Laws 1910, c. 111, requiring demand for a transcript for purposes of appeal to be served on the "official stenographer" within 30 days after adjournment of court; and, such demand having been served, the transcript furnished will not be stricken, unless shown to be incorrect in some material particular. *Lumber Mineral Co. v. King*, 54 South. 250, 251, 98 Miss. 733.

### OFFICIAL SURVEY

An "official survey," under St. 1890, §§ 1734, 1735, must show distinctly of what piece of land it is a survey, at whose request it was made, what owners were notified and present at the date of the survey, and the name of the chainman; and if such essentials are omitted it cannot be treated as an official survey. *Watkins v. Havighorst*, 74 Pac. 318, 319, 13 Okl. 128.

### OFFICIALLY

See Duly and Officially.

### OFFSET

See Set-Off.

### OFFSPRING

See Natural Offspring.

In the absence of proof to the contrary, it may be inferred that a child described in relation to a named man as his child is not merely a child committed to his custody, but is the "offspring" of his body and lawfully begotten. *Rimes v. State*, 67 S. E. 223, 7 Ga. App. 556.

### OHM

The electrical unit of resistance, called the "ohm," is 1,000,000,000 units of the centimeter-gram-second, usually called the C. G. S. system. *Peoria Waterworks Co. v. Peoria R. Co.*, 181 Fed. 990, 1001.

### OID

"Old" is defined in the Century Dictionary as having the form or resemblance of the thing indicated, like, as, in anthropoid, like man; crystalloid, like crystal; hydroid, like water. It is much used as an English formative, chiefly in scientific words. Rubberoid, therefore, is a descriptive word, meaning like rubber. *Standard Paint Co. v.*

*Trinidad Asphalt Mfg. Co.*, 31 Sup. Ct. 456, 457, 220 U. S. 448, 55 L. Ed. 538.

### OIL

See Coconut Oil; Dead Oil; Linseed Oil; Olive Oil; Salad Oil; Sesame Oil; Wood-Nut Oil.

As land, see Land.

As materials, see Materials.

As mineral, see Mineral.

As real property, see Real Property.

Dealer in oil, see Dealer.

Manufacture of, see Manufactures—  
Manufactured Articles.

### OIL COMMONLY USED IN SOAP MAKING

Niger-seed oil, which, while used in soap making, can be used for other purposes, though without the proper qualities for such purposes, is within the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 568, 30 Stat. 151, for oils "commonly used in soap making, \* \* \* fit only for such use." *United States v. Colby & Co.*, 158 Fed. 883, 82 C. C. A. 629.

Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 568, 30 Stat. 198, relating to "oils commonly used in soap making" and "fit only for such uses," does not include so-called "oleic acid," or red oil, which is fit for other uses, although commonly used as soap stock. *Edward Hill's Sons & Co. v. United States*, 151 Fed. 475, 81 C. C. A. 13.

### OIL COMPANY

As merchant, see Merchant.

### OIL DEPOT

Any warehouse or place where oils are stored in large quantities is a depot within the meaning of a statute imposing a tax on "oil depots," wherein petroleum or other oils are stored in bulk or tank. *Standard Oil Co. v. Commonwealth*, 82 S. W. 1020, 1022, 119 Ky. 75.

### OIL MILL

See Cotton Seed Oil Mill.

### OIL WELL

As mine, see Mine.

### OLD

#### OLD BRASS

"Composition metal" is a commercial designation for all composite metals of copper, tin, lead, and spelter containing 70 per cent. or more of copper, and articles made of that metal are not "old brass," within the commercial meaning of that term. "Composition scrap" is the commercial designation which includes old cannon and various other articles made of composition metal, which are dealt in by the old-metal trade. Down-

ing v. United States, 122 Fed. 445, 446, 58 C. C. A. 427.

### OLD-FIELD PINE

A timber deed, which conveyed all the pine timber 10 inches and up, includes every kind of pine on the land, regardless whether it is worth sawing, and so includes "old-field pine," which is pine that grows on land that has been once farmed. *Hearin v. Union Sawmill Co.*, 151 S. W. 1007, 1008, 105 Ark. 455.

### OLD LINE POLICY

A contract of life insurance which does not unalterably fix the payments to be made by the insured, and which makes the benefit to be paid dependent upon the collection of such assessments as may be necessary, is an assessment policy, an old-line policy being one in which the premiums and the liability incurred by the insurer are fixed and unalterable. *Knott v. Security Mut. Life Ins. Co.*, 144 S. W. 178, 188, 161 Mo. App. 579.

Where a policy provided that the price of the insurance was calculated on the American Tables of Mortality, and that a certain sum should be laid aside from the premiums for the first two years to make an emergency fund required by Rev. St. 1899, § 7905, and that, if the death rate should exceed that estimated in the American Tables, an assessment might be made to meet the emergency, it was an "old line life insurance policy," and not an assessment policy, defined by section 7901 as one where the amount is dependent on the collection of an assessment on persons holding similar contracts, and hence the policy in question was within section 7890, declaring that no misrepresentation should avoid a policy unless the matter represented should have actually contributed to the contingency or event on which the policy was to become payable. *Williams v. St. Louis Life Ins. Co.*, 87 S. W. 499, 503, 189 Mo. 70.

### OLD WATER

Where benefits of an irrigation system were classified under two heads, one of "old water," and the other of "new water," and the term "old water" referred to existing water rights at the time of the purchase of the canal, and "new water" referred to rights yet to be acquired by the enlargement of the canal, and no benefits under the head of "old water" were apportioned to plaintiff's land, and the canal had not been enlarged so as to acquire any "new water," until such enlargement occurred, or it was made to appear that the canal company had sufficient water to supply plaintiff's demand without interfering with prior users, he could not acquire a perpetual water right by the temporary use of water from the canal when prior users were not demanding their full rights.

*Gerber v. Nampa & Meridian Irr. Dist.*, 100 Pac. 80, 84, 16 Idaho, 1.

## OLEOMARGARINE

Dealer in oleomargarine, see Dealer.

"Oleomargarine is a manufactured product made of oleo oil, neutral lard, milk and cream, and pure butter, although pure butter is not used in all grades, and butter and milk and cream and other coloring matter is evidently used for the purpose of giving it the semblance of the true dairy product." *State v. Armour Packing Co.*, 100 N. W. 59, 60, 124 Iowa, 323, 2 Ann. Cas. 448.

Agricultural Law, Laws 1893, p. 660, c. 338, art. 2, § 20, defines oleomargarine as any article or substance in the semblance of butter not the usual product of the dairy, and not made exclusively of pure and unadulterated milk or cream, or (2) any article or substance into which any oil, lard, or fat not produced from milk or cream enters as a component part. Section 26 (page 663), as amended by Laws 1894, p. 870, c. 426, Laws 1897, p. 810, c. 768, and Laws 1902, p. 966, c. 385, provides that any person manufacturing, selling, etc., any substance in imitation or semblance of butter, shall be deemed guilty of a violation of the agricultural law, whether he sells such substance as butter, oleomargarine, or under any other name or designation whatsoever. Depositions on which a warrant charging a violation of said section 26 was issued showed that relator sold an article called "Oleomargarine," consisting of a small brick of white substance wrapped in paper, and labeled "Oleomargarine." There was no statement that the article imitated or was in semblance of natural butter. The chemist who analyzed the substance deposed that it was not natural butter, nor of the color of natural butter produced from pure milk or cream, etc., but was what is commonly known as oleomargarine. Held, that the depositions negated the fact that the substance was an imitation or in semblance of natural butter, and disproved the essential facts necessary to constitute the crime. *People ex rel. McAuley v. Wahle*, 109 N. Y. Supp. 629, 631, 124 App. Div. 762.

## OLIVE OIL

### OLIVE OIL IN TINS

Construing Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 40, 30 Stat. 153, providing (1) for olive oil "in bottles, jars, tins, or similar packages," and (2) for "olive oil, not specially provided for," held, that oil in 5-gallon tins, in which form it is not sold to the consumer but to hotels and retail dealers, is not subject to the first provision, but to the latter. *United States v. La Manana, Azema & Farnan*, 154 Fed. 927.

## OLIVES

### OLIVES IN JARS

Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 264, 30 Stat. 171, relating to olives "in bottles, jars or similar packages," and "in casks or otherwise than in bottles, jars, or similar packages," does not import an intention to make a division between olives in retail packages and those in wholesale packages, and that "olives in jars" holding 10 gallons are therefore within the first of these provisions. *United States v. Shing Shun & Co.*, 173 Fed. 844, 845.

### OLIVES PREPARED

As fruit, see Fruit.

## OLOGRAPHIC WILL

See Holographic Will.

## OMISSION

See Willful Omission.

"Omission" denotes a negative and inaction. *Randle v. Birmingham Ry., Light & Power Co.*, 53 South. 918, 921, 169 Ala. 314.

"Omission" is a correlative of duty. *New York Cent. & H. R. R. Co. v. United States*, 166 Fed. 267, 269, 92 C. C. A. 331.

The act of a railroad company in closing or obstructing a drain so as to damage lands and crops was an act of "commission" and not of "omission." *Brown v. Louisiana & N. W. R. Co.*, 42 South. 656, 118 La. 87.

Under St. 1894, c. 389, requiring in case of omission to state the place of the injury, the term "omission" means something more than a failure to state the precise spot of the accident with sufficient clearness. The failure must be an omission patent on the face of the document. Hence a notice of accident on a highway, stating that it occurred while driving along the F. road, leading from W., about three or four miles from W., at a point thereon on the F. side of the five bridges, is not within the statute. *Tobin v. Inhabitants of Brimfield*, 65 N. E. 28, 182 Mass. 117.

The violation by a corporation of the duty imposed by the Employers' Liability Act, requiring all railroads to equip their cars used in interstate commerce with automatic couplers, constituted an "omission," within the meaning of Code 1896, § 27, giving a right of action to the personal representative for the wrongful act, omission, or negligence of any person or corporation causing the death of intestate. *Mobile, J. & K. C. R. Co. v. Bromberg*, 37 South. 395, 400, 141 Ala. 258.

### Neglect distinguished

See Neglect.

## OMISSIONS, NEGLECTS, AND DEFAULTS

An alderman, clothed with original criminal jurisdiction by the town charter, who failed to charge a person brought before him with any offense under the charter, and who tried him for an offense not embraced within the charter, and who fined and imprisoned him for an offense of which he was not tried in an orderly manner, and to which he had not pleaded guilty, and who failed to keep a record of his judicial proceedings was guilty of "omissions, neglects, and defaults," within Rev. Code 1852, as amended to 1893, p. 697, c. 92, § 2, authorizing the judges of the superior court to punish the contempt, omissions, neglects, and defaults of enumerated officers. *In re Tull* (Del.) 78 Atl. 299, 300, 2 Boyce, 126.

### OMIT

See Neglect.

Under Code Supp. 1907, § 1385b, authorizing the auditor to correct errors in the assessment list, and to assess for taxation any omitted property on notifying the owner, etc., taxable property is omitted from the assessment roll where the assessor erroneously decides that property subject to taxation is not taxable and leaves it off the roll on that account, as well as where through oversight or ignorance of the existence of the property it is omitted; the word "omit" meaning to let fall, to leave out, not to insert or name, to neglect to mention or to speak of, as to "omit" an item from a list, etc. *Talley v. Brown*, 125 N. W. 248, 253, 146 Iowa, 360, 140 Am. St. Rep. 282.

## ON—UPON

See As Upon the Trial; In or Upon; In, Upon, or About; Lived Upon; Long On; Squatted Upon; Standing or Erected Upon.

The word "upon" is ordinarily synonymous with "on" in all of its meanings; the prefix "up" being almost eliminated. *State ex rel. Barrett v. Hitchcock*, 146 S. W. 40, 51, 241 Mo. 433.

Where a note is payable on a fixed day, and not "on or about" a fixed date, and the debtor makes payment before the maturity of the note, he is not entitled, in the absence of an agreement to the contrary, to interest on the payments from the time they are made to the date on which the note is due. *Black-shear Mfg. Co. v. Stone*, 70 S. E. 29, 30, 8 Ga. App. 661.

While jurisdiction of the courts of a state extends only to things "on" a river, and not to permanent structures attached to the river bed within another state, it includes a suit relating to floating structures used in connection with fish nets in the river, although anchored by means of weights. Co-

*lumbia River Packers' Ass'n v. McGowan*, 172 Fed. 991, 997.

In calling for the Ohio river as the northern boundary of a magisterial district which bordered on it, the designation of the beginning point as "on the Ohio river" means that the district line begins in the line of the county on its northern shore. *Commonwealth v. Louisville & E. Packet Co.*, 80 S. W. 154, 155, 117 Ky. 936.

In a conveyance the words "to," "on," "by," "at," "along," a nontidal stream presumptively carry title as far into the stream as the grantor possesses. *Leary v. Jersey City*, 189 Fed. 419, 428.

A conveyance of land bounding "on" a way, where, as a matter of construction, the granted premises do not stop at the side line, goes to the line of the ownership of the grantor. An owner laid out a passageway along the easterly line of his tract. He subsequently conveyed the tract by mortgage, which described the land as "on a" way and gave courses and distances. He subsequently conveyed the way to a third person. Held, that the mortgages operated to convey to the center of the way, with a right of way over the other half, and that the third person had a half of the way, with a corresponding right of way over the other half. *Gould v. Wagner*, 82 N. E. 10, 11, 13, 196 Mass. 270.

In an action against a street railroad company for personal injuries, an allegation in the declaration that plaintiff was "on" one of defendant's cars renders the count demurrable, as plaintiff might have been on the car as a trespasser; the action being based on his legal presence on the car. *Breese v. Trenton Horse R. Co.*, 19 Atl. 204, 205, 52 N. J. Law, 250.

"There is a long line of uniform authorities that the words 'on,' 'when,' 'after,' 'from and after,' and like expressions, used in a devise of a remainder following a life estate, do not afford sufficient ground in themselves for adjudging that a remainder is contingent and not vested, and that such words, unless their meaning is enlarged by the context, are to be construed as relating merely to the time of the enjoyment of the estate, and not to the time of its vesting an interest. Where nothing appears in the context of the will which enlarges these words, they do not of themselves effect a postponement of the vesting of the remainder until the death of the life tenant." *Davidson v. Jones*, 98 N. Y. Supp. 265, 266, 112 App. Div. 254 (citing *Connelly v. O'Brien*, 60 N. E. 20, 166 N. Y. 406; *Hersee v. Simpson*, 48 N. E. 890, 154 N. Y. 496; *Nelson v. Russell*, 31 N. E. 1008, 135 N. Y. 137, *Moore v. Lyons* [N. Y.] 25 Wend. 119).

Adverbs of time, such as "upon," "then," "from and after," etc., in the devise or bequest of a remainder limited upon life estate,

are construed to relate merely to the time of enjoyment of the estate, and not to the time of its vesting in interest. *Staples v. Mead*, 137 N. Y. Supp. 847, 850, 152 App. Div. 745.

The location of a depot at a point within 300 feet of the northern boundary of a town, 100 feet of its eastern boundary, and 1,450 feet from its southern boundary at the nearest point, is not a location "on" the southern limits of the town within the terms of a deed delivered in escrow and conveying land in consideration of such location. *Bridgers v. Beaman*, 75 S. E. 798, 799, 159 N. C. 521.

As used in Code Civ. Proc. § 847, as it stood prior to 1897, requiring that judgment be rendered upon the coming in of the report of sale, the word "upon" does not mean "immediately upon." Hence a deficiency judgment in a foreclosure suit, under such statute, was not erroneous because not rendered immediately upon the coming in of the report of sale, where entered at the term at which confirmation was had. *Crary v. Buck*, 95 N. W. 839, 840, 1 Neb. (Unof.) 596.

#### As after

As used in a will directing the payment of certain indebtednesses "upon" the death of testator's wife, the word "upon" meant immediately after. *Brown v. Ferren*, 58 Atl. 870, 73 N. H. 6.

In section 2330, Rev. Codes 1905, relating to the division of counties, the word "upon" means after, or following, and the section makes the qualifying of the commissioners a condition precedent to clothing the new county with legal existence. The word "formed" means and relates only to the area of the county and has no reference to a county equipped with means of government, and therefore the voters are legal voters at a primary held before the appointment of the commissioners. *Murray v. Davis*, 128 N. W. 305, 306, 21 N. D. 64.

#### As and

Where a lease recited that the lessee had hired a store in the course of erection "on" a lot described, it was held that the word "on" could not be read as "and," and that the building only was demised. *Klie v. Von Broock*, 37 Atl. 469, 472, 56 N. J. Eq. 18.

#### As at the time of

A clause in a will devising property to testator's grandchildren "upon the death" of their mother does not indicate an intention to postpone the vesting of the remainder to the date of the mother's death, instead of from the date of testator's death, but merely refers to the time when the remaindermen shall come into the enjoyment of the estate. *Archer v. Jacobs*, 101 N. W. 195, 199, 25 Iowa, 467.

A remainder is not to be considered contingent where it may be vested consistently with the intent of testator, and the words "after" and "upon the death of," and like

words, do not make a contingency, but merely indicate when the remainder shall take effect in possession. *Clark v. Peters*, 124 N. Y. Supp. 961, 962, 68 Misc. Rep. 252.

A will gave part of testator's estate in trust for his brother, providing that "upon his death" the property should be conveyed to another. Held, that the use of the word "upon," followed by directions to convey, indicates that, until the contingency named should happen, there was to be no vesting. *In re Keogh*, 95 N. Y. Supp. 191, 196, 47 Misc. Rep. 37.

The word "upon," as used in a bond in which the condition is that if within one year, upon request and payment of a certain sum, the obligor shall make and execute a valid deed of a piece of land, is equivalent in meaning to the words "at the time of," and requires the obligor to execute his deed within a reasonable time after request made and money paid or tendered, if done, within a year. *Brown v. Clough*, 39 Me. 566, 568.

#### Condition precedent

The words "on payment," in a contract of sale providing that, "on payment" of the contract price and interest, the vendor would execute and deliver a warranty deed of the said premises, make the conditions of the contract concurrent as to time and dependent, so that the payment of the money is a condition precedent to the delivery of the deed which is intended by the parties to take place at the same time. *Hunt v. Lake*, 97 N. Y. Supp. 298, 299, 48 Misc. Rep. 570.

#### As contiguous, near to, or at

When used as indicating relative situation, "on" means at, near, or adjacent to, without implying contact or support. *O'Mara v. Jensma*, 121 N. W. 518, 519, 143 Iowa, 297.

The word "on" in Laws 1905, p. 114, making it unlawful for a person to be in an intoxicated condition on any public street or highway, is not synonymous with "near," and one could not be convicted under the act for being intoxicated on a porch or shed of a store, within 15 to 30 feet of a public road. *Hutchinson v. State*, 70 S. E. 63, 65, 8 Ga. App. 684.

Where a deed described the land as lot 10, of block V of the Mott tract, "the same being the lot on the corner of First street on the east side of F. street, being 65 feet front by 165 feet deep," and a map of the Mott tract showed lot 10 of block V, as a lot fronting 60 feet on F. street with a depth of 165 feet, and as located 60 feet from First street, and lot 9 of the same dimensions lying between it and First street, and fronting on F. street, the quoted words did not render the description uncertain as inconsistent with the other description, for the word "on" in the quoted description might be construed as equivalent to "near to" or "at," as simply denoting proximity. *Hall v. Bartlett*, 112 Pac. 176, 178, 158 Cal. 638.

#### As in or during

The word "on" is often given the meaning of "in" or "during," and this meaning is well recognized when used to designate a date or calendar division of time, and is always its meaning when used with reference to a named day. *Henry v. Lovenberg* (Tex.) 128 S. W. 675, 678.

#### As on surface of

Under Rev. St. 1899, § 6116, providing that before granting any franchise for constructing and operating an elevated, underground, or other street railroad "on," "over," or under any street or alley, etc., the word "over" means "over," and can only apply to elevated roads; and "under" means beneath," and can refer only to underground roads; and "on" means "on," and can only refer to a surface road on the street. *Ruckert v. Grand Ave. Ry. Co.*, 63 S. W. 814, 818, 163 Mo. 280.

#### As over

An indictment alleging that accused practicing medicine without a license treated a patient, and that the treatment consisted in physical manipulations with accused's hands "over" the patient, is sustained by proof that accused placed his hands "upon" the patient and rubbed and manipulated his hands "upon" his body; the words "upon" and "over" being synonymous. *Milling v. State* (Tex.) 150 S. W. 434, 436.

#### When synonymous

The words "on or upon," when affecting the quality of an estate in reference to the time of its vesting or enjoyment, are synonymous with "when." In bequests of personal property these words usually import a condition, and, unless explained or controlled by some expressions or other provisions of the will, they are annexed as conditions precedent to the gift and render the interest contingent. While several modern text-writers and many decisions seem to give these words the same significance in reference to devises of real, and bequests of personal, property, the older authorities hold that in respect to realty they import usually a condition subsequent determinative of the estate according to the terms of the condition, and that in the meantime the estate would vest. But all of the authorities are agreed that both as to real and personal property they may be so explained and controlled by other expressions and provisions of the will that they do not import a condition at all, but simply refer to the time of enjoyment, and that the interest conferred will vest at the testator's death to be possessed and enjoyed at the time indicated. *Hooker v. Bryan*, 53 S. E. 130, 131, 140 N. C. 402.

#### ON AND AFTER

The provision in section 33, Tariff Act July 27, 1897, c. 11, 30 Stat. 213, that "on and after" that date merchandise previously

imported should be subjected to the duties imposed by said act, is not limited to merchandise imported prior to that date, but applies also to that imported on that day. *John B. Ellison & Sons v. United States*, 136 Fed. 969, 972, 978.

Where certain guaranties of payment expressly applied to all goods sold on credit "on and after" their dates from time to time, and for any balance or balances of account of such goods, including interest thereon "after maturity," and which were made to continue until notice of their discontinuance of further liability thereon, given by the subscribers in writing to the seller, the guaranties were continuing, notwithstanding the amount of the liability was limited, and were applicable to all future sales made prior to notice of discontinuance. *Bond v. John V. Farwell Co.*, 172 Fed. 53, 65, 98 C. C. A. 546.

### ON OR ABOUT

An admission that a notice was served "on or about" June 16, 1906, cannot be construed as an admission that the notice was served June 15th or prior thereto. *Hope v. Scranton & Lehigh Coal Co.*, 105 N. Y. Supp. 372, 378, 120 App. Div. 595.

A contract for the sale of calendars, containing the name of the buyer and matter advertising his business as insurance agent, stipulated that the calendars should be shipped by freight and delivered f. o. b. cars "on or about" November 1st. On December 8th, following, the seller shipped the goods by express, and the buyer received them 6 days later. It would take a package from 8 to 22 days to be carried by freight. Held, that time was of the essence, and the seller failed to deliver in time. *Brown & Bigelow v. Bard*, 118 N. Y. Supp. 371, 374, 64 Misc. Rep. 249.

Where a note is payable on a fixed day, and not "on or about" a fixed date, and the debtor makes payment before the maturity of the note, he is not entitled, in the absence of an agreement to the contrary, to interest on the payments from the time they are made to the date on which the note is due. *Blackshear Mfg. Co. v. Stone*, 70 S. E. 29, 30, 8 Ga. App. 661.

"Among the meanings of the word 'about,' as given in Webster's Dictionary, are 'concerning,' 'with regard to,' 'on account of,' 'touching.'" Acts 1898, p. 1169, c. 502, subjecting every building to a lien for the payment of debts contracted for work done "on or about" the same, eliminates the right of a lien for materials furnished for a building, and gives a lien for labor only. A subcontractor agreed with the principal contractor to "carve, furnish the models, and \* \* \* erect in place and finish all the exterior marble work" for a building. The material was taken to the subcontractor's yard, where stonecutters put the stones into proper shape. The stones were then loaded on cars and

transported to the side of the building, where they were unloaded, and then hoisted from the sidewalk and placed in the building in proper place. Held, that the subcontractor furnished work "on or about" the building within the act. *Evans Marble Co. v. International Trust Co.*, 60 Atl. 667, 672, 101 Md. 210, 109 Am. St. Rep. 568, 4 Ann. Cas. 831.

Comp. Laws, § 10,714, requires the filing of a claim of mechanic's lien within 60 days of the time of furnishing the last material. A claim was filed on April 30th, stating that the last materials were furnished on or about March 3d. Held, that as the phrase "on or about" is a relative term, not showing definitely when the materials were furnished, and as the claim showed on its face that the last materials were furnished at least 56 days before lien filed, it was not a compliance with the statute. *Godfrey Lumber Co. v. Kline*, 133 N. W. 528, 529, 167 Mich. 629 (quoting 6 Words and Phrases, p. 4966).

### In civil pleadings

There is no fatal variance between an allegation that a contract was made "on or about September, 1906," and proof that it was entered into on October the same year. *Kerr v. Blair*, 105 S. W. 548, 551, 47 Tex. Civ. App. 406.

There is no variance between a complaint in trover alleging that the conversion occurred on or about October 18th and the proof that it occurred on October 21st. *Blair v. Riddle*, 57 South. 382, 383, 3 Ala. App. 292 (citing 6 Words and Phrases, p. 4966).

### In indictments or informations

Charging that the offense was committed "on or about" a certain day is indefinite and uncertain, and is fatal upon motion in arrest of judgment. *Morgan v. State*, 40 South. 828, 829, 51 Fla. 76, 7 Ann. Cas. 773.

The words "on or about," in an indictment alleging that defendant "did, on or about the 1st day of April, 1901," commit the offense charged, do not render the month and the year, as well as the day, uncertain. The meaning of the language to the general understanding is that the time of the crime was near the 1st day of April in the year 1901. There is no uncertainty as to the year. The words "April, 1901," mean April in the year 1901, and no resource of ingenuity can make them mean anything else. An averment in this language is of a time within the year, and if any day within the year may be proved the allegation is sufficient. An averment of time in an indictment is a matter of form, not generally material, and in view of Rev. St. § 1025, which provides that no indictment shall be deemed insufficient by reason of any defect in matter of form only, as well as under the Oregon statute, adopted by rule in the federal courts in that state, which provides that the precise time need not be stated, an indictment alleging the time of commission of the offense as on or



about a day named is sufficient, except in cases where the time is an ingredient of the offense. *United States v. McKinley*, 127 Fed. 168, 171.

The common understanding of the words "on or about," when used in connection with a definite point of time, is that they do not put the time at large, but indicate that it is stated with approximate accuracy. An indictment under Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 493, for depositing an obscene, lewd, and lascivious letter in the mails, is not bad because it alleged that the offense was committed "on or about" a given date, where it shows that but a short time elapsed between the writing of the letter and the finding of the indictment; the defect being one of form only, by which the defendant was not prejudiced, and to be disregarded under Rev. St. § 1025. *Rinker v. United States*, 151 Fed. 755, 757, 81 C. C. A. 379.

### ON OR ABOUT THE PREMISES

The Alabama statute provides that it shall be unlawful for any person without a license to sell vinous or spirituous liquors in any quantity, if the same is drunk "on or about the premises." This statutory prohibition embraces places over which the seller has no legal right to exercise authority or control, but which are so near his premises, and so situated in relation thereto, that they are within the mischief intended to be remedied; but where the liquor is taken by the purchaser, in the quart measure of the seller, to a place on the opposite side of the street, out of view of the seller's house, about fifty feet distant therefrom, and in front of another store, and is there drunk, the court cannot assume, as a legal conclusion, that such place is within the statute. *Easterling v. State*, 30 Ala. 46, 48.

### ON OR BEFORE

See, also, *Before*.

A written contract for the exchange of property, which provides that property is to be conveyed subject to an incumbrance due "on or before" two years, means that the incumbrance will mature in two years, but may be paid at any time on or before maturity. *Schenck v. Ballou*, 97 N. E. 704, 705, 253 Ill. 415, Ann. Cas. 1913A, 251 (citing 6 Words and Phrases, p. 4967).

In an admission that a note sued on was indorsed by the several defendants "on or before negotiation," the words "on or before" excluded "after," and the word "negotiation" signified delivery, that term being generally descriptive of all those acts by which a note or bill is put into circulation or passed in its circulation, including delivery in issue, transfer by delivery, or transfer by indorsement. *Edward Knapp & Co. v. Tidewater Coal Co.*, 81 Atl. 1063, 1066, 85 Conn. 147.

An indictment alleging that the theft occurred "on or before" the 21st day of July was not fatally defective because not showing that the offense was committed within the period of limitation; the state being required to prove that the offense was committed within the period of the limitation counting from the time the indictment was returned by the grand jury. *Presley v. State*, 181 S. W. 332, 333, 60 Tex. Cr. R. 102.

A negotiable note on which the maker indorsed after it was barred by limitations "on or before the year 1904 I promise to pay within note" became due and payable not later than January 1, 1904; the words "on or before" as used in notes meaning immediately at or any time in advance of the date named. *Lovenberg v. Henry*, 140 S. W. 1079, 1080, 104 Tex. 550; *Henry v. Lovenberg*, (Tex.) 128 S. W. 675.

Under a contract to sell potatoes to be delivered on or before November 1st under which the buyer was to furnish cars and was entitled to determine when the potatoes should be delivered, giving the natural and ordinary interpretation to the phrase "on or before," the seller was entitled to such seasonable notice of the arrival of the cars as would enable him, by the use of reasonable diligence, to complete the transportation and delivery on November 1st, and was not required, when notified on November 1st that the cars were ready to commence hauling and continue hauling and loading on that and succeeding days, where it would have been impossible for him to complete the delivery on November 1st. *Pinkham v. Haynes*, 68 Atl. 642, 644, 103 Me. 112 (Leader v. Plante, 50 Atl. 54, 95 Me. 341, 85 Am. St. Rep. 415; *In re Public Road in Middlesex and Monmouth Counties*, 4 N. J. Law, 290).

### As rendering note nonnegotiable

A note payable "on or before" a certain date is valid as a negotiable instrument. *Lovenberg v. Henry*, 140 S. W. 1079, 1081, 104 Tex. 550; *Cunningham v. McDonald*, 83 S. W. 372, 374, 98 Tex. 316.

A note payable "on or before" a certain date is negotiable. The maker of such note has the right to pay before the date named, but the holder cannot demand payment before that day. *National Bank of Commerce v. Kenney*, 83 S. W. 368, 371, 98 Tex. 293.

### As giving option as to payment of note or other obligation

The words "on or before," in an instrument payable on or before a certain date, gives the obligor the right to pay at his option any time before the date. *Henry v. Lane*, 128 Fed. 243, 252, 62 C. C. A. 625 (citing *Kikindal v. Mitchell*, 14 Fed. Cas. 468, 2 McLean, 402).

Where the owner of lots wrote real estate agents that he would sell the lots for a given price, so much cash and the balance

on long time, the agents were not authorized to sell on terms whereby notes running from one to five years, given by the purchaser for the balance, were payable "on or before" certain dates. The quoted words placed in each of the notes gave the maker the privilege of paying them at any time he might choose, and they did not comply with the terms of the authority, because they were not long-time notes. *Colvin v. Blanchard*, 106 S. W. 323, 325, 101 Tex. 231.

#### ON OR NEAR

See Property On or Near Premises.

#### ON ACCEPTING THIS OPTION

The first clause of an option contract for the sale of bonds provided that, in case "this option is accepted" by defendant, plaintiff would endeavor to procure the sale and delivery of \$50,000 more of the same kind of bonds or such part thereof as he could obtain control of at the same price. The second clause declared, "in case this option is taken up as hereinafter provided," plaintiff agreed to sell at a certain price stock of the company that issued the bonds. The third clause contained an agreement of plaintiff to sell certain other bonds of the same kind at the same price "in case this option is accepted" by defendant; and the seventh clause declared that it was expressly understood that defendant was to purchase, "on accepting this option," \$20,000 of said bonds, the proceeds to be applied to a particular purpose. Held, that the words "on accepting this option," in the seventh clause, did not mean that defendant was bound to purchase such bonds on the delivery and acceptance of the paper containing the option, but only on his election to purchase the bonds specified in the first clause. *Martyn v. Hitchings*, 78 N. E. 380, 381, 192 Mass. 71.

#### ON ACCOUNT OF

"A 'payment on account of the accident' means a payment because of accident, and may be either on account or in full settlement." *Wallner v. Chicago Consol. Traction Co.*, 91 N. E. 1053, 1055, 245 Ill. 148.

In an assignment of all claims or causes of action for or "on account of," in trespass upon certain real estate, the words "on account of" doubtless mean by reason of. A cause of action in trover for the conversion of logs previously cut by a trespasser certainly seems to be a cause of action resulting "by reason of" the initial trespass. The conversion is a natural and legitimate result of the trespass. *Dunbar v. Montreal River Lumber Co.*, 106 N. W. 389, 390, 127 Wis. 130.

Plaintiff having sued two corporations jointly for injuries alleged to have occurred in a collision between a street car of defendant traction company and a train belonging to defendant railroad company, received from

the railroad company, \$1,000 "on account of" his injury, and dismissed the suit as to it, testifying that he had no further claims against the railroad company. Held, that the words "on account of" should be construed to mean "because of the accident," and did not indicate a partial payment rather than a full settlement, and that the proof, therefore, showed a full payment and release of one of two joint tort-feasors. *Wallner v. Chicago Consol. Traction Co.*, 91 N. E. 1053, 1055, 245 Ill. 148.

#### ON AND HUNG

Provision in a building contract that the third payment thereon should be made "when trim is on and doors hung" in practice refer to a stage of the work and are given a liberal construction. It is not necessary for compliance therewith that all the trim be on and doors hung, because in practice some of the doors are left unhung, although prepared to be hung for convenience in the work. *Veitch v. Clark*, 57 Atl. 272, 273, 87 N. J. Eq. 57.

#### ON ANY CONSIDERATION

Under Rev. Pen. Code, § 618, making it an offense to buy or receive in any manner, "upon any consideration," property, knowing that it has been stolen, the gist of the offense is the buying or receiving with such knowledge, and an information is not bad for omitting to allege that the property was bought or received "upon any consideration"; that phrase being synonymous with "any motive" or "for any cause." *State v. Pirkey*, 118 N. W. 1042, 1044, 22 S. D. 550, 18 Ann. Cas. 192.

#### ON ANY MILLSITE, ETC.

B. & C. Comp. § 5668, as amended by Laws 1907, p. 294, provides that, when two or more mines are claimed by the same person or persons and worked through a common shaft or tunnel or at one mill, or other reduction works, then all the mines, and all roads, tramways, trails, flumes, ditches, or pipe lines, buildings, structures, or superstructures used or owned in connection therewith, shall be deemed one mine. Held, that the words "roads, tramways, trails, flumes, ditches or pipe lines," include such appurtenances when not situated upon the mine, and that the term "upon any millsite or mill used, owned or operated in connection with such mine," in such section, prior to its amendment, had reference to the millsite or mill not situated on the mine; the section as amended necessarily including the millsite or mills connected with the mine, without being specifically mentioned, so that a miner's lien notice need not state nor the proofs show that the labor for which the lien is claimed has been done on the mill or building on the mine to subject them to the lien. *Washburn v. Inter-Mountain Mining Co.*, 109 Pac. 382, 385, 38 Or. 578, Ann. Cas. 1912C, 357.

**ON ANY UNDERSTANDING OR AGREEMENT**

Under Pen. Code, § 113 (Penal Law, § 2440; Consol. Laws, c. 40), making it a felony to give or offer to a witness, or one about to be called as a witness, any bribe upon any understanding or agreement that his testimony shall be thereby influenced, or to attempt by any other means fraudulently to induce any witness to give false testimony, the essence of the crime is the understanding under which the money was given to a prospective witness and not the giving of the money; the words "upon any understanding or agreement," and "attempts fraudulently to induce," being equivalent to "with the intent." *People v. Kathan*, 120 N. Y. Supp. 1096, 1099, 136 App. Div. 303.

**ON APPROVAL**

In a receipt given by a dealer in diamonds to S. & Co. for a pair of diamond ear knobs, "on approval to show to my customers, said knobs to be returned to said S. & Co. on demand," the expression "on approval," as ordinarily interpreted, was not inconsistent with a mere authority "to show" nor with an obligation "to return on demand," and parol evidence was admissible to show that, in the diamond trade, such words took a recognized meaning and were understood, not to confer a power to sell, but authority merely to show diamonds to a customer and report to the owner. *Smith v. Clews*, 21 N. E. 160, 162, 114 N. Y. 190, 4 L. R. A. 392, 11 Am. St. Rep. 627.

**ON ARRIVAL**

Under the federal pure food act of 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768), forbidding the introduction of misbranded or adulterated liquors into one state from another, such liquors are removed from the operation of the commerce clause of the federal Constitution, and become subject to the laws of the state upon arrival within its territory and before delivery to the consignee. *State v. Intoxicating Liquors*, 76 Atl. 268, 269, 106 Me. 135.

The expression "upon arrival in such state," as used in Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313, providing that liquors transported into any state shall, "upon arrival in such state," be subject to the operation of the laws of such state to the same extent as though they had been produced in such state, means neither on entrance within the state borders, nor on delivery to the consignee but on reaching its destination. *Hudson v. State*, 101 Pac. 275, 279, 2 Okl. Cr. 176.

Laws 1900, c. 20, §§ 4, 8, as amended by Laws 1906, c. 478, and Laws 1907, c. 666, prohibit the possession of deer between certain dates, etc., and provide that such possession by a common carrier unaccompanied by the owner shall constitute violation of the law.

Section 141, added by Laws 1902, c. 194, provides that, whenever in this act the possession of game is prohibited, reference is had equally to such game coming from without the state as to that taken within the state. *Lacey Act May 25, 1901, c. 553, § 5, 31 Stat. 188*, provides that game transported into any state shall, upon arrival therein, be subject to the laws of such state, to the same extent as though it had been there produced. Held that, in view of the latter statute, the provisions of the state statute do not attach to a shipment of foreign game while in transit, in possession of a common carrier, and until its arrival at the point of destination and delivery there to the consignee. *People v. Fargo*, 122 N. Y. Supp. 553, 555, 137 App. Div. 727.

**ON BOARD**

A marine policy, insuring "freight on board, or not on board," valued at £2,062, or actual freight, if more, "full interest admitted, the policy being deemed sufficient proof of interest," should be construed to cover the freight at risk at the valuation specified, though the freight actually at risk was much less in value. Where a marine policy insured "freight on board, or not on board," valued at a specified sum, or actual freight, if more, full interest admitted, and of the actual freight insured lost the whole, except a small salvage, there having been no abandonment, the percentage of actual freight lost should have been applied to the value in the policy. *New York & Cuba Mail S. S. Co. v. Royal Exch. Assur.*, 154 Fed. 315, 318, 83 C. C. A. 235 (citing *Arn. Ins. § 339*; *Adams v. Pennsylvania Ins. Co. [Pa.] 1 Rawle, 97*; *De Longuemere v. Phoenix Ins. Co. [N. Y.] 10 Johns, 127*; *Same v. New York Fire Ins. Co. [N. Y.] 10 Johns, 201*; *Minturn v. Warren Ins. Co., 2 Allen [84 Mass.] 86*).

**ON CASH SALE**

See Cash Sale.

**ON A CONTINGENCY**

See Contingency.

**ON CONVICTION**

The words "upon conviction," in P. L. 1906, p. 199, providing that, where the holder of a liquor license shall sell liquor contrary to the act, his license shall thereby "upon conviction" become forfeited and void, refer to the forfeiture, and it is not necessary that a petition for the revocation of a license should state that the person complained of had been convicted of the offenses charged. *Davis v. Repp*, 75 Atl. 169, 170, 79 N. J. Law, 394.

**ON THE CURB**

A sale of stock "on the curb" is a sale in the roadway near the sidewalk in Broad street in the city of New York, where brokers gather and deal in securities which are not

listed at the New York Stock Exchange. *Content v. Banner*, 76 N. E. 918, 184 N. Y. 121, 6 Ann. Cas. 103.

### ON DEMAND

#### In bills, notes, or bonds

In a note payable "on demand," the word "demand" is not a part of the contract, but is used to show that the debt is due. *Van Vliet v. Kanter*, 119 N. Y. Supp. 187, 188, 65 Misc. Rep. 48.

The term "payable on demand" in a bill imports that the debt is already due, so that limitation begins to run from the date. *Cook v. Carpenter*, 81 Atl. 799, 803, 212 Pa. 165, 1 L. R. A. (N. S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723.

An instrument which acknowledges an indebtedness from the maker to a person named and which promises to pay a specified sum to such person, "and in the event of my (maker's) death, I hereby authorize and direct the payment of the same out of the funds of my estate," is a promissory note payable on demand, within Negotiable Instruments Law (Consol. Laws 1909, c. 38) §§ 26, 29, declaring that an instrument is payable on demand when no time for payment is expressed, etc.; the quoted clause being surplusage. *Gilbert v. Adams*, 131 N. Y. Supp. 787, 788, 146 App. Div. 864.

### ON DEMAND AFTER DATE

A note payable to the order of the maker "on demand after date" at a bank designated is a note payable on demand, within Negotiable Instrument Law (Laws 1897, p. 723, c. 612, § 26), declaring that a note is payable on demand where it is expressed to be payable on demand, or in which no time for payment is expressed, and is not a note payable at a determinable future time, within section 23 (page 722), providing that a note is payable at a determinable future time which is expressed to be payable at a fixed period after date, etc., and it must be presented for payment within a reasonable time after its issue, as expressly required by section 131 (page 736). *Schlesinger v. Schultz*, 96 N. Y. Supp. 383, 386, 110 App. Div. 356.

### ON DEPOSIT

The words "on deposit," in the writing as follows: "Received of L. \$1,600 on deposit in national currency"—have a well-known meaning and imply a promise to pay upon presentation, where no other date of payment is fixed. *Lewis v. Norris*, 108 Pac. 134, 135, 80 Kan. 620 (quoting *Long v. Straus*, 6 N. E. 123, 7 N. E. 763, 107 Ind. 94, 57 Am. Rep. 87).

### ON DUTY

An employé is "on duty" within the statute making it unlawful for any interstate carrier to require or permit any employé to be or remain on duty for a longer

time than 16 consecutive hours, where he is at his post in obedience to rules or requirements of his superior and ready and willing to work, whether actually at work or awaiting orders, or the removal of hindrances from any cause, and the limitation of time of continuous service when applied to trainmen includes the time of duty preceding and subsequent to the time of service in actual operation of trains, as required by the rules of the employment. *United States v. Chicago, M. & P. S. R. Co.*, 195 Fed. 783, 785.

The expression "on duty," as used in the Hours of Service Law, otherwise known as the Sixteen-Hour Law, of March 4, 1907 (chapter 2939, 34 Stat. 1415, 1416), means "to be actually engaged in work or to be charged with present responsibility for such should the occasion for it arise." *United States v. Denver & R. G. R. Co.*, 197 Fed. 629, 631.

Act March 4, 1907, c. 2939, § 2, 34 Stat. 1415, provides that it shall be unlawful for any common carrier subject to the act to require or permit any employé subject thereto to be or remain on duty for a longer period than 16 consecutive hours, and whenever such employé has been continually on duty for 16 hours he shall be relieved, and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; and no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty. The act further provides in section 1 that the term "employés" as used in the act, shall be held to mean persons actually engaged in or connected with the movement of any train. Held, that where an interstate carrier had a rule requiring engineers to report 30 minutes before leaving time, during which they were required to overlook their engines in preparation for the trip, to see that they were properly oiled and the brakes O. K., and to connect the engines with their trains, the time so occupied constitutes a part of their time of duty; and this though it was the custom of the carrier not to strictly enforce the rule. *United States v. Illinois Cent. R. Co.*, 180 Fed. 630, 631.

### ON EITHER SIDE

See Run Upon Either Side.

### ON THE EXPRESS AGREEMENT

Where a deed provided that it was "upon the express agreement" of the grantee to build or cause to be built on the premises, within six months, a dwelling house to cost not less than \$1,500, which agreement was considered as a part of the consideration for the conveyance, such provision constituted a mere personal covenant on the part of the grantee, and was not a condition subsequent, authorizing a forfeiture for nonperformance. *Hawley v. Kaftz*, 83 Pac. 248,

249, 148 Cal. 398, 8 L. R. A. (N. S.) 741, 118 Am. St. Rep. 282.

#### ON THE FARM

Where the judgment debtor and his family lived on land belonging to his wife and her coheirs in indivision, and his sons cultivated the land under an agreement by which they received the surplus of the cotton after the supplies were paid for, and plaintiff received the other products for the support of the family, corn, hay, and cane raised on the land belonged to the debtor and were "on the farm" within the law, so as to exempt from seizure upon execution; the law not requiring that the farm belong to the person claiming the exemption. *Hinton v. Roane*, 50 South. 798, 799, 124 La. 927, 134 Am. St. Rep. 526.

#### ON FILE

The withdrawal of the deposition of a party from the files of the state circuit court where the action was begun for use on the trial of the action in the federal court after removal to the federal court does not prevent the use of the deposition on a subsequent trial within *Burns' Ann. St. 1908, § 456*, permitting the use of depositions provided they remain "on file" from the time the former action was dismissed until the time at which it was proposed to use them in a subsequent action. *Lake Erie & W. R. Co. v. Huffman*, 97 N. E. 434, 437, 177 Ind. 126.

#### ON FINAL DISTRIBUTION

Testator bequeathed to a daughter a certain sum "to be paid out of my residuary estate upon final distribution." In a subsequent section of the will he left the residue of his estate in trust, and provided that the income should be paid to his wife during her natural life or while she remained unmarried for her maintenance and the education and maintenance of two daughters, and that when said daughters arrived at lawful age, the trustees were requested to convey to each of them a moiety of the property in their hands. Held, that the phrase, "upon final distribution," did not mean upon final distribution of the personal estate made pursuant to order of the probate court, but referred to the final distribution on the coming of age of the two daughters who were to take the property left in trust. *McDevitt v. Hibben*, 123 Ill. App. 438, 441; *Id.*, 77 N. E. 586, 221 Ill. 284.

#### ON FIRE

A marine policy contained a clause, "Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk, or on fire." The libel alleged that on November 18th, while the ship was lying in port and before discharge, a fire broke out in the after 'tween-decks of the ship and burned the bulkhead forward of the lazarette, the door thereof,

and a considerable portion of dunnage, and other parts of the ship. An exhibit, quoting from the ship's protest, recited that the master, on the alarm being given, went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette, which were then full of cargo, and that after considerable trouble the fire was extinguished with considerable damage. It was held that the words "on fire," as used in the particular average clause, were not synonymous with the word "burnt," contained in former policies, but were indicative of a happening whereby the ship was endangered by actual fire burning some part of it, necessitating extraordinary efforts to prevent serious damage, and that, under such definition, the libel was not subject to exception as stating a loss from which the insurer was exempted by the particular average clause as matter of law. *Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co.*, 184 Fed. 947, 949.

#### ON THE GROUND

Under a contract to conduct a circus for four days, entitling the amusement company to draw on funds derived from advance sales of tickets when the show was "on the ground," the show was "on the ground" when the paraphernalia arrived at the show grounds and the actors at their lodgings, and the equitable title to part of funds then vested in the company's assignee, so as to preclude the other party, who had knowledge of the assignment, from defeating the assignee's rights by paying, with the company's consent, money due the actors, who refused to perform unless paid in advance. *Brindze v. Atlantic City Policemen's Beneficial Ass'n*, 72 Atl. 435, 437, 75 N. J. Eq. 405.

#### ON HAND

See *Cash On Hand*; *Stock on Hand*; *Then on Hand*.

A bequest by a manufacturer of a product "on hand" includes that in the hands of a selling agent in another city, as well as that at the factory. *Brown v. Clothey*, 79 N. E. 269, 270, 193 Mass. 271.

Where a shipper, demanding stock cars, has his stock within five miles of the station ready to be loaded within a few hours after receiving notice of the arrival of the cars, he has his stock "on hand," within *Rev. St. 1895, art. 4502*, relating to furnishing shippers with cars on demand, and providing that it shall be necessary for the party bringing suit against any railroad company under the provisions of this law, to show by evidence that he had "on hand," at the time demand was made, the freight necessary to load the cars. *Texas & P. Ry. Co. v. Taylor*, 126 S. W. 1117, 1119, 103 Tex. 367 (citing *Crouch v. Parker*, 58 N. Y. 597).

The phrase "on hand," as used in *Rev. St. 1895, art. 4502*, does not require that the

shipper shall have the property at the immediate point of shipment at the time of demand, but, as the statute gives the railroad company six days from demand within which to furnish cars, and the shipper 48 hours thereafter to load, the words mean that he has or owns the property so circumstanced as may be shipped within the time named. *Texas & P. Ry. Co. v. Taylor*, 118 S. W. 1097, 1100, 54 Tex. Civ. App. 419.

The requirement of Rev. St. 1895, art. 4502, that the shipper prove that he had on hand, at the time of the order, the necessary freight for loading the cars forbade any character of speculation and precluded recovery by a shipper, where such freight in form and condition to be shipped is not there on hand, though he is able to show that he could have had it ready if the cars had been furnished, and a shipper of crushed stone, who intended to load from the crusher and save expense in handling the crushed product, did not have such freight "on hand," and he was not entitled to a penalty for failure to furnish the cars demanded. *Chicago, R. I. & G. Ry. Co. v. Risley Bros. & Co.*, 119 S. W. 897, 898, 55 Tex. Civ. App. 66.

#### ON HEARING IN EQUITY

An order of a Circuit Court granting a preliminary injunction made after the filing of a bill and on notice to the defendants, pursuant to which their counsel appeared specially to object to the jurisdiction, but were heard upon the merits as amici curiae, was made "upon a hearing in equity" within the meaning of section 7 of the act (Act March 3, 1901, c. 517, 26 Stat. 828), creating the Circuit Courts of Appeals, as amended by Act April 14, 1906, c. 1627, 34 Stat. 116, and is appealable thereunder. *Northern Pac. R. Co. v. Pacific Coast Lumber Mfrs.' Ass'n*, 165 Fed. 1, 5, 91 C. C. A. 39; *Union Pac. R. Co. v. Oregon & Washington Lumber Mfrs.' Ass'n*, 165 Fed. 13, 91 C. C. A. 51.

#### ON ITS LINE

Where a railroad company operates its trains engaged in interstate commerce with its own engines and crews over the tracks of another company, under a contract between them, such tracks are a part of its line, within the meaning of Safety Appliance Act March 2, 1893, c. 196, § 6, 27 Stat. 532, as amended by Act April 1, 1896, c. 87, 29 Stat. 85, imposing a penalty on any railroad company hauling or using "on its line" any car in violation of its provisions, and it is immaterial that its trains, while on such tracks, are run subject to rules and regulations prescribed by the owner of the tracks; nor is it any defense to an action to recover the penalty for hauling a car not equipped as required by the act in one of its interstate trains on such tracks that the inspection of such cars is made by a servant of the company owning the tracks, who, in performing such duty, acts as its own inspec-

tor. *Philadelphia & R. R. Co. v. United States*, 191 Fed. 1, 2, 111 C. C. A. 661.

#### ON THE JOB

When plaintiff contracted with defendant city to repair a bridge, the contract providing that plaintiff's compensation should be a certain sum per thousand feet for the lumber used, and that no work should be begun until material for at least one-half of the repairs should be "on the job," and in compliance with this requirement plaintiff distributed lumber along the bridge, and had used a part of it in making repairs, when the bridge and all the lumber was destroyed by fire, he was entitled to recover for the lumber which had been used, but not for that which had not. *Young v. City of Chicopee*, 72 N. E. 63, 186 Mass. 518.

#### ON A JOURNEY

See Journey.

#### ON THE LIKE PROOF

"Upon the like proof," as used in Rev. St. 1898, § 2891, authorizing the entry of default judgments on the applicant filing a proof of default with the clerk before applying for a judgment, and authorizing plaintiff to apply to the court for judgment when the defendant has made default "upon the like proof," means proof of default made to the court; and hence, where the application is made to the court, it is not necessary that proof of service should be filed before the rendition of judgment. *Schmidt v. Hoffmann*, 105 N. W. 44, 46, 126 Wis. 55.

#### ON THE MERITS

See Merits.

#### ON THE OPINION BELOW

Where a Circuit Court of Appeals affirms a decision "on the opinion below," it approves the reasoning, adopts the findings, and concurs in the conclusions of the court below; but, where the decision below is merely "affirmed," such approval and concurrence are not to be inferred, but, on the contrary, it is to be understood that for some reason the appellate court prefers not to adopt the opinion below. *Victor Talking Mach. Co. v. Hoschke*, 188 Fed. 326, 328, 110 C. C. A. 304.

#### ON THE PART OF

The words "on the part of the mother," as used in Tex. Rev. St. 1895, art. 1700, making bastards capable of inheriting "from and through" their mother and of "transmitting estates," and giving them the right to distributive shares of the personal estates of any of their kindred "on the part of their mother," mean of the mother's side of the genealogical tree, and the article gives the bastard kinship in law on the mother's side, but does not change his status as to the father. *Berry v. Powell*, 105 S. W. 845, 347, 47 Tex. Civ. App. 599.

**ON THE PREMISES**

A brewery company owned lots 3 to 10, inclusive; the brewery proper covering lots 5 to 10. The second story of the building on lots 3 and 4 was occupied by the president of the brewery as a residence, that part of the first story on lot 4 was used as his office, and that part on lot 3 was occupied as a saloon. There were partitions between the saloon and office and the office and brewery proper, with entrances through them, and the public entrance to the saloon was on the corner of lot 3, through which brewery employes, who were given free beer, entered. Held, that the brewery was selling beer "upon the premises" within Code, § 2460, providing that one operating any brewery permitting any drinking, or sale at retail, of its product upon the premises, shall forfeit the exemption thereby granted, so that it was not exempted under section 2456, exempting manufacturers of liquor from the penalties provided by law for manufacturing liquors. *Orke v. McManus*, 121 N. W. 177, 178, 142 Iowa, 654 (citing 6 Words and Phrases, p. 5512).

**ON PROPER CAUSE SHOWN**

Corporation Act (P. L. 1896, p. 292) § 44, provides that the books of a corporation, except the stock and transfer books, may be kept outside of the state if the by-laws or certificate of incorporation so provides, and that the Court of Chancery or the Supreme Court or any justice thereof, may, upon proper cause shown, summarily order any or all of the books of the corporation to be forthwith brought within the state and kept therein at such place and for such time as may be designated in such order. Held, that the phrase "upon proper cause shown" means a cause, the propriety of which is made to appear to the judicial officer nominated in the section, and the propriety of the "cause shown" must be submitted to the determination of such officer, and for such determination the conclusion reached by applicant for the order from undisclosed facts is not a valid substitute, and a petition for such order not setting forth facts from which the officer can make such determination is insufficient. *National Packing Co. v. Garven*, 78 Atl. 703, 706, 79 N. J. Law, 266.

**ON REASONABLE TERMS**

The phrase "on reasonable terms" in common parlance means the charges for services rendered or the price of goods sold and delivered. *State v. Central Vermont Ry. Co.*, 71 Atl. 194, 196, 81 Vt. 463, 130 Am. St. Rep. 1065.

**ON SALE (In Patent Law)**

See, also, Public Use (In Patent Law).

Proof of a mere contract to construct from plans, and to deliver in the future, a machine or manufacture not shown to have

been previously built, is insufficient to establish that the machine or manufacture was "on sale" within the meaning of Rev. St. § 4886, so as to defeat a patent therefor not applied for until more than two years after such contract was made, in the absence of any evidence that the invention had been reduced to practice at the time the executory contract was made. *McCreery Engineering Co. v. Massachusetts Fan Co.*, 195 Fed. 498, 501, 115 C. C. A. 408.

A single unrestricted sale by the inventor of his invention is a public sale, or puts it "on sale," within the meaning and intent of Rev. St. U. S. § 4886, but a single sale of an invention by the inventor for experimental purposes, where he is unable otherwise to make proper tests, does not put the invention "on sale." *In re Mills*, 25 App. D. C. 377, 383.

A machine put out for trial, under a "sale or return" contract, does not constitute a being on sale two years before the patent application, unless the trial period expired, or unless there was actual acceptance more than two years before the application. *William B. Mershon & Co. v. Bay City Box & Lumber Co.*, 189 Fed. 741, 748.

Where the inventor of a cigar pocket for more than two years before applying for a patent therefor made and sold such pockets in the regular course of his business, such articles were in "public use" and "on sale," and defeated his right to a patent under Rev. St. § 4886, although they were not kept by him in stock, but were made up only on orders received; it being the custom of the trade to take such orders by sample. A device will be "on sale" and in "public use" if it is offered for sale, whether any specimen of it is actually sold or not. *Dittgen v. Racine Paper Goods Co.*, 181 Fed. 394, 398 (citing *Walk. Pat.* [11th Ed.] p. 96).

**ON STOCK**

No obligation to honor any draft except one for the price of stock shipped to the drawee is assumed by a live stock commission firm in writing to a bank, "We will honor P.'s draft for one thousand dollars on hogs or cattle." There is a manifest difference between the expressions "for stock" and "on stock." The one merely relates to the use the drawer is to make of the money he obtains for the draft, and the other is equivalent to "against stock," and clearly implies that the draft is to be drawn on the strength of the stock; that the stock is to be made in a way security for the draft. *Stough v. E. J. Healy*, 89 Pac. 898, 899, 75 Kan. 526, 10 L. R. A. (N. S.) 918.

**ON SUSPICION**

Where the consignee refused to accept certain cigars, and the consignor directed them to be delivered to a third person, such

conduct indicates that the cigars were sent out "on suspicion" (that is, in expectation that they would be accepted), and not that they had been bought or ordered by the consignee or by such third person. *New York & N. J. Steamboat Co. v. New Jersey Produce Co.*, 68 Atl. 209, 210, 75 N. J. Law, 298.

#### ON THE TABLE

See Continued on the Table.

#### ONCE

See At Once.

#### ONCE A WEEK

Proof that a summons was published for "six successive weeks" in a weekly newspaper sufficiently shows a publication "once a week" for six successive weeks. *McHenry v. Bracken*, 101 N. W. 960, 961, 963, 93 Minn. 510 (citing *Iowa State Sav. Bank v. Jacobson*, 66 N. W. 453, 8 S. D. 292).

Const. 1901, § 106, provides that no local law shall be passed, unless notice of the intention to apply therefor shall have been published at least once a week for four consecutive weeks in some newspaper published in such county or counties, or, if there is no newspaper so published, then by posting a notice for four consecutive weeks at five different places in the county or counties, prior to the introduction of the bill. Held, that the posting clause requires that the notice must be posted during a period of 4 weeks, or 28 days, before the introduction of the bill, but that the word "a" in the clause "once a week for four consecutive weeks," in the publication clause, was used in the sense of "in each," so that, where the notice was published in a newspaper once a week in each of four consecutive weeks prior to the introduction of the bill, the constitutional requirement was complied with, though 28 days did not intervene between the first publication and the introduction of the bill. *Lower v. State* (Ala.) 59 South. 611, 612.

#### As requiring full number of weeks

A tax sale notice published once in each week for four consecutive weeks prior to the day of sale complies with the requirements of section 7639, Gen. St. 1901, providing that notice shall be published "once in each week for four consecutive weeks prior to the day of sale," though the first publication was made 25 days only before the sale. *Tidd v. Grimes*, 71 Pac. 844, 845, 66 Kan. 401.

#### ONCE A YEAR

Where a policy of fire insurance provides that "the insured shall take an 'inventory' of the stock hereby covered, at least 'once a year,' during the life of this policy," the assured has a year from the date of the policy in which to make an inventory, although the policy runs for one year only. *Tucker v.*

*Colonial Fire Ins. Co.*, 51 S. E. 86, 88, 56 W. Va. 30.

#### ONE

See Some One.

#### ONE BUILDING

Under Liquor Tax Law, Laws 1897, p. 220, c. 312, § 17, subd. 8, requiring the consent of the owners of two-thirds of the number of buildings used exclusively as dwellings and situate within 200 feet of premises to be used for the liquor traffic to the carrying on of such traffic, an ordinary frame building, in a country village, intended and used for two families, is one building. In re *Clement*, 103 N. Y. Supp. 157, 158, 118 App. Div. 575.

#### ONE DWELLING HOUSE

The words "one dwelling house," as used in a conveyance of land declaring that the grantee shall not occupy the premises, except for one dwelling house to each lot, are used in the sense in which the words are ordinarily used. A building planned and designed for two or more dwellings cannot properly be described as one dwelling house. A building designed and planned for two families, one to occupy the ground floor and one the second floor, each to have a separate entrance, violates the restriction in the conveyance. *Harris v. Roraback*, 100 N. W. 391, 392, 137 Mich. 292, 109 Am. St. Rep. 681.

A double two-story building, comprising four flats under a single roof, with a division wall running through it on the center line of the lot from front to rear and from cellar to roof, on either side of which was a bay front, intended for the occupation of several families, was not "one dwelling," within a restrictive building covenant providing that not more than "one dwelling" should be erected on each lot. *Sanders v. Dixon*, 89 S. W. 577, 582, 585, 114 Mo. App. 229.

#### ONE-HALF

See Eastern One-Half.

#### ONE-HALF GALLON

Gen. Laws 1909, c. 123, § 52, imposing a penalty for the sale or keeping for sale by retail druggists, without first obtaining a license, of enumerated liquors, and declaring that the finding of any liquors enumerated on the premises of any retail druggist in quantities exceeding one-half gallon shall be considered evidence that the same is kept for sale, when construed in the light of chapter 32, § 3, providing that every word importing the singular number only may be construed to include the plural, and every word importing the plural number only may be construed to embrace the singular, prohibits the keeping of intoxicating liquor in quantities exceeding one-half gallon, whether it consists of one kind only, or is the aggregate of sev-



eral kinds. *State v. Almy*, 79 Atl. 962, 963, 32 R. I. 415.

### ONE HOUSE

The erection of a house or flat two stories high under a single roof, planned for separate occupancy by two families, one on each floor, with separate entrances, did not constitute a breach of a building restriction in a deed providing that not more than "one house" should be erected on each 40-foot frontage. *Pank v. Eaton*, 89 S. W. 586, 587, 115 Mo. App. 171.

### ONE LOT

The words "one town or city lot," in Act Dec. 8, 1852, limiting the extent of the homestead, mean the lot or piece of ground on which the head of a family has a house, with the appurtenances which he uses as a home, though it contains more than one lot, according to the plat and survey of the town or city. *Owens v. Jabine*, 115 S. W. 383, 384, 88 Ark. 468.

### ONE PLACE

On a trial for keeping a liquor nuisance, the proof showed that defendant conducted a hotel and in the rear of it about three feet therefrom is a small building, and that, to gain entrance to it, it is necessary to pass through the hotel. The evidence showed that defendant sold liquor in the basement of the hotel and in this building. Held that, within Rev. Codes 1905, § 9373, the building constituted "one place" for the maintenance of a liquor nuisance, and it was not error to deny defendant's motion to require the prosecution to elect which place they would rely on as the place of sale. *State v. Ildvedsen*, 126 N. W. 489, 490, 20 N. D. 62.

### ONE RAILROAD

Circular No. 325 of the railroad commission, declaring that continuous mileage rates shall apply to the Central Railroad and the Wadley Southern Railway Company for transportation of passengers and freight passing between those railroads or over any portion of either, such rates to be governed by the freight and passenger tariffs prescribed by the Georgia railroad commission for the Central of Georgia Railway Company, is a clear and complete fixing of a continuous mileage rate between the two roads, without necessity of resorting to ascertain its meaning, to rule No. 1 of the commission, declaring that, when two or more connecting lines of railroad are operated by one management, or where the majority of the stock of each is controlled by one of such companies, the lines of railroads of all shall be considered as constituting but one railroad, and the rates shall be computed on a continuous mileage basis. *Hill v. Wadley Southern Ry. Co.*, 57 S. E. 795, 800, 128 Ga. 705.

### ONE STATE TO ANOTHER

Engaged in transportation from one state to another, see Engaged.

### ONE SUBJECT

See Subject (Of Statute).

### ONEROUS

"Onerous" means burdensome or oppressive. *Meador v. Adams*, 76 S. W. 238, 239, 33 Tex. Civ. App. 167.

### ONEROUS DONATION

An "onerous donation" is a gift burdened with charges imposed by the donor. A manual gift may be free, onerous, or remunerative, and when the donor makes such a gift, *omnium bonorum*, on condition that the donee shall maintain him for the rest of his life, it will be dealt with as an onerous donation, and not as a commutative contract. *Ackerman v. Lerner*, 40 South. 581, 587, 116 La. 101.

### ONLY

See Fit Only.

The word "only," in Pol. Code Mont. § 4350, providing that the county treasurer must disburse the county moneys only on county warrants issued by the county clerk, based on orders of the board of county commissioners, or as otherwise provided by law, limits the power of the treasurer to pay out the money of the county, both as to the amount and the precedent conditions of payment. *Ex parte Farrell*, 92 Pac. 785, 786, 36 Mont. 254.

Seattle City Charter, art. 16, § 12, declares that every employé in the classified civil service shall hold office until removed or retired; that any employé may be removed by the appointing power "only" on the filing with the Civil Service Commission of a statement of the reasons therefor; that an employé removed may demand an investigation, which the Commission shall make, and certify its decision to the appointing officer, and if the removal is not sustained the employé shall be reinstated. The Commission is given power to require the attendance of witnesses. Section 4 provides that the Commission "shall make rules for examinations, appointments, and removals." Article 24, § 8, provides that every officer, board, or department authorized to appoint any employé shall have the right to remove the person so appointed. Article 16, § 20, provides that any officer who has been convicted after trial before the Commission shall be dismissed from the service. Held, that the Commission has no power to dismiss a clerk in the police department who has been appointed by the chief of police; such power of removal being in the chief of police. "only," and the action of the Commission authorized by the charter being a mere basis

for action by the removing power. *Easson v. City of Seattle*, 73 Pac. 496, 498, 32 Wash. 405.

In a written warranty that "it is understood that the goods are warranted only against breakage caused by manifest defects in material," the word "only" necessarily excludes all other warranties. Giving the word its ordinary meaning, and applying it in its restrictive sense, as qualifying the word to which it naturally belongs, the conclusion cannot be escaped that it restricts the meaning to be given to the verb warranted. *Dowaglac Mfg. Co. v. Mahon*, 101 N. W. 903, 13 N. D. 516.

#### In limitation in deed or lease

A conveyance, "for railroad purposes only" entitles the company to the use and possession of the entire strip so long as any part of it is used for such purposes. *Ritter v. Thompson*, 144 S. W. 910, 911, 102 Ark. 442.

Where grantors of a shore front at a summer resort reserved the right to build a pier, covenanting not to permit the sale of commodities thereon, and to charge "only an entrance fee," their covenant is not broken by charging for the use of roller skates at a rink on the pier, where all who pay the entrance fee may go to every part of the pier, including the rink. *Atlantic City v. Associated Realities Corp.*, 67 Atl. 937, 938, 72 N. J. Eq. 634.

#### In limitation of jurisdiction

Using Webster's definition of "only" as "utterly, entirely, wholly" (Webst. Dict. p. 913), jurisdiction cannot be founded only on one ground, when another and equally important constitutional ground is presented in the same suit. *Cound v. Atchison, T. & S. F. R. Co.*, 173 Fed. 527, 533.

The word "only" in the judiciary act (Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433), providing that, where jurisdiction is founded "only" on the fact of diversity of citizenship, suit may be brought in the district of the residence of either the plaintiff or the defendant, is equivalent to "solely"; and a suit within the general jurisdiction of the federal courts, both on the ground of diversity of citizenship and because founded upon a law of the United States, can be brought only in the district where defendant resides. *Whittaker v. Illinois Cent. R. Co.*, 176 Fed. 130, 131 (citing *Cound v. Atchison, T. & S. F. R. Co.*, 173 Fed. 527; *McCormick Harvesting Mach. Co. v. Walthers*, 10 Sup. Ct. 485, 134 U. S. 41, 33 L. Ed. 833).

#### ONLY ADVISORY

The phrase "only advisory," within the rule holding that a master's findings are only advisory to the court, simply mean that such findings are not conclusive upon the court,

but, on the contrary, his conclusions both of law and fact may be reviewed by the chancellor. In other words, the master's conclusions do not bind the court on any questions of law or fact. *Guarantee Gold Bond, Loan & Savings Co. v. Edwards*, 104 S. W. 624, 633, 7 Ind. T. 297.

#### ONLY CHILDREN

A complaint on a note, which averred that the payee died intestate leaving no widow and that he left plaintiffs as his children and only children and "only heirs at law," that all claims against him and his estate had been paid, and that no letters of administration had been granted on the estate, was sufficient to show the plaintiffs' right to sue as owners of the note, though the quoted words be taken to state a mere conclusion, the words "only children," standing unqualified, including deceased as well as living children. *Barrett v. Sipp*, 98 N. E. 310, 311, 50 Ind. App. 304.

#### ONYX

So-called Mexican onyx is dutiable as "onyx" rather than as "marble," under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 114, 30 Stat. 153. *Blochman Banking Co. v. Blake*, 168 Fed. 572.

#### OONTZ

It was held in *Commonwealth v. Kammerer* (Ky.) 13 S. W. 108, under a statute providing that "Whoever \* \* \* shall set up, carry on or conduct \* \* \* a keno bank, faro bank, or other machine or contrivance used in betting," etc., "shall be fined," etc., that "oontz," which is played with dice on a table or other surface was not within the meaning of "other machine or contrivance." *White v. State*, 76 N. E. 554, 555, 37 Ind. App. 95.

#### OPAL

As precious stone, see Precious Stones.

#### OPAQUE

The term "opaque," as employed in describing a patent for a current controlling device for telephone circuits, and in defining a circuit in its relation to the energizing current, is a circuit containing a condenser or equivalent device which prevents the passing through the circuit of an appreciable or substantial amount of current—that is, a sufficient amount to affect the operation of the system to an objectionable degree—and by the term "opaque," when referring to the talking current, is contemplated that characteristic of the circuit which will prevent the passage of the talking currents there-through in sufficient amount to materially affect the transmission of the talking currents through the path containing the tele-

phone receiver. *Kellogg Switchboard & Supply Co. v. Dean Electric Co.*, 168 Fed. 549, 551 (adopting definition given in description of patents in Congress).

## OPEN

See *Holding Open*; *Unopened*; *Way Opened and Dedicated to Public Use*. Keep open, see *Keep*.

Defendant owned a tract lying between plaintiff's land and a certain creek, and the parties made a contract by which plaintiff agreed to furnish labor "to clean off right of way and dig ditch through C. pond and to clean out and open the old ditch" on defendant's land; plaintiff agreeing "to dig this ditch not less than six or eight feet wide and the proper depth necessary and not to exceed three feet in the new ditch." The contract further provided that defendant should allow plaintiff's water right of way through the ditch, through the pond to the creek, for the purpose of keeping the ditch clean and open. The new ditch referred to was to connect with the old ditch, which was to furnish the outlet to the creek; the purpose being to make one drainage ditch by digging the new ditch to meet the old. Held that, under the provision "to clean out and open the old ditch," plaintiff was required not merely to remove the rubbish therefrom, but to widen it, so as to make it an unobstructed outlet for the water; the word "open" meaning to form by cutting, cleaning, removing, or pushing aside whatever impedes or hinders. *Alexander v. Smith*, 57 South. 104, 107, 3 Ala. App. 501.

### Saloon

A saloon is "open" on Sunday, in violation of *Mills' Ann. St. (Rev. Supp.)* § 1346d, though not kept open in the same manner as on week days; it being enough that it is so kept that access may be had thereto by persons not employed about it, and that, though the door is not kept open, it is opened on application for admission. *Birmingham v. People*, 90 Pac. 1121, 40 Colo. 362.

Under a statute forbidding the keeping open of a tipping-house on the Sabbath, the law does not concern itself with the length of time during which it was open, but does under some circumstances justify the opening of a house used as a saloon on secular days even on the Sabbath day, and a charge which failed to present the distinction between the lawful and unlawful opening of such a house, but charged that the offense was complete whenever it appeared that the house in question was a tipping-house and that it was open on the Sabbath day and that the law did not concern itself with the purpose for which it was open, too greatly restricted the purposes for which a saloon may be open on the Sabbath day. *Richard-*

*son v. State*, 59 S. E. 916, 917, 3 Ga. App. 313.

### Street or road

The expression "to open," as applied to a street or road, is used almost indifferently to express two very different processes—the act of establishing or creating a highway, and that of actually putting in shape for travel one already having a legal existence. *Board of Com'rs of Cowley County v. Johnson*, 90 Pac. 805, 807, 76 Kan. 65.

In an ordinance, which proposes to vacate a part of a street and open it on other lines, the words "open on other lines" are only applicable to an already existing highway. *Erie Ry. Co. v. City of Pasaic*, 74 Atl. 338, 79 N. J. Law, 19.

Where an ordinance, entitled "An ordinance to open, grade, macadamize and otherwise improve" a new street designated in such title, contained provisions for the taking of the lands required for such street, by condemnation, and the payment of proper damages for such taking, it was held, that the word "open" implies the acquisition by condemnation, if such acquisition be necessary, of the lands required for such opening, and that the title sufficiently indicates an intent to condemn. *Beechwood Park Land Co. v. City of Summit*, 73 Atl. 57, 58, 78 N. J. Law, 182.

A charter giving a city authority to "open, alter, widen, establish, abolish," etc., streets, does not give it authority to alienate streets. *Krause v. City of El Paso (Tex.)* 101 S. W. 828, 833.

The method of opening a street in Jersey City is prescribed in its charter, which declares that a street must be opened in that manner and not otherwise. Every street "opened" in the city involves: (1) The acquisition of the necessary lands; (2) the obligation of the city to improve, maintain, and keep in repair the streets of the city; and (3) the assessment for benefits. *City of Jersey City v. National Docks R. Co.*, 26 Atl. 145, 148, 55 N. J. Law, 194.

The word "opened," as used with reference to streets and public places, refers to the time when the city becomes vested with the title to the land on which the street or avenue is to run. But it was not used in that sense in *Laws 1895, p. 2037, c. 1006, § 2*, relating to the discontinuing and closing of streets, and providing that the contiguous street bounding the plot or square wherein is situated the land sought to be closed and occupied has been opened; but the purpose of the act was to substitute one system of the public highways for another by opening new streets and closing old ones, and it was not intended to physically close the streets of one system without providing something to take their places. *Johnson & Co. v. Cox*, 86 N. Y. Supp. 601, 603, 42 Misc. Rep. 301.

Where J. avenue was opened under Laws 1867, p. 953, c. 400, under which act the city acquired only an easement for street purposes, and thereafter proceedings were instituted to acquire land to widen the avenue, when a part of it then in use was abandoned under Laws 1895, p. 2037, c. 1006, § 2, providing that, when the public easement in a street was legally abandoned, the owner regained complete possession thereof, and, after the new street was opened, could occupy the abandoned part, and the cemetery association owned the fee in land which was included within the abandoned portion of J. avenue, the new street was not "opened," within the statute, until there had been an actual physical opening, and hence the abandoned part of the avenue was not exempted from assessment as "land actually used for cemetery," by Laws 1879, c. 301, § 1. In re Jerome Ave. in City of New York, 85 N. E. 755, 756, 192 N. Y. 459.

Laws 1895, p. 2037, c. 1006, relating to the discontinuing and closing of streets and other thoroughfares in New York city, provides (section 2) that on the filing of a map showing the intention of the public authorities to close or discontinue any street, road, or other thoroughfare which has been in actual and physical use, the owner of the fee thereof shall be permitted to close and use and occupy the same as fully as if the same had not been laid out, dedicated, established, or used, provided the contiguous street bounding the plot or square wherein the land sought to be closed and occupied has been "opened." Held, that the term "opened" as used therein meant actually opened so that a road could be used, and that till a road, intended to take the place of a discontinued thoroughfare, was "physically opened and capable of public use" owners of premises abutting the old road are properly prohibited from closing or fencing the roadbed in front thereof. Isaac G. Johnson & Co. v. Cox, 89 N. E. 454, 457, 196 N. Y. 110.

#### OPEN ACCOUNT

Money advanced under a contract or at the instance and request of another is not an "open account" within Rev. St. 1895, art. 3102, providing that on all open accounts, when no interest is agreed on by the parties, interest shall be allowed from the first day of January after the same are made. *Courtie v. Roensch*, 134 S. W. 413, 416.

Items for unliquidated damages set forth in a petition do not constitute an "open account" within Rev. St. 1909, § 1799, providing that in actions on an open account where the items are set forth in the petition, defendant, who makes default, shall be deemed to admit the account to be due as set forth in the petition, and a petition in an action by a subcontractor against the principal contractor for damages for failure to procure for the subcontractor access to the grounds

on which the work is to be done, is not enlarged by items of unliquidated damages incorporated in the petition. *W. W. Brown Const. Co. v. MacArthur Bros. Co.*, 139 S. W. 104, 108, 236 Mo. 41.

Civ. Code 1895, § 4130, which provides the mode of proof and defense in a suit in a justice's court on an "open account," does not apply to an action for the loss of or damage to personal property by a common carrier, even though the cause of action is set out in detail in a statement attached to the summons and verified by the affidavit of the plaintiff. *E. E. Lowe Co. v. Central of Georgia Ry. Co.*, 51 S. E. 653, 123 Ga. 712.

"An account current" is an "open or running account" between two or more parties, or an account which contains items between the parties from which the balance due to one of them is or can be ascertained, from which it follows that such an account comes under the terms of an "open account" in so far as it is running, unsettled, or unclosed." Where supplies of coal for a vessel were ordered and delivered at different times, a bill being rendered after each delivery, the several charges do not constitute a running account, but each constitutes a separate and distinct cause of action, and to entitle the seller to a lien for any item under the New York statute notice thereof must have been filed within 30 days after such item was furnished or suit to enforce the lien must have been instituted within that time. *The Golden Rod*, 153 Fed. 171, 173, 82 C. C. A. 345 (quoting and adopting definition in 1 Cyc. p. 363).

Where petition alleged that plaintiff sold and delivered certain goods to defendant the amounts and prices of which were itemized in an exhibit, and paid certain freight charges for defendant, and that correct bills and invoices were made out at the time of the shipments, and received by defendant, who agreed to pay the sums set forth and itemized, an affidavit as to the correctness of the items was no proof thereof, under Rev. St. 1895, art. 2323, providing that in an action on an open account an affidavit of its correctness shall be prima facie evidence thereof, as the petition showed an account stated so far as the sales were concerned, and the freight charges were evidently based on a special contract, which formed no part of the account for goods sold. An "open account" is one in respect to which nothing has occurred to bind either party by its statements; an account which is yet fully open to be disputed. An account consisting of many items based on agreements as to each item as to price and time of payment is not an open account any more than one in which the price and time of payment has been fixed by an agreement made after all the items of the account have been consummated by sale and delivery. The word "open" indicates that there is something undetermined by

contract of the parties, or by the application of settled rules of law, and an account cannot be said to be "open" when there remains no term of contract to be settled by agreement. "Open account" is used in opposition to "stated account," wherein the account is closed by the assent to its correctness by the party charged. An "account stated" is an agreement between two persons who have had previous transactions fixing the amount due in respect to such transactions and promising to pay them. In other words, an "account stated" is one consisting of many items based on agreements as to each item as to the price and time of payment. *Wroten Grain & Lumber Co. v. Mineola Box Mfg. Co.* (Tex.) 95 S. W. 744, 745 (citing *McCamant v. Batsell*, 59 Tex. 363; *Abb. Law Dict.*; *Whittlesey v. Spofford*, 47 Tex. 13).

#### OPEN AND APPARENT

A hazard is open and apparent which can be discovered by the exercise of ordinary care by the party charged with the duty of exercising such care. *Indianapolis Traction & Terminal Co. v. Holtsclaw*, 82 N. E. 986, 989, 41 Ind. App. 520.

#### OPEN AND NOTORIOUS ADULTERY

A married man was not guilty of "open and notorious adultery" because he lived in adultery with his brother's wife, under such circumstances that the community in which he lived believed that they were married and where their adulterous relation was kept secret. *People v. Salmon*, 83 Pac. 42, 43, 148 Cal. 303, 2 L. R. A. (N. S.) 1186, 113 Am. St. Rep. 268.

#### OPEN AND NOTORIOUS POSSESSION

An instruction that the sale of goods or property by one who is involved deeply in debt and unable to meet his obligations in order to be valid against the creditors of the grantor must be accompanied by open and notorious change of possession, and that by "open and notorious possession" I mean the public change of possession, which is to continue and to be manifested continually by the outward and visible signs, such as render it evident that possession of the judgment debtor has ceased, is correct. *Swartzburg v. Dickerson*, 73 Pac. 282, 12 Okl. 566.

#### OPEN AND OBVIOUS DEFECT

An open and obvious defect is one manifest to the sense of observation, whether it arises from the nature of the business, the manner in which it is conducted, or the use of defective and unsafe appliances. *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 106 N. W. 218, 216, 73 Neb. 259.

#### OPEN BIDDING

*Hurd's Rev. St.* 1899, p. 453, c. 32, § 85, provides that the board of directors of a building and loan association shall hold such stated meetings, not less frequently than

once a month, as may be provided by the by-laws, at which the money in the treasury shall be offered for loan in open meeting, and that the stockholders who shall bid the highest premium for the preference or priority of loan shall be entitled to receive a loan of a certain amount for each share of stock. Held, that where at a regular meeting "money was offered for sale," and there were several bids therefor, among which was the bid in question, the requirement of the statute with reference to "open bidding" was complied with as to the bid in question, though it was made by way of written application for the money, submitted without the presence of the bidder. *Savage v. Evanston Savings & Loan Ass'n*, 81 N. E. 1062, 1063, 228 Ill. 481 (citing *Farmers' Savings & Building & Loan Ass'n v. Kent*, 30 South. 874, 181 Ala. 246; *Ruppel v. Missouri Guarantee Savings & Building Ass'n*, 59 S. W. 1000, 158 Mo. 613; *State v. Stockton*, 85 Mo. App. 477; *Miller v. Missouri Guarantee Sav. & Building Ass'n of Hannibal*, 83 Mo. App. 669; *Edinger v. Same*, 83 Mo. App. 615).

#### OPEN CAR

An "open car" on a trolley line is one with a running board on each side along which the conductor passes collecting the fares and discharging his general duties. *Drake v. Auburn City Ry. Co.*, 66 N. E. 121, 122, 173 N. Y. 466.

A policy, issued to a railroad company, which covered in general terms all cotton on or in depots, platforms, or grounds adjacent thereto, and in transit, but which provided that cotton in open cars was not covered, insured cotton on a stationary flat car placed on a spur track adjacent to a depot to remain there about 12 hours, though the cotton was subsequently to be transported on the car, since the "open cars" referred to meant cars of that description commonly used for transportation, as the company sought to relieve itself from the increased hazard incident to the transportation of cotton on open cars due to sparks from locomotives in actual transportation, and since the words "in transit" meant in course of passing from point to point. *Royal Ins. Co. v. Texas & G. Ry. Co.*, 115 S. W. 117, 120, 53 Tex. Civ. App. 154.

#### OPEN CONCUBINAGE

The word "open," in Civ. Code, art. 1481, providing that those living in open concubinage are respectively incapable of making to each other any donation of immovables, means "not secret, without concealment or disguise"; so that, where the living is under the cloak of an innocent relation and sought to be kept secret, it does not give rise to the incapacity pronounced by that article. *Succession of Jahraus*, 38 South. 417, 418, 114 La. 456.

**OPEN COURT**

See Confession in Open Court.

An "open court" contemplates the presence of the judge and the clerk of the court, or a duly qualified deputy, the regular opening and closing of the court, and the presence of the clerk's docket, upon which should be entered, under the eye of the court, the successive steps taken in open court in each case. *Hays v. Philadelphia, W. & B. R. Co.*, 58 Atl. 439, 441, 99 Md. 413.

Written application filed with the clerk, and not brought to the court's attention, is not made in "open court," within Rev. St. 1895, art. 3188, providing that no jury trial shall be had, unless application therefor be made in open court. *Gibson v. Singer Sewing Mach. Co. (Tex.)* 147 S. W. 285, 286.

In the provision of Bankr. Act July 1, 1898, c. 541, § 12, 30 Stat. 549, that a bankrupt may offer terms of composition to his creditors after he has been examined in open court or at a meeting of his creditors, etc., the term "in open court" refers to proceedings before the referee. In *re Bloodworth-Stembridge Co.*, 178 Fed. 372, 373.

Pub. Laws 1911, c. 702, § 2, provides that theaters afterwards erected should have an open court or space on sides not bordering on streets or alleys which should be at least six feet wide, etc. This act took the place of Pub. Laws 1909, c. 472, § 27, providing for similar courts from the proscenium line to the line of the street in front parallel with the adjoining street, which declared that such courts should be "open to the sky opposite the whole length of the auditorium." Held, that "open court," as used in the act of 1911 was one completely uncovered and open to the sky, and that a covered passageway was not in compliance therewith. *Greenough v. Allen Theater & Realty Co.*, 80 Atl. 260, 261, 33 R. I. 120.

**Continuous session distinguished**

The term "open court," as used in Acts 1898, No. 108, p. 155, providing that appeals in criminal cases shall be taken by motion, either verbal or in writing, in open court within three days after sentence shall have been pronounced, means the actual session of the court while the judge is on the bench, as contradistinguished from the continuous session of ten months provided for by article 117 of the Constitution. *State v. Vicknair*, 43 South. 635, 637, 118 La. 963.

**Hold court synonymous**

Acts 1888-89, p. 64, is not violative of Const. 1875, art. 4, § 19, providing that no bill shall be so altered or amended on its passage through either house as to change its original purpose; the change having been only from a bill to fix the time of "opening" courts to one to fix the time of "holding" courts, and the terms as used in the connec-

tion being synonymous. *Letcher v. State*, 48 South. 805, 806, 159 Ala. 59, 17 Ann. Cas. 716.

**OPEN CROSSING**

The expression "open crossing," when applied to railroads, has a well-understood meaning, and the use to be made of it necessarily depends somewhat upon the character of the land on each side of the track and the purposes to which the owner put it, and where a railroad company agreed to give the owner an "open crossing," where the road intersected a 220-acre pasture, the parties contemplated an "open crossing" for the passage of stock between the separate parts of the farm. *Hartshorn v. Chicago Great Western Ry. Co.*, 113 N. W. 840, 841, 137 Iowa, 324.

**OPEN FOR BUSINESS**

Where an insurance policy warranted that insured should keep an inventory and his books of account in a fireproof safe during the hours when his drug store "was not open for business," and insured was in the habit of keeping his store open for business until 11 or 12 o'clock at night, the policy did not require that such books should be placed in his safe during his temporary absence from the store at about 9 o'clock on the evening of the fire, answering a professional call, as a physician, about a block distant from the store. *Major v. Insurance Co. of North America*, 86 S. W. 883, 884, 112 Mo. App. 235.

Where a store containing insured's fixtures and stock was locked for a half hour at noon while the persons in charge were at lunch, and during that time the property was destroyed by fire, the store was not then "open for business," within a provision of the iron-safe clause in the policy, requiring that assured shall keep his books and inventory locked in a fireproof safe when the building is not actually open for business, or in some place not exposed to a fire which would destroy the building. *Joffe & Mankowitz v. Niagara Fire Ins. Co.*, 81 Atl. 281, 283, 116 Md. 155, Ann. Cas. 1913C, 1217.

**OPEN HOUSE**

Under Acts 31st Leg. c. 17, § 15, defining an "open house" as one in which no screens obstructing the view through the place of entrance into such house are used, a saloon conducted in a wing of the entrance lobby of a hotel in plain view of the entrance thereto is conducted in an "open house." *Doyle v. Scott (Tex.)* 134 S. W. 829, 830.

Acts 30th Leg. c. 138, § 15, requiring persons engaged in the sale of intoxicating liquors to be drunk upon the premises to give bond conditioned that they will keep an open house, and defining an "open house" as one in which no screen or other devices are used inside or outside such house that will obstruct the view through the open door or

place of entrance where the liquors are sold, does not require that ordinary doors used at such entrances shall be constructed of transparent material, and a failure to so construct them is not a breach of the bond, where there is no other screen or device to obstruct the view through the open door. *State v. W. C. Ward & Sons (Tex.)* 135 S. W. 182, 183.

### OPEN MARKET

In an action against a carrier for damages to a shipment of cattle, in a requested instruction for defendant that there was no evidence to show that the cattle in certain cars were not sold in "open market" on a certain date, the words "open market" unexplained would necessarily have confused and misled the jury, and, if by "open market" was meant that the sale was made before the close of the regular market as held that day, the request should have been so framed as to express that meaning. *Baltimore & O. R. Co. v. Whitehill*, 64 Atl. 1083, 1089, 104 Md. 295.

### OPEN MORTGAGE CLAUSE

The indorsement on a fire policy that loss, if any, shall be payable to the mortgagee as his mortgage interest may appear, designates the payee of any loss which, for the purposes of distinction, has been called "open mortgage clause," but does not bring insurer and mortgagee into contractual relations with each other, either directly or through an assignment of the policy, and neither does the mortgagee thereby become a person whose property or property interests are insured under the policy, and the contract for indemnity remains one exclusively between insurer and the owner of the property. *Collinsville Sav. Soc. v. Boston Ins. Co.*, 60 Atl. 647, 648, 77 Conn. 676, 69 L. R. A. 924.

### OPEN, NOTORIOUS, AND CONTINUOUS CHANGE OF POSSESSION

The words "open, notorious, and continuous change of possession," used to describe one of the requisites of a valid sale of property as against the seller's creditors, means that the possession taken must be actual, and must be of such a character as to apprise the community, or those who are accustomed to deal with the seller, that the goods have changed hands, and that the title has passed out of the seller and into the buyer. *Williams v. Youtsey*, 131 S. W. 705, 706, 151 Mo. App. 69.

### OPEN POLICY

An open or unvalued policy is one in which the value of the interest at risk is not fixed in the policy, but is estimated by a certain standard, and in case of loss is made out by proof. *Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.*, 185 Fed. 172, 174.

An "open policy of insurance" is one where the value of the property insured is not

agreed on or liquidated. On an open policy of marine insurance on a cargo, the recovery in case of a total loss is the value of the cargo, at the place of shipment, and does not include a loss of profits. *Leonard v. Bosch*, 68 Atl. 56, 73 N. J. Eq. 438.

Under a marine insurance policy covering an importation valuing the property at the invoice, an invoice, not stating the actual cost or actual market value, as required by Act Cong. June 10, 1890, c. 407, 26 Stat. 181, to be stated in the "invoice" accompanying importations, was not such an invoice as the contract contemplated; and hence the policy was an open and not a valued one, and, the insured, having paid in reliance on the valuations given in such invoice, might recover back the excess over the actual value. *Insurance Co. of North America v. Willey*, 98 N. E. 677, 679, 212 Mass. 75.

Civ. Code, § 1793, defines insurance as a contract whereby one undertakes to indemnify another against loss. Section 1845 provides that a policy is either open or valued. Section 1846 defines an open policy as one in which the value of the thing insured is not agreed upon, but left to be ascertained in case of loss. Section 1847 defines a valued policy as one which provides that the thing insured shall be valued at a specified sum. Section 1877 provides that double insurance exists where the same person is insured by several insurers in respect to the same subject. Section 1878 provides that in case of double insurance each insurer shall contribute ratably toward the loss. Sess. Laws 1905 c. 126, prescribes a standard form of fire policy which provides that the amount of insurance written therein on real property shall be taken conclusively to be the true value. Held that, under the standard policy, the value of real property on total loss is conclusively fixed by the total of all the insurance written therein which is the amount of the policy and concurrent insurance, and the total amount of loss is the sum total of insurance, and, the value of the property being conclusively fixed at a sum equal to the loss, the several policies cannot be prorated. *Lawver v. Globe Mut. Ins. Co.*, 127 N. W. 615, 619, 25 S. D. 549.

### Valued policy distinguished

See Valued Policy.

### OPEN SHOP

An employer who does not discriminate between union and nonunion labor, but leaves the matter to the voluntary choice of his employes, maintains an "open shop." *Shine v. Fox Bros. Mfg. Co.*, 156 Fed. 357, 86 C. C. A. 311.

The term "open shop" has a distinctive trade meaning, and in reference to trade matters means that in selecting employes there should be no discrimination against union or nonunion men. The term excludes the idea

of discrimination against men because of their membership in a union. The moment men are discriminated against with reference to their employment because they are union men, the shop pursuing this policy becomes a "closed shop." The principle of an "open shop" is that in it men are employed regardless of whether they are union or nonunion. This is the sense in which the term "open shop" is invariably used. *Sackett & Wilhelms L. & P. Co. v. National Ass'n of Employing Lithographers*, 113 N. Y. Supp. 110, 114, 61 Misc. Rep. 150.

### OPEN STORE

The keeping of a fruit stand open on Sunday for the sale of fruit is the keeping of an "open store" within Code Miss. 1906, § 1367, providing that a person shall not keep open his store on Sunday for the purpose of disposing of any wares or merchandise, etc. *City of Gulfport v. Stratakos*, 43 South. 812, 90 Miss. 489, 13 Ann. Cas. 855.

### OPEN TO USE

The words "open to use," as used in an act providing that every railroad company or corporation whose lines or road, or any part thereof, is "open to use," shall within six months after the passage of the act maintain fences on the sides of their roads, or the part thereof "open to use," where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands, and that any such railroad company failing to maintain such fences shall be liable to the owners of live stock killed, injured, or damaged by their agents, employes, engines, or cars, do not include a railroad, which the evidence shows was built in 1872, and further, that an owner of stock had done business with the "Rio Grande" for 25 years. *Denver & R. G. R. Co. v. Kelso*, 90 Pac. 65, 66, 40 Colo. 84.

### OPEN VISIBLE RISK

An "open visible risk" is such a one as would instantly appeal to the senses of an intelligent person familiar with the business, and about which there can be no difference of opinion in the minds of intelligent persons; and it is not required that the servant make close scrutiny into all the details of the instrumentalities with which he deals to determine the risk involved. *Millen v. Pacific Bridge Co.*, 95 Pac. 196, 199, 51 Or. 538.

### OPENED AND DEDICATED TO PUBLIC USE

See Way Opened and Dedicated to Public Use.

### OPENING OF THE COURT

Code 1882, § 4926, providing that defendant shall file his answer in writing on or before the "opening of the court" at the return term of the suit, is mandatory, and a rule of court providing that new cases shall

be called for assignment on the second Monday of the term, and that defendants should have until such call to file answer in all cases where an appearance has been entered during the first day of the term, is void, it being an unwarranted construction to extend the meaning of the words "opening of the court" to include any other day except the first day of the term. If the plea could be filed after the first day of the term, it could be filed on the last day, as well as on any intermediate day. To give any other construction to this statute would be to deprive it of a definite meaning in this regard. *Lippman v. Aetna Ins. Co.*, 47 S. E. 593, 594, 120 Ga. 247.

### OPENING STATEMENT

As pleading, see Pleading.

### OPENLY

An answer setting up that a waste ditch was used continuously, openly, peaceably, etc., sufficiently shows that the use was not clandestine, as the word "openly" sufficiently shows that fact. *Abbott v. Pond*, 76 Pac. 60, 142 Cal. 398.

### OPENLY OUTRAGE PUBLIC DECENCY

The statute (St. 1893, § 2552; Wilson's Rev. & Ann. St. 1903, § 2650) making it an offense to commit any act which "openly outrages public decency" and is injurious to public morals is directed against acts which are committed openly and affect the public. A doctor's private office is not such a place as will give an act committed therein the character of an open act, especially when no one was present except the one against whom the act was committed. *Gunn v. Territory*, 91 Pac. 861, 862, 190 Okl. 240.

### OPENLY POSSESS

Where a petition alleges that the plaintiffs own and "openly possess" land, the petition is not drawn under Act No. 38 of 1908, authorizing suits to establish title to real estate where neither of the claimants are in actual possession, since the quoted phrase cannot be construed as an averment simply of title to the land, but means to possess in an open manner; publicly; not in private; without secrecy; by some word or act which is an open declaration to those in the neighborhood that they are exercising the rights of ownership. *McHugh v. Albert Hanson Lumber Co.*, 56 South. 636, 637, 129 La. 680.

### OPENNESS, NOTORIETY, AND EXCLUSIVENESS OF POSSESSION

An instruction that "openness, notoriety, and exclusiveness of possession" are shown by such acts in respect of the land in its condition at the time as comport with ownership, such acts as would ordinarily be performed by the true owner in appropriating the lands or its avails to his own use, or preventing others from the use of it as far as reasonably practicable, was correct. *Alaba-*



ma State Land Co. v. Matthews, 53 South. 174, 175, 168 Ala. 200.

## OPENWORK ARTICLES

As embroideries, see Embroidery.

Not dutiable as articles in imitation of lace, see Articles Within Tariff Act.

## OPERA

The word "opera" is different in meaning from the words "opera house," in that the former may have no relation to the building in which it may be rendered, and so a "theater" may mean a place where plays are produced, whereas a "theater building" may be such whether plays are produced therein or not. *Neher v. Viviani*, 110 Pac. 695, 698, 15 N. M. 460.

## OPERA HOUSE

Opera distinguished, see Opera.

The word "opera" is different in meaning from the words "opera house," in that the former may have no relation to the building in which it may be rendered, and so a "theater" may mean a place where plays are produced, whereas a "theater building" may be such whether plays are produced therein or not. *Neher v. Viviani*, 110 Pac. 695, 698, 15 N. M. 460.

## OPERATE

See Cease to be Operated; Constructed, Run, and Operated; Continuously Operated; In Operation; Physical Operation of Switch; Properly Operated; Under the Control, Management, or Operation.

The word "operate" is defined as "to put in action and supervise the working of, as to operate a machine," or as "to put into or to continue in operation; to work, as to operate a machine." Thus, by a strict definition, the meaning of the phrase "operating a machine," as used in Labor Law, § 81, providing that children under 16 years of age shall not be permitted to operate, or assist in operating, dangerous machinery of any kind, would be to work the machine, or, in other words, to regulate and control its management and operation. *Gallenkamp v. Garvin Mach. Co.*, 86 N. Y. Supp. 378, 384, 91 App. Div. 141 (dissenting opinion by Ingraham, J., adopted in 72 N. E. 1142, 179 N. Y. 588. Citing Stand. Dict.; Imp. Dict.).

In an action against an abutting owner for injuries from defects in the cover of a coal hole, where the complaint predicates negligence of the defendant in the management, operation, and control of the sidewalk, and in keeping the coal hole in defective order, and in failing to provide proper warning as to the defective state of the coal hole cover, there is no legal differentiation between the terms "management" "operation,"

and "control," and any one of them would be sufficient to justify the admission of testimony to sustain a delinquency intended to be charged. *Maldosky v. Germania Bank*, 127 N. Y. Supp. 292, 293.

Under Code Va. Supp. 1898, § 2485, providing that "all persons furnishing supplies to a mining or manufacturing company necessary to the operation of the same shall have a prior lien upon the personal property of such company other than that forming part of its plant," etc., supplies necessary to the "operation of a manufacturing establishment" are such as pertain to its output, and do not include material or machinery necessary to the construction, equipment, and completion of its plant, and for the latter the statute gives no lien. *American Wood-working Machinery Co. v. Agelasto*, 136 Fed. 399, 400, 69 C. C. A. 243.

The phrase "purchasing or constructing," as used in Const. art. 10, § 12a, and Laws 1903, p. 93, authorizing certain cities with the assent of two-thirds of the voters thereof, voting at an election for the purpose, to become indebted in a larger amount than specified in Const. art. 10, § 12, not exceeding an additional 5 per cent. of the value of the taxable property for the purpose of purchasing or constructing waterworks or electric light plants to be owned exclusively by the city so purchasing or constructing the same, do not give cities the power to issue bonds for the purpose of maintaining and operating waterworks or electric light plants, for the power to maintain and operate waterworks and electric light plants is not necessarily incident to or implied in the power to purchase or construct waterworks or electric light plants, for the word "maintain" does not mean to provide or construct, but to keep up and preserve, and the word "operate" means to put into or continue in operation or activity. *State ex rel. City of Chillicothe v. Wilder*, 98 S. W. 465, 467, 200 Mo. 97.

The expression "operate as a grant," used by the Supreme Court of the United States in construing the confirmatory act of June 13, 1812 (2 Stat. 748, c. 99), to operate as a grant of the fee from the United States to the claimant of land, is in no case used by that court in any different sense. It is simply a judicial construction to the effect that Congress intends by an act of confirmation, where there is a confirmer or class of confirmer to take thereunder, that the same shall operate to vest in the confirmer any legal title which may be in the United States. *Catron v. Langhlin*, 72 Pac. 26, 31, 11 N. M. 604.

### Operating car

Engaged in operation of car, see Engaged.

### Operating engine

Engaged in operating engine, see Engaged.

### Operating house of prostitution

Since a conviction of a violation of Act April 26, 1909, punishing one who shall engage or assist in operating or managing any house of prostitution, cannot be had unless it is shown that accused had control of and conducted or assisted in the management and operation of the affairs of the house in some manner, or that he was able to bring about or assist in bringing about prostitution, a charge that if accused in any manner aided or abetted a third person in the management of the house he is guilty is erroneous; the word "management" meaning the act of managing; the manner of treating, directing, carrying on, or using for a purpose; and the word "operate" meaning to put into or to continue in operation or activity; the word "manager" meaning one who has the conduct or direction of anything; and the phrase "to carry on," when applied to business, meaning to prosecute, to help forward, to continue, etc. *Trozso v. People*, 117 Pac. 150, 154, 51 Colo. 323.

### Operating railroad

Engaged in operation of railroad, see Engaged.

Code, § 2071, makes every railroad company liable for damages to employes by the mismanagement of the engineers or other employes, when such wrongs are in any manner connected with the "use and operation" of any railway about which they shall be employed. Plaintiff was a machinist's helper in the machine shop of defendant railroad company where engines were brought for repairs; his duty being to block the wheels of an engine when placed over the draw pit in the shop and to remove such blocks when the engine was to be moved. After one set of wheels had been put on an engine and it was about to be moved by another engine, in order to put on the second pair of drivers, plaintiff attempted to brush a chock from under the wheel of the dead engine, when the other engine started without warning and crushed his hand. The operating department of the railroad had no control over the machine shops, which were used only for repairing disabled equipment which had been withdrawn from service, and not merely for temporary repairs and cleaning, as were the roundhouses. Held, that the statute referred to the physical "use and operation" of the railroad in transportation, and the rails on the shop floor did not constitute a "railway," nor was the movement of the repaired engine by the other engine done in the "use and operation" of the railway, within the meaning of the statute, so that the company was not liable for the negligence of the engineer in starting the live engine. *Slaats v. Chicago, M. & St. P. Ry. Co.*, 129 N. W. 63, 64, 149 Iowa, 735, Ann. Cas. 1912D, 642.

The risk of injury attending the removal from the track of a hand car used for the

transportation of a section crew and materials is peculiar to the "operation of railroads," within Rev. St. 1898, § 1816, as amended by Laws 1903, p. 741, c. 448, providing that every railroad shall be liable for damages to its employes, provided the same shall arise from a risk peculiar to the "operation of railroads." *Hardt v. Chicago, M. & St. P. Ry. Co.*, 110 N. W. 427, 431, 130 Wis. 512.

Where a section hand, engaged with others in trucking rails, was injured by a rail which he was standing astride being suddenly dropped to the ground, in view of the necessity of haste caused by frequently passing trains and the embarrassment of standing ground between rails and ties, the injury was one arising from a risk peculiar to the operation of railroads within St. 1898, § 1816, as amended by Laws 1903, p. 741, c. 448, making the company liable for such injuries, though caused by the negligence of a fellow servant. *Meo v. Chicago & N. W. Ry. Co.*, 120 N. W. 344, 138 Wis. 340.

The complete control and management of the track is the very essence of "operating" a railroad. *Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. 441, 450.

The word "operate," in St. 1898, § 1810, requiring railroads to be fenced and provided with cattle guards within three months from the time of commencing to "operate the same," refers to the transportation of goods and passengers, and not to the running of construction trains. *Nordean v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 135 N. W. 150, 151, 148 Wis. 627.

A joint traffic arrangement under which one line hauls the cars of another within the state does not constitute the "operation of a railroad." *Slaughter v. Canadian Pac. Ry. Co.*, 119 N. W. 398, 400, 106 Minn. 263.

A blacksmith engaged in construction of a railroad bridge, and injured by the act of a fellow servant in letting a coil of rope fall while they were both at camp, is not injured in the "operation of a railroad," within the meaning of the railway fellow-servant act (Revisal 1905, § 2646). *O'Neal v. South & W. R. Co.*, 67 S. E. 1022, 1023, 152 N. C. 404.

A cause of action against a railroad operating a road in front of premises accrues when every part of the road is adjusted according to its final construction and it begins to carry passengers, for until that time it is not in "operation," defined as active exercise of some specific function of office, or power exercised in producing an effect, though prior to that time construction and experimental trains had been operated. *Rothman v. Interborough Rapid Transit Co.*, 121 N. Y. Supp. 200, 201, 66 Misc. Rep. 378.

An employe of a railroad company, engaged in trucking freight from a warehouse to a freight car, is within the protection

of Rev. St. 1899, § 2873, making every railroad corporation liable for all injuries to a servant while engaged in the work of operating the railroad by reason of the negligence of any other servant. *Orendorff v. Terminal R. Ass'n of St. Louis*, 92 S. W. 148, 149, 118 Mo. App. 348.

The fellow servant act (Priv. Laws 1897, p. 83, c. 56, § 1), giving a servant of any railroad company "operating" in the state a right of action against the company for injuries sustained through the negligence of a fellow servant, is not applicable to an injury sustained by a servant assisting in the construction of a railroad at a point five or six miles from the completed track, and still further from the track on which trains were being operated. The word "operating," as applied to a railroad, means operation in the course of its business in any of its departments but not in the course of its construction. *Nicholson v. Transylvania R. Co.*, 51 S. E. 40, 41, 138 N. C. 516.

While the mere repair of a roadbed or track is not operation of a railroad, yet the risk of injury attending the removal from the track of a hand car used for the transportation of a section crew and materials is peculiar to the "operation of railroads" within a statute providing that every railroad shall be liable for damages to its employes from risks peculiar to the "operation of railroads." *Hardt v. Chicago, M. & St. P. Ry. Co.*, 110 N. W. 427, 431, 130 Wis. 512.

Under the statute providing that every railroad corporation owning or operating a railroad shall be liable for all damages sustained by any servant, "while engaged in the work of operating such railroad, by the negligence of any other agent or servant thereof," a fireman who, after attending to the headlight of his engine, stood in front of the pilot a short time, and, while returning to the cab, was struck by lumber projecting from the door of one of the passing cars, was engaged in the "operation of a railroad." *St. Louis & S. F. R. Co. v. Bussong*, 90 S. W. 72, 73, 40 Tex. Civ. App. 476.

A contractor to furnish logs to a saw-mill over a logging railroad, to which spurs were connected and on which a log skidder was operated solely to haul logs to a point where they could be loaded on cars and transported to the mill, was a person "operating a railroad" within *Sayles' Ann. Civ. St. 1897*, art. 4560h, providing that all persons engaged in the common service of a person operating a railroad in the same grade of employment and together doing the same character of work at the same time and place are "fellow servants," and that employes who do not come within such provisions are not fellow servants. *Hampton v. Woolsey (Tex.)* 139 S. W. 888, 890.

*Ann. St. 1906*, § 2873, makes every railroad liable for damages sustained by a servant while engaged in operating the railroad by reason of the negligence of another servant. Section 1192 requires railroads to carry a limited amount of baggage for each passenger, and section 1100 requires them to give checks therefor. Plaintiff was injured while engaged with another employe in transferring baggage from and to passenger trains to the baggage rooms of defendant railroad terminal company. Held, that plaintiff was engaged in "operating the railroad," within section 2873. *Turner v. Terminal R. Ass'n of St. Louis*, 111 S. W. 841, 842, 132 Mo. App. 38.

Rev. St. 1899, § 2873, provides that every railroad corporation owning or operating a railroad in this state shall be liable for any damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof. Held, that the work of repairing or reconstructing a bridge over which a railroad company's track was laid is work performed in "operating such railroad," within the meaning of the statute. *Huston v. Quincy, O. & K. C. R. Co.*, 107 S. W. 1045, 1048, 129 Mo. App. 576.

Rev. St. Mo. 1899, § 2873, providing that every railroad corporation shall be liable for all damages sustained by any servant while engaged in the work of "operating such railroad," by reason of the negligence of any other agent or servant thereof, is not limited in its application to the servants of the railroad company actually engaged in the operation of trains thereon, but includes all servants whose work is directly necessary for the running of trains, and therefore includes section hands engaged in repairing the road. *Callahan v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 71 S. W. 208, 170 Mo. 473, 60 L. R. A. 249, 94 Am. St. Rep. 746.

Under Railroad Law (Laws 1890, p. 1113, c. 565, § 101) as amended by Laws 1897, p. 776, c. 688, relating to street surface railroads, and providing that no corporation constructing and operating a railroad under the provisions of this article, etc., shall charge any passenger more than five cents for one continuous ride from any point on its road, "or on any road, line or branch operated by it, or under its control," to any other point thereof, etc., and Railroad Law (Laws 1890, p. 1096, c. 565, § 39) imposing a penalty on any railroad corporation receiving more than the lawful rate of fare, etc., the operation or control of a road within the meaning of such sections means a control of the operation of the road, and not merely a control of the corporation or individuals operating it by reason of the ownership of a majority of the road's capital stock. *Judgment, Senior v. New York*

City R. Co., 97 N. Y. Supp. 645, 111 App. Div. 39.

Where a railway company for a fixed rental furnished to a brewing company a locomotive for the exclusive use of the brewing company in a yard containing tracks and switches, the ties and rails for which were owned by the railway company and the real estate by the brewing company, and the engineer and fireman operating the locomotive were selected by the railway company and paid by the brewing company, the maintenance and operation of such yard was the operation of a railway, within Rev. Laws 1905, § 2042, providing that every company owning or operating a railroad shall be liable for all damages sustained within the state by any agent or servant thereof, without contributory negligence on his part, by reason of the negligence of any other servant thereof, so that neither the railway company nor the brewing company could escape liability to an injured person upon the ground that the injury resulted from the negligence of a fellow servant, if the injured employé was exposed to a railroad hazard. Schoen v. Chicago, St. P., M. & O. Ry. Co., 127 N. W. 433, 434, 112 Minn. 38, 45 L. R. A. (N. S.) 841.

In Gen. Laws 1890, p. 214, c. 125, § 1, providing that whenever freight, baggage, or other property has been transported over two or more railroads operating any part of their roads in this state and having an agent in this state, or operated by any assignee, trustee, or receiver of such railways, suit for loss or damages thereto may be brought against any one or all of such railroad corporations, the term "operating any part of their roads in this state" means that such corporations are engaged in the transportation of freight, baggage, or other property within the state. Where the undisputed evidence showed that a railway track did not extend into the state, and that the company was not engaged in the transportation of any freight, baggage, or other property within the limits of the state, but, in the course of business between it and another railroad company as connecting lines, the engines and cars of each road reciprocally passed over the boundary line of the states of Texas and Arkansas, in no sense could it be said that such interchange of business is within the term "operating any part of their roads within this state." St. Louis, I. M. & S. R. Co. v. J. H. White & Co., 80 S. W. 77, 79, 97 Tex. 493.

#### Operating sawmill

An employé engaged in cutting and delivering logs to his employer's sawmill is not entitled to a lien, under Ballinger's Ann. Codes & St. § 5919, giving a lien for labor in the operation of a sawmill, etc., but he may assert a lien on the logs cut and delivered under section 5390 et seq., giving to a person performing labor on logs a lien thereon, etc.

Graham v. Gardner, 89 Pac. 171, 172, 45 Wash. 648.

#### Operating street railway

Authority to an electric company to "operate" its railway on a certain street does not authorize it to exclude the public from the street nor to operate the railway so as to render the street unnecessarily dangerous. McKim v. City of Philadelphia, 66 Atl. 340, 342, 217 Pa. 243, 19 L. R. A. (N. S.) 508.

It has been held that a street railroad company running its cars over portions of the lines of another company by virtue of a lease is not "operating" a railroad, as that term is employed in the Constitution and in Railroad Law, §§ 91, 102, requiring the consent of abutting owners to the construction or operation of a street railroad. Topham v. Interurban St. R. Co., 86 N. Y. Supp. 295, 299, 42 Misc. Rep. 503 (citing Ingersoll v. Nassau Electric R. Co., 52 N. E. 545, 157 N. Y. 453, 43 L. R. A. 236).

#### Operating trains, locomotives, or cars

Where plaintiff was injured while blocking up a turntable so as to turn a push car by the car being derailed and a timber thereon falling on plaintiff, he was "operating a car," within Sayles' Ann. Civ. St. 1897, art. 4560f, making railroads liable for injuries to employes while operating cars, etc., by negligence of other employes. Missouri, K. & T. Ry. Co. of Texas v. Bailey, 115 S. W. 601, 605, 53 Tex. Civ. App. 295.

Injury to a railway sectionman, caused by his foreman suddenly stopping a hand car on which they were riding, did not arise in the operation of railroad trains, within the employer's liability act (Burns' Ann. St. 1908, § 8017), making railroad companies liable for injuries to employes in enumerated cases. Richey v. Cleveland, C. C. & St. L. R. Co., 96 N. E. 694, 697, 176 Ind. 542.

Where sectionmen in building a temporary track used a push car to bring the rails, and plaintiff was injured by the falling of a rail while being removed from the car to the track, the injury did not occur while engaged in the work of "operating a car," within the fellow servant rule of Batts' Ann. Civ. St. art. 4560ea. Texarkana & Ft. S. Ry. Co. v. Anderson, 118 S. W. 127, 102 Tex. 402.

"Operate: \* \* \* (2) To effect any result; exert agency; act. (3) To bring about a specified result. (4) To produce the proper or intended effect." Under Rev. St. art. 4560f, providing that every corporation operating a railroad shall be liable for damages sustained by any servant while engaged in operating its cars by reason of the negligence of any other servant, though a fellow servant, an employé in a quarry was engaged in operating a car, where he and another employé loaded it with rock, started it, and mounted it when loaded, and by the use of brakes regulated its speed down the track to the

crusher, and after unloading it pushed it back. *Texas & P. Ry. Co. v. Webb*, 72 S. W. 1044, 1046, 31 Tex. Civ. App. 498 (quoting and adopting Office Stand. Dict.).

In a complaint, in an action by a servant for injuries, ascribing the injury to the negligent operation of a train by an engineer, the word "operation" means management or conduct, and presupposes the existence of the subject of operation, and does not extend to negligence in the composition of the train, and evidence tending to show negligence in the composition of the train does not support the averment. *Reeves v. Henderson-Boyd Lumber Co.*, 55 South. 191, 192, 172 Ala. 526 (citing 6 Words and Phrases, p. 4992).

The term "operation," in an instruction in an action for injuries to a passenger caused by the negligent handling and running of the train, in which the court declared the prima facie liability of the carrier for the negligent "operation" and running of the train, is synonymous with the term "running," and the instruction is not objectionable as not confining the negligence to the running of the train. *Louisville, & N. R. Co. v. Willis*, 51 South. 134, 136, 58 Fla. 307.

"Operation" means how cars shall be run, and what shall be done in that respect by a street railway company, and does not relate to fare. A provision in a contract between a city and a street railway company that the city should not reduce fares below five cents was not abrogated by a subsequent contract providing that in the construction, maintenance, and "operation" of its lines the company should be subject to all present or future ordinances of the city. *Minneapolis St. R. Co. v. City of Minneapolis*, 155 Fed. 989, 1000.

Where a "fire knocker," for the purpose of moving blocked cars of wood, to unload which was a part of his duty, was attempting to remove the block so as to move the cars a short distance, and another "fire knocker" was on top of the cars signaling the engineer for the same purpose, they were engaged in operating cars under Rev. St. 1895, art. 4560f, exempting persons engaged in "operating the cars" from the fellow-servant rule. *Texas & P. Ry. Co. v. Johnson*, 118 S. W. 1117, 1118, 55 Tex. Civ. App. 495.

One employed as night hostler in a railroad yard charged with the duty, pursuant to the orders of his superior, of turning engines when they come in the yard, seeing that they get fuel, sand, and water, and are oiled, wiped, and dispatched on the road, is not, while inspecting a switch engine to determine whether it has been properly wiped, engaged in the operation of a locomotive, within the statute relating to employes engaged in the work of operating locomotives. *Galveston, H. & N. Ry. Co. v. Cochran*, 109 S. W. 261, 263, 49 Tex. Civ. App. 591.

Where a railroad section foreman was injured while assisting his collaborators in loading rails onto a flat car composing part of a train, while the train was at rest, he having no duty to perform with reference to the movement of the train, he was not engaged in operating a car, locomotive, or train within Sayles' Ann. Civ. St. 1897, art. 4560f, providing that every person, receiver, or corporation operating a railroad shall be liable for damages sustained by any servant or employe while engaged in operating cars, locomotives, or trains, by reason of the negligence of any fellow servant. *St. Louis Southwestern Ry. Co. of Texas v. McGee* (Tex.) 141 S. W. 1054, 1055.

An allegation in a petition that injury occurring upon the derailment of a train was caused from the manner in which the engine and cars were being "operated," refers to that which was being done by the employes on the engine and cars at the time of the accident, and not to the manner in which the train was ordered to be run by the officials of the road. *Missouri, K. & T. Ry. Co. of Texas v. Poole*, 133 S. W. 289, 240, 104 Tex. 36.

A freight handler negligently run into by an engine while he was pushing a car to a freight house by direction of his superior is within Laws 1893, c. 220, making railroad companies liable for injuries to any employe through the negligence of another employe, without contributory negligence on his part, while engaged in "operating cars." *Ean v. Chicago, etc., R. Co.*, 69 N. W. 997, 998, 95 Wis. 69.

Plaintiff was engaged with others in distributing ties along a railway track. The ties were placed on a car which was pushed along the track by plaintiff and the other workmen and the ties pulled or thrown off where needed without stopping the car, if possible. It was the duty of plaintiff to assist in starting, stopping, and moving the car as well as throwing off the ties. While he was moving a tie thrown off, a co-employe caused another to slide off, which injured him. Held, that plaintiff was injured while engaged in operating a car within the meaning of the statute, declaring that the fact that injury in such cases is due to the act of a fellow servant does not defeat recovery. *Freeman v. Shaw* (Tex.) 126 S. W. 53, 55.

Where railroad employes were transporting ballast on a push car for repair of a track, and had to remove the car from the track between trips and replace it on the track, they were "operating the car" within a statute providing that a railroad company shall be liable for injuries to a servant, in operating a car, through the negligent act of any other servant. *Seery v. Gulf, C. & S. F. Ry. Co.*, 77 S. W. 950, 951, 34 Tex. Civ. App. 89.

Under Rev. St. Mo. 1899, § 2864, as amended by Laws Mo. 1905, pp. 135-137, providing

that whenever any person, including an employé of the corporation or individual hereinafter referred to, whose death is caused by the negligence of a coemployé thereof, shall die from an injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or whilst running, conducting, or managing any locomotive, car, or train of cars, or any street car, or of any master, pilot, engineer, agent, or employé whilst running, conducting, or managing any steamboat, or of any driver of any stage, automobile, or other public conveyance whilst in charge of the same as a driver, and when any passenger shall die from an injury resulting from any defect or insufficiency in any railroad, or in any locomotive, car, street car, steamboat, stage, automobile, or other public conveyance, the corporation, or individual in whose employ any such officer, agent, servant, master, pilot, engineer, or driver shall be when such injury is committed, or who owns, operates, or conducts any such railroad, locomotive, car, street car, automobile, coach, or other public conveyance when any injury is received resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence, or criminal intent above declared, shall forfeit and pay as a penalty for every such person, employé, or passenger so dying not less than \$2,000, nor more than \$10,000 in the discretion of the jury, which may be sued for and recovered by persons bearing specified relations to deceased, the words "operates or conducts" do not include a mere servant of a railroad company or other public carrier, but has reference to the railroad company or individual, using the locomotive, cars, or other conveyances of another railroad company or individual, as lessee or bailee for the particular purpose. *Chicago, R. I. & P. R. Co. v. Stepp*, 151 Fed. 908, 913.

The term "operation," as used in *Sayles' Ann. Civ. St. 1897*, art. 4560f, providing that every person or corporation operating a railroad shall be liable for all damages sustained by any servant thereof while engaged in the work of operating cars of such railroad by reason of the negligence of a fellow servant, comprehends something more than the mere running of cars, locomotives, and trains of a railroad company. It includes within its meaning every employé who when injured was performing some work in the line of his duty directly connected with or incident to the movement and operation of a car, locomotive, or train. A servant of a railroad company injured while unloading ties from a box car in a train used for distributing the ties along the track by the negligence of a fellow servant was engaged in work proximately and necessarily connected with the operation of the cars at the time of his injury and was entitled to the protection of the statute. *St. Louis Southwestern Ry. Co.*

of *Texas v. Thornton*, 103 S. W. 437, 438, 46 Tex. Civ. App. 649.

#### **Operating under patent**

A license to "operate under a patent" does not authorize the licensee to buy up infringing articles made by others, who have been adjudged infringers, and resell them under its own name. *Victor Talking Mach. Co. v. American Graphophone Co.*, 178 Fed. 577, 578.

Where defendant, which had been enjoined from infringing a patent owned by complainant, covering a sound-producing apparatus for talking machines, including the sound record, under a subsequent contract with complainant was given the right to "operate" under such patent, in return for the granting of a like right under a patent of its own, it had the right to sell records made by another, as well as those of its own make, and was not chargeable with violation of the injunction because it sold records made by another, who had been held as a contributory infringer of complainant's patent; such records, however, not being a direct infringement. *American Graphophone Co. v. Victor Talking Mach. Co.*, 183 Fed. 580, 581, 106 C. C. A. 348.

#### **OPERATE SUBSTANTIALLY AS DESCRIBED**

The words "to operate substantially as described," at the end of a claim in an application for a patent, do not import into the claim elements described in the specification but not mentioned in the claim for the purpose of either extending or limiting it. *General Electric Co. v. International Specialty Co.*, 126 Fed. 755, 758, 61 C. C. A. 329; *De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co.*, 150 Fed. 601, note.

#### **OPERATED WITHOUT LICENSE**

See License (Governmental Regulation).

#### **OPERATING EXPENSES**

The "operating expenses" of a railroad include the value of the use of property that is used but not consumed in rendering the service, as well as the value of labor and management used, and of property used and consumed, in rendering the service. *State ex rel. Railroad Com'rs v. Louisville & N. R. Co.*, 57 South. 673, 676, 63 Fla. 274.

It has been held that taxes, rents, and cost of construction are "operating expenses" of a railroad. There are some kinds of construction, some kinds of rents, and some kinds of taxes, that ought not to be charged as "operating expenses"; but whether or not rents, taxes, and cost of construction are "operating expenses" depends on the circumstances of each particular case, to be determined by the evidence. *Schmidt v. Louisville, C. & L. Ry. Co.*, 84 S. W. 314, 318, 119 Ky. 287.

Liabilities incurred by the receiver of a railroad for car rentals, for cars destroyed

by fire, for rolling stock, equipment and traffic balances due other roads, and for damages for injuries to persons or property caused by torts of the servants of the receiver are legally classed as items of "operating expenses." *St. Louis Union Trust Co. v. Texas Southern Ry. Co.* (Tex.) 126 S. W. 296, 300.

## OPERATION

See Mining Operation; Negligent Operation.

A policy indemnifying an employer against liability for claims for personal injuries to its employes while engaged in "operations connected with the business of iron and steel works," covers injuries received by an employe by reason of the construction of a building by the employer for use in his business. *Hoven v. Employers' Liab. Ass'n Corp.*, 67 N. W. 46, 48, 93 Wis. 201, 32 L. R. A. 388.

The word "thing" is defined as "that which is or may become the object of thought; that which has existence or is conceived or imagined as having existence; any object, substance, attribute, idea, fact, circumstance, event, etc. A thing may be material or ideal, animate or inanimate, actual, possible, or imaginary." And the word "operation" is defined as "the course of action or series of acts by which some result is accomplished; process. (a) In surg., the act or series of acts and manipulations performed upon a patient's body, as in setting a bone, amputating a limb, extracting a tooth, etc." An indictment under the federal statute for mailing a letter giving information where and how and of whom and by what means articles and things designed and intended for the procuring of an abortion might be obtained states an offense, where it sets out a letter written to defendant inquiring for some medicine or other means for accomplishing such result, and a letter, alleged to have been mailed by defendant in reply, which, when read in connection with the letter of inquiry, in effect offers for a stated consideration to effect the desired result by some treatment or operation, although the particular means is not specified; the word "thing," as used in the statute, being a comprehensive term, which includes any kind of treatment or operation. *United States v. Somers*, 164 Fed. 259, 261, 262 (quoting and adopting definition in Cent. Dict.).

The term "operation," in an accident insurance policy issued to a physician which covered "that class of injuries known as septic wounds, caused by accident while performing any 'operation' pertaining to the business of the insured," means treatment pertaining to the business of insured, and the company was liable where death was caused by septicæmia resulting from a wound from a broken bottle which he broke while preparing medicine for a patient. *Central Accident*

*Ins. Co. v. Rembe*, 77 N. E. 123, 126, 220 Ill. 151, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann. Cas. 155.

A surgical "'operation' begins when the opening is made into the body and ends when this opening has been closed in a proper way after all appliances necessary to the successful operation have been removed from the body." *Harris v. Fall*, 177 Fed. 79, 84, 100 C. C. A. 497, 27 L. R. A. (N. S.) 1174 (quoting and adopting definition in *Akridge v. Noble*, 41 S. E. 78, 114 Ga. 949).

## OPERATION AND REPAIR

Labor performed in mowing grass, weeds, and bushes off a railway right of way is work done in the "operation and repair of a railroad," within *Sayles' Ann. Civ. St.* 1897, art. 3312. *Missouri, K. & T. Ry. Co. of Texas v. Bryan* (Tex.) 107 S. W. 572, 576 (citing *Pittsburg & B. Pass. Ry. Co. v. City of Pittsburg*, 80 Pa. 72, 74; *Arthur v. City of Charleston*, 41 S. E. 171, 51 W. Va. 182).

## OPERATION OF LAW

See Domicile by Operation of Law.

The suing out of an injunction to restrain a performance of a contract for street improvements is not a prevention of performance by the "operation of law" within the meaning of that phrase as used in *Civ. Code*, § 1511, providing that the want of performance of an obligation is excused when such performance is prevented or delayed by the "operation of law." *Union Contracting & Paving Co. v. Campbell*, 84 Pac. 305, 306, 2 Cal. App. 534.

## OPERATIVE

See Practical Railroad Operatives.

### Civil engineer

A civil engineer is not entitled to a lien for wages earned by him in the construction of a railroad under *Rev. St. art. 3312*, being neither a "mechanic," "laborer," nor "operative." *Gulf & B. V. R. Co. v. Berry*, 72 S. W. 1049, 1050, 81 Tex. Civ. App. 3.

### Operator distinguished

See Operator.

### Workman distinguished

See Workmen.

## OPERATOR

See Confidence Operator; Telegraph Operator.

In an arbitration proceeding between a railroad company, and the Order of Railroad Telegraphers, in which the question was submitted whether members of the Order of Railroad Telegraphers in the employ of the railroad company should legislate for train dispatchers relative to rates of pay, hours of service, or otherwise, expert or opinion evidence tending to show that a train dispatcher was an entirely different functionary from a telegrapher or "operator," that while

the dispatcher might be an operator he was not necessarily such, his duties being very dissimilar in character, largely administrative, and of much greater importance not only to his employer in carrying on the service but to the safety and convenience of the public, that he stood in a different relation to his employer, as well in fact as in law, and representing him in the discharge of his duties as an alter ego or vice principal in his relations with other employes, was competent. In re Southern Pac. Co., 155 Fed. 1001, 1004.

#### Operative distinguished

An "operator" is one who operates or produces an effect, while an "operative" is a skilled workman, an artisan, or mechanic. Seaboard Air Line Ry. v. Continental Trust Co., 166 Fed. 597, 600.

### OPHTHALMOLOGY

Practice of science as practice of medicine, see Practice of Medicine.

### OPINION

See Fixed Opinion; Intimation of Opinion; Matter of Impression or Opinion.

An "opinion" is "a notion of conviction founded on probable evidence; belief stronger than an impression, less strong than positive knowledge." In re Clark, 103 S. W. 1105, 1108, 126 Mo. App. 391 (quoting Webst. Dict.).

"Opinion" arises when the assent of the understanding is so far gained by the evidence of probability that it rather inclines to one persuasion than to another, yet not without a mixture of uncertainty or doubt. Bilton v. Territory, 99 Pac. 163, 167, 1 Okl. Cr. 566.

While the word "opinion," in a close and strict sense, means a court's decision upon pleadings and facts duly presented in a cause, yet in a broader sense it means one's "notion," "idea," "view," or even one's "sentiments." Ex parte Clark, 106 S. W. 990, 998, 208 Mo. 121, 15 L. R. A. (N. S.) 389.

In an action for injuries to a passenger, testimony of plaintiff that she slipped on material on the platform of the car which "looked like old ice" is not an "opinion" in its ordinary sense, which is an inference as to what will follow from a given state of facts, "but is the observation of an existing condition." Murphy v. North Jersey St. Ry. Co., 80 Atl. 331, 334, 81 N. J. L. 706, 35 L. R. A. (N. S.) 592.

#### As disqualifying a juror

As applied to the opinion of a juror when challenged for bias, an "impression" of the juror is correctly defined as an opinion, remembrance, or belief, especially when that is somewhat indistinct or vague. Under St. § 7278, providing that if a juror has formed an "opinion" the court may examine him and permit him to serve if satisfied that the

juror will render an impartial verdict on the evidence, "opinion" is a conclusion or a judgment held with confidence but falling short of positive knowledge, facts held to show that the court did not abuse its discretion in overruling a challenge for bias after an examination on voir dire. Lindsey v. State, 69 N. E. 126, 131, 69 Ohio St. 215.

#### False representation distinguished

See False Representation.

#### Impression or understanding

There is "a marked distinction between a matter of 'opinion' and a matter of 'impression' or 'understanding.' The former is predicated upon the existence or nonexistence of a fact. The latter is only a deduction drawn from the assumption of that fact, so that, while the one may rise to the standard of evidence, the other is universally rejected as such." Cross v. Aby, 45 South. 820, 822, 55 Fla. 311 (quoting and adopting definition in Chaires v. Brady, 10 Fla. 133, 140).

An "opinion," within the meaning of Bates' Ann. St. § 7278, providing that if a juror has formed an opinion the court shall thereupon proceed to examine him on the grounds of such, opinion, etc., is well defined as being a conclusion or judgment held with confidence but falling short of positive knowledge, and while an "opinion" and an "impression" are alike in mind, there is an essential difference between the two in degree, an impression as applied to this subject-matter being correctly defined as, a notion, remembrance, or belief especially one that is somewhat indistinct or vague. Lindsey v. State, 69 N. E. 126, 131, 69 Ohio St. 215.

Within Gen. St. 853, § 205, providing that it shall be good cause of challenge to a juror that he has formed or expressed an opinion on the issue or any material fact to be tried, an impression depending only on the newspaper account of the truth of which he had no knowledge is not an opinion. State v. Medlicott, 9 Kan. 257, 279.

#### Judgment distinguished

See Judgment (Of Court).

#### Statement of fact distinguished

"To distinguish 'opinions' from 'statement of facts,' the general rule is if the vendor, knowing them to be untrue, makes statements with the intention of misleading the vendee, and if the latter, relying upon them, is misled to his injury, or if he induces the vendee not to make inquiries with respect to value, or any extrinsic facts affecting values, or makes statements in such a manner that the vendee, instead of being put on inquiry, is put off his guard, it has been held that a substantial right to recover damages is created, or the vendee may, at his opinion, avoid the contract. To effect this, however, the representations must, as a rule, be coupled with other circumstances, as where they are fraudulently made of par-



ticulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced by the vendor's artifice to forbear inquiries which he would otherwise have made; but whether a representation as to value is merely an expression of 'opinion' or belief, or an affirmation of fact to be relied on, is a question for the jury, and should properly be left to their decision. Again, while the purchaser must rely upon his own judgment in questions of value, yet, in regard to any extrinsic facts affecting the quality or value of the subject of the contract, he may rely upon the assurances of the vendor; and, if he does so rely, and those assurances are fraudulently made to induce him to enter into the contract, he may maintain an action for the injury sustained." *Oneal v. Weisman*, 88 S. W. 290, 292, 39 Tex. Civ. App. 592 (quoting and adopting definition 2 Warv. Vendors, § 946).

A statement of a salesman of a seller of an automobile that the tires of the machine were as good as new was merely an expression of "opinion" as to their condition, and not a statement of a present existing fact, necessary to constitute a warranty. *Warren v. Walter Automobile Co.*, 99 N. Y. Supp. 396, 398, 50 Misc. Rep. 605.

#### OPINION (Of Court)

See On the Opinion Below.

An "opinion" is a written statement by the court of its reasons for the conclusion reached from an examination of the law and of the facts in controversy, but forms no part of the judgment, though it may with propriety be consulted to explain an ambiguity therein. *State v. Gray*, 71 Pac. 978, 979, 42 Or. 261 (adopting definition in *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565; *Keane v. Fisher*, 10 La. Ann. 261).

The "opinion" of a court giving the reasons on which its judgment is based is never called a "report." In appellate tribunals, when in a given case the court has reached its conclusion, and is ready to pronounce its judgment, some member of the court is usually designated to prepare the opinion, but he is never said to report it. The opinion is delivered, not reported, by him. *Gillette v. Peabody*, 75 Pac. 18, 20, 19 Colo. App. 356.

In Pennsylvania practice, the docket entry, "rule absolute for new trial," implies all that is meant by the words "judgment vacated, verdict set aside, and new trial granted," and following that practice in the United States Circuit Court of the Eastern District of Pennsylvania, the words "opinion granting a new trial filed," entered in the appearance docket of the United States court, have the effect of disposing of any docket entries which stand in the way of the order, and imply all that is meant by the words "judgment vacated, verdict set aside, and new trial granted." *Evans v. Freeman*, 140 Fed. 419,

423 (citing *Fisher v. Hestonville, M. & F. Pass. Ry. Co.*, 40 Atl. 97, 185 Pa. 602).

#### Decision distinguished

Under Rev. Civ. St. 1911, art. 1955, providing that a plaintiff may take a nonsuit before the jury retires, and, on trial by the judge, before decision is announced, the term "decision" is not equivalent to "opinion," and, though the court in a case tried without a jury expressed an opinion indicating that he intended to render a decision in favor of the defendants, the plaintiffs would not be precluded thereby from having a nonsuit (citing 2 Words and Phrases, p. 1901). *Kidd v. McCracken*, 150 S. W. 885, 887, 105 Tex. 383.

#### As judgment

See Judgment (Of Court).

#### OPINION EVIDENCE

"Opinion evidence" is that which is given by a person of ordinary capacity who has by opportunity for practice acquired a special knowledge outside of the limits of common observation and which may be of value in elucidating a matter under consideration. The experiential qualifications of the witness, including his opportunity to observe the very thing under inquiry, being first shown, his special knowledge may be imparted in aid of the jurors at the trial under questions in ordinary form. *Crosby v. Wells*, 67 Atl. 295, 298, 73 N. J. Law, 790.

All matters of physical facts are not "opinion evidence" in the legal sense of that term. They are not theoretical, nor conclusions drawn by inference, but a statement of facts from personal observation, and hence also they are not "expert evidence." The exceptions to the rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning, but it includes the evidence of common observers testifying the result of their observations made at the time in regard to common appearances, facts, and conditions which cannot be reproduced and made palpable to a jury. *Britt v. Carolina Northern R. Co.*, 61 S. E. 601, 603, 148 N. C. 37.

#### OPIUM

See Crude Opium.

Manufacture of, see Manufactures—Manufactured Articles.

Unmanufactured opium, see Unmanufactured.

#### OPPORTUNITY

See Clear Opportunity.

By "opportunity" is meant "fit or convenient time; suitable occasion; time or place favorable for executing the purpose or doing the thing in question." Under a provision in a policy of insurance that a de-

linquent should have the "opportunity for reinstatement on similar conditions," the context showing that the term "similar conditions" had reference to the payment of past-due premiums, assessments, and other indebtedness, a delinquent was entitled to reinstatement, and, if the company refused to reinstate him, to recover the premiums paid in the absence of anything in the policy which required the approval of the company, or any of its officers as a condition precedent to reinstatement. *Lane v. Fidelity Mut. Life Ins. Co.*, 54 S. E. 854, 855, 142 N. C. 55, 115 Am. St. Rep. 729.

The rule that opportunity to know the truth will prevent recovery means merely that one may not blindly act on statement in disregard of knowledge of their falsity or with such opportunity that by the exercise of ordinary observation, not necessarily by search, he would have known thereof. *Jacobsen v. Whitely*, 120 N. W. 285, 286, 138 Wis. 434.

## OPPOSITE

The term "opposite," in a stipulation in a contract between a railroad company and landowners, providing that the former should have certain rights respecting land in consideration of the construction of its railroad, and that the company would cause its railroad to be constructed within one year and in operation "opposite" lands of the parties by a time fixed, must be liberally and reasonably construed so as to carry into effect the general intent expressed in the contract, and means a place or places from which the land can be reached for development of its resources, it being underlaid with coal, economically and conveniently, considering the topography of the land and all material circumstances, and completion of the road to a point 10 miles distant from the place from which this can be done, is not a compliance with the stipulation, though it is possible to build a branch road to the land from that point. *Adams v. Guyandotte Valley Ry. Co.*, 61 S. E. 341, 343, 64 W. Va. 181.

### Adverse synonymous

"Opposite" is a synonym of "adverse." *Prunty v. Consolidated Fuel, etc., Co.*, 108 Pac. 802, 803, 82 Kan. 541 (citing *Webst. Universal Dict.*).

## OPPOSITE PARTY

The term "opposite party," as used in a statute providing for the reversal of a decree entered on a bill taken for confessed, and requiring reasonable notice to the opposite party of the motion to reverse, does not mean only the plaintiff, but any party to the suit, who has an interest in upholding the decree sought to be reversed, whose pecuniary or profiting interest would be prejudiced by reversal. It means opposite in interest. *Mor-*

*rison & Co. v. Leach*, 47 S. E. 237, 238, 55 W. Va. 128.

The phrase "opposite party," in the statute providing that when a suit is prosecuted or defended by heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the "opposite party" shall not be admitted to testify to matters equally within the knowledge of decedent, refers to the real party in interest who must be concluded by the determination of the suit. Where on appeal by heirs from an order allowing the final account of the administrator, the issue was whether certificates of deposit in favor of decedent and which had been in the hands of the administrator were a part of the estate, the testimony of a witness on behalf of the administrator that the property belonged to her by gift causa mortis from decedent was not incompetent; the witness not being the real party in interest. *Reed v. Whipple*, 103 N. W. 548, 553, 140 Mich. 7.

## OPPOSITE TO

Laws 1815, c. 199, § 1, supplementing Rev. Laws 1813, c. 74, § 4, allowed the commissioners of the land office to grant to "adjacent" owners land under the water surrounding Staten Island, which grant was not to extend more than 500 feet from low-water mark. A riparian landowner applied for a grant of land opposite to and "adjoining" his, and extending to a point 500 feet from low-water mark, and an affidavit appended to his application described his land as being bound by the low-water mark. The Attorney General recommended that applicant be granted the land "opposite to" that now held by him, and the commissioners passed a resolution that letters patent be issued to him for the land under water applied for. A patent was issued, describing the land granted as beginning at low-water mark and extending to a point 500 feet out. Held, that the words "adjoining" and "opposite to" must be understood to be equivalent to "adjacent" as used in the statute, and the application must be taken to apply to land immediately contiguous to that of the applicant, and as declaring that he owned the land to low-water mark, and hence was broad enough to include any land lying between his actual boundary and low-water mark, so that the patent must be construed as granting to applicant all the land lying between his land and a line 500 feet out from low-water mark, as any other construction would not be in accord with the commissioners' resolution, and would render the patent void under the statute. *Bardes v. Herman*, 129 N. Y. Supp. 723, 726, 144 App. Div. 772; *Warth v. Same*, 129 N. Y. Supp. 730, 144 App. Div. 943.

## OPPRESSION

A police officer is guilty of "oppression" under Pen. Code, § 556, where he enters a

saloon, and, without any justification, points a pistol at a woman who is there, and detains her against her will, and commits acts whereby she is injured. *People ex rel. Reardon v. Flynn*, 111 N. Y. Supp. 1067, 58 Misc. Rep. 624.

Where a person goes to a billiard room to collect a bill, and while there the place is raided by the police on information that gambling was going on there, and an officer, though told by such person of the reason for his presence, struck him and took him before a magistrate for disorderly conduct, on which charge the magistrate discharged him, and such person was neither gambling nor in the commission of any overt act authorizing his arrest, the police officer was guilty of "oppression" under Pen. Code, § 556. *People ex rel. Reardon v. Flynn*, 111 N. Y. Supp. 1065, 1066, 58 Misc. Rep. 621.

"Oppression" is defined by the Standard Dictionary as "the act of subjecting to cruel and unjust hardships." The mere omission to repair a damage unintentionally, though negligently done, cannot be said to be subjection to cruel and unjust hardship. Civ. Code, § 3294, authorizing an award of punitive damages in an action not arising from contract, where defendant has been guilty of oppression, fraud, or malice, express or implied, does not apply to a case of simple negligence. That defendant constructed a bulkhead adjoining plaintiff's property for the purpose of retaining dirt, gravel, sand, etc., so negligently that it gave way, and precipitated gravel, dirt, etc., onto plaintiff's premises, destroying a portion of his fence and chicken house, was insufficient to show such gross negligence, wantonness, or oppression as to justify an award of punitive damages. *Spencer v. San Francisco Brick Co.*, 89 Pac. 851, 852, 5 Cal. App. 126.

### OPPRESSIVE ACT

There is no fatal inconsistency between a general verdict against a sheriff on the theory that he was a trespasser in making an execution levy and special findings showing that he acted "oppressively," though the jury do not affirmatively find that the writ was in his hands more than 60 days before the levy so as to make him liable on the theory that the writ was functus officio; an "oppressive" act in its ordinary sense being an act of cruelty, severity, unlawful exaction, domination, or excessive use of authority. *Gallegos v. Sandoval*, 106 Pac. 373, 376, 15 N. M. 216.

## OPTIC

### OPTICAL INSTRUMENT

Certain small slightly made magic lanterns not sufficiently substantial to be used by mature persons, but rather by children as toys, are not dutiable as "optical instru-

ments," under Tariff Act 1894, § 1, Schedule B, par. 98. *Borgfeldt v. United States*, 124 Fed. 457, 458.

### OPTICIAN

Itinerant optician, as merchant, see Merchant.

An "optician" is a maker of optical instruments, and applies to a man who fits glasses to the eyes. One who diagnosed his patient's diseases by a microscopic examination of a drop of blood, and treated them by placing them under the rays of electric arc lights, is not an "optician" within Acts 1901, p. 115, c. 78, excepting opticians from its provisions as to licensing persons practicing medicine. *O'Neil v. State*, 90 S. W. 627, 628, 115 Tenn. 427, 3 L. R. A. (N. S.) 762.

### OPTICS

The term "optics," as defined by the Standard Dictionary, is "the science that treats of light and vision, the organs of sight, chromatics, and all that is connected with the phenomena of sight. It includes: (1) Geometrical optics. (2) Physical optics, embracing (a) the undulatory theory, and the effect explained by it, as polarization, refraction, and interference; and (b) electro-optics, treating of such phenomena as depends on bodily function or brain action." *O'Neil v. State*, 90 S. W. 627, 629, 115 Tenn. 427, 3 L. R. A. (N. S.) 762.

## OPTION

See At the Option of Either Party; Buyer's Option; Local Option Law; On Accepting this Option.

Agency distinguished, see Agency.

As property, see Property.

As sale, see Sale.

See, also, Attempt to Purchase.

An "option" is an exclusive privilege to buy; and a contract for an option is the agreement by which the privilege is created. *Benedict v. Pincus*, 84 N. E. 284, 286, 191 N. Y. 377.

An "option" is a right acquired by contract to accept or reject an offer to purchase property at a fixed price within a specified time. *Winslow v. Dundon*, 125 Pac. 136, 138, 46 Mont. 71.

An "option" is a continuing offer which the offerer may not withdraw until the expiration of the time limited. *Adams v. Peabody Coal Co.*, 82 N. E. 645, 646, 230 Ill. 469.

An "option" is simply a contract, by which the owner of property agrees that another shall have a right to buy it at a fixed price within a certain time. The owner does not sell the property, but sells the privilege to buy at the option of the other person. *McGregor v. Ireland*, 121 Pac. 358, 86 Kan. 426 (citing 6 Words and Phrases, p. 5001).

"An option conveys no title to the thing sold, but creates rights in personam, which may be again sold or assigned by the vendee." *Womack v. Coleman*, 100 N. W. 9, 11, 92 Minn. 328.

An "option" has been defined to be "an unaccepted offer to sell." It transfers no title or right in rem, but creates a right in personam, and that right is to accept or reject a present offer within a limited or reasonable time in the future. It is a continuing offer until the expiration of the time limited. *Standiford v. Thompson*, 135 Fed. 991, 996, 68 C. C. A. 425.

"An option contract to purchase" is but a continuing offer to sell, and conveys no interest in the property. \* \* \* Although based upon a consideration, it is but an offer, a privilege extended, differing from an ordinary offer only in this: That it is not revocable, because based upon a valuable consideration. An assignment of it therefore passes no interest in the property to which it relates." *Rease v. Kittle*, 49 S. E. 150, 154, 56 W. Va. 269 (citing *Caldwell v. Frazier*, 68 Pac. 1076, 65 Kan. 24; *Gilbert v. Port*, 28 Ohio St. 276).

An "option" is "a right of choice or election; sometimes applied to contracts whereby one purchases the right for a certain time, at his election, to demand and receive or to deliver property at a stated price." *Montgomery v. Hundley*, 103 S. W. 527, 531, 205 Mo. 138, 11 L. R. A. (N. S.) 122 (quoting and adopting the definition in *Cyc. Law Dict.* p. 645).

The obligation by which one binds himself to sell, and leaves it discretionary with the other party to buy, is what is termed in law an "option," which is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time. *Montgomery v. Waldeck*, 2 Alaska, 581, 585; *Montgomery v. Hundley*, 103 S. W. 527, 531, 205 Mo. 138, 11 L. R. A. (N. S.) 122 (quoting and adopting the definition in *Black v. Maddox*, 30 S. E. 723, 104 Ga. 157); *Womack v. Coleman*, 100 N. W. 9, 11, 92 Minn. 328 (quoting and adopting definition in *Black v. Maddox*, 30 S. E. 723, 104 Ga. 157).

An "option" is "the obligation by which one binds himself to sell and makes it discretionary with the other party to buy, which is simply a contract by which the owner of property agrees with another person that he shall have a right to buy the property at a fixed price within a certain time." *Indiana & A. Lumber & Mfg. Co. v. Pharr*, 102 S. W. 686, 689, 82 Ark. 573 (quoting and adopting the definition in *Black v. Maddox*, 30 S. E. 723, 104 Ga. 157).

An "option" is a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to

buy the property at a fixed price within a certain time, and, unless the option is founded on a consideration, it may be withdrawn at any time before acceptance. *Ganss v. J. M. Guffey Petroleum Co.*, 110 N. Y. Supp. 176, 177, 125 App. Div. 760.

"An 'option' is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land if the holder elects to accept within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a binding contract. If an acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end." *John v. Elkins*, 59 S. E. 961, 963, 63 W. Va. 158.

An "option" is a right acquired by contract to accept or reject a present offer within a limited or reasonable time in the future. In such contract two elements exist: First, the offer to sell, which does not become a contract until accepted. Second, the completed contract to leave the offer open for the specified time. *Bates v. Woods*, 80 N. E. 84, 85, 225 Ill. 126 (citing *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17).

"An 'option' is a right acquired by contract to accept or reject a present offer, within a limited or reasonable time in the future." It is "the obligation by which one binds himself to sell, and leaves it discretionary with the other party to buy, which is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time." *Troglod v. Williams*, 56 S. E. 865, 868, 144 N. C. 192, 10 L. R. A. (N. S.) 887 (quoting and adopting definition in *Black v. Maddox*, 30 S. E. 723, 104 Ga. 157, and citing *Sitterling v. Grizzard*, 19 S. E. 92, 114 N. C. 108; *Hopwood v. McCausland*, 94 N. W. 469, 120 Iowa, 218; *Lits v. Goosling*, 19 S. W. 527, 93 Ky. 185, 21 L. R. A. 127; *Cozart v. Herndon*, 19 S. E. 158, 114 N. C. 252; *Clark*, Cont. 369; *Cyc. p. 265*).

An "option" is a continuing offer upon the part of the optioner to sell, and when limited to a certain time it is essential that it should be accepted within such time by a compliance with its terms upon the part of the optionee, and if not accepted within such time, the right to do so is lost. An "option" is not an executory contract, but is an executed one, giving a right to the optionee, by complying with the provisions of the option, to convert it into a valid and binding executory contract. *Fulton v. Messenger*, 56 S. E. 830, 831, 61 W. Va. 477 (citing *Pollock v. Brookover*, 53 S. E. 795, 60 W. Va. 75, 6 L. R. A. [N. S.] 406; *Rease v. Kittle*, 49 S. E. 150, 56 W. Va. 269; *Weaver v. Burr*, 8 S. E. 743, 31 W. Va. 736, 3 L. R. A. 94; *Har-*

ly v. Watterson, 19 S. E. 536, 39 W. Va. 214; Donnally v. Parker, 5 W. Va. 301).

"An 'option' is in a sense a continuing offer of a contract, and if the offeree decides to exercise his right to demand the conveyance or other act contemplated he must signify that fact to the offerer." Hence a lessee's acceptance of an option to purchase creates a contract for purchase. *Sizer v. Clark*, 93 N. W. 539, 541, 116 Wis. 534.

In a sense all options are contingent because they may or may not be exercised within the time or upon the conditions stipulated; and such contingency does not render the options invalid. An option is a unilateral agreement binding upon the party who executes it from the date of its execution, and becomes a contract *inter partes* when exercised according to its terms. *Boyer v. Nesbitt*, 76 Atl. 103, 105, 227 Pa. 398, 136 Am. St. Rep. 890.

The phrase "option of either party," in an agreement between a dealer in electric lamps and a manufacturer, whereby the dealer agreed to carry the manufacturer's lamps in stock at all times, with privilege "to settle by return of lamps at any time at option of either party and by a sixty-day notice by either party," must receive a construction in harmony with the entire agreement, and the manufacturer did not have the right to elect to take lamps in payment, but the election related to the time of payment. *Union Trust Co. v. Michigan Electric Co.*, 103 N. W. 556, 557, 140 Mich. 131.

An "option to purchase" is merely an agreement whereby the buyer may upon compliance with certain terms and conditions become the owner of the property, the seller giving him that option, and an "option to purchase" differs from an "option to return," in that in the former the property does not pass, while it does pass in the latter, subject to the right to rescind. In *re Allen*, 183 Fed. 172, 174.

An "option" to purchase if one likes is essentially different from an option to return a purchase if one should not like it, and in the one case title will not pass until the option is determined, while in the other the property passes at once, subject to the right to rescind and return. *State v. Betz*, 106 S. W. 64, 66, 207 Mo. 589 (quoting and adopting definition in *Hunt v. Wyman*, 100 Mass. 198, 200).

"An 'option to purchase' if he liked is essentially different from an option to return a purchase if he should not like. In one case, the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return." The option given by an agreement for a transfer of corporate stock, together with the owner's proxy as director, in consideration of a specified sum "to be

considered an option," running until a given date, when an additional sum is to be paid, or, in lieu thereof, all the property delivered under the agreement is to be returned, is not an option to purchase, but one to return; and, if not exercised at the time named, the sale is complete, and the promise to pay the purchase price becomes absolute. *Guss v. Nelson*, 26 Sup. Ct. 260, 261, 200 U. S. 298, 50 L. Ed. 489 (quoting and adopting definition in *Hunt v. Wyman*, 100 Mass. 198, 200, quoted approvingly in *Sturm v. Boker*, 14 Sup. Ct. 99, 104, 150 U. S. 312, 329, 37 L. Ed. 1093, 1100).

An "option" being a mere right to purchase, the consideration of the contract is the consideration given for the right to purchase, and not the value of the subject-matter of the contract; therefore the recording fee for recording an option contract to purchase land will under Act March 17, 1910 (Acts 1910, c. 315), which graduates the fees for recording such contracts according to the consideration, be based upon the consideration given for the contract and not upon the land in question. *Stearnes v. Goad*, 69 S. E. 1101, 111 Va. 834.

Where a contract for the division of corporate stock between promoters provided that plaintiff should have one-half of a certain block of the stock on his selling or paying for a specified portion of the corporation's bonds, it was not error for the court to refer to the contract as an "option," defined to be a right to choose between one of two or more alternatives. *Malloy v. Drumheller*, 122 Pac. 1005, 1009, 68 Wash. 106.

An instrument reciting that plaintiff has an "option" to purchase land with all growing crops for \$10,200, to be paid \$250 cash and the balance on or before August 15, 1903, otherwise the cash payment was to be forfeited, and declaring that the \$250 was a part payment on the land, etc., constituted a mere option to purchase; there being no mutuality of obligation on the part of plaintiff. *White v. Bank of Hanford*, 83 Pac. 698, 699, 148 Cal. 552.

Where an offer of sale was based on a valuable consideration, it amounted to an "option" binding the promisor to make the proposed sale if accepted by the promisee, and was irrevocable until the expiration of the time agreed upon by the parties, during which the offer was to remain open, and, if acceptance was made within such time, it would complete the contract. *Simpson & Harper v. Sanders & Jenkins*, 60 S. E. 541, 543, 130 Ga. 265.

A vendor, contracting to sell for a specified sum described real estate, providing that the contract shall be void after a designated date, gives to the purchaser only an "option" to purchase on payment of the price, and the purchaser cannot, before exercising his op-

tion, advertise to sell the same at auction, and where he does so the vendor may object to the sale and assert ownership in the premises. *Thacher v. Weston*, 83 N. E. 360, 361, 197 Mass. 143.

M. agreed in writing to sell certain land to plaintiff at a specified price per acre and convey it to any one to whom plaintiff might sell it on payment of such sum. The agreement recited a consideration of a dollar paid by plaintiff, and required payment of the balance within 12 months. Held that, plaintiff not being bound to purchase, the agreement was a mere "option," terminable at M.'s election before acceptance. *Noble v. Mann* (Ky.) 105 S. W. 152.

A letter from plaintiffs to defendant reading: "We will withdraw [certain land] from the market until January 1st, 1904, during which time you may send your men to look it over, and if, at the expiration of the time, \* \* \* you desire to take this land, we will sell you eight-ninths and give you warranty deed on the same at the rate of \$20 per acre, and in the meantime we will try to get the consent of the parties holding the other one-ninth at the same price, but will not guaranty their consent"—was not an "option," but a mere offer to sell the land, having no consideration to uphold it, and hence was revocable at plaintiff's pleasure before acceptance by defendant. *Comstock Bros. v. North*, 41 South. 374, 375, 88 Miss. 754.

A contract which gives to a broker the exclusive right to procure a purchaser of real estate of the owner for a specified price with the right to retain for his services any excess which a purchaser may pay, and which provides that the option shall run to a designated date, and that the owner will furnish an abstract of title and warranty deed to the broker or to any one designated by him, is an agreement to pay a commission for selling land; the word "option" relating to the exclusive right to sell within the limited time. *Brittson v. Smith*, 130 N. W. 599, 601, 165 Mich. 222.

An instrument whereby an owner of a mining claim leased the same and agreed to convey the claim to the lessee for a specified sum, payable in installments on designated dates, and whereby the lessee was given possession with a right to carry on mining operations on accounting for a part of the value of the ore mined, and providing that, if the lessee should fail to pay the price on the last designated date, the agreement to convey should be void, when construed as an entity, as it must be, was but an option; an "option" being a right acquired by contract to accept or reject a present offer within a limited or reasonable time in the future. *Snider v. Yarbrough*, 115 Pac. 411, 412, 43 Mont. 203.

Plaintiffs entered into a written agreement that defendant should have the exclusive license to manufacture and sell skates under and during the term of their patent, except as hereinafter provided; and defendant agreed to pay plaintiffs \$500 for such right, and also a certain royalty. Defendant further agreed that, if the royalty in any one year should not amount to \$500, it would either pay plaintiffs that sum within 60 days of the termination of the year, as liquidated damages, or submit to the cancellation of the license, at plaintiffs' "option." Held, that such agreement did not entitle plaintiffs to demand the money or cancel the license, but gave defendant the right to retain the license on failure to pay \$500 as royalty in any one year, by payment of a sum equal thereto, or to cancel the agreement, at its option. *Prouty v. Union Hardware Co.*, 57 N. E. 352, 353, 176 Mass. 155.

The owner of one-half of a patent conveyed his half to a third person in trust to form a corporation, to convey his interest in the patent to this corporation for one-half of its stock, and to so distribute his stock that the trustee should receive 21 $\frac{3}{4}$ /250 of his share and should hold 215 $\frac{3}{4}$ /250 thereof in trust for his wife and child. The owner of the other half of the patent at the same time, in consideration of this deed, agreed with him in writing to convey his half of the patent to the corporation for one-half its stock and to convey to the trustee as his own personal property 21 $\frac{3}{4}$ /250 of his share in consideration of services rendered and to be rendered by the latter in the organization and promotion of the corporation. Held, this was not a unilateral contract or an agreement for an "option," but an executed agreement on the part of the first party and an executory one on the part of the second party. *Howe v. Howe & Owen Ball Bearing Co.*, 151 Fed. 820, 824, 83 C. C. A. 536.

A loan contract between an insurer and insured and the beneficiary for the pledge of the policy to secure a loan, which stipulates that insurer shall loan a specified sum, and that insured and beneficiary shall assign the policy as collateral, and that, in the event of the nonpayment of the debt at maturity, insurer may, at its "option," cancel the policy, and apply the cash surrender value to the payment of the debt, evidences a loan transaction, and not a sale or option to sell; the word "option" in the contract meaning that insurer may, on default, at its pleasure, apply the cash surrender value in payment of the loan. *Frese v. Mutual Life Ins. Co. of New York*, 105 Pac. 265, 270, 11 Cal. App. 387.

A contract binding one party to sell certain land upon certain terms, and binding the other party to purchase same upon such terms, was a "contract of sale," and not an "option." *Heimberger v. Rudd*, 138 N. W. 374, 377, 30 S. D. 289.

A written agreement, providing that an owner of land bound himself to sell it to another for a specified sum to be paid as therein provided, and that if the vendor's title was not good the down payment should be refunded, but if he should furnish a good and sufficient warranty deed and abstract of title, and the other party should fail or refuse to carry out the contract, the down payment should be forfeited to the vendor, was an enforceable "contract of sale," and not an "option"; an agreement by the purchaser to take the land being implied, and the provision for the forfeiture of the down payment not rendering the contract an option in the absence of an agreement by the vendor to accept such sum as his liquidated damages. *Heath v. Huffhines* (Tex.) 152 S. W. 176, 177.

An agreement to sell realty, "cash on delivery of deed or one-half on time if terms can be agreed on," is a mere "option" and not a contract of sale. *Wallace & Eves v. Figone*, 81 S. W. 492, 493, 107 Mo. App. 362.

A memorandum, signed by a purchaser therein named, read as follows: "R. sells to K." certain property. "Selling price \$29,800, on which Mr. K. lets \$25 deposit. There is at present" a certain described mortgage. "Second mortgage \* \* \* to run" until a certain date. "Contract to take place" at a fixed place and time, and a certain sum "to be paid on contract. Brokers \* \* \* are S. and L." Held, at most, an "option," and not an enforceable contract. *Seidman v. Rauner*, 99 N. Y. Supp. 862, 863, 51 Misc. Rep. 10.

The power to withdraw an offer or retract a promise to keep such offer open is a valuable advantage which may itself be the subject of sale, and an "option contract" is the sale and purchase of this advantage or right belonging to the owner of the property. *Patterson v. Farmington St. Ry. Co.*, 57 Atl. 853, 858, 76 Conn. 628.

#### In futures

Dealing in options as gambling, see Gambling—Gaming.

The purchase and sale of grain and dealing in what is commonly called "options" does not contemplate the delivery of the actual grain, but is a mere gambling transaction on the fluctuations of the market. *John Miller Co. v. Klovstad*, 105 N. W. 164, 165, 14 N. D. 435.

An "option" in the peculiar language of dealers in grain may consist of a "put" or a "call." A "put" is the privilege of delivering or not delivering the thing sold, and a "call" is the privilege of calling for or not calling for the article bought. Optional contracts in this sense are usually settled by adjusting the market values as the party having the option may elect. It is simply a mode adopted for speculating in differences in market value of grains or other commodities, and it was in this sense that the term "option" was used

in Cr. Code Ill. § 130, declaring that whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity shall be subject to a fine. *Zeller v. Leiter*, 99 N. Y. Supp. 624, 628, 627, 114 App. Div. 148 (citing *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414).

An instrument by which the person signing the same offers to contract with a person named therein for the sale of a specified number of bushels of wheat on the Chicago Board of Trade, at a specified sum per bushel, the same to be delivered on a date named, and containing a further promise to leave the offer open for acceptance until a time specified, is an option contract within the meaning of Crim. Code, § 130, providing that whoever contracts to give another the option to buy at any future time in grain or other commodity shall be subject to a fine, and all contracts made in violation of the section shall be considered gambling contracts and void. *Woods v. Bates*, 126 Ill. App. 180, 184; *Bates v. Woods*, 80 N. E. 84, 225 Ill. 126.

## OPTOMETRY

Comp. Laws 1907, regulating the practice of optometry in section 1686x1, defines optometry as the employment of "subjective and objective" mechanical means to determine the accommodative and refractive conditions of the eye, and in the three preceding sections created a board of examiners, defining to what extent applicants for a license to practice shall be examined before license, with a proviso that every person then engaged in the practice of optometry shall file an affidavit thereof, and satisfactory evidence with said board, who shall, in consideration of \$3, issue to him a certificate of registration. Section 1686x5 provides that a failure to apply in time for a certificate shall be a waiver of right thereto. The board furnished blanks to be filled in by applicants under the proviso, stating their names, addresses, length of time and where engaged in refracting. Held, that where an applicant complied with the terms of the proviso, filled in the blanks correctly, and filed an affidavit under oath, he was entitled to a certificate, though he used only the subjective method, since while it was the intention to require all those who had no practice to take an examination as to both methods, one method was sufficient under the proviso, as otherwise section 1686x5 would be inoperative. *State ex rel. Hallen v. Utah State Board of Examiners in Optometry*, 108 Pac. 347, 348, 37 Utah, 330.

## OR

Or otherwise, see Otherwise.

Construed as and

And construed as or, see And.

To prevent an absurd or unreasonable result, the word "or," used in a contract, may

be read "and." *Manson v. Dayton*, 153 Fed. 258, 269, 82 C. C. A. 588 (citing *End. Interp. St.* § 303; *Thomas v. City of Grand Junction*, 56 Pac. 665, 667, 13 Colo. App. 80, 84, 85; *Kitchen v. Southern Ry.*, 48 S. E. 4, 6, 68 S. C. 554, 1 Ann. Cas. 747).

An instruction is not erroneous for authorizing the conviction of one who "advised 'or' encouraged" another in the commission of a crime instead of "advised 'and' encouraged," in accordance with the definition of a principal in *Pen. Code*, § 41. *State v. Allen*, 87 Pac. 177, 182, 34 Mont. 403.

A warrant of attorney contained in a joint and several note signed by eight makers authorizing the holder to have judgment against "us, or any or either of us," is not exhausted by the entry of judgment against one or more but not all of the makers, but is the equivalent of eight separate warrants, signed by one of the makers, and the holder may at his election enter a several judgment against each maker. It cannot be doubted that in this case "or" includes "and." Otherwise the power would be exhausted if the judgment was entered against only one of the signers—a result that is so absurd as hardly to need refutation. *George D. Harter Bank v. Straus*, 170 Fed. 489, 492.

#### Same—In deeds and conveyances

Where, in an oil and gas lease, it is stipulated that the lessee shall complete one well within one year, "or" pay at the rate of \$4 quarterly, in advance, for each additional three months such completion is delayed, and it is expressly declared that the contract is made "for the sole and exclusive purpose of mining and operating for oil and gas," and it is otherwise manifest from the instrument as a whole that the intention of the parties was not that the lessee should have the right to simply hold the land during the term of the lease—not exploring it himself for oil and gas, and not allowing any one else to do so—but that he should be bound to complete a well within one year, the obligation to pay \$4 quarterly will be held to be a mere penal clause, and not an alternative obligation, and the making of said payments will be held not to be a fulfillment of the principal contract, in whole or in part, but merely the payment of liquidated damages. *Murray v. Barnhart*, 42 South. 489, 492, 117 La. 1023.

A trust deed, stating in the granting clause, "has and hereby does grant, bargain, sell and convey unto said party of the second part or his successors in trust," is not void for uncertainty as to the grantee by reason of the use of the word "or"; it being the intention of the grantor to vest the legal title of the property in the trustee, with power, on conditions named, to substitute a trustee. *Empire Ranch & Cattle Co. v. Stratton*, 126 Pac. 1094, 22 Colo. App. 577 (citing 6 Words and Phrases, p. 5002).

#### Same—In civil statutes

"Or" and "and" may be read convertibly in construing a statute, to effect legislative intent. *Ransom v. Rutherford County*, 130 S. W. 1057, 1063, 123 Tenn. 1, Ann. Cas. 1912B, 1356; *In re Steinruck's Insolvency*, 74 Atl. 360, 225 Pa. 461; *People ex rel. Cohen v. Butler*, 109 N. Y. Supp. 900, 903, 125 App. Div. 384.

The word "and" may be substituted for the word "or" when necessary to make a statute express the true legislative intent as gathered from the context and the circumstances attending its enactment. *James v. United States Fidelity & Guarantee Co.*, 117 S. W. 406, 409, 133 Ky. 299; *State v. Hooker*, 98 Pac. 964, 972, 22 Okl. 712; *James v. United States Fidelity & Guarantee Co.*, 117 S. W. 406, 409, 133 Ky. 299.

As used in the proviso limiting the general right of a wife to inherit the real estate of her husband, as given in section 8 of act concerning descents and distributions (section 2510, *Gen. St.* 1901), which declares that the wife shall not be entitled to any interest under the provisions of this section, in any land to which the husband has made a conveyance, when the wife at the time of the conveyance is not "or" never has been a resident of this state, the word "or" should be read "and," with the effect that a wife who had ever been a resident of this state is entitled to the benefits of the act. *Kennedy v. Haskell*, 73 Pac. 913, 914, 67 Kan. 612.

As used in *Rev. St.* 1887, § 4842, providing that an appeal from a justice's court is not effectual unless an undertaking be filed for \$100 for the payment of the costs on appeal, or if a stay of proceedings be claimed in a sum equal to twice the judgment, the word "or" means "and," and the statute requires that an undertaking be given for the sum of \$100 for the payment of costs, and if a stay of proceedings be claimed, then in an additional sum equal to twice the judgment. *Lilly v. Spokane Valley Land & Water Co.*, 94 Pac. 715, 717, 15 Idaho, 467.

Where a landlord had entered for the tenant's breach of the lease and claimed possession, it was entitled to answer in summary proceedings by the tenant's agent to recover possession of a part of the premises from a subtenant under *Code Civ. Proc.* § 2244, providing that the person to whom the precept is directed or his landlord or any person in possession "or" claiming possession of the premises or a part thereof, may answer; the word "or" being used in such section in its copulative and not in its disjunctive sense. *Cohen v. Carpenter*, 113 N. Y. Supp. 168, 171, 128 App. Div. 862.

*Labor Law* (Laws 1897, p. 468, c. 415. § 20, as amended by Laws 1899, p. 351. c. 192), providing that, if hoisting apparatus is used in a building in the course of construc-



tion, the "contractors or owners" shall cause the openings in each floor to be inclosed, places such duty on the owner of a building as to an employe of an independent contractor, as well as on the contractor, though all the work on the building is being done by independent contractors and the hoisting machine is installed by a hoisting machine company, paid by the contractors for the use thereof. *Rooney v. Brogan Const. Co.*, 95 N. Y. Supp. 1, 5, 107 App. Div. 258.

In Act N. J. April 18, 1884, § 4, providing "that this act shall not apply to railway, canal, 'or' banking corporations, \* \* \* 'or' manufacturing companies 'or' mining companies carrying on business in this state," the word "or" is used in its copulative, and not in its disjunctive, sense, and the qualifying words "carrying on business in this state" relate to all the corporations designated in the act, and not merely to mining companies. *Standard Underground Cable Co. v. Attorney General*, 19 Atl. 733, 735, 46 N. J. Eq. 270, 19 Am. St. Rep. 394.

Laws 1905, p. 163, c. 103, § 6, providing that one who has not purchased "one complement" of school land "under this act or former law" may buy not to exceed eight sections in designated counties, or such part thereof as will complete "his complement," under this act, including the purchase under the act of 1901, when taken in connection with section 5, authorizing a lessee of school land or an assignee of an entire lease to purchase land included in the lease, provided the applicant has not purchased one complement, as provided by this act or other law, which announces a general rule applicable to all lands except those mentioned in section 6, and defines the rights of lessees and assignees, authorizes one who has purchased four sections in one of the designated counties the full amount allowed by the act of 1901 to purchase four sections additional in such county; the word "complement" in section 6 meaning eight sections, and the phrase therein, "under this act or former law," meaning "under this act and former law." *Ross v. Terrell*, 90 S. W. 1093, 1095, 99 Tex. 502.

#### Same—In penal statutes

When necessary to give effect to any part of a statute of the intention of the Legislature, the word "and" may be substituted for "or," and vice versa. *Williams v. State*, 137 S. W. 927, 928, 99 Ark. 149, Ann. Cas. 1913A, 1056; *State v. Hooker*, 98 Pac. 964, 972, 22 Okl. 712.

Kirby's Dig. § 5242, which is part of an act regulating the practice of medicine, provides that any itinerant vendor of drugs intended for the treatment of disease "or" who may, by writing, print, or other methods, profess to cure diseases by any drug, shall, unless he has a certificate, be in violation of

this law. Other parts of the act provide for an examining board to issue certificates, and section 5241 makes it an offense to practice medicine without a license, and section 5243 defines what constitutes the practice of medicine. Held, that in view of the general scope of the act, and that, if construed otherwise, the clause "who may by writing, print or other methods profess to cure disease," etc., would be rendered ineffective, this section must be taken to require only those itinerant vendors of drugs who profess to cure disease to secure a license; the word "or" being construed as "and." *Williams v. State*, 137 S. W. 927, 99 Ark. 149, Ann. Cas. 1913A, 1056.

Acts 1901, c. 78, entitled "An act to regulate the practice of medicine and surgery," as amended by Acts 1907, c. 543, provides in section 4 that it shall be unlawful for any itinerant physician, or vendor of any drug, nostrum, or application, to sell "or" apply the same. Held that, in view of Const. art. 2, § 17, prohibiting a bill from embracing more than one subject, which shall be expressed in its title, the disjunctive "or," used between "sell" and "apply," must be construed as "and," to bring the act within the title, so that the statute, thus being a regulation of the practice of medicine, is not open to the objection that it prohibits the sale of property, and works a deprivation of the same, contrary to Const. art. 1, § 8, and Const. U. S. Amend. 14. *Kirk v. State*, 150 S. W. 83, 84, 126 Tenn. 7, Ann. Cas. 1913D, 1239.

Enforcing Act (Laws 1907-08, p. 606, c. 69) art. 3, § 8, providing that no warrant shall issue but upon probable cause, supported by oath describing, as particularly as may be, the place to be searched "or" the person or thing to be seized, was evidently intended by the Legislature to follow Const. art. 2, § 30 (Bunn's Ed. § 39), providing that no search warrant shall issue but upon probable cause, supported by oath describing the place to be searched "and" the person or thing to be seized, and, the word "or" being inserted by inadvertence, and to carry out the evident legislative intent, the same will be construed by substituting the conjunctive particle "and" in place of the disjunctive "or." *State v. Hooker*, 98 Pac. 964, 972, 22 Okl. 712.

Rev. St. 1889, § 3486, provided that any person who should, "under promise of marriage, seduce and debauch any unmarried female of good repute should be punished." This section was amended by Acts 1897, p. 106, entitled "An act to amend section 3486, chapter 47, article 2, of the Revised Statutes of Missouri of 1889, relating to the seduction of unmarried females under 18 years of age," and changed the section, so as to provide that any person who should, under promise of marriage, seduce or debauch any unmarried female, etc., should be punished. Held, that the words "seduce" and "debauch," though ordinarily not synonymous, were used in such

section synonymously, and that the word "or" must be construed to mean "and," in order to bring the offense defined within the title, so that an instruction that the jury could convict, if they believed prosecutrix was either seduced "or" debauched by defendant under promise of marriage, was erroneous. *State v. Long*, 141 S. W. 1099, 1101, 238 Mo. 383.

#### Same—In pleading

In Rev. Codes 1905, § 6938, subd. 4, authorizing an attachment where defendant has sold, assigned, transferred, secreted, or otherwise disposed of, "or" is about to sell, assign, etc., with intent to cheat or defraud his creditors or hinder or delay them, the disjunctive conjunction "or" does not connect two grounds for an attachment, but the whole subdivision states only one ground consisting of different phases of facts or conditions intimately related, pertaining to that one ground, and an affidavit for an attachment stating such ground disjunctively in the language of the statute is sufficient. *McCarthy Bros. Co. v. McLean County Farmers' Elevator Co.*, 118 N. W. 1049, 1050, 18 N. D. 176, 138 Am. St. Rep. 757, 20 Ann. Cas. 574 (citing *Shinn, Attach. & Garn.*, §§ 145, 146; *Waples, Attach. & Garn.*, § 136; *Wood v. Wells*, 2 Bush [65 Ky.] 197; *Klenk v. Schwalm*, 19 Wis. 111).

An indictment for forgery of a writing "or" paper did not describe the instrument in the alternative, since the words "writing" and "paper" when connected disjunctively clearly amount to the same thing, a written instrument. *Blais v. State*, 126 S. W. 1064, 1065, 94 Ark. 327.

An indictment is subject to demurrer if the descriptive terms relating to any material allegation are set forth in an alternate form. The word "or" is generally used as a disjunctive, and to express the notion that the two clauses which it connects are alternative; but this is not always so. It may properly be used to introduce a statement which is an amplification or explanation of a preceding statement. The use of the word in the present indictment was of the latter nature. *Whitaker v. State*, 75 S. E. 258, 11 Ga. App. 208.

A pleader should use the word "and" in an indictment when the word "or" is used in the statute, whenever the word "or" would leave the averment uncertain as to which of two or more things is meant, but not so where the complaint charges inaction as the violation of a statute commanding action, and the use of the conjunctive "and," instead of the disjunctive "or," would not make the allegation more certain. In a prosecution under Pub. Laws 1908, p. 287, c. 1592, § 12, requiring every chauffeur, after knowingly causing an accident, by collision or otherwise, or knowingly injuring any person, horse, or vehicle, to forthwith bring his motor vehicle to a full stop, return to the scene of the accident,

and give to any proper person, demanding the same, the number of his driver's license, the registration number of the motor vehicle, and the names and residences of each male occupant. It was held that, under the rule that the word "or" is a proper connective in pleading negative averments, a complaint charging that accused, while driving a motor vehicle, did not, after knowingly causing an accident by a collision with a horse, etc., bring such vehicle to a full stop "or" return to the scene of the accident, but drove the vehicle away therefrom with great speed, against the statute, etc., was not objectionable for duplicity. *State v. Smith*, 72 Atl. 710, 711, 715, 29 R. I. 513.

#### Same—In wills

To effectuate the intention of the testator, the word "or" may be read as "and," or vice versa, when necessary to avoid defeating his intention. *Shropshire v. Gault* (Ky.) 83 S. W. 590 (citing *Hunt v. Johnson*, 10 B. Mon. [49 Ky.] 342; *Robb v. Belt*, 12 B. Mon. [51 Ky.] 647; *Anlick v. Wallace*, 12 Bush [75 Ky.] 531); *In re Allison*, 102 N. Y. Supp. 887, 891, 53 Misc. Rep. 222; *Shaver's Adm'r v. Ewald's Ex'r*, 134 S. W. 906, 907, 142 Ky. 472.

Where, from the language of the will, it is apparent that the testator used the word "or" as the equivalent of "and," it will be so construed. *Olcott v. Tope*, 115 Ill. App. 121; *Id.*, 72 N. E. 751, 753, 213 Ill. 124. Thus where testatrix made specific bequests to some of the children and all of the grandchildren of her brother who had four living children, two of whom had children, and four deceased children, two of whom left issue surviving, and further provided that the house in which she lived was to be disposed of and the proceeds equally divided between the "children and heirs" of her brother, the clause disposing of the remainder of her estate to the "living children or heirs of her brother, including the widow of a deceased child and the son of another deceased child," should be construed as if "or" was "and." *McClench v. Waldron*, 91 N. E. 126, 128, 204 Mass. 554.

In a will by which testatrix gave her entire estate to her daughter, providing that if she should not be living "at the time of my decease or die without lawful issue" the estate should be divided between her two sons, the word "or" will be construed to mean "and," and the daughter, surviving the mother, will take the whole estate absolutely. *In re Edwards' Estate*, 76 Atl. 28, 29, 227 Pa. 299, 19 Ann. Cas. 921.

Under the provision for the establishment of an asylum with the money bequeathed to the adopted daughters, or either of them, upon the death of either before they should become of age or be married, the amount bequeathed to E. was not available for such charitable use where she became of

age before her death unmarried, it being so available only in case she died before either event happened; it being permissible to construe the word "or" to mean "and," when it seems necessary to give effect to the meaning of testator. *Clarke v. Inhabitants of Andover*, 92 N. E. 1013, 1015, 207 Mass. 91.

A testator devised his whole estate to his wife to manage and control in every particular, "that is to say, to sell a part or any part, or the whole, should it be necessary or advisable in her best judgment." Held, that she took the property absolutely, and that her title was not cut down by the subsequent provision "or I further wish and desire my said wife to make a last will and testament wherein such division of our estate shall be made among our children as in her best judgment will be just, reasonable and proper": "or" apparently meaning in the event of her not selling the property, and, even if read as "and," merely expressing a wish as to the disposition she should make of the property. *Snyder v. Snyder*, 83 Atl. 246, 247, 115 Md. 699.

A will, after giving a life use of testator's residuary estate, consisting of land, to his wife, provided that after her death, subject to her life use thereof, testator gave to his daughter A. for her life the use of the T. block, and then proceeded: "On the death of both my said wife and daughter, I give \* \* \* said T. block to my son H. absolutely, or in case he should die before that time, to his legal heirs-at-law, to be distributed among them as if it were his intestate property." Held, that reading the devise to the son, as it must be read in view of the rule that the law favors vested estates, as though phrased "subject to the life estates above created in favor of my wife and daughter, I give," etc., and treating the word "or," in said devise, as used as the equivalent of "and," which use is plainly shown from the employment of the latter word for a like purpose in a subsequent devise of a remainder to the daughter, the son was given a vested remainder in fee. *Cody v. Staples*, 67 Atl. 1, 80 Conn. 82.

Testatrix gave all her realty to her husband for life, after his death such realty to revert to testatrix's two daughters, and provided that, if either daughter should die without leaving legal issue, the property should go to the other daughter, if living, and, if both should die without leaving legal issue, the property should go to testatrix's husband "or his heirs." Held, that the intent was that, if both daughters died without leaving legal issue during their father's lifetime, the daughters' interests should go to him in fee, the daughters taking remainders which vested in them immediately upon testatrix's death; the word "or" in the phrase "or his heirs" being construed as "and," the general rule that, where the context of the will is silent, words referring to the death of

the prior legatee in connection with some collateral event apply where the contingency happens after as well as before death of testator, not applying where the context shows the intent to be otherwise. *Smith v. Dellitt*, 94 N. E. 113, 115, 249 Ill. 113 (citing 6 Words and Phrases, p. 5008).

#### Not construed as and

The conjunction "or" may be used as a disjunctive or as an equivalent. As stated in Webster's International Dictionary, "or" may be used to join as alternatives terms expressing unlike things or ideas, or different terms expressing the same thing or idea. *Amet v. Texas & P. Ry. Co.*, 41 South. 721, 722, 117 La. 454.

The use of the disjunctive "or" in "where goods, wares or merchandise are manufactured or offered for sale," means either where they are manufactured, or where they are offered for sale. *Baltimore & O. S. W. R. Co. v. Cavanaugh*, 71 N. E. 239, 242, 35 Ind. App. 32.

The meaning of the term "proper party," as used in the phrase "is not a proper or necessary party," is not so clear as the meaning of the term "not a necessary party." The word "or" may be used in two forms. In one it corresponds to "either," and in that sense the term "proper or necessary" would mean either proper or necessary; that is, one or the other. In the other form it means to express the same thing alternatively in different words. In that sense, the term "not proper or necessary," would imply that it was not proper; that is, not necessary. *Jones v. Kansas City, Ft. S. & M. R. Co.*, 77 S. W. 890, 893, 178 Mo. 528, 101 Am. St. Rep. 434.

Provisions in the charter of a college that the trustees should hold inviolate all furniture, stock, assets, lands, buildings, moneys, or endowment funds, professorships, scholarships, or other funds, did not forbid the trustees from using for current expenses money donated without any direction as to the purpose for which it was to be used; the word "or" not being used as equivalent to "either," and as presenting the choice of either. The word "or" has two significations. It may be used to convey the idea of an alternative, or may be used to join different terms expressing the same thing or idea, and in this sense it was here used. *Board of Trustees of Park College v. Attorney General*, 129 S. W. 27, 31, 228 Mo. 514.

In an action under Civil Damage Act (Code 1906, c. 32) § 26, by a wife injured in her means of support, against a saloon keeper alleged to have unlawfully sold her husband intoxicants, it was error to instruct that a sale of intoxicants to a person "at a time when he was intoxicated or when the defendant, or his bartender, or clerk, or any of them, knew or had reason to believe" he was intoxicated, was an unlawful sale, since an actual sale to an intoxicated person, and

knowledge, actual or constructive, by the seller of such intoxication, are two essential elements of one offense, and the word "or" instead of "and" conveys the idea that either element of the offense, without the other, is sufficient to constitute an unlawful sale. *Duckworth v. Stalnaker*, 69 S. E. 850, 854, 68 W. Va. 197.

A city ordinance providing that the city treasurer shall receive a monthly salary and a specified "per cent. of all moneys received and paid out by him as treasurer," which shall be payable monthly, is unambiguous, and comprehends both a receipt and disbursement of funds before any commission is payable; and under Code Civ. Proc. § 1858, requiring the court, in the construction of a statute, to declare its terms, and not insert what has been omitted, the court may not construe the ordinance so as to allow the percentage on all moneys received, and on all moneys paid out, by construing the word "and" in the quoted phrase to mean "or." *City of Corona v. Merriam*, 128 Pac. 769, 770, 20 Cal. App. 231.

It is error to define a principal as one who "aids or abets" in the commission of a crime instead of "aids and abets" in accordance with the definition of Pen. Code, § 41. *State v. Allen*, 87 Pac. 177, 178, 34 Mont. 403 (citing *People v. Dole* [Cal.] 51 Pac. 945; *Id.*, 55 Pac. 581, 122 Cal. 486, 68 Am. St. Rep. 50).

An instruction that accused, on trial for homicide, cannot be guilty as an aider or abettor in the killing of decedent if he gave no "assistance or uttered no word to the person doing the killing," etc., is misleading for using the word "or," instead of "and," between the words "assistance" and "uttered." *Morris v. State*, 41 South. 274, 284, 146 Ala. 66.

Where, in a prosecution for keeping a bawdyhouse, the court charged that a bawdyhouse was a house of ill fame kept for the resort and commerce of lewd people of both sexes, an instruction that if the jury believed that accused kept a common bawdyhouse and "did willfully and knowingly keep or suffer to remain in and about her house lewd women, or men, for the purpose of prostitution, or permit them to come together and meet or remain there for the purpose of having illicit sexual intercourse," etc., she was guilty, was not prejudicially erroneous in that the use of the disjunctive, "or," authorized a conviction in case accused suffered either lewd women or men to remain in her house without requiring that the house was permitted to be used for immoral purposes. *State v. Price*, 92 S. W. 174, 175, 115 Mo. App. 656.

In a docket entry of a justice of the peace, relating to the preliminary examination of a person charged with crime, which recites that the offense of "pocket picking 'or' larceny from the person" had been committed, the word "or" is not used disjunctively,

but indicates the synonym of the terms preceding and following it. *State v. Dunn*, 71 Pac. 811, 812, 66 Kan. 483.

Where, in an action for injuries to an employé, the grounds of negligence were the failure of the engineer to warn the employé of the backing of the train and the failure to keep a brakeman stationed near the rear end of the train to warn the employé, and there was nothing in the evidence to suggest any other grounds of recovery, an instruction that if the person in charge of the engine at the time of the injury was guilty of negligence in operating the engine, followed by a distinct disjunctive statement of the two grounds of negligence alleged, is not misleading, though connected by the word "or," which must have been used in the sense of "that is." *Choctaw, O. & T. Ry. Co. v. McLaughlin*, 96 S. W. 1091, 1093, 43 Tex. Civ. App. 523.

#### Same—In civil statutes

Const. § 201, prohibiting consolidation of "parallel or competing" railroads, should not be read "parallel and competing." *Commonwealth ex rel. Breathitt v. Louisville & N. R. Co.*, 138 S. W. 291, 293, 144 Ky. 324, Ann. Cas. 1913A, 633.

The word "or" may be used to join, as alternatives, terms expressing different things, as well as to join different terms expressing the same thing, and, in a statute giving an action for damages caused by reason of the insufficiency of any bridge or culvert, it is used in the former sense, so that it does not co-ordinate "bridge" and "culvert," and make each in turn the equivalent of the other, but specializes one to one meaning and the other to another meaning, thus making the statute mean as though it read, "either a bridge or a culvert." *Cleveland v. Town of Washington*, 65 Atl. 584, 585, 79 Vt. 498.

"The conjunction 'or' may be used as a disjunctive or as an equivalent." As used in a statute providing that all claims for lands or damages to the owner caused by its taking "or" expropriation for public works shall be barred by two years' prescription, the word "or" makes the terms taking and expropriation equivalent. *Amet v. Texas & P. Ry. Co.*, 41 South. 721, 722, 117 La. 454 (citing and adopting *Webst. Int. Dict.*).

The word "or," in Acts 1889, p. 117, c. 81, providing that a conditional seller, on regaining possession on the buyer's default, shall advertise the property for sale "by printed hand bills or written or printed notices," etc., is used in its ordinary meaning to indicate an alternative. *J. I. Case Threshing Mach. Co. v. Watson*, 122 S. W. 974, 975, 122 Tenn. 156.

As used in Code, § 3105, providing that every laborer or miner who shall perform labor in opening, developing, or operating any coal mine shall have a lien on all property

"of the person, firm or corporation owning or operating such mine," etc., the word "or," between the words "owning" and "operating," cannot be construed to mean "and," and hence the statute does not give a lien on mining property of an owner in favor of the employees of an operating lessee. *Caster v. McClellan*, 109 N. W. 1020, 1021, 132 Iowa, 502 (citing 6 Words and Phrases, p. 5009).

The statute making adultery ground for divorce, but imposing on the complaining party the burden of proving that the adultery was without his or her "consent, connivance, privity, or procurement," by the use of the disjunctive conjunction "or" makes the inhibition apply to each of the quoted words separately, and the existence of either condition is therefore sufficient to bar a favorable decree. *Richardson v. Richardson*, 114 N. Y. Supp. 912, 916.

Webster says the conjunction "or" is often placed between different terms expressing the same thing or idea; as this is a sphere or globe. The word "assessments" and the word "dues," in Rev. St. 1890, § 1408 (Ann. St. 1906, p. 1111), declaring that a fraternal beneficiary association might make provision for the payment of benefits from a fund to be derived from "assessments or dues" collected from its members, are used there without definition, and seemingly as meaning the same thing. *State ex rel. Supreme Lodge K. P. v. Vandiver*, 111 S. W. 911, 916, 213 Mo. 187, 15 Ann. Cas. 283.

In Act May 11, 1874, imposing a double liability on "all stockholders in banks, banking companies, saving fund institutions, trust companies and all other incorporated companies doing the business of banks or loaning and discounting moneys as such in this commonwealth," the word "or" is used to mark an equivalent and has the same effect as if it were "that is." *De Haven v. Pratt*, 72 Atl. 1068, 1073, 223 Pa. 633.

In Acts 1905, p. 579, c. 167, § 123 (Burns' Ann. St. 1908, § 7793), provides that any person aggrieved by decision of the county commissioners in proceeding relating to highways may appeal, and that such appeal shall be tried *de novo*, and may be had as to any issue tried, "or that might have been tried, before the county board," the last clause only authorizes the trial of such issues as might have been tried under issues before the board, and does not authorize the trial of issues not presented. *Aetna Life Ins. Co. v. Jones*, 89 N. E. 871, 872, 173 Ind. 149.

Under Mills' Ann. St. Colo. § 1508, giving a right of action for death negligently caused by a carrier to be sued for and recovered, first, by the husband or wife, if there is no husband or wife, by the children, and, if the deceased be a minor or unmarried, by the father and mother, the words "minor or unmarried" cannot be construed to mean "minor and unmarried," thus giving

no right of action for the death of an adult leaving no husband, wife, or children, but should be construed as giving the father and mother a right of action whenever the deceased leaves no husband, wife, or children. *Hopper v. Denver & R. G. R. Co.*, 155 Fed. 273, 275, 84 C. C. A. 21.

Under Levee Act, § 58, providing that the owner of land outside a drainage district who shall make a connection with a drainage ditch or whose land will be benefited by such ditch shall be deemed to have made voluntary application to be included in the district, it is not necessary that there should be both connection and benefit, but either in itself is sufficient, since this is the plain and unambiguous meaning of the language of the act, and there is no room for construction where there is no ambiguity, and, while "or" may sometimes be construed in statutes, contracts, or wills as "and" to effectuate the intention of the parties, this will be done only where the intention is clearly manifest, and a construction of the word according to its real meaning would involve an absurdity, or produce an unreasonable result. *Gar Creek Drainage Dist. v. Wagner*, 100 N. E. 190, 193, 256 Ill. 338.

#### Same—In penal statutes

Penal statutes are to be construed in favor of the accused, and the word "or" will not in general be construed "and" or vice versa, where the effect would be to aggravate the offense or would be to the disadvantage of the accused. *Williams v. United States*, 87 Pac. 647, 648, 17 Okl. 28 (citing *United States v. Ten Cases of Shawls*, 28 Fed. Cas. 35; *Rice v. United States*, 53 Fed. 910, 4 C. C. A. 104; *United States v. Fisk*, 3 Wall. [70 U. S.] 445, 18 L. Ed. 243).

Rev. St. 1870, § 910, making it an offense to retail intoxicating liquors "without previously obtaining a license therefor from the police jury of said parish or from the authorities of any town or city," is to be construed literally, and the word "and" cannot be substituted for the word "or." *State v. Lewis*, 41 South. 63, 116 La. 762.

In a statute which punishes "every person who holds, arrests, returns or causes to be held, arrested or returned," three distinct acts are mentioned, that of holding, arresting, and returning, and the disjunctive "or" indicates the separation between them and shows that either one may be the subject of indictment and punishment. *Clyatt v. United States*, 25 Sup. Ct. 429, 431, 197 U. S. 207, 49 L. Ed. 726.

As used in Rev. St. § 792, making it criminal to assault another by willfully shooting at him, "or" with intent to commit murder, rape "or" robbery, the word "or" is to be taken as written; and "shooting at" is a complete crime in itself. *State v. Fairbanks*, 39 South. 443, 444, 115 La. 457 (citing

State v. Brady, 2 South. 556, 39 La. Ann. 687).

The word "or," as used in Ballinger's Ann. Codes & St. § 7154, providing for the punishment of persons who shall "willfully or maliciously" commit certain acts, cannot be construed as "and." State v. Tiffany, 87 Pac. 932, 933, 44 Wash. 602 (citing Rountree v. State, 10 Tex. App. 110; Werner v. State, 67 N. W. 417, 93 Wis. 266).

#### Same—In pleading

The disjunctive "or," in an allegation that the death of a servant was caused by the negligence of the officials or some one of the employés of defendant, and especially by the negligence of the employés of defendant or its officers, indicates that the words "officers," "officials," and "employés" meant the same thing—coemployés or fellow servants of deceased. State, to Use of Zier v. Chesapeake Beach Ry. Co., 56 Atl. 385, 386, 98 Md. 35.

#### Same—In wills

The word "and" will not be substituted for "or" in the clause in a will providing for the disposition of the testator's estate in case any of his sons should die "without leaving a wife or child," unless the whole context of the will plainly and beyond question requires such substitution in order to give effect to the intention of the testator. Travers v. Reinhardt, 27 Sup. Ct. 563, 565, 205 U. S. 423, 51 L. Ed. 885.

In construing the expression in a will, "without leaving a wife, or a child, or children," the word "and" will not be substituted for the disjunctive "or," where the dominant intention of the testator in the disposal of his estate as appears from his will, does not require such substitution, and especially where the repetition of the same expression in another part of the will shows deliberation and care by the testator in the selection of words. Under such circumstances, the words used, being plain and unambiguous, must be given their ordinary and usual meaning, and cannot be controlled by conjecture. Traverse v. Reinhardt, 25 App. D. C. 567, 576.

The word "or," as used in devises to one's children "or" other lineal descendants, etc., indicates alternate devises to children, if any, and, if none, then to other lineal descendants. Reilly v. Bristow, 66 Atl. 262, 264, 105 Md. 326.

Where testatrix bequeathed to her infant daughter all her residuary estate, with a provision that if she should die before arriving at the age of 21 years or without disposing of the same, or without having made a last will, then over, in construing the proviso, "and" could not be substituted for "or," as it would express a sense contrary to the plain intent of the testatrix. In re Polley's Estate, 62 Atl. 553, 554, 70 N. J. Eq. 659.

A will in which testator stated his intention to travel and that knowing the uncertainty of a journey he bequeathed his real estate and personal property to his wife and also all judgments owned by him and notes due, and should anything befall him while away, "or" that he should die, all his estate and property was set over to his wife for her sole benefit, was not merely contingent on testator's death during the journey, but continued operative after his safe return and his death thereafter. In re Forquers' Estate, 66 Atl. 92, 95, 216 Pa. 331, 8 Ann. Cas. 1146.

Testator's will gave his wife a life estate, and provided that on her death the property should be divided between his "children or their heirs as the law directs." Held that, inasmuch as under Code, § 2913, making technical words unnecessary to create a fee, a construction of "or" as "and" would render the clause meaningless, and as there appeared no reason to believe "or" was intended for "and," the will meant that the heirs of a child dying before the life tenant took under the will, and not by descent, and hence the remainder was contingent. Courts of justice will transpose the clauses of a will and construe "or" to be "and" and "and" to be "or" only in such cases when it is absolutely necessary so to do to support the evident meaning of the testator. But they cannot arbitrarily expunge or alter words without such apparent necessity. Taylor v. Taylor, 92 N. W. 71, 72, 118 Iowa, 407 (citing Griffith's Lessee v. Woodward [Pa.] 1 Yeates, 318).

Testator, having when he wrote his will but one sister and one half-sister and one half-brother living, and having had brothers and sisters who died previously, leaving issue, the heirs of such deceased brothers and sisters are included in the provision of the will for division of property between his "sisters and brothers or their heirs." The word "or," as thus used, probably has no significance, if used alone, but, when used in connection with a gift to "his brothers or their heirs," would seem to indicate an intention that, where the brothers were not living so they could not take, their heirs should take for them. In re Edwards, 117 N. Y. Supp. 3, 5, 132 App. Div. 544.

#### As alias

"Or" is usually disjunctive, occasionally is construed as a conjunction to avoid absurdity, and is sometimes used in the sense of "alias," as, "violin or fiddle." "Or," within the provision of St. 1898, § 1777, for "toll or boom charges" by a boom company, is used in the sense of "alias." Menominee River Boom Co. v. Augustus Spies Lumber & Cedar Co., 132 N. W. 1118, 1122, 147 Wis. 559.

#### As conferring discretionary power

As used in a municipal ordinance which provided that whoever should be found guilty of being a vagrant should be fined not less

than \$5 nor more than \$25, and on default should be imprisoned not less than 10 nor more than 30 days, or both, at the discretion of the court, the words "or both, at the discretion of the court," relate to the two penalties, fine and imprisonment, and the court in its discretion may impose both penalties, or only one. *State ex rel. Fritz v. Gossens*, 54 South. 795, 128 La. 270.

#### As nor

An indictment for inclosing public lands, alleging that accused so constructed, maintained, and controlled the inclosure then and there having no claim or color of title made or acquired in good faith or otherwise or at all to any of the land, "or an asserted right" thereto by or under claim made in good faith, with a view to entry thereof, etc., was not fatally defective for failure to sufficiently negative the asserted right by a direct and positive averment, since the word "or," both in the statute and in the indictment, should be construed to mean "nor." *Lillis v. United States*, 190 Fed. 530, 535, 111 C. C. A. 362.

#### As of

In Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181, the proviso relative to "embroidered wearing apparel or other article or textile fabric," is not to be construed as though the second "or" were "of"; nor should the doctrine of noscitur a sociis be applied so as to restrict the proviso to such articles of wearing apparel as are textiles or made of textiles, and thus exclude embroidered furs. *Hugo Jaeckel & Son v. United States*, 178 Fed. 260, 261, 101 C. C. A. 620.

#### As to wit

The word "or" in statutes is often used in the sense of "to wit"—that is, in explanation of what precedes—and gives to that which precedes the same signification as that which follows. *Bryan v. Menefee* (Okla.) 95 Pac. 471, 475, 21 Okl. 1 (citing 6 Words and Phrases, pp. 5014, 5015).

The word "or" may be used in the sense of to wit. An information based on the provisions of a violation of Cr. Code, § 121, which charges in the language of the statute that the property in question came into the possession of defendant by virtue or under color of his relation as an officer, is not void for duplicity, for the words, "by virtue" and "under color," as applied to the expression of his relation as an officer, mean one and the same thing. *Hendee v. State*, 113 N. W. 1050, 1052, 80 Neb. 80, 84.

#### As word of substitution

Where, after attempting to create an intermediate estate in a trustee for a period of 25 years, the testatrix devised the property to certain named persons, "or" their heirs, absolutely, the word "or" interposed between the names of the devisees and their

heirs indicates substitution. *Johnson v. Preston*, 80 N. E. 1001, 1006, 226 Ill. 447, 10 L. R. A. (N. S.) 584 (citing *Ebey v. Adams*, 25 N. E. 1013, 135 Ill. 80, 10 L. R. A. 162; 1 Redf. Wills, 486).

A will, after giving a life use of testator's residuary estate, consisting of land, to his wife, provided that after her death, subject to her life use thereof, testator gave to his daughter A. for her life the use of the T. block, and then proceeded: "On the death of both my wife and daughter I give \* \* \* said T. block to my son H. absolutely, or in case he should die before that time, to his legal heirs, to be distributed among them as if it were his intestate property." Held, that reading the devise to the son as it must be read in view of the rule that the law favors vested estates, as though phrased "subject to the life estates above created in favor of my wife and daughter, I give," etc., and treating the word "or" in said devise as used as the equivalent of "and," which use is plainly shown by the employment of the latter word for a like purpose in a subsequent devise of a remainder to the daughter, the attempted limitation over in case of his not surviving both his mother and sister was therefore not an alternative, but a substitutionary gift, and so void under the statute of perpetuities. *Cody v. Staples*, 67 Atl. 1, 80 Conn. 82.

The word "or" in wills may be changed to "and," but a devise to testator's named son "or his children" is a substitutional gift, and the word "or" will not be deemed to mean "and" in the absence of anything in the general scheme in the will or any single provision thereof requiring such construction. *Bender v. Bender*, 75 Atl. 859, 860, 861, 226 Pa. 607, 134 Am. St. Rep. 1088.

#### OR ELSEWHERE

A consent decree in Georgia in partition of described Georgia lands gave some of the heirs certain lands in settlement of claims against the estate "in Thomasville, Thomas county or elsewhere." Held, that the general term "or elsewhere" did not include Florida lands. *Atkinson v. Schilman*, 53 South. 844, 846, 60 Fla. 301.

A rule of a railroad providing for the precautions to be taken when an engine is placed upon a siding "or elsewhere" to stand has no application to a locomotive which the engineer has brought to a temporary stop on the main track. As the words "or elsewhere" must be construed to refer to things of the same kind as the word "siding," the words "or elsewhere" following the word "siding" are within the ejusdem generis doctrine. *Cleveland, C. & St. L. R. Co. v. Bergschicker*, 69 N. E. 1000, 1002, 162 Ind. 108.

The words "or elsewhere," in an ordinance which provides, among other things,

that "any person or persons who shall in any street, railroad depot, public place or elsewhere within the town of Boonton use obscene language," etc., construed to refer to places of the same character (that is, to places frequented by the public); and therefore a private yard abutting on a highway would not be included within its terms. *Peer v. Dixon*, 83 Atl. 180, 181, 82 N. J. Law, 366.

#### OR OTHER

See Other.

#### OR UNDER

Sixteen years of age or under, see Years of Age.

### ORAL DEFAMATION

See Slander.

### ORAL DEMURRER

A motion to strike a paragraph of the answer is an oral demurrer thereto. *Kelly v. Malone*, 63 S. E. 639, 5 Ga. App. 618.

### ORAL LEASE

A direction by one who had been occupying an apartment to the janitress, who was without authority to lease the same, not to let any one have the apartment during his absence, and a statement by him that when he came back he would sign the lease with the agent and that he wanted it for a year, did not constitute an "oral lease," and was no more than an agreement for a lease. *Columbia Bank v. Clarke*, 108 N. Y. Supp. 587.

### ORCHARD

Fruit trees planted in the line of a prospective highway, with the evident purpose of raising difficulties to the laying out of the highway, are not an "orchard" within the meaning of the highway law, which prohibits the laying out of a highway through an orchard of the growth of four years or more. *In re Fenn*, 136 N. Y. Supp. 262, 263, 151 App. Div. 797.

In an action under Code 1907, § 6037, for statutory penalty for destruction of fruit trees inclosed on premises, a general charge for defendant because there was no proof that the trees were removed from an inclosure was properly refused; it appearing that the trees were taken from a yard and orchard, which showed prima facie an inclosure; "orchard" being defined by Webster as meaning, among other things, "an inclosure containing fruit trees," etc. *Wright v. Sample*, 50 South. 268, 162 Ala. 222.

#### ORCHARD RUN

As used in a contract to sell prunes on trees, the contract reciting: "For prunes running orchard run (60 to the pound) when

dried, \$95 per ton (with variations of \$1.00 per point up or down). All prunes to be good merchantable quality. Test accepted at 53." the words in parentheses having been erased when the contract was executed, the words "orchard run" meant all the prunes in the orchard, without reference to size in grading. *Ross v. Frank*, 106 Pac. 1025, 13 Cal. App. 88.

### ORDAIN—ORDINATION

As used in Gen. Laws 1907, p. 406, c. 226, § 12, providing that a petition for a proposed ordinance, charter, or amendment to the charter of any city shall be filed with the city clerk, who shall transmit it to the next session of the council, which shall either ordain or reject the same, as proposed, within 30 days thereafter; but if rejected, or no action is taken thereon within that time, it shall be submitted to the voters, the word "ordain" is employed in the sense of "adopt" or "approve"; that is, the council may either approve or reject the proposed charter or ordinance, after which proceedings may be taken as therein directed, and hence the adoption of a proposed charter by resolution. Instead of by ordinance, was sufficient. *Haines v. City of Forest Grove*, 103 Pac. 775, 776, 54 Or. 443 (citing 6 Words and Phrases, p. 5016).

### ORDER

See Apparent Good Order; Fraternal Order; Good Order; Good Order and Condition; Proper Order; Proved Order; Running Order; Special Order; Stay Order; Stop Order; Taking Orders; Under the Order or Direction of; Under the Orders and Employment of. Any special order, see Any.

Where a bill of lading contains a provision and condition to the effect that, "if the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the bill of lading, properly indorsed, shall be required before delivery of the property at destination," and the words "order notify" appear before the name of the consignee thereon, such bill of lading requires notice to the consignee and production of the bill of lading before delivery. *F. L. Layton & Sons v. Charleston & W. C. Ry. Co.*, 72 S. E. 988, 989, 90 S. C. 323.

The word "order," as used in a bill of lading before the name of the consignee, required a proper indorsement by the consignee before delivery of the property could be legally made by the carrier at destination. *Ullmann v. Southern R. Co.*, 93 N. Y. Supp. 480, 481, 47 Misc. Rep. 107.

In a clause in the charter of a vessel then at Venice requiring the vessel to "sail 48 hours after orders are given," the word "orders" described the action of the char-



terer in directing the master's course after the vessel was loaded with the charterer's property, and did not refer to the time when she was required to sail from Venice after naming of the port of loading. *Rosasco v. Pitch Pine Lumber Co.*, 138 Fed. 25, 27, 70 C. C. A. 455.

#### Of civil authority

Where a policy of insurance on a hotel excepted risks "for loss caused directly or indirectly by invasion \* \* \* or riot or military or usurped power, or by order of any civil authority," and three persons for whose arrest warrants had been issued by a federal court took refuge in the hotel and resisted arrest, and exchanged shots with the marshal's posse, whereupon, the marshal burned it and arrested one of the three, it was held that, while the riot by the persons resisting arrest was the occasion of the hotel's loss by fire, the direct cause of the loss was the marshal's unauthorized act, and hence the insurer was not released from liability by the excepted risks of "riot" and "order of any civil authority." *American Cent. Ins. Co. v. Stearns Lumber Co.*, 140 S. W. 148, 145 Ky. 255, 36 L. R. A. (N. S.) 566, Ann. Cas. 1913B, 628.

#### As justice and public welfare may require

Const. art. 1, § 16, declares that property shall not be taken or damaged without compensation, and Laws 1903, p. 140, c. 92, § 4, authorizes the assessment of damages and benefits for land taken for public use, and authorizes the court to "make such order in the premises as justice and the public welfare may require." Held, that the authority to make such order in the premises as justice and the public welfare may require referred to the necessary assessment of damages and benefits, and did not confer authority on the city council to first modify a proposed replat, and then adopt it as modified. *Brazell v. City of Seattle*, 104 Pac. 155, 158, 55 Wash. 180.

#### Of municipal authorities

Under Rev. St. 1899, § 3028, requiring the legislative body of a city to "order," on application therefor, a local option election, an order for an election, duly passed by the council of the city at a proper meeting, is sufficient, and an ordinance or a formal resolution for an election is not necessary. An order for a local option election, under this statute, which authorizes an election at which only qualified voters shall vote, need not limit the right to vote to legal voters. The council of a city ordering a local option election need not formally set out on its record the fact that the notice of the election was given as ordered. *State v. Armstrong*, 127 S. W. 93, 94, 140 Mo. App. 719.

Election of a city solicitor by the Cambridge board of aldermen, as required by Rev. Laws, c. 26, § 7, is not an "ordinance" or "or-

der," within general rules and orders of the city council, providing that every ordinance and order requiring concurrent action shall remain with the clerk for 36 hours after passing one board. *Pevey v. Aylward*, 91 N. E. 315, 316, 205 Mass. 102.

Under a covenant in a lease requiring the lessee to make repairs on "order" of the municipal authorities, a notice from a health department, proved to be official and in customary form, though on a printed form, with a printed signature, is an "order." *Townsend v. Rosenblum*, 113 N. Y. Supp. 1029, 1031.

"An order," as used in a lease requiring the tenant to comply with all regulations and orders of all municipal departments of the city, was satisfied by the service of a notice by the city building department, which, after reciting the dangerous condition of the premises, declared, "You are therefore required to make the same safe," as authorized by Greater New York Charter (Laws 1901, p. 179, c. 466, § 407 et seq.). *Markham v. David Stevenson Brewing Co.*, 93 N. Y. Supp. 684, 688, 104 App. Div. 420.

Rev. St. 1898, § 1554, authorizes an order to be given by members of the city council forbidding the sale of liquor to spend-thrifts. Section 1558 provides for revocation of a liquor license for failure to observe "any order" of the aldermen made pursuant to law. Section 1549 requires a bond by a liquor dealer conditioned that he will "obey all orders of such \* \* \* aldermen or any of them made pursuant to law." Held, that an ordinance prescribing hours of closing and opening for saloons is an order within the meaning of section 1558, and that that section does not refer solely to the order specified in section 1554. *State ex rel. McKay v. Curtis*, 110 N. W. 189, 191, 130 Wis. 357.

#### Of master to servant

Where a foreman ordered a railway employé to go upon a bridge pier and remove woodwork therefrom, directing the specific manner in which the removal should be made, and the foreman, in an attempt to further the work, without warning the employé, pried down a timber, breaking off the footing upon which the employé stood, causing his injury, there was an "order," within Burns' Ann. St. 1901, § 7083, subd. 2, making corporations liable for injuries to employés from the negligence of persons in its service to whose order the employés are bound to and do conform. *Toledo, St. L. & W. R. Co. v. Pavey*, 79 N. E. 529, 530, 39 Ind. App. 284.

As used in Employers' Liability Act (Burns' Ann. St. 1901, § 7083, subd. 2), making an employer liable for injuries to its employé caused by the negligence of a person in its service to whose order or direction the injured employé was bound to and did conform, the words "order or direction" apply to special orders as distinguished from gen-

eral orders, and the protection of the statute does not extend to an employé injured from the negligence of the foreman while working under general directions. *Indianapolis St. Ry. Co. v. Kane*, 80 N. E. 841, 843, 169 Ind. 25.

#### **Of railroad commission**

The expression "order of the commission," as used in Act Aug. 23, 1907 (Laws 1907, p. 78) § 9, relating to the jurisdiction of the railroad commission, and providing that if any corporation within its jurisdiction shall do any act declared unlawful, or omit to do any act required to be done either by any law of Georgia, or by an order of the commission, it shall be liable to persons injured thereby, has reference to special orders of the commission, and not to its general rules. *Southern Bell Telephone & Telegraph Co. v. Beach*, 70 S. E. 137, 139, 8 Ga. App. 720.

#### **Ordinance distinguished**

See Ordinance.

#### **Warrant**

Under Sand. & H. Dig. Ark. § 5273, which provides that each city council shall cause to be provided for its clerk's office a seal, which seal shall be affixed to all transcripts, orders, or certificates which it may be necessary or proper to authenticate under the provisions of this act, a city warrant is not an "order." *Condon v. City of Eureka Springs*, 135 Fed. 566, 571.

#### **ORDER (In Commercial Law)**

See Attested Order; Mail Order; Money Order; Money Order Funds.

Warrant synonymous, see Warrant.

"An 'order' is in its principal elements the same whether it is for the payment of money or for the delivery of goods." *United States v. Green*, 136 Fed. 618, 649 (citing *Bish. St. Crimes*, p. 298, § 327).

The indorsement of a check payable to a real or fictitious person, other than accused, is equivalent to an "order for the payment of money," within Penal Code, § 470, enumerating the subjects of forgery. *People v. Jones*, 106 Pac. 724, 725, 12 Cal. App. 129.

#### **As rendering instrument negotiable**

The words "or order" are not essential to make a bill of lading quasi negotiable. *Forbes v. Boston & L. R. Co.*, 133 Mass. 154, 157.

#### **Particular instruments**

A written instrument in the following language: "Mr. Alex. Sapp Please let Jim have \$1.00 in trade and oblige, C. H. Rogers. \$1.00 P. S. Will pay Thursday"—is "an order for money or other property," within the meaning of the forgery statute. *Johnson v. State*, 36 South. 166, 47 Fla. 35.

#### **Sale distinguished**

A sale of personal property is a transmutation of property from one man to an-

other in consideration of some price or recompense in value, and so one having an agency to sell wine, which he was expected to deliver, is not entitled to a commission on the mere procuring of orders, the title of the wine not passing until an actual delivery; an "order" being only an executory agreement which cannot even be deemed a "sale" for the purpose of determining the number of sales made by the agent in a given time. *Hall v. French-American Wine Co.*, 134 N. Y. Supp. 158, 161, 149 App. Div. 609.

#### **ORDER (In Practice)**

See Final Order; Interlocutory Order; Lawful Order.

See, also, Final Decree or Judgment.

As expressly defined by Gen. Code Ohio. § 11582, an "order" is a direction of the court or judge made or rendered in writing, and not included in a judgment. *Mannington v. Hocking Val. Ry. Co.*, 183 Fed. 133, 141.

Under Rev. St. 1887, § 4880, an "order" is defined to be every direction of a court or judge made and entered in writing and not included in a judgment. *Dahlstrom v. Portland Min. Co.*, 85 Pac. 916, 917, 12 Idaho, 87.

Under Rev. St. 1899, § 4402, providing that, on the dismissal of an appeal from justice court for irregularity, the district court clerk shall certify the "order" of dismissal to the justice, under section 4247 defining a final order to be an order affecting a substantial right when it determines the action and prevents a judgment, and section 4249 providing that a final order of the district court may be reversed, etc., an order dismissing an appeal from a justice court must be made by the district court, and must appear upon its record, and no individual act of appellant, such as an entry on the docket, can operate as a dismissal of the appeal. *Mayott v. Knott*, 92 Pac. 240, 16 Wyo. 108.

The provision in Chicago Municipal Court Act (Hurd's Rev. St. 1909, c. 37) § 264, authorizing the chief justice to prescribe abbreviated forms of entries of "orders" by the court, extends to all orders, whether interlocutory or final. *City of Chicago v. Coleman*, 98 N. E. 521, 522, 254 Ill. 388.

The term "rule" or "order," which are synonymous, includes commands to lower courts or court officials to do ministerial acts. *Carter v. Louisiana Purchase Exposition Co.*, 102 S. W. 6, 9, 124 Mo. App. 530.

The error of a trial court in directing or refusing to direct a verdict is one of law reviewable by the Supreme Court on appeal as coming within "orders, rulings, or decisions," made in the action within Comp. Laws 1907, § 3304, authorizing the court on appeal from a judgment to review orders, rulings, and decisions in the action. *Law v. Smith*, 98 Pac. 300, 304, 34 Utah, 394.

An indorsement by a justice of the city court upon an "order" for the examination of a judgment debtor, reciting, "Proceedings dismissed upon objection made by judgment debtor," is itself an order within Code Civ. Proc. § 767, defining a written direction of a court or judge, not contained in a judgment, to be an order. *McAlpin v. Stoddard*, 105 N. Y. Supp. 9, 12, 54 Misc. Rep. 647.

Code 1896, § 1372, allows 30 cents for entering any "order" of court, and an item of a cost bill stated upon an execution was "orders of court, 30¢." Held, that it was obvious that the word "order" was intended, and the execution was not invalid on the ground that the bill of costs was not itemized as required by section 1883. *Simmons v. Sharpe*, 42 South. 441, 442, 148 Ala. 217.

The words "judgment" and "order," in Code, § 542, subhead 3, which provides that the Supreme Court may reverse, vacate, and modify a judgment of a district court for errors appearing on the record, and in reversing such judgment or "order" may reverse, vacate, or modify any immediate "order" involving the merits of the action or any part thereof, are used somewhat indiscriminately, so much so as to suggest that any specific independent part of a judgment is appealable. *Kremer v. Kremer*, 90 Pac. 908, 990, 76 Kan. 134.

Where a justice of the peace was clerk as well, an execution issued by him was "ordered by the court," within Gen. St. c. 38, art. 1, § 4, providing that, unless so ordered, no execution shall issue till 10 days after judgment rendered. *Guelot v. Pearce* (Ky.) 38 S. W. 892, 893.

A record stating "that the said indictment and proceedings are handed down to the quarter sessions, there to be proceeded with according to law," etc., is sufficient to give the quarter sessions jurisdiction; the words "handed down" and "ordered to be delivered" being convertible terms. *Engeman v. State*, 23 Atl. 676, 678, 54 N. J. Law, 247.

An order of approval of an account and discharge of a guardian is "an order or judgment," within Rev. St. 1895, art. 2799, providing that any person interested in a guardianship may by a bill of review have any order or judgment corrected on showing error therein. *Nicholson v. Nicholson* (Tex.) 125 S. W. 965, 967.

#### **As judgment or decree**

See Decree; Judgment.

#### **As notice**

See Notice.

#### **Order after judgment**

An order of the trial court quashing an execution is an "order on a summary application in an action after judgment," and is appealable. *Barnett v. Bohannon*, 112 Pac. 887, 988, 27 Okl. 363.

An order setting aside a default before entry of judgment thereon is not appealable; it not being an "order after judgment" or an "interlocutory order," within Code Civ. Proc. § 963, making appealable interlocutory orders entered in actions to redeem mortgaged property or in partition suits, etc. *Savage v. Smith*, 97 Pac. 821, 822, 154 Cal. 325.

#### **Order against sale or conveyance**

An order of the superior court, annulling and setting aside a former order confirming the sale of realty belonging to a decedent's estate, is an order "against directing a sale or conveyance" within Code Civ. Proc. § 963, subd. 3, so as to be appealable to the Supreme Court. In *re West's Estate*, 122 Pac. 953, 954, 162 Cal. 352.

An order of the probate court discharging an order upon the executrix to show cause why the homestead devised by the will of the testate should not be sold to pay debts of the estate is an "order refusing to direct the sale of real estate," within the meaning of subdivision 3, § 4665, Gen. St. 1894, and such order can be reviewed by appeal only, and not upon certiorari. In *re Wilson's Estate*, 97 N. W. 647, 648, 91 Minn. 115.

#### **As proceeding**

See Proceeding.

#### **Ruling on demurrer**

A decision overruling a demurrer to an amended complaint, with leave to defendants to answer, was not a judgment of itself, but an "order" which was subject to vacation for cause under Code Civ. Proc. § 473, providing that the court may relieve a party from a mistake in an order made during the progress of the proceedings during the term in the furtherance of justice. *Dent v. Superior Court of Los Angeles County*, 95 Pac. 672, 673, 7 Cal. App. 683.

Under Pen. Code, § 1008, providing that, if a demurrer is allowed, the judgment is final on the indictment or information, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection may be avoided in a new indictment or information, directs the case to be resubmitted or directs a new information to be filed, provided that, after such order, the defendant may be examined before a magistrate, and discharged or committed by him as in other cases, and section 1009 providing that if the court does not permit the information to be amended, nor direct that a new information be filed, the defendant must be discharged, the court's minutes reciting that, the demurrer to the information having been argued and submitted, the court expressed the opinion that the demurrer should be sustained, but that the defect in the information might be corrected by a new information, did not constitute an order within section 1008, authorizing proceedings de novo and a new information against the

accused. *Ex parte Hayter*, 116 Pac. 370, 372, 16 Cal. App. 211.

**As written instrument**

See Written Instrument.

**ORDER AFFECTING SUBSTANTIAL RIGHT**

See Substantial Right.

**ORDER GRANTING OR CONTINUING INJUNCTION**

An order overruling a motion to dissolve or modify an injunction previously granted is not one continuing the injunction within the meaning of the statute, and is not appealable. *Lewis v. Hitchman Coal & Coke Co.*, 176 Fed. 549, 550, 100 C. C. A. 137.

A preliminary restraining order requiring the defendants to show cause why it should not be made permanent, is an "order granting an injunction" within the statute. *Taylor v. Breese*, 163 Fed. 678, 683, 90 C. C. A. 558. And so is an interlocutory decree in a suit for infringement of a patent which adjudges the patent valid and infringed, awards an injunction, and directs an accounting. *Highland Glass Co. v. Schmertz Wire Glass Co.*, 178 Fed. 944, 970, 102 C. C. A. 316.

**ORDER GRANTING OR REFUSING ALIMONY**

An order adjudging or refusing to adjudge a share of the husband's property to the wife, where a divorce is granted to the husband by reason of the aggression of the wife, under Rev. St. § 5700, is an "order granting or refusing alimony," within Rev. St. 1908, § 5706, and either party may appeal. *Flesler v. Flesler*, 93 N. E. 899, 900, 83 Ohio St. 200.

**ORDER OF COURT**

See By Order of Court.

As law, see Law.

See, also, Judgment; Order (In Practice).

The expression "orders of court" has been treated as covering not only orders of the courts in session, but orders of the absent judges. *United States v. McCabe*, 129 Fed. 708, 711, 64 C. C. A. 236.

**ORDER OF DEPORTATION**

The requirement of Chinese Exclusion Act May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7, that an order of deportation be executed by the marshal, and that the person to be deported shall not be admitted to bail, refers to the final order of deportation, and does not prohibit bail pending an appeal. *United States v. Yee Yet*, 192 Fed. 577, 579.

**ORDER OF INTERSTATE COMMERCE COMMISSION**

The Commerce Court has jurisdiction of a suit to annul an "order" of the Interstate Commerce Commission which either awards or denies reparation to a complainant under

Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590. A petition by a carrier to the Interstate Commerce Commission for leave to refund to a shipper a portion of a freight charge paid which it admits to have been excessive is not the equivalent of a complaint for reparation by the shipper under Interstate Commerce Act Feb. 4, 1887, c. 104, § 13, 24 Stat. 383, and a denial of the petition by the Commission for want of jurisdiction, because under its construction of the statute the claim of the shipper was barred by limitation, does not constitute an order adverse to the shipper which can be made the basis of a suit by him for relief in the Commerce Court. *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667, 669 (per Archbald, Judge, solus).

Act Cong. June 18, 1910, c. 309, 36 Stat. 539, confers on the Commerce Court jurisdiction previously possessed by the Circuit Courts of the United States of cases brought to enjoin, set aside, annul, or suspend any "order" of the Interstate Commerce Commission, also authorizing the Commerce Court to exercise any and all powers of the Circuit Court of the United States so far as may be appropriate to the effective exercise of the jurisdiction conferred, and that nothing contained in the act shall be construed as enlarging the jurisdiction previously possessed by the courts thereby transferred to and vested in the Commerce Court; the jurisdiction so far as conferred, however, being exclusive, and so far as not conferred being reserved. Held, that since capacity to sue in the Commerce Court depends on the general equity practice in force in the Circuit Courts, and prior to the creation of the Commerce Court a shipper claiming to be injured by a ruling of the Interstate Commerce Commission refusing to annul a private car demurrage rule could have sued in the Circuit Court to set aside the commission's ruling, such ruling, though granting no affirmative relief, should be construed as an "order" of the commission which the Commerce Court had jurisdiction to review on petition of the person conceiving himself injured thereby. *Procter & Gamble Co. v. United States*, 188 Fed. 221, 224.

**ORDER OF PUBLICATION**

As process, see Process.

**ORDER TO SHOW CAUSE**

An "order to show cause" is but a means prescribed by law in the nature of a process to bring a defendant into court to answer plaintiff's demands. *Morehouse v. Pacific Hardware & Steel Co.*, 177 Fed. 337, 339, 100 C. C. A. 647.

An "order to show cause" is an order requiring a party to appear and show cause why a certain thing should not be done or permitted. *Spaeth v. Sells*, 176 Fed. 797, 799.

**ORDERLY HOUSE**

See, also, Disorderly House.

An "orderly house," or place for the sale of liquors, within the condition of a bond providing that a liquor dealer shall maintain such a place, is one in which no music, loud or boisterous talking, yelling, or indecent, vulgar language is allowed, used, or practiced, or any other noise calculated to disturb or annoy any person residing or doing business in that vicinity. *Adams v. State (Tex.)* 146 S. W. 1088, 1088.

**ORDINANCE**

See Criminal Ordinance; Fixed by Ordinance; Necessary Police Ordinances; Permanent Ordinance; Prescribed by Law or Ordinance; Prior Ordinance. Any proposed ordinance, see Any. Vacation ordinance, see Vacation.

The term "ordinance," as used in speaking of the legislation of the constitutional convention, means a law which is essential to carry into effect the objects for which the convention was created, and, when once adopted by the convention, such ordinance has the force and effect of law. *Smith v. State ex rel. Hepburn*, 113 Pac. 932, 935, 28 Okl. 235 (quoting and adopting the definition in *Frantz v. Autry*, 91 Pac. 193, 18 Okl. 561); *Frantz v. Autry*, 91 Pac. 193, 213, 18 Okl. 561.

"An 'ordinance' of a municipal corporation is a local law, and binds persons within the jurisdiction of the corporation." *Pittsburgh, C. & St. L. Ry. Co. v. Lighthouse*, 71 N. E. 218, 221, 163 Ind. 247 (citing *Baltimore & O. S. W. R. Co. v. Peterson*, 59 N. E. 1044, 156 Ind. 364; *Pennsylvania Co. v. Stegemeier*, 20 N. E. 843, 118 Ind. 305, 10 Am. St. Rep. 136).

"Ordinance" as a term of municipal law, is the equivalent of legislative action, and in a statute carries with it by implication the usual incidents of such action. *Stemmler v. Borough of Madison*, 83 Atl. 85, 82 N. J. Law, 596, Ann. Cas. 1913D, 767.

An "ordinance" is a local law prescribing a general and permanent rule. "A city council is a miniature general assembly, and their authorized ordinances have the force of laws passed by the Legislature." *Kersey v. City of Terre Haute*, 68 N. E. 1027, 1029, 161 Ind. 471 (citing *Citizens' Gas & Min. Co. v. Town of Elwood*, 114 Ind. 332, 16 N. E. 624, and quoting *Taylor v. City of Carondel-et*, 22 Mo. 105).

A municipal ordinance is a local law, affecting the property, rights, and liberty of citizens, who are entitled to know at what time and under what circumstances it acquires that status. *Mayor and Board of Trustees of Town of New Iberia v. Moss Hotel Co.*, 36 South. 552, 553, 112 La. 525.

A "municipal ordinance" is a law of local application, and a violation of the ordinance is an offense against the city enacting the ordinance. The ordinance is penal in its nature; otherwise the offender could not be arrested and taken in custody for its violation. An infraction of the ordinance is termed a petty offense and constitutes a crime, in the broad meaning of that word. *Pearson v. Wimblish*, 52 S. E. 751, 755, 124 Ga. 701, 4 Ann. Cas. 501 (citing *McRae v. Mayor, etc., of City of Americus*, 59 Ga. 170, 27 Am. Rep. 390).

"An 'ordinance regulating a street' is a legislative act, entirely beyond the judicial power of the state." *Indiana R. Co. v. Calvert*, 80 N. E. 961, 964, 168 Ind. 321, 10 L. R. A. (N. S.) 780, 11 Ann. Cas. 635 (quoting and adopting the definition in *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222; *Indianapolis & C. R. Co. v. State ex rel. City of Lawrenceburg*, 37 Ind. 489).

"Police ordinances" are at once family rules on a large scale and state laws on a small scale. \* \* \* In a city, we think, a man may fight in a way to violate an ordinance without being guilty of an assault and battery." *Porter v. State*, 52 S. E. 283, 288, 124 Ga. 297, 2 L. R. A. (N. S.) 730 (quoting and adopting definition in *McRae v. Mayor, etc., of City of Americus*, 59 Ga. 168, 27 Am. Rep. 390).

**Writing essential**

Since an ordinance must be reduced to writing before it can be acted on by the city council, it means something more than a verbal motion subsequently reduced to writing by the clerk or secretary of the council, and hence a recital in the minutes of a city council that a certain councilman presented a petition from P. asking permission to erect a fence around a portion of the property on which a new building was to be erected, including a portion of a street and alley with a recommendation of the board of fire commissioners that the request be granted, and that on motion the request was granted, did not constitute an ordinance and was insufficient to grant the authority prayed; especially under *Austin City Charter (Sp. Laws 1909, c. 2, art. 11) § 15*, providing that an ordinance shall be complete in the form in which it is finally passed, and be filed with the clerk of the city council before action shall be taken thereon. *American Const. Co. v. Seelig*, 133 S. W. 429, 431, 104 Tex. 16.

"Ordinance," as used in *Indiana Act 1899, p. 343, c. 154, § 25*, providing that no board of county commissioners, officers, agent, or employé of any county shall have power to bind the county by any contract or agreement or in any other way to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the occupation, etc., means

an instrument in writing, something more and additional to a verbal motion subsequently reduced to writing by a clerk or subordinate of the local board, so that such acts required to be done by ordinance cannot be validly done by order, resolution, or notice. *State ex rel. Davis v. Board of Commissioners of Newton County*, 74 N. E. 1091, 1093, 165 Ind. 262, 6 Ann. Cas. 468.

#### **As contract**

See Contract.

#### **As permanent rule**

An ordinance amending an ordinance passed by an incorporated town of the Indian Territory granting to a corporation a franchise to furnish said town with light and heat by means of natural gas, and extending the time set in the ordinance amended for furnishing the same, is an "ordinance of general and permanent nature" within *Mansf. Dig. Ark. § 924* (*Ind. T. Ann. St. 1899, § 694*), providing that, when an ordinance of such a nature is advanced from the first to the third reading on the same day, two-thirds of the members of the council must vote in favor thereof. *Town of Sapulpa v. Sapulpa Oil & Gas Co.*, 97 Pac. 1007, 1010, 22 Okl. 347.

#### **By-laws, rules, and regulations synonymous**

The words "ordinances," "rules," "regulations," and "by-laws" are synonymous terms. *State ex rel. Krebs v. Hootor*, 120 N. W. 199, 200, 83 Neb. 690 (citing 6 Words and Phrases, p. 5025).

Within a city charter authorizing the board of commissioners by "ordinance" to levy an additional tax, a mere order or resolution of ratification and affirmation, modifying in part a prior ordinance levying an additional tax and in all other respects confirming it, was a valid exercise of the powers of the commissioners. *Johnston v. City of Huntington*, 76 S. E. 142, 144, 71 W. Va. 106.

#### **Law distinguished**

Law as including ordinance, see Law.

As law of the state, see Law of the State.

A "municipal ordinance" is not regarded in the light of a public law of which the courts should take judicial notice. *Stott v. City of Chicago*, 68 N. E. 736, 739, 205 Ill. 281.

"A city ordinance" is not a law of the same character as a statute. It is merely a regulation; a rule of conduct passed by the common council for the direction and supervision of its citizens. *People v. Gardner*, 106 N. W. 541, 545, 143 Mich. 104.

#### **As liability**

See Liability.

#### **Order distinguished**

Though the words "regulation or order" and "ordinance and resolution," as found

in the California statutes, may often be used to express the same meaning, it does not necessarily follow that in all cases the word "order" is synonymous with "ordinance." *apd*, under the Consolidation Act April 25, 1863 (*St. Cal. 1863, p. 540, c. 352*), which authorizes the board of supervisors of the city and county of San Francisco to proceed under the police power by "regulation or order," a contract for the disposition of garbage may be made by "order," and the mayor's signature is not essential to its validity. *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 29, 40, 61 C. C. A. 91.

#### **As private act**

See Private Act.

#### **Resolution included**

The term "ordinance" or "resolutions," as used in Nev. Codes 1905, § 2658, giving the mayor of the city power to sign or veto any ordinance or resolution, was intended to include, not only ordinances as such, but also resolutions of a legislative character, which therefore are similar to ordinances in this respect. *State v. Duis*, 116 N. W. 751, 753, 17 N. D. 319.

An "ordinance" is also a resolution, and the two are equivalent. Hence an ordinance authorizing a street improvement passed only 19 days after the resolution of intention had been passed is premature and void under the *Vrooman Act* (*St. 1855, p. 147, c. 153*), though not signed by the mayor until two days after its enactment. *Mulberry v. O'Dea*, 88 Pac. 367, 368, 4 Cal. App. 385 (citing *City of Los Angeles v. Waldron*, 3 Pac. 890, 65 Cal. 283; *Hellman v. Shoultera*, 44 Pac. 915, 45 Pac. 1057, 114 Cal. 157).

Under *Barre City Charter* (Acts 1894, No. 165) §§ 5, 53, 55, vesting the administration of municipal affairs in the mayor and board of aldermen, and empowering the council to make "ordinances," regulations, and by-laws to provide a supply of water, etc., a grant of a privilege to an individual to install a system of pipes through the streets of the city, to convey water to the inhabitants thereof, may be by resolution of the board of aldermen, approved by the mayor, and need not be by ordinance which, strictly speaking, is an expression of the municipal will affecting the conduct of the inhabitants generally or of a number of them under some general designation. *City of Barre v. Perry & Scribner*, 73 Atl. 574, 82 Vt. 301.

There is a plain distinction between the functions of an "ordinance" and a simple "resolution" not adopted as an ordinance. An "ordinance" is a mode of expressing the legislative acts of a municipal corporation, and a resolution is an order of temporary character and of a ministerial nature. *Pensacola v. Southern Bell Telephone Co.*, 37

South. 820, 824, 49 Fla. 161 (citing *City of Jacksonville v. Ledwith*, 7 South. 885, 26 Fla. 163, 9 L. R. A. 69, 23 Am. St. Rep. 558).

#### As statute

See Statute.

#### Election of city officer

Election of a city solicitor by the Cambridge board of aldermen, as required by Rev. Laws, c. 26, § 7, is not an "ordinance" or "order," within general rules and orders of the city council, providing that every ordinance and order requiring concurrent action shall remain with the clerk for 36 hours after passing one board. *Pevey v. Aylward*, 91 N. E. 315, 316, 205 Mass. 102.

#### Grant of land

The word "ordinance," in its usual primary sense, means a local law, a rule of conduct prospective in its operation, and applying generally to the persons and things subject to the local jurisdiction. It does not, in its ordinary use or signification, include a grant of lands. *Southern Pac. Co. v. Western Pac. R. Co.*, 144 Fed. 160, 181.

#### Warrant

Under Sand. & H. Dig. Ark. § 5273, which provides that "each city council shall cause to be provided for its clerk's office a seal, which seal shall be affixed to all transcripts, orders, or certificates which it may be necessary or proper to authenticate under the provisions of this act or of any by-law or ordinance of the city," a city warrant is not an "ordinance." *Condon v. City of Eureka Springs*, 135 Fed. 566, 571.

### ORDINARY (ADJ.)

"Ordinary" means methodical, regular, according to established order, common, usual, often recurring. *City of Long Beach v. Boynton*, 119 Pac. 677, 679, 17 Cal. App. 290. See, also, *Fritz v. Western Union Tel. Co.*, 71 Pac. 209, 213, 25 Utah, 263.

In prosecutions for homicide, in charging as to the presumption that persons intend the ordinary results of their acts, the words "necessary," "probable," "usual," and "ordinary" are substantially synonymous. *Beauregard v. State*, 131 N. W. 347, 351, 146 Wis. 280.

Where a reservation in a timber deed provided that the vendors should have the right to use such timber from the land as might be necessary for ordinary plantation purposes connected with the land, not including the right to clear any of the land, the grantors or those claiming under them were entitled to use the timber for every other ordinary plantation purpose, than clearing any part of the land, etc., construing the word "ordinary" in its usual acceptation as "common," "usual," "common occurrence," "usual practice," and the word "plantation" as a cultivated estate, a large farm for rais-

ing the different products of agriculture. *Midland Timber Co. v. Pegues*, 76 S. E. 32, 34, 93 S. C. 82.

### ORDINARY ACTION

Rev. St. 1874, c. 68, § 11, providing that notice of proceedings by an abandoned spouse to sell the property of the delinquent spouse for family support shall be given "as in ordinary actions," and that anything done under "the order or decree of the court" shall be valid, as if done by the party owning the property, authorizes service by publication as in chancery, notwithstanding the use of the word "action"; that word in a comprehensive sense being synonymous with "suit," and being used interchangeably therewith to mean any legal proceeding in a court for the enforcement of a right, so that the words "ordinary actions" did not contemplate personal service as in a strictly legal action. *Brand v. Brand*, 96 N. E. 918, 920, 252 Ill. 134.

### ORDINARY APPLIANCES

An instruction that, if the jury believe from the evidence that defendant's locomotive was running at such rapid rate of speed that it would have been impossible, by the use of ordinary means and appliances, to stop the locomotive and prevent the injury to the stock within the distance in which stock upon the tracks could be seen by the aid of the headlight, then the defendant was guilty of negligence is not erroneous for the reason that, if the locomotive in question was equipped with some extraordinary appliance by which it could be stopped within the distance to which the headlight throws the light, it would not be within the rule, since the expression "ordinary means and appliances" refers to the ordinary or customary means and appliances at the command of that particular train or locomotive. *Louisville & N. R. Co. v. Christian Moerlein Brewing Co.*, 43 South. 723, 726, 150 Ala. 390.

### ORDINARY BAGGAGE

See, also, Ordinary Luggage.

The word "baggage" has been well defined to mean such articles of necessity, or personal convenience, as are usually carried by passengers for their personal use, and not merchandise or other valuables, though carried in the trunks of passengers, not destined for such use, but for other purposes, as for sale, and the like. The addition of the word "ordinary," in the statute regulating the carrier's charges for transporting passengers with "ordinary baggage," does not limit the word "baggage" to wearing apparel and other articles ordinarily carried by a common traveler, but is used merely to recognize the well-established meaning of the word "baggage" as distinguished from "merchandise." *Doerner v. St. Louis & S. F. R. Co.*, 130 S. W. 62, 63, 149 Mo. App. 170.

"Ordinary baggage" is, in general, such articles of necessity and convenience as are usually carried by passengers for personal use and comfort, or protection. The property must have the characteristics of personal effects, and be carried for the passenger's use. Manifestly this excludes merchandise, and, by weight of authority, it excludes all property carried for trade purposes, or designed and intended to be used in connection with such purposes. Thus, samples carried by a passenger in his trunk to be used in making sales of goods are not baggage, and it is immaterial that they are necessary to the object of the passenger's journey. And there is no principle on which to distinguish between a case involving samples of the goods to be sold and one involving models or photographs intended to represent the goods to be sold. So under Code, § 2077, requiring a carrier to accept and carry the ordinary baggage of a passenger, a carrier is not liable for delay in the delivery of a sample case checked by a passenger as baggage and containing photographs of articles of furniture which the passenger was engaged in selling as a commercial traveler. *McElroy v. Iowa Cent. Ry. Co.*, 110 N. W. 915, 916, 133 Iowa, 544.

#### ORDINARY BUSINESS

By the "ordinary business of a municipal corporation," which under Code, § 4359, cannot be stopped by temporary injunction, is meant simply those matters which come within the exercise of those powers and functions conferred upon it by law which are beneficially incident to its existence and operation as a corporation. It does not extend to those matters where the city acts merely by appointment from the state, and in respect of which the beneficial interest is in the public at large. *Wingert v. Snouffer & Ford*, 108 N. W. 1035, 1037, 134 Iowa, 97.

#### ORDINARY CALLING

Things repeated daily or weekly in the course of trade or business are parts of the "ordinary calling" of a man exercising such trade or business. *Ellis v. State*, 63 S. E. 588, 589, 5 Ga. App. 615.

#### ORDINARY CARE

See Reasonable and Ordinary Care; Usual and Ordinary Care; Want of Ordinary Care.

See, also, Ordinary Diligence; Ordinary Negligence.

"Ordinary care" is that kind of care, in the particulars specified, as other persons similarly situated exercise under like circumstances, and nothing more. *City of Mankato v. Barber Asphalt Paving Co.*, 142 Fed. 329, 246, 73 C. C. A. 439.

"Ordinary care" is that measure of prudence universally exacted in all the lawful relations of life, except where, from other considerations, a higher degree of caution, is

enjoined. *Sullivan-Sanford Lumber Co. v. Watson (Tex.)* 135 S. W. 635, 639.

The mere exercise of one's best judgment is not necessarily ordinary care. Men of average prudence sometimes arrive at erroneous conclusions from a heedless or careless consideration of the subject before them, or from want of ordinary care in other respects. *Carney v. Concord St. Ry.*, 57 Atl. 218, 222, 72 N. H. 364.

Instructions defining "ordinary care" as such care as a prudent man of the requisite skill will take under the circumstances of the particular case, or such as ordinarily prudent men exercise in matters affecting their own interests, erroneously fix the standard of such care. *Reffke v. Patten Paper Co.*, 117 N. W. 1004, 1005, 136 Wis. 535.

An instruction which, in attempting to define "ordinary care," makes the jurors the standard of what is a prudent person is erroneous. *Mayor, etc., of City of Americus v. Johnson*, 58 S. E. 518-520, 2 Ga. App. 378.

#### As care exercised by one accustomed or skilled

"Ordinary care," as applied to railway employes and agents, is that degree of care which railway employé and agents of ordinary skill and prudence observe under similar circumstances. *Louisville, H. & St. L. R. Co. v. Keesee (Ky.)* 103 S. W. 261, 264.

"Ordinary care" and skill on the part of a physician and surgeon is that degree of care and skill usually exercised and possessed by physicians and surgeons of ordinary care and skill in similar communities. *Dorris v. Warford*, 100 S. W. 312, 313, 124 Ky. 768, 9 L. R. A. (N. S.) 1090, 14 Ann. Cas. 602.

As used in an instruction defining "ordinary care" as that degree of care which ordinarily prudent and skillful men usually exercise under the circumstances in occupations similar to those proven in the particular case, the word "skillful" does not add a new, distinct, or different standard, but only requires what should be required of ordinary men in the business in which they are engaged. It is better to give the ordinary definition. The instruction is only technically erroneous, if at all. *Southern R. Co. in Kentucky v. Otis' Adm'r (Ky.)* 78 S. W. 490, 481.

#### As care exercised in person's own affairs

"Ordinary care" is that degree of care which a person of ordinary prudence would take of the property under the same circumstances if it were his own. *Bigger v. Acree*, 112 S. W. 879, 87 Ark. 318, 23 L. R. A. (N. S.) 187.

"Ordinary care" is that care which men of common prudence generally exercise about their own affairs in the age and country in which they live. *Lyman v. Southern R. Co.* 44 S. E. 550, 551, 132 N. C. 721 (quoting and



adopting definition in *Neal v. Wilmington & W. R. Co.*, 53 N. C. 482).

"Ordinary care" is such care as it is to be assumed that an ordinarily prudent man would exercise in the circumstances were the risk his own. *Lake Erie & W. Ry. Co. v. Ford*, 78 N. E. 969, 972, 167 Ind. 205.

The words "ordinary care," as used in an instruction in an action for the wrongful death of an employé, mean such care as an ordinarily prudent man would use in matters involving his own interest under circumstances similar to those under investigation. *Illinois Cent. R. Co. v. Cane's Adm'r (Ky.)* 90 S. W. 1061, 1064.

"Ordinary care" is such care as ordinarily prudent men, as a class, would exercise in caring for their own property under the like circumstances. *Fraam v. Grand Rapids & I. Ry. Co.*, 126 N. W. 851, 853, 161 Mich. 556, 29 L. R. A. (N. S.) 834, 21 Ann. Cas. 96.

"Ordinary care" is such care as an ordinarily prudent person would use for his own safety under like conditions and similar circumstances. *Louisville & N. R. Co. v. Ueltschi's Ex'rs (Ky.)* 97 S. W. 14, 16.

The term "ordinary care" contemplates that degree of care that an ordinarily prudent person would use in the transaction of his own business under like or similar circumstances. *Guitar v. Randel (Tex.)* 147 S. W. 642, 647.

"Ordinary care" is such care as ordinarily careful and prudent persons are accustomed to use in their own affairs. *Nashville, C. & St. L. R. Co. v. Russell*, 110 S. W. 317, 319, 129 Ky. 14.

Rev. Codes 1905, § 6694, defines "ordinary care" as such care as persons of ordinary prudence usually exercise about their own affairs of ordinary importance. *Reinke v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 135 N. W. 779, 782, 23 N. D. 182; *McBride v. Wallace*, 117 N. W. 857, 858, 17 N. D. 495 (citing Rev. Codes 1905, §§ 5472, 6694; 3 Current Law, 162, note 68).

#### **As care of generality or majority of people**

"Ordinary care" is such care as the great mass of mankind would ordinarily use in the same or similar circumstances. *Palmer v. Schulz*, 120 N. W. 349, 352, 138 Wis. 455 (citing *Nass v. Schulz*, 81 N. W. 133, 105 Wis. 146, 150; *Duthie v. Town of Washburn*, 58 N. W. 380, 87 Wis. 231, 233; *Hennessey v. Chicago & N. W. Ry. Co.*, 74 N. W. 554, 99 Wis. 110; *Ward v. Milwaukee & St. P. Ry. Co.*, 29 Wis. 144; *Stafford v. Chippewa Valley Electric R. Co.*, 85 N. W. 1036, 110 Wis. 331, 354; *Dehsoy v. Milwaukee Electric Ry. & Light Co.*, 85 N. W. 973, 110 Wis. 412; *Schrunk v. St. Joseph*, 97 N. W. 946, 120 Wis. 223).

"Ordinary care," in the abstract, is such care as the great mass of mankind ordinarily exercise, and, as applied to any particular case, it is such care as the great mass of mankind ordinarily exercise under the same or similar circumstances. *Sufferling v. Heyl & Patterson*, 121 N. W. 252, 254, 139 Wis. 510.

"Ordinary care" \* \* \* is such degree of care and prudence as ordinarily careful and prudent persons, or as the great mass of mankind (that is, the majority of persons), would exercise under the same circumstances." *Banderob v. Wisconsin Cent. Ry. Co.*, 113 N. W. 738, 743, 133 Wis. 249.

"Ordinary care" is that degree of care "which the great mass of mankind, or the type of that mass, the ordinarily prudent man, exercises under like circumstances." *Pumorio v. City of Merrill*, 103 N. W. 464, 466, 125 Wis. 102 (quoting and adopting definition in *Dehsoy v. Milwaukee Electric Ry. & Light Co.*, 85 N. W. 973, 110 Wis. 412).

In an action for injuries to an employé, an instruction that "ordinary care" in such a case is such care as the great mass of mankind would have exercised under the same circumstances was held sufficient, without the addition of the words "engaged in a similar employment." *Johnson v. St. Paul & W. Coal Co.*, 105 N. W. 1048, 1052, 126 Wis. 492.

An instruction that "ordinary care" was such care as the great majority of mankind would and do exercise in the transactions of human life under like conditions and circumstances was not erroneous because of the use of the expression "under like circumstances"; this being the equivalent of "under the same or similar circumstances," which is the proper standard. *Warden v. Miller*, 87 N. W. 828, 830, 112 Wis. 67.

"Ordinary care" is the care ordinarily exercised by the great mass of mankind or the ordinarily prudent person under the same or similar circumstances, and an instruction defining this term, which omits the qualification "under the same or similar circumstances" or "under like circumstances," is erroneous. *Yerkes v. Northern Pac. R. Co.*, 88 N. W. 34, 36, 112 Wis. 184, 88 Am. St. Rep. 961; *Boelter v. Ross Lumber Co.*, 79 N. W. 243, 245, 103 Wis. 324 (citing *Duthie v. Town of Washburn*, 58 N. W. 380, 87 Wis. 233; *Hennessey v. Chicago & N. W. R. Co.*, 74 N. W. 554, 99 Wis. 110, 118).

An instruction that the jury might find "proximate causation" between the negligence of a street car conductor and plaintiff's injury if the injury might reasonably have been expected by the conductor in the exercise of "ordinary care" as a man of intelligence having the knowledge that might be reasonably expected and ought to have been had in doing such work, if not actually erroneous, would have been more nearly accurate if it had been limited to what might

have been expected by a man of "ordinary intelligence"; the standard of comparison being the conduct or foresight of ordinarily, prudent, careful, and intelligent persons, and the omission of the qualifying expression conveying the idea of something higher than the ordinary. *Dehsoy v. Milwaukee Electric Ry. & Light Co.*, 85 N. W. 973, 974, 110 Wis. 412.

"Actionable negligence" is the absence of ordinary care, and "ordinary care" is that care which is exercised by the great mass of mankind. If the defendant's conduct does not measure up to this standard, it is negligent, whether it falls much or little below the standard. *Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347, 361, 173 Mich. 57.

**As care observed by person of common or average prudence**

"Ordinary care," required of a boarding house keeper in caring for the property of guests, is the average common prudence, or such care as a prudent person would ordinarily exercise in caring for his own property. *Herter v. Dwyer*, 129 N. Y. Supp. 505, 507.

The "ordinary care" required of travelers upon highways is such care as persons of common prudence generally exercise. *Farrar v. Inhabitants of Greene*, 32 Me. 574.

**As care of ordinarily prudent person**

"Ordinary care" is such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances. *Everett v. St. Louis & S. F. R. Co.*, 112 S. W. 486, 497, 214 Mo. 54; *Skonieczny v. Churchman (Del.)* 78 Atl. 634, 635, 7 Pennewill, 226; *Felver v. Central Electric R. Co.*, 115 S. W. 980, 983, 216 Mo. 195; *Benson v. City of Spokane*, 80 Pac. 1106, 1107, 39 Wash. 101; *Galveston, H. & N. R. Co. v. Olds (Tex.)* 112 S. W. 787, 792; *Gulf, C. & S. F. R. Co. v. Hays*, 89 S. W. 29, 32, 40 Tex. Civ. App. 162; *Nephler v. Woodward*, 98 S. W. 488, 490, 200 Mo. 179; *International & G. N. R. Co. v. Tasby*, 100 S. W. 1030, 1031, 45 Tex. Civ. App. 416; *Jackson v. Sumpter Valley Ry. Co.*, 93 Pac. 356, 360, 50 Or. 455; *Chrismer v. Bell Tel. Co.*, 92 S. W. 378, 383, 194 Mo. 189, 6 L. R. A. (N. S.) 492; *Louisville, H. & St. L. R. Co. v. Stillwell*, 134 S. W. 202, 204, 142 Ky. 330; *Reynolds v. Galveston, H. & S. A. R. Co. (Tex.)* 99 S. W. 569, 570; *Rapid Transit R. Co. v. Miller (Tex.)* 85 S. W. 439; *Chesapeake & O. R. Co. v. Wilson's Adm'r (Ky.)* 102 S. W. 810, 812; *Wellmeyer v. St. Louis Transit Co.*, 95 S. W. 925, 928, 198 Mo. 527; *Heberling v. City of Warrensburg*, 103 S. W. 36, 39, 204 Mo. 604 (quoting and adopting definition in *Cohn v. City of Kansas*, 18 S. W. 973, 108 Mo. 392); *Adkisson's Adm'r v. Louisville, H. & St. L. R. Co. (Ky.)* 110 S. W. 284, 286; *Cross v. Illinois Cent. R. Co. (Ky.)* 110 S. W. 290, 292; *Gilliam v. Texas & P. R. Co.*, 38 South. 166, 168, 114 La. 272 (citing *Little Rock &*

*M. Ry. Co. v. Wilson*, 16 S. W. 613, 90 Tenn. 271, 13 L. R. A. 364, 25 Am. St. Rep. 693); *Reyburn v. Missouri Pac. R. Co.*, 86 S. W. 174, 176, 187 Mo. 565; *Murray v. St. Louis Transit Co.*, 75 S. W. 611, 612, 176 Mo. 183; *Moore v. Lindell Ry. Co.*, 75 S. W. 672, 674, 176 Mo. 528; *Houston & T. C. R. Co. v. Johnson*, 127 S. W. 539, 541, 103 Tex. 320; *Kolb v. St. Louis Transit Co.*, 76 S. W. 1050, 1052, 102 Mo. App. 143; *Missouri, K. & T. R. Co. of Texas v. Parrott*, 92 S. W. 795, 100 Tex. 9; *Southern Pac. Co. v. Hetzer*, 135 Fed. 272, 283, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; *Dallas Consol. Electric St. Ry. Co. v. Conn (Tex.)* 100 S. W. 1019, 1020; *Peterson v. Westmann*, 77 S. W. 1015, 1016, 103 Mo. App. 672.

"'Ordinary care' is such care as a person of ordinary prudence would exercise under the same or like circumstances." *Galveston, H. & S. A. R. Co. v. Hubbard*, 76 S. W. 764, 33 Tex. Civ. App. 343; *Atherton v. Tacoma Ry. & Power Co.*, 71 Pac. 39, 41, 30 Wash. 395.

"Ordinary care" is defined as such care as a reasonably prudent person would have exercised under the same circumstances, or such care as is usually exercised by men of ordinary prudence under the same or similar circumstances. *Copeland v. Wabash R. Co.*, 75 S. W. 106, 108, 109, 175 Mo. 650.

"Ordinary care" is such care as an ordinarily prudent man, mindful of himself and of the rights of others, would exercise under the same circumstances. *American Ice Co. v. South Gardiner Lumber Co.*, 79 Atl. 6, 7, 107 Me. 494, 32 L. R. A. (N. S.) 1003.

"Ordinary care" is such care as a person of ordinary prudence and caution would have exercised in the circumstances surrounding the plaintiff or in like circumstances. *Chicago Union Traction Co. v. Hansen*, 125 Ill. App. 153, 158.

"Ordinary care" is that degree of care usually exercised by persons of ordinary care and prudence "engaged in the same or similar business under the same or similar circumstances," and a charge substituting, in place of the quoted phrase, the phrase, "under the facts and circumstances surrounding them at the time," is erroneous. *Williams v. North Wisconsin Lumber Co.*, 102 N. W. 589-591, 124 Wis. 328.

"Ordinary care" may be defined as that degree of care which a person of ordinary prudence, in the same occupation, would use under the same or similar circumstances. *Theobald v. St. Louis Transit Co.*, 90 S. W. 354, 366, 191 Mo. 395.

"'Ordinary care' by a person in the performance of daily tasks is that degree of care which men of ordinary prudence exercise under the ordinary and usual circumstances of their occupations." *Chicago, B. &*

Q. R. Co. v. Lilley, 93 N. W. 1012, 1016, 4 Neb. (Unof.) 286.

An instruction that "ordinary care" as used in instructions given meant such care as ordinarily prudent persons would exercise under circumstances similar to those proven in the case, and that negligence was the failure to exercise ordinary care, was correct. Louisville & N. R. Co. v. Lucas' Adm'r (Ky.) 98 S. W. 308, 312.

A charge defining "ordinary care" as "that degree of care which men of ordinary caution and prudence would use under the same or similar circumstances, a failure to use ordinary care is negligence," while not in the usual form, is substantially correct, and not subject to the criticism that it imposes on the person charged a higher degree of care than that required by law. St. Louis S. W. R. Co. of Texas v. Connally (Tex.) 93 S. W. 206, 207.

"Ordinary care" implies the exercise of reasonable diligence, and it is the care which persons of ordinary prudence, not careless persons, would take under all the circumstances. Wilson v. New York, N. H. & H. R. R. Co., 69 Atl. 364, 372, 29 R. I. 146 (quoting Wabash R. Co. v. McDaniels, 2 Sup. Ct. 932, 107 U. S. 454, 24 L. Ed. 605; Mayhew v. Sullivan Min. Co., 76 Me. 100, 112).

"Ordinary care" is such as an ordinarily reasonable and prudent person would exercise under the same surroundings. Lawson v. Seattle & R. Ry. Co., 76 Pac. 71, 72, 34 Wash. 500.

"Ordinary and reasonable care" is such care as an ordinarily careful person would use in given circumstances. Colsch v. Chicago, M. & St. P. Ry. Co., 127 N. W. 198, 200, 149 Iowa, 176, 34 L. R. A. (N. S.) 1013, Ann. Cas. 1912C, 915.

The legal duty which one owes to another in respect to care for the safety of the person or property of that other is "ordinary care" under the circumstances, which is that degree of care which a person of ordinary prudence would exercise under similar circumstances, and such duty may be assumed by contract or may arise from the circumstances or the relation of the parties. Sharkey v. Skilton, 77 Atl. 950, 952, 83 Conn. 503.

"Ordinary care" means such care as persons of ordinary prudence and caution would exercise in the same situation and under like circumstances. Linder v. St. Louis Transit Co., 77 S. W. 997, 999, 103 Mo. App. 574.

An instruction that "by the term 'ordinary care' is meant such care as a person of ordinary care and prudence ordinarily 'would' have exercised under circumstances the same as or similar to those disclosed by the testimony" was not objectionable because of the use of the word "would." Roedler v. Chicago, M. & St. P. Ry. Co., 109 N. W. 88, 91, 129 Wis. 270.

In an action for personal injuries, "ordinary care" was defined as care which a person of ordinary caution, prudence, and judgment would be expected to exercise in any given case, and counsel took an exception thereto, claiming that "ordinary care is such care as ordinarily careful and prudent persons usually exercise or are accustomed to exercise under similar circumstances." Held that, while possibly the latter definition was couched in better chosen language, the distinction between "person" and "persons" and between the "given case" and "similar circumstances" was not so marked or so vital as to raise a presumption that the jury were misled to defendant's prejudice. Crandall v. City of Dubuque, 112 N. W. 555, 556, 136 Iowa, 663.

There is a want of ordinary care on the part of the plaintiff only when, under all of the circumstances and surroundings of the case, he has done, or omitted to do, something which "an ordinarily careful and prudent person," in a like situation as the plaintiff, would not have done, or omitted to do, and which was the efficient and proximate cause of plaintiff's injury. Hone v. Mammoth Min. Co., 75 Pac. 381, 383, 27 Utah, 168.

"What a person of ordinary care and prudence would do in a given case furnishes a fair and reasonable test of 'ordinary care,' and the omission of anything which an ordinarily prudent person would do is a failure to do that which ordinary prudence suggests." Little v. McGuire, 43 Iowa, 447, 449.

Warehousemen must use "ordinary care" to protect property intrusted to them, which is such care as ordinarily prudent persons in that business are accustomed to exercise. Muskogee Crystal Ice Co. v. Riley Bros., 106 Pac. 629, 630, 24 Okl. 114.

The "ordinary care" required of a bailee for hire is that degree of care which ordinarily prudent persons would use in similar circumstances. Michigan Stove Co. v. Pueblo Hardware Co., 116 Pac. 340, 342, 51 Colo. 160.

#### As care ordinarily or usually used

"Ordinary care" is such care as an ordinarily prudent person usually exercises under the same or similar circumstances. Louisville & N. R. Co. v. Berry (Ky.) 111 S. W. 370, 372; Louisville R. Co. v. Esselman, 98 S. W. 50, 52; Cross v. Illinois Cent. R. Co. (Ky.) 110 S. W. 290, 292; Postal Tel. Cable Co. v. Terrell, 100 S. W. 292, 293, 124 Ky. 822, 14 L. R. A. (N. S.) 927; D. H. Ewing & Sons v. Callahan (Ky.) 105 S. W. 387, 388.

"Ordinary care" is such care as ordinarily careful and prudent persons ordinarily exercise under the same or similar circumstances, in the same or similar business. City of Covington v. Whitney (Ky.) 99 S. W. 337, 338; Toebe v. City of Covington, 141

S. W. 421, 423, 145 Ky. 763; Louisville & N. R. Co. v. Carter (Ky.) 112 S. W. 904, 906.

"Ordinary care" is that degree of care and diligence which an ordinarily careful and prudent person would ordinarily use under like or similar circumstances. Logan v. Metropolitan St. R. Co., 82 S. W. 126, 128, 183 Mo. 582; Creamer v. Louisville Ry. Co., 134 S. W. 193, 195, 142 Ky. 340.

The controlling standard or test of reasonable or "ordinary care" is what a reasonably prudent person would ordinarily have done in the like circumstances, rather than the prevailing practice of others engaged in the same business. The practice of others, even though not a general or prevailing one, is some evidence of what could have been done, and so has a material bearing upon whether the requisite care was exercised in what was actually done; and an instruction which treats what a reasonably prudent person would ordinarily have done in the like circumstances as the controlling standard or test of reasonable or "ordinary care," and also evidence only of that standard, and directs that such practice be considered with all the other evidence bearing upon the subject in fixing upon that standard, is not objectionable as permitting the jury to find that the conduct in question was negligent, even though it conformed to the prevailing practice of others, because that practice was not in itself the legal standard, but, as indicated in the instruction, was evidence only thereof. Chicago G. W. R. Co. v. McDonough, 161 Fed. 657, 666, 88 C. C. A. 517.

"Ordinary care" is such care as ordinarily careful and prudent persons ordinarily exercise under the same or similar circumstances. Cornelius v. South Covington & C. St. R. Co. (Ky.) 93 S. W. 643, 644.

"Ordinary care" means the degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. Hanley v. Ft. Dodge Light & Power Co., 107 N. W. 593, 594, 133 Iowa, 326 (quoting and adopting the definition in Gorman's Adm'r v. Louisville R. Co. [Ky.] 72 S. W. 760).

"Ordinary care" means such care as a person of ordinary prudence would usually exercise in the same situation and circumstances. Dean v. Kansas City, St. L. & C. R. Co., 97 S. W. 910, 912, 199 Mo. 386.

"Ordinary care" is such care as persons of ordinary prudence usually exercise under similar circumstances. Dorris v. Warford, 100 S. W. 312, 313, 124 Ky. 768, 9 L. R. A. (N. S.) 1090, 14 Ann. Cas. 602.

"Ordinary care" is that care which is usually exercised under like circumstances by persons of ordinary prudence. Weber v. Union Development & Construction Co., 42 South. 652, 653, 118 La. 77, 12 Ann. Cas. 1012.

A request to instruct that, if plaintiff was injured by attempting to jump from the buggy, she cannot recover unless a person acting with due care would have believed it necessary to so jump, and she used ordinary care in doing so, should have been granted; the "ordinary care" referred to being such care as an ordinarily prudent person would exercise in view of the existing circumstances. Warth v. Jackson County Court, 76 S. E. 420, 423, 71 W. Va. 184.

An instruction that "ordinary care" is such care as is usually exercised by persons of ordinary care and prudence in the age and country, and under the same or similar circumstances, as a party charged with like negligence is sufficient. Arkansas City v. Payne, 102 Pac. 781, 782, 80 Kan. 353, 18 Ann. Cas. 82.

"Ordinary care" is such as a person of ordinary prudence and caution, according to the usual and general experience of mankind, would exercise in the same situation and circumstances as those of the defendant, whose conduct in that regard is in question. Carr v. Missouri Pac. R. Co., 92 S. W. 874, 876, 195 Mo. 214; Feddeck v. St. Louis Car Co., 102 S. W. 675, 679, 125 Mo. App. 24.

"Ordinary care" is that care which an intelligent prudent person engaged in that kind of business ordinarily exercises with respect to it. Shandrew v. Chicago, St. P., M. & O. Ry. Co., 142 Fed. 320, 324, 73 C. C. A. 430.

"Ordinary care" is such care as one of ordinary prudence usually exercises under given circumstances. Cincinnati, N. O. & T. P. Ry. Co. v. Evans' Adm'r, 110 S. W. 844, 848, 129 Ky. 152.

An instruction that "ordinary care" is that degree of care and caution that a person of ordinary prudence is accustomed to use under like or similar circumstances is not incorrect, as there can be no practical difference between what a person of ordinary prudence would "ordinarily do or usually do" and what such person is accustomed to do under similar circumstances. St. Louis & W. Ry. Co. of Texas v. Brown, 69 S. W. 1010, 1012, 30 Tex. Civ. App. 57.

An instruction that "ordinary care" is such care as persons of ordinary prudence and intelligence exercise under the same or similar circumstances was not fatally defective for failure to use the word "ordinarily," "usually," or "customarily," or a word of like import after the word "intelligence." Coppins v. Town of Jefferson, 105 N. W. 1078, 1080, 126 Wis. 578.

An instruction defining "ordinary care" as that degree of care which a person of ordinary prudence would usually exercise under the same circumstances, and the failure to use such care is negligence, is not erroneous because of a qualification of the word "exer-

cise" by the word "usually." *International & G. N. R. Co. v. Ford* (Tex.) 118 S. W. 1187, 1138.

#### As care of ordinary man

In an action for damages from a collision with a street car, an instruction that "ordinary care is such care as an ordinary person would usually observe under the same or similar circumstances as those under investigation" is erroneous; ordinary care being such care as an ordinarily prudent person would usually exercise under circumstances similar to those proven in the case. *Henderson City R. Co. v. Lockett* (Ky.) 98 S. W. 303, 304.

"Ordinary care" is that degree of care which an ordinary person would use under like or similar circumstances. *Missouri, K. & T. R. Co. of Texas v. O'Connor* (Tex.) 78 S. W. 874, 876.

A livery man is liable for injuries to horses in his care only when caused by his lack of "ordinary care," which is that care an ordinary man would exercise over his own similar property under like conditions. *Caldwell v. Nichol*, 134 S. W. 622, 623, 97 Ark. 420.

#### As care of prudent, careful, or cautious man

"Ordinary care" is such care as would be ordinarily used by a prudent person performing a like service under similar circumstances. *Holden v. Missouri R. Co.*, 76 S. W. 973, 978, 177 Mo. 456.

"'Ordinary care' is that care which a prudent person ordinarily uses under like circumstances, which is another and different thing from such care as persons ordinarily use under like circumstances." *Heberling v. City of Warrensburg*, 103 S. W. 36, 39, 204 Mo. 604 (quoting *Cohn v. City of Kansas*, 18 S. W. 973, 108 Mo. 392).

A charge defining "ordinary care" as "such care as a prudent man would exercise under the same or similar circumstances" is erroneous, since it makes the test the care that a prudent man would exercise, while the true test is the care that an ordinarily prudent person would have exercised. *City of Paris v. Tucker* (Tex.) 93 S. W. 233, 235.

An instruction defining "ordinary care" in an action for injuries on a toll bridge as such care as a prudent operator of a toll bridge would exercise under the same or similar circumstances is not misleading or confusing in using the words "such care as a prudent operator of a toll bridge would exercise" instead of "such care as a person of ordinary prudence would exercise," as both expressions mean practically the same thing. *Gibler v. Terminal R. Ass'n of St. Louis*, 101 S. W. 37, 40, 203 Mo. 208, 11 Ann. Cas. 1194.

"'Ordinary care and caution' is such care and caution as a prudent man would

exercise under similar circumstances." *International & G. N. R. Co. v. Trump*, 94 S. W. 908, 906, 42 Tex. Civ. App. 536 (quoting and adopting definition in *Houston & T. Ry. Co. v. Oram*, 49 Tex. 846; *Texas & N. O. R. Co. v. Black* [Tex.] 44 S. W. 673).

A charge that "ordinary care" is "that care that a prudent man would exercise under like or similar circumstances" is not misleading because the word "a," instead of the word "every" is used. *Goodwyn v. Central of Georgia R. Co.*, 58 S. E. 688, 2 Ga. App. 470.

"Ordinary care" means that care that a prudent person would exercise under the same or similar circumstances. This definition is in substantial accord with that given of ordinary diligence in Civ. Code 1895, § 2898. *City of Atlanta v. Harper*, 59 S. E. 230, 129 Ga. 415.

#### As care of reasonable and intelligent man

"'Ordinary care' means simply that degree of vigilance which a reasonable and prudent person would exercise under like circumstances." *Lake Shore & M. S. Ry. Co. v. McIntosh*, 38 N. E. 476, 479, 140 Ind. 261.

"Ordinary care" is such care as a person of reasonable and ordinary prudence and skill would reasonably exercise under the same or similar circumstances. *Cousineau v. Muskegon Traction & Lighting Co.*, 108 N. W. 720, 722, 145 Mich. 314.

It is inaccurate, but not reversible error, to instruct that "ordinary care" is such care as a person of ordinary prudence and intelligence would use under the same or similar circumstances. *Houston & T. C. R. Co. v. Gray*, 85 S. W. 838, 839, 38 Tex. Civ. App. 249 (citing *Houston & T. C. R. Co. v. Brown*, 85 S. W. 44, 37 Tex. Civ. App. 595; *Same v. Kothmann*, 84 S. W. 1089, 37 Tex. Civ. App. 548).

"'Ordinary care' is defined as the care that would be exercised by a reasonably prudent person under the same or similar circumstances." *Cornovski v. St. Louis Transit Co.*, 106 S. W. 51, 56, 207 Mo. 263; *Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247, 259, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448.

"Ordinary care" is such care as a reasonable and prudent man would use under the same or similar circumstances. *Antonian v. South. Pac. Co.*, 100 Pac. 877, 880, 9 Cal. App. 718.

"Ordinary care" is such care as a reasonable, prudent, and careful person would exercise under similar circumstances. *Campbell v. Walker* (Del.) 78 Atl. 601, 603, 2 Boyce, 41.

"Ordinary care" is such as a man of reasonable prudence and caution would exercise under the circumstances. *Hot Springs St.*

R. Co. v. Hildreth, 82 S. W. 245, 247, 72 Ark. 572.

Instructing that ordinary care of the driver would be "such a degree of care and caution, all things considered, that a reasonably prudent man would have exercised," without adding at the end the words "under the same or similar circumstances," if error, was technical, and not injurious. *Swalm v. Northern Pac. Ry. Co.*, 128 N. W. 62, 63, 143 Wis. 442.

"'Ordinary care' is that care which the ideal prudent man would have exercised under the existing conditions." Hence, in an action for injuries to a conductor by falling down the steps of a depot platform at night, in the absence of a light, an instruction that, though plaintiff's lantern was blown out, he was entitled to proceed to his train, "if he thought he could safely make the journey by exercising ordinary care," was erroneous; the standard of plaintiff's duty being, not what he thought he could safely do, but what a reasonably prudent man under the circumstances would do. *Beard v. Southern Ry. Co.*, 55 S. E. 505, 508, 143 N. C. 136.

#### As care reasonably to be expected

By "ordinary care" is meant such care and caution as a person of ordinary prudence might reasonably be expected to exercise under like circumstances. *Louisville & N. R. Co. v. Joshlin (Ky.)* 110 S. W. 382, 385.

"Ordinary care" is such care as ought reasonably to be expected of an ordinarily prudent person in the same situation as the person whose conduct is in question. *Booker v. Southwest Missouri R. Co.*, 128 S. W. 1012, 1017, 144 Mo. App. 273.

"'Ordinary care' is that degree of care, precaution, or diligence, which may properly be expected or required, having regard to the nature of the action and the circumstances surrounding the transaction." *Missouri, K. & T. R. Co. of Texas v. Moss (Tex.)* 135 S. W. 626, 627.

"Ordinary care, foresight, and diligence" mean such foresight and diligence as a person of ordinary sense or prudence, engaged in the same or similar business, might be reasonably expected to use under the same or similar circumstances. *Laurence L. Prince & Co. v. St. Louis Cotton Compress Co.*, 86 S. W. 873, 877, 112 Mo. App. 49.

"Ordinary care" is that degree of care which may have been reasonably expected from a sensible person in the situation of the plaintiff and defendant at the time. *Whitfield v. Atlantic Coast Line R. Co.*, 60 S. E. 1126, 1128, 147 N. C. 236.

An instruction defining "ordinary care" to be that degree of care, precaution, or diligence which may properly be expected or required, having regard to the nature of the act or duty and to the attending circumstan-

es, is not erroneous. *Houston & T. C. R. Co. v. Roberts*, 109 S. W. 982, 983, 50 Tex. Civ. App. 69.

#### As due care

The expression "due care" is not the equivalent of "ordinary care." *City of San Antonio v. Talerico (Tex.)* 78 S. W. 28, 32.

"Due care," "due diligence," and "ordinary care" are convertible terms, and mean the same thing. *Western Union Tel. Co. v. Smith (Tex.)* 133 S. W. 1062, 1064; *Cornovski v. St. Louis Transit Co.*, 106 S. W. 51, 56, 207 Mo. 263 (citing 3 Words and Phrases, p. 2222; 6 Words and Phrases, p. 5035). But see *City of San Antonio v. Talerico (Tex.)* 78 S. W. 28, 32.

The rule of law now generally recognized is that the legal measure of duty except that made absolute by law, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," used interchangeably. *Raymond v. Portland R. Co.*, 62 Atl. 602, 604, 100 Me. 529, 3 L. R. A. (N. S.) 94.

"'Due care' is 'ordinary care'; and 'ordinary care' is the care that would be exercised by a reasonably prudent person under the same or similar circumstances." *Cornovski v. St. Louis Transit Co.*, 106 S. W. 51, 56, 207 Mo. 263.

A traveler crossing a railroad track is bound only to use "due care," which is not the highest degree of care possible, but is only "ordinary care" under the circumstances. *Colorado & S. Ry. Co. v. Chiles*, 114 Pac. 661, 664, 50 Colo. 191.

The care to be exercised by a gas company to prevent escape of gas from its mains to the injury of trees along the street, is not "ordinary care," as distinguished from "extraordinary care," but due care or care commensurate with the danger. *Gould v. Winona Gas Co.*, 111 N. W. 254, 258, 100 Minn. 258, 10 L. R. A. (N. S.) 889.

#### As reasonable care

"Ordinary care" means reasonable care. *Hanley v. Ft. Dodge Light & Power Co.*, 107 N. W. 593, 594, 133 Iowa, 326.

To use "reasonable care" is equivalent to the expression to use or exercise "ordinary care." *International & G. N. R. Co. v. Trump*, 94 S. W. 903, 906, 42 Tex. Civ. App. 536.

The phrase "reasonable care" has been declared by the courts of England to be synonymous with "ordinary care." *Caven v. Bodwell Granite Co.*, 59 Atl. 285, 287, 99 Me. 278.

The words "ordinary care" embody the same degree of diligence as the words "ordinary and reasonable care and diligence," and have substantially the same significance. The words "ordinary" and "reasonable," descriptive of diligence, are synonymous, and

are used interchangeably in statutes and by the courts. *Goodwyn v. Central of Georgia R. Co.*, 58 S. E. 688, 2 Ga. App. 470.

The terms "ordinary care" and "reasonable care" are in law, practically synonymous. In their ordinary use in connection with the subject in hand, they are also substantially synonymous, and may be used interchangeably in instructions in an action for injuries. *Louisville & N. R. Co. v. Pointer's Adm'r*, 69 S. W. 1108, 1112, 118 Ky. 952. See, also, *Caven v. Bodwell Granite Co.*, 59 Atl. 285, 287, 99 Me. 278.

The use of the words "reasonable care," instead of "ordinary care," in an instruction in an action for injuries, is not such a defect as will invalidate a judgment for plaintiff. *Spaulding v. Metropolitan St. R. Co.*, 107 S. W. 1049, 1051, 129 Mo. App. 607.

"Ordinary care" and "reasonable care," as applied to the duty of a master to provide rules for the regulation of his activities, are, ordinarily, convertible terms. *Texas & N. O. R. Co. v. Walker (Tex.)* 125 S. W. 99, 106.

An instruction that a telegraph company must use "reasonable care" in transmitting and delivering messages imposes no higher degree of care on the company than "ordinary care," as the two terms are synonymous. *Western Union Tel. Co. v. Guinn (Tex.)* 130 S. W. 616, 618.

Where the court in its charge used the terms "ordinary care," "reasonable diligence," and "reasonable care," it should, in an instruction defining ordinary care, have also told the jury that reasonable diligence or reasonable care is ordinary care. *Greene v. Louisville R. Co.*, 84 S. W. 1154, 1155, 119 Ky. 862, 7 Ann. Cas. 1126.

An instruction, in an action for negligent delay in transmission and delivery, on the measure of the telegraph company's duty in delivering, was not erroneous for requiring it to transmit in "due time (that is, such time as it would have been delivered by the exercise of reasonable care and diligence in getting it through and delivered)," on the ground that it was only required to use "ordinary care," in absence of a request for a more specific charge; the terms "reasonable care" and "ordinary care" having substantially the same meaning. *Western Union Telegraph Co. v. Vance (Tex.)* 151 S. W. 904, 907 (citing 7 Words and Phrases, p. 5955).

#### As relative term

"Ordinary care" is a relative term, and depends on the circumstances and conditions of the particular case. *Norfolk & W. Ry. Co. v. Fritts*, 49 S. E. 971, 973, 108 Va. 687, 68 L. R. A. 864, 106 Am. St. Rep. 911; *Cousineau v. Muskegon Traction & Lighting Co.*, 108 N. W. 720, 722, 145 Mich. 314; *Anderson v. Great Northern Ry. Co.*, 99 Pac. 91, 95, 15 Idaho, 513; *Liberty v. Haines*, 68 Atl. 738,

741, 103 Me. 182; *Teddeck v. St. Louis Car Co.*, 102 S. W. 675, 679, 125 Mo. App. 24; *Lynch v. Chicago & A. R. Co.*, 106 S. W. 68, 76, 208 Mo. 1; *Woods v. Wabash R. Co.*, 86 S. W. 1082, 1086, 188 Mo. 229 (citing 1 Thomp. Neg. § 25).

The term "ordinary care" is of a flexible nature, and adapts itself to the particular circumstances under which it is to be applied, depending upon the relation between the parties in interest, and the business in which they are engaged, and varying with the peculiar phase of every situation. *Palace Hotel Co. v. Medart*, 100 N. E. 317, 320, 87 Ohio St. 130, Ann. Cas. 1913E, 860 (citing 6 Words and Phrases, p. 5035).

"The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions." *Palmer v. Portland Ry., Light & Power Co.*, 108 Pac. 211, 214, 56 Or. 262 (quoting *Grand Trunk Ry. Co. v. Ives*, 12 Sup. Ct. 679, 682, 683, 144 U. S. 408, 417, 36 L. Ed. 485); *Hainlin v. Budge*, 47 South. 825, 832, 56 Fla. 342 (quoting and adopting definitions in 7 Words and Phrases, p. 5976); *Birmingham Ry., Light & Power Co. v. Williams*, 48 South. 93, 96, 158 Ala. 381 (citing *Grand Trunk R. Co. v. Ives*, 12 Sup. Ct. 679, 144 U. S. 408, 36 L. Ed. 485); *Johnson v. Union Pac. Coal Co.*, 78 Pac. 1089, 1090, 28 Utah, 46, 67 L. R. A. 506 (citing *Cayzer v. Taylor*, 10 Gray [76 Mass.] 274, 69 Am. Dec. 317; *Nitro-Glycerine Case*, 15 Wall. 524, 538, 21 L. Ed. 206; *Boyle v. Union Pac. Ry.*, 71 Pac. 968, 991, 25 Utah, 422, 430; *Shearman & Redfield*, Neg. § 195; *Bailey, Mast. Liab.* p. 101; *Titus v. Bradford, B. & K. R. Co.*, 20 Atl. 517, 518, 136 Pa. 618, 628, 20 Am. St. Rep. 944; *Dickert v. Salt Lake City Ry. Co.*, 59 Pac. 95, 20 Utah, 394; *Oklahoma Gas & Electric Co. v. Lukert*, 84 Pac. 1076, 1084, 16 Okl. 397 (quoting and adopting definition in *Grand Trunk Ry. Co. v. Ives*, 12 Sup. Ct. 679, 682, 144 U. S. 408, 417, 36 L. Ed. 485); *Southern Ry. Co. v. McGowan*, 43 South. 378, 382, 149 Ala. 440; *Lynch v. Kineth*, 78 Pac. 923, 924, 36 Wash. 368, 104 Am. St. Rep. 958; *Meng v. St. Louis & S. R. Co.*, 84 S. W. 213, 215, 108 Mo. App. 553 (citing *Grand Trunk R. Co. v. Ives*, 12 Sup. Ct. 679, 144 U. S. loc. cit. 417, 36 L. Ed. 485; *Baltimore & O. R. Co. v. Griffith*, 16 Sup. Ct. 105, 159 U. S. 603, 40 L. Ed. 274; *Texas & P. Ry. v. Gentry*, 16 Sup. Ct. 1104, 163 U. S. 353, 41 L. Ed. 186; *Warner v. Baltimore & O. R. Co.*, 18 Sup. Ct. 68, 168 U. S. 349, 42 L. Ed. 491; *Washington & G. R. v. McDade*, 10 Sup. Ct. 1044, 135 U. S. 554, 34 L. Ed. 235); *Sans Bois Coal Co. v. Janeway*, 99 Pac. 153, 156, 22 Okl. 425 (quoting and adopting a definition in *Worth Bros. Co. v. Kallas*, 162 Fed. 806, 89

C. C. A. 186); *Knoxville Traction Co. v. Brown*, 89 S. W. 319, 320, 115 Tenn. 323 (citing *Grand Trunk R. Co. v. Ives*, 12 Sup. Ct. 679, 144 U. S. 417, 36 L. Ed. 485); *Worth Bros. Co. v. Kailas*, 162 Fed. 306, 308, 89 C. C. A. 186 (quoting with approval from *Grand Trunk R. Co. v. Ives*, 12 Sup. Ct. 679, 682, 144 U. S. 408, 417, 36 L. Ed. 485); *Klutt v. Philadelphia & R. R. Co.*, 142 Fed. 394, 396, 73 C. C. A. 494; *Swift & Co. v. Sandy*, 165 Fed. 622, 623, 92 C. C. A. 56; *Kube v. St. Louis Transit Co.*, 78 S. W. 55, 59, 103 Mo. App. 582 (quoting *Frick v. St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 595).

"'Ordinary care,' or the care the common law requires one to exercise in and about his business, has a relative signification. It means such care as a man of ordinary prudence and foresight would be expected to exercise in like circumstances; the care commensurate with the risk and danger of the business to others." *Mertens v. St. Louis Transit Co.*, 99 S. W. 512, 514, 122 Mo. App. 304.

"Ordinary care" is a relative term, and diligence amounting to ordinary care varies with the circumstances of each case. *Denson v. Georgia Ry. & Electric Co.*, 68 S. E. 1113, 135 Ga. 132.

The term "ordinary care" does not express distinctly any certain degree of care; what is ordinary care depends upon the circumstances of each particular case, so that ordinary care under one set of circumstances might be positive negligence under other circumstances. *Illinois Cent. R. Co. v. Keegan*, 112 Ill. App. 28, 36.

There is no fixed standard in the law by which a court can arbitrarily say in all cases what conduct shall be considered reasonable and prudent, or what shall constitute "ordinary care," and the jury are free to fix the standard for reasonable, prudent, and careful men under the circumstances of the case as they find them according to their judgment and experience of what that class of men do under such circumstances, and to test the conduct involved in the issues by that standard. *Southern R. Co. v. Stutta*, 144 Fed. 948, 949, 75 C. C. A. 588.

The care imposed by law is ordinary care; that is, such care as persons of ordinary prudence would use under similar circumstances. "Ordinary care" would require the exercise of a very great degree of vigilance under some circumstances, and the amount of vigilance and caution to be used will vary according to the situation of the parties and the surrounding circumstances. But the standard by which the acts are to be judged does not change; it remains the same. *Dallas Consol. Electric St. R. Co. v. Chambers*, 118 S. W. 851, 852, 55 Tex. Civ. App. 331.

Care or the want of it is not to be measured arbitrarily according to fixed definitions

as "slight care," "ordinary care," or "extraordinary care," or "slight negligence," or "gross negligence," although all these phrases are used somewhat loosely by courts and law-writers, but it is to be measured by reasonableness, under all the circumstances of the particular inquiry. The only true measure is "reasonable care." And that expression has been declared by the courts in England and elsewhere to be synonymous with "ordinary care." "Reasonable care" is a relative term, and what is reasonable care in a given case depends upon many considerations. What would be reasonable care under some conditions would clearly be negligence in others. Reasonable care and vigilance vary according to the exigencies which require vigilance and attention. They relate to the work to be done, to the instrumentalities to be used, to the dangers that may result from their use, to the varying duties owed by those who supply or use them. And in all cases reasonable care means such care as reasonable and prudent men use under like circumstances. *Caven v. Bodwell Granite Co.*, 59 Atl. 285, 287, 99 Me. 278 (citing *Fletcher v. Boston & M. R.*, 1 Allen [83 Mass.] 9, 79 Am. Dec. 695; *Bigelow v. Reed*, 51 Me. 325; *Palmer v. Penobscot Lumbering Ass'n*, 38 Atl. 108, 90 Me. 193; *Sawyer v. J. M. Arnold Shoe Co.*, 38 Atl. 333, 90 Me. 369; *Cayzer v. Taylor*, 10 Gray [76 Mass.] 274, 69 Am. Dec. 317; *Cunningham v. Hall*, 4 Allen [86 Mass.] 268; *Holly v. Boston Gaslight Co.*, 8 Gray [74 Mass.] 123, 69 Am. Dec. 233).

"Ordinary care" as applied to a master is such care as reasonable and prudent men use under similar circumstances in providing safe and suitable appliances and instrumentalities for the work to be done, and in providing generally for the safety of the servant in the course of his employment, regard being had to the work and difficulties and dangers attending it. The term has a relative significance and its definition must depend on the surrounding circumstances of the particular case, the determination of which, when a given state of facts is such that reasonable men may fairly differ upon the question of negligence, is for the jury. *Fisher's Adm'r v. Chesapeake & O. Ry. Co.*, 52 S. E. 373, 374, 104 Va. 635, 2 L. R. A. (N. S.) 954 (citing *Bertha Zinc Co. v. Martin's Adm'r*, 22 S. E. 869, 93 Va. 804, 70 L. R. A. 999; *Richlands Iron Co. v. Elkins*, 17 S. E. 890, 90 Va. 261).

In an action against a railroad company for damages for suffering endured by plaintiff's intestate, killed while crossing defendant's tracks, an instruction that while the fact that there was a freight train standing on the side track, the engine of which partially obstructed the crossing and was making a loud noise, would impose upon deceased a greater degree of care for his own safety, yet if these conditions existed, and defendant was responsible for them, this would



impose upon defendant a correspondingly greater degree of care, was not erroneous in imposing upon defendant a greater degree of care than "ordinary care"; "ordinary care" being but reasonable care which varies according to the circumstances, and requires unusual caution where the circumstances are unusually hazardous. *St. Louis, I. M. & S. R. Co. v. Chamberlain*, 150 S. W. 157, 161, 105 Ark. 180.

The terms "ordinary care" and "ordinary diligence" must be understood to import all the care, prudence, and diligence which the peculiar circumstances of the case, the conditions and instruments employed, reasonably require, and such as a reasonably prudent and careful man would exercise under like circumstances. *Neal v. Wilmington & N. C. Electric Ry. Co.*, 53 Atl. 338, 339, 3 Pennewill, 467.

**Same—As applied to children or infants**

The term "ordinary or reasonable care," applied to the conduct of a child, means such care as may reasonably be expected of children of similar age, judgment, and experience under similar circumstances. *Rohloff v. Fair Haven & W. R. Co.*, 58 Atl. 5, 7, 76 Conn. 689; *Galveston, H. & N. R. Co. v. Olds* (Tex.) 112 S. W. 787, 792.

"Ordinary care," as applied to a child, is the kind of care which children of its age and intelligence are accustomed to exercise under the same or similar circumstances; and this though he had arrived at the age when he should be chargeable with the care required of an adult as a matter of law. *Erle R. Co. v. Weinstein*, 166 Fed. 271, 273, 92 C. C. A. 189.

The rule that ordinary care is such care as an ordinarily prudent person would use under similar circumstances does not apply to a child of tender years, and the care required of a child is according to his maturity and capacity only, which must be determined by the circumstances of each case. *Texas & P. R. Co. v. Crump* (Tex.) 110 S. W. 1013, 1014.

An instruction defining "ordinary care," in an action for injuries received by a boy 16 years of age, while employed in feeding sheets of brass to a rolling machine, as such care as boys of the age, intelligence, and experience of plaintiff usually exercise under similar circumstances, contains the idea that the care used must be the care, ordinarily used by the great mass of boys or by the class of ordinary careful boys, and is correct. *Anderson v. Chicago Brass Co.*, 106 N. W. 1077, 1080, 127 Wis. 273.

The "ordinary care" of an infant is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances.

*Goldstein v. People's R. Co.* (Del.) 60 Atl. 975, 976, 5 Pennewill, 306.

In determining the question of negligence, the conduct of children is not judged by the same rules which govern that of adults, and "ordinary care" for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances. *Cecchi v. Lindsay* (Del.) 75 Atl. 376, 378, 1 Boyce, 185.

"Ordinary care" depends on the facts of each particular case, and with reference to an injured infant means such care as a child of his age, intelligence, capacity, and experience, as shown by the evidence, would ordinarily exercise in the same situation and circumstances in which the infant was placed at the time he was injured. *Morgan v. O. Hager & Sons Hinge Mfg. Co.*, 97 S. W. 638, 642, 120 Mo. App. 590.

Whether or not an infant exercised "ordinary care" depends upon whether he used that care that a person of his own age, education, and mental and physical capacity would ordinarily use under like circumstances. *Marius v. Motor Delivery Co.*, 131 N. Y. Supp. 357, 360, 146 App. Div. 608.

"Ordinary care" is a relative term, and the same standard is not expected of an infant as of a mature man, and what will be regarded as carelessness in the latter will not necessarily be so in the case of the former. *United Rys. & Electric Co. of Baltimore v. Carneal*, 72 Atl. 771, 774, 110 Md. 211.

The standard of "ordinary care" to be required of a boy of 16 years is "such care as boys of his age, intelligence, and experience usually use and exercise under similar circumstances." *Kucera v. Merrill Lumber Co.*, 65 N. W. 374, 375, 91 Wis. 637.

"Ordinary care," as applied to a boy 14 years of age, is that degree of care which may reasonably be looked for in a boy of his age, experience, and intelligence. *Chess & Wymond Co. v. Gohagan's Guardian* (Ky.) 105 S. W. 890.

Where employes of a railroad see a child of tender years upon the track, "ordinary care" is the greatest care that can be exercised to avoid injury. *Anderson v. Great Northern Ry. Co.*, 99 Pac. 91, 96, 15 Idaho, 513.

**Same—Character of business affecting**

"Ordinary care" exercised by those who make a business of using electricity for profit to prevent injury to others therefrom requires much greater precaution in its use than where the element used is of a less dangerous character. As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention in avoiding injury to another to constitute what the law terms "ordinary

'care.'" *Commonwealth Electric Co. v. Melville*, 70 N. E. 1052, 1053, 210 Ill. 70.

A power company, furnishing electricity to patrons, with respect to employes of the latter rightfully on the premises and likely to come in contact with wires carrying the current, is bound to use ordinary care, which demands such diligence as is commensurate with the danger involved in the use of the electricity. *Denson v. Georgia Ry. & Electric Co.*, 68 S. E. 1113, 135 Ga. 132.

By "ordinary and reasonable care" is meant such care as an ordinarily prudent and careful person, having in mind the dangers to be apprehended, would exercise under the same circumstances. The precautions necessary to be taken in the exercise of reasonable and ordinary care vary with the circumstances of each particular case and the degree of hazard connected therewith; greater precautions being necessary in the case of great hazard, and less in cases where there is little danger. "Electric companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus. This care varies with the danger which would be incurred by negligence. In cases where the wires carry strong and dangerous currents of electricity, and the result of negligence might be exposure to death or serious accident, the highest degree of care is required." Under such circumstances, reasonable care requires the exercise of a high degree of diligence, and the terms "reasonable care" and "high degree of diligence" may be deemed to be synonymous. *Gilbert v. Duluth General Electric Co.*, 100 N. W. 653, 655, 93 Minn. 99, 106 Am. St. Rep. 430.

"Ordinary care," under the circumstances, is the legal standard in all cases. The significance of the term "ordinary care" varies with the attendant and surrounding circumstances. This care is to be exercised by the carrier of passengers at all times when, and at all places where, the parties are in the relation of passenger and carrier, whether during transit, at the stations, and upon platforms, or in waiting rooms; and it applies to all matters which pertain to the business of the carrier of passengers. *Pomroy v. Bangor & A. R. Co.*, 67 Atl. 561, 562, 102 Me. 497 (citing *Dodge v. Boston & B. S. Co.*, 19 N. E. 373, 148 Mass. 207, 2 L. R. A. 83, 12 Am. St. Rep. 541; *Jordan v. New York, N. H. & H. R. Co.*, 43 N. E. 111, 185 Mass. 846, 32 L. R. A. 101, 52 Am. St. Rep. 522; *Shannon v. Boston & A. R. Co.*, 2 Atl. 678, 78 Me. 52).

Railroads owe the duty to exercise "ordinary care," which in the case of passengers is the highest degree of care that a person of ordinary prudence can exercise consistent with the mode of conveyance and the proper conduct and management of the business to see that their passengers are furnished safe and comfortable transportation. *St.*

*Louis, I. M. & S. R. Co. v. Pitcock*, 101 S. W. 725, 727, 82 Ark. 441, 118 Am. St. Rep. 84, 12 Ann. Cas. 582.

The term "ordinary care," when applied to an engineer conducting a train in an emergency, means the "ordinary care" of competent men in that position and cannot be regarded as anything less than great care. *Rowe v. Southern California Ry. Co.*, 87 Pac. 220, 222, 4 Cal. App. 1 (citing *Henderson v. Los Angeles Traction Co.*, 89 Pac. 976, 150 Cal. 689; *Esrey v. Southern Pac. Co.*, 37 Pac. 500, 103 Cal. 544, 545; *Everett v. Los Angeles Consol. Electric Ry. Co.*, 43 Pac. 207, 46 Pac. 889, 115 Cal. 114, 34 L. R. A. 350).

The term "ordinary care," when applied to the management of railroad engines and cars in motion, imports all care which the peculiar circumstances of the place or occasion reasonably require, and this will be increased or diminished according as ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and management of such engines and cars. *MacFeat v. Philadelphia, W. & B. R. Co. (Del.)* 62 Atl. 898, 906, 5 Pennewill, 52.

"Ordinary care and diligence," when applied to the management of railways, must be understood to import all the care, circumspection, prudence, and discretion which the peculiar circumstances of the place or occasion reasonably require of the servants of the company; and this will be increased or diminished according as the ordinary liability to danger and accident, and to do injury to others, is increased or diminished in the movement and operation of the cars. *Boudwin v. Wilmington City R. Co. (Del.)* 60 Atl. 865, 866, 4 Pennewill, 381.

"Ordinary care," which is the care that an ordinarily prudent person would or should exercise under similar circumstances, is a comparative thing, and what would be ordinary care under one condition might be stark negligence under another. The speed at which a street car is running may be negligent speed, although ordinance speed or less, depending on the care required under the circumstances. *Beier v. St. Louis Transit Co.*, 94 S. W. 876, 880, 197 Mo. 215.

The term "ordinary care and diligence," applied to the management of electric cars in motion, means all the care, prudence, and discretion which the circumstances of the place and occasion require. *Goldstein v. People's R. Co. (Del.)* 60 Atl. 975, 976, 5 Pennewill, 306.

The "ordinary care" required in the operation of electric street cars imports all the care and discretion which the place of the danger and the occasion requires, and such care increases or diminishes as the danger of accident increases or diminishes in the operation of the cars. *Lenkewitz v. Wilming-*

ton City R. Co. (Del.) 74 Atl. 11, 13, 7 Pennewill, 64.

The exercise of "ordinary care" in the operation of a street railway implies such care as the circumstances of the place or occasion reasonably require, to be increased or diminished as the danger of accident or injury increases or diminishes. *Eaton v. Wilmington City R. Co.* (Del.) 75 Atl. 369, 371, 1 Boyce, 435.

A street railroad company is bound to operate its property with "ordinary care and caution"; such term being understood to import all the care and caution which the particular circumstances of the case reasonably require, and such as a reasonably careful man would exercise under like circumstances, the amount of care varying with the ordinary liability to danger and accident and to do injury to others in the operation and use of the railroad. *Gismondi v. People's R. Co.* (Del.) 83 Atl. 136, 138, 2 Boyce, 577.

"Ordinary care," as applied to the motor-man of an electric street car, means the degree of care which men of average prudence and skill, engaged in operating street cars by electric power in the city in question and on the street on which the accident occurred usually exercise under similar circumstances. *Louisville Ry. Co. v. Boutellier* (Ky.) 110 S. W. 357, 360.

"The term 'ordinary care and diligence,' when applied to the management of electric railway cars in motion, must be understood to import all the care, circumspection, prudence, and discretion which the particular circumstances of the place or occasion require of the servants of the \* \* \* company, and this will be increased or diminished as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and operation of such cars." *Di Prisco v. Wilmington City R. Co.* (Del.) 57 Atl. 906, 909, 4 Pennewill, 527 (citing *Tully v. Philadelphia, W. & B. R. Co.* [Del.] 3 Pennewill, 455, 50 Atl. 95).

"Ordinary care" is not great care, and, where an elevator is used as a means of personal transportation, a higher degree of care than ordinary care is required in its operation. *Belvidere Bldg. Co. of Baltimore v. Bryan*, 64 Atl. 44, 50, 103 Md. 514.

"Ordinary care" in the selection and retention of servants and agents requires that degree of diligence and precaution which the exigencies of the particular service reasonably require, and is such care as, in view of the consequences that may result from negligence on the part of employes, is fairly commensurate with the perils or dangers likely to be encountered. *Emery v. City of Tacoma*, 127 Pac. 851, 853, 71 Wash. 132.

The "ordinary care" exacted in employing servants is that degree of care that a

man of ordinary prudence would use in view of the nature of the employment and the consequences of employing an incompetent person. *Worley v. Spreckels Bros. Commercial Co.*, 124 Pac. 697, 701, 163 Cal. 60.

The term "ordinary care," as used in the rule requiring an employer to use ordinary care in the selection of an employe, means that degree of care that a man of ordinary prudence would use in view of the nature of the employment and the consequence of the employment of an incompetent person. *Still v. San Francisco & N. W. Ry. Co.*, 98 Pac. 672, 675, 154 Cal. 559, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177.

The test of "ordinary care" on the part of an employer toward his servants is not whether he may apprehend that an injury might result to some one of them, but whether an ordinarily prudent person, under the same or similar circumstances, in the exercise of ordinary care, would have apprehended such injury. *Guse v. Power & Mining Machinery Co.*, 139 N. W. 195, 198, 151 Wis. 400.

"Ordinary care" by a master in giving notice to his servants of all perils to which they will be exposed, other than such as they should, in the exercise of "ordinary care," have foreseen, as necessarily incidental to the business, requires that he should actually give the notice and not merely try to give it. "If therefore, he fails to give such notice in terms sufficiently clear to call the attention of his servants to the peril of which he is aware, he is liable to them for any injury which they may suffer thereby in ignorance of that peril and without contributory negligence." *Crapo v. City of Syracuse*, 76 N. E. 465, 468, 183 N. Y. 395 (citing *Mather v. Rillston*, 15 Sup. Ct. 464, 156 U. S. 391, 39 L. Ed. 464; *Gates v. State*, 28 N. E. 373, 128 N. Y. 226; *Simone v. Kirk*, 65 N. E. 739, 173 N. Y. 13; *Pantzar v. Tilly Foster I. M. Co.*, 2 N. E. 24, 99 N. Y. 368; *Benzing v. Steinway & Sons*, 5 N. E. 449, 101 N. Y. 547; *Finn v. Cassidy*, 59 N. E. 311, 165 N. Y. 584, 53 L. R. A. 877).

The "ordinary care" required of a druggist in compounding medicines and filling prescriptions requires a degree of vigilance and prudence commensurate with the dangers involved, and the highest practicable degree of prudence, thoughtfulness, vigilance, and the most exact and reliable safeguards consistent with reasonable conduct of the business that human life may not be exposed to the danger resulting from substitution of deadly poisons for harmless medicine. *Tremblay v. Kimball*, 77 Atl. 405, 408, 107 Me. 53, 29 L. R. A. (N. S.) 900, Ann. Cas. 1912C, 1215.

#### Same—In crossing railroads

"Ordinary care" on the part of a motor-man approaching a street crossing where a traveler is attempting to cross in front of

the car means that degree of care which men of ordinary prudence and skill, engaged in like work, would exercise under similar circumstances; while ordinary care on the part of the driver means that degree of care which a man of ordinary prudence, driving a wagon, engaged in like work and under the same or similar circumstances, usually exercises for his own safety. *Keefe v. Seattle Electric Co.*, 104 Pac. 774, 776, 55 Wash. 448.

"Ordinary care" is that care which ordinarily prudent persons use in their business, or such care as the great mass of mankind observe in the transactions of human life. One crossing a street car track in advance of an approaching car must, in the exercise of ordinary care, take the speed of the car into consideration, where the car is approaching at an unlawful rate of speed, and it is observable. *Grimm v. Milwaukee Electric R. & L. Co.*, 119 N. W. 833, 835, 138 Wis. 44 (citing *Dreher v. Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Duthie v. Town of Washburn*, 58 N. W. 380, 87 Wis. 231, 233; *Nass v. Schulz*, 81 N. W. 133, 105 Wis. 146; *Hayes v. Railway Co.*, 111 N. W. 471, 131 Wis. 399).

"Ordinary care," as applied to cases where the public has by acquiescence acquired license to use or travel over railroad grounds, is that degree of care which is reasonably adequate to meet and avoid the dangers which ought to be anticipated under all the circumstances, including the fact of the licensed use. *Rowley v. Chicago, M. & St. P. R. Co.*, 115 N. W. 865, 869, 135 Wis. 208.

Within the rule requiring a person approaching a railroad crossing to exercise "ordinary care under the circumstances," the quoted phrase is precisely defined by law, and makes it the duty of such person, in attempting to cross, to listen for signals, notice signs put up as warnings, and look attentively up and down the track. *Wilkinson v. Oregon Short Line R. Co.*, 99 Pac. 466, 468, 35 Utah, 110 (quoting with approval from *Mann v. Belt Ry. & Stockyard Co.*, 26 N. E. 820, 128 Ind. 142).

In an action for the death of a person at a station, the court instructed that, though he was negligent, defendant was liable if the train employes saw decedent who was unaware of his peril, and failed to give a proper warning by a signal which he would be likely to hear, and, such signal being unheeded, failed to stop. The court further instructed that if he was struck between the street crossing and the depot at which defendant's trains made regular stops, and the track was so a pedestrian could have been seen for a long distance with ordinary care and diligence, and was frequently used at such point by pedestrians, and deceased, while walking thereon, became in imminent peril, and the

trainmen became aware thereof in time, by ordinary care, to have stopped the train and averted the injury, and they failed to use such care and stop the train, and he was struck and killed, the jury must find for plaintiff, though they found that decedent was negligent, and that by ordinary care was meant such as an ordinary careful and prudent person would exercise under the same or similar circumstances. Held, not to conflict with an instruction that it was decedent's duty to look both ways and listen for the approach of trains, and if at any time before he was injured he could, either by looking or listening, have known of the train's approach in time to get off and avoid the accident. plaintiff was not entitled to recover. *Potter v. St. Louis & S. F. R. Co.*, 117 S. W. 593, 601, 136 Mo. App. 125.

In an action for injuries to a traveler on a highway by a collision with a street car, the court defined "ordinary care" to mean such a degree of care under the circumstances in which plaintiff was placed "at the time" as an ordinarily prudent person would exercise under like circumstances. A subsequent instruction declared that, in going across or near defendant's track at the time and place in question, it was plaintiff's duty to exercise ordinary care to avoid injury from the approaching car, and, if he failed to do so, he could not recover. Held, that the first instruction was not objectionable as limiting the time at which plaintiff was required to exercise care to the moment of the collision. *Chicago City Ry. Co. v. Ryan*, 80 N. E. 116, 118, 225 Ill. 287.

One driving onto a railroad at a crossing, where the gates have negligently been left up though a train is approaching, has no right to rely exclusively on the operatives of the gates or of the train in looking out for his safety and giving him notice, but he must use "ordinary care," such care as an ordinarily prudent person would use under the same or similar circumstances, to discover the approach of the train and for his own safety; and, if he does so rely on the others, without using such care, he is guilty of contributory negligence. *Louisville & N. R. Co. v. Roth*, 114 S. W. 264, 268, 130 Ky. 759.

"Ordinary care" is a relative term, depending upon many things, and differing greatly in specific cases. "What would be ordinary care in approaching an unknown place of danger, such as a railroad crossing, with nothing to disclose its presence, and the inability to see it from darkness, would be an entirely different thing from approaching a known or visible crossing." *Chicago & E. R. Co. v. Fretz*, 90 N. E. 76, 79, 173 Ind. 519.

"Ordinary care" is that care which a careful and prudent person ordinarily exercises under like circumstances and conditions. To entitle a pedestrian to proceed on his way and cross the tracks of a street railway com-

pany, he is not bound to wait for conditions that exclude all doubts of safety, but it is his privilege to take such a chance as a person of "ordinary care" and prudence would take in the exercise thereof under the circumstances; and therefore, in an action against a street railway company for injuries to a traveler in a collision with a car, an instruction that, if the traveler took a doubtful chance of being able to cross in front of the car, it would be a negligence precluding a recovery was properly refused. *Doherty v. Metropolitan St. Ry. Co.*, 91 N. Y. Supp. 19, 20.

#### Same—Danger as affecting

"Ordinary care" is a relative term, and means a degree of care commensurate with the danger involved. *Tackett v. Henderson Bros. Co.*, 108 Pac. 151, 155, 12 Cal. App. 658.

What is "ordinary care" must be gauged and determined by the danger which its exercise requires to be overcome, for what would be "ordinary care" under certain conditions might under different conditions be gross negligence. *Galveston, H. & S. A. R. Co. v. Thompson (Tex.)* 116 S. W. 106, 108.

"Ordinary care" is such care as men ordinarily exercise under the same or similar circumstances. The amount of care which will satisfy this requirement is necessarily adjusted to, and varies with, the danger to be guarded against. As the danger or the probability of injury therefrom increases, so do men ordinarily increase the care which they exercise for their own protection. *Chicago & N. W. R. Co. v. Andrews*, 130 Fed. 65, 73, 64 C. C. A. 399.

"Ordinary care" is that degree of care which prudent, intelligent, and experienced men usually employ under like circumstances to guard against dangers which are obvious or reasonably to be anticipated. An instruction, in an action against a railroad company to recover for an injury to a brakeman by falling through an open culvert, which stated that the degree of care required from defendant in the construction of the culvert was such as a master would ordinarily use if the danger to be guarded against was a personal danger to the master himself, is erroneous, as stating an incorrect measure of care, as well as misleading, in that there could be no evidence to make it applicable to a railroad company. *Southern Pac. Co. v. Gloyd*, 138 Fed. 388, 391, 70 C. C. A. 528.

What is "ordinary care" depends on the circumstances of the particular case, and, when the circumstances are such that an ordinarily careful and prudent person would take greater precautions for his own safety than under less threatening circumstances, the greater degree of caution is "ordinary care." One injured by another's negligence may recover if he has observed ordinary care for his safety. *Dickson v. Geo. B. Swift & Co.*, 87 N. E. 50, 61, 238 Ill. 62 (citing *West*

*Chicago St. R. Co. v. Manning*, 48 N. E. 958, 170 Ill. 417).

"Negligence" is defined to be the want of "ordinary care"; that is, such care as an ordinary prudent person would exercise under like circumstances. There is no precise definition of "ordinary care," but it may be said that it is such care as an ordinarily prudent person would exercise under like circumstances, and should be proportioned to the danger and peril reasonably to be apprehended from a lack of proper prudence. *Hill v. Glenwood*, 100 N. W. 522, 523, 124 Iowa, 479.

"Ordinary care" is defined to be "that degree of care which a person of ordinary prudence, under the particular circumstances, is presumed to exercise to avoid injury. Such care is required to be in proportion to the danger to be avoided and the fatal consequences that might result from the neglect." *Indianapolis St. Ry. Co. v. Seerley*, 72 N. E. 169, 170, 1034, 35 Ind. App. 467 (adopting definition in *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185, 197; *Louisville, N. A. & C. R. Co. v. Schmidt*, 46 N. E. 344, 147 Ind. 638-640; *Illinois Cent. R. Co. v. Cheek*, 53 N. E. 641, 152 Ind. 663).

What is proper care in a given situation is gauged by the danger to be reasonably apprehended under the circumstances existing at the time, and not by looking back after the accident; and "ordinary care," where the danger is great, may call for unremitting attention; but the mere probability of injury arising from want of "ordinary care" is an important element in determining the degree of care required. *Parry Mfg. Co. v. Eaton*, 83 N. E. 510, 513, 41 Ind. App. 81.

The term "ordinary care," as applied to one's duty to provide reasonably safe appliances furnished a third person for the use of his employes, is a relative term; diligence commensurate with the danger being required. *Trask v. Hallowell Granite Works*, 76 Atl. 919, 921, 106 Me. 458.

"Ordinary care," when applied to the duty of a master, means such care as a person of ordinary prudence would exercise, taking into consideration all the circumstances of the case; and as a danger increases that which would be "ordinary care" and prudence must increase. When applied to an employe with regard to the condition of the machinery furnished by the master, it means such care as a person situated as the employe is situated will ordinarily use. *Atoka Coal & Mining Co. v. Miller*, 104 S. W. 555, 560, 7 Ind. T. 104.

Where a locomotive engineer knew that a fireman was at work under an attached engine, "ordinary care" on the part of the engineer would be the use of every precaution to prevent the engine from moving. *Atchison, T. & S. F. Ry. Co. v. Seeger*, 98 S. W. 892, 895, 44 Tex. Civ. App. 584.

"Ordinary care" is the degree of care that a person of ordinary prudence would commonly exercise under like circumstances. "The degree of care does not vary with the increase or diminution of danger. It continues to be ordinary in degree, but the quantum of diligence to be used differs under different conditions." "Ordinary care" will require the exercise of a very great degree of vigilance under some circumstances, and the amount of vigilance and caution to be used will vary according to the situation of the parties and the surrounding circumstances, but the standard by which the acts are to be judged does not change." *International & G. N. R. Co. v. Hall (Tex.)* 92 S. W. 996, 998 (quoting and adopting definition in *Galveston, H. & S. A. Ry. Co. v. Gormley*, 43 S. W. 878, 91 Tex. 399, 66 Am. St. Rep. 894; *Gulf, C. & S. F. Ry. Co. v. Smith*, 28 S. W. 522, 87 Tex. 354).

"Ordinary care" is that care which persons of ordinary prudence would exercise under the circumstances. "Ordinary care" in some circumstances is nothing short of the highest degree of care, while in some circumstances much less and sometimes very little care would satisfy the requirement of ordinary care. *Whittaker v. Brooklyn, Q. C. & S. R. Co.*, 97 N. Y. Supp. 414, 415, 110 App. Div. 787.

In case of an impending collision between a street car and a wagon, "ordinary care" on the part of the street car company implies that the machinery and appliances should be in proper condition, and also that the servants of the company shall do all that men of reasonable care, prudence, and alertness in the same situation and with the same appliances could do to stop the car and prevent the collision. *Memphis St. R. Co. v. Haynes*, 81 S. W. 374, 376, 112 Tenn. 712.

#### **Same—Knowledge as affecting**

The term "ordinary or reasonable care to prevent injury" means all ordinary care in the light of all the surrounding facts and circumstances, so that the care required to prevent the infliction of injury is always proportioned to the probability that exists that an injury will be done under circumstances which are known to exist or from past experience may be reasonably expected to exist in a particular case." *Chesapeake & O. Ry. Co. v. Farrow's Adm'x*, 55 S. E. 569, 571, 106 Va. 137, 10 Ann. Cas. 12.

There is no precise definition of "ordinary care," but it may be said that it is such care as an ordinarily prudent person would exercise under like circumstances, and should be proportioned to the danger and peril reasonably to be apprehended from a lack of proper prudence. A blind person, while crossing a public street, is not bound to exercise any higher degree of care to avoid accident from a defective condition of the street than a person having the full

sense of sight. *Hill v. City of Glenwood*, 100 N. W. 522, 523, 124 Iowa, 479.

When a traveler perceives that a way is under repair and much incumbered for that purpose, and that but a narrow and difficult passage is open for him, the exercise of "ordinary care" requires that he exercise that degree of watchfulness and caution which men of ordinary prudence would under such circumstances, and that he do not drive with the same rapidity or exercise only the same attention which would be allowable on a smooth and unincumbered way. *Jacobs v. Inhabitants of Bangor*, 16 Me. 187, 190, 33 Am. Dec. 652.

#### **Same—Means of preventing as affecting**

"Ordinary care," as used in the definition of negligence as failure to exercise the ordinary care of prudent men under all the attending circumstances, does not require that all possible means for avoiding accident should be availed of. *Stephenson v. Corder*, 80 Pac. 938, 939, 71 Kan. 475, 69 L. R. A. 246, 114 Am. St. Rep. 500.

"Ordinary care" calls for the use of the senses to discover approaching danger, and for a reasonable exercise of judgment to avert it. A person of "ordinary care" never will trust himself, or those committed to his care, to mere chance, where means are available upon employment of which he may overcome probable danger. Where a section foreman allowed his men to place hand cars on the track in order to go to camp without warning the men that a train might overtake them, or taking any precautions to ascertain if a train was approaching, or to give warning in case one should approach, when he knew that a passenger train was due, and that the sharp curves in the track and the topographical obstructions made the risk of being run down very great, his acts showed a failure to exercise "ordinary care." *State v. Koonse*, 101 S. W. 139, 144, 123 Mo. App. 655.

#### **Slight negligence distinguished**

Slight negligence is not incompatible with the exercise of "ordinary care." *Malott v. Schlosser*, 119 Ill. App. 259, 261.

### **ORDINARY CAUTION**

"Ordinary caution" is such caution as a person of ordinary prudence would use for his own protection under the same circumstances, in view of the danger to be avoided. *Jansen v. Southern Pac. Co.*, 89 Pac. 616, 617, 5 Cal. App. 12.

### **ORDINARY CIRCUMSPECTION**

The portion of the charge, "Plaintiff was not bound to inspect the track at the place in question to ascertain if it was reasonably safe to be used by him in the performance of his duties as brakeman," given after a por-

tion, that though the track at the place was not reasonably safe, plaintiff assumed the risk from such unsafe condition, if any, of which he had actual knowledge, or would have learned by the exercise of that ordinary circumspection which a prudent and competent man would have used in the particular employment; and in an action for injury to a brakeman by being struck by an engine, while his foot was caught in an unfilled space between ties in the track, on evidence that the unfilled spaces directly causing the injury were covered and obscured by tall, thickly-growing grass, making it appear on casual inspection that the spaces were filled, and that plaintiff had never had an opportunity to be on the track before, and did not know that there were unfilled spaces there—was not calculated to confuse and mislead the jury; there being a difference between making a previous critical examination, which the word "inspection" means, of the track to ascertain if it was reasonably safe, and using reasonable care and caution, which is the meaning of "ordinary circumspection," to observe what was open and obvious, to discern whether it was unsafe. *St. Louis Southwestern R. Co. of Texas v. Ford*, 121 S. W. 709, 713, 56 Tex. Civ. App. 521.

#### ORDINARY CLERK

There is no such position as that of "ordinary clerk" known to the charter of the city and county of San Francisco. The term is used by the Civil Service Commissioners to designate an arbitrary class established by them, from which various extra clerks allowed to various officers and departments must be appointed. An appointee, having taken the examination for ordinary clerks under a classification established by the Civil Service Commission, as provided for in article 13 of the charter of the city and county of San Francisco, who was appointed to a temporary position in the office of the board of elections under article 11 of the charter, giving the board a right to appoint such clerical assistants as might be necessary, and later to other temporary positions in the office of the tax collector and auditor, under article 4 of the charter, providing for the appointment of extra clerks in such offices, was merely an extra clerk, whose employment ended when his services were no longer required, and on the termination of such employment the placing of his name on the register of eligibles, according to the relative excellence of his examination, without regard to the priority thereof, along with persons taking the examination after his appointment to the position in the office of the board of elections, was not a discharge, in violation of the provisions of article 13 of the charter relating to the appointment, term of employment, and discharge of civil service employes. *Rodrigue v. Rogers*, 87 Pac. 563, 564, 4 Cal. App. 257.

#### ORDINARY COURSE OF BUSINESS

In an action in France on a foreign bill by the indorsee against the drawee, the original of which the latter had paid under a forged indorsement, the court found that the drawee made such payment in the ordinary course of business over the counter, and without notice that the original bills had been lost, and without opposition or objection to such payments, and that there was no evidence that the payments were made in bad faith. Held, that the use of the phrase "paid in the ordinary course of business" construed with the balance of the finding merely meant that payment was made to the holder of the original drafts against their surrender at the drawee's bank on a business day, in banking hours, in the same way it usually paid drafts, and was insufficient to exclude an inference of negligence in the drawees, arising from their failure to detect a variance in the indorsement which was forged. *Kessler v. Armstrong Cork Co.*, 158 Fed. 744, 750, 85 C. C. A. 642.

Stock Corporation Law, § 16, which is entitled "Voluntary sale of franchise and property," provides that a stock corporation, with the consent of the holders of two-thirds of its stock, may convey its property, rights, privileges, and franchises, or any interest therein, or any part thereof, to a domestic corporation engaged in a business of the same general character, and that, before the conveyance is made, such consent shall be obtained at a meeting of the stockholders. A stock corporation having operated a calendar department and employed salesmen and kept accounts for it separate from its other business, but doing the printing or lithographing for such department, sold to a corporation, organized for the purpose, its business, assets, good will, and contracts with salesmen, in all about one-thirteenth part of its whole business. Held, that the sale was not an "ordinary business transaction," but a sale and transfer of a part of its franchise and property within the meaning of the section. *In re Timmis*, 93 N. E. 522, 523, 200 N. Y. 177.

#### ORDINARY COURSE OF LAW

The right to seek relief before the board of railroad commission is not a remedy in the "ordinary course of the law," so as to prevent the issuance of mandamus, under Gen. St. 1901, § 5185, prohibiting such writ, where the relator has a plain and adequate remedy under the "ordinary course of the law." *Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 88 Pac. 72, 78, 74 Kan. 808.

#### ORDINARY CURRENT EXPENSES

Gen. Laws 1908, c. 135, § 12, requires the town sergeant of each town annually in April to make a list of the keepers of dogs in the town, and return such list to the town clerk on or before May 1st, for which service he

shall receive from the town treasury 20 cents for each dog listed, and section 13 provides for the killing of nonlicensed dogs and for the payment of a fee of \$2 out of the town treasury for each dog killed and buried. Held, that a city's liability for the salary of chief of police and town sergeant, and for the fees of the sergeant as dog lister, under such provision, constituted an "ordinary current expense" of the town, which, if, with other like expenses, it was within the town's limit of current revenues and such special taxes as it might legally and in good faith levy therefor, was not the "incurring of indebtedness" in excess of the limit fixed by Acts 1895, c. 1428; and hence the fact that the town's debt limit was exceeded was no defense to an action to enforce liability for such services. *Trainor v. Lee*, 88 Atl. 847, 848, 34 R. I. 845.

### ORDINARY DEBT

Where a city purchased fire apparatus without complying with Const. art 11, § 5, requiring provision for assessment and collection of a sinking fund so that the provision was invalid, the city's use of the property so purchased raised an implied promise to pay the reasonable rental value thereof and rendered the city liable for rent, which, being an "ordinary debt," payable out of current revenues, was not within such constitutional provision. *Fabric Fire Hose Co. v. City of Teague (Tex.)* 152 S. W. 506, 508.

### ORDINARY DILIGENCE

"Ordinary diligence," like most other human qualifications or characteristics, is a relative term, to be judged of by the nature of the subject to which it is directed." *Holladay v. Kennard*, 12 Wall. [79 U. S.] 254, 258, 20 L. Ed. 390.

"Ordinary care" and "ordinary diligence" are commonly treated as synonymous and interchangeable when applied to the same conduct in cases of injury. *Atlanta, K. & N. Ry. Co. v. Tilson*, 62 S. E. 281, 285, 181 Ga. 395.

"Ordinary diligence" is such care and diligence as a man of ordinary prudence bestows on his own affairs. This definition was given with reference to the care required of a warehouseman. *Southern Ry. Co. v. Aldredge & Shelton*, 38 South. 805, 807, 142 Ala. 368 (citing *Moore v. Mayor*, etc., of City of Mobile [Ala.] 1 Stew. 284; *Jones v. Hatchell*, 14 Ala. 743).

The term "ordinary diligence" contemplates that degree of diligence that an ordinarily prudent person would use in the transaction of his own business under like or similar circumstances. *Guitar v. Randel (Tex.)* 147 S. W. 642, 647.

The terms "ordinary care" and "ordinary diligence" must be understood to import

all the care, prudence, and diligence which the peculiar circumstances of the case, the conditions and instruments employed, reasonably require, and such as a reasonably prudent and careful man would exercise under like circumstances. *Neal v. Wilmington & N. C. Electric Ry. Co.*, 53 Atl. 338, 339, 3 Pennewill, 467.

"Ordinary diligence or care" required of a bailee for hire is such as would be exercised by a person of ordinary prudence with reference to his own property under the same or like circumstances. *Weick v. Dougherty*, 90 S. W. 966, 967, 139 Ky. 528, 3 L. R. A. (N. S.) 348.

"Ordinary diligence" is that degree of care which every prudent man takes of his own property of a similar nature. *Southern Ry. Co. v. Davis*, 65 S. E. 181, 182, 182 Ga. 812.

In an action by an employé for personal injuries, an instruction defining "ordinary diligence" as that diligence which every prudent man takes under similar circumstances was correct. *Sanders v. Central of Georgia Ry. Co.*, 51 S. E. 728, 123 Ga. 763.

An instruction that one who uses as much care as to his neighbor's property as he does to his own is exercising "ordinary diligence" is erroneous, under Civ. Code 1895, § 2898, providing that ordinary diligence is that care which "every prudent man" takes of his own property of a similar nature. *Brown Store Co. v. Chattahoochee Lumber Co.*, 57 S. E. 1043, 1 Ga. App. 609.

"Ordinary diligence" is defined by Civ. Code 1895, § 2898, as "that care which every prudent man takes of his own property of a similar nature. The absence of such diligence is termed ordinary neglect." *Insurance Co. of North America v. Leader*, 48 S. E. 972, 977, 121 Ga. 260; *Southern Railway Co. v. Davis*, 65 S. E. 131, 132, 132 Ga. 812.

### ORDINARY DOCILITY

Sheep are domestic animals of "ordinary docility," within the rule that railroads must fence against "all domestic animals of ordinary docility." *Cotton v. Wiscasset, W. & F. R. Co.*, 57 Atl. 785, 786, 98 Me. 511.

### ORDINARY EXPENSES

#### Of municipality

The words "ordinary county expenses," used in Civ. Code 1902, § 799, providing for an estimate by the board of commissioners of the amount necessary to pay such expenses, are those to be incurred for the current fiscal year. *State ex rel. People's Bank of Greenville v. Goodwin*, 62 S. E. 1100, 1103, 81 S. C. 419.

The proviso to section 8 of article 8 of the Constitution, "that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the gen-



eral laws of the state," may properly be construed by the Legislature to authorize the lawmaking body to include within the term "ordinary and necessary expenses" any expenditure rendered necessary by casualty or accident, which has impaired or injured municipal property that is necessary for the protection of the city against fires, or for the health and welfare of the city. *Hickey v. City of Nampa*, 124 Pac. 280, 281, 22 Idaho, 41.

A purchase by a city of a city hall site is not an ordinary municipal expense within the charter authorizing the levying of taxes for "ordinary municipal expenses," and the cost thereof may not be paid out of fund for such expenses. *Niles Bryant School of Piano Tuning v. Bailey*, 128 N. W. 118, 119, 161 Mich. 193.

### ORDINARY FLOODS

An ordinary flood is one, the repetition of which, though at uncertain intervals, might by the exercise of ordinary diligence in investigating the character and habits of the stream have been anticipated. *Chicago, R. I. & P. Ry. Co. v. McKone*, 127 Pac. 488, 490, 38 Okl. 46, 42 L. R. A. (N. S.) 709; *Town of Jefferson v. Hicks*, 102 Pac. 79, 80, 23 Okl. 684, 24 L. R. A. (N. S.) 214.

### ORDINARY LANGUAGE

The notice of injury required by the factory act is to be written in "ordinary language"; that is, the party is to use his own untutored language. *Berger v. Metropolitan Press Printing Co.*, 104 Pac. 617, 619, 55 Wash. 422 (quoting *Dresser, Employers' Liability*, § 27; citing *Driscoll v. City of Fall River*, 39 N. E. 1003, 163 Mass. 105).

### ORDINARY LOW-WATER MARK

"Ordinary," in the grant, in 1640, of tide flats around an island, to the "ordinary low-water mark," means "mean," in the absence of usage to the contrary at that time or a contrary construction by the parties. *East Boston Co. v. Commonwealth*, 89 N. E. 236, 237, 208 Mass. 68, 17 Ann. Cas. 146.

### ORDINARY LUGGAGE

See, also, Ordinary Baggage.

"Ordinary luggage" being confined to that which is personal to the passenger, and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise, or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of "ordinary luggage" unless accepted as such by the carrier. Memoranda and papers in the possession of an agent, but relating exclusively to the business of his principal, and carried by him solely for business purposes, are not baggage, when put by the agent into his trunk. *Yazoo & M. V. R. Co. v. Georgia*

*Home Ins. Co.*, 37 South. 500, 85 Miss. 7, 67 L. R. A. 646, 107 Am. St. Rep. 265.

### ORDINARY NEGLECT

By Civ. Code 1895, § 2898, "ordinary neglect" is defined as the absence of ordinary diligence. *Brown Store Co. v. Chattahoochee Lumber Co.*, 49 S. E. 889, 840, 121 Ga. 809 (citing *Macon & W. R. Co. v. McConnell*, 31 Ga. 133, 76 Am. Dec. 685; *Macon & W. R. Co. v. Davis*, 13 Ga. 68; *Southern Mut. Ins. Co. v. Hudson*, 38 S. E. 964 [2], 113 Ga. 434).

### ORDINARY NEGLIGENCE

See, also, Ordinary Care.

"Ordinary negligence" is the omission to exercise ordinary care—that degree of care generally exercised by an ordinarily prudent person under like circumstances. *Cummings v. Wichita R. & Light Co.*, 74 Pac. 1104, 1105, 68 Kan. 218, 1 Ann. Cas. 708.

"Ordinary negligence" is characterized by inadvertence, ordinarily present with the great mass of mankind, and injuries proximately resulting therefrom to the person or property of another, and not proximately contributed to by that other's want of ordinary care, are actionable. *Astin v. Chicago, M. & St. P. R. Co.*, 128 N. W. 265, 268, 143 Wis. 477, 31 L. R. A. (N. S.) 158.

"Ordinary negligence," as distinguished from "willful or wanton negligence," is not actionable if the negligence of the injured party directly contributed to the result; willful negligence authorizing an action regardless of such contribution. *Alger, Smith & Co. v. Duluth Superior Traction Co.*, 101 N. W. 298, 299, 93 Minn. 314.

### Gross and slight negligence distinguished

A cause of action sounding in ordinary negligence, and a cause of action sounding in gross negligence, are different, as both cannot characterize a single circumstance of a person being injured by another. *Astin v. Chicago, M. & St. P. R. Co.*, 128 N. W. 265, 268, 143 Wis. 477, 31 L. R. A. (N. S.) 158.

"Gross negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than as implied by the term 'ordinary negligence'; but after all it means the absence of the care which was necessary under the circumstances." *Raymond v. Portland R. Co.*, 62 Atl. 602, 605, 100 Me. 529, 3 L. R. A. (N. S.) 94 (quoting and adopting definition in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 23 L. Ed. 374).

### As negligence

See Negligence.

### ORDINARY PROBATE PROCEEDINGS

Code Civ. Proc. § 1616, as amended in 1905, allows executors all necessary expenses of management and settlement of the estate, and authorizes any attorney, who has render-

ed services to an executor, to apply for an allowance of suitable compensation out of the estate. Section 1619 allows administrators, etc., for fees for their attorneys for ordinary probate proceedings, the same amounts allowed for their own services by section 1618 as amended in 1905, with such further allowance as the court deems reasonable for any extraordinary services, as for litigation necessary for the administrator to prosecute or defend. Petitioners applied for compensation from the estate for their services as attorneys in opposing a contest of two codicils, altering legacies given by the will, and giving some additional ones. Held that, while counsel fees incurred in opposing a contest may be charged against the estate, if it goes to the parties benefited by the litigation, under the circumstances the estate had no interest therein, and the application was properly denied, such expenses being chargeable to those legatees having a direct interest in supporting the codicils, and services in probating the instruments, such as the order admitting them to probate, etc., were not "extraordinary services," but were services rendered in "conducting the 'ordinary probate proceedings,'" within section 1619, for which compensation was allowable only on final accounting. In *re Hete's Estate*, 101 Pac. 448, 449, 155 Cal. 448.

### ORDINARY PRUDENCE

"Ordinary prudence" requires a person to take into consideration the natural and probable consequences of a given act, and not such consequences as are remote, speculative, or merely possible. *Dunphy v. St. Joseph Stockyards Co.*, 95 S. W. 301, 305, 118 Mo. App. 506.

### ORDINARY RAINFALL

"Ordinary rainfalls" are such as are not extraordinary, and floods which habitually occur, though at irregular intervals, are not extraordinary. *Miller & Lux v. Madera Canal & Irrigation Co.*, 99 Pac. 502, 508, 155 Cal. 59, 22 L. R. A. (N. S.) 391.

### ORDINARY REPAIRS

The replacing of a dozy or rotten round in a 40-foot extension ladder used in the business of an electric light company is not such ordinary repairs as a workman is usually expected to make, in the absence of proof that the defective condition of the round was known to the servant. *Twombly v. Consolidated Electric Light Co.*, 57 Atl. 85, 87, 98 Me. 353, 64 L. R. A. 551.

The work of rebuilding a factory a large part of which has been destroyed, is not "ordinary repairs," but "construction, demolition, or extraordinary repairs," within the exception of an employer's liability policy excepting injuries to persons occurring in the construction, demolition, or in making extra-

ordinary repairs to structures, buildings, or plants. *Home Mixture Guano Co. v. Ocean Accident & Guarantee Corporation, Limited*, of London, England, 176 Fed. 600, 603.

### ORDINARY RISK

The failure of the master to use proper care to provide a reasonably safe place for the servant to perform his work and to furnish him with reasonably safe appliances is not an "ordinary risk of his employment" with the assumption of which the servant is charged unless he knows of such failure. *Smith v. Buffalo Oil Co.*, 91 S. W. 383, 384, 41 Tex. Civ. App. 267 (citing *Missouri, K. & T. Ry. Co. of Texas v. Hannig*, 48 S. W. 508, 91 Tex. 350; *Texas & N. O. R. Co. v. Bingle*, 42 S. W. 971, 91 Tex. 287; *St. Louis S. W. Ry. Co. of Texas v. Smith* [Tex.] 63 S. W. 1064; *Gulf, C. & S. F. R. Co. v. Moore*, 68 S. W. 559, 28 Tex. Civ. App. 603; 1 *Shear. & R. Neg.* [4th Ed.] § 186).

The "ordinary risk" of employment which is assumed by a servant does not include such risks of dangers as a master could, by the exercise of ordinary care, discover and prevent. *Klofski v. Railroad Supply Co.*, 85 N. E. 274, 278, 235 Ill. 146.

### ORDINARY SKILL

The term "ordinary skill" contemplates that degree of skill that an ordinarily prudent person would use in the transaction of his own business under like or similar circumstances. *Guitar v. Randel* (Tex.) 147 S. W. 642, 647.

#### As required of physician

Persons practicing as physicians and surgeons are required to possess ordinary skill in their profession, and to practice their profession with ordinary skill, which is that degree skill which is ordinarily possessed by physicians and surgeons in practice. *Kruger v. McCaughey*, 149 Ill. App. 440, 444.

"Ordinary care and skill" on the part of a physician and surgeon is that degree of care and skill usually exercised and possessed by physicians and surgeons of ordinary skill in similar communities. *Dorris v. Warford*, 100 S. W. 312, 313, 124 Ky. 768, 9 L. R. A. (N. S.) 1090, 14 Ann. Cas. 602.

### ORDINARY STATE BUSINESS

The State Warehouse Act (Laws 1912, p. 707), in so far as it provides for an issuance of bonds and an increase of the public debt without first submitting the question to the qualified voters, violates Const. art. 10, § 11, prohibiting an increase in the state debt without the consent of the voters except for the "ordinary" and current business of the state; the building of warehouses not being "ordinary" state business, and the bonds not being intended to be for a debt of the state. *State ex rel. Lym v. McCown*, 75 S. E. 392, 396, 92 S. C. 81.

**ORDINARY TAX**

Laws 1907, c. 65, imposing on every insurance company doing business in the state, except domestic mutual insurance companies, an annual tax of 2½ per cent. of the gross amount of premiums received in the state during the preceding year, etc., when construed in the light of the history of the legislation on the subject, imposes an "occupation tax" and not an "ordinary tax" within the Constitution relating to taxation. *Queen City Fire Ins. Co. v. Basford*, 130 N. W. 44, 47, 27 S. D. 164.

**ORDINARY TENANCY**

Leases in which property is let to single tenants are spoken of as "ordinary tenancies." *La Plante v. La Zear*, 68 N. E. 312, 313, 31 Ind. App. 433.

**ORDINARY THREADS**

The word "ordinary," in a statute providing for tariff on imported "cotton cloth in which other than the 'ordinary' warp and filling threads have been introduced in the process of weaving to form a figure," means those threads which ordinarily enter into the construction of the ordinary plain fabric and which cannot be removed without destroying its integrity, as distinguished from "extraordinary threads," which are not an integral part of the fabric, but are independent threads introduced to form a figure and for no other purpose. *United States v. Rusch & Co.*, 167 Fed. 528, 525, 93 C. C. A. 159.

**ORDINARY TIME**

The words "ordinary time," as used in *Revisal 1905*, § 2632, imposing a penalty on a carrier for neglecting to transport within the ordinary time required for such transportation, mean the regular customary time within which, by the facilities in general use for the performance of the duty of carrying goods, the carriage should be completed. *Jenkins v. Southern Ry. Co.*, 59 S. E. 663, 666, 146 N. C. 178.

*Revisal 1905*, § 2632, declares that it shall be unlawful for any railroad company to neglect to transport within a reasonable time any goods received for shipment and billed to or from any place in the state, unless otherwise agreed between the parties, or unless the same be destroyed, under a penalty. It is further provided that the company shall be deemed to have transported the goods in a reasonable time if it has done so within the ordinary time required for such transportation, and that a delay of two days at the initial point, and 48 hours at one intermediate point for each 100 miles or fraction over which goods are to be transported, shall be held to be prima facie reasonable, and a failure to transport within such time shall be held prima facie unreasonable. The duty imposed by the statute is but declaratory of the common law, and the definition of

reasonable time "as the ordinary time required" within which an act is to be done is the regular, customary, and usual time and is synonymous with "reasonable time," which means "as soon as the party conveniently can." The provision as to the allowance of time at the initial point and intermediate points lowers the standard of duty, as it is not clear that so much time would be given under all circumstances. The last sentence in the statute, "And a failure to transport within such time will be held prima facie unreasonable," is not very clear, and the words cannot refer to time which "shall not be charged," because to do so would be contradictory and destructive of the immediately preceding sentence. The last sentence should therefore be referred to the terms "ordinary time," thus making the act to read "a failure to transport within ordinary time shall be held prima facie unreasonable." *Stone & Co. v. Atlantic Coast Line Co.*, 56 S. E. 932, 934, 144 N. C. 220 (citing *Moore, Carriers*, 188; *Tiffany, Sales*, 195; *Crook v. Cowan*, 64 N. C. 743; *State v. Patterson*, 47 S. E. 808, 134 N. C. 612; *Ober v. Smith*, 78 N. C. 316).

**ORDINARY TRAVEL**

"Ordinary travel" on a public street includes the use of a street by bicycle, and a bicycle is a vehicle of such a nature that it may be properly used on highways and its use regulated by the Legislature, and, being a vehicle, its proper place is on the highway or street, and not on the sidewalk, unless otherwise provided by statute. *Molway v. City of Chicago*, 88 N. E. 485, 486, 239 Ill. 486, 23 L. R. A. (N. S.) 543, 16 Ann. Cas. 424.

**ORDINARY USE**

Where the court instructed that municipalities are only liable for such defects in sidewalks as are apparent, or suggested by appearances, or disclosed by a test in the nature of the "ordinary use of such walks," it properly explained that by "ordinary use of such walk" was not meant such as a person walking over the walk with no regard for the walk would have, but such as a person going over the walk in the ordinary way that people go over walks, at the time being mindful of its condition and having particularly in mind the duty of ascertaining the condition of the walk with reference to whether it was safe and fit for public travel. *Hunter v. Village of Ithaca*, 105 N. W. 9, 10, 141 Mich. 539.

The taking of water from a stream for purposes of irrigation is not an "ordinary or natural use" within the rule giving riparian owners the absolute right to such uses. *Bigham Bros. v. Port Arthur Canal & Dock Co. (Tex.)* 91 S. W. 848, 853.

**ORDINARY WEAR AND TEAR**

The breaking of a window due to a defect in the construction of the building is a

part of the "ordinary wear" within the exception to a covenant in a lease to leave the premises in as good condition as when taken, "ordinary wear" excepted. The term here used is "ordinary wear," while the term is usually "ordinary wear and tear"; but it is doubtful if there is any distinction between the two expressions. An exception in either form will doubtless apply more naturally to the gradual deterioration which results from use, lapse of time, and the operation of the elements. It has been held, however, and seems to be the accepted doctrine, that the words "ordinary wear and tear" will cover a specific and substantial injury suddenly sustained as the result of a structural defect. *Drouin v. Wilson*, 67 Atl. 825, 827, 80 Vt. 335, 13 Ann. Cas. 93 (citing *Brown v. Burrington*, 36 Vt. 40).

In general, the ordinary reasonable use and wear of property by a tenant has relation to the depreciation in condition of building or property which it undergoes during the tenant's occupation, when the tenant, in the case of a residence, at least, does nothing in connection with the use more than to come and go and perform the acts usually incident to creating and maintaining conditions for living in the ordinary way. *Taylor v. Campbell*, 108 N. Y. Supp. 399, 400, 123 App. Div. 698.

#### Live stock transported

In an action for damages for injuries to stock shipped over defendant's road, the term "ordinary wear and tear excepted," as used in an instruction that "the law requires a common carrier who receives stock for transportation to carry and transport the same from place of shipment to the place of destination in as safe and speedy a way as possible and to deliver the same in like order and condition as received 'ordinary wear and tear excepted,'" should be construed to mean the depreciation in value which results from the mere transportation itself unaccompanied by negligence of the carrier. *International & G. N. R. Co. v. Young* (Tex.) 72 S. W. 68.

#### ORDINARILY

"Ordinarily" means "according to established order; methodical; regular; customary, as the ordinary forms of law or justice; common, usual." *Renow v. State*, 120 S. W. 174, 176, 56 Tex. Cr. R. 343 (quoting and adopting definition in *Webst. Dict.*).

In an action for injuries to a passenger, an instruction that plaintiff assumed the risks "ordinarily" incident to the coupling of the cars, instead of such risks as were "usually" incident thereto, was not objectionable; such words being regarded as synonymous. *St. Louis Southwestern R. Co. of Tex. as v. Morrow* (Tex.) 93 S. W. 162, 163.

#### ORDINARILY PRUDENT MAN

In a personal injury action by a servant, the court told the jury that it would refer during the charge to "the prudent man, and reasonable care" and they would understand thereby "the care and prudence of an ordinarily careful and prudent man in like circumstances," and would measure plaintiff's conduct by that standard, that care of a prudent man under some circumstances might be negligence under others, and they should apply the test with their general knowledge of the degree of care that a man of ordinary prudence would exercise and, in directing attention to the question of plaintiff's care, told them to consider whether he exercised the care and prudence "of an ordinarily prudent man and was without fault on his part." Held, that the standard of care stated as the measure of plaintiff's conduct was too low; the words "ordinarily prudent man" suggesting mediocrity of care, if not carelessness. *Drown v. New England Telephone & Telegraph Co. & Consolidated Lighting Co.*, 70 Atl. 599, 605, 81 Vt. 358.

The term "ordinarily prudent person" is synonymous with the term "person of ordinary care." A charge submitting the issue of assumed risk, which uses the term "ordinarily prudent person," is sufficient, under the statute providing that the defense shall not be available where a "person of ordinary care" would have continued in the service with a knowledge of the defect. *Texas & P. R. Co. v. Johnson*, 106 S. W. 773, 776, 49 Tex. Civ. App. 135.

#### ORDINARILY PURE

"Ordinarily pure and wholesome water" means water reasonably clean and free from bacteria or other contamination, rendering it unfit for domestic use and dangerous to individuals. *Peffer v. Pennsylvania Water Co.*, 70 Atl. 870, 873, 221 Pa. 578.

#### ORE

See Extra Good Ore; Iron Ore; Roasting Ore.

As property, see Property.

"Ore" is a metalliferous mineral or rock, especially one which is of sufficient value to be mined. *J. M. Guffey Petroleum Co. v. Murrel*, 53 South. 705, 713, 127 La. 466.

#### ORE ROASTER

"An 'ore roaster' is designed for expelling the sulphur from iron ore preliminary to smelting." *Davis-Colby Ore Roaster Co. v. Lackawanna Iron & Steel Co.*, 128 Fed. 453.

#### ORGANIC

##### ORGANIC ACT

The charter or statute by which a municipal corporation is created is its organic act, and neither the corporation nor its of-

filcers can do any act, make any contract, or incur any liability not authorized thereby, or by some legislative act applicable thereto. *Wakefield v. Brophy*, 122 N. Y. Supp. 632, 634, 67 Misc. Rep. 298.

### ORGANIC LAW

Under the constitution declaring that a freeholder's charter shall be the "organic law of the city," such charter is properly termed the local constitution of the city and fixes the organization of the municipal government. *In re Pfahler*, 88 Pac. 271, 275, 150 Cal. 71, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911.

### ORGANIZE

See *County Completely Organized; Duly Organized and Existing*.

"To organize" means to arrange or constitute in parts; each having a special function or relation. *Board of Sup'rs of Norfolk County v. Duke*, 73 S. E. 456, 459, 113 Va. 94.

The word "organized," used in relation to a school board, might, interpreted in its limited sense, be held to mean merely the election of officers for the board, but, interpreted in a broader sense, the word means: Erected, established, constituted, composed, and formed as to its constituent parts. *Copelin v. Board of School Directors of City of Harrisburg*, 64 Atl. 5422, 544, 545, 215 Pa. 359.

"An indictment charging embezzlement by an officer of the city was not objectionable in failing to allege that the money in question belonged to an "organized city." The use of the word "organized" in the statute qualifies the word "city" and is mere surplusage, since a city must be organized to be a city, a distinct entity capable of owning property susceptible of embezzlement. *Bode v. State*, 113 N. W. 996, 997, 80 Neb. 74.

### Corporations

A corporation created by special charter is fully "organized," within Pub. St. 1882, c. 105, § 9, now Rev. Laws, c. 109, § 13, so as to transfer the franchise from the incorporators to the corporation, when the first meeting has been called, the act of incorporation accepted, officers elected, by-laws for future meetings adopted, and stock subscriptions accepted; and thereafter the affairs of the corporation are subject to the control of the stockholders, even if only a small part of the stock has been subscribed for and accepted, and although no payments have been made thereon; no call for payments having been made. *Roosevelt v. Hamblin*, 85 N. E. 98, 100, 199 Mass. 127, 18 L. R. A. (N. S.) 748.

Real estate trusts created by deed for the purchasing, improving, holding, or selling of lands and buildings, and for the benefit of the shareholders, which do not derive any

benefit from and are not "organized" under any statute of the state, and which by their terms end with lives in being and 21 years thereafter, are not subject to the excise tax imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112, on the doing of business by corporations, joint-stock companies, or associations "organized" under the laws of the United States, or of any state or territory. *Eliot v. Freeman*, 31 Sup. Ct. 360, 361, 220 U. S. 178, 55 L. Ed. 424.

### ORGANIZATION

See *Color of Apparent Organization; Labor Organization*.

The term "organization" implies a recognition of order, and an obedience to duly constituted authority. *State ex rel. Cook v. Houser*, 100 N. W. 964, 980, 122 Wis. 534.

As used in Code, tit. 9, c. 9, § 1833, providing that mutual benefit associations shall not employ paid agents in soliciting and procuring members, except in the "organization" of subordinate bodies, the word "organization" refers to subordinate bodies, and not that of the association itself. *First Nat. Bank of Marshalltown v. Church Federation of America*, 105 N. W. 578, 580, 129 Iowa, 268.

### ORGANIZATION OF ELECTORS

In Const. Amend. 1908, art. 2, § 2½, which provides that the Legislature may enact laws as to the election of delegates to conventions of political parties, and shall enact laws providing for the direct nomination of candidates for public office by electors, political parties, or organizations of electors without conventions, at elections to be known as "primary elections," the term "political parties" is intended to embrace those which had participated in a struggle at the polls for political ascendancy, and political "organizations of electors" is intended to include new parties which had not participated in prior elections, organized to advance some principle or measure of public policy. *Socialist Party v. Uhl*, 103 Pac. 181, 185, 155 Cal. 776.

### ORGANIZATION OF MILITIA

The word "organization" as used in Act Cong. May 27, 1908, c. 204, that the organization, armament, and discipline of the organized militia in the several states shall be the same as that which is now or may hereafter be prescribed for the regular army of the United States, does not relate to or include the enlistment of a soldier, but relates to the distribution of the personnel of the army or militia into units. *Acker v. Bell*, 57 South. 356, 358, 62 Fla. 108, 39 L. R. A. (N. S.) 454, Ann. Cas. 1913C, 1269.

### ORGANIZED TERRITORY

"Organized territories" have reference exclusively to that system of organized governments long existing within the United

States, by which certain regions of the country have been erected into civil governments. Their powers, executive, legislative, and judicial, are conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States; they are not in a sense independent governments, yet they exercise nearly all the powers of governments under what are generally called organic acts, passed by Congress, conferring such powers on them. More briefly, "organized territory" has been defined as an "inchoate state." Porto Rico, though it became by the Treaty of Paris a "territory" of the United States, did not become an "organized territory" in the technical sense of the words so as authorized extradition from a state or territory of the United States to Porto Rico. In re Kopel, 148 Fed. 505, 507 (citing *De Lima v. Bidwell*, 21 Sup. Ct. 743, 182 U. S. 1, 45 L. Ed. 1041; In re Lane, 10 Sup. Ct. 760, 135 U. S. 447, 34 L. Ed. 219; *Ex parte Morgan*, 20 Fed. 305).

### ORGANIZED TOWN

An incorporated village is an "organized town" within the statute requiring a duplicate of the auditor's notice of the meeting of the county board of commissioners to pass on the petition of the judge of the county seat to be posted, 10 days before such meeting, in a public place in each organized town of the county. *Tucker v. Board of Com'rs of Lincoln County*, 97 N. W. 103, 104, 90 Minn. 406.

### ORGANZINE

Silk "organzine," damaged in dyeing, is not by reason of the damage removed from the provision for "organzine," in *Tariff Act* July 24, 1897, c. 11, § 1, Schedule L, par. 385, 30 Stat. 185, and is classifiable as such, rather than as "silk waste" under section 2, *Free List*, par. 661, 30 Stat. 201. *Cohen v. United States*, 180 Fed. 634.

### ORIFICE

A contract to furnish water for public purposes contained this clause: "Said first party agrees to furnish water at its mains without extra charge, for the following municipal purposes: \* \* \* For eighteen (18) taps or faucets in computing which each 'orifice' beyond the main shall be counted as one 'tap,' except that in the town hall and in schoolhouses one faucet may be connected with all the water-closets and urinals in any one building." In addition to the water charged in the account annexed, plaintiff has for many years furnished without charge water for the city hall with 13 separate taps or faucets, for the city farm with 6 faucets, and for the city farm stable with 1 faucet; each building being connected with the main by one service pipe. The plumbing for each water-closet and for the urinal in the town

hall is entirely separate and distinct from that of each other. Held, that each of these faucets was an "orifice" beyond the main and must be counted as one "tap." *Public Works Co. v. City of Old Town*, 66 Atl. 723, 724, 102 Me. 306.

### ORIGIN

See *Domicile of Origin*.

### ORIGINAL

See *Triplicate Original*.

Where two copies of a letter are written exactly alike by the same writer, one of which is desired to be mailed and the other retained, the one has not become the "original" and the other a copy by whatever evidence the accuracy of the copy is established, so that a typewritten carbon copy of a letter mailed is not a duplicate original, so as to be admissible in evidence without accounting for the original. *McDonald v. Hanks*, 113 S. W. 604, 607, 52 Tex. Civ. App. 140.

### ORIGINAL AMOUNT IN CONTROVERSY

Under Const. art. 4, § 4, providing that the Supreme Court shall not have jurisdiction of actions for the recovery of money when the "original amount in controversy" does not exceed \$200, the amount in controversy is the amount of the principal sum sued for, with interest to the commencement of the action, and not with interest to the date of the trial, since the obvious meaning and purpose of the word "original" is to limit the amount to the time when the matter first originates as a controversy in court. *Ingham v. Wm. P. Harper & Son*, 128 Pac. 675, 676, 71 Wash. 286.

Under Const. art. 4, § 4, and *Ballinger's Ann. Codes & St.* § 4650, providing that the appellate jurisdiction of the Supreme Court shall not extend to civil actions at law for the recovery of money where the "original" amount in controversy does not exceed \$200, the amount in controversy to which the appellate jurisdiction of the Supreme Court extends is that which was in actual dispute before the action was brought, and does not include attorney's fees which are merely incidental to the suit; the word "original" meaning "pertaining to the origin or beginning; preceding all others; first in order; primitive; pristine." *Fidelity & Deposit Co. of Maryland v. Faben*, 98 Pac. 764, 765, 51 Wash. 308.

### ORIGINAL ANSWER

A pleading which in its substance is a direct and full reply to the cause of action set up in the plaintiff's petition and contains, among other matter, a sworn denial of partnership of the defendants, should, under the rules of pleading, be denominated either an "original" or "amended" answer.

and is not a "supplemental answer." *Chicago, R. I. & T. R. Co. v. Halsell*, 83 S. W. 15, 98 Tex. 244.

### ORIGINAL APPLICATION

The "original application," as used in Rev. St. § 4897, providing that a second application may be made within two years after the allowance of original application, means the first application. *Weston Electrical Instrument Co. v. Empire Electrical Instrument Co.*, 181 Fed. 90, 91.

### ORIGINAL APPROPRIATION

Where the owner of certain land had used water from a main irrigation ditch through a lateral since September 3, 1888, when the right so to do was decreed to her by a void probate decree, such use constituted an "original appropriation" as of that date. *Bullerdick v. Hersmeyer*, 81 Pac. 334, 335, 32 Mont. 541.

### ORIGINAL CONSTRUCTION

Until property once bears specifically the cost of building a pavement abutting it done on the order of the council of the city, or by the city's express permission, indicated by act of its legislative body, there has not been an original construction of such improvement within a statute allowing the city to order the original construction of such improvement at the cost of the abutting owners. *Gulfoyle's Ex'r v. City of Maysville*, 112 S. W. 666, 129 Ky. 532.

Where a portion of an old turnpike road, by the extension of the limits of a city, was included within, and became a public way of, the city, and, as such, had a few repairs made on it, the regrading and paving of the road was an "original construction" of the street, within Ky. St. 1894, § 2833, making lot owners liable for the costs of the "original construction," and the city liable for costs of "reconstruction," of streets. *McHenry v. Selvage*, 35 S. W. 645, 99 Ky. 232.

### ORIGINAL CONTRACT

See Contract to Answer for Default of Another.

### ORIGINAL CONTRACTOR

An "original contractor" within Mechanics' Lien Law is one, who, for a fixed price, agrees to perform certain work, and does not include persons doing carpentry work, etc., by the day. *Van Horn Trading Co. v. Day* (Tex.) 148 S. W. 1129, 1130.

Every person who deals directly with the owner, and who, in pursuance of a contract with him, performs labor or furnishes material, is an original contractor within Comp. Laws 1897, § 2221, giving every original contractor a lien. *Gray v. New Mexico Public Stone Co.*, 110 Pac. 603, 604, 15 N. M. 478.

Under L. O. L. § 7420, making it the duty of every original contractor to file his lien within 60 days from the completion of his contract, and of every mechanic or other person to file within 30 days, one engaged merely to work for an indefinite time, under the direction of the lessee of a house, is a mere "laborer," whose rights to a lien would expire within 30 days from his last day of work; but one engaged under a direct contract with the owner to furnish labor or labor and materials is an "original contractor," though the contract be implied. *Bernard v. Hassan*, 118 Pac. 201, 60 Or. 62.

Where plaintiff contracted with a lessee to raise a number of old buildings above the street level and remodel them, and "furnish all of the necessary labor and material to be used to fully complete the work," plaintiff to receive the actual cost of the materials and labor, plus 10 per cent. and the reasonable value of the work, to be determined by the amount of work and labor done when it was completed, it was held that the labor to be performed was not merely incidental to the furnishing of the materials, and hence plaintiff was an "original contractor" within the meaning of the statute, and not a materialman, and was not entitled to a mechanic's lien where the contract was not in writing and filed with the county recorder as the statute (Code Civ. Proc. § 1183) requires. *Peterson v. Frelermuth*, 121 Pac. 299, 301, 17 Cal. App. 609.

### Materialman

A party furnishing the material for a building is an original contractor, within Rev. St. 1899, § 4207, requiring an original contractor to file his lien account within six months after the indebtedness shall have accrued. *E. R. Darlington Lumber Co. v. James T. Smith Bldg. Co.*, 114 S. W. 77, 78, 134 Mo. App. 316.

### ORIGINAL COST

In determining what is a fair and reasonable price to be paid by a city for a waterworks system at the termination of a franchise to a private company, is not to be determined by the "original cost" of the plant, but by its present value, and "original cost" and "present value" are not equivalent terms. *Galena Water Co. v. City of Galena*, 87 Pac. 735, 737, 74 Kan. 644 (citing *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827; *Town of Bristol v. Bristol & Warren Waterworks*, 49 Atl. 974, 23 R. I. 274).

### ORIGINAL DISTRICT

Code Supp. 1907, § 1989a23, provides that if any person owns lands within a drainage district which has been assessed for benefits, and which is separated from the ditch by the land of others, and shall desire to drain his land across the land of such oth-

ers into the ditch, and shall be unable to agree on the terms on which he may enter on their lands and construct such ditch, he may file a petition, asking the board of supervisors to establish a subdistrict within the limits of the original district to secure more complete drainage, describing the lands to be affected, and that all other proceedings shall be the same as provided for the establishment of original districts. By Acts 33d Gen. Assem. c. 118, § 22, it was provided that additional lands within any district which were benefited by an improvement might be included therein. Held, that the terms "subdistrict" and "original district" in section 1989a23 were used in contradistinction to each other, the term "original district" not having been used in the earlier statute in contradistinction to the annexed territory provided for by section 1989a54, as added by Acts 33d Gen. Assem. c. 118, § 22; and hence the phrase "within the limits of the original district" in section 1989a23 must be deemed as applicable to annexed territory as to the lands originally included in the district, so that it is not necessary to the annexation of territory to a district that it shall have been within the original territory. *Bird v. Board of Sup'rs of Harrison County*, 135 N. W. 581, 584, 154 Iowa, 692.

#### ORIGINAL ENTRIES

See Book of Original Entries.

#### ORIGINAL IMPROVEMENT

The construction for the first time of sewer is an "original improvement" within Ky. St. 1903, § 3100, providing that no error in the proceedings of the general council shall exempt from payment after the work is done, as required by the ordinance or contract, but that no ordinance for any original improvements mentioned in the act shall pass both branches of the general council at the same meeting, and at least two weeks shall intervene between its passage in the two branches. *Thomas v. Woods*, 108 S. W. 878, 879, 128 Ky. 555.

#### ORIGINAL INSTRUMENT

Where a declaration of trust is made in duplicate by the same impression of the typewriter, and signed at the same time, each party taking one, either is admissible as an original. *First Nat. Bank of Bandon v. Jamieson*, 128 Pac. 433, 63 Or. 594.

#### ORIGINAL JURISDICTION

The phrase "original jurisdiction" means the power to entertain cases in the first instance as distinguished from appellate jurisdiction, and does not mean exclusive jurisdiction. A court of original jurisdiction is one in which an action has its origin. *Burks v. Walker*, 109 Pac. 544, 545, 25 Okl. 353.

The "jurisdiction" to consider causes *de novo*, on appeal, and to decide them on the

law and the evidence according to the right of the case, independent of the rulings and judgment of the lower court, is original and not appellate. In *re Burnette*, 85 Pac. 575, 577, 73 Kan. 609.

#### ORIGINAL LIABILITY

The words "original liability," within V. S. 1183, providing that, if execution on a judgment obtained against an association is returned unsatisfied, a suit for the amount unpaid may be brought against any or all of the associates on their "original liability," have reference to the liability consequent on membership in the association at the time of the creation of the liability on which the judgment was recovered, and persons whose membership had ceased when the liability merged in the judgment or persons whose membership did not commence until subsequent thereto were not responsible in supplementary proceedings under the section. *F. R. Patch Mfg. Co. v. Capeless*, 63 Atl. 938, 940, 79 Vt. 1.

#### ORIGINAL LOCATOR

The "original locator" of mining ground is a discoverer of the mineral therein contained. *Zerres v. Vanina*, 134 Fed. 610, 614.

#### ORIGINAL OBLIGATION

Under Rev. Civ. Code, § 1973, making a promise to answer for another's obligation an "original obligation," where the promise is made by one who has received property upon an undertaking to apply it pursuant to such promise, etc., an agreement to pay another's account is an original contract, and not a guaranty, where the debtor has turned his bills receivable, etc., to the promisor, on his agreement to pay the debtor's debts. *Grimsrud Shoe Co. v. Jackson*, 115 N. W. 656, 659, 22 S. D. 114.

Under the provisions of subdivision 3, § 6010, Rev. St. 1887, a promise to answer for the obligation of another is deemed an "original obligation" of the promisor, and need not be in writing, where the promise is for an antecedent obligation of another, and is made upon the consideration that the party receiving it cancels the antecedent obligation and accepts the new promise as a substitute therefor. *McCallum v. McClarren*, 98 Pac. 200, 201, 15 Idaho, 374.

#### ORIGINAL PACKAGE

An "original package" is defined as a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together convenient for handling. It is again defined to be the unit which the carrier receives, transmits, and delivers as an article of commerce, and again as that package which is delivered by the importer to the carrier at the initial point of shipment in the exact condition in which it was shipped. If sold, it must be in the form



as shipped or received, for, if the package be broken after such delivery, it by that act alone becomes a part of the common mass of property within the state, and is subject to the laws of that state, enacted in virtue of its police power. *State v. Eckenrod*, 127 N. W. 56, 58, 148 Iowa, 173.

The term "original packages," as used in *Laws Kan.* 1907, c. 250, providing that it shall be unlawful to sell, offer for sale, or deliver for use at any coal mine or mine in the state, powder in any manner except in original packages, containing 12½ pounds of powder, etc., do not necessarily have the same meaning as used in decisions of the federal Supreme Court, so as to make the statute void as designed to prohibit importations of black powder from other states, the act not dealing with importations, special or general, but only with sales within the state, at a specified place, and delivery at such place of the powder sold in other than the prescribed quantity and in a prescribed package. *Williams v. Walsh*, 32 Sup. Ct. 137, 139, 222 U. S. 415, 56 L. Ed. 253.

"The doctrine [of 'original package'] has no application where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee." *Crigler v. Commonwealth*, 87 S. W. 276, 279, 120 Ky. 512 (quoting and approving *Austin v. Tennessee*, 21 Sup. Ct. 132, 179 U. S. 343, 45 L. Ed. 224).

Each separate bottle shipped into the state by a manufacturer to a local dealer under a contract by the terms of which the agreed prices were per cask containing 10 dozen bottles, and per case containing 6 dozen bottles, cannot be considered an original package, so as to save the local sales from the interdiction of *Laws Miss.* 1908, c. 115, prohibiting sales of malt liquors. *Purity Extract & Tonic Co. v. Lynch*, 33 Sup. Ct. 44, 45, 226 U. S. 192, 57 L. Ed. 184.

An original package as governed by the interstate commerce law is one delivered by the importer to the carrier at the initial point of shipment, and retains its form and contents until received by the consignee in the same condition as when shipped, and if upon arriving at its destination in a sister state the package is broken, and its contents in smaller units offered for sale, entering into the retail commerce of the state the distinctive quality of interstate commerce is lost, and the goods become at once subject to state laws. *Ex parte Agnew*, 131 N. W. 817, 819, 89 Neb. 306, 35 L. R. A. (N. S.) 836, Ann. Cas. 1912C, 676; *Ex parte King*, 131 N. W. 820, 89 Neb. 298.

Where goods are packed in a case by the shipper in another state, and are shipped in-

to the state, the "original package" was the case in which the goods were packed and shipped into the state, and when the case was opened for the sale and delivery of the separate packages, and they were removed therefrom, such packages lost their distinctive character of articles of interstate transportation, and became a part of the taxable property of the state. *Parks Bros. & Co. v. Nez Perce County*, 89 Pac. 949, 951, 13 Idaho, 208, 121 Am. St. Rep. 261, 12 Ann. Cas. 1113.

Where a liquid in casks is shipped in interstate commerce in car load lots, the cask and not the car is the "original package" within the meaning of Food & Drugs Act June 30, 1906, c. 3915, § 10, 34 Stat. 771, which authorizes the seizure and forfeiture for adulteration or misbranding of articles so shipped while remaining in "original unbroken packages." *United States v. Sixty-Five Casks Liquid Extracts*, 170 Fed. 449, 454 (citing 6 Words and Phrases, p. 5059).

Where the manufacturer of whisky received a barrel of his product from a government warehouse after paying the tax, having the barrel stamped to show the payment and receiving stamps to be affixed on each five gallons thereof when transferred to kegs of that capacity, he was not required to sell the whole barrel in one package to avoid payment of a license, but could divide it into five-gallon kegs for sale, and when stamped the kegs were "original packages containing not less than five gallons" within the statute authorizing the sale of whisky by the manufacturer thereof in that manner without license. *Bunch v. State*, 114 S. W. 239, 88 Ark. 230.

#### Subdivisions of packages

"The term 'original packages' is not defined by any statute, and is simply a convenient form of expression adopted by Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. [25 U. S.] 419, 6 L. Ed. 678, to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported. It is not denied that, in the changed and changing conditions of commerce between the states, packages in which shipments may be made from one state to another may be smaller than those 'bales, hogsheads, barrels, or tierces,' to which the term was originally applied by Chief Justice Marshall, but, whatever the form or size employed, there must be a recognition of the fact that the transaction is a bona fide one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the states." The tax imposed on cigarette selling by Code Iowa, § 5007, is not an invalid regulation of commerce as applied to sales at retail of packages of ten cigarettes in small pasteboard boxes, sealed, and stamped with the revenue stamp, which had been

shipped loose to the retailer from another state by an express company which merely issued a receipt in duplicate, showing the number of packages and the name of the consignee, the packages not being separately or otherwise addressed, since such a box can in no just sense be considered an "original package." *Cook v. Marshall County, Iowa*, 25 Sup. Ct. 233, 235, 196 U. S. 261, 49 L. Ed. 471.

### ORIGINAL PROMISE

An obligation to answer for the debt, default, or miscarriage of another is original and valid, though in parol, if made at the time or before a debt is created, where credit is given solely to the promisor; or where credit is given on the promises of both, as principals and jointly liable, and not on the promise of one, as surety for the other; or a promise, made after the debt is created, when, by reason of the promise, the original debtor is released; or if it is a promise to pay out of funds placed in the hands of the promisor by the debtor; or if it be a promise based on a new consideration of benefit or harm passing between the promisor and the creditor. Where there is no benefit to one promising to answer for the debt of another, and the promise does not create an original obligation, but is a collateral promise, merely superadded to the promise of another to pay the debt, the original promisor remaining liable, the collateral promisor is not liable, unless there is a writing, whether the promise is made when the debt is created or not. *Peele v. Powell*, 73 S. E. 234, 236, 156 N. C. 553.

A promise made at the time or before a debt is created, and where credit is given solely to the promisor or to both promisors as principals, or a promise based on a new consideration passing between the promisor and the creditor, or a promise for the benefit of the promisor where he has a personal and pecuniary interest in the transaction in which a third party is the original obligor, is an "original promise," which is not within the statute of frauds, but a promise not creating an original obligation and merely superadded to the promise of another who remains liable, to pay such debt, is a collateral promise required by the statute to be in writing and signed, whether made at the time the debt was created or afterwards. *Whitehurst v. Padgett*, 73 S. E. 240, 241, 157 N. C. 424.

Where the defendant bought uncompleted houses, the plumbing in which plaintiffs had contracted with her vendors to do, and which they had partly done, her promise that, if they would hurry up the work so that the buildings could be rented, she would pay them, not only for the work of completion, but for what they had done for her vendors, is an "original promise" on a new and sufficient consideration, and so not within the

statute of frauds. *Breen v. Isaacs*, 96 N. Y. Supp. 741, 49 Misc. Rep. 127.

Where defendant, who was the owner of certain premises, promised that, if plaintiff would refrain from filing a lien thereon for materials delivered to a contractor and would continue to furnish sand for the buildings being erected, defendant would pay the debt owing by the contractor to plaintiff, defendant's agreement was an original promise based on a new consideration, and was not, therefore, within the statute of frauds. *Schnauffer v. Ahr*, 103 N. Y. Supp. 195, 198, 53 Misc. Rep. 299.

A promise to pay the debt of another in consideration that the creditors release the debtor and accept the promise instead thereof is an original promise which is not required to be in writing under Rev. St. 1887, § 6010, subd. 3, making a promise for an antecedent obligation of another in consideration that the party receiving it cancel the antecedent obligation and accept the new promise as a substitute therefor an original promise. *McCallum v. McClarren*, 98 Pac. 200, 201, 15 Idaho, 374.

### ORIGINAL RECORD

It was complainant's custom in operating a lumber yard, on receiving an order, to write the substance on a small order blank, which was given to a loader, who put the material on a wagon, and returned the slip to the yard clerk, who then made three "original slips" on an automatic register, showing the date, names, quantity, price, etc. In filling out the blanks the machine made three exact copies of the slips by one impression, and automatically numbered them. One of the slips was given to the driver, who delivered the lumber, and the other two and the original written memorandum retained by plaintiff. Held, that the original written memorandum was a mere shop book entry, and not ordinarily admissible, but that one of such "original slips" retained by plaintiff in its office was admissible as the original record. *Federal Union Surety Co. v. Indiana Lumber & Mfg. Co.*, 95 N. E. 1104, 1105, 176 Ind. 328.

### ORIGINAL SPECIAL PROCEEDING

While a criminal contempt proceeding for violating an order enjoining accused from maintaining a liquor nuisance in which a warrant of attachment was issued is an "original special proceeding" under Rev. Codes 1905, § 7555, providing that, if an attachment is issued in contempt proceedings, it shall be deemed an original special proceeding by the state against accused, it is not, strictly speaking, an independent proceeding, as it grows out of and is, to a certain extent, connected with the main action and is dependent for its foundation upon the proceedings in the main action and the violation of the injunctive order therein issued. *State v. Helser*, 127 N. W. 72, 75, 20 N. D. 857.

**ORIGINAL SUIT**

A proceeding under Rev. St. 1895, c. 17, tit. 30, art. 1375, authorizing a new trial for good cause shown, upon defendant's application, where judgment was rendered against him on service by publication without appearance, is not an "original suit," but a "continuation of the former suit." Hence, the order vacating the original judgment is an interlocutory order from which no appeal lies. *Wolf v. Sahm*, 120 S. W. 1114, 1117, 55 Tex. Civ. App. 564.

**ORIGINAL SUM**

The phrase "original sum," as used in St. 1909, c. 490, pt. 2, § 59, which requires a person redeeming land sold for taxes to pay the original sum, with interest and other charges, means the amount paid at tax sale; hence, where a purchaser of a tract of land at a tax sale has subdivided it by his own deed before the time for redemption had expired, in such a way that his grantee owned the tax title to a part of the land and plaintiff the equity of redemption, the right to redeem depends upon plaintiff's paying the whole sum paid for the tax deed. *McNell v. O'Brien*, 91 N. E. 138, 140, 204 Mass. 594.

**ORIGINAL UNDERTAKING**

If no other person is liable for the same debt for which the undertaking is made, although another person may be liable for a distinct debt which is the measure of the one in question, the undertaking is an original one. *Jolley v. Walker's Adm'rs*, 26 Ala. 690, 702.

Where a tenant became sick after planting the crop, and defendant bought the crop from him and agreed to pay the lessor the rent due, and the lessor accepted defendant as his tenant, the agreement to pay the rent was an "original undertaking," not required to be in writing under the statute of frauds. *Pylant v. Webb*, 58 S. E. 329, 2 Ga. App. 171.

Where relators furnished supplies, labor, and materials to a subcontractor for the construction of a highway, and treated the latter as their debtor until after he absconded, the undertaking of the contractors, if any, to liquidate such indebtedness, was not an "original undertaking," but a contract to answer for the default of another, within the statute of frauds. *Miller v. State ex rel. Prather*, 74 N. E. 260, 261, 35 Ind. App. 379.

**ORIGINAL WIDTH**

The words "original width," as used in Burns' Ann. St. 1908, § 7663, creating a highway by 20 years' user, but declaring that all highways previously laid out according to law, or used as such, for 20 years or more, shall continue as located and as of their original width respectively until changed according to law, related to the width of the highway when the proceeding was begun to

ascertain and record it, and not to a possibly wider or narrower way at some remote or recent period. *Pitser v. McCreery*, 89 N. E. 317, 318, 319, 172 Ind. 663.

**ORIGINAL WRIT**

See *Scire Facias*.

**ORIGINALLY EXERCISED BY CHANCERY COURT**

See *Jurisdiction Originally Exercised by Chancery Court*.

**ORIGINATING**

The words "originating" and "arising," as used in the section of the Constitution relating to the appellate jurisdiction of the Supreme Court and the circuit court, refer to cases which the circuit and county courts, respectively, exercise original jurisdiction of and determine. *Mugge v. Warnell Lumber & Veneer Co.*, 50 South. 645, 646, 58 Fla. 318.

**ORIGINATING CAUSE**

The initial and moving or "originating cause" is to be understood as meaning the surrounding conditions in which the negligence of defendant operated as the efficient cause of the injurious consequences. *Winchel v. Goodyear*, 105 N. W. 824, 827, 126 Wis. 271.

**ORIGINATING WITHIN VEHICLE**

Where an accident to an automobile resulted in the leakage of gasoline from the tank, and fire was communicated to the gasoline, which had escaped from burning lamps affixed to the outside of the vehicle, the fire loss on the vehicle was not one "originating within the vehicle," within a clause of a fire policy exempting the insurer from liability for fire so originating. *Preston v. Aetna Ins. Co.*, 103 N. Y. Supp. 638, 639, 118 App. Div. 784; *Same v. Union Assur. Soc.*, 103 N. Y. Supp. 640, 641, 118 App. Div. 788.

**ORNAMENT**

Personal ornaments as goods and chattels, see *Goods*.

A watch, chain, purse, or rosary, being each an article of use, and not worn for ornament, is not a "jewel" or "ornament," within the statute relieving an innkeeper from liability for loss of money, jewels, or ornaments, where he provides a safe, posts notice thereof, and the guest neglects to deposit the same in the safe. *Jones v. Hotel Latham Co.*, 115 N. Y. Supp. 1084, 1085, 62 Misc. Rep. 620.

**Watch**

A watch and fob are embraced in the terms "jewels" and "ornaments," as used in Act 1879, p. 185, c. 145, relating to the liability of the proprietor of a hotel for the keeping of any jewels and ornaments belonging to a guest. Mr. Webster defines the word "jewel" as an ornament of dress, usually made of a precious metal, having enamel or precious stones as a part of its design;

but we are of the opinion that it was used by the Legislature in the common meaning attributed to it as an ornament or useful article of value, and embraces a watch used for a timekeeper or chronometer, and in which precious stones may or may not form a part. The fob is evidently an article kept and worn both for use and ornament. *Rains v. Maxwell House Co.*, 79 S. W. 114, 117, 112 Tenn. 219, 64 L. R. A. 470, 2 Ann. Cas. 488.

### ORNAMENTAL FEATHERS

Peacock feathers in a crude condition, used in that state for ornamental purposes, are dutiable under the provision in paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191, for "ornamental feathers," and not under that in the same paragraph for "feathers crude." *George Silva & Co. v. United States*, 127 Fed. 781.

Crude ostrich feathers, which in that condition are never used for ornamental purposes, but need to be dressed and otherwise manufactured before becoming suitable for such use, are dutiable as "feathers \* \* \* crude," and not as "ornamental feathers," under the Tariff Act. *Brodie v. United States*, 135 Fed. 914, 915; *Spero v. Same*, 135 Fed. 915, 916.

### ORNAMENTAL FIXTURES

An electric chandelier, annunciator, and like contrivances or devices attached to the ceiling or walls of a house by a tenant, at his own expense and for his personal comfort and convenience, come within the legal definition of "domestic or ornamental fixtures" when so placed that they can be readily detached without injury to the premises. In the absence of any understanding to the contrary, such fixtures may be removed by the tenant at any time during his term or occupancy, and even thereafter, if he be deprived of the opportunity to remove them by a wrongful retaking of possession of the premises by the landlord. Not being annexed to the rented structure with any view to their becoming permanently attached thereto as a part of the realty, they do not lose their identity as chattels, and a possessory warrant will lie to recover them from a landlord who wrongfully withholds possession thereof from the tenant. *Raymond v. Strickland*, 52 S. E. 619, 620, 124 Ga. 504, 3 L. R. A. (N. S.) 69.

### ORNAMENTAL LEAVES

Bleached or dyed grasses that are intended for ornamental or decorative purposes are classable as "ornamental \* \* \* leaves \* \* \* not specially provided for," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191. And so are palm leaves that have been subjected to a process of painting, etc., to give them their natural appearance and to prevent decomposition. And also wreaths and crosses mounted on wire frames. *United States v. H. Bayersdorf-*

*er & Co.*, 175 Fed. 959, 960, 99 C. C. A. 449. See, also, *Bayersdorf & Co. v. United States*, 171 Fed. 286.

### ORNAMENTAL PROJECTIONS

As used in a city ordinance, authorizing the issuance of permits to construct "ornamental projections" beyond the building line, included all decorative projections on the face of a building beyond the building line in the nature of porches, arches, porticos, pedestals, free standing statuary columns, and pillars erected entirely for the enhancement of the beauty of the building from an artistic standpoint. *McMillan v. Klaw & Erlanger Const. Co.*, 95 N. Y. Supp. 365, 367, 107 App. Div. 407.

### ORNAMENTAL STONES

In construing the provision in paragraph 435, Schedule N, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 192, for imitation precious stones not "ornamented or decorated," held, as to stones which have been incrustated, but in which the incrustations are a part of the imitation, that they are not ornamented or decorated within the meaning of said provision. *United States v. R. F. Downing & Co.*, 144 Fed. 1022, 73 C. C. A. 42; *Id.*, 139 Fed. 155.

### ORNAMENTS AND OTHER ARTICLES

See Other.

### ORPHAN

"Orphans," as used in a certificate of a mutual benefit association, providing for payment to the family, "orphans," or dependent of the member, as he might direct, represented the children of the family after the death of father and mother. *Klee v. Klee*, 93 N. Y. Supp. 588, 590, 47 Misc. Rep. 101.

"Orphans," as used in the rules of an association providing that upon the death of a member the society would pay to the widower or orphans of the deceased member a certain sum, is intended in the sense of "children" and not in the strict legal sense of orphans. *Fischer v. Malchow*, 101 N. W. 602, 603, 98 Minn. 306.

Where a benevolent association's charter provided for the payment of benefits to "orphans," such term would not be limited to persons who were orphans in a strict sense, embracing those only related by consanguinity, but would be construed in the sense of children. *Berdan v. Milwaukee Mut. Life Ins. Co.*, 99 N. W. 411, 413, 136 Mich. 396, 4 Ann. Cas. 332.

A bequest for the education of "orphans or poor children" means orphans without estate to pay for such education and children whose parents are living but are too poor to pay for it. *Crow ex rel. Jones v. Clay County*, 95 S. W. 369, 379, 196 Mo. 234.

**ORPHAN ASYLUM—ORPHANS' HOME—ORPHANAGE**

As charity, see *Charity*.

As public charity, see *Public Charity*.

Lexicographers are not unanimous, but lean toward a meaning for "orphanage" or "orphan asylum" suggesting destitution of those relieved, rather than a profit-seeking enterprise. *Standard Dict.* "Orphanage." "An institution for the care of destitute orphans; orphan asylum." *Cent. Dict.* "Orphanage." "An institution or home for orphans; orphan asylum; an asylum or home for destitute orphan children." *Webst. Dict.* "Orphanage." "An institution or asylum for the care of orphans." *Id.* "Asylum." "An institution for the protection or relief of some class of destitute, unfortunate, or afflicted persons." *Baker v. State*, 97 N. W. 566, 569, 120 Wis. 135.

**ORTHOPEDIST**

As physician, see *Physician*.

**OSTENSIBLE****OSTENSIBLE AGENCY**

An agency is "ostensible" when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him. *Weidenaar v. New York Life Ins. Co.*, 94 Pac. 1, 6, 86 Mont. 592.

**OSTENSIBLE AUTHORITY**

"Ostensible authority" of an agent is such as a principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess. *Weidenaar v. New York Life Ins. Co.*, 94 Pac. 1, 7, 36 Mont. 592 (citing *Civ. Code*, § 3093). But a collector of a local lodge of a mutual benefit society, consisting of a grand lodge and subordinate local lodges, empowered to act as superintendent of the society in the state in the institution of new lodges, has no authority to waive delinquency of a member in a local lodge or receive current dues from one who has ceased to be a member of the society. *Kennedy v. The Grand Fraternity*, 92 Pac. 971, 977, 36 Mont. 325, 25 L. R. A. (N. S.) 78. *Civ. Code Cal.* § 2317, gives the same definition. And so, where certificates of stock owned by plaintiff were indorsed in blank without knowledge by his brother in plaintiff's name, and hypothecated to secure a debt of the brother, and plaintiff, being informed by the secretary of the corporation, said it was all right, the plaintiff could not as against an innocent purchaser from the pledgee dispute the brother's authority to transfer the stock. *Dover v. Pittsburg Oil Co.*, 77 Pac. 405, 406, 143 Cal. 501.

**OSTENSIBLE PARTNER**

*Civ. Code Ga.* 1910, § 3157, declares that "an 'ostensible partner' is one whose name appears to the world as such, and he is bound, though he have no interest in the firm." He is liable as a partner only to those persons who have acted on the faith of the truth of the appearance. *American Cotton College v. Atlanta Newspaper Union*, 74 S. E. 1084, 1085, 138 Ga. 147.

**OSTEOPATH**

As physician, see *Physician*.

As practicing medicine, see *Practice of Medicine*.

**OSTEOPATHY**

See *Practice of Medicine, Surgery, and Osteopathy*.

As practice of medicine, see *Practice of Medicine*.

"Osteopathy" is a method of treating diseases of the human body without the use of drugs, by means of manipulation applied to various nerve centers, chiefly those along the spine, with a view to inducing free circulation of the blood and lymph, and an equal distribution of the nerve forces. Special attention is given to the readjustment of any bones, muscles, or ligaments not in the normal position. *State v. Johnson*, 114 Pac. 390, 392, 84 Kan. 411, 41 L. R. A. (N. S.) 539 (quoting 6 Words and Phrases, p. 5070). It is that method of the healing art accomplished by a system of rubbing or kneading the body. *State v. Marble*, 73 N. E. 1063, 1064, 72 Ohio St. 21, 70 L. R. A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898. See, also, *Ex parte Collins*, 121 S. W. 501, 508, 57 Tex. Cr. R. 2; *Ligon v. State*, 39 South. 662, 663, 145 Ala. 659; *Bennett v. Ware*, 61 S. E. 548, 549, 4 Ga. App. 293 (quoting *State v. Laffring*, 55 N. E. 168, 61 Ohio St. 39, 46 L. R. A. 334, 76 Am. St. Rep. 858; *Nelson v. State Board of Health*, 57 S. W. 501, 108 Ky. 769, 50 L. R. A. 383; *State v. McKnight*, 42 S. E. 580, 131 N. C. 717, 59 L. R. A. 187).

**OSTRICH FEATHERS**

Not dutiable as ornamental feathers, see *Ornamental Feathers*.

**OTHER**

See *All Other*; *Another*; *Any Other*; *Every Other*; *No Other*; *Some Other*; *With Every Other Person*.

*Pen. Code* 1901, § 172, declares that "murder" is the unlawful killing of a human being with malice aforethought. Such malice is express or implied. Section 173 declares that all murder perpetrated by poison or by any other kind of willful, deliberate, and premeditated killing, or which is committed in

the perpetration of certain crimes, is murder in the first degree, and all other kinds of murder are in the second degree. Held, that the word "other" in section 173 was used to supply the sense of addition to the enumeration; and hence an instruction that it was not essential to a verdict of murder in the first degree by poison that there should be proof that defendant administered the poison to decedent with a specific intent to kill him was proper; malice being implied. *Eytinge v. Territory*, 100 Pac. 443, 445, 12 Ariz. 131.

#### As different

The natural, usual, and normal use of the word "other" is to indicate a differing from or an addition to the thing or things immediately in contemplation. *De Loach & Co. v. Aetna Ins. Co.*, 62 S. E. 473, 474, 4 Ga. App. 746.

#### As ejusdem generis

"Where a statute or other document enumerates several classes of persons or things, and immediately following, and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated." *Standard Oil Co. v. Swanson*, 49 S. E. 262, 263, 121 Ga. 412 (citing *Sanders v. State*, 12 S. E. 1058, 86 Ga. 717; *St. Paul Fire & Marine Ins. Co. v. Penman*, 151 Fed. 961, 969, 81 C. C. A. 151).

The rule that where a statute enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" will be read as "other such like," so that the persons or things comprised may be read as ejusdem generis with, and not of a quality superior to, or different from, those specifically enumerated, does not apply, where the intention of the Legislature is clear and there is no room for construction. *Vassey v. Spake*, 65 S. E. 825, 826, 83 S. C. 566.

"When general words follow an enumeration of particular cases, they apply only to cases of the same kind as those expressly mentioned, or, stated in different language, 'the word "other," following an enumeration of particulars, embraces enumerated particulars of like nature only, unless a broader sense is obviously intended.'" *Chicago Union Traction Co. v. Chicago*, 65 N. E. 451, 460, 199 Ill. 484, 59 L. R. A. 631 (quoting and adopting *Union County v. Ussery*, 35 N. E. 618, 147 Ill. 204; and citing and adopting *Misch v. Russell*, 26 N. E. 528, 136 Ill. 22, 12 L. R. A. 125; *First Nat. Bank of Joliet v. Adam*, 28 N. E. 955, 138 Ill. 483; *Ritchie v. People*, 40 N. E. 454, 155 Ill. 93, 29 L. R. A. 79, 46 Am. St. Rep. 815).

#### Other accidental or natural causes

Testator recited that having in mind the many catastrophes resulting from the action of the elements, and the great suffering, etc., caused by the destruction of life and property by storms, floods, fires, and other accidental and natural causes, etc., he devised the remainder of his estate to trustees to invest and pay the income for the charitable purpose of relieving the wants, distress, and suffering arising from such causes, and for the purpose of aiding such persons as the trustees deemed advisable who were victims of such accidents and catastrophes, and enjoining the trustees to select subjects worthy of assistance, and to use the fund for the greatest possible benefit to suffering humanity. In determining whether there was a sufficiently definite designation of beneficiaries, the court said: "Can it be doubted that the testator intended by the word 'such' to limit the relief to sufferers from some causes, accidents, or catastrophes, as distinguished from others not within his mental category? We think not. Certainly he intended that some causes, some accidents and catastrophes, should be excluded from those whose victims were to be the subjects of the annual expenditures of the income of this fund. If so, then is it not possible for the court to find some line of differentiation, which was in the mind of the testator, with sufficient certainty and definiteness to enable it to decide, in any concrete instance of expenditure or proposed expenditure, whether it is authorized? We are convinced that it is possible. Obviously the purchase of food for the homeless victims of the New Richmond cyclone would be justified. We think it equally obvious that expenditure to aid the cure of consumptives or inebriates would be forbidden to the trustees. Whether famine sufferers of a drouth-stricken region might be relieved, would perhaps be a question of more doubt than either of the other two, for they would not be victims of storm, fire, or flood. The inquiry, therefore, would be whether drouth would be a 'natural cause' so similar in character or results to those specified that we must conclude that the testator had it in mind in enlarging the field otherwise limited by the three expressed causes. We must presume that he had in mind a class of causes illustrated by the three named, though not strictly confined to them, but similar enough to be within the same general conception of possible suffering which he desired to relieve. Such is the unavoidable force and significance of the words used." *Kronshage v. Varrell*, 97 N. W. 923, 929, 120 Wis. 161.

#### Other action

"'Other action' pending is a good plea in bar to a popular action, or a qui tam action for a penalty, because, by bringing the first suit, the plaintiff in it is entitled exclusive

ly to the penalty, and consequently no other person can ever have any right." "It is well known that a man cannot bring a second action for the same cause for which he has a prior action pending. The same rule applies to qui tam actions where the plaintiffs are different, if the cause of action is the same." *B. F. Johnson Pub. Co. v. Commonwealth* (Ky.) 97 S. W. 749, 750 (quoting *Anderson v. Barry*, 2 J. J. Marsh. [25 Ky.] 265; *Commonwealth v. Churchill*, 5 Mass. 174).

#### Other actionable injury

Code Civ. Proc. § 549, authorizes the arrest of defendant in an action for damages for "personal injury." By section 3343, subd. 9, "personal injury" is defined as including assault, battery, false imprisonment, or "other actionable injury to the person." Held, that the words "other actionable injury to the person" mean other actions like to assault, or, in other words, an action in which defendant was himself at fault, and hence the statute does not authorize the arrest of defendant in an action for negligence or assault where the act causing the injury was that of his servant, but which is imputed to be his act, though not authorized by him. *Dauids v. Brooklyn Heights R. Co.*, 92 N. Y. Supp. 220, 222, 45 Misc. Rep. 208.

#### Other acts

The "other act" referred to in B. & C. Comp. § 549, subd. 4, providing that, where a party in good faith gives due notice of an appeal, and thereafter omits, through mistake, to do any other act necessary to perfect the appeal, the court may permit an amendment or performance of such act, is the filing of an undertaking on appeal, an omission to do which through mistake may be supplied on application therefor. *Hanley v. Stewart*, 102 Pac. 2, 54 Or. 38.

#### Other agent

Rev. St. 1898, § 2948, as amended by Laws 1899, c. 51, p. 74, and Laws 1905, c. 105, p. 126 providing that service of summons on a foreign corporation must be by delivering a copy to an officer "or other agent having the management, direction or control of any property of such corporation," does not authorize service on a person unconnected with the business for which the corporation was organized, and not having under his control any property, related to such business, but who, while temporarily in the state on his own business, is intrusted by the vice president of a foreign corporation with a bill for collection. The phrase "other agent" must be given a restricted meaning, and must be held to mean a person who is in some way connected with the business of the corporation for which it was created, or has under his control any property in some way related with such business. In other words, the "other agent" must possess some of the powers possessed by the persons named im-

mediately preceding the phrase "or other agent." *Honerine Min. & Mill Co. v. Tallerdar Steel Pipe & Tank Co.*, 88 Pac. 9, 11, 31 Utah, 328.

#### Other amusements

As used in Pen. Code 1895, art. 199, prohibiting merchants, grocers, or traders in any business whatsoever, or the proprietor of any public place of amusement, to barter or permit his place of business or of public amusement to be opened on Sunday, and further providing that the term public amusement shall be construed to mean circuses, theaters, and such "other amusements" for which admission fee is charged, the phrase "other amusements" refers to amusements of like or similar character of those expressly named in the statute, and does not include the game of baseball. *Ex parte Roquemore*, 181 S. W. 1101, 1103, 60 Tex. Cr. R. 282, 32 L. R. A. (N. S.) 1186. And, while a moving picture show is not a theater, it falls within the prohibition of the statute as one of "such other amusements" prohibited. *Ex parte Lingenfelter*, 142 S. W. 555, 557, 64 Tex. Cr. R. 30.

In Code Ann. St. 1908, § 8653, conferring power to license, tax, suppress, regulate and prohibit, theatrical and other exhibitions and shows, and "other amusements," the words "other amusements" must be construed in the light of the purpose of the section and must be limited to amusements of the kind and character named in the section. They could not be extended to include private amusements which are in themselves harmless, and therefore an ordinance prohibiting the keeping of card tables for sale in a place of business or making it unlawful to permit card playing in and under all circumstances in places of business, or adjacent thereto, is unauthorized. *Ex parte Sapp*, 113 N. W. 261, 79 Neb. 781, 12 L. R. A. (N. S.) 441.

#### Other animal

The words "or other animal," in New York Sanitary Code, § 195, providing that no person owning a stable or other premises shall keep therein any dog or other animal which shall by noise disturb any person in the vicinity, applies to animals ejusdem generis, and does not apply to horses kept in stables. *People v. Edelstein*, 86 N. Y. Supp. 861, 91 App. Div. 447.

The words "other animals," as used in a contract for the shipment of live stock that the value for which the carrier should be liable in case of loss should not exceed for a horse or mule \$100, cattle \$30 each, other animals at \$5 each, include hogs. *Nashville, C. & St. L. R. Co. v. Stone & Haslett*, 79 S. W. 1031, 1038, 112 Tenn. 348, 105 Am. St. Rep. 955.

Under Laws 1905, p. 113, § 15, subd. 15, authorizing cities and villages to pass ordi-

nances regulating the running at large of cattle, hogs, mules, sheep, goats, dogs, and other animals, they may pass ordinances to prevent the running at large of horses within the corporate limits; the phrase "other animals" being broad enough to include horses and all other animals. *Best v. Broadhead*, 108 Pac. 333, 335, 18 Idaho, 11.

#### Other articles

Gelatin spangles strung on cord, and used in making trimmings or ornaments for wearing apparel, are ejusdem generis with the articles enumerated in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189, providing for "ornaments, trimmings and other articles" composed of gelatin spangles, and are dutiable under that provision, rather than under paragraph 450 (30 Stat. 193) relating to "manufactures of \* \* \* gelatin." *G. Hirsch's Sons v. United States*, 141 Fed. 380, 381; *Hirsch v. United States*, 145 Fed. 1022, 74 C. C. A. 681.

In Rev. Laws Mass. c. 198, § 14, which gives a lien on a vessel for money due for "provisions, stores, or other articles furnished for or on account of such vessel" by virtue of a contract, express or implied, with the owner, the words "other articles" include only such articles in the nature of provisions and stores as might be necessities for the vessel in the sense of the maritime law. *The Satellite*, 188 Fed. 717, 719.

Bead fringes, which consist of beads strung on a cord or webbing and are used to decorate lamps as trimmings and shades, are not removed by the doctrine of ejusdem generis from the provision for "ornaments, trimmings, and other articles \* \* \* in part of beads," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189. *Holcomb & Co. v. United States*, 180 Fed. 795, 796.

"Spangled hat crowns" are, in a general way, of the same character as the class of materials considered under the provision in the Tariff Act for fabrics, wearing apparel, trimmings, etc., including "other articles \* \* \* composed wholly or in part" of gelatin spangles, and are dutiable under said provision for "articles," rather than as manufactures of gelatin. *Louis Metzger & Co. v. United States*, 141 Fed. 381, 382.

#### Other bailee

The statute defining the crime of embezzlement by "any carrier or other bailee" is not confined to bailees of the class "carriers," but embraces all bailees. *Faggard v. State*, 104 Pac. 930, 931, 3 Okl. Cr. 159.

The word "bailee," used in its broad sense, includes every person to whom the possession of personal property is delivered by another. The words "other bailee," as used in Pen. Code Ga. 1895, § 191, providing that any factor, commission merchant, warehouse keeper, etc., or any "other bailee,"

who shall fraudulently convert anything of value intrusted to him, shall be guilty of a felony, are equivalent to the words "other like bailee," and it is necessary that the character of the relation be a more fiduciary one than that arising from a mere loan for the benefit of the borrower. *Rice v. State*, 64 S. E. 575, 6 Ga. App. 160 (citing *Sanders v. State*, 12 S. E. 1058, 86 Ga. 718; *Cody v. State*, 28 S. E. 106, 100 Ga. 109).

A person hiring a horse and buggy from the owner for one day contracts to return the property at the end of such period, and is a "bailee" within Kirby's Dig. § 1839, providing that any carrier or other bailee who shall embezzle or convert to his own use property in his possession as bailee shall be guilty of larceny; the term "bailee" in that section not being limited by the rule of ejusdem generis to bailees of the generic class of carriers, but embracing all bailees. *Tally v. State*, 150 S. W. 110, 111, 105 Ark. 28.

#### Other banking game

Slot machines where the chances are unequal, with the chances in favor of the machine, are "other banking games" within Laws 1907, p. 25, c. 64, § 1, making it unlawful to operate any banking games of chance such as faro, monte, etc., or any other banking games. *Territory v. Jones*, 99 Pac. 338, 342, 14 N. M. 579, 20 L. R. A. (N. S.) 239, 20 Ann. Cas. 128.

#### Other borate material

The enumeration in paragraph 11, Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 152, of "other borate material," refers only to borate materials found in nature in a raw condition, such as the "borates of lime or soda" included in the same provision, and does not embrace borate of manganese or bormangan, which is a manufactured article made from manganese and borates of lime or soda, and which is held to be dutiable as a chemical compound or salt under paragraph 3 of said act, § 1, Schedule A, 30 Stat. 151. *Hempstead v. Thomas*, 129 Fed. 907, 908, 64 C. C. A. 339.

#### Other building

An awning in front of a building extending 13 feet from the house line to the curb, supported by five posts and covered with a roof of transparent glass, is not covered by the words "dwelling house or other building" in a deed providing that the front line of any messuages, dwelling houses, or other buildings shall recede eight feet from the street line. *Olcott v. Sheppard, Knapp & Co.*, 89 N. Y. Supp. 201, 202, 96 App. Div. 281.

*Burns' Ann. St.* 1901, § 3541, subd. 4, authorizes municipal corporations to direct the location of tallow chandleries, soap factories, and other buildings and to prohibit the erection of such buildings, or the continuance of noxious trades therein. Subdivision 11 authorizes such corporations to direct the



location of markets or slaughterhouses, and to regulate the same, and gives them jurisdiction for that purpose for two miles in all directions from the city limits. Held, that the express mention of slaughterhouses in subdivision 11 precludes the extension of the power of prohibition contained in subdivision 4, so as to include slaughterhouses within the general designation of "other buildings and structures." *City of Elkhart v. Lipschitz*, 74 N. E. 528, 529, 164 Ind. 671.

The phrase "wharf or place of storage, or in any warehouse, mill, store or other building," in *Hurd's Rev. St. 1905*, c. 38, § 124, providing that whoever fraudulently utters any receipt or other written evidence of the delivery or deposit of any grain, flour, pork, etc., on any wharf or place of storage, or in any warehouse, mill, store or other building, when the quantity specified has not in fact been delivered or deposited, shall be imprisoned, do not limit the operation of the section, or of section 125, providing that whoever, having given any such receipt, shall sell or in any manner remove from the place of storage any such property, without the consent of the holder of the receipt, shall be imprisoned, to buildings alone in which goods are received in store for hire, but the words extend to all buildings in which goods are stored, whether for hire or otherwise, and hence one who, being the owner of an elevator, and having issued a receipt for grain therein also owned by him, thereafter removed the same without the consent of the holder, violated section 125. *McReynolds v. People*, 82 N. E. 945, 947, 230 Ill. 623.

#### Other cases

*Rev. St. 1899*, § 2982, provides that no petition for review of any judgment for divorce shall be allowed, but there may be review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children, or any of them, as in "other cases." Held, that the phrase "as in other cases" refers to a petition for review, the sole matter with which the section is concerned, and not to a writ of error, and the section means that there shall not be a petition for review of a divorce judgment, but may be a petition for review of the alimony and custody of children, as in ordinary cases where the petition may be had under sections 777-783. *Elliott v. Elliott*, 115 S. W. 486, 487, 135 Mo. App. 42.

#### Other casualty

"Other" is frequently used in an unrestricted sense—not limited by the rule *ejusdem generis*. As used in *McClain's Code*, § 1685, authorizing domestic insurance companies to insure houses, buildings and all other kinds of property against loss or damage by fire or other casualty, the words "other casualty" include other risks than those already

mentioned in the specific reference to loss or damage by fire. *Bankers' Mut. Casualty Co. v. First Nat. Bank of Council Bluffs*, 108 N. W. 1046, 1048, 181 Iowa, 456 (citing *Flower v. Witkovsky*, 87 N. W. 864, 69 Mich. 371; *People v. Stone* [N. Y.] 9 Wend. 182; *Hall v. State*, 4 N. W. 1068, 48 Wis. 689).

#### Other causes

The words "other causes," as used in a contract of sale of a specified number of cars daily of furnace coke during a specified period of time, subject to strikes, accidents, or other causes, relate to shortage of cars, and hence a shortage of cars is a legal excuse for nondelivery. *Hatfield v. Thomas Iron Co.*, 57 Atl. 950, 953, 208 Pa. 478.

Defendant contracted to use natural gas from plaintiffs' wells for a specified time at specified prices, the contract providing that, if by reason of fire, explosion, or other cause defendant's factory should be closed down, plaintiffs might during the time dispose of gas elsewhere, and, if the nonuse extended over a month, plaintiffs should have the right to cancel the contract. Held, that the words "other cause," following "fire and explosion," should be construed to mean other cause similar to fire or explosion under the rule of *ejusdem generis*, and did not therefore entitle defendant to shut down his factory for any cause whatsoever without a liability for breach of such contract. *Hickman v. Cabot*, 183 Fed. 747, 749, 106 O. C. A. 183.

*Const. Ky. § 192*, provides that a corporation shall not hold any real estate except such as may be necessary for carrying on its legitimate business, for a longer period than five years, under penalty of escheat. *Ky. St. 1903*, § 567, contains the same provisions. *Ky. St. 1903*, § 2971, being a part of the laws relating to the government of cities of the first class, provides that so much real, personal, or mixed property in the city which, from alienage, defect of heirs, failure of kindred, or other causes, shall escheat to the commonwealth shall vest in the board for the benefit of the schools, and that the board may, in the name of the commonwealth, sue for and recover the same. Held, that the Legislature intended by the use of the words "other causes" in section 2971 to provide for the recovery of escheats by school boards happening upon events of a different class than those specifically mentioned in the section, hence the board might sue to recover land escheated by a corporation under *Const. § 192*, and *Ky. St. 1903*, § 567. *Commonwealth, for Use of Louisville School Board, v. Chicago, St. L. & N. O. R. Co.*, 99 S. W. 596, 599, 124 Ky. 497.

While the extent of indulgence by a court in allowing supplemental affidavits of defense is largely in its discretion, such indulgence cannot be extended after a case has been finally passed upon by an appellate

court, except for legal or equitable reasons of which defendant could not have availed himself when his original affidavit of defense was filed, and under Act March 18, 1874 (P. L. 64), providing that judgment should be entered for plaintiff where the refusal of judgment for want of a sufficient affidavit of defense has been reversed by the appellate court, unless "other legal or equitable causes" shall be shown, means a defense which did not exist when the affidavit of defense was filed, and, where an original affidavit of defense setting forth that an assignment sued upon was void as contravening the federal bankruptcy law was held good by the lower court, but upon appeal was held insufficient, a supplemental affidavit setting up that the assignment was void under the state assignment acts of March 24, 1818 (P. L. 285), and April 17, 1843 (P. L. 273), could not be filed after return of the record and motion by plaintiffs for judgment. *Wood v. Kerkeslager*, 76 Atl. 425, 426, 227 Pa. 536; *Third Nat. Bank v. Same*, 76 Atl. 427, 227 Pa. 542.

#### Other children

In a statute providing that a wife shall be entitled to one-half of the estate of her deceased husband "if there was no 'other' heirs, and an heir's part if there should be 'other' heirs, in all cases where there is no will," the word "heirs" is used in the sense of "children," and the use of the word "other" before "children" was intended to include grandchildren or descendants of any child living at the death of the intestate. *De Graffenreid v. Iowa Land & Trust Co.*, 95 Pac. 624, 640, 20 Okl. 687.

#### Other circumstances

The "other circumstances" referred to in Code Civ. Proc. §§ 872, 882, requiring that the affidavit to take the testimony of a witness shall show that the witness is about to depart from the state or is sick, or that some other special circumstances exist requiring his examination in advance, means such as will make the presence and evidence of the witness at the trial doubtful and uncertain as bearing on the probability of his future attendance. *W. P. Davis Mach. Co. v. Robinson*, 85 N. Y. Supp. 574, 575, 42 Misc. Rep. 52.

#### Other claim

Where plaintiff and defendant's testator arrived at a settlement as to their controversy and as to certain claims by plaintiff against the testator, and the latter made provision for plaintiff in his last will, and agreed never to revoke or modify the will, so as to defeat plaintiff's rights therein, and plaintiff agreed that upon faithful execution by the testator of the covenants to be performed by him she would release him "from all other and further claims, demands, and causes of action of every kind," and that thereupon she would take "no action at law or in equity to en-

force any such other or further claim," the word "other," in such a contract, plaintiff having but one claim against the testator, must be taken in the sense of "additional," so that the meaning would be that, upon the transfer to plaintiff of the portion of the estate devised to her by the will, she would take such portion in full payment of her claim, and make no further or additional claim on the same indebtedness or cause of action. *Colt v. O'Connor*, 109 N. Y. Supp. 689, 694, 59 Misc. Rep. 83.

#### Other compensation

The words "other compensation," as used in Hurd's Rev. St. 1903, c. 24, § 86, providing that if the salary, fees, or other compensation of certain city officers has been once fixed, such fees or compensation shall not be increased or diminished, to take effect during the term for which any such officer was elected or appointed, is broad enough to include allowances made for the payment of assistants and office expenses. *City of Chicago v. Wolf*, 77 N. E. 414-418, 221 Ill. 130.

#### Other corporations

Const. 1901, § 235, providing that municipal and other corporations invested with the power of eminent domain shall make compensation for property taken, "injured," or destroyed by the construction of their works, highways, or improvements, includes within the term "other corporations" counties, so as to make a county liable for damages to premises due to a change in the grade of a road, whereby the premises were left at a considerable distance above the road on a perpendicular embankment. *Dallas County v. Dillard*, 47 South. 135, 136, 156 Ala. 334, 18 L. R. A. (N. S.) 884.

#### Other country

The Philippine Islands are not "another country" within the meaning of article 8 of the Cuban Treaty, providing that the rates therein granted shall continue preferential in respect to like imports from "other countries." *Faber v. United States*, 31 Sup. Ct. 659, 660, 221 U. S. 649, 55 L. Ed. 897.

#### Other county buildings

Shannon's Code, § 6045, subsec. 11, authorizes the expenditure of the general fund of a county by the county judge for building, repairing, and taking care of courthouses, jails, and "other county buildings." Held, that the words "other county buildings," as so used, under the rule of ejusdem generis, meant county buildings of the same nature and kind as courthouses and jails, and did not include schoolhouses and buildings used for school purposes. *State ex rel. Davidson County Board of Education v. Pollard*, 136 S. W. 427, 429, 430, 124 Tenn. 127.

Ky. St. 1903, § 3948, provides that the "jailer of each county shall be superintendent of the public square, courthouse, clerk's of-

free, jail, stray-pen and other public county buildings at the seat of justice." Section 356 requires the jailer to furnish fuel, lights, and water to the circuit court rooms, and allows him \$2 a day therefor, to be paid out of the state treasury. Section 1749 provides against the allowance of a fee bill for any ex officio services. Held that the duty and expense of maintaining, lighting, heating, and janitor's service for an armory erected at the seat of justice by the fiscal court at the expense of the county was not intended to be borne by the county jailer; the words "other county buildings" referring only to buildings of the same class as those specifically mentioned in the section. *Fiscal Court of Jefferson County v. Pfanz*, 104 S. W. 1002, 1003, 127 Ky. 8.

#### Other court

Const. art. 7, § 1, as amended in 1881, providing that the judicial power of the state should be vested in the Supreme Court, in circuit courts, and in such "other courts" as the General Assembly might establish, authorized the Legislature by Acts 1907, p. 7, c. 5, to create a superior court within a district composed of two counties with the same jurisdiction as circuit courts were then empowered to exercise. *Board of Com'rs of Elkhart County v. Albright*, 81 N. E. 579, 580, 168 Ind. 564; *Mumaw v. Turner*, 81 N. E. 721, 169 Ind. 701.

#### Other crops

The words "other crops," in Sess. Laws 1899, p. 176, c. 17, art. 1, § 5, providing for the insurance of grain in bins and stacks, "growing wheat, rye, barley, flax, oats, and other crops" include growing cotton. *State Mut. Ins. Co. v. Clevenger*, 87 Pac. 583, 17 Okl. 49.

#### Other damages

The actual damages from failure to unload a passenger's baggage at the proper station does not constitute "other element of recoverable damages" within the rule that mental suffering, without physical injury or other element of recoverable damages, cannot be made the subject of an independent action, though the act complained of was willful. *Chicago, R. I. & P. R. Co. v. Moss*, 116 S. W. 192, 89 Ark. 187.

#### Other deadly weapon

"Where a statute, in defining a crime committed by use of weapons, mentions certain weapons 'or other deadly weapon,' it is held that those named in the statute need not be described as deadly weapons; but, if another than those named in the statute is relied upon as coming within the term 'other deadly weapon,' it must be so averred as to bring it within that designation." *State v. Spigener*, 50 South. 977, 96 Miss. 597 (quoting *State v. Taylor*, 93 Pac. 252, 50 Or. 449).

A pistol used in striking another is a deadly weapon, within Ky. St. § 1166, pro-

viding for the punishment of any one who shall willfully and maliciously "strike" another with a knife, sword, or "other deadly weapon," with intent to kill. *Riggs v. Commonwealth (Ky.)* 33 S. W. 413, 414.

#### Other defects

A contract for a newly patented machine contained several specific warranties, and after them a general clause which provided that, if there were any "other defects" whatever, the contract should be void. Held, that the words "other defects" referred to defects in the patent and not in the machine itself. *Vaughan v. Porter*, 16 Vt. 266, 270.

#### Other defense

The term "or other defense," in Rev. St. 1899, § 4188, declaring that in actions on assigned accounts defendant shall be allowed every just set-off "or other defense" which existed in his favor at the time of his being notified of such assignment, is used in a restrictive sense and must be a defense to the demand itself, not a set-off or counterclaim. *Scarritt Estate Co. v. J. F. Schmelzer & Sons Arms Co.*, 86 S. W. 489, 490, 110 Mo. App. 406.

#### Other demands

Rev. Code 1852, c. 89, § 25, fixing the order in which executors or administrators shall pay demands against decedent, does not mention taxes, though the last clause provides for payment of "other demands." Held, that though the statute does not mention taxes, in view of the intention to include all legal claims against the estate, taxes will be deemed to come under the class designated "other demands" to be paid after judgments. *Dayett v. Willits*, 74 Atl. 689, 691, 9 Del. Ch. 424.

#### Other disability

The nondeclaration of the result of an election for Governor is not a disability of the Governor such as is meant by Const. § 16, art. 7, providing that, in case of the death, conviction on impeachment, failure to qualify, resignation, or "other disability" of the Governor, the president of the Senate shall act as Governor until the vacancy is filled or the disability removed. It is simply non-action or incomplete action by the agencies of the law assigned to vest the title in the candidate. It is not like insanity. Conviction of the officer for crime, continued absence, or other disability connected with the person of the Governor, death, conviction on impeachment, failure to qualify, or resignation would produce a vacancy, and it would seem that the language "or other disability" means something of a different character from those cases named—something attaching to the person of the Governor and disabling him; and this construction seems confirmed by the after language of the section, providing that "the president of the Senate shall act as Governor until the vacancy is filled or the disability is removed," thus us-

ing the words "vacancy" and "disability" as meaning different things; "vacancy" referring to death, conviction, failing to qualify, and resignation, but "disability" referring to something relating to the person, and for the time being disabling him, notwithstanding the use of the word "other." *Carr v. Wilson*, 9 S. E. 31, 35, 32 W. Va. 419, 3 L. R. A. 64.

#### Other disposition

A will gave testator's granddaughter a life estate, provided on her death the property should be divided among her living children and the heirs of any who should have died, authorized her on the eldest becoming of age to alienate and dispose of the remainder over in favor of such child or children, and empowered her in case she left no children or descendants to dispose of the property by will. A codicil provided in case the granddaughter should die without children or descendants, and making no will or "other disposition of the property," the remainder over should go to testator's nephew by marriage. Held that, by the words "other disposition," the codicil did not recognize a right in the granddaughter to make disposition of the property generally, but only as provided in the will, and so did not change her qualified title to an absolute title. *Lichter v. Thiers*, 121 N. W. 153, 139 Wis. 481.

#### Other domestic purposes

The right to cut timber from public mineral lands, subject to mineral entry only, for building, agricultural, mining, or other domestic purposes, given to any bona fide resident of certain states and territories by Act June 3, 1878, c. 150, 20 Stat. 88, extends to all such lands in the state or territory, without limitation to any local subdivision. Under such statute, a resident of Montana, where he observes the regulations made by the Secretary of the Interior for the protection of undergrowth, etc., may lawfully cut timber for firewood from public mineral lands within the state, and ship the same to any part of the state for sale and use there in households, hoisting works in mines, smelters, or other local purposes, all of which are domestic purposes within the meaning of the statute. *United States v. Edgar*, 140 Fed. 655, 659.

#### Other duties

The general words "other duties," in Const. art. 13, § 11, requiring that the board of equalization shall perform such other duties as may be required by law, must be restricted to mean other duties of general character, with duties indicated in the previous provision to be performed by the board. *State v. Eldredge*, 76 Pac. 337, 340, 27 Utah, 477.

The use of the word "other," in Snyder's Const. p. 203, art. 6, § 31, providing that the board of agriculture shall be the board of regents and shall discharge such "other" du-

ties as may be provided by law, clearly indicates that the framers of the Constitution had in mind that certain duties would follow the creation of the board. *Trapp v. Cook Const. Co.*, 105 Pac. 667, 669, 24 Okl. 850.

#### Other dwellers

Liquor Tax Law, Laws 1903, p. 1132, c. 486, § 31, subd. "k," defines a hotel as a building regularly kept open for the accommodation of all able to pay for their entertainment and who, without any stipulated engagement as to the duration of their stay, or as to compensation, are supplied with meals, lodging, and attention, and in which the only "other dwellers" are the family and servants of the hotel keeper. Held that, where a building contained rooms of the size and number required by the statute which were kept open and free for the accommodation of transient "guests" who might apply, persons who occupied some of such rooms continuously at a stipulated weekly or monthly rental should be regarded as "guests" and not "other dwellers" within such statute; the words "other dwellers" being limited to persons other than "guests" of any character, to wit, those who are in the hotel under a stipulated engagement or without any engagement. *Cullinan v. Clark*, 93 N. Y. Supp. 256, 257, 46 Misc. Rep. 188.

#### Other employés

Under subdivision 7, § 1617, Pol. Code, authorizing boards of education and trustees of school districts to employ teachers, "also to employ janitors and other employés of the schools, and to fix and order paid their compensation," the words "janitors and other employés of the schools" refer to persons employed in and about the schools and buildings, in the actual carrying out and maintenance of the schools themselves, and cannot by any reasonable construction be held to include a person rendering legal services to the board of education or board of trustees. *Denman v. Webster*, 78 Pac. 139, 189 Cal. 452.

#### Other employment

By "other employment," as used in the rule making it the duty of a servant discharged in violation of a contract of hiring to seek "other employment," is meant employment of a character such as that in which he was employed, or not of a more menial kind. *Cooper v. Stronge & Warner Co.*, 128 N. W. 541, 111 Minn. 177, 27 L. R. A. (N. S.) 1011, 20 Ann. Cas. 668.

#### Other entertainment

Greater New York Charter, Laws 1897, p. 522, c. 378, § 1481, after prohibiting certain specified amusements on Sunday, prohibited "any other entertainment of the stage." Held, that the word "other" as so used was unrestrictedly comprehensive and embraced every other sort or kind of entertainment whether *ejusdem generis* with the

class enumerated or not. In *re Hammerstein*, 108 N. Y. Supp. 197, 198, 57 Misc. Rep. 52.

#### Other equivalent circumstances

The law does not require the "other equivalent circumstances" referred to in Pen. Code 1895, § 65, making it a necessary element of voluntary manslaughter that there be an assault upon the person killing, or an attempt to commit a serious personal injury, or other equivalent circumstances to justify the excitement of passion and to exclude all idea of deliberation or malice, to be in the nature of an assault, or an attempt to commit a serious personal injury; but the circumstances referred to must be such as would as much exclude all doubt of deliberation or malice and justify the excitement of passion as would an assault, or attempt to commit a serious personal injury. *Battle v. State*, 65 S. E. 382, 384, 133 Ga. 182.

Where there was evidence that the deceased had been guilty of frequent sexual intercourse with the wife of the accused, and knowledge of that fact had been brought home to the accused before the killing, and after such knowledge the accused came upon the deceased, and, in a conversation with him in reference to the illicit relations, the passions of the accused were aroused, it was a question for the jury to determine whether the sight of the deceased and the conversation which then ensued constituted "other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied"; and a charge to the effect that if the jury believed that the circumstances at that time were such as to arouse in the mind of accused that passion supposed to be irresistible, and he shot and killed under those circumstances, it would not be murder, but voluntary manslaughter, is substantially a correct statement of the law. The law does not require the "other equivalent circumstances," referred to in section 65, Pen. Code 1910, to be in the nature of an assault, or an attempt to commit a serious personal injury, by the deceased; but the circumstances therein referred to must be, in the opinion of the jury, the equivalent of an assault, or of an attempt to commit a serious personal injury on the slayer, in justifying the excitement of passion and excluding all idea of deliberation or malice. *Land v. State*, 76 S. E. 78, 11 Ga. App. 761 (citing *Battle v. State*, 65 S. E. 382, 133 Ga. 185).

#### Other estate

A judgment creditor expressly released his lien on certain described real estate of his debtor that it might be conveyed to a mortgagee, the debtor having a right to reconveyance on payment of the mortgage debt at any time before the property should be sold by the mortgagee. The release, however, provided that it should not affect the creditors'

lien on the other estate of the debtor. Held, that on a sale of the property free from liens by the mortgagee and the debtor's trustee in bankruptcy, realizing a sum more than sufficient to pay the mortgage debt, such surplus did not constitute "other estate" within the meaning of the release, and that the judgment creditor had no claim thereto. In *re Cullen*, 176 Fed. 463, 464.

#### Other evidence

A disclosure or statement by the complainant, which depends wholly upon her veracity, is not "other evidence" in support of her version of the affair, within the meaning of Pen. Code, § 283, providing that no conviction can be had for abduction, compulsory marriage, rape, or defilement, upon the testimony of the female abducted, compelled, or defiled, unsupported by "other evidence." *People v. Green*, 92 N. Y. Supp. 508, 511, 103 App. Div. 79 (citing *People v. Page*, 56 N. E. 750, 162 N. Y. 272).

Books of account, which being shown to conform to the requirements of Comp. Laws 1897, § 3031, are admissible in evidence, when so admitted in a suit against an administrator, may constitute "other material evidence," corroborating the claimant as required by section 3021. *Radcliffe v. Chavez*, 110 Pac. 699, 701, 15 N. M. 258.

#### Other evidence of indebtedness

See, also, Evidence of Indebtedness.

The warehouse receipts authorized to be issued under the State Warehouse Act (Laws 1912, p. 707) are not "scrip, certificates or other evidence of state indebtedness" within the meaning of Const. art. 10, § 7, restricting the issuance of such paper. *State ex rel. Lyon v. McCown*, 75 S. E. 392, 396, 92 S. C. 81.

Wilson's Rev. & Ann. St. 1903, § 2408, provides that it shall be unlawful for any public officer either directly or indirectly to buy, barter for, or otherwise engage in any manner in the purchase of any bonds, warrants, or any other evidence of indebtedness against the territory, any subdivision thereof, or municipality therein, of which he is an officer. Held, that the words "other evidence of indebtedness," under the rule ejusdem generis, applies only to bonds, warrants, and other evidence of indebtedness of that character, and did not prevent a county commissioner from advancing, on the credit of the county, money with which to employ a chain bearer in the survey of a road. *Ticer v. State ex rel. Holt*, 128 Pac. 493, 496, 35 Okl. 1.

Public Service Commissions Law (Laws 1907, c. 429) § 55, provides that any railroad corporation may issue stock, bonds, notes, or other evidence of indebtedness, payable at periods of more than 12 months after date, when necessary for certain enumerated purposes, provided it shall secure from the Pub-

lic Service Commission an order authorizing such issue. The vice presidents of several railroad companies calling themselves in combination the "New York Central Lines," parties of the first part, entered into an agreement with a trust company, designated as trustee, and the six railroad companies designated as parties of the third part, by which the parties of the first part sold certain rolling stock to the trust company, and the trust company rented the same to the several railroad companies; such companies issuing certificates to the trust company to the amount of the purchase price of the equipment, payable in installments, and denominated as rent. The trust company was not to be liable on the certificates in any event. Held that, while the words "other evidence of indebtedness" as used in the statute refer to obligations of like character with stock, bonds, and notes, the trust certificates were substantially obligations of that character, and hence the issuance of the same must be sanctioned by the Public Service Commission. *People v. New York Cent. & H. R. R. Co.*, 123 N. Y. Supp. 125, 127, 138 App. Div. 601.

#### Other exhibition

Where, under Sayles' Ann. Civ. St. 1897, art. 5049, subd. 23, imposing a license tax on "circuses and other exhibitions," a Wild West show is not a circus, it cannot be held as "another exhibition," as, in construing laws imposing burdens of taxation, nothing should be left to inference. *State v. Cody* (Tex.) 120 S. W. 267, 269.

#### Other expenses

Charter of the City of St. Louis, art. 5, § 14, provides that no money shall be expended except by ordinance, the provisions of which shall be specific and definite. An appropriation ordinance provided for "publishing proceedings, printing, stationery, office expenses, furniture, rent of telephone and other expenses of house of delegates." Held, that the term "other expenses" means expenses of the character theretofore mentioned in that clause of the appropriation act, and does not include an appropriation for expenses incurred by a committee appointed by a resolution of the house of delegates to investigate tax returns. *State ex rel. Gavigan v. Dierkes*, 113 S. W. 1077, 1081, 214 Mo. 578; *State ex rel. Barrett v. Same*, 113 S. W. 1081, 214 Mo. 592.

Ky. St. 1909, § 4464, provides for an election upon the question of levying a tax to maintain a graded common school and for erecting or repairing suitable buildings therefor, if necessary. Section 4481 (section 5758) makes it the duty of the district trustees to provide funds for purchasing suitable buildings, or for erecting or repairing them, and for other expenses needful in conducting a good graded common school, and permits

them to use such part of the proceeds of the tax as they may deem necessary. Held, that the phrase "and for other expenses needful in conducting a good graded common school" implies the power to rent a suitable building temporarily and until one can be secured or built by the trustees, and a petition for the election, reciting that the proposed tax was to be used for the purpose of maintaining a graded common school and for the erecting, purchasing, leasing, and repairing of suitable buildings therefor if necessary, was no more than the two sections of the statute authorized, meaning that the trustees were to buy a building if they could, and, if not, to buy a lot and built a house, to repair any building bought or built by them, and in the meantime, to lease a suitable building for the continuation of the school, and did not render the petition insufficient. *Jeffries v. Board of Trustees of Columbia Graded Common School*, 122 S. W. 813, 817, 135 Ky. 488.

#### Other explosive

Blasting powder, although it may be a less dangerous explosive than dynamite or gunpowder, is none the less included in the words, "or other explosives," as used in a condition avoiding a policy of fire insurance if there be kept, used, or allowed on the premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, naphtha, nitroglycerin, or other explosives. *Penman v. St. Paul Fire & Marine Ins. Co.* 30 Sup. Ct. 312, 313, 216 U. S. 311, 54 L. Ed. 493.

A provision of a fire insurance policy, making it void if, without permission indorsed thereon, there should be kept or allowed on the insured premises "benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerin or other explosives, phosphorus or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard," must be construed to include blasting powder by the words "other explosives," in the absence of evidence showing that it is of less explosive force than any one of the substances enumerated, and therefore not in the same class. *St. Paul Fire & Marine Ins. Co. v. Penman*, 151 Fed. 961, 963, 81 C. C. A. 151.

#### Other gambling device, bank, table, or machine

It was held in *Commonwealth v. Kammerer* (Ky.) 13 S. W. 108, under a statute providing that "whoever \* \* \* shall set up, carry on or conduct \* \* \* a keno bank, faro bank, or other machine or contrivance used in betting," etc., "shall be fined," etc., that "oontz," which is played with dice on a table or other surface, was not within the meaning of "other machine or contrivance." *White v. State*, 76 N. E. 554, 555, 37 Ind. App. 95.

**Other good and valuable consideration**

Where an instrument of advice had a consideration of \$1 and other good and valuable consideration, the term "other good and valuable consideration" means nothing, and would be given no weight in the absence of evidence explaining the nature and character of that consideration. Where K. takes a deed from M. to all his interest in a mining claim, which is all the property of M. in this state, for a consideration of \$1, and "other good and valuable consideration," which latter consideration is not explained, and at the time of such transfer K. has notice that his grantor is heavily indebted in this state, and has avoided personal service of process, and has allowed a judgment in rem entered against him for over \$50,000, and has been trying to buy up such claims at one-fifth their face value, and that he is not meeting his obligations in due course of business, and that he has no other property in the state out of which such indebtedness can be made, and during the meanwhile K. had occupied a close confidential relation with M., under such circumstances, held, that K. cannot restrain an execution sale of such property to pay creditors on the theory that he is an innocent purchaser for a valuable consideration. *California Consol. Min. Co. v. Manley*, 81 Pac. 50-52, 10 Idaho, 786.

**Other good material**

Vitrified brick is "other good material," within Acts 1904, p. 225, c. 225, § 4, providing that the specifications of material to be used in the construction of public roads shall require the construction "of a macadamized or of a telford or of other stone, or of a road constructed of gravel or of other good material." *Anne Arundel County Com'rs v. United Ry. & Electric Co.*, 72 Atl. 542, 547, 109 Md. 377.

**Other goods of same owner**

Laws 1902, p. 1776, c. 606, § 2, gives a warehouseman a lien on goods stored for storage charges, etc., on such goods or "other goods belonging to the same owner." Held, that the words "other goods belonging to the same owner" should be restricted to actual, as distinguished from apparent, ownership due to possession, so that where selling agents, in possession of goods belonging to plaintiffs, stored the goods with other goods belonging to such agents, the warehouseman was not entitled to a lien on plaintiffs' goods for the storage charges on the goods belonging to the agents. *Schwab v. Oatman*, 106 N. Y. Supp. 741, 747, 56 Misc. Rep. 393.

**Other governing authority**

The words "or other governing authority," used in Const. art. 290, in designating the authority whose consent would have to be obtained by riparian owners desiring to build wharves on their front, refer not nec-

essarily to town councils which, in certain communities, are designated by other names, but to whatever body or functionary is vested by the Legislature with authority over the river front at the time the consent is solicited. *State ex rel. Illinois Cent. R. Co. v. Board of Levee Com'rs of Orleans Levee Dist.*, 33 South. 385, 396, 109 La. 403.

**Other grievances**

A lease limiting the liability of the tenant respecting orders of a city department to those issued for the correction, prevention, and abatement of "nuisances" or "other grievances" does not render the tenant liable for the cost of a fire escape, as the words are to be taken in their natural and usual sense. The absence of a fire escape is not a "nuisance," as that word is commonly used, and the more generic words "other grievances" do not extend the plaintiff's liability so far as to render him liable for the cost of the fire escape. *Kalman v. Cox*, 92 N. Y. Supp. 816, 46 Misc. Rep. 589.

**Other indebtedness**

The Legislature, in 1900, after having made specific appropriation for payment of interest for the ensuing two years on certain designated debts of the state, appropriated a specific sum for each of the years 1900 and 1901 for the payment of interest on "other state indebtedness." Held, that such "other state indebtedness" included state bonds issued as provided by Acts 1896, p. 27, c. 34, and disclosed a legislative intention that such bonds should remain outstanding and interest-bearing for the whole of the year 1901. *Colbert v. State*, 39 South. 65, 66, 86 Miss. 769.

A provision of the articles of incorporation that a building and loan association shall have a lien upon the shares of each shareholder for any sum due it for subscription, money loaned, or any "other indebtedness due from the shareholder" did not give a lien for the amount of defalcation upon stock held by a defaulting officer; the phrase quoted having reference only to indebtedness as a shareholder. *Jewell v. Nuhn* (Iowa) 138 N. W. 457, 458.

**Other industry**

A cotton gin is embraced within the term "other industry," as used in Const. art. 9, § 33, which provides that any person owning or operating a coal, lead, iron, or zinc mine, or any sawmill, grain elevator, or other industry, when the Corporation Commission shall reasonably determine that the amount of business is sufficient to justify it, near or within a reasonable distance of any railroad, may, at the expense of such person, build and keep in repair a switch leading from the railroad to such mine, etc., or other industry, the railroad being required to furnish the switch stand and frog and other necessary materials for making connections with the

side track. *St. Louis & S. F. R. Co. v. Zalondek*, 115 Pac. 867, 869, 28 Okl. 746.

#### Other intoxicating liquors

The phrase "other intoxicating liquors," in *Laws 1906*, p. 86, c. 21, using the words, "spirituous, vinous, malt or 'other intoxicating liquors'" in reference to local option elections, does not add anything to the legal effect of the statute, and the act is equivalent to Const. § 61, and Ky. St. 1903, § 2554, relating to local option elections, and using the words, "spirituous, vinous, or malt liquors." *O'Neal v. Minary*, 101 S. W. 951, 954, 125 Ky. 571.

#### Other judicial officers

Const. art. 6, enumerates various judicial officers, including judges of the Court of Appeals, justices of the Supreme Court, county judges, surrogates, and justices of the peace, and authorizes the election of district court justices and the establishment of inferior local courts, and section 11 authorizes the removal of judges of the Court of Appeals and Supreme Court justices by concurrent resolution of both legislative houses, and provides that "all other judicial officers except justices of the peace and judges or justices of inferior courts not of record may be removed by the Senate," on the Governor's recommendation, for cause and after hearing. Held, that the Court of Claims was not included within the words "all other judicial officers"; they referring to judicial officers expressly named in the Constitution or those which it authorized the Legislature to create, so that the judges of that court could be removed summarily without hearing by the abolition of their offices. *People ex rel. Swift v. Luce*, 133 N. Y. Supp. 9, 15, 74 Misc. Rep. 551.

#### Other lands

The phrase "owner of other lands," used in Rev. Civ. St. 1897, art. 4218ff, permitting owners of other lands contiguous to school lands, or within a radius of five miles thereof, to buy such school lands, which article is a part of the act of 1897 which permitted a settler to buy four sections of school land in all, provided not more than two were classed as agricultural lands, does not include the owner of a lot or lots in town, but applies only to persons engaged in agricultural or stock raising pursuits. *Conn v. Terrell*, 80 S. W. 608, 609, 97 Tex. 578.

A testator executed his will in 1886, which was probated in 1896. The substance of so much of the instrument as is here material was: Separate parcels of described realty were devised, respectively, to the three daughters of the testator, Lavinia, Josephine, and Emma, and to his son George, in items 1, 3, 5, and 8. Each of such devises was for and during the life of the devisee, with remainder to the child or children of the respective devisee living at the time of the

death of the devisee. In item 6 certain other described realty was devised to Josephine, and to Emma, "in trust for Lucinda V. \* \* \* said Josephine \* \* \* to have and to hold the property in this item bequeathed to her for and during her natural life, and at her death to her children living at the time of her death. And the said Emma \* \* \* to have and to hold the property in this item bequeathed to her as trustee for my daughter, said Lucinda V. \* \* \* in trust for the use, benefit and behoof of the said Lucinda V., \* \* \* for and during her natural life, and at her death to her children living at the time of her death." In item 7 certain other described realty was devised to Emma, in trust "to and for my daughter said Lucinda V., \* \* \* for and during her natural life, then to vest in and become the property of the children of the said Lucinda V. \* \* \* living at her death." Item 10 was as follows: "I give, devise and bequeath to my said daughter Lavinia, \* \* \* Josephine, \* \* \* Emma, \* \* \* in trust for Lucinda V., \* \* \* Emma, \* \* \* and to my son George, \* \* \* all my other lands not hereinbefore disposed of, of which I may die seised and possessed, for and during their natural lives, and at their deaths to their respective children living at the time of their death, to be divided among my said children, share and share alike. Item 13 was as follows: "Having fully provided for my deceased daughter Roxy Ann, \* \* \* in her lifetime, and having advanced to her in lands and money a portion equal to the share given to each of my said children in this will, I make no provision or bequest to her children." The testator died seised and possessed in fee of other lands than those specifically devised in items 1, 3, 5, 6, 7, and 8 of the will, which others were subject to the provisions of item 10, and which, after the death of the testator, were partitioned in kind among the children of the testator, named in item 10 of the will. Lucinda V. subsequently died unmarried and without children. Held, item 10, in which was devised only all "other lands" of which the testator might die seised and possessed "not hereinbefore disposed of," did not purport to dispose of, nor dispose of, any of the lands previously devised to Lucinda V. in items 6 and 7, nor any reversionary interest therein. *Lane v. Patterson*, 76 S. E. 47, 138 Ga. 710.

#### Other liabilities

Act April 28, 1876 (P. L. 53), providing that members of beneficial associations shall not be individually liable for the payment of periodical or funeral benefits or other liabilities of the association, and the sums shall be payable out of the treasury, by the words "other liabilities" means all liabilities properly chargeable to the treasury of the society, and contemplates obligations in addition to



funeral expenses or death benefits. *Wolfe v. Limestone Council No. 373, Order of Independent Americans*, 82 Atl. 499, 501, 283 Pa. 357.

#### Other lawful expenses

Obligors in a bond given by them to a third person at the request, for the benefit of, and on the agreement of defendant and others to be responsible for their share, executed a declaration of trust reciting that the obligors held land in trust for defendant and the other beneficiaries, and that on demand each of the beneficiaries would pay his proportion of any interest charged, taxes, assessments, or "other lawful expense of said trust." Held, that the quoted words in the declaration of trust included any sum paid by the obligors on the bond, if paid in good faith, pursuant to a reasonable settlement of their liability thereon. *Cunniff v. McDonell*, 81 N. E. 879, 880, 196 Mass. 7.

#### Other lien

The holder of an invalid tax deed in possession of the real estate brought an action to quiet his title. The tax deed was held void as a muniment of title, but the lien of the taxes was preserved, and the land was ordered sold and was sold, to satisfy it. Held, the redemption act (chapter 109, p. 188, Laws 1893), which provides that the act shall apply to all sales under foreclosure of mortgage, mechanics' lien, or "other lien," whether special or general, has no application to such a sale, and neither the defendant owner nor the holder of a mortgage lien has any right to redeem therefrom. The "other liens," general or special, to which the act makes reference, are those arising from obligations created in or connected with dealings between private parties. *Davidson v. Plummer*, 92 Pac. 705, 706, 76 Kan. 462.

The operation of Const. art. 5, § 15, declaring that the annual assessment for taxes made on landed property shall be a special lien thereon, and that the land shall be subject to sale for the payment of taxes and penalties, whereby landed property, whether homestead or not, is subject to a sale for taxes and for penalties accruing on account of a delinquency, is not limited by article 16, § 50, protecting the homestead against forced sale, and providing that no mortgage, deed of trust, or other lien on the homestead shall be valid; the words "other lien" including only such liens as are created by contract by husband and wife. *City of San Antonio v. Toepferwein*, 133 S. W. 416, 417, 104 Tex. 43.

Pub. St. 1901, c. 245, § 28, provides that if a trustee is adjudged chargeable for any personal property subject to mortgage, pledge, or other lien, the court may appoint a receiver and dispose of it, if more can be obtained for it than the claims upon it. Section 29 provides that, if a trustee is adjudged chargeable for any promissory note, or other

security for payment of money, or any chose in action upon which execution cannot be levied, the court may appoint a receiver to collect it. Section 30 provides that the trustee may be adjudged trustee for the value of any note, chose in action, etc., which he refuses to deliver to the receiver, pursuant to the court's order. Section 31 requires a trustee adjudged chargeable to retain the sum or article other than that for which a receiver is appointed, for which he is so charged, until demanded of him upon execution issued, or the suit is otherwise terminated, and, by section 32, the proceeds of property in the hands of a receiver, for which the trustee was charged, shall be applied under the court's direction after paying costs, charges, and prior liens, in satisfaction of the judgment, and any surplus shall be paid to defendant. The trustee held a check payable to himself and defendant, who transferred his interest therein to claimant, after service of the writ with claimant's knowledge. Held, that the check held by the trustee was a chose in action, and his possession thereof is aptly described by the term "other lien," used in the statute, even though defendant did not indorse the check to him for collection, so that the trustee was chargeable therefor, and a receiver was properly appointed to collect it. *Musgrove v. Goss*, 72 Atl. 371, 378, 75 N. H. 208 (citing *Mitchell v. Green*, 62 N. H. 588, 590).

#### Other machinery

A policy describing the insured property as a frame building "while occupied as a flour and roller mill," and the fixed and movable machinery, pipes, belting, pulleys, shafting, roller mills, and appurtenances, smut mill and appurtenances, purifiers, blowers, dusters, tools, etc., "and such other machinery not more hazardous as is usual to roller mills" will be held to include machinery used in the manufacture of meal, bran, and other feed products, where not to do so would render the policy void from its execution. *Capital Fire Ins. Co. v. Carroll*, 109 Pac. 535, 537, 26 Okl. 286.

By "other machinery," in a statute using the term "mill and other machinery," machinery that is appurtenant to the mill proper is meant. *Southwest Missouri Light Co. v. Scheurich*, 73 S. W. 496, 498, 174 Mo. 235.

#### Other matter or thing

The general words "or other matter or thing," in Rev. St. § 1782, prohibiting a United States senator from receiving compensation for rendering services to any person in relation to any proceeding, contract, etc., or other matter or thing in which the United States is a party, were intended to cover kindred subjects, like preliminary examinations and inquiries necessary to enable the government, acting through one of its departments, to determine whether a proceeding should be instituted, a charge or accusation

made or an arrest ordered, or whether a contract or claim should be made. *United States v. Burton*, 131 Fed. 552, 558.

An order appointing an attorney to act for the county attorney in a case before the grand jury wherein the county attorney was under disability by reason of interest, and also to act as county attorney in "another matter," and fixing the compensation, was invalid, as it would be assumed that the payment included services in "another matter" which was beyond the court's jurisdiction. *State v. Miller*, 109 N. W. 1087, 1089, 132 Iowa, 587.

#### **Other means**

The phrase "by mechanical or other means," as used in the statute making it a misdemeanor for any person, not licensed, to record or register, by mechanical or other means, bets or wagers on trials of speed, etc., embraces something outside the mechanical class, and covers the registration of such bets by means of the initials or private marks of the parties written on cards. *State v. Villines*, 81 S. W. 212, 213, 107 Mo. App. 593.

The words "other means," as used in Gen. St. Kan. 1901, § 1249, cl. 23, enumerating some of the purposes for which corporations may be formed, among which being the manufacture and supply of gas or the supply of light or heat to the public by any other means, are broad enough to include natural gas, although when the act was passed the use of natural gas may not have been within the contemplation of the Legislature. *Compton v. People's Gas Co.*, 89 Pac. 1039, 1040, 75 Kan. 572, 10 L. R. A. (N. S.) 787.

In Comp. Laws, § 504, relating to allowance of alimony pendente lite, and providing that such orders may be enforced and made effectual by attachment, commitment, and by requiring security for obedience thereto, or by "other means according to the usages of courts," the words "other means according to the usages of courts" would not support the authority of the court to order an execution to issue; enforcement of interlocutory orders for payment of money by execution does not appear to be according to the usages of courts and can be resorted to only where the statutes specifically so provide, and the only provision for execution in our civil procedure is after final judgment. *Kapp v. Seventh Judicial Dist. Court*, 107 Pac. 95, 96, 32 Nev. 264, Ann. Cas. 1912D, 177.

#### **Other mechanical contrivances**

See Vehicles and Other Mechanical Contrivances.

#### **Other merchandise**

Paragraph 8 of section 2 of the general tax act of 1902 (Acts 1902, p. 21), imposing a special tax upon traveling venders "of patent or proprietary medicines, special nostrums, jewelry, paper, soap, or other merchandise,"

does not embrace venders of merchandise not ejusdem generis with the articles expressly enumerated. *Standard Oil Co. v. Swanson*, 49 S. E. 262, 263, 121 Ga. 412.

#### **Other mineral**

The words "other minerals" or "other valuable minerals" taken in the broadest sense would include petroleum oil; but, if the parties did not intend that the title to petroleum and gas should pass, the title remains in the owner of the fee. A deed purporting to convey all minerals underlying described land does not convey the natural gas thereunder, where the parties do not contemplate a conveyance thereof. *McKinney's Heirs v. Central Kentucky Natural Gas Co.*, 120 S. W. 314, 315, 134 Ky. 239, 20 Ann. Cas. 934 (quoting and adopting definition in *Donahue, Petroleum & Gas*, p. 220).

#### **Other mineral substances**

Pure Food and Drug Act June 30, 1906, c. 3915, 34 Stat. 768, is entitled "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors," and section 7 provides that an article shall be deemed adulterated, in the case of confectionery, if it contains terra alba, barytes, talc, chrome yellow, or other mineral substances or poisonous color or flavor, or other ingredient deleterious or detrimental to health. Held that, since the purpose of the act was to protect the purchaser of food products from having inferior and different articles passed off on him in place of those he desired, and to protect him from injury by prohibiting the addition to foods of substances poisonous or deleterious to health, the words "other mineral substances," under the doctrine of ejusdem generis, included other mineral substances which are deleterious or detrimental to health of the same nature as those specifically described preceding such words, and hence did not include a thin coating of pure silver covering candy, used principally by confectioners for decorative purposes, and not deleterious or detrimental to health. *French Silver Dragée Co. v. United States*, 179 Fed. 824, 827, 103 C. C. A. 316.

#### **Other moneyed capital**

See Moneyed Capital.

#### **Other municipalities**

The phrase, "other municipalities," contained in the title and body of P. L. 1906, p. 13, relative to official oaths of officers elected or appointed in towns, townships, and "other municipalities" of the state, is sufficiently descriptive of cities to include them. *Ludlam v. Dallas*, 81 Atl. 489, 490, 82 N. J. Law, 122.

The enactment of laws providing for the creation of municipal and public corporations is within the inherent legislative power, and Laws 1911, c. 92, authorizing the establishment of port districts, and providing for the

development of a system of harbor improvements and terminal facilities, and the method of payment therefor, with defined powers to be exercised by a board of commissioners, is constitutional, there being no constitutional provision in terms prohibiting the creation of other municipal corporations than counties, cities, towns, and school districts, specifically recognized as municipal corporations; Const. art. 11, § 4, which requires the Legislature to establish a system of county government, and Const. art. 11, § 10, which declares that municipal corporations shall not be created by special laws, being only declarations of mandatory duty placed upon the Legislature's inherent powers, and the words "other municipal corporations," as used in Const. art. 8, § 6, limiting the rate of indebtedness of counties, cities, towns, and school districts, and other municipal corporations, having reference to others than those specifically named. *Paine v. Port of Seattle*, 126 Pac. 628, 630, 631, 70 Wash. 294.

#### Other necessities

Under Rev. St. 1909, § 4065, requiring the necessary expense incurred by the probate court for books, furniture, and other necessities, to be paid by the county, a probate judge was entitled to recover from the county the expense of a janitor, in his office, and for telephone service; the latter coming within the term "other necessities." *Motley v. Pike County*, 135 S. W. 39, 40, 233 Mo. 42.

#### Other necessary expenses

Acts 1873, p. 68, c. 24, provides that the trustees of the several townships, towns, and cities shall have the power to levy a special tax in their respective townships, towns, and cities for the construction, renting, or repairing of schoolhouses, for providing furniture, school apparatus, and fuel therefor, and for the payment of other necessary expenses of the school, etc. Held, that the clause for the payment of "other necessary expenses" of the school did not authorize the levying of a tax to provide free transportation for the pupils of a consolidated school district to and from the school. *State v. Jackson*, 81 N. E. 62, 64, 168 Ind. 384 (citing *Honey Creek School Tp. v. Barues*, 21 N. E. 747, 119 Ind. 213; *First Nat. Bank of Marion v. Adams School Tp.*, 46 N. E. 832, 17 Ind. App. 375; *School City of Rushville v. Hays*, 70 N. E. 134, 162 Ind. 193).

#### Other notes circulating as money

As used in Kirby's Dig. § 1814, making it a felony for a cashier of an insolvent bank to receive on deposit bank bills or notes, United States Treasury notes, or "other notes, bills, or drafts, circulating as money or currency," the quoted phrase refers to notes, bills, or drafts, other than United States Treasury notes and national bank notes, which pass from hand to hand; that is, such as are payable to bearer or are properly indorsed

by the payee so that the legal title may pass by delivery. *State v. Smith*, 120 S. W. 156, 157, 91 Ark. 1.

#### Other nuisance

Where a deed provided that the grantor should not put upon the premises "any buildings, timber, trees or other nuisances," the words "other nuisances" will not include excavations unless it appears from the whole instrument that such was the intention. *Cross v. Frost*, 23 Atl. 916, 64 Vt. 179, 182.

#### Other obligation by which debt is secured

The phrase "other obligation by which a debt is secured," as used in Const. art. 13, § 4, providing that a mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purpose of assessment or taxation, be deemed an interest in the property thereby affected, does not include a collateral security, or credits by loan on personality. *Bank of Willows v. Glenn County*, 101 Pac. 13, 14, 155 Cal. 352.

The term "contract or other obligation," in Const. art. 13, § 4, providing that a mortgage, deed of trust, or other obligation by which a deed is secured shall for the purpose of taxation be treated as an interest in property, were inserted to cover any and all possible contracts of lien upon realty which the ingenuity of lawyers might attempt to devise to evade the constitutional requirement. *Bank of Woodland v. Pierce*, 77 Pac. 1012, 1013, 144 Cal. 434.

#### Other occupation

Under charter authority to a city to regulate and prescribe the compensation of hackmen, cabmen, omnibus drivers, and all "others pursuing a like occupation," the city can limit the rate of fare to be charged by street railway companies, inasmuch as the phrase "others pursuing a like occupation," when construed ejusdem generis, includes street railway companies. *Chicago Union Traction Co. v. Chicago*, 65 N. E. 451, 460, 199 Ill. 484, 59 L. R. A. 631 (citing and adopting *Union County v. Ussery*, 35 N. E. 618, 147 Ill. 204; *Misch v. Russell*, 26 N. E. 528, 136 Ill. 22, 12 L. R. A. 125; *First Nat. Bank of Joliet v. Adam*, 28 N. E. 955, 138 Ill. 483; *Ritchie v. People*, 40 N. E. 454, 155 Ill. 98, 20 L. R. A. 79, 46 Am. St. Rep. 315).

#### Other offenses

See Assault to Commit Other Offense.

#### Other officers

The words, "other officer," as used in the statute covering bribery (Rev. St. § 6900), must be extended to include members of the council of a municipality. *Amundson v. State*, 28 Ohio Cir. Ct. R. 655, 656.

The words "other officers," in Rev. Code, 1852, as amended to 1893, p. 697, c. 92, § 2, authorizing the judges of the Superior Court to punish the contempt, omissions, neglects,

and defaults of justices of the peace, sheriffs, coroners, clerks and "other officers" within the state, include the office of alderman, vested with jurisdiction to administer the criminal law. In re Tull (Del.) 78 Atl. 299, 300, 2 Boyce, 126.

The words "other officers," as used in Const. art. 8, § 3, making it the duty of the two houses of the General Assembly after organization at request of either house to join in grand committee for the purpose of electing other officers, undoubtedly meant such officers as by special direction of the Constitution or by law were to be elected by the General Assembly. In re Decision of Justices, 69 Atl. 555, 556, 28 R. I. 607.

A "solicitor of business" is not within the clause "and other officers," in Rev. St. U. S. § 5136, giving a national bank power to appoint a president, vice president, cashier, and other officers, and dismiss such officers at pleasure; but under subdivisions 3 and 7 of said section, empowering such a bank to make contracts and to exercise, by duly authorized "officers" or agents, all such incidental powers as shall be necessary to carry on the banking business, it may employ a solicitor of business for a year. *Case v. First Nat. Bank of Brooklyn*, 109 N. Y. Supp. 1119, 1120, 59 Misc. Rep. 269.

As used in Code Civ. Proc. § 1986, subd. 3, as amended by St. 1907, p. 730, c. 391, § 1, providing that a subpoena to require attendance out of court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws, is to be issued by the judge, justice, or other officer before whom attendance is required, and if the subpoena is issued to require attendance before a commissioner or other officer upon the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required, upon the order of such court or a judge thereof, the term "other officer" means any one authorized to administer oaths or take testimony, etc., and includes a notary public, in view of Pol. Code, § 794, providing that it is the duty of notaries public to take depositions and affidavits and administer oaths in all matters to be used before any court, etc., and it was proper for a judge of the superior court of S. county to order the clerk to issue a subpoena requiring a witness residing therein to attend before a notary in the county to give his deposition, and for the clerk to issue such subpoena. In re Scott, 96 Pac. 385, 387, 8 Cal. App. 12.

In Const. § 160, expressly making two years the term of office of city legislative boards generally, and in the next clause prescribing the manner of electing such boards in cities of the first and second class, and in the succeeding clause providing that "other officers" of towns or cities, if elected by the voters thereof, shall hold office for

"four years, and until their successors shall be qualified," the provision as to the terms of office of "other officers" was plainly exclusive of the provisions as to the terms of city legislative boards, and was not open to construction. *McDermott v. City of Louisville*, 32 S. W. 264, 265, 98 Ky. 50.

Since 1835 there has been in Missouri a separate statute limiting the time within which actions against constables must be commenced (Rev. St. 1835, p. 116, § 4), which limitation was in 1889 extended from two to three years (Rev. St. 1889, § 2377; Rev. St. 1899, § 882). The term "or other officer," used in Rev. St. 1899, § 4274, limiting actions against a sheriff, coroner, or other officer to three years after accrual of cause, was not in the original act of 1848 (Acts 1848-49, p. 75, § 5), which related only to a sheriff or a coroner; the words being inserted in the revision of 1855 (Rev. St. 1855, p. 1048, c. 103, art. 2, § 4), in which revision there was a separate statute of limitations of two years as to constables (Rev. St. 1855, p. 347, c. 29, § 6). Held, that the term "or other officer," in section 4274, applies to a treasurer of a school district, and bars a civil action against him and his sureties on his official bond, if not brought within the time limited. *State ex rel. School District of Sedalia v. Harter*, 87 S. W. 941, 944, 188 Mo. 516.

The term "other officers," as used in Loc. Act Mich. 1907, No. 461, p. 362, which makes it the duty of a certain county treasurer and all "other officers" of the county having county funds in their possession or under their control to deposit them in depositaries designated by the board of supervisors, may include deputies of the treasurer and persons appointed under Comp. Laws, § 3527, to perform the duties of treasurer but who are not designated as "treasurer." *Gratiot County v. Munson*, 122 N. W. 117, 118, 157 Mich. 505.

#### Other packages

In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 258, 30 Stat. 171, relating to sardines "in bottles, jars, tin boxes, or cans" of various small sizes not exceeding 70 cubic inches, also "in other packages," the doctrine of *noscitur a sociis* is not to be so applied as to limit the latter phrase to packages of a retail size, and thus exclude sardines in large tins dealt in at wholesale. *Strohmeyer & Arpe Co. v. United States*, 178 Fed. 263, 101 C. C. A. 400.

#### Other paper

The words "other paper," as used in Kirby's Dig. § 3490, allowing the clerk of the circuit court 10 cents each "for filing complaint, answer, reply, petition, demurrer, affidavit, or other paper" in a cause is a general term, but according to the old and settled rule of statutory construction must be confined in its meaning to that class of pa-

pers to which the preceding words belong. *Hempstead County v. Harkness*, 84 S. W. 799, 78 Ark. 600 (citing *Eastern Arkansas Hedge-Fence Co. v. Tanner*, 53 S. W. 886, 67 Ark. 156; *Matthews v. Kimball*, 66 S. W. 651, 69 S. W. 547, 70 Ark. 451; *Sedg. St. & Const. Law* [2d Ed.] pp. 360, 361; *End. Interp. St.* §§ 400-407; *Suth. St. Const.* 268-276; *State v. Blackburn*, 33 S. W. 529, 61 Ark. 407).

In a statute laying tariff on imported "paper hangings and paper for screens or for fire boards and all 'other paper' not specifically provided for in this act," there is no reason to suppose the words "other paper" were used with any different meaning from that given it in a former act in which the words were used in a like association, and therefore plain paper stamped by single operation into shapes with lace-like effects to be used on the tops of packages of candy, fruit, etc., or under finger bowls, was dutiable as "paper," rather than as "manufactures of paper." *Hamilton v. United States*, 167 Fed. 796, 798, 93 C. C. A. 186.

#### Other party

The term "other parties," as used in *Code Civ. Proc. Cal.* § 389, providing that when a complete determination of a controversy cannot be had without the presence of other parties court must then order them to be brought in, etc., means persons whose presence is essential to the complete determination of a controversy between parties who were already before the court. *Alpers v. Bliss*, 79 Pac. 171, 173, 145 Cal. 565.

*Rev. St. 1899*, § 4652, providing that in actions where one of the original parties to the contract in issue and on trial is dead the other party to such contract cannot testify in his own favor, means by the "other party" one who is a party to the suit, as well as to the contract. *Jackson v. Smith*, 123 S. W. 1026, 1028, 139 Mo. App. 691.

A decedent's executrix, in a suit to enforce subrogation to the rights of a mortgagee in certain land as against an heir of decedent by his first wife, was not disqualified to testify as the "other party" to any contract or cause of action in issue, under *P. S. 1589*, though she might benefit by a successful termination of the litigation by force of the decedent's will. *Wilder's Ex'r v. Wilder*, 72 Atl. 203, 206, 82 Vt. 123.

Notice of application by a landholder for the appointment of commissioners to review the assessment of damages to his land, by laying out a road over the same, must be given to the township committee, and not to the applicants. The town committee are "the other party" referred to in the act of March 1, 1850. *Inhabitants of Hopewell Tp. v. Welling*, 24 N. J. Law, 127, 128.

#### Other permanent fixtures

"Other permanent fixtures," as used in a policy providing that the insurer should not

be liable, unless liability was specifically assumed, for loss of store or office furniture or fixtures, and describing the property insured as a building including gas, steam, and water pipes and all other permanent fixtures contained therein, did not cover or include counters, shelving, and office fixtures in the building which might be removed without injury to the building. *Banyer v. Albany Ins. Co.*, 83 N. Y. Supp. 65, 85 App. Div. 122.

#### Other persons

Under *Rev. St.* § 5480, Act June 8, 1872, c. 335, 17 Stat. 323, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873, providing that if any person having devised or intending to devise any scheme or artifice to defraud, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post office establishment of the United States, or by inciting such "other person" or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, mail any letter or receive any letter from the mail, he shall, upon conviction, be punishable by a fine or imprisonment, or both. The clause, or by inciting such "other person" or any person to open communication with the person so devising or intending, clearly indicates that the person mentioned in the preceding clause with whom the deviser opened or intends to open correspondence is to be such "other person" and not himself. *Erbaugh v. United States*, 173 Fed. 433, 434, 97 C. C. A. 663.

An employé in the customs service of the United States who makes and returns false weights in connection with an entry of imported merchandise is comprehended by the words "other person" in the provisions of the customs administration act (Act June 10, 1890, c. 407, § 1, 26 Stat. 131), for the forfeiture of goods or their value where "any owner, importer, consignee, agent, or other person" shall make an entry by means of false and fraudulent practices, or shall be guilty of any unlawful act or omission whereby the United States is deprived of the lawful duties, and for the punishment of such person by fine or imprisonment or both. *United States v. Mescall*, 30 Sup. Ct. 19, 20, 215 U. S. 26, 54 L. Ed. 77.

As used in General Tax Act 1905, § 2, par. 28 (Acts 1905, p. 30), which levies a special tax upon each brewing company for each plant or brewery in the state and "upon all other persons, firms, and corporations who are engaged in the sale of beer, whether on consignment or otherwise \* \* \* for each place of business including all other persons, corporations, or agencies maintaining storage depots in this state," etc., the word "other" following the word "including" was not intended to contrast the persons, corpo-

rations, and agencies enumerated after it with the persons, firms, or corporations just previously enumerated. The phrase "all other persons" has the same meaning as the identical words "all other persons" earlier in the paragraph. *Whittlesey v. Acme Brewing Co.*, 56 S. E. 299, 300, 127 Ga. 208.

As used in Laws 1903, p. 141, c. 93, imposing a penalty on an officer of a corporation who makes exaggerated reports "to the stockholders or to other persons dealing with such corporation," the comprehensive class "stockholders or other persons" includes all persons dealing with corporations. *State v. Merchant*, 92 Pac. 890, 891, 48 Wash. 69.

The words "or other," in St. 1898, § 1165, providing that the owner or occupant of any land sold for taxes "or other" person may at any time within three years from the date of the certificate of sale redeem the same or any part thereof or interest therein, must be given such construction as will enable those whose rights will be directly prejudiced by absolutism of a tax title to redeem, though they be neither owners nor occupants, and a minor is entitled to redeem from a tax sale, and he has such an interest after executing and delivering a warranty deed as entitles him to redeem. *Hoffman v. Peterson*, 102 N. W. 47, 48, 123 Wis. 632.

Rev. St. § 725, which gives to federal courts power to punish as contempts disobedience or resistance by officers, "or by any party, juror, witness, or 'other person,' to any lawful writ, process, rule, decree or command of the said courts," extends the power of such court to enforce its decrees to persons other than those made parties by name; and it is the settled rule thereunder that, to render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit nor have been actually served with a copy of the injunction, so long as he appears to have had actual notice. *Employers' Teaming Co. v. Teamsters' Joint Council*, 141 Fed. 679, 681.

The words "other person," in Wilson's Rev. & Ann. St. 1903, § 2774, providing that every transfer of property with intent to delay or defraud any creditor or "other person" of his demands is void against all creditors, includes a wife, and, where a husband by cruel treatment compels the wife to leave him and bring an action for divorce and alimony, she is a quasi creditor in relation to the alimony which the law awards her, and a transfer by the husband of property with intent to defraud the wife is void as against her. *Bennett v. Bennett*, 81 Pac. 632, 637, 15 Okl. 286, 70 L. R. A. 864.

The words "other person," in Mills' Ann. St. § 2584, providing if "any officer or other person," by virtue of any execution, shall take or seize property exempted from levy and sale, such officer or person shall be lia-

ble for three times the value of the property, includes an execution creditor, who authorizes or knowingly ratifies the act of an officer in seizing under execution and selling exempt property of the judgment debtor. *Seerle v. Brewer*, 90 Pac. 508, 509, 40 Colo. 299, 122 Am. St. Rep. 1065.

In Rev. St. § 1165, authorizing the owner, occupant, or other person to redeem land sold for taxes, the words "or other person" do not embrace other persons having no interest whatever in the land. *Rutledge v. Price Co.*, 27 N. W. 819, 920, 66 Wis. 35.

All noncombatants except the wives and children of military and civil officers were embraced in the words "other persons" in a contract with the United States for the transportation to Spain at the cabin rate of Spanish military and civil officers in the Philippine Islands, and at the steorage rate of such other persons as might be designated by the Secretary of War. *J. M. Ceballos & Co. v. United States*, 29 Sup. Ct. 583, 588, 214 U. S. 47, 53 L. Ed. 904.

In Act Aug. 13, 1907 (Acts 1907, p. 727), regulating the issuance of prescriptions for intoxicating liquors by licensed physicians or other persons, the words "other persons" apply to a licensed physician, or one not licensed who assumed to practice medicine, and therefore, whether the physician whose name was signed to the prescription by defendant was a licensed physician or not. If he practiced such profession, he was within the terms of the act. *McAllister v. State*, 47 South. 161, 163, 156 Ala. 122.

The term "other persons," as used in Act 1901 (23 St. at Large, p. 754), providing that the term public officer shall include all officers of the state, and other persons whose duties are defined by law, in its literal meaning would include guardians, administrators, and other trustees, and it could not have been the intention of the Legislature to include such persons in the definition of public officers. The intention probably was to include in the definition all persons whose public duties are defined by law such as poorhouse superintendents. *Sanders v. Belue*, 58 S. E. 762, 764, 78 S. C. 171.

Laws 1891, c. 114, § 1 (Gen. St. 1900, § 4643), providing that eight hours shall constitute a day's work for all laborers or other persons employed by any city, applies to the engineers and firemen who operate the water and electric plant of the city of Ottawa. *State v. City of Ottawa*, 113 Pac. 391, 393, 84 Kan. 100.

The words "other persons," as used in Gen. St. 1901, c. 38, § 3, subd. 8, providing that every person residing in this state and being the head of a family shall have exempt from seizure and sale upon any attachment, execution, or other process, the following articles of personal property: The necessary

tools and implements of any mechanic, miner, or "other person" used and kept in stock for the purpose of carrying on his trade or business, means other persons obliged to use tools or implements to carry on their trades or business in the same way that a mechanic or miner requires tools or implements to carry on his trade or business. *Williams v. Vincent*, 79 Pac. 121, 122, 70 Kan. 595, 68 L. R. A. 634, 109 Am. St. Rep. 469.

A person residing in the state who is the head of a family, and whose principal business is the running of a threshing machine, is included in the phrase, "or other person," as used in the statutes of Kansas relating to exemption of tools. *Jackman v. Lambertson*, 80 Pac. 55, 56, 71 Kan. 138.

The words "other person or persons," as used in *Burns' Ann. St. 1908*, § 8346, making it unlawful for any railroad, or any common carriers or agent thereof, or any drayman, or other person or persons, to ship, receive, transport, carry, or handle intoxicating liquors under false or fictitious names or titles, within the state, include all individuals, though they are not engaged in the business of a common carrier, so that an affidavit charging violation of the statute was not insufficient for failing to allege that defendants or either of them was either a railroad, common carrier, or agent thereof, or person engaged in transportation business or any business of like kind or character. *State v. Decker*, 89 N. E. 816, 317, 172 Ind. 614.

The clause "other person having the legal care and control of any infant," in *Rev. St. 1899*, § 1857, punishing any master or mistress of an apprentice, or "other person having the legal care and control of any infant," who shall unlawfully assault such apprentice or infant, is modified by the context, and has relation to the preceding words "master \* \* \* of an apprentice," and this refers to a different kind of relationship from that of parent and child, and where one who adopted a child by a deed of adoption, as authorized by section 5248, providing that from the time of filing a deed of adoption a child adopted shall have the same rights for support and proper treatment as any child has by law commits an assault and battery on the child, the prosecution must be brought under section 1850, fixing the punishment for any one who shall assault another under such circumstances, as not to constitute any other offense, instead of under section 1857. *State v. Koonse*, 101 S. W. 139, 141, 123 Mo. App. 655.

#### Same—As ejusdem generis

In *St. 1898*, § 2320, providing that conveyances made with the intent to hinder, delay, or defraud creditors, "or other persons," of their lawful actions or demands, shall be void as against such person, the words "other persons" refer to persons of the same general class having rights of action which may

be hindered by conveyance.—*Corry v. Shea*, 128 N. W. 892, 894, 144 Wis. 135, Ann. Cas. 1912A, 1154.

The words "and any other persons," as used in *Laws 1897*, p. 326, c. 112, § 1, giving cities power to construct and operate water-works to supply the inhabitants thereof and any other persons with water, does not include other municipalities. The words must be construed according to the rule of ejusdem generis. The specific words in the statute referred to that class of persons who are inhabitants of the city (that is to say, persons who are habitually and regularly within the corporate limits); and the general words following can have no broader application than to persons within the corporate limits, such as transient persons. *Farwell v. City of Seattle*, 86 Pac. 217, 218, 43 Wash. 141, 10 Ann. Cas. 130.

#### Other person interested

The purchaser of the interest of an heir to land owned by decedent is not entitled to apply for a sale thereof for the payment of debts, under *Rev. St. 1899*, § 150, providing that such application may be made by any "creditor or other person interested in the estate." The term "other person interested in the estate" contemplates persons who have an interest in the distribution of the estate or who have a right to participate in such distribution, such as an heir or one who is made the legatee by will or the guardian or creditor of one of the heirs of the estate or other persons who may be entitled to a distributive share of the estate. The purchase of the interest of two children of deceased in land which descended to them falls far short of creating any "interest in the estate," as contemplated by the statute. *Stark v. Kirchengraber*, 85 S. W. 868, 871, 186 Mo. 633, 105 Am. St. Rep. 629.

#### Other personal effects or property

The phrase "other personal property" in the iron-safe clause of a fire policy, requiring that the clause shall be complied with if the insurance covers merchandise or other personal property, means articles in the nature of merchandise, and does not include ordinary store fixtures such as show cases, iron safes, etc. *American Ins. Co. v. Bagley*, 65 S. E. 787, 6 Ga. App. 736.

Where a statute exempted stocks and other personal property from taxation in certain circumstances, the use of the word "other" is a clear indication that the Legislature regarded stocks as included within the description of personal estate. *Trenton v. Standard Fire Ins. Co.*, 68 Atl. 1111, 1112, 76 N. J. Law, 79.

The word "other," as used in a provision of a tax law relating to the taxation of "rolling stock and other personal property," means other than located; i. e., the unlocated personality or personality of like nature

with rolling stock. *Greene County v. Wright*, 54 S. E. 951, 954, 126 Ga. 504 (citing *Columbus Southern Ry. Case*, 15 S. E. 293, 89 Ga. 574).

#### Other place

In construing *Rev. St. 1899, § 1856*, which makes it an offense for any father or mother or any other person to whom a child under the age of six years has been confided to "expose such child in a street, field, or other place with intent wholly to abandon it," the rule of *ejusdem generis* does not apply, and "other places" will not be limited in its meaning to places like a street or field; and therefore an indictment charging accused with exposing a child under the age of six years in a certain street railway shelter or station with intent to unlawfully and feloniously wholly abandon such child charges an offense under the statute. *State v. Eckhardt*, 133 S. W. 321, 232 Mo. 49.

*Act No. 176 of 1908, § 1*, known as the "Gay-Shattuck Act," requires a license of from \$200 to \$1,600 based on the annual gross receipts of the business for every business conducting a barroom, cabaret, café, beer saloon, or other place where intoxicating or malt liquors are sold in quantities of less than five gallons. Section 3 contains a prohibition of the sale of malt liquors, etc., without a license, in substantially the same language designating the various places as in section 1. Section 4 provides that the statute shall not apply to groceries where liquor is sold in original packages, and not consumed on the premises. Section 8, in prescribing the formalities to be observed in licensing places where liquors are sold to be drunk on the premises, gives the same list of places as in section 1, but does not add "other places" where liquor is sold, and sections 10 and 11 also discriminate between barrooms and other places where liquors are sold not to be drunk on the premises. Held, that the statute required a license for the sale of malt liquors in original packages from a brewery warehouse; such warehouse coming within the provision "other place" where malt liquors are sold. *State v. Pabst Brewing Co.*, 55 South. 349, 350, 128 La. 770.

#### Other place of public accommodation or amusement

A roller skating rink to which the public are invited on the sole condition of paying a fixed charge is a "public place of amusement," within *St. 1898, § 4398c*, providing that any person denying to another the equal enjoyment of the accommodations of "inns, restaurants, saloons, barber shops, eating houses, public conveyances, \* \* \* or any other place of public accommodation or amusement," shall be liable to the person aggrieved. *Jones v. Broadway Roller Rink Co.*, 118 N. W. 170, 171, 136 Wis. 595, 19 L. R. A. (N. S.) 907.

#### Other places where refreshments are served

In construing the civil rights act (*Code, § 5008*), declaring that all persons shall be entitled to the full and equal enjoyment of the privileges of inns, restaurants, chop-houses, eating houses, lunch counters and "all other places where refreshments are served," etc., the rule "*ejusdem generis*" applies, and the words "other places where refreshments are served" are limited to places of the same nature as public inns, restaurants, chop-houses, eating houses, etc., and hence does not include a merchant's booth in a pure food show, rented from a retail grocers' association maintaining the show, to which an admission was charged generally, where the merchant gave away cups of coffee, gratis, to prospective patrons for advertising purposes. *Brown v. J. H. Bell Co.*, 123 N. W. 231, 234, 146 Iowa, 89, 27 L. R. A. (N. S.) 407, *Ann. Cas.* 1912B, 852.

#### Other portions of street

*Code, § 834*, providing that all street railway companies shall be required to make all the paving between the rails of their tracks and one foot outside thereof at their own expense, unless, by ordinance or by virtue of the provisions of any ordinance under which such street railway may have been constructed or may be maintained, it may be bound to pave other portions of said street as specified by ordinance, in the use of the words "other portions of said street," means not something less, but something more, than the statute requires. *Des Moines City Ry. Co. v. City of Des Moines*, 131 N. W. 43, 46, 152 Iowa, 18.

#### Other ports

Libelants signed shipping articles for a voyage from Seattle to Shanghai, China, "and such other ports and places in any part of the world as the master may direct," and back to a final port of discharge on Puget Sound. It was during the time of the war between Japan and Russia, and the vessel was in fact loaded with a contraband cargo for the Russian government, and her destination was Vladivostok, if that port could be reached. It was not shown, even if it had been competent to do so, that the crew knew the real nature of the voyage. The voyage commenced in January, and the vessel proceeded first to Alaska and then by a northern route to avoid capture, and, owing to the season, she was caught in the ice and held for 41 days, and the crew suffered much hardship. She was subsequently captured by a Japanese warship, and condemned as a prize; the crew being detained for a time and then returned to Seattle, where their expenses and wages at the contract rate were paid, and they receipted for the same in full. Held, that the voyage made was one not indicated by the articles, but one ma-



terially different and more hazardous, and for which the current rate of wages was higher than those paid, and that under the circumstances libelants were entitled to recover damages for the unusual hardships to which they were subjected by reason of the deviation. *Turtle v. Northwestern S. S. Co.*, 154 Fed. 146, 147.

#### Other process

In construing the provision in the Tariff Act for "precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process," in reference to intaglios incised in rock crystal (a precious stone), which have been attractively and skillfully painted, the value and salability of the articles being chiefly attributable to the painting, the words "or other process" include such process of painting, and such intaglios are dutiable under said provision, rather than as manufactures of rock crystal, not specially provided for. *Benedict & Warner v. United States*, 135 Fed. 242.

#### Other proof

Under Sand. & H. Dig. § 2231, providing that an extra judicial confession of defendant will not warrant a conviction, unless accompanied with "other proof" that such offense was committed, such confession may be considered as tending to prove (though insufficient in itself) the corpus delicti, as well as connection of defendant with the crime. *Misenheimer v. State*, 84 S. W. 494, 495, 73 Ark. 407 (citing *People v. Jaehne*, 8 N. E. 374, 108 N. Y. 182; *People v. Badgley* [N. Y.] 16 Wend. 53; *People v. Deacons*, 16 N. E. 676, 109 N. Y. 374; *Cunningham v. Commonwealth*, 9 Bush [72 Ky.] 149; *State v. Patterson*, 73 Mo. 695; *Bish. New Cr. Proc.* § 1058; *Underhill, Cr. Ev.* § 147; *Bradley v. State*, 32 Ark. 704; *Redd v. State*, 40 S. W. 374, 63 Ark. 457).

#### Other property

A brass railing attached partly to the freehold and partly to an engine in an ice plant, the engine being attached to the freehold, comes within the purport of Revisal 1905, § 3511, making it "larceny" for any person to enter on the lands of another and carry off any "wood or other kind of property whatsoever, growing or being thereon." *State v. Beck*, 53 S. E. 843, 141 N. C. 829.

Rev. St. 1898, § 4423, punishing one obtaining by false pretenses "any money, goods, wares, merchandise or other property" when considered in connection with section 4972, subds. 3, 4, defining the word "property" as including real and personal property and defining the words "personal property" as including things in action and evidences of debt, makes it a criminal offense to obtain by false pretenses a promissory note, notwithstanding the rule *noscitur a sociis*. *Clawson v. State*, 109 N. W. 578, 579, 129

Wis. 650, 116 Am. St. Rep. 972, 9 Ann. Cas. 966.

"Other property," as used in a statute providing that, if any person designedly or by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or "other property," he shall be punished, means property of the class previously enumerated as similar to money or goods, and therefore does not include real property. *State v. Eno*, 109 N. W. 119, 120, 131 Iowa, 619, 9 Ann. Cas. 856.

Under Laws 1893, p. 197, c. 84, § 22, as amended by Laws 1907, p. 325, c. 153, § 23, authorizing assessments for street improvements on the several "lots, blocks, tracts and parcels of land or other property," a street railroad franchise in a street to be improved is a mere easement, and is not assessable as "other property"; the rule of *ejusdem generis* applying. In re City of Seattle, 103 Pac. 807, 808, 54 Wash. 460.

The water hydrants and electric light fixtures of the city are "private property" owned by it in its corporate capacity. They have a permanent situs within the drainage district and constitute "property" and "other property liable to assessment" within the meaning of chapter 80, Laws 1909. *State v. Board of Com'rs of Shawnee County*, 110 Pac. 92, 95, 83 Kan. 199.

Revenue Act (Hurd's Rev. St. 1909, c. 120) § 25, divides all personal property for assessment purposes into 36 classes, the thirty-sixth being "all other property required to be listed," and requires that the schedule when completed by the assessor shall distinctly show in appropriate columns the value of the property assessed. Held, that though the board of review, in making assessments, is required to make a list of the property assessed, setting down in the proper columns the separate kinds of property and the assessed value thereof, yet, where an assessment of complainant's property was all placed under the item "all other personal property required to be listed," it would be presumed that the assessment was of property not included in any of the kinds of property enumerated in the preceding classes, so that, in a suit to restrain the collection of taxes extended on such assessment, it was incumbent on complainant to show that he did not own any property within that class, and that the valuation was excessive, fraudulent, and dishonestly made. *Holt v. Hendee*, 93 N. E. 749, 750, 248 Ill. 288, 21 Ann. Cas. 202.

As used in the Railroad Law, § 12 (Laws 1890, p. 1087, c. 565), requiring intersecting railroads to receive from each other and forward to their destination "goods, merchandise, and other property," the phrase "other property" means any property which from its nature, and the condition in which

It is, is reasonably capable of being transported over the road. Such railroads must receive cars and freight from each other and transport the same. This section and section 35, requiring such lines to afford each other equal terms for accommodation in the transportation of cars, passengers, baggage, and freight, required such roads to interchange cars loaded with freight. *Hudson Valley Ry. Co. v. Boston & M. R. R.*, 92 N. Y. Supp. 928, 932, 45 Misc. Rep. 520.

#### Other provisions

The authorities of the city of Chicago have power to adopt an ordinance requiring bakeries to be licensed, defining a "bakery" as any place used for the purpose of mixing, compounding, or baking, for sale, or for purposes of a restaurant, bakery, or hotel, any bread, biscuits, etc., or any food product of which flour or meal is a principal ingredient, and providing for ventilation, light, and other sanitary requirements in such bakeries, under *Cities and Villages Act*, § 62, par. 50 (*Hurd's Rev. St.* 1911, c. 24), authorizing cities to regulate the sale of meats, poultry, etc., and all other provisions, and to provide for place and manner of selling them, and paragraph 53, giving them power to provide for and regulate the inspection of meats, poultry, etc., and other provisions, the phrase "other provisions" including bakery products, covered by the ordinance, and the power to regulate including the power to license, and also, by paragraph 78, giving cities power to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease. *City of Chicago v. Drogasawacz*, 99 N. E. 869, 870, 256 Ill. 34.

#### Other public show

The phrase "or other public sports, exercises, or shows," in *Pen. Code*, § 265, prohibiting "all shooting, hunting, fishing, playing, horse racing, gaming or other public exercises or shows" on Sunday, when considered in connection with section 277, prohibiting theatrical plays, etc., on Sunday, does not include a moving picture show. *People v. Hemleib*, 111 N. Y. Supp. 690, 691, 127 App. Div. 356; *William Fox Amusement Co. v. McClellan*, 114 N. Y. Supp. 594, 598, 599, 62 Misc. Rep. 100; *Edwards v. McClellan*, 118 N. Y. Supp. 181. But see *Gale v. Bingham*, 110 N. Y. Supp. 12, 13.

#### Other public use

The use of streets for moving a building is an unusual and extraordinary use, and is not such "other public use" as is contemplated by *Comp. Laws* 1897, § 6691, providing that every telephone company organized thereunder shall have the power to construct and maintain lines for the transmission of telephone messages through public streets and highways, with all necessary erections and fixtures therefor, provided that the same

shall not injuriously interfere with other public uses of such places. *Kibbie Tel. Co. v. Landphere*, 115 N. W. 244, 245, 151 Mich. 309, 16 L. R. A. (N. S.) 689 (citing *Northwestern Tel. Exch. Co. v. Anderson*, et al., 98 N. W. 706, 12 N. D. 585, 65 L. R. A. 771, 102 Am. St. Rep. 580, 1 Ann. Cas. 110; *Williams v. Citizens' Ry. Co.*, 29 N. E. 408, 130 Ind. 71, 15 L. R. A. 64, 30 Am. St. Rep. 201; *Dickson v. Kewanee Electric Light & Motor Co.*, 53 Ill. App. 379; *Millville Traction Co. v. Goodwin*, 32 Atl. 263, 53 N. J. Eq. 448; *Taylor v. Portsmouth, K. & Y. St. Ry.*, 39 Atl. 560, 91 Me. 193, 64 Am. St. Rep. 216).

#### Other purposes

A religious association known as "Shiloh Association" purchased land and established a school called "Shiloh Institute," the deed for the property being executed to trustees appointed by the association, and reciting that it was upon trust to hold such property for the purpose of establishing and maintaining a school of general learning and for any other proper and legal purpose which the association might deem best, and giving the trustees power to sell or mortgage the property whenever requested by the association. Held, that the "other proper and legal purpose" should be construed as of the same general nature and kind as the main object of a school, and that the right to sell or mortgage meant a sale or mortgage in furtherance of the trust to maintain a school. *Spring Green Church v. Thornton*, 73 S. E. 810, 812, 158 N. C. 119.

As used in *Act Nov. 29, 1890*, entitled an act to create a new charter for the city of Columbus, and to consolidate and declare the rights and powers of such corporation, and for "other purposes," means other purposes appropriate to the subject-matter of the act (to wit, the creation of a new charter for the city of Columbus), not indicated in the phrase "to consolidate and declare the rights of such corporation," as each law must be limited to one subject. There can be no limitation that the phrase "and for other purposes," in the title of an act, refers to purposes other than those naturally or ordinarily appropriated to the subject-matter expressly declared. *Blair v. State*, 17 S. E. 96, 97, 90 Ga. 326, 35 Am. St. Rep. 206.

In the provision of the charter of the *Barre Water Company* authorizing the company to take water for the extinguishment of fires, and for domestic, sanitary, and other purposes, the words "other purposes" mean other purposes like those specially mentioned. Therefore a use of water for polishing granite has none of the elements of a public use, and in that respect is unlike fire, domestic, or sanitary uses. *Smith v. Barre Water Co.*, 50 Atl. 1055, 73 Vt. 310, 311.

In *Comp. Laws* 1907, § 2806, providing that no person shall be allowed to acquire

any right or title in or to any lands held by any town or city designated for public use as streets, lanes, avenues, parks, public squares, or for other purposes, the phrase "for other purposes" must be limited to things ejusdem generis, with the special property named, and so land held by a city for sale as business property is subject to adverse possession. *Pioneer Investment & Trust Co. v. Board of Education of Salt Lake City*, 99 Pac. 150, 153, 35 Utah, 1, 136 Am. St. Rep. 1016.

#### Other reasonable cause

The words "for other reasonable cause," as used in Gen. St. 1902, § 815, which provides that courts of common pleas may grant new trial for mispleading or discovery of new evidence, or want of actual notice of suit to any defendant, or of a reasonable opportunity to appear and defend, when a just defense, in whole or in part, exists, or for other reasonable cause, according to the usual rules in such cases, should be construed to mean causes of the same general character as those specified, and hence the section did not authorize the granting of a new trial on the ground that, by reason of the death of the trial judge before filing findings, the plaintiff was precluded from reviewing errors of law, alleged to exist in the judgment, on an appeal. *Elchells v. Wainwright*, 57 Atl. 121, 124, 76 Conn. 534.

#### Other relative

In the interpretation of section 5971, Rev. St. 1892, to prevent the lapsing of a devise or legacy when made to any child or other relative of the testator if such child or other relative shall have been dead at the time of the making of the will, or shall die thereafter, leaving issue surviving the testator, the phrase "other relative" should, in accordance with the maxim "noscitur a sociis," be restricted to relationships of the character indicated by the associated word "child," and regarded as including those which are consanguineous but excluding those which are affinitive merely. *Schaefer v. Bernhardt*, 81 N. E. 640, 641, 76 Ohio St. 443, 10 Ann. Cas. 919.

A grandniece and grandnephew are "other relatives," within a statute providing that mutual benefit associations may, for the purpose of assisting the widows and orphans or other relatives of deceased members, provide in their by-laws for the raising of a fund by payments from members. *Mathewson v. Supreme Council Royal Arcanum*, 110 N. W. 69, 71, 146 Mich. 671.

#### Other remedy

As used in Code Civ. Proc. § 1822, which bars rejected claims after six months from notice of dispute, unless the claimant commences an action for the recovery thereof within that time, declaring that in default thereof the claimant and all persons claiming

under him are forever barred from maintaining any such action and from every "other remedy" to enforce payment thereof out of decedent's property, the words "other remedy" included summary proceedings by an undertaker to compel payment of his bill authorized by section 2729, subd. 3, which he could not maintain after the expiration of six months from notice of the rejection of his claim. *In re Mudge*, 118 N. Y. Supp. 568, 571.

#### Other representative of value

It is not a crime, under Pen. Code, § 330, making it an offense to operate any banking or percentage game played with any device, "for money, checks, credit, or other representative of value," to set up and operate a slot machine on which games are played unless played for money, checks, credits, or other representative of value, and, if played for something not included in these words, it is not a crime. The court said: "If the Legislature was intending to prohibit all gambling with banking devices or by banking games played with cards, dice, or any device, it seems to us there would have been no limitation as now to money, checks, or credits, but the statement would have been for anything of value or that represents value. Gambling such as it is sought to prohibit by section 330 is carried on almost exclusively for money, or some obligation or promise which calls for money, and not other property. \* \* \* Courts have no power to legislate; and, if the Legislature intended to simply prohibit banking and percentage games where played for money, checks, credits, and other things similar to money, checks, and credits, this court has no power to add a further prohibition, and say that it will be a crime if such banking or percentage game is for other kinds of property, such as grain, fruit, horses, cattle, lumber, and all other things of whatever kind which may have a value." As stated in 21 Am. & Eng. Ency. of Law, 1012: "Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the class embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as of the same kind, class, or nature with, and not of a quality superior to, or different from, those specifically enumerated." It follows that "the very language of the statute itself shows that the gambling which the Legislature was attempting to prohibit was that sort of gambling usually carried on at a fixed place of business, where those seeking to play at games of chance could come, and where money is the thing usually wagered, or its representative, such as checks, or anything which is a demand to be paid in money. It would hardly be considered reasonable that the Legislature had in mind that the games

and devices enumerated were played in the general markets where grain, animals, and stocks are bought and sold. The intent of the Legislature to legislate against games set up and carried on at a fixed place and in houses or rooms is shown by section 331 of the Penal Code, which attempts to prohibit the use of any house for the gambling prohibited in section 330. Neither is it plain that the Legislature had in mind any kind of property other than money, the thing most common for use in such games, and its representative, such as checks, and demands for the payment of money. Neither would it be a reasonable supposition that in 1872, when the act was passed, any banking game would be set up or carried on in gambling for anything but money and the instruments representing money, and therefore the Legislature could not have had in mind the cigar slot machine, and could not have prohibited its use. The ingenuity of man, however, has devised a banking game in the cigar slot machine by which gambling may be carried on for property not included within 'money, checks, credits or other representatives of value.' McLaughlin, J., in a concurring opinion says: "The words 'or other representative of value' found in the section must be construed in connection with the preceding language in the same sentence, for the word 'other' is a correlative and specifying word, meaning 'different from that which has been specified; not the same; not his or those.'"

\* \* \* But, aside from this, there is another rule commanding that words not plainly used in a technical sense shall be taken in their ordinary, general sense, and if this is applied to the word 'representative,' as used in the section, it seems quite clear to my mind that cigars or tobacco cannot be considered as representative of value. The word 'representative,' as used in the statute, certainly means 'typifying;' 'presenting by means of something;' 'standing in the place of;' 'that which represents anything.' Cigars and tobacco are things of value; they have a value. This is beyond cavil. But in my opinion it could hardly be said that they represent their own inherent or market value. A certain coin or check or bill will represent the value of any quantity of cigars or tobacco, and these in turn will be inherently worth the price obtainable for them. But it would hardly be contended that because they have a certain value, measured by current mediums of exchange, they represent the value of the coin or currency paid for them, any more than they represent any other commodity which might be exchanged for them in the course of trade. Every commodity has a value measured according to fixed standards, but the various commodities sold and bought in many markets and transactions do not represent the value of the gold, silver, or currency paid for them. On the contrary, the medium of exchange established by law

or recognized in business dealings represents their value." *Ex parte Williams*, 87 Pac. 565, 568, 7 Cal. Unrep. 301 (citing *Chegaray v. Mayor, etc., of City of New York*, 13 N. Y. 220; *Shirk v. People*, 11 N. E. 888, 121 Ill. 61; *Commonwealth v. Kammerer* [Ky.] 13 S. W. 108; *People v. Bealoba*, 17 Cal. 339; *Hyatt v. Allen*, 54 Cal. 357; *Stroud, Judicial Dict.* p. 1359 et seq.; *Lewis' Sutherland, Statutory Const.* §§ 423, 430; *In re La Société Française d'Épargne et de Prévoyance Mutuelle*, 56 Pac. 458, 123 Cal. 525; *State v. Woodman*, 67 Pac. 1120, 26 Mont. 348).

#### Other roads

The phrase "other roads," as used in Acts 1895, p. 174, c. 82, granting the board of county commissioners power to purchase toll roads, and declaring that when conveyed the roads shall be free and shall be kept in repair as provided by law for the repair of other roads, must be construed as meaning other free roads of the class or kind to which those purchased would belong when conveyed to the county. *State ex rel. Shanks v. Board of Com'rs of Carroll County*, 70 N. E. 138, 142, 162 Ind. 183.

#### Other security

The phrase "other security," as used in Const. art. 11, § 3, which provides that nothing in the article relating to homestead exemptions shall be construed to interfere with the sale of property under any mortgage, pledge, or other security, means "security of a like character; that is, such as is created by his (the debtor's) own act." *Oppenheim v. Myers*, 39 S. E. 218, 219, 99 Va. 582 (quoting definition in *White v. Owen*, 30 Grat. [71 Va.] 43).

#### Other serious ailment

The words "other serious ailment," in an application for life insurance, declaring that the applicant had never had any of listed diseases, some 60 in number, or any "other serious ailment," modify the negative answers to the list of questions as to whether the applicant had suffered from the listed diseases, and the words called for ailments of a serious character, and the statement was a representation and not a warranty, and insurer may not defeat a recovery on the policy without averring and proving the materiality of the statement and that it was known to be false when made. *Minnesota Mut. Life Ins. Co. v. Link*, 82 N. E. 637, 639, 230 Ill. 278.

#### Other shows

Under section 51 of the Greater New York charter, and sections 305, 352, of ordinances passed pursuant to such charter provision, providing that a license may be required of all common shows, and providing that a "common show" shall be deemed to include Ferris wheel, gravity steeplechase, chute, scenic cave, bicycle carousel, scenic

railway, striking machines, switchback, merry-go-round, puppet shows, ball games, and all "other shows of like character," the giving of a free moving picture show in an ice cream saloon and candy store, while not within the term "other shows of like character," is included in the words "common shows," since those words are not limited by the list given, but include many others not given. *Weistblatt v. Bingham*, 109 N. Y. Supp. 545, 546, 58 Misc. Rep. 328.

#### Other sources

In *United States v. Norton*, 91 U. S. 566, 568, 23 L. Ed. 454, the court, after quoting Webster's lexical definition of the term "revenue" as the "income of a nation, derived from its taxes, duties, or other sources, for the payment of the national expenses," say: "The phrase 'other sources' would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the Patent Office in excess of its expenditures, and those of the Post Office Department." *People's United States Bank v. Goodwin*, 162 Fed. 937, 941.

#### Other state or government

The phrase "other state," in P. L. 1893, p. 301, making it lawful for any corporation, created under the revised corporation act of 1875, to purchase, hold, and dispose of shares of the capital stock of any corporation created under the laws of any "other state," did not include a foreign country. *Warren v. Pim*, 59 Atl. 773, 775, 66 N. J. Eq. 353.

#### Other stock

The statute requiring actions against a railroad for damages for killing animals, such as horses, mules, cattle, or other stock, to be brought in the county where the killing occurred, does not apply to actions for killing dogs; "other stock" only including such animals as those mentioned, so that it was not necessary to prove that a dog was killed in the county where the action was brought. *El Dorado & B. R. Co. v. Knox*, 117 S. W. 779, 781, 90 Ark. 1, 184 Am. St. Rep. 17.

Under Pub. St. 1882, c. 11, § 20, providing that all personal estate shall be assessed to the owner in the city of which he is an inhabitant, except that all goods, wares, and merchandise, "and other stock in trade," in cities other than where the owner resides, shall be taxed in those places where the owner hires or occupies manufactories, stores, shops, or wharves, the capital used in conducting the business of a banker and broker was not taxable at the place where such business is located but at the place of residence of such banker and broker. *Prince v. City of Boston*, 79 N. E. 741, 193 Mass. 545 (citing *Tisdale v. Harris* [Mass.] 20 Pick. 9; *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Boston Loan Co. v. Boston*, 137 Mass. 332; *Barron v. Boston*, 72 N. E. 951, 187 Mass. 168; *Martin v. Portland*, 17 Atl. 72, 81 Me. 293).

#### Other structure

The phrase "other structure," in 71 Ohio Laws, p. 168, § 1, providing that any person who shall perform labor or furnish machinery or materials for erecting, altering, repairing, or removing any house, mill, manufactory, or other building, fixture, bridge, or other structure, by virtue of a contract with the owner or owners, shall have a lien to secure the payment of the same, must be limited to improvements on the same class as those specifically named, and cannot be extended so as to include a railroad. *Rutherford v. Cincinnati & P. R. Co.*, 35 Ohio St. 559, 563.

The term "other structure," as used in Act March 12, 1887 (St. 1886-87, p. 112, c. 95) § 8, declaring guilty of a felony one who maliciously deposits or explodes at, in, under, or near any building, vessel, railroad, tramroad, or cable road, or any train or car, or any depot, stable, car house, theater, schoolhouse, church, dwelling house, or other place where human beings usually inhabit, assemble, frequent, or pass and repass, any explosive, with intent to injure or destroy such building or other structure, does not apply only to the specifically enumerated, but includes the malicious depositing and exploding of dynamite in the levels, stopes, and chutes of a working mine. In *re Mitchell*, 82 Pac. 347, 348, 1 Cal. App. 396.

Const. art. 15, § 1, after authorizing the Legislature to establish harbor lines in front of cities, declares that the state shall not grant rights in the waters beyond such lines, nor relinquish control of any area lying between the harbor line and the line of ordinary high tide or such other line not less than 50 nor more than 600 feet from the harbor line as may be determined by the commissioners, but such area shall be reserved for "landings, wharves, streets and other conveniences of navigation and commerce." Section 2 directs that the Legislature shall provide for leasing the right to build wharves, docks, and other structures on the harbor areas, and Laws 1907, p. 674, c. 244, empowers railroads to appropriate lands by condemnation, but exempts harbor areas. Held, that the word "commerce" as used in section 1 included commerce by both land and sea, and that the words "other structures" in section 2 was equivalent in meaning to the words "other conveniences" in the first section; and hence neither the Constitution nor the statute precluded a railroad company from acquiring the right to cross the harbor area by obtaining a lease of the right of way from the state, provided that in doing so it did not interfere with navigation of the stream. *State ex rel. Hulme v. Puget Sound & G. H. Ry. Co.*, 103 Pac. 809, 811, 54 Wash. 530.

The words "other structures," as used in *Gulf, C. & S. F. Ry. Co. v. Clark*, 101 Fed. 678, 41 O. C. A. 597, in which it is held that

"a riparian owner may construct necessary embankments, dykes, or other structures to maintain his bank of the stream in its original condition," does not include a "jetty," which is a dam projected into the stream for the purpose of deflecting the current so as to deepen the channel, or to form an eddy below the obstruction in which sediment may be deposited, thereby extending and protecting the banks. *Morton v. Oregon Short Line Ry. Co.*, 87 Pac. 151, 153, 48 Or. 444, 7 L. R. A. (N. S.) 844, 120 Am. St. Rep. 827.

As used in an act to regulate the location of "pesthouses, crematories, and other objectionable structures," the word "structures" means some structure of like character; that is, some sort of a building. *Frelinghuysen v. Town of Morristown*, 70 Atl. 77, 79, 76 N. J. Law, 271.

#### Other suitable articles

Under Ballinger's Ann. Codes & St. § 499, providing that the county surveyor shall be furnished "with all necessary cases and other suitable articles," and section 342 giving the county commissioners general charge of the county property and the management of the county funds and business, the county commissioners are bound to procure for the surveyor a surveyor's transit, which is within the quoted words "other suitable articles." *State ex rel. Manning v. Major*, 97 Pac. 249, 50 Wash. 355.

#### Other sums

The term "other sums," as used in an option for purchase of a mine, providing for certain payments and certain work at certain times, by the purchaser, and that if the purchaser shall fail to pay any of the installments of the purchase price, or shall fail to comply with any of the covenants or conditions, the contract shall terminate, and all payments or "other sums" which may have been paid by the purchaser shall be forfeited and become liquidated damages, includes money paid for work done on the mining claims referred to. *K. P. Min. Co. v. Jacobson*, 83 Pac. 728, 730, 30 Utah, 115, 4 L. R. A. (N. S.) 755.

#### Other supplies

California county government act (St. 1897, p. 459, c. 277, § 25, subd. 8) confers express authority on the board of supervisors to furnish a courthouse without requiring competitive bidding. Section 4 (page 452) gives the board general authority to purchase such personal property as may be necessary in the exercise of its powers; and section 25, subd. 21 (page 464), declares that the board shall annually advertise for bids for furnishing the county with stationery, clothing, bedding, groceries, provisions, drugs, medicines, "and all other supplies." Held, that the term "other supplies" had reference to ordinary supplies which the board was required to keep for use and replenish annually, if need-

ed for distribution among the county officers, and did not include furnishings for the courthouse, which the board was authorized to purchase without advertising for bids. *Riverside County v. Yawman & Erbe Mfg. Co.*, 86 Pac. 900, 901, 3 Cal. App. 691.

#### Other tangible property

The term "other tangible property," in a statute providing that every person engaged in the business of buying and selling grain for profit shall be a grain broker and shall, at the time required by the act, determine under oath the average amount of capital invested in such business, exclusive of real estate or "other tangible property" assessed separately for the preceding year, and taxes shall be charged on such average capital the same as other property, is equivalent to all tangible property, including real estate, and where, in ascertaining the average capital for assessment as such, all tangible property that is capable of being assessed separately, including real estate, is separately assessed, and the value thereof deducted, the object of the statute is reached, and the constitutional requirement that all property shall be valued for taxation and required to bear its share of the public burden is accomplished, and the tangible property of a grain broker, including real estate, must be assessed in precisely the same manner as the property employed in other ways is assessed. *Central Granaries Co. v. Lancaster County*, 113 N. W. 199, 201, 77 Neb. 319.

#### Other taxing officer

The words "other taxing officers," as used in the act abolishing the state board of taxation and creating in lieu thereof a board for equalization, revision, review, and enforcement of tax assessments, and providing in section 34 that, where complaint is made to the created board by any person or corporation aggrieved by the assessment of property, the board shall have the power to review and correct the action of the local assessors or "other taxing officers" and of all "boards of tax review" by reducing or increasing such assessment, refers only to local taxing officers, and the term "boards of tax review" referred to in the statute means boards that exercise an appellate review of the acts of local assessors and other local taxing officers. *Tuckerton R. Co. v. State Board of Assessors*, 67 Atl. 69, 70, 75 N. J. Law, 157.

#### Other thing

In an action on an insurance policy, a plea averring that the application made by assured provided, among "other things," that all statements contained in the application were true, and then alleging a false statement by assured, was bad in failing to allege or show that by the contract, taken as a whole, the answers were warranted as true and amounted to more than untrue representations immaterial to the risk. For all that

is shown in the plea, the "other things" they aver to be in the application and contract may so control the particular provision therein mentioned as declaring a warranty as to show the answers relating to certain disease were not intended to be and were not in fact warranted to be true. *Schloss & Kahn v. Westchester Fire Ins. Co.*, 37 South. 701, 141 Ala. 566, 109 Am. St. Rep. 58.

Greater New York Charter, Laws 1901, p. 323, c. 466, § 780, authorizes the marshal to enter any building to examine "the stoves and pipes thereto, ranges, furnaces and heating apparatus of every kind whatsoever, including the chimneys, flues and pipes with which the same may be connected, engine rooms, boilers, ovens, kettles, and also all chemical apparatus or other things which in his opinion may be dangerous in causing or promoting fires." Held, that the "other things" are not limited to the classes previously specified, and that a dumb-waiter shaft, extending from the basement to the roof, but without connection with the outer air at the roof, may be condemned as dangerous, and specific changes ordered therein. *Lantry v. Mede*, 108 N. Y. Supp. 1099, 1100, 58 Misc. Rep. 221.

#### Other timber

The title of Laws 1899, p. 332, "An act for the improvement of the navigation of rivers and their tributaries \* \* \* and for collecting tolls and charges thereon for the floating, driving and handling of sawlogs and other timber products and the navigation of barges and rafts," was broad enough to embrace "booms" and "brails," which are composed of logs and timber products. *St. Joe Imp. Co. v. Laumierster*, 112 Pac. 683, 684, 19 Idaho, 66.

The terms "logs, lumber, or other timber," as used in Acts 1903, pp. 682-689, requiring persons hauling "logs, lumber, or other timber of whatsoever description over the public roads of the country to secure a license," do not, in the connection used, include firewood. *Kennamer v. State*, 43 South. 482, 483, 150 Ala. 74.

#### Other unlawful disposition

Where accused ordered liquor for another from a dealer without the state, receiving an amount sufficient to pay therefor, accused was an agent, and was not liable under Code 1907, § 7363, making it an offense to aid in an unlawful sale or purchase or other unlawful disposition of liquor, or to act as agent of the purchaser in procuring an unlawful purchase, etc.; the separation of accused's part of the liquor from that ordered for the other not being a "sale" or "other unlawful disposition of" liquor within the statute. *Vernon v. State*, 50 South. 57, 58, 161 Ala. 83.

#### Other unprofessional conduct

Act April 17, 1907 (Laws 1907, p. 227, c. 123) § 11, authorizes the refusal of a license to practice medicine for a conviction of a

crime of the grade of a felony, or one which involves moral turpitude, or procuring or aiding or abetting the procuring of a criminal abortion, or for "other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public." Held, that by the use of the word "other," in the clause quoted, it was intended that the conduct referred to therein should be similar in its nature to that designated in the preceding subdivision and defined as a crime of the grade of a felony, etc. *Morse v. State Board of Medical Examiners*, 122 S. W. 446, 447, 57 Tex. Civ. App. 93.

#### Other valuable minerals or deposits

The words "other valuable deposits" (Rev. St. § 2320) in the clause relating to the location of lode mining claims, "mining claims upon veins or lodes of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits," include nonmetalliferous, as well as metalliferous, deposits. *Webb v. American Asphaltum Min. Co.*, 157 Fed. 203, 205, 84 C. C. A. 651.

Const. art. 13, § 4, provides that all mines and mining claims, etc., containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits, shall be taxed, etc., and the net annual proceeds of all mines and mining claims shall be taxed, etc. At the time the Constitution was framed the specified metals were the only ones mined in large quantities in the territory, and coal, with the exception of lime and common rock, was the only nonmetallic product mined in quantity sufficient to justify the method of taxation proposed. Held, that the classification was not intended as a limitation, but an enumeration of substances then produced in quantity sufficient to warrant the method of taxation imposed, and, under the exception to the rule of ejusdem generis that where the particular things enumerated are complete so that there remain no others of like kind, then the things that fall within the general words must be assumed to be of a different kind and not ejusdem generis with those enumerated, the phrase "other valuable mineral deposits" embraces all mineral deposits, including a deposit of gypsum and the net annual profits from the sale of products manufactured therefrom are taxable under the section. *Nephi Plaster & Mfg. Co. v. Juab County*, 93 Pac. 53, 54, 83 Utah, 114, 14 L. R. A. (N. S.) 1043.

The words "other minerals" or "other valuable minerals," taken in the broadest sense, would include petroleum oil, but, if the parties did not intend that the title to petroleum and gas should pass the title remains in the owner of the fee. A deed purporting to convey all minerals underlying described land does not convey the natural gas thereunder, where the parties do not contemplate a conveyance thereof. *McKinney's Heirs v.*

Central Kentucky Natural Gas Co., 120 S. W. 314, 315, 184 Ky. 289, 20 Ann. Cas. 934 (quoting and adopting definition in Donahue, Petroleum & Gas, p. 220).

#### Other value in business

Where the business of a decedent is continued by the administrator, the good will of such business is an asset subject to a transfer tax, under the term "other value in business." In *re* Keahon's Estate, 113 N. Y. Supp. 926, 927, 60 Misc. Rep. 508.

#### Other vehicles

Rev. St. 1895, art. 3017, subd. 1, authorizing an action for death by the negligence of the "proprietor, owner, charterer, hirer of any railroad, steamboat, stagecoach or other vehicle for the conveyance of goods or passengers," applies to carriers transporting persons or freight from some point of origin to some more or less distant point of destination, and does not apply to an elevator in an office building used to transport persons visiting the building; the words "other vehicle" meaning a vehicle performing, substantially at least, the same office and serving the same necessities as a railroad, steamboat, or stagecoach. *Farmers' & Mechanics' Nat. Bank v. Hanks*, 137 S. W. 1120, 1125, 104 Tex. 320. Under the rule *ejusdem generis*, the words "other vehicles for the conveyance of goods or passengers" should be construed to mean vehicles for the conveyance of goods or passengers for hire, and that the section therefore did not confer a right of action for wrongful death caused by the alleged negligence of the driver of a private vehicle, used solely to further the owner's private business. *Pulom v. Jacob Dold Packing Co.*, 182 Fed. 356, 359.

In the title to Laws 1909, c. 259 (Rev. Laws Supp. 1909, §§ 1278—1, 1278—25), "An act to license and define the road regulations of motor vehicles and other vehicles," etc., the term "other vehicles" is not limited to other vehicles of the same nature not usually known as "motor vehicles," such as steam or electrically propelled vehicles. *State v. Busian*, 127 N. W. 495, 496, 111 Minn. 488, 31 L. R. A. (N. S.) 682.

A municipal ordinance, providing that no person shall set up, employ, or use any hackney coach, cab, or "other vehicle" for the conveyance of passengers, for hire, without a license, though passed before the advent of automobiles, includes taxicabs used for hire. *State v. Dunklee*, 84 Atl. 40, 76 N. H. 439, Ann. Cas. 1913B, 754.

#### Other works

The words "other works," as used in Pen. Code 1895, § 1089, which provides that misdemeanor convicts shall be sentenced to work on the public works, or on such other works as the county authorities may employ the chain gang, authorizes the employment of chain gangs on private works, providing the

actual control of the prisoners is exercised by the county authorities. *McDonald v. State*, 64 S. E. 1108, 1110, 6 Ga. App. 339.

#### OTHER INSURANCE

Where the insured at the time of applying for insurance, informed the company's agent that there was a certain amount of insurance on the property, and that additional insurance was desired, and the company issued additional insurance, the continuation of the existing insurance, either by renewals of policies, already thereon, or by substituting other policies, was not "other insurance," within the company's policy, stipulating that it should be void if the insured should thereafter procure other insurance. *Lewis v. Guardian Fire & Life Assur. Co.*, 87 N. Y. Supp. 525, 527, 93 App. Div. 157.

The term "other insurance," used in an indorsement on a fire policy, means insurance in addition to that effected by the policy itself. *De Loach & Co. v. Aetna Ins. Co.*, 62 S. E. 473, 474, 4 Ga. App. 746.

A void insurance policy does not constitute "other insurance," within a clause providing that a certain policy shall be void if insured has or shall make any other insurance on the property. *Hayes v. Milford Mut. Fire Ins. Co.*, 49 N. E. 754, 756, 170 Mass. 492.

#### OTHERS

The word "others," in a complaint alleging that the action is brought for the benefit of plaintiff and of all "others" similarly situated and interested in the questions involved, and who may contribute to the expenses of the same, means two at least. *Climax Specialty Co. v. Seneca Button Co.*, 103 N. Y. Supp. 822, 824, 54 Misc. Rep. 152.

\* \* \* In order to read the expression 'survivors,' in a will, as meaning 'others,' there must be a gift over, or some other indication of the manifest intention to oust the ordinary interpretation." *Hill v. Safe Deposit & Trust Co.*, 60 Atl. 446, 448, 101 Md. 60, 4 Ann. Cas. 577 (quoting and adopting definition in *Anderson v. Brown*, 35 Atl. 937, 84 Md. 271).

#### OTHERWISE

See Not Otherwise.

The words "or otherwise" in law, when used as a general phrase following an enumeration of particulars, are commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the classes before mentioned, receiving an *ejusdem generis* interpretation. *New York Life Ins. Co. v. McDearmon*, 114 S. W. 57, 59, 137 Mo. App. 671 (quoting 6 Words and Phrases, p. 5105); *Fleming v. City of Rome*, 61 S. E. 5, 6, 130 Ga. 383 (citing 6 Words and Phrases, p. 5105).



In Rev. St. § 903, providing that any officer of the state, or any other person, who shall convert to his own use, in any way whatever, or shall use, by way of investment in any kind of property or merchandise, or shall loan, with or without interest, or use in any other manner than as directed by law, any portion of the public money which he is authorized to collect, or which may be intrusted to his keeping or disbursement, or for any other purpose, shall be guilty of an embezzlement of the same, the words "or for any other purpose" are equivalent to "or otherwise." An indictment is not bad on the ground that the pleader used the words "or otherwise" in framing the indictment instead of "or for any other purpose." *State v. Dudenhefer*, 47 South. 614, 617, 618, 122 La. 288.

Specific language in one section of a by-law will prevail over a vague and general term "or otherwise" contained in another section of the by-law. Thus, where section 330 of the by-laws of a mutual benefit association provided that, if any designation of a beneficiary should fail "for illegality or otherwise," the benefit should be payable to the person or persons mentioned in class first, would be controlled by section 331, providing that in the event of the death before the decease of a member of one or more of the beneficiaries designated by him in accordance with the laws of the order, if he shall have made no other or further disposition thereof, as provided in the laws of the order upon his death, that part of the benefit made payable to the deceased beneficiary or beneficiaries shall be paid to the surviving beneficiary or the surviving beneficiaries equally. *Polhill v. Battle*, 52 S. E. 87, 88, 124 Ga. 111.

In an action against the sureties on a bond given by a widow for community property, in which it appeared that prior to the date of the bond she had used the proceeds of the community property to pay debts for improvements on her own property, and where defendants contended that her use constituted a devastavit, a charge that defendants were not liable is she used the proceeds for the payment of debts and support of the children "or otherwise," before the date of the bond, was erroneous. *Neaves v. Griffin* (Tex.) 80 S. W. 420, 421.

Ribbons composed chiefly of silk, but in part of cotton, are not "ribbons \* \* \* of cotton, \* \* \* whether composed in part of india rubber or otherwise," under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179, for the word "otherwise" is there used with the meaning of "not," and not as relating to other materials than india rubber. Such ribbons are properly assessed as manufactures of silk, under paragraph 391 of Schedule I. *Gartner, Sons & Co. v. United States*, 154 Fed. 957, 958.

### Otherwise change

Authority under the charter of the city of Atlanta "to open, lay out, to widen, straighten, or otherwise change streets" within the city does not comprehend the power to abandon a thoroughfare and open another to take its place over a strip of land running parallel with, but some 26 feet distant from, the nearest boundary line of the street sought to be vacated and devoted to a purpose inconsistent with its use by the public. *Coker v. Atlanta. K. & N. Ry. Co.*, 51 S. E. 481, 482, 123 Ga. 483.

### Otherwise convey

The term "otherwise convey," as used in Rev. St. 1895, art. 651, providing that every corporation shall have power to hold, purchase, sell, mortgage, or "otherwise convey" such real estate as the purposes of the corporation shall require, embraces the power to lease the real estate of the corporation. *Starke v. J. M. Guffey Petroleum Co.*, 86 S. W. 1, 3, 98 Tex. 542, 4 Ann. Cas. 1057.

### Otherwise dispose of

The phrase "or otherwise dispose of," as used in a statute making it an offense to "sell, give away, or otherwise dispose of" liquor without a license, must be construed as extending only to a disposition in ejusdem generis with a sale or a gift. They are not to be extended to any and every act which may be said to be a disposition. It would be a departure from the rule of statutory construction to give the general words "or otherwise dispose of" so loose and expansive a construction as to include within them any act not akin to a sale or gift, not intended as, and not having in it any of the properties of, a parting with property by one person to another. Where defendant, having no possession or otherwise of whisky, at the request of another got and gave it to the latter, it being the property and in the possession of a third person, and taken from him without any authority, there was no violation of the statute. *Maxwell v. State*, 37 South. 266, 140 Ala. 131.

In view of Acts 1906 (Sp. Sess.) p. 91, § 31, providing that the term "otherwise dispose of" following the words "sold, offered for sale," etc., when used in any indictment, shall include a barter, exchange, giving away, furnishing, or other manner of disposition, the delivery of a bottle of whisky by accused to an acquaintance to keep for him, while accused went before the grand jury to testify, would not support an indictment charging that he sold or "otherwise disposed of" intoxicants contrary to law, in absence of a showing that he intended or consented that such acquaintance could use some part of the liquor. *O'Brien v. State*, 57 South. 1028, 1029, 3 Ala. App. 173.

**Otherwise disqualified**

The words "otherwise 'disqualified'" and "not 'disqualified,'" employed in Administration Act (1 Starr & C. Ann. St. 1896, p. 270, c. 3) § 5, provided that where two executors are appointed by the same will, and one or more of them dies, refuses to qualify or is otherwise disqualified, letters testamentary shall be granted to the other person, not renouncing and not disqualified, plainly mean not otherwise legally incompetent, or not legally competent under the statute. *Clark v. Patterson*, 73 N. E. 806, 809, 214 Ill. 533, 105 Am. St. Rep. 127.

**Otherwise improve**

Under a grant to a city "otherwise to improve any street," a city had power to pass an ordinance condemning, and ordering the removal of an old brick sidewalk. *Scott v. City of Marshall*, 85 S. W. 98, 99, 110 Mo. App. 178.

**Otherwise injured**

Crimes Act, § 107 (Gen. St. 1901, § 2100), provides that every person who shall maliciously injure specified property "or cut down, lop, girdle, or otherwise injure or destroy any fruit or ornamental shade tree, being the property of another," shall be guilty of a misdemeanor. Held that, by the use of the words "or otherwise," the malice which is made an ingredient of the offense may exist against the owner "or otherwise," viz., against the property itself. *State v. Boles*, 74 Pac. 630, 633, 68 Kan. 167, 1 Ann. Cas. 491.

Where insured, in his application for accident insurance, warranted that he had never had "paralysis, fits of any kind, brain disorder, diabetes, hernia, varicose veins, or any bodily or mental infirmity, injuries or wounds," or suffered the loss of a limb or an eye, except as stated, and that he had never been ruptured or "otherwise injured," the words "injuries or wounds" and "otherwise injured" should be construed to refer only to such serious other wounds or injuries not specified as might affect the risk. *Trenton v. North American Acc. Ins. Co. (Tex.)* 89 S. W. 276, 277.

**Otherwise injuriously affected**

The clause "misrepresented or otherwise injuriously affected," in Pen. Code, § 514, subd. 3, providing that any person who shall utter a writing purporting to have been written or signed by another, which writing the person uttering it knows to be false, forged, or counterfeited, and by the uttering of which the sentiments, opinions, conduct, interests, or the rights of the person purporting to have signed it shall be "misrepresented or otherwise injuriously affected," is guilty of forgery, is in the alternative, and the disjunctive clause "or otherwise injuriously affected" does not qualify or govern the meaning of the word "misrepresented," and

means that if the opinions, conduct, rights, etc., be injuriously affected by other means, or in other respects, or from other causes than misrepresentation, an offense is committed, the same as if committed by misrepresentation. *People v. Abeel*, 91 N. Y. Supp. 699, 703, 45 Misc. Rep. 86.

**Otherwise payable**

An accident insurance policy provided generally for the payment of \$5,000 in case of accidental death, or \$10,000 if the fatal injuries should be received in certain specified circumstances. It also provided that, in case of suicide, the company should only be liable for one-twentieth of the "amount 'otherwise payable.'" The assured committed suicide in a manner and place in no way connected with the particular circumstances which would render the company liable for \$10,000. Held, that the "amount otherwise payable" plainly meant the amount payable had the death been accidental, and not by suicide; i. e., one-twentieth of \$5,000. *Van Slooten v. Fidelity & Casualty Co.*, 79 N. Y. Supp. 608, 609, 78 App. Div. 527.

**Otherwise proved**

The words "otherwise be proved," in Rev. Code 1871, § 1101, providing that if any person shall be a subscribing witness to a will wherein any devise or bequest is made to such subscribing witness, and the will cannot "otherwise be proved," such devise or bequest shall be void, refer to the execution of the will, and not to proof of its contents. *Swanzy v. Kolb (Miss.)* 46 South. 549, 550.

**Otherwise provided**

Laws 1860, p. 592, c. 345, provides that the lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed or so injured by the elements or any other cause as to be untenable shall not be liable for rent to the lessor or owner, after such destruction or injury, unless "otherwise expressly provided" by written agreement or covenant, etc. Held that, where a lease provided that, in case of partial damage by fire not sufficient to render the premises untenable, the landlord should repair as speedily as possible, and in case of total destruction the rent should be paid up to the time of the fire and the lease be terminated, and, in case the damage by fire was so extensive as to render the premises untenable, the rent was to cease to such time as the building could be put in complete repair, without any provision for termination of the lease, the rights of the parties were "otherwise expressly provided," and the statute did not apply. *Weinberg v. Savitzky*, 93 N. Y. Supp. 485, 486, 47 Misc. Rep. 132.

Where the city charter provides that one convicted in the recorder's court may appeal to the city court, it is "otherwise provided," within Code 1896, § 2969, providing that, if

not otherwise provided by the charter of a city, an appeal to the circuit court will lie from a judgment of conviction for a violation of an ordinance. *Reid v. Greene*, 47 South. 193, 156 Ala. 640.

Statutes 1907, p. 531, c. 550, regulating construction, alteration, and maintenance of buildings in Boston, by section 12 declares every building shall have, with reference to its height, condition, construction, etc., reasonable means of egress in case of fire, satisfactory to the commissioner. Section 13 provides no part of any structure, except cornices, permanent awnings, string courses, window caps and sills, bay windows, under such terms, regulations, and restrictions as may be required by the mayor and board of aldermen, and outside means of egress as "otherwise provided," shall project over any public way or square. Section 17 prohibits less than two means of egress from every story of a building used above the first for storage or sale of merchandise, one of which means may be an outside fire escape. Held, that the phrase "otherwise provided," in section 13, refers to provisions of sections 12 and 17, and hence, where it appeared sufficient means of egress satisfactory to the building commissioner were provided in a building, the erection of a proposed covered way attached thereto was within the general prohibition of section 13, and properly disallowed. *Jordan v. Swasey*, 89 N. E. 108, 203 Mass. 48.

#### Otherwise provided by law

As used in Pol. Code 1895, § 4350, declaring that the county treasurer shall dispense the county's moneys only on county warrants issued by the county clerk based on orders of the board of county commissioners, "or as otherwise provided by law," the words "or as otherwise provided by law" include jurors' and witnesses' certificates, and hence the restriction of the treasurer's power of payment applies as well to them as to other claims against the county. *Silver Bow County v. Davies*, 107 Pac. 81, 84, 40 Mont. 418.

The appeal required by Act June 22, 1860, c. 188 (12 Stat. 85, 87) § 11, to be taken to the Supreme Court of the United States if the decree of the District Court in certain private land claim cases is against the United States, is "otherwise provided by law" within the meaning of Act March 3, 1891, c. 517, 26 Stat. 828, § 6, making the Circuit Court of Appeals the proper tribunal for the review of final decisions of the District Court in other than certain excepted cases, which include those where it is otherwise provided by law. *United States v. Dalcour*, 27 Sup. Ct. 58, 59, 203 U. S. 408, 51 L. Ed. 248.

#### Otherwise united in interest

The owner of the premises and a contractor for work thereon are not joint contractors as to a subcontractor, or "otherwise united in interest," within Code Civ. Proc.

§ 399, providing that an attempt to commence an action is the commencement thereof against each defendant, when the summons is delivered to be served to officers of the county in which one of two codefendants, who are joint contractors or otherwise united in interest, resides. *Martens v. O'Neill*, 115 N. Y. Supp. 260, 262, 131 App. Div. 123.

#### Admissions in pleadings or otherwise

"Otherwise," as used in Code 1899, c. 64, § 8, providing that divorce suits shall be conducted as other suits in equity, except that the bill shall not be taken for confessed, and, whether the defendant answer or not, the cause shall be heard independently of the admissions of either party in the pleadings or "otherwise," operates in a suit for divorce on the ground of defendant's adultery to exclude evidence of defendant's confessions of adultery made in the country. *Trough v. Trough*, 53 S. E. 630, 634, 59 W. Va. 464, 4 L. R. A. (N. S.) 1185, 115 Am. St. Rep. 940, 8 Ann. Cas. 837 (citing and adopting *Hampton v. Hampton*, 12 S. E. 340, 87 Va. 148).

#### Advancement or otherwise

The word "otherwise," as used in Civ. Code art. 1227, defining the collation of goods as the supposed or real return to the mass of the succession which an heir makes of property, which he received in advance of his share or otherwise, in order that such property may be divided, together with the other effects of the succession, refers to the provisions contained in the other articles relating to collation, and includes everything that may have been received by the heir from the parent himself, save where the latter has indicated unequivocally that it was intended as an advantage. *Sibley v. Pierson*, 51 South. 502, 513, 125 La. 478.

#### Assignment or otherwise

In Code, § 4604, providing that no person from whom a party in interest derives his interest by assignment or "otherwise" shall be examined as a witness as to any personal transaction with a deceased person against an executor of such person, the word "otherwise" is of broad significance. It means that, if the right asserted by a claimant depends for its existence and validity upon a transaction between the deceased and a third person, the evidence of such third person shall not be allowed to prove the transaction. *McClanahan v. McClanahan*, 105 N. W. 833, 834, 129 Iowa, 411.

The word "otherwise," as used in Code, § 4604, providing that no person interested in the event of an action, nor any person from whom any party or interested person derives any title by assignment or otherwise, shall be a witness as to any personal transaction or communication between such witness and a person deceased, means another manner or way, as by devise or descent, and "derives" is defined as meaning "to receive,

as from a source or origin, to obtain by descent or transmission"; and the statute does not disqualify an agent as a witness, since an agent is not interested in the result of the action or bound by the judgment. *Stiles v. Beed*, 130 N. W. 376, 380, 151 Iowa, 86.

#### **Contiguous property or otherwise**

As used in a constitutional provision empowering the Legislature to vest cities, villages, and towns with the right to make local improvements by special assessment, special taxation of contiguous property, or "otherwise," the words "or otherwise" were used for the purpose of excluding possibility of misapprehension that, because only cities, towns, and villages could be authorized to make local improvements by special assessment or special taxation, they could not be authorized to make them by general taxation. *City of Chicago v. Brede*, 75 N. E. 1044, 1045, 218 Ill. 528.

#### **Credit or otherwise**

"On credit or otherwise," as used in Rev. Codes 1899, § 1115a, authorizing towns to purchase road machinery on credit or otherwise, means that the purchase may be made to be paid for out of the general fund and not made on credit to be paid out of special taxes. *Bank of Park River v. Town of Norton*, 104 N. W. 525, 526, 14 N. D. 143.

#### **Deed, mortgage, or otherwise**

Const. art. 3, § 28, providing that a homestead set off and recorded shall not be waived by deed of conveyance, mortgage, or "otherwise," includes a devise, and prevents the alienation of the homestead, either by deed or devise, or in any other manner, unless the wife joins the husband in the disposition. *Davis v. Milady*, 75 S. E. 363, 364, 92 S. C. 135.

#### **Forfeiture or otherwise**

Under the rule ejusdem generis, the words "or otherwise," as used in Comp. Laws, § 8534, providing that all corporations whose charters shall expire by their own limitation, or shall be annulled by forfeiture, "or otherwise," shall nevertheless continue for three years after dissolution to prosecute and defend suits, and to enable them gradually to close their concerns, to dispose of and convey their property, and to divide their capital stock, but not to continue the business for which they may have been established, should be referred to corporate termination by circumstances or acts not dependent on the voluntary act of the corporation, and not to voluntary proceedings in its behalf; the provision of the section being reasonable and beneficial as applied to a corporation whose charter has expired or has been forfeited at the suit of the Attorney General, but being inapplicable to dissolution proceedings under sections 10,852-10,890. *Jacobs v. E. Bement's Sons*, 126 N. W. 1043, 1044, 161 Mich. 415.

#### **Indebtedness due under policy or otherwise**

A provision of a life policy that any indebtedness due the company under any provision of the policy, "or otherwise," including any balance of the premiums remaining unpaid, will be deducted upon settlement of the policy, could not be construed to cover merely indebtedness arising under the policy, but covered all debts due the company, and would include advances made to insured on a running account. *Webb v. Missouri State Life Ins. Co.*, 115 S. W. 481, 482, 134 Mo. App. 576.

#### **Investments in bonds, stocks, or otherwise**

As used in Bates' Ann. St. § 2731, providing that all property, real or personal, in this state, whether belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be taxed, etc., the word "otherwise" includes only such property or investments as are specifically mentioned and required to be taxed in the subsequent sections, and property or investments not so mentioned cannot be taxed. *Chisholm v. Shields*, 66 N. E. 93, 94, 67 Ohio St. 374.

#### **Manufacture or otherwise**

"Changed in condition by manufacture or otherwise," as used in Tariff Act July 24, 1897, c. 11, § 5, 30 Stat. 205, means only changed in condition by manufacture, or by some process similar to manufacture. But any artificial process is a process of manufacture, and surely the words "or otherwise" cannot be considered to mean only processes similar to manufacture, for that construction would be meaningless. The words unquestionably mean changed in condition from any cause, and, as "remanufacture" would cover all artificial processes, so "or otherwise" will cover such changes as occur from natural causes, such as those here under discussion. *Franklin Sugar Refining Co. v. United States*, 137 Fed. 655, 658.

#### **Negligence or otherwise**

Plaintiff, having contracted to construct the superstructure of a bridge, agreed to indemnify the bridge company against all liability or damage on account of accident whether occasioned by the omission or negligence of plaintiff, its agents, or workmen "or otherwise," during the continuance of the agreement, plaintiff to pay all judgments recovered by reason of such accident by reason of any suit or suits against the bridge company, including costs, expenses, etc., and to give the bridge company an indemnifying bond against all claims for damages to persons or property of whatsoever nature arising during construction of the bridge. Held, that the words "or otherwise" did not broaden the scope of plaintiff's liability which was limited to accidents arising from acts of

negligence and omissions by plaintiff, its agents and servants, and, so construed, was not contrary to public policy. *Pennsylvania Steel Co. v. Washington & Berkeley Bridge Co.*, 194 Fed. 1011, 1017.

#### Owner or otherwise

The consent of the sublessee of the owner to, or his knowledge of, repairs made by a garage keeper to an automobile, was not sufficient to give the garage keeper a lien thereon, under Lien Law (Consol. Laws, c. 33) § 184, giving a lien for repairs made by order of the owner, whether conditional vendee, mortgagor, or otherwise; the words "or otherwise," in the statute, not including a lessee or sublessee. *Lloyd v. Kilpatrick*, 127 N. Y. Supp. 1096, 1098, 71 Misc. Rep. 19.

#### Prohibited by law or otherwise

The word "otherwise," as used in Pen. Code 1895, § 428, as amended by Acts 1897, p. 39, which is by its terms made applicable only in those counties, cities, or other localities where the sale of liquors "is prohibited by law, high license or otherwise" really means nothing in the statute. When the Legislature used the words prohibited by law, it exhausted the subject, and the addition of the words "high license or otherwise" was wasteful and ridiculous excess. These general words are sometimes added to specific enumeration in statutes out of abundance of caution, but they usually mean nothing, and the use of the word "otherwise," following the words "prohibited by law," meant that the otherwise prohibition of the sale of liquor was to be a legal prohibition; that is, prohibited by the law of high license or otherwise prohibited by law. *Rose v. State*, 58 S. E. 20, 22, 1 Ga. App. 600.

#### Received in cash or otherwise

Ky. St. 1903, § 4226, provides that every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of the state, but doing business therein, shall annually return to the Auditor of Public Accounts, for deposit in the insurance department, a statement under oath of all premiums received for on the face of the policy for original insurance, and all renewal premiums received in cash or otherwise on business done in the state during the year, and shall at the same time pay into the state treasury a tax of \$2 upon each 100 of said premiums as ascertained. Held, that where an insurance company in its policy stipulated for a premium larger than was actually needed to carry the risks insured against under ordinary conditions, but which might be needed in case of extraordinary conditions, and, in order to provide in advance against such a contingency, collected as premium for the first year the full amount stipulated for, setting aside so much thereof as was overpayment as a guarantee against misfortune, and then for the premiums for the succeeding

years did not collect the entire amount stipulated for because of the sufficiency of the overpayment of the first year's premium to guard against additional risks, but designated the part not collected from the policy holder as a dividend, the company was not liable to taxation on the entire premiums stipulated for in the policy, but only for the amount actually collected, as the part of such premiums designated by the company as a dividend was not in fact a dividend, but merely an overcharge, which was never collected from the policy holder; and hence was not received by the company as "cash or otherwise" within the terms of the statute. *Mutual Ben. Life Ins. Co. v. Commonwealth*, 107 S. W. 802, 803, 128 Ky. 174.

#### Vacancy created by death, resignation, or otherwise

As used in Laws 1901, p. 18, c. 2, § 1, providing that, whenever a vacancy in any county office shall occur by reason of death, resignation, "or otherwise," it shall be the duty of the Governor of the territory to fill such vacancy by appointment, and that the appointee shall be entitled to hold the office until his successor is elected and qualifies, the words "or otherwise" should not be construed ejusdem generis, but rather as extending the scope of the statute to include vacancies other than such as were created by death or resignation. *Territory ex rel. Curran v. Gutierrez*, 78 Pac. 139, 144, 12 N. M. 254.

## UGHT

Const. 1890, § 71, providing that the title of a statute ought to indicate clearly its subject-matter, leaves to the Legislature the sufficiency of the title of an act; the word "ought" in such section being used in an advisory or advisory sense. *City of Jackson v. State*, 59 South. 873, 874, 102 Miss. 663.

#### As synonymous with should

An instruction that, when a criminal charge is to be proved on circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion, is not erroneous in failing to make that condition mandatory; the word "ought" meaning to be bound in duty or by moral obligation, to be necessary or becoming, and to be synonymous with "should." *State v. Blaine*, 124 Pac. 516, 517, 45 Mont. 482.

## OUR

### OUR CHILDREN

The phrase "our children," in a will giving and bequeathing to testator's wife all his property, "to hold and dispose of as she may think best for the welfare of herself and our children," and suggesting that a son be given at his maturity whatever sum is nec-

essary to make his property equal to the other son's property at his majority, and providing that in case of further issue the same rule to apply, embraces an after-born child, and an after-born child is included with the children living at the date of the will in the benefit, if any, of the provisions for the children. *Kidder's Ex'rs v. Kidder* (N. J.) 56 Atl. 154, 155.

## OUR OWN

See As Our Own.

## OUR OWN BENEFIT

See For Our Own Benefit.

## OUSTER

See Constructive Ouster.

Discontinuance within law relating to ouster, see Discontinuance.

"Ouster" is a wrongful dispossession or exclusion of a party from real property who is entitled to the possession. *Ferris v. McNally*, 121 Pac. 889, 893, 45 Mont. 20.

"An entry by one man on the land of another is an 'ouster' of the legal possession arising from the title, or is not, according to the intention with which it is done. If made under claim or color of right, it is an 'ouster'; otherwise it is a mere trespass. The intention guides the entry and fixes its character." *Swope v. Ward*, 84 S. W. 895, 897, 185 Mo. 316 (quoting and adopting definition in *Ewing v. Burnet*, 11 Pet. [36 U. S.] 41, 9 L. Ed. 624); *Jasperson v. Scharnikow*, 150 Fed. 571, 573, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178 (quoting and adopting definition in *Ewing v. Burnet*, 11 Pet. [36 U. S.] 51, 9 L. Ed. 624).

"Ouster," or dispossession, according to Blackstone, is a wrong or injury that carries with it the amotion of possession, for thereby the wrongdoer gets into actual occupation of the land or hereditament, and obliges him that has a right to seek his legal remedy, in order to gain possession of the freehold and damages for the injury sustained. It is effected by one of the following methods: (1) Abatement. (2) Intrusion. (3) Disseisin. (4) Discontinuance. (5) Deformation. *Dobbins v. Dobbins*, 53 S. E. 870, 872, 141 N. C. 210, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682 (citing 3 Black. Com. 167).

"Ouster by abatement" is where a person dies seised of an inheritance, and, before the heir or devisee enters, a stranger who has no right makes an entry and gets possession of the freehold. It is a figurative expression to denote that the rightful possession of the freehold of the heir or devisee is overthrown by the rude intervention of a stranger, and is always consequent upon the descent or devise of an estate in fee

simple. *Brown v. Burdick*, 25 Ohio St. 260, 268 (quoting 3 Bl. Comm. 167-169).

"Ouster" means very much the same thing as "adverse possession." *Earnest v. Little River Land & Lumber Co.*, 75 S. W. 1122, 1126, 109 Tenn. 427 (citing *Tied. Real Prop.* § 693).

A conveyance alone does not amount to an "ouster," where no possession is taken in pursuance of it, and the same is true of a mortgage. *Scottish-American Mortgage Co. v. Bunkley*, 41 South. 502, 503, 88 Miss. 641, 117 Am. St. Rep. 763 (citing *Freem. Cotenancy*, § 226; *Warr. Eject.* § 450 et seq.; *Wood, Lim. p.* 621).

### By tenant in common

"'Ouster,' in a legal sense, is the wrongful dispossession or exclusion from real property of a party entitled to the possession thereof. As applied to cotenants, limitations do not begin to run in favor of one against another until actual ouster or some other act or acts amounting to a total denial of the right and until notice or knowledge of the act or acts relied on as an ouster is brought home to the party dispossessed. The notice or knowledge required must be either actual, or the act or acts relied on as an ouster must be of such an open and notorious character as to be notice of themselves, or reasonably sufficient to put the dissatisfied cotenant on inquiry which, if diligently pursued, will lead to notice or knowledge in fact." *Clark v. Beard*, 53 S. E. 597, 598, 59 W. Va. 669.

A tenant in common in sole possession may make his possession adverse to his cotenant by repudiating the relation of tenancy in common between them, and any act or conduct signifying intention to occupy and enjoy the land exclusively, of which the tenant out of possession has knowledge or sufficient information to put him on inquiry amounts to an "ouster," and from the time he has notice thereof the possession is adverse. *Russell v. Tennant*, 60 S. E. 609, 611, 63 W. Va. 623, 129 Am. St. Rep. 1024.

Where, on redemption of certain land from foreclosure for the benefit of the heirs and distributees of the former owner, the deed was made to J., one of such heirs, in his own right, and he thereafter held exclusive possession of the land, paid taxes thereon, collected rents, mortgaged the land, and openly claimed it as his own, such acts were insufficient to constitute an "ouster" of the interest of his cotenants, who had knowledge that the interest held by J. had been acquired under a contract made for the benefit of all. *Donason v. Barbero*, 82 N. E. 620, 625, 230 Ill. 138.

A tenant in common in possession cannot occupy the opposing positions of recognizing and purchasing the interests of some of his cotenants, and at the same time claim

that he has ousted other cotenants. Before a tenant in common can rely on an "ouster" of his cotenant, he must claim the entire title to the land in himself, and must hold the exclusive and adverse possession against every other person. *Schoonover v. Tyner*, 84 Pac. 124, 125, 72 Kan. 475.

The mere taking of a tax title by a tenant in common to unimproved wild land, without any exclusive residence on and occupation of it, is not such an "ouster" of his cotenants as will set the statute of limitations in motion. *Barrett v. McCarty*, 104 N. W. 907, 909, 20 S. D. 75.

## OUSTER IN PAIS

As eviction, see Eviction.

## OUT

See Paying Out; Send Out; Specifying Out; Strike Out.

## OUT OF BANKS (Of Stream)

When it is said that a river is "out of its banks," no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time, and is no longer surface water, and the land over which its current flows must be regarded as its channel, so that, when swollen by rains and melting snows, it extends and flows over the bottoms along its course (that is, its flood channel), as when, by droughts, it is reduced to its minimum, it is then in its low-water channel. *Price v. Oregon R. Co.*, 83 Pac. 843, 846, 47 Or. 350.

## OUT OF COURT

The words "out of court" are the accepted and ordinary words to describe the process of execution, thus an allegation that an execution was issued out of the Supreme Court was sufficient to show that it was issued by the county clerk. *Jaques v. Willett*, 104 N. Y. Supp. 500, 501.

## OUT OF OFFICE

The plaintiff took an appeal from the judgment of the circuit court, and his bill of exceptions was signed by a judge other than the one before whom the case was heard, but who was then sitting in the division in which the action had been tried. *Rev. St. 1909, § 4149*, relating to the circuit court of the Eighth circuit, provides that the judges of that circuit may rotate in service between the civil and criminal divisions, and by section 4152 the court was specially empowered to make all rules which its peculiar organization should require. By *Rev. St. 1909, § 2032*, it is provided that where the judge who heard the case "shall go out of office" before signing the bill of exceptions, it shall be signed by the succeeding or acting judge

of the court in which the case was heard. Held, that the words "shall go out of office" do not mean that the judge's term of office must have expired, but mean only that he "shall go out of office" so far as relates to presiding in that particular division of court, and therefore a bill of exceptions signed by the then acting judge of that division is a bill signed by the proper judge. *Fenn v. Reber*, 132 S. W. 627, 631, 153 Mo. App. 219.

In *Rev. St. 1899, § 731*, providing that where the judge who heard a cause shall "go out of office" before signing a bill of exceptions, the bill, if agreed to be true by the parties to the action or their attorneys, or shown to the judge to be correct, shall be signed by the succeeding or "acting judge" of the court where the case was heard, the expression "go out of office" should not be confined to the death or resignation of the judge, but covered a case where the regular judge was disabled by sickness to hold court, and an acting judge was elected to hold the ensuing term, as required by section 1879, in which case such newly elected judge was the "acting judge," with all the powers of the regular judge, as provided by section 1682, and was the proper person to sign a bill of exceptions at the term over which he presided in a case tried before the regular judge at the prior term. *Ranney v. Hammond Packing Co.*, 110 S. W. 613, 132 Mo. App. 324.

## OUT OF PLUMB

There is no variance between an allegation that a wheel driving the belting was "out of plumb and wabbly," causing the belting to alternately tighten and loosen, in such manner as to tear out the rivets holding sections of the belt together, and proof that the surface of the wheel over which the belting worked was not true to the axle, that the axle had gotten out of the true center by the wheel having worn on one side, and that its operation was thereby rendered irregular and unsteady. *Receivers of Kirby Lumber Co. v. Poindexter (Tex.)* 103 S. W. 439, 440.

## OUT OF THE ORDER NAMED

The charter of a fraternal order provided for the payment of money on the death of a member to such person of his immediate family as the member should designate, or to such person or persons, in default of such family, of the blood relatives of the member, as by him designated, or in default of any designation by the member, or "out of the order named," then to such family or relatives who were heirs at law of the member. A member, while unmarried, designated his father, and afterwards married, and died without having changed the designation, as he was authorized to do under the laws of the order; his wife remaining a member of his family until his death. Held, that the

words quoted were susceptible of an interpretation which sets aside the designation if out of the order named when applied to the member's family as it is at the time of his death, and that the widow was entitled to the money due from the order. *Larkin v. Knights of Columbus*, 73 N. E. 850, 851, 188 Mass. 22.

### OUT OF THE STATE

Any person out of state, see Any.

A foreign corporation is "out of the state," within Gen. St. 1901, § 4449, providing that when a cause of action accrues against a person, if he be out of the state, the period limited for the commencement of the action shall not begin to run until he comes into the state. *Williams v. Metropolitan St. Ry. Co.*, 74 Pac. 600, 602, 68 Kan. 17, 64 L. R. A. 794, 104 Am. St. Rep. 377, 1 Ann. Cas. 6.

A statute provides that if, on an application for probate, it shall appear that any heir of testator resides or has gone "out of this state," or that any such heir on diligent inquiry cannot be found, the judge of the county court shall cause notice to him to be published in a newspaper. Held, that an affidavit for publication under such section, alleging that certain heirs of the deceased could not, after due diligence and inquiry, be found "in this state," was sufficient, though it also stated on information and belief that they resided in California, which statement was surplusage. *Whitney v. Hanington*, 85 Pac. 84, 85, 36 Colo. 407.

### OUT OF WHICH PAYMENT CAN BE MADE

Laws 1907, p. 909, c. 267, in amendment of St. 1898, § 4041a, provides that a guardian ad litem for an infant who is a necessary party to a proceeding to probate or to construe a will or to settle an estate may be allowed compensation for his services and expenditures to be fixed by the court in which such proceeding is had and paid out of the body of the estate, if the infant has no available property out of which such payment can be directed. Held, that the clause "out of which such payment can be directed by the court" limits the right of direction to property in custodia legis, leaving the balance, if any, allowed, collectible out of the property of the infant as his debt. In re *McNaughton's Will*, 118 N. W. 997, 1006, 138 Wis. 179.

### OUTAGE

"Normal outage or wantage" may be defined to be the difference between the capacity of a cask or bottle and the quantity of wine or liquor which is usually placed in it according to the custom of trade; a certain vacancy being allowed for the expansion of such wines and liquors. Such practice among

merchants is well known, and is a matter of common knowledge, and is recognized by customs practice. No objection can be made by the importers to an allowance for such normal outage, for it is favorable, and not prejudicial, to their interests." *United States v. A. D. Shaw & Co.*, 144 Fed. 329, 331, 75 C. A. 291.

The normal "outage" or "wantage" is defined by the Board of General Appraisers as: "The difference between the capacity of a cask or bottle and the quantity of wine or liquor which is usually placed in it, according to the custom of trade; a certain vacancy being allowed for the expansion of such wines and liquors." *Alexander D. Shaw & Co. v. United States*, 141 Fed. 469, 470.

### OUTBUILDING

See Usual Outbuildings.

An "outbuilding" is a building adjoining or belonging to a dwelling house; "outbuilding" comprehends something used in connection with a main building. *Firth v. Marovich*, 116 Pac. 729, 731, 160 Cal. 257, Ann. Cas. 1912D, 1190.

### OUTER

In the Century Dictionary the word "outer" is defined as "opposed to inner." *Brialia v. Carnegie Steel Co.*, 118 Fed. 579, 595.

### OUTFIT

See Grading Outfit.

### OUTHOUSE

An "outhouse" is a building adjoining or belonging to a dwelling house; "outbuilding" comprehends something used in connection with a main building. *Firth v. Marovich*, 116 Pac. 729, 731, 160 Cal. 257, Ann. Cas. 1912D, 1190.

An "outhouse" has a technical meaning, being a house that belongs to a dwelling, and is in some respect parcel of such dwelling house, and situated within the curtilage. *State v. Rowland Lumber Co.*, 69 S. E. 58, 59, 153 N. C. 610.

The word "outhouse," as used in 2 *Balinger's Ann. Codes & St.* § 7104, defining burglary as the unlawful breaking and entering of any outhouse adjoining any dwelling house and occupied therewith, uses the word "outhouse" in its ordinary and usual acceptation, and means that any outhouse, to be a subject of burglary, must be both adjoining to the dwelling house and occupied therewith. Other outhouses, even though within the inclosure, are not subject to burglary. The term "outhouse" has a well defined and understood meaning, and denotes a building contributory to the dwelling, either within or without the curtilage. *State v. Randall*,



78 Pac. 998, 36 Wash. 438 (citing Bishop, St. Crimes [3d Ed.] § 291).

### Smokehouse

A "smokehouse" is not necessarily an "outhouse" belonging to or used with a dwelling house. It usually is used with a dwelling house, but is not always so. Under the statute making it a crime to feloniously break into a dwelling house, or any outhouse belonging to or used with any dwelling house, etc., an indictment charging defendant with having feloniously broken into and entered the smokehouse of a certain person, but failing to allege that such smokehouse belonged to or was used with any dwelling house, was insufficient. *Dunn v. Commonwealth*, 84 S. W. 321, 119 Ky. 457.

## OUTLAW

"A person does not become an 'outlaw' and lose all rights by doing an illegal act." *National Bank & Loan Co. v. Petrie*, 23 Sup. Ct. 512, 513, 189 U. S. 423, 47 L. Ed. 879.

The word "outlaw," in its ordinary and accepted meaning, refers to a person who has been deprived of the law or excluded from its protection. *Wilson v. Atlantic Coast Line R. Co.*, 55 S. E. 257, 260, 142 N. C. 333 (dissenting opinion of Walker, J.). See, also, *Louisville & N. R. Co. v. Railroad Commission*, 157 Fed. 944, 952.

### As applied to animals

"Outlaw," as applied to cattle, means that the ownership thereof is unknown. *State v. Eddy*, 90 Pac. 641, 46 Wash. 494.

## OUTLAYS

The word "outlays," when used in connection with an attorney's agreement for compensation, so as to provide for his reimbursement for outlays, does not ordinarily mean the personal or traveling expenses of the attorney, but refers to costs of suit and other expenses paid to third persons for similar purposes. *Cooley v. Miller & Lux*, 105 Pac. 981, 987, 156 Cal. 510.

## OUTPUT

A contract to sell the entire "output" of a cement mill for a year required the seller to deliver no more than he actually produced in the mill during the year, though that amount did not equal the estimated capacity of the mill. *Burt v. Garden City Sand Co.*, 86 N. E. 1055, 1057, 237 Ill. 473.

## OUTRAGE

### OUTRAGE PUBLIC DECENCY

See Openly Outrage Public Decency.

## OUTSIDE

See Ground Outside of or Adjoining.

## OUTSIDE OF TRACKS

Under Railroad Law (Laws 1890, p. 1112, c. 565, § 98), requiring a railroad company to keep in repair that portion of the street "between its tracks, the rails of its tracks, and two feet in width 'outside of its tracks,'" it is required to keep in repair a space two feet outside of each rail. *City of Amsterdam v. Fonda, J. & G. R. Co.*, 104 N. Y. Supp. 411, 412, 119 App. Div. 680.

## OUTSIDE WHICH

Acts 1904, p. 1077, c. 616, § 1, prohibiting the obstruction of the sidewalks of Baltimore city, gives the board of estimates authority to regulate the limits within which it shall be lawful to erect any steps for houses, but that no such regulation shall permit any erection at any point between the grade of the sidewalk and a point 10 feet above the grade, provided "that 'outside which' such erections shall lawfully exist between the grade of the sidewalk, etc., at the time of the passage of the statute, other such erections may be permitted; and the section then defines the "burned district," within the meaning of the section. Held, that the proviso was void, as meaningless; the courts having no right to construe it by inserting the phrase "burned district" after the word "outside," and to eliminate "which," and substitute therefor the word "where." *Storck v. Mayor, etc., of City of Baltimore*, 61 Atl. 830, 332, 101 Md. 476.

## OUTSTANDING

Where defendant corporation guaranteed payment of a fixed dividend on stock in another corporation, so long as the certificate of stock should be "outstanding," a dissolution of such other corporation, and a decree distributing its assets, terminated a stockholder's right to dividends under the agreement; the term "outstanding," as used, meaning "lawfully outstanding," and the certificate remaining effective only for the purpose of production as evidence of the holder's right under the decree of distribution. *Bijur v. Standard Distilling & Distributing Co.*, 70 Atl. 934, 937, 74 N. J. Eq. 546.

## OUTSTANDING ACCOUNTS

The expression "outstanding and open account" has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions not reduced to writing and subject to future settlement and adjustment. It does not include bills of exchange, promissory notes, or other written evidence of indebtedness. *Kramer v. Gardner*, 116 N. W. 925, 926, 104 Minn. 370, 22 L. R. A. (N. S.) 492.

**OUTSTANDING STOCK**

Stock once issued is and remains outstanding, within the purview of the franchise tax act, although owned by the corporation issuing the same, until retired and canceled as provided by statute for the reduction of capital stock. *Goldstein-Fineberg Co. v. State Board of Assessors*, 83 Atl. 773, 83 N. J. Law, 61.

**OUTSTANDING TITLE**

An outstanding mortgage or deed of trust, without entry of foreclosure, though the condition has been broken, is not such an "outstanding legal title" as will defeat a recovery in an action of ejectment; but where such mortgage or deed of trust has been foreclosed, and the legal title has been transmitted to a purchaser at the foreclosure sale, such title constitutes an outstanding title which will defeat ejectment, even between third persons not claiming thereunder. *Benton Land Co. v. Zeitler*, 81 S. W. 193, 197, 182 Mo. 251, 70 L. R. A. 94.

The paramount title of the state to lands under water is an "outstanding title," within the term of a conveyance of lands and water rights, providing that, in case the purchaser should be put to any expense in extinguishing any outstanding title, the vendor should bear its share of the loss and expense according to its proportional relation to the entire property. *United New Jersey R. & Canal Co. v. Long Dock Co.*, 38 N. J. Eq. 142, 147.

**OVER**

See *Bind Over*.

Pay over, see *Pay*.

An indictment alleging that accused practicing medicine without a license treated a patient, and that the treatment consisted in physical manipulations with accused's hands "over" the patient, is sustained by proof that accused placed his hands "upon" the patient and rubbed and manipulated his hands "upon" his body; the words "upon" and "over" being synonymous. *Milling v. State (Tex.)* 150 S. W. 434, 436.

The grant to a telephone company of the right to construct and maintain a line "over and along" a certain tract, including necessary poles along the roads adjoining the tract, limited the grantee's rights to the construction and maintenance of a line along the highways which extended through the tract, and not across the land. *Morison v. American Telephone & Telegraph Co.*, 101 N. Y. Supp. 140, 141, 115 App. Div. 744.

Under Rev. St. 1899, § 6116, providing that before granting any franchise for constructing and operating an elevated, underground, or other street railroad on, "over," or under any street or alley, etc., the word "over" means "over" and can only apply to

elevated roads. *Ruckert v. Grand Ave. Ry. Co.*, 63 S. W. 814, 818, 163 Mo. 260.

**As across at same or higher level**

By the word "over," in Rev. Laws, § 3381, relating to railroad crossings was intended, not "upon," but "above," so the railroad should pass under the highway. *Vermont Central R. Co. v. Royalton*, 4 Atl. 868, 58 Vt. 234.

Where a railroad's charter required it to construct good and sufficient bridges or passages "over" its railroad or roads where any public highway shall cross the same, the word "over" was used in its ordinary sense to mean "above." *Borough of South Amboy v. Pennsylvania R. Co.*, 73 Atl. 852, 858, 76 N. J. Eq. 57.

"Overbuilding" the poles and wires of a telephone system is the stringing of wires above the wires of such system. *Chicago Telephone Co. v. Northwestern Telephone Co.*, 65 N. E. 329, 338, 199 Ill. 324.

**OVER WHOLE LINE OF RAILROAD**

In a statute regulating the additional charges of way freight over through freight, the words "over the whole line of its road" mean, and only mean, freight which is taken on at one terminus and discharged at the other, and do not mean the pro rata allowance which may fall to the road in question under the disposition of the products of transportation of through freights proper—those freights which, in their transit, pass over more than one railroad, and merely traverse this road as a stage in a more extended shipment. *Mobile & M. Ry. Co. v. Steiner*, 61 Ala. 559, 597.

**OVERCHARGE**

A carrier, charging a higher rate for carrying freight in one direction than it does for carrying freight of the same class in the opposite direction, does not, as a matter of law, make an "overcharge," within Revised 1905, §§ 2642-2644, imposing a penalty on a railroad charging more for the transportation of property than is allowed by law, etc. *James H. Scull & Co. v. Atlantic Coast Line R. Co.*, 56 S. E. 876, 877, 144 N. C. 180.

"Overcharges" falling within the jurisdiction of the federal tribunals, mentioned in the Interstate Commerce Act, § 9, are overcharges growing out of excessive rates over and above the rates fixed by schedules filed, published and posted as required by the act, and where no such schedules have been posted, and the overcharge is merely one in excess of the rate agreed on with the shipper, action therefor may be maintained in the state courts. *Wabash R. Co. v. Sloop*, 98 S. W. 607, 613, 200 Mo. 198.

**OVERDRAFT**

An "overdraft" arises where a customer of a bank draws from it more money than

is standing to his credit in his account with it. *State v. Jackson*, 118 N. W. 880, 882, 21 S. D. 494, 16 Ann. Cas. 87.

## OVERFLOW

Subject to overflow, see Subject to.

### OVERFLOWED LANDS

See Swamp and Overflowed Lands.

Overflowed lands are those that are covered by nonnavigable waters, or are subject to such periodical or frequent overflows of water, salt or fresh (not including lands between ordinary high and low water marks of navigable waters) as to require drainage or levees or embankments to keep out the waters and thereby render the lands suitable for successful cultivation. *State ex rel. Ellis v. Gerbing*, 47 South. 353, 357, 56 Fla. 608, 22 L. R. A. (N. S.) 337.

## OVERLOOK

Under Code, § 1374, providing that "when property subject to taxation is withheld, overlooked or from any other cause is not listed or assessed," the county treasurer may within a specified time demand of the owner the amount the property should have been taxed in each year the same was so withheld or overlooked and not listed and assessed, etc., a county treasurer may list for taxation all taxable property which has not been listed for taxation, and may list for taxation property which the assessor knowingly omitted because of the erroneous decision that it was not taxable; the word "withhold" meaning to hold back, to restrain, to keep from action, to refrain from giving, and the word "overlook" meaning to look beyond, so that what is near by is not perceived, to omit to see by looking at other objects, to refrain knowingly from notice, etc. *Taley v. Brown*, 125 N. W. 248, 253, 146 Iowa, 360, 140 Am. St. Rep. 282.

## OVERRATE

"Overrated," in Rev. St. 1883, c. 6, § 96, means overrated with reference to the fair value of the property in question, and not by comparison with the valuation placed upon other specific pieces of property in the town. *Penobscot Chemical Fibre Co. v. Inhabitants of Town of Bradley*, 59 Atl. 83, 85, 99 Me. 268.

## OVERRULING

Under a statute providing that defendant, on the "overruling" of a plea in abatement, may plead to the merits, and rely on any defenses as if said plea had not been interposed, defendant, on judgment being rendered against a plea in abatement, either on motion to strike out, or on being set down for argument on its sufficiency, or on demurrer, or on an issue as to its merits, may

plead over. *Sewell v. Tuthill & Pattison*, 79 S. W. 376, 377, 112 Tenn. 271.

## OVERSEE

### OVERSEER OF ELECTION

"Overseers of election" are persons appointed by the court to oversee the election. They are entitled to be present with the election officers during the time the latter are engaged in receiving and counting the votes and making up and signing the returns to challenge any person offering to vote and interrogate him and his witnesses under oath, in regard to his right and suffrage as well as to examine any papers the voter may produce. The overseers are required to oversee and certify the returns or note on each return their reason for not certifying it, and are entitled to supervise the proceedings of the election officers and report to the court. The election board is required to afford overseers every facility for the discharge of their duties, and if, by violence or intimidation, they are driven from the polls, the entire vote polled in that district may be rejected. *In re Parrish*, 63 Atl. 460, 461, 214 Pa. 63.

### OVERSEER OF HIGHWAYS

The word "overseer," in a statute relating to the obstruction of public roads, means an overseer of country roads. *St. Louis, I. M. & S. R. Co. v. State*, 107 S. W. 668, 669, 85 Ark. 131.

Since the term "road precinct," as employed in Code 1896, form 75, giving a form charging an overseer of a road precinct with failure to perform his duties, and in Code 1896, §§ 2454, 2461, 2462, 2470, relating to the apportionment of road precincts, the appointment of overseers, and their duties, etc., designates any road apportioned to an overseer, so that a road overseer of a particular road is properly called "overseer of a road precinct," an indictment in the Code form, alleging that defendant, an "overseer of a road precinct, failed to discharge his duties, is sufficient under the express provisions of sections 4923, 5395, and is technically accurate in designating the officer as an overseer of a road precinct. *Ward v. State (Ala.)* 39 South. 923, 924.

### OVERSEER OF POOR

As city officer, see City Officer.

## OVERT ACT

See, also, Attempt to Commit Crime; Attempt to Enter.

An overt act essential to establish an attempt to commit a crime is an act done to carry out the intention, and it must be such as would naturally effect that result unless prevented by some extraneous cause. *People v. Mills*, 70 N. E. 786, 790, 178 N. Y. 274, 87 L. R. A. 131.

No exact definition of an "overt act" can be given. It may be a motion, a gesture, conduct, or demonstration, or anything else which evidences reasonably a present design to take the life of the accused or to do him great bodily harm. Such purpose may be manifested by conduct, falling short of personal violence or actual assault, and in some instances the extent of the "overt act" which would induce the accused to act in self-defense is measured by the character of the deceased for a violent, dangerous man, notorious in the community, or known to the accused as such. *State v. Golden*, 37 South. 757, 761, 113 La. 791.

Since the term "overt" simply means "open," and in homicide cases an "overt act" is an open act, indicating a present purpose to do immediate great bodily harm, which can be shown in a given case only by evidence as a question of fact, a requested charge, undertaking to instruct what was an overt act, was properly refused; it being a question of fact for the jury. *Johnson v. State*, 143 S. W. 1134, 1137, 125 Tenn. 420, Ann. Cas. 1913C, 261.

Before the offense of conspiracy is completed, one or more of the parties must do some act to effect the object of the conspiracy. Such act is termed an "overt act." An "overt act" as effecting the object of a conspiracy "must be one independent of the conspiracy and agreement. It must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent, independent act following the complete agreement or conspiracy and done to carry into effect the object of the original combination." *United States v. Richards*, 149 Fed. 443, 446.

To constitute an indictable conspiracy there must be some "overt act," which must tend to carry out the object of the conspiracy, or in some way effectuate it, and if the conspiracy ceases without an overt act it would not constitute an offense, though when consummated it is the conspiracy rather than the overt act which constitutes the crime. *United States v. McLaughlin*, 169 Fed. 302, 307.

## OVERTONES

When a tubular bell is struck a blow by a hammer, the fundamental sound is followed by nascent, undulatory, longitudinal vibrations, extending the entire length of the tube. These vibrations are styled "overtones," or "partials." *Durfee v. Bawo*, 118 Fed. 853, 855.

## OVERVALUATION

See, also, *Overrated*.

An owner of cut-over lands, assessed for taxation as timbered lands, is entitled to reduction of the assessment as for "overvalua-

tion" known to be such, within Code 1906, § 4312. *Board of Sup'rs of Wayne County v. Mobile & O. R. Co.*, 56 South. 173, 90 Miss. 845.

## OVERWHELMING

A juror was disqualified to sit in a murder case in which the sole defense was insanity, who stated on his voir dire that he would require overwhelming proof of insanity before acquitting on that ground; the law only requiring proof of insanity by a "preponderance" of the evidence, which may leave the mind in doubt, while "overwhelming" proof is such as is sufficient to remove every doubt from the mind. *Jones v. State*, 131 S. W. 572, 576, 60 Tex. Cr. 139.

## OWE

See *Debt Owed*; *Due and Owning*; *Money Owning*.

Legally due and owing, see *Legally Due*.

Ordinarily, the words "due," "owing," and "payable" are conclusions of law, denial of which raises no issue. *Irwin v. Insurance Co. of North America*, 116 Pac. 294, 295, 16 Cal. App. 143.

The word "due" in Code, §§ 1308, 1309, making credits taxable and defining "credit" as including every claim or demand due or to become due, etc., is synonymous with "owing," and does not have reference to the time of payment or the fulfillment of an obligation. *Talley v. Brown*, 125 N. W. 243, 249, 146 Iowa, 360, 140 Am. St. Rep. 282.

Testator bequeathed a sum to his daughter, but provided the "amount she may be owing on my books" should be deducted therefrom, and his account books showed sums charged to his daughter, but the evidence showed that most of them were advanced to her husband. Held that, the meaning of the word "owing" could be explained by the connection in which it was used, and that testator intended the amount advanced to his daughter's husband to be charged to her and deducted from the legacy. In re *Bresler's Estate*, 119 N. W. 1104, 1106, 155 Mich. 567.

### As due and unpaid

Due as meaning owing, see *Due*.

The allegation that a debt is owing is not the equivalent of an allegation that it is due and unpaid; an allegation that one "owes" a debt meaning simply that he is obliged or bound to pay, which is as true of an immature as of an overdue obligation. *McDuffie v. Lynchburg Shoe Co. (Ala.)* 59 South. 567, 568.

### Enforceable obligation

Bankr. Act July 1, 1898, c. 541, § 1, subd. 11, 30 Stat. 544, provides that "debt" shall include any debt, demand, or claim provable in bankruptcy; section 4 declares that any

"person" who "owes debts," except a corporation, shall be entitled to the benefits of the act as a voluntary bankrupt; and section 63 declares that debts shall be a fixed liability, absolutely owing at the time of the filing of the petition, etc. Held, that the words "owes debts" mean an obligation for which a debtor is legally liable, and hence the bankruptcy act includes an infant, where he owes debts for which his property is legally chargeable. In re Walrath, 175 Fed. 243, 244.

## OWELTY

"Owely of partition" is a sum paid or secured, in the case of partition in unequal proportions, by him who has received the larger portion to him who has the less, for the purpose of equalizing the portions" (quoting 21 Am. & Eng. Enc. Law, p. 1179, par. 4). But where, in a partition suit between a father and his children, land apportioned to the children was charged with owelty to the amount of a debt of the father, who had given a trust deed on the land to secure the same, such amount was not owelty as to the creditor, who was not a party to the proceeding. *Stone v. McGregor*, 87 S. W. 334, 335, 99 Tex. 51.

## OWN

See For His Own Use and Benefit; Not His Own.

His own, see His.

"Own," as an adjective, means "peculiar, proper, exclusive, particular, individual, private, and as indicative of possession." In certifying the acknowledgment of a woman, the officer stated that she acknowledged the same to be her own act and deed. The use of the word does nothing more than indicate that the signing of the deed was her act in compliance with the statute. It does not convey the idea that she had willingly signed, and the certificate was not a sufficient compliance with the statute requiring that the wife should acknowledge the instrument to be her act and deed, should declare that she had freely and willingly signed and sealed it, and that she wished not to retract. *Tiemann v. Cobb*, 80 S. W. 250, 251, 35 Tex. Civ. App. 289 (citing Cent. Dict. in verb "Own").

## OWN (Verb)

See Property Owned; Then Owned.

As titles and rights to real property vary from the absolute and unqualified fee simple to that of the mere occupant, so the word "own" varies in its significance. The word "owned" is not a technical term. It is a general expression used to describe a great variety of interests, and may vary in significance, according to context and subject-matter. *Peterson v. Johnson*, 111 N. W. 659, 660,

132 Wis. 280 (citing *Merrill Ry. & Lighting Co. v. Merrill*, 96 N. W. 686, 119 Wis. 249; and 6 Words and Phrases, p. 4904).

Under Tax Law (Laws 1896, p. 802, c. 908) § 11, providing that all the personality of every corporation liable to taxation on its capital shall be assessed in the tax district where its principal office is located, and section 3 (Laws 1896, p. 797, c. 908) declaring that all personality situate or "owned" within the state is taxable, merchandise and materials belonging to a manufacturing corporation having its principal office in New York, but which materials are situate at the company's mills in another state, are not taxable. Chattels or property having a defined situs is not "owned" in the state when it is actually located in a foreign state. Indebtedness due the corporation was taxable, irrespective of the residence of the debtors. *People ex rel. Orinoka Mills v. Barker*, 83 N. Y. Supp. 83, 35, 84 App. Div. 469.

Const. art. 13, § 10, provides that all persons in the state shall be subject to taxation on the real and personal property "owned" or used by them within the territorial limits of the authority levying the tax, and Laws 1896, c. 129, § 13 (Comp. Laws 1907, § 2515), declares that all of the taxable property must be assessed in the county, city, or district in which it is situated. Held, that the word "owned," as used in the constitutional provision, does not mean that the property was owned where the owner thereof necessarily resides, but that personal property must be considered according to the legislative construction of the term to be "owned" where it is situated, and hence, where a band of sheep had never been within the territorial limits of a city during the period for which taxes were assessed, they were not taxable there. *Murdock v. Murdock*, 113 Pac. 330, 331, 38 Utah, 373.

Under Rev. St. 1895, arts. 2967, 2968, declaring that all property of the husband "owned or claimed" by him before marriage, and that "acquired" afterwards by gift, devise, or descent, shall be his separate property, and all property "acquired" by the husband or wife during the marriage, except that "acquired" by gift, devise, or descent, shall be the common property of the husband and wife, ownership resting in adverse possession for 10 years, existing in part before marriage and in part after marriage, is community property; the word "acquired" denoting all property coming to husband or wife during coverture by title, other than by gift, devise, or descent; and the word "claim," when applied to land, importing a legal or equitable right to the land; and the words "owned or claimed" signifying a legal or equitable ownership by legal or equitable right to demand the land. *Sauvage v. Wauhop* (Tex.) 143 S. W. 259, 263.

**As absolute ownership**

Under Hurd's Rev. St. 1908, c. 120, § 2, cl. 2, providing that church property "owned" by the congregation shall be exempt from taxation, land held by the congregation under a contract for a deed is not exempt. *People v. Logan Square Presbyterian Church*, 94 N. E. 155, 249 Ill. 9.

**As now owned**

A deed of trust conveying certain lands specifically described, and all other lands "owned" by the grantor, in the same counties, conveys only those lands owned by the grantor at the time of the execution of the deed of trust. *Ross v. Lafferty* (Tex.) 95 S. W. 18, 19 (citing *Galbraith v. Engleke* [Tex.] 1 S. W. 346; *Jemison v. Scottish-American Mortg. Co.*, 46 S. W. 886, 19 Tex. Civ. App. 232; *Brown v. Jackson*, 3 Wheat. [16 U. S.] 449, 4 L. Ed. 432; *Butterfield v. Smith*, 11 Ill. 485; *Fitzgerald v. Libby*, 7 N. E. 917, 142 Mass. 235).

**As owned in the future**

The accrued interest of an heir, though undivided, is not a property right to be "owned in the future," within the Porto Rico Mortgage Law, defining things not mortgageable as the property right in things which, although they will be owned in the future, are not yet recorded in the name of the person who will have a right to own them. *Cabrera v. American Colonial Bank*, 29 Sup. Ct. 623, 628, 214 U. S. 224, 53 L. Ed. 974.

**Leasehold interest**

A railway corporation operating a line of railroad is the corporation "owning" the railroad within a statute imposing a penalty on a corporation "owning" a railroad for failing to equip its locomotives with bells or whistles, etc. *Chicago, R. I. & P. R. Co. v. State*, 106 S. W. 199, 84 Ark. 409.

Under a statute subjecting street railway companies to a charge on their gross revenues in lieu of other taxation, and exempting from taxation on the payment of such license fee all real estate "owned" and actually and necessarily used by the company in the operation of its business, real property leased by a street railway company, which has paid the license tax, for five years, and actually and necessarily used by it in the operation of its business, is exempt from general taxation. *Merrill Ry. & Lighting Co. v. Merrill*, 96 N. W. 686, 119 Wis. 249.

**Possess synonyms**

There is no substantial difference between the meaning of the words "possess" and "own." They are equivalents in common speech, and according to all the lexicographers. *Thomas v. Blair*, 35 South. 811, 813, 111 La. 678.

The word "possessed," as used in an allegation, in an action by an administrator for the conversion of goods claimed to have been

owned by intestate, that intestate, at the time of his death, was "seised and possessed" of the property, means "owned"; that is, that the intestate was the owner of the goods at the time. *Grant v. Hathaway*, 96 S. W. 417, 118 Mo. App. 604 (citing 6 Words and Phrases p. 5463).

The word "own" is a synonym of "possess." To own is to have a good legal title to. Acts 1905, p. 82, c. 52, is entitled an act to regulate and in certain cases to prohibit the manufacture, sale, "keeping for sale, owning, or giving away of cigarettes," etc., and providing penalties for violation thereof, and declares that it shall be unlawful for any person directly or indirectly to manufacture, sell, dispose of, give away, or keep for sale any cigarettes, etc., or "keep or own or to be in any way concerned, engaged, or employed in owning or keeping any such cigarettes." The act passed the Senate under a title "An act to regulate the manufacture, sale, and the giving away of cigarettes," etc. When the bill passed the House on third reading, it retained such title, which was afterwards amended by adding a penalty clause. The bill then went back to the Senate, and a conference committee reported the bill with its present title under which it was adopted. Held, that the act should not be construed as intending to prohibit the act of smoking cigarettes or keeping them in possession for the sole purpose of smoking them. *State v. Lowry*, 77 N. E. 728-734, 166 Ind. 372, 4 L. R. A. (N. S.) 528, 9 Ann. Cas. 350.

**OWN COST**

See At Its Own Cost.

**OWN HAND**

See Die by His Own Hand.

**OWN RIGHT**

A person who leased a farm to carry on at the halves, and the same was put in the list to himself and the lessor jointly, did not hold the land in his "own right" so as to give him a settlement under the pauper act of 1817. *Town of Newfane v. Town of Dummerston*, 34 Vt. 184, 187.

Real estate held jure uxoris is not held in the husband's "own right," within the meaning of Gen. St. c. 19, § 1, subd. 4, which provides that every person whose ratable estate held in his own right shall be set in the list and gain a settlement, etc. *Town of Baltimore v. Town of Chester*, 47 Vt. 648, 650.

**OWNER**

See Consent of Owner; Equitable Owner; Former Owner; Landowner; Real Owner; Reputed Owner; Resident Owner; Riparian Owner; Signed by the Owner; True Owner; Unknown Owner; Upland Owner.

Belong to the owner, see *Belong—Belonging*.

Other goods of same owner, see *Other*.

Owner or otherwise, see *Otherwise*.

Unconditional and sole owner, see *Unconditional and Sole Ownership*.

"To own" is defined "to hold as property; to have a legal or rightful title to; to have; to possess." And an "owner" is "one who owns; a rightful proprietor." An "owner" is not necessarily one owning the fee simple or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner, and, indeed, there may be different estates in the same property vested in different persons, and each be an owner thereof." *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 971, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185 (quoting *Baltimore & O. R. Co. v. Walker*, 16 N. E. 475, 480, 45 Ohio St. 577, 585); *Jones v. State*, 70 N. E. 952, 954, 70 Ohio St. 36, 1 Ann. Cas. 618 (quoting and adopting definition in *Baltimore & O. R. Co. v. Walker*, 16 N. E. 475, 45 Ohio St. 577).

The word "owner," as applied to land, is descriptive of various rights to and interests in land. As titles and rights to real property vary from the absolute and unqualified fee simple to that of the mere occupant, so the word "own" and "ownership" varies in its significance, according to context and subject-matter. *Peterson v. Johnson*, 111 N. W. 659, 660, 132 Wis. 280 (citing *Merrill Ry. & Lighting Co. v. Merrill*, 96 N. W. 686, 119 Wis. 249; and 6 Words and Phrases, p. 4904).

The word "owner," as applied to real estate, may designate the owner of the fee or the owner of a less estate, as a lessee for a term of years, or any rightful proprietor, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied and when used in a statute, the obvious nature and purpose of the statute may indicate its meaning. *Guild v. Prentis*, 74 Atl. 1115, 1116, 83 Vt. 212, Ann. Cas. 1912A, 313.

An "owner" of a thing is he who has dominion over it, including the idea of right of possession. The word "owner," as applied to land, has no fixed meaning which can be declared to be applicable under all circumstances and as to any and every enactment. It usually denotes a fee-simple estate, but it has been defined to be "one who has the usufruct, control, or occupation of land with a claim of ownership, whether his interest be an absolute fee or a less estate." As used in B. & C. Comp. § 1830, prohibiting the trespass by one not the owner of the land nor an officer on lawful business, it is not limited to the holder of the fee-simple estate, but also includes one holding merely a usufructuary interest. *Binhoff v. State*, 90 Pac. 586, 587, 49 Or. 419 (quoting and adopting defini-

tion in *Anderson's Law Dict.* and *Coombs v. People*, 64 N. E. 1056, 198 Ill. 586).

One in possession of unsurveyed public land, with intent to procure title and prepare it for cultivation and plant a crop, is the owner within articles of a corporation organized to secure a supply of water for irrigation, and to distribute it among stockholders for use on lands "owned" by them; for the word "owned" means held or occupied, and the words "owning," "owner," and "owned" being general terms, and their precise meaning depending on the nature of the subject-matter and connection in which they are used. *Miller v. Imperial Water Co.*, No. 8, 103 Pac. 227, 229, 156 Cal. 27, 24 L. R. A. (N. S.) 372 (quoting 6 Words and Phrases, p. 5134).

In construing the redemption laws, the word "owner" is a generic term which embraces the different species of interest which may be carved out of a fee-simple estate. *Hodges v. Harkleroad*, 85 S. W. 779, 781, 74 Ark. 343 (citing 2 Blackw. Tax Titles, § 705).

"Although the word 'owner' has a variety of meanings, and may, under certain circumstances, include an equitable as well as a legal ownership, or even a right of present use and possession, it implies something more than a bare legal title, and we know of no authority for saying that a person in possession of land under a void deed can be regarded as the 'owner' thereof. Ownership may not imply a perfect title, but it implies something more than the possession of land under a title which is void." *Hyde v. Shine*, 25 Sup. Ct. 760, 763, 199 U. S. 62, 50 L. Ed. 90.

The word "owner," as used in an answer to a complaint in an action for the specific performance of a lease, which alleges that, during all the time referred to in the complaint, defendant was the owner of certain lots, has a definite meaning, and is one who has dominion over a thing, which he may use as he pleases, except as restrained by law or by agreement. *West v. Washington R. Co.*, 90 Pac. 666, 672, 49 Or. 436.

The "owner" of land is commonly understood to be the person who has the legal title thereto, and, as used in a statute requiring consents of the owners of dwellings within a certain distance of the premises in which traffic in liquors is to be carried on, it cannot be supposed that the Legislature intended anybody except the persons having the legal title. *In re Clement*, 101 N. Y. Supp. 447, 450.

The word "owner," while not a technical term, but one of wide application in various connections, primarily means, with respect to land, a person who is seized of a freehold estate therein, one who owes no service to another which limits his dominion. *American Woolen Co. v. Town Council of North Smith-*

field, 69 Atl. 293, 29 R. I. 93, 16 Ann. Cas. 1227.

The word "owner," as used in Act June 4, 1897, c. 2, § 1, 30 Stat. 84, providing that, in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may relinquish the tract to the government, and select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, refers only to one who holds both the legal and equitable title to the patented land. *United States v. Hyde*, 132 Fed. 545, 548.

The term "owner," as used in determining who may redeem from tax sale, includes mortgagees, judgment creditors, and holders of contingent interests in the land affected by the sale. Thus, where the holder of a junior judgment lien on certain land purchased the same on execution on his judgment, and thereafter purchased an outstanding tax lien against the property, under which he obtained title, the purchase of such tax certificate by him would be construed in equity as a redemption, since he would not be permitted thereby, as against the holder of the senior judgment lien, to absorb the land, which was the entire fund for the payment of both judgments. *Lane v. Wright*, 96 N. W. 902, 903, 121 Iowa, 376, 100 Am. St. Rep. 362 (citing *Adams v. Beale*, 19 Iowa, 61; *Swan v. Harvey*, 90 N. W. 439, 117 Iowa, 58).

The word "property," as well as "owner," may be used to convey a meaning sometimes broad and sometimes quite restricted. In its general and commonly accepted sense, ownership and property would necessarily imply the power of sale. They are frequently used in a more restricted sense, and as used in Laws 1903, p. 200, providing that the probate court shall not have jurisdiction to inquire into the insanity of any person who is the owner of no property, the property which the person thought to be insane must own is property which he has been managing and controlling, or which he may manage and control in his direction of his affairs. The statute contemplates that, if he be found of unsound mind, a guardian of his person and his property be appointed who shall take upon himself the management and control of such property. Where testator provides for the setting aside of property sufficient to produce a certain income to be paid to one as trustee for another, an incompetent, who shall pay the same out for the benefit of the incompetent, the incompetent owns no property, within the meaning of the act. *Carter v. Bolster*, 98 S. W. 105, 106, 122 Mo. App. 135.

The word "owner," in 1 Rev. St. (1st Ed.) pt. 1, c. 16, tit. 1, § 64, providing that no highway shall be opened or worked with-

out a release by the owner or an assessment of his damages, means the person entitled to the legal estate. In *re Riddell*, 116 N. Y. Supp. 261, 264.

The word "owner" in Ky. St. § 2361, authorizing the owner of land, though not in actual possession, to sue for trespass thereon, means one who owns the land by a title of record deductible from the commonwealth, or who has acquired ownership by adverse possession of the land. *Scroggins v. Nave*, 119 S. W. 158, 159, 133 Ky. 793.

Grantee in possession under an unrecorded deed is the "owner" within Lien Law (Laws 1897, pp. 515, 518, c. 418) §§ 2, 9, requiring a notice of lien to state the name of the owner of the property, defined to include the owner in fee or of a less estate therein, etc. *Vogel & Binder Co. v. Charles P. Evans Co.*, 118 N. Y. Supp. 10, 14, 133 App. Div. 836.

The word "owner," as used in Const. § 6, art. 13, making it the duty of every "owner" to enter his land for taxation under penalty of forfeiture, means or includes a bona fide claimant. Nowhere is the verity of ownership determined in charging a tax on real estate. The charging is always made against the man who appears to be owner and claims to be. *State v. West Branch Lumber Co.*, 63 S. E. 372, 377, 64 W. Va. 673.

In the absence of knowledge to the contrary, the person shown by the public records to be vested with the title to real property is the "owner" thereof, within Rev. St. 1899, § 5686, requiring special tax bills to state the name of the "owner" of the property. *City of St. Joseph ex rel. Swenson v. Forsee*, 84 S. W. 98, 110 Mo. App. 127 (citing *Smith v. Barrett*, 41 Mo. App. 460; *Vance v. Corrigan*, 78 Mo. 94; *Cowell v. Gray*, 85 Mo. 169; *Payne v. Lott*, 3 S. W. 402, 90 Mo. 676; *Crane v. Dameron*, 12 S. W. 251, 98 Mo. 567).

Any person owning land, whether his title be of record in the office of the register of deeds or not, may maintain proceedings as "owner," under the Torrens Act, for land transfers to register his title. *National Bond, etc., Co. v. Alderson*, 108 N. W. 861, 99 Minn. 137.

The object of the lien law of 1897 (Laws 1897, p. 514, c. 418), giving a lien on the real property improved to the extent of the "owner's right, title or interest" therein, providing that the term "owner" includes the owner in fee or of a less estate therein, etc., is to bind the interest of the person against whom the notice of lien is filed, and it is not the legislative intent to give a lien on the property through the filing of any notice describing it, notwithstanding the statutory definition of the word "owner." *Strauchen v. Pace*, 88 N. E. 51, 52, 195 N. Y. 167.



Whenever the word "owner" or "reputed owner" is used in the mechanic's lien statutes, it means the owner or reputed owner with whom the contract was made, and he is therefore the only necessary defendant under the statute. *Carswell v. Patzowski*, 55 Atl. 342, 348, 4 Pennewill, 408.

It is not necessary to the attachment of a mechanic's lien that the person for whom a building is erected should own the fee-simple title, but the word "owner," as used in *Wilson's Rev. & Ann. St. 1903*, § 4819, providing that a person claiming a mechanic's lien for material or labor under a subcontract, with the contractor, etc., shall file with the clerk of the district court a statement verified by affidavit setting forth the amount due from the subcontractor to the claimant, the value, etc., includes every character of title, whether legal or equitable, fee-simple, or leasehold. *Crutcher v. Block*, 91 Pac. 895, 898, 19 Okl. 246, 14 Ann. Cas. 1029.

Under Code Iowa, § 2311, defining an "owner" of land as the person having title thereto, or the lessee or occupant thereof, and section 3096 providing that every person for whose use or benefit any improvement is made, having the capacity to contract, shall be included in the word "owner," the mere fact that a contract for the erection of a building and the bond given by the contractors for the faithful performance thereof speak of the obligee of the bond as the "owner" of the premises does not constitute a false representation to the surety on the bond on the part of the obligee, though the legal title to the lot on which the house was built is in the name of another; there being no pretense that the obligee of the bond was a trespasser on the land, or that he was not the owner of the building. *Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson*, 100 N. W. 550, 552, 124 Iowa, 599.

Where an indictment alleged that defendants had conspired to defraud the United States by fraudulently obtaining title to state land within a forest reservation for the purpose of exchanging the same as authorized by Forest Reserve Act June 4, 1897, c. 2, 30 Stat. 34, it stated an offense against the United States, since, when Congress provided in such act that the "owner" of land within a forest reservation might exchange his land for land open for settlement outside the reservation, the owner of a full, complete, and indefeasible title was meant, and not one who held land the title to which was subject to forfeiture for fraud. *Ex parte Hyde*, 194 Fed. 207, 214.

A married woman permitting a dog of her husband's to remain on the home premises, the title to which is in her, is not harboring a dog as an "owner," within Code, § 2340, making an owner liable for damages done by his dog, and she is not liable for injuries to a driver on a public road in con-

sequence of the dog frightening her horses, causing them to run away. *Burch v. Lowary*, 109 N. W. 282, 283, 181 Iowa, 719, 117 Am. St. Rep. 448.

The word "owner," in Code, § 2340, making the "owner" liable for damages done by his dog, when construed according to the context and approved usage of the language as required by section 48, signifies the person to whom the dog belongs, and the owner is liable without proof of knowledge of evil propensities; but one harboring a dog is not liable, in the absence of previous knowledge of viciousness. *Alexander v. Crosby*, 119 N. W. 717, 718, 143 Iowa, 50.

The "owner," within the meaning of Act No. 57 of 1908 (Laws 1908, p. 64), to prohibit any person as agent, owner, officer, or employé from engaging, encouraging, promoting, aiding, or assisting in the operation of a betting book upon horse races, or in selling auction pools upon any horse race, is one who conducts the betting by using "betting books," "sheets," "tickets," and "other devices." *State v. Scheffeld*, 48 South. 932, 934, 123 La. 271.

Under Rev. St. 1895, art. 4497, giving the penalty for failure to furnish a shipper with cars, and providing that when the "owner" of any freight shall apply in writing, etc., a shipper of crushed stone, who intended to load from the crusher and save expense in handling the crushed product, was not the "owner" of any crushed rock when he ordered cars. *Chicago, R. I. & G. R. Co. v. Risley Bros. & Co.*, 119 S. W. 897, 898, 55 Tex. Civ. App. 66.

One who has represented himself to be the "owner" of real property, and who is estopped from asserting the contrary, is the "owner" thereof, within Pen. Code, § 640d, making the act of offering real property for sale, by a person not possessed of authority in writing from the "owner," a misdemeanor. *Lopard v. Fritz*, 91 N. Y. Supp. 5, 6, 45 Misc. Rep. 620.

Code, § 2814, as amended by Laws 1907, p. 152, c. 153, authorizes school corporations to hold, within certain limitations, land for schoolhouse sites, which must be upon public roads, and except in cities, etc., at least 30 rods from the residence of any "owner" who objects to a site being placed nearer. Section 2815 provides for condemnation of a site if the owner refuses or neglects to convey, etc. Section 2773 authorizes boards of directors to fix schoolhouse sites. Held, that the term "owner," used in section 2814, refers to the owner of a residence within 80 rods of a schoolhouse site, and not to the owner of a site, and that the prohibition against locating a site within 30 rods of a residence applies to schoolhouse sites, whether acquired by purchase, devise, gift, or condemnation. *Mendenhall v. Board of Directors of Inde-*

pendent School Dist. of Leighton, 115 N. W. 11, 12, 137 Iowa, 554.

Defendants were the agents and their principal was the grantee of land, and on September 10, 1908, defendants gave plaintiff an option to buy the land, and, a dispute arising whether this option had expired, the parties on February 23, 1909, made a written agreement, by which defendants agreed to procure and deliver to plaintiff within 10 days a written extension of the option, to be binding on defendants and the owner. Within the time allowed defendants offered to plaintiff a contract signed by them and by their principal extending the original option for 90 days. The land had been bought by the defendants previous to the contract with plaintiff and by them sold to their principal, and the holder of defendants' purchase-money notes secured by vendor's liens obtained a judgment in foreclosure for title and possession of the land in July, 1909, at which time there were also other judgments and incumbrances against the property. Held, that until July 1, 1909, when the vendor's liens were foreclosed, defendants' principal was the "owner" of the land, and hence the instrument offered by defendants was a compliance with its contract to extend the plaintiff's option. *Hahl v. McPherson* (Tex.) 133 S. W. 515, 517.

St. 1885, c. 153, § 16, relating to foreclosure of liens for street improvements, making the executor, administrator, or guardian of the "owner" and persons in possession under claim or exercising acts of ownership over the same, also "owners" for the purposes of the law, recognizes constructive or virtual representation as sufficient to give jurisdiction of the property in the equitable action to be brought against the "owner," pursuant to section 12, though the proceeding be held not to be one in rem because the res is not made defendant. *Los Angeles County v. Winans*, 109 Pac. 640, 647, 13 Cal. App. 234.

Const. art. 14, § 7, providing that the state thereby releases to the owner or owners of the soil all mines and minerals thereon, was curative in its nature and retrospective in its effect, and intended as an extinguishment of the rights of the state in only those mines and minerals in soil owned at the time of its adoption, and was not intended to prevent the state from reserving mines and minerals in lands of the public domain subsequently granted by it, in view of the facts that this provision was originally adopted by the convention which framed the Constitution of 1866 at a time when the state could not afford to be generous in its disposal of the ungranted public domain; that it was adopted, not as a general provision of the Constitution, but as an ordinance substituted for one having special reference to the title to a salt lake, then in dispute; and that its language has remained unchanged in subsequent

Constitutions, especially as the term "release" commonly means to surrender a right or discharge a liability which presupposes the existence of some person against whom the right may be exercised or the liability enforced, and the word "owner" ordinarily means one who already has a legal or rightful title, and not one who must acquire such title in the future in order to come within the term; and hence Rev. St. 1895, art. 3498n, reserving minerals on lands thereafter granted by the state, is valid. *Cox v. Robison*, 150 S. W. 1149, 1150, 105 Tex. 426.

#### As owner at the time of

The word "owner," in Rev. St. 1899, § 2893, requiring the statement filed by a mechanic's lien claimant to state the name of "the owner or owners \* \* \* if known," when considered in connection with section 2889, giving a person performing work or furnishing materials by virtue of a contract with the owner a lien therefor, and section 2894 making it the duty of the county clerk to make an abstract of every lien account filed, containing the name of the person against whose property the lien is filed, etc., means the owner at the time the statement is made and filed. *Davis v. Big Horn Lumber Co.*, 85 Pac. 980, 981, 14 Wyo. 517.

By the expression "the owner of the house for the time being," as used in Act April 10, 1849, § 4 (P. L. 600), providing that in all conveyances the right to compensation for a party wall shall pass to the purchaser, unless otherwise expressed, and the owner of the house for the time being shall have all the remedies with respect to such party wall as he may have in relation to the house to which it is attached, must be understood the owner when the wall is injured. The obvious intent of the act is to give the right of compensation to the person who is injured. The injury arises from the use of the wall in the construction of an adjoining building. Until such use there is no injury. *Lea v. Jones*, 57 Atl. 1113, 209 Pa. 22.

#### As right to possession

"Ownership of chattels usually draws to it the right of possession. Proof of ownership would warrant the inference that the owner was entitled to possession." A complaint in claim and delivery under the Code, alleging that plaintiff is the "owner," sufficiently answers the requirement that plaintiff shall allege that he is entitled to possession. *Illinois Sewing Mach. Co. v. Harrison*, 96 Pac. 177, 43 Colo. 362 (quoting and adopting definition in *Wells, Replevin* [2d Ed.] § 39).

#### Absolute or qualified owner

The word "owner" is often used to designate a person having an interest in property under a special title, and in Rev. St. § 3337, giving compensation to an owner for driving the logs of another which have be-

come so intermixed with his own that they cannot be conveniently separated, it includes a person having possession under a special title or interest as a bailee as well as the absolute owner of the property. *Wisconsin River Log-Driving Ass'n v. D. F. Comstock Lumber Co.*, 40 N. W. 146, 147, 72 Wis. 464, 1 L. R. A. 717.

The word "owner" in the St. Louis city charter, providing for special taxes for street improvements against the property benefited, and providing that tax bill shall be a lien on the property charged therewith, and that suits for the enforcement thereof shall be brought against the owner of the land, is used in its restricted sense, and means the "legal owner," though the term in its wider sense may include any person beneficially interested in the property. *Granite Bituminous Paving Co. v. Parkview Realty & Improvement Co.*, 151 S. W. 479, 481, 168 Mo. App. 468.

The word "owner" is a word of very comprehensive meaning, and may be applied to more than one person in regard to the same property at the same time; one being regarded as owner for a certain purpose, and another for an entirely different purpose. The word applied to real estate, without any qualifying words, has been held to mean *prima facie* the person who has the fee simple; but an owner need not necessarily have the fee simple, and one having a lesser estate, such as a trustee and mortgagor in possession, may be an owner. *Good v. Jarrard*, 76 S. E. 698, 701, 93 S. C. 229, 43 L. R. A. (N. S.) 383.

The determination of the ownership of real property, for purposes of taxation, is sometimes a question of serious difficulty. The authorities, however, appear to hold that by the "owner" is meant the person who has the legal title or estate to or in the land, and not one who by contract or otherwise has a mere equity therein, or a right to compel a conveyance of such legal title or estate to himself. *Collins v. Reger*, 57 S. E. 743, 746, 62 W. Va. 195 (quoting and adopting definition in *Black, Tax Titles*, § 106).

A city holding a qualified fee in lands is the owner thereof within P. L. 1909, p. 27, authorizing cities bordering on the Atlantic Ocean owning lands contiguous to the beach or ocean front to improve the same for public use and recreation, and to issue bonds therefor. *Bew v. Ventnor City*, 80 Atl. 28, 29, 81 N. J. Law, 207.

One who had a right to shoot on certain land could maintain an action under V. S. 4626, providing that one willfully entering on land on which shooting was prohibited with permission of the "owner" would forfeit the penalty at the suit of such owner. Defendant's contention that the word "owner" had reference to the person who owned the legal title and not to a person having

an ownership for a particular purpose was overruled. *Payne v. Sheets*, 55 Atl. 656, 657, 75 Vt. 335.

#### Administrator

A personal representative in the possession of and exercising complete control over real estate of decedent, if his authority to remonstrate is not challenged by an heir or devisee, is the "owner" of such real estate within Laws 1905, p. 228, c. 20, in amendment of Laws 1903, p. 186, c. 17, § 128, providing that no repavement shall be ordered if remonstrated against by the owners of 50 per cent. of the foot frontage. *Chan v. City of South Omaha*, 123 N. W. 464, 466, 85 Neb. 434, 133 Am. St. Rep. 670.

In proceedings against an administrator to enforce a mechanic's lien on premises, the interest of the owner being a leasehold, the administrator was properly described as the "owner" or proprietor thereof, as the leasehold, being a chattel real, descended to the administrator. *Laverne v. Evans Bros.* Const. Co., 52 South. 318, 320, 166 Ala. 289.

#### Agent or servant

In a city charter authorizing the city to require "owners" of dangerous buildings to remove the same at their own expense, while it may be convenient, in the exercise of the power granted by the provisions of the charter, to extend the application of the term to agents of the owners, it is not a reasonably necessary incident to the express power granted, which confines it to the owners. The rule is that it not only must be reasonably incident to the express powers granted or convenient for the exercise of such power, but it must be essential and indispensable to the purposes to be accomplished by the corporation. *City of St. Louis v. J. E. Kaime & Bro. Real Estate Co.*, 79 S. W. 140, 142, 180 Mo. 309.

One appointed by a duly executed writing as manager and attorney in fact for the owner in conducting a mercantile business has such authority that a materially false property statement made by him for the purpose of obtaining goods for sale in such business on credit is one made by the "owner" within the meaning of Bankr. Act July 1, 1898, c. 541, § 14b (3), as added by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, which makes the obtaining of property on credit by means of such a statement ground for refusal of a discharge. In *re Reed*, 191 Fed. 920, 930.

#### All persons having an interest

"The word 'owner' is a comprehensive term, and is applied to any person who has dominion of a thing real or personal, corporeal or incorporeal, and a right of enjoyment and disposition." *Bouvier*. When the term is employed in the statutes relating to eminent domain, to designate the persons who are to be made parties to the proceedings, and who are entitled to receive compensation for

land taken against their will, it should be held to include all those who have any lawful interest in the property to be condemned. *Brigham City v. Chase*, 85 Pac. 436, 437, 438, 30 Utah, 410 (citing 2 Lewis, Em. Dom. § 335).

The word "owner," in the statute giving a company power to condemn land and providing that it shall be liable for all such damages as may be established by any landowner, embraces not only the owner of the fee but a lessee for years and any other person who has an interest in the property affected by the condemnation. *Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co.*, 66 S. E. 194, 196, 84 S. C. 306.

All persons having an interest in land are "owners" within the meaning of the statute relating to parties in condemnation proceedings. *State v. Missouri Pac. Ry. Co.*, 105 N. W. 983, 985, 75 Neb. 4.

The word "owner," as used in the road laws (Comp. St. 1905, c. 78, §§ 18-29), applies to all persons having an interest in the estate taken or damaged. *Beste v. Cedar County*, 128 N. W. 29, 30, 87 Neb. 689.

The word "owner," as used in the condemnation law, includes all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon and includes a person who claims an interest in land, and between whom and another there is a dispute over the title. *New York Cent. & H. R. Co. v. Matthews*, 128 N. Y. Supp. 138, 141, 70 Misc. Rep. 567; 129 N. Y. Supp. 828, 144 App. Div. 732.

The statutory requirement that a tax deed shall recite that the land sold at a tax sale has not been redeemed is sufficiently fulfilled by a recital that the owner has not offered to redeem; the word "owner" in this connection including any one who has a substantial interest in the property. *Steele v. Dye*, 105 Pac. 700, 702, 81 Kan. 286.

"The owner," as used in Act 1874 (*Hurd's Rev. St.* 1893, c. 82), relating to mechanics' liens, means the owner of any interest in the land. *Sorg v. Crandall*, 84 N. E. 181, 184, 233 Ill. 79.

Under Mechanic's Lien Act June 14, 1898, § 3 (P. L. p. 538), requiring stop notices to be served on the "owner of the building," a stop notice is properly served upon the owner of the land and not upon the person liable under contract for the price of the building. *Gardner & Meeks Co. v. Herold*, 72 Atl. 24, 25, 76 N. J. Law, 524.

"Where it is manifest that the building was erected for the immediate use, enjoyment, or benefit of a particular person, that person, within the meaning of the statute concerning mechanics' liens, is to be regarded as the 'owner or proprietor' thereof." *Winslow Bros. Co. v. McCully Stone Mason Co.*,

69 S. W. 304, 306, 169 Mo. 236 (quoting and adopting definition in *Burgwald v. Weippert*, 49 Mo. 60).

### Corporations

Rev. Civ. Code, § 415, designates the owners of shares in a corporation with a capital stock as stockholders, and the incorporators of a corporation having no capital stock and their successors as members. Section 742 provides that the private property of the members of benevolent corporations are not liable for corporate debts, unless it is so provided in the articles of incorporation. Sections 740 and 411 make persons signing articles of association and their associates and successors on complying with the statute a body corporate. Section 182 provides that ownership is the right to possess and use to the exclusion of others. Held, that an incorporated commercial club, whose articles of association provided that its members should not be liable for corporate debts, and not its members, was the "owner" of liquors kept to be furnished the members in exchange for checks for which they paid. *State v. Mudie*, 115 N. W. 107, 110, 22 S. D. 41.

### Creditor secured by deed of trust

Creditors secured by a deed of trust are not owners of land within the meaning of an act providing that the owners shall be given notice and opportunity to be heard before assessments for improvements are levied against the property. *City of Richmond v. Williams*, 47 S. E. 844, 845, 102 Va. 733.

### Equitable owner

A person who has paid the consideration for land, though it is deeded to another, is the "owner" thereof, within Code Civ. Proc. § 696, giving a lien for labor or material furnished under a contract with the owner. *J. F. Anderson Lumber Co. v. Spears*, 127 N. W. 643, 645, 25 S. D. 624.

### Executor

The signatures by executors and trustees of an estate are the signatures of the "owners" within the meaning of the statute as to special assessments. *Shannon v. City of Omaha*, 103 N. W. 53, 55, 73 Neb. 507 (citing *Portsmouth Savings Bank v. City of Omaha*, 93 N. W. 231, 67 Neb. 50).

An executor is not an "owner" of realty, and his signature to a petition for a street improvement as executor is not authorized. *People v. Board of Assessors of City of Buffalo*, 109 N. Y. Supp. 991, 994.

Where certain real estate abutting on a street, the sidewalk of which was to be improved, was vested in defendant executors for 10 years, the heirs having only the right to the proceeds, the executors were the "owners" of such property, within Ky. St. § 3567 (*Russell's St.* § 1589), requiring notice to be given property owners of such contemplated improvement; and hence, notice having been

given to such executors and they having failed to begin the performance of the improvement within the time specified, the city was entitled to do the work and enforce a lien on the property therefor. *City of Winchester v. Bush*, 133 S. W. 791, 792, 141 Ky. 709.

Greater New York Charter, § 894a, added to Laws 1901, c. 466, by Laws 1906, c. 207, providing that, so long as the books of annual record of assessed valuation of personalty remain open for correction, the board of taxes and assessments, on 10 days' notice to the person in interest, may add to the assessment roll the name of the owner of any personalty, and its assessed valuation, that may have been omitted, authorizes the addition of the name of an executor holding personal property of a testator dying before the second Monday of January; the executor being the "owner" of the personal estate of testator. *People ex rel. Stebbins v. Purdy*, 129 N. Y. Supp. 273, 278, 144 App. Div. 361.

#### **Fee-simple owner**

The word "owner," standing alone, signifies absolute owner, or owner in fee simple, not a qualified or limited estate in the land. *Phillips v. Hardenburg*, 80 S. W. 891, 895, 181 Mo. 463.

A covenant in a mortgage that the mortgagor is the "owner" is that he is the owner in fee simple. *Slater Trust Co. v. Randolph-Macon Coal Co.*, 166 Fed. 171, 174.

The word "owner," as applied to land, usually refers to a fee simple, though the meaning may not be the same under all circumstances. *People v. Bennett Medical College*, 94 N. E. 110, 112, 248 Ill. 608, 140 Am. St. Rep. 237.

A building restriction agreement executed by persons who are "owners in fee simple" is valid, though not signed by the wife of one of the owners, and, where he and the wife subsequently executed a conveyance to a third person subject to the agreement, the property was subject to the agreement; the quoted words only meaning that the fee simple of the property was vested in the parties to the agreement. *Goodhue v. Cameron*, 127 N. Y. Supp. 120, 126, 142 App. Div. 470.

#### **Grantee of standing timber**

Under a statute imposing a penalty for cutting trees, recoverable by the owner, and defining the "owner" to be the owner of the timber when one owns the timber and another owns the land, where there is no separate ownership of the timber and land the owner of the land is the owner of the timber. *Brasher v. Shelby Iron Co.*, 40 South. 80, 144 Ala. 659.

The owner of timber upon lands is not an "owner of timbered lands" within the meaning of Rev. St. 1892, § 1469, providing that courts of chancery shall entertain suits by any person claiming to own any timbered

lands, to enjoin trespass on such lands by the cutting of trees, etc. *Doke v. Peek*, 34 South. 896, 45 Fla. 244, 110 Am. St. Rep. 70.

#### **Guardian**

A guardian in possession of and exercising complete control over his ward's real estate is the "owner" thereof within Laws 1905, p. 228, c. 20, in amendment of Laws 1903, p. 186, c. 17, § 128, providing that no repavement shall be ordered if remonstrated against by the owners of 50 per cent. of the foot frontage. *Chan v. City of South Omaha*, 123 N. W. 464, 466, 85 Neb. 434, 133 Am. St. Rep. 670.

#### **As holder**

See Holder.

#### **Incumbrancer or lienholder**

As statutes conferring power on the state to sue "owners" of property for delinquent general taxes are construed to contemplate as "owners" all incumbrancers, and thereby give the state a first lien, *St. Louis City Charter*, art. 6, § 18, providing that the expense of improving streets shall be charged to the adjoining property as a special tax, and section 25, which provides that special assessments and taxes may be collected of the owner of the land in any court of competent jurisdiction, and that the owner, or any other person having an interest in the property charged with a tax bill, may pay the same, without interest, within 30 days after the notice of the bill, must be construed to give a right to sue the incumbrancers as well as the legal owners, and to make a special tax levied thereunder a first lien on property affected; the tax being on the property, and not on the individual owner, and the rule giving general taxes priority being applicable to special assessments, irrespective of the absence of express statutory declaration as to such priority. *Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Co.*, 146 S. W. 1142, 1146, 242 Mo. 241, 40 L. R. A. (N. S.) 119, Ann. Cas. 1913C, 1200.

The Supreme Court of Nebraska has held that the term "owner," as used in a statute providing for the foreclosure of a tax lien and providing for service of process where the "owner" of the land is not known, applies to the owner of the fee and does not include a person holding a lien upon the premises. *Leigh v. Green*, 24 Sup. Ct. 390, 391, 193 U. S. 79, 48 L. Ed. 623.

#### **Joint owners**

Penal Law (Consol. Laws, c. 40) § 1427, subd. 2, providing that "any person, who not being the owner thereof, and without lawful authority, willfully injures or disfigures \* \* \* a monument \* \* \* in a cemetery \* \* \* is guilty of a misdemeanor," is not to be construed as though the word "sole" were before the word "owner," and so does not apply to a joint owner of a mon-

ument, who, though without right, removes an inscription therefrom. *People v. Otis*, 121 N. Y. Supp. 810, 811, 137 App. Div. 426.

#### Lessee

The word "owner," as used in Civ. Code, §§ 542-544, providing that, when the owner of any tract of land abutting on a railroad constructs a fence about it on all sides except along the railroad, it shall be the duty of the railroad company to construct a fence along its right of way, means the owner of the fee, and does not include a lessee. *Crary v. Chicago, M. & St. P. R. Co.*, 100 N. W. 18, 19, 18 S. D. 237.

A railway corporation operating a line of railroad is the "owner" thereof within a statute imposing a penalty on a corporation owning a railroad for failure to equip its locomotives with bells or whistles. *Chicago, R. I. & P. R. Co. v. State*, 106 S. W. 199, 94 Ark. 409.

The term "owner in possession" of premises, within a statute prescribing a penalty against such persons, where intoxicants are unlawfully sold on their premises, includes a tenant for a term of years, or of any freehold or greater estate. *Commonwealth v. Smith & McGuilar*, 105 S. W. 397, 398, 127 Ky. 171.

Lessees are not "owners" within Laws 1906, c. 1355, § 2, providing that no liquor license shall be granted where the owners of the greater part of the land within 200 feet of such plaintiff shall object. *American Woolen Co. v. Town Council of North Smithfield*, 69 Atl. 298, 298, 29 R. I. 93, 16 Ann. Cas. 1227.

The holder of an unexpired lease of premises is entitled to an award of damages as an "owner" within Code Civ. Proc. § 3358, defining such term to include all persons having any estate, interest, or easement in the premises condemned, or any lien, charge, or incumbrance thereon. *People v. Thornton*, 106 N. Y. Supp. 704, 705, 122 App. Div. 287. And a tenant in possession under a lease for six years is an "owner," under this section. *Baker v. State*, 118 N. Y. Supp. 618, 620, 63 Misc. Rep. 549.

The word "owner," as used in Rev. St. § 4275, making a building liable if the owner knowingly permits it to be used for gaming, includes a lessee, and the interest of a lessee subletting to one who, with the knowledge of lessee, uses it for gaming, may be subjected to the judgment against sublessee for a loss therein at gaming. *Iroquois Co. v. Meyer*, 89 N. E. 90, 91, 80 Ohio St. 676.

Laws 1907, p. 94, § 44, which makes it unlawful to hunt on land of another without written permission from the owner or his agent, and which also provides that said permission shall be good for one year from the date of its issuance, unless otherwise provided therein, and said permission shall expire

unless otherwise provided, at the expiration of one year from the date of its issuance, do not authorize a mere tenant of an owner to give the written permission; the term "owner" being employed in its primary meaning, which is he who has the title, as distinguished from a mere possessory right to the premises. *Barclay v. State*, 47 South. 75, 76, 156 Ala. 163 (citing 6 Words and Phrases, p. 5134 et seq.).

One who has an ordinary oil and gas lease, authorizing entry on the land to explore for oil and gas, is not an "owner" within the mechanic's lien law, and hence one who performs labor for him cannot obtain a mechanic's lien. *Eastern Ohio Oil Co. v. McEvoy*, 89 Pac. 1048, 1049, 75 Kan. 515.

The word "owner," in Wilson's Rev. & Ann. St. 1903, § 4817, providing that any person who shall under contract with the owner of land furnish material for the erection of any building thereon shall have a lien on the land, building, and appurtenances, includes a leasehold under a lease from the school land leasing board, and a lien for materials attaches to such a leasehold estate, subject to the paramount interest of the United States, the lessor, or the holder of the fee. *Block v. Pearson*, 91 Pac. 714, 716, 19 Okl. 422.

The word "owner," in Code Civ. Proc. § 619 (Wilson's Rev. & Ann. St. 1903, § 4817), providing that any person who shall under contract with the "owner" of any tract of land furnish material for the erection, alteration, or repair of any building thereon, shall have a lien on the tract, includes any interest in lands, no matter how slight, and a mechanic's lien will attach to a leasehold estate. *Jarrell v. Block*, 92 Pac. 167, 169, 19 Okl. 467.

A tenant in possession who constructs an improvement for his own use and benefit, with the knowledge and approval of his landlord, is an "owner" within Code, § 3089, requiring a mechanic's lien to be predicated on a contract with the owner, and section 3096, declaring an owner to be any person for whose use or benefit any building, erection, or other improvement is made. *Webster City Steel Radiator Co. v. Chamberlin*, 115 N. W. 504, 505, 137 Iowa, 717.

In Laws 1891, p. 179, c. 96, as amended by Laws 1905, p. 173, c. 86, providing that any person is guilty of forcible entry or detainer, who, without the permission of the "owner," enters on the land of another and fails to remove therefrom after certain notice, the word "owner" is used in a more comprehensive sense than the record or title owner of the land. Where defendant went into possession under an agreement with the lessee in a lease which, by its provisions, could not be assigned without the consent of the landlord, and no such consent was obtained, and subsequently plaintiff obtained a

lease from the landlord, and thereafter defendant paid rent to plaintiff, there was such relationship between plaintiff and defendant, that plaintiff might maintain unlawful detainer. *Stahl Brewing & Malting Co. v. Van Buren*, 88 Pac. 837, 838, 45 Wash. 451.

The phrase "the person owning the adjoining fields," in Rev. St. 1899, § 4573, cl. 2, forbidding under penalty the throwing down of partition fences, should not be construed to mean only the owner of the land, as a tenant may own the field and be an "owner" within the meaning and protection of the statute. *Robinson v. Schiltz*, 115 S. W. 472, 473, 135 Mo. App. 32.

As used in St. 1898, § 1891, providing that respective occupants of adjoining lands used for farming shall maintain partition fences, unless they mutually otherwise agree, and owners of land who do not maintain lawful partition fences cannot recover for trespass by the animals of owners of the adjoining lands, with whom partition fences might have been maintained, the term "owners of lands" includes a tenant as the occupant of land; and where he failed to maintain a partition fence he was precluded from recovering for trespass by animals of the owner of the adjoining land, with whom a partition fence might have been maintained. *Peterson v. Johnson*, 111 N. W. 659, 660, 132 Wis. 280.

The term "owner," used in Act March 27, 1901 (Laws 1901, p. 219, § 1), requiring the owners of certain hotels to provide fire escapes, does not refer to the proprietor of the business, but to the owner of the building. *Yall v. Snow*, 100 S. W. 1, 3, 201 Mo. 511, 10 L. R. A. (N. S.) 177, 119 Am. St. Rep. 781, 9 Ann. Cas. 1161.

#### Lessor

Act March 27, 1901 (Laws 1901, p. 219, § 1), requiring the "owner, proprietor, lessee or keeper" of certain hotels to provide fire escapes, places the initial duty upon the owner of the building without regard to the liability of his lessee. *Yall v. Snow*, 100 S. W. 1, 3, 201 Mo. 511, 10 L. R. A. (N. S.) 177, 119 Am. St. Rep. 781, 9 Ann. Cas. 1161. The use of the word "owners" in this act indicates clearly that the Legislature meant to impose the duty upon more persons than the occupant alone. A person may be the owner of a hotel building, and still not be the occupant or keeper thereof, and hence the liability of the "owner" is not contingent upon his being in possession. *Johnson v. Snow*, 100 S. W. 5, 6, 201 Mo. 450.

Labor Law (Laws 1897, p. 482, c. 415) art. 6, § 86, as amended by Laws 1907, p. 1049, c. 490, requires the owner, agent, or lessee of a factory to provide in each workroom thereof sufficient ventilation and makes such persons otherwise liable to a penalty. Section

94, as added by Laws 1906, p. 303, c. 178, and amended by Laws 1908, p. 1217, c. 426, § 2, provides that the term "owner" shall mean the owner of the freehold or the lessee, and defines the term "tenant factory" as a building, separate parts of which are occupied by different persons, and one or more of which parts is so used as to constitute a factory, and makes the owner of such tenant factory responsible for the nonobservance of section 86, and provides that the lessee shall permit the owner to enter the premises to comply with the law. *Held*, that where the owner of a building leases the lower floor under a lease requiring the tenant to observe such regulations, and the latter partitions the floor, puts in workbenches, stoves, etc., thereby creating poor ventilation, the owner is personally liable, though he did not create the condition, and though the tenant may be also liable. *People ex rel. Williams v. Eno*, 119 N. Y. Supp. 600, 602, 134 App. Div. 527.

#### Mortgagee

"Some courts, considering that word [owner] strictly in such statutes [statutes regulating the enforcement of the right of eminent domain], have held it not to embrace a mortgagee. \* \* \* Other courts, however, have held that a consideration of the context of the statutes which they were interpreting, and the evident purpose intended thereby to be subserved, that mortgagees were embraced." *Glover v. United States*, 17 Sup. Ct. 95, 97, 164 U. S. 294, 41 L. Ed. 440.

Under the decisions of the Supreme Court of Nebraska, mortgagees of property in that state have an estate in the property mortgaged separate and distinct from that of the mortgagors, and are comprehended within the term "owner" in cases where "owners" are required to be made parties to suits. *City of Omaha v. Omaha Water Co.*, 192 Fed. 246, 249, 112 C. C. A. 504.

The "owners" entitled to institute proceedings, under Rev. St. 1909, §§ 5496-5541, for the organization of drainage districts by circuit courts, and elect commissioners, and otherwise act, are the title owners of the land, and mortgagees are not necessary signers. *Sibbett v. Steele*, 144 S. W. 439, 440, 240 Mo. 85.

A mortgagee is within the protection of a provision of a city charter requiring the street commissioners, in condemning land, to ascertain the damages for which the "owner" or occupant of "any right or interest claimed in any ground or improvements" ought to be compensated. *Mayor, etc., of Hagerstown v. Groh*, 61 Atl. 467, 468, 101 Md. 560.

Under Rev. St. Me. c. 93, § 29, which gives a lien for labor or materials furnished in erecting, altering, or repairing a house, building, or appurtenances by virtue of a

contract with or "by consent of the owner," as construed by the Supreme Judicial Court of the state, in order that the interests in real estate of any person shall be affected by reason of his statutory consent, he must be held to have set in motion a train of circumstances which necessarily, or reasonably, or ordinarily, resulted in the furnishing of labor and materials for which the lien is claimed. A mortgagee out of possession is not an "owner" within the meaning of the statute, nor can he be held to have consented to the displacement of his own lien merely because he may have knowledge of the making of the improvements. *Central Trust Co. of New York v. Bodwell Water Power Co.*, 181 Fed. 735, 738.

A mortgagee not in possession is not an "owner" within the meaning of the Maine mechanic's lien statute (Rev. St. Me. c. 93, § 29), which gives a lien for labor or materials only when they are furnished "by virtue of a contract with or by consent of the owner," and he is not required to serve notice of his dissent where he has knowledge that improvements are being made on the property, as is required of the owner, in order to prevent the displacement of his mortgage. *Allis-Chalmers Co. v. Central Trust Co. of New York*, 190 Fed. 700, 702, 111 O. C. A. 428, 39 L. R. A. (N. S.) 84.

#### **Mortgagor**

The phrase "owner of an equity of redemption," in Rev. Laws, c. 187, § 33, providing that if the owner of an equity of redemption dies, the administrator may redeem, having been substituted without comment by the commissioners for revision, in place of the words of the original act, "a person entitled to redeem" will be construed to include the grantor of an absolute deed intended as a mortgage. An administrator may redeem without taking out a license to sell, but in such case the result inures to the benefit of the widow and heirs, though at common law the right to redeem from a deed absolute in form but intended as a mortgage survives to the grantor's heir and not to the administrator. *Clark v. Seagraves*, 71 N. E. 813, 815, 186 Mass. 430.

#### **Municipality**

The setting off of fireworks by a municipality, which holds ground for the public as a playground, solely for the public use, under Rev. Laws, c. 28, § 19, and St. 1910, c. 508, is not a nuisance, as the town is not the owner of the playground in the ordinary sense; and, furthermore, the setting off of fireworks on a single occasion does not create any permanent or continuing condition of real estate, and ordinary negligence is not a nuisance. *Kerr v. Inhabitants of Brookline*, 94 N. E. 257, 208 Mass. 190, 34 L. R. A. (N. S.) 464.

#### **Person in possession or control**

The word "owner," in Act 1887 (Hurd's Rev. St. 1908, c. 38, §§ 256a-256g), entitled "an act to indemnify property owners for damages caused by mobs and riots," did not restrict the right of recovery to the legal owner so that a railroad company which had in its possession cars of other roads received for transportation could recover against a municipality for their destruction by a mob within the city. *Pittsburg, C. & St. L. Ry. Co. v. City of Chicago*, 89 N. E. 1022, 1024, 242 Ill. 173, 44 L. R. A. (N. S.) 358, 134 Am. St. Rep. 316.

One who has possessed a tract of land as owner for a number of years is considered in law as provisional owner, with exclusive rights of entry and possession, and is entitled to redeem the land from a tax sale. *Bentley v. Cavallier*, 46 South. 101, 102, 121 La. 60.

Respondent, a coal company, having in its possession a loaded coal flat moored to its float in the Allegheny river in Pittsburgh, with the right to retain it until it was unloaded, cast it loose during a flood to avoid injury to its float and other vessels, and it sank some distance below. The place was not marked, and some three weeks later libellant's vessel ran into it and was injured. Held, that respondent stood in the place of the owner within the meaning of Act March 3, 1890, c. 425, § 15, 30 Stat. 1152, requiring the owner of any vessel sunk in a navigable channel to immediately mark the place and maintain the marks until it is removed or abandoned, and, it appearing that there had been no abandonment, that respondent was liable to libellant for the injury to its vessel. *Second Pool Coal Co. v. People's Coal Co.*, 188 Fed. 892, 894, 110 O. C. A. 526.

#### **Person taxed as owner**

The word "owner," in St. 1893, § 5579, providing that land shall be assessed to the owner thereof on the 1st day of January of each year, and the owner on that day shall be liable for the tax of that year, fixes the person liable for the tax for a year, and one owning land on the 1st day of January, who subsequently conveys the same, is still liable for the tax, independent of the deed, which liability continues, as between the owner and the territory, until the tax is actually paid. *Rudd v. Dunlap*, 83 Pac. 451, 15 Okl. 458.

#### **Pledgee**

A pledgee of personal property is an "owner" thereof, within the meaning of an insurance policy. *Whelen v. Goldman*, 115 N. Y. Supp. 1006, 1010, 62 Misc. Rep. 108.

#### **School board**

Rev. St. § 2676, providing that if the "owner" or "possessor" of any lot or land in any city or village digs or causes to be



dug any cellar, pit, vault, or excavation to a greater depth than 9 feet below the curb of the street on which such lot or land abuts, or, if there be no curb, below the surface of the adjoining lots, and by such excavation causes any damage to any wall, house, or other buildings on the lot adjoining thereto, such owner or possessor shall be liable in a civil action to the party injured to the full amount of the damages aforesaid, does not apply to boards of education holding titles to the lot or land being excavated for school and school building purposes. *Board of Education of Cincinnati v. Volk*, 74 N. E. 646, 649, 72 Ohio St. 469.

#### State

The word "owner," in a contract for the construction of a public building for the commonwealth which provides that the "owner" may retain out of any payment due the contractor an amount sufficient to indemnify him against liens for which, if established, the "owner" might become liable, is used in a sense of an ordinary "owner." Laborers and materialmen of the contractor are entitled in equity to be paid out of the fund retained by the commonwealth; the statute requiring officers of the commonwealth to obtain security for payment by the contractor for labor performed and materials furnished being enacted to give laborers and materialmen security equivalent to the lien which the law creates on the property of other owners. *Burr v. Massachusetts School for Feeble-Minded*, 83 N. E. 883, 884, 197 Mass. 857.

#### Stockholder

Const. art. 12, § 3, and Civ. Code, § 322, make each stockholder of a corporation individually liable for such proportion of its debts incurred while he was a stockholder as the shares owned by him bear to the whole of the subscribed shares of the corporation, and the Code section also provides that the term "stockholder," as used therein applies, not only to such as appear by the corporate books to be such, but to every equitable owner of stock though it is on the books in another's name. Const. art. 12, § 14, requires books to be kept by the corporation wherein shall be recorded the amount of the capital stock subscribed, the names of the owners, and the amount of stock owned by each. Held, that the stockholders were not bound to see that not only their own names, but also the names of all other stockholders, were entered on the books as such, and that it would not be presumed that the corporation had entered the names of all stockholders on its books, so as to prevent a stockholder from showing other subscriptions than those shown by the corporate books, when sued on his statutory liability under section 322, so as to reduce the amount of such liability; the terms "owner" and "stockholder" in the statute including the real owner,

though his name does not appear on the corporate books as owner. *Hughes Mfg. & Lumber Co. v. Wilcox*, 106 Pac. 871, 873, 13 Cal. App. 22.

In June, 1905, defendant newspaper published an article to the effect that bookmakers at a race track were committing a felony, and that "the owners of the race track are equally guilty with the bookmakers under the statute." At that time the race track was owned by a corporation, of which another corporation, a jockey club, was lessee, and plaintiff and two others were the principal stockholders in the lessee corporation, but during the year 1905 plaintiff was not actively engaged in managing the jockey club, and on May 1, 1905, he left for Europe, and was there when the article was published. During his absence the management of the race track was left to the discretion of the other two principal stock owners. Defendant's paper had on numerous occasions published the fact that the plaintiff and the two other principal stockholders were the owners of the race track. Held, that plaintiff was included within the term "owners" as used in the published article, so that it was libelous as to him. *Tilles v. Pulitzer Pub. Co.*, 145 S. W. 1148, 1149, 241 Mo. 609.

#### As successful claimant

See Successful Claimant.

#### Surviving spouse

A surviving spouse in the possession of and exercising complete control over the homestead of the deceased spouse is the "owner" thereof within Laws 1905, p. 228, c. 20, in amendment of Laws 1903, p. 186, c. 17, § 128, providing that no repayment shall be ordered if remonstrated against by the owners of 50 per cent. of the foot frontage. *Chan v. City of South Omaha*, 123 N. W. 464, 466, 85 Neb. 434, 133 Am. St. Rep. 670.

#### Tax sale purchaser

Where a statute limits the right of redemption from a sale for taxes to the owner, the word "owner" is not limited to the person who owned the land when the tax from which redemption is sought was assessed, but includes a purchaser at tax sale, who thereupon becomes entitled as owner to redeem from prior sales. *Rogers v. City of Lynn*, 86 N. E. 889, 890, 200 Mass. 354.

Notwithstanding the paramount nature of a tax title, the statute providing that "the owner of land taken or sold for payment of taxes may redeem the same" recognizes that another person than the purchaser at the tax sale may be the "owner," so as to be entitled to redeem. *Hillis v. O'Keefe*, 75 N. E. 147, 148, 189 Mass. 139.

#### Tenant by entirety

One of two tenants by entireties is not the "owner" of lands for the purpose of making a contract with a broker for commissions for the sale of such lands without the con-

sent of the other tenant, within Gen. St. p. 1804, § 10, providing that no broker shall be entitled to any commission unless the authority for the sale is in writing signed by the owner or his authorized agent. *Murphy v. Lewis*, 69 Atl. 483, 76 N. J. Law, 141.

#### **Tenant for life**

Under Code, § 785, requiring a city changing an established grade of a street to the injury of abutting property to pay the damages to the owner, and section 48 (8, 10), defining "real property" as including lands, tenements, hereditaments, and all rights thereto and interest therein, and the word "property" as including real property, a tenant for life or for years of a city lot is an "owner" to the extent of his interest, and may sue the city for injuries sustained by a change in the established grade of the street in front of the property. *Chiesa & Co. v. City of Des Moines (Iowa)* 138 N. W. 922, 923.

#### **Tenant in common**

A tenant in common is an "owner" within Laws 1905, p. 228, c. 20, in amendment of Laws 1903, p. 186, c. 17, § 128, providing that no repavement shall be ordered if remonstrated against by the owners of 50 per cent. of the foot frontage. *Chan v. City of South Omaha*, 123 N. W. 464, 466, 85 Neb. 434, 133 Am. St. Rep. 670.

#### **Trustee**

Under Civ. Code 1896, § 1713, as amended by Act Oct. 1903 (Gen. Acts 1903, p. 374), requiring an application for the condemnation of land to state the names and residence of the owners of each tract, if known, in trust estates, the trustee being the only proper party, it is unnecessary to name the cestui que trust. *Birmingham & A. A. R. Co. v. Louisville & N. R. Co.*, 44 South. 679, 681, 152 Ala. 422.

#### **Vendee under bond or contract**

A vendee of realty, in possession under an executory contract of sale at the date of the assessment, is the real "owner" for the purpose of taxation, and that, too, whether prior to said sale the same was subject to taxation in the hands of his vendor or not. *Bowls v. Oklahoma City*, 104 Pac. 902, 903, 24 Okl. 579, 24 L. R. A. (N. S.) 1299.

A contract to purchase land does not make the purchaser the "owner" within the mechanics' lien statute (Rev. St. 1895, art. 3294). *Hubbell v. Texas Southern R. Co.*, 120 S. W. 313, 316.

One who contracts to purchase land, pays part of the price, and takes possession under his contract, is an "owner" within Civ. Code 1902, § 3008, which gives a mechanic's lien for labor performed or materials furnished for a building under contract with, or consent of, the owner. *Ridgeway v. Broadway*, 75 S. E. 132, 133, 91 S. C. 544.

"The lien law, designed to protect materialmen and laborers, should be liberally construed to effectuate that purpose. The definition given by the statute to the word 'owner' is a very broad one, and excludes all idea that a lien is only given to the fee owner. In this state, relation of a vendee in a contract for the purpose of real property by future payments has been passed upon. The vendee becomes the equitable owner of the land, and the vendor holds the legal title in trust for the purchaser and as security for the payment of the purchase price. Payment of the purchase price entitles the purchaser to a deed, and, until such payment, his rights are measured under the rules applying to equitable owners. The statute (section 6243), in express terms, permits the lienholder to enforce his lien to the extent of all the right, title, and interest of the owner. This precludes the idea that there must be absolute ownership before the lien attaches. We think it clear that a vendee under a contract of sale of real estate is expressly entitled to incur his interest in the land through purchase of materials entitling the person proving them to a lien." *Salzer Lumber Co. v. Claffin*, 113 N. W. 1036, 1037, 16 N. D. 601.

One is the "owner" of land, and so, under *Sayles' Ann. Civ. St. 1897*, art. 4218ff, entitled to purchase contiguous public lands, where he has an oral contract to purchase it, under which he has taken possession and made improvements permanent and valuable relative to the value of the land. *Bone v. Cowan*, 84 S. W. 385, 386, 37 Tex. Civ. App. 519 (citing *Smith v. Rothe* [Tex.] 55 S. W. 754).

Under Rev. St. 1909, § 9255, providing that if a majority of the resident owners of property liable to taxation for a street improvement at the date of the passage of the resolution therefor, owning a majority of the front feet owned by residents of the city abutting on the street, shall not file a protest, a contract may be let for the work, a person having a contract for property of which he has taken possession, and on which he is living, and who has made part payment of the purchase price and been offered a deed, which has not been delivered because corrections therein were required, is a "property owner" entitled to sign such a protest. *Shaw v. Goben*, 151 S. W. 209, 210, 167 Mo. App. 125.

#### **Vendor in contract of sale**

"Under the provisions of the Mechanics' Lien Law, the 'owner' of real estate on whose interest a mechanic's lien attached is a person for whose immediate use and benefit the building, erection, or improvement is made." A vendor under an executory contract of sale whose vendee is in possession, and who makes improvements by erecting buildings on the real estate covered by such executory

contract, is not the "owner" within the meaning of this law. *Johnson v. Sollday*, 126 N. W. 99, 100, 19 N. D. 463.

Under Laws 1897, p. 516, c. 418, § 3, declaring that a contractor, subcontractor, laborer, or materialman in the performance, labor, or furnishing of materials for the improvement of any real property, "with the consent," or at the request, of the owner thereof, or his agent, contractor, or subcontractor, shall have a lien, etc., a person who has contracted to sell real estate remains "the owner" within such act until title passes. *Schnauffer v. Ahr*, 103 N. Y. Supp. 195, 199, 53 Misc. Rep. 299 (citing *Packard v. Sugarman*, 66 N. Y. Supp. 30, 31 Misc. Rep. 623).

#### Owner of import

One having full dominion over property, with a right to sell or otherwise dispose of it without accountability to any one, may be considered the "owner" within Customs Administrative Act June 10, 1890, c. 407, § 5, 26 Stat. 132, requiring that, "whenever merchandise imported into the United States is entered by invoice, one of the following declarations, according to the nature of the case, shall be filed with the collector of the port at the time of entry by the owner, importer, consignee, or agent," etc., and hence he might properly make the required declaration. *United States v. Ninety-Nine Diamonds*, 132 Fed. 579. See, also, *Id.*, 139 Fed. 961, 970, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185.

#### Owner of railroad

Under Const. art. 9, § 8, prohibiting the granting of a license to a foreign corporation to build a railroad within the state, and providing that where a railroad is partly in the state the "owners" or projectors thereof must incorporate in the state, the term "owners" applies more especially to those who have a right of property in a tangible railroad in existence in such form as to constitute the subject of ownership, 23 St. at Large, p. 1053, providing for the domestication of foreign railroad corporations, is invalid under such constitutional provision. *Carolina, C. & O. R. Co. v. McCown*, 66 S. E. 418, 423, 84 S. C. 318.

#### Owner of street

In Code Civ. Proc. § 3358, the word "owner" is defined as including all persons having any estate, interest, or easement in the property to be taken. In proceedings to condemn property in a public street, the fee of which was in a private individual for the erection and maintenance of a telephone system, neither the municipality nor its board of trustees has, as such, any estate, interest, or easement in the property sought to be taken, and they were in no sense "owners" of the property within the meaning of that term as used in the statute. *New Union*

*Telephone Co. v. Marsh*, 89 N. Y. Supp. 79, 82, 96 App. Div. 122.

One who owns the fee of the street in front of premises for which a liquor license is sought is, notwithstanding the easement of the public to use the street for travel, the "owner of real estate" within 25 feet of the premises, and so entitled under Rev. Laws, c. 100, § 15, to object to the granting of the license. *Moran v. Gallagher*, 85 N. E. 579, 580, 199 Mass. 486, 20 L. R. A. (N. S.) 116.

#### Owner of vessel

The word "owner," as used in the statute creating a lien on vessels, does not include a charterer. *Ballinger's Ann. Codes & St. § 5953*, providing that all steamers, vessels, etc., are liable for the nonperformance or malperformance of any contract for the transportation of passengers or property between places within the state, or to or from places within the state, made by their respective owners, masters, agents, or assignees, does not create a lien on the vessel for breach of contract of affreightment made by her charterer. *Guffey v. Alaska & P. S. S. Co.*, 130 Fed. 271, 279, 64 C. C. A. 517 (citing *The C. W. Moore*, 107 Fed. 957).

#### OWNER AFFECTED

See Affected.

#### OWNER OF RECORD

One holding under a recorded tax deed, invalid on its face, is not a "person appearing of record as owner," within Rev. Laws, c. 12, § 15, requiring an assessment to the owner of record; for, when a tax deed fails to convey a title, it fails to convey the rights of the original owner, who remains the only person appearing of record as owner, and a sale founded thereon is void. *Connors v. City of Lowell*, 95 N. E. 412, 416, 209 Mass. 111, Ann. Cas. 1912B, 627.

#### OWNER'S RISK

See At Owner's Risk.

The general words of exemption for liability for damage in the case of shipment of glass and the words "owner's risk" do not relieve a carrier from the consequences of its negligence. *Rieser v. Metropolitan Exp. Co.*, 91 N. Y. Supp. 170, 171, 45 Misc. Rep. 632.

#### OWNERSHIP

See Act of Ownership; Claim of Ownership; Clothe with Indicia of Ownership; Entire, Unconditional and Sole Ownership; Exclusive Ownership; Fitful Acts of Ownership; Imperfect Ownership; Joint Ownership; Perfect Ownership; Qualified Ownership; Sole and Unconditional Ownership; Unconditional and Sole Ownership.

Element of robbery, see Robbery.

As titles and rights to real property vary from the absolute and unqualified fee simple

to that of the mere occupant, so the word "ownership" varies in its significance, according to context and subject-matter. *Peterson v. Johnson*, 111 N. W. 659, 660, 132 Wis. 280 (citing *Merrill Ry. & Lighting Co. v. Merrill*, 96 N. W. 686, 119 Wis. 249 and 6 Words and Phrases, p. 4904).

"Ownership" is the state of being an owner, the right to own, exclusive right of possession, legal or just claim or title, proprietorship; so that claim of "ownership" is synonymous with claim of title. *Stryker v. Meagher*, 107 N. W. 792, 793, 76 Neb. 610 (citing *Bouv. Dict.*).

Where a full abstract of title to land tendered United States in exchange for lieu land was furnished, that grantors did not have an unincumbered title to land offered in exchange, in absence of fraud, did not entitle the government to rescind a patent granted for the lieu land, as "ownership" of land authorized to be conveyed in exchange does not imply perfect title. *United States v. Conklin*, 169 Fed. 177, 183.

Under Rev. Codes, 1905, § 4702, defining "ownership" as the right to possession and use to the exclusion of others, the term is broader than either "title" or "possession" and includes both. *Fleming v. Sherwood* (N. D.) 139 N. W. 101, 103, 43 L. R. A. (N. S.) 945.

#### Homestead entry

The relation between a homesteader and land which he has entered under the federal homestead law is an "ownership." It is what is described by the Louisiana Code as an "imperfect ownership," by which is meant an ownership which does not invest the titular with the right to use, enjoy, and dispose of the property in an unlimited manner. It is furthermore a conditional ownership. An imperfect conditional ownership under the Louisiana Code is an "ownership." The acquisition of land by the homesteader dates from the entry. The occupying and cultivating of the land for five years and the making of final proofs are merely conditions imposed upon the title, and the accomplishment of these conditions has a retroactive effect to the date of the entry. Consequently the homestead becomes the joint property of the husband and wife if the community of acquets and gains existed between them at the time of the entry, even though the proofs were made and the certificate of the patent issued only after the dissolution of the community by the death of the wife. *Crochet v. McCamant*, 40 South. 474, 476, 477, 116 La. 1, 114 Am. St. Rep. 538.

The homesteader by settlement and entry under the federal homestead laws acquires an inchoate title, which, when perfected, relates back to the date of entry. His possession is therefore that of quasi own-

er. *Mott v. Hopper*, 40 South. 921, 923, 116 La. 629.

#### Occupancy, possession, or seisin

"Ownership" of land has a broader significance than mere right of occupancy. An owner has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases. "Ownership" is the right by which a thing belongs to some one in particular, to the exclusion of all others. Indian agreement 1883 between the United States and Chiefs Moses and Sar-sarp-kin, of the Columbia reservation, and Tonasket and Lot, of the Colville reservation, provided for the removal of the tribes to the Colville reservation at their election, for their surrender of a large quantity of reservation lands, and for the allotment in severalty of one square mile of land to each head of a family or male adult, "in the possession or 'ownership' of which they shall be guaranteed and protected." This agreement was ratified by Act Cong. July 4, 1884 (23 Stat. 79, c. 180), providing that, in case the Indians elect to remain on the Columbia reservation, the Secretary of the Interior shall cause the quantity of land stipulated in the agreement to be allowed them: the same, when selected, "to be held for the exclusive use and occupation" of such Indians, and the remainder of the reservation to be restored to the public domain. Held, that land allotted to such Indians in severalty vested in them in fee, as distinguished from a mere right of possession. *United States v. Moore*, 154 Fed. 712, 715.

There may be an "ownership"—that is a right of property—without possession or a right to possession. *Schwald v. Brunjes*, 123 S. W. 472, 139 Mo. App. 516.

"The law recognizes two kinds of ownership in personal property; general and special." Where a person had the general property in goods seized under execution against another, and the judgment was satisfied, he became entitled to the immediate possession thereof, and had such ownership as would support an indictment for larceny against one stealing them while in custody of the law under the execution subsequent to the satisfaction of the judgment. *People v. Frankenberg*, 86 N. E. 128, 131, 236 Ill. 408.

"In burglary, 'ownership' means any possession which is rightful against the burglar." In a prosecution for burglary in entering a chicken house, evidence that prosecutor was in actual possession of the house as alleged at the time the burglary was committed was sufficient to sustain an allegation that prosecutor was the owner of the house. *State v. McGuire*, 91 S. W. 939, 942, 193 Mo. 215 (quoting and adopting definition in 2 Bish. New Cr. Proc. § 37).

In a prosecution for theft, the test of "ownership" is not whether the person from

whom the property was taken would be responsible for its loss to the real owner, but whether he had the actual care, control, and management of the property. *King v. State* (Tex.), 100 S. W. 387, 389.

The statute relating to the allegation of ownership of property, in indictments for crimes involving personal property, provides that "ownership" is constituted by the actual care, control, and management of the property. A minor son was living with his father, and under his direction and control, and was temporarily looking after horses which were on the range. Held, that the ownership of the horses was in the father, and an indictment for receiving the horses, which had been stolen, and bringing them into the state, which alleged ownership in the son, was insufficient. *Bryan v. State*, 111 S. W. 1035, 1036, 54 Tex. Cr. R. 59.

Where an indictment for burglary charged the entering of a warehouse, the property of H., proof that H. had the keys to the property, was in apparent control and occupancy thereof, and had been so for many years, that he stored therein beer belonging to a brewing company and property of his own and others, sufficiently showed him to have been the owner though the title was in the brewing company; the term "ownership" as used in an indictment for burglary meaning any possession which is rightful as against the burglar. *State v. Burns*, 136 N. W. 520, 155 Iowa, 488.

Under the acts of descent in this country, the word "seisin" is equivalent to "ownership." *North v. Graham*, 85 N. E. 267, 270, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189 (citing *Cook v. Hammond*, 6 Fed. Cas. 399, 4 Mason, 467).

#### **Ownership of corporate stock**

The ownership of stock in a corporation is the right to participate in the immunities and benefits of the corporation, and in the choice of its officers and management of its concerns, to share in its dividends and profits, and to receive an aliquot part of the proceeds of the capital on the winding up and termination of the active existence of the corporation. *Marbury Lumber Co. v. Hunter*, 53 South. 1028, 1029, 169 Ala. 503.

#### **Ownership of game**

There is a fundamental distinction between the "ownership" which one may acquire in game and the "ownership" which one may acquire in chattels or lands. *Sherwood v. Stephens*, 90 Pac. 345, 346, 13 Idaho, 299.

#### **Person assessed**

Greater New York Charter (Laws 1897, p. 367, c. 378) § 1027, provides that when taxes remain unpaid, the collector shall advertise such lands for sale at a day specified, and there shall be appended to the notice of

sale a statement of the property sold, or the statement of the property may be published in a pamphlet, and the notice shall also state that the statement of the taxes and "ownership of the property" is published in the pamphlet. In a pamphlet published under this section, the name of the owner of property was not given, but opposite the description of the lot, under the heading "To Whom Assessed," appeared the name of the person to whom the lot was assessed. Under Greater New York Charter, § 889 (page 317), the name of the owner or occupant is to be given in the assessment of property if known, but under section 894 (page 319) a tax is not invalid because the name of the lawful owner is not inscribed in the assessment roll. Held, that by the "ownership of the property" is meant the name of the person to whom it is assessed, and that the sale based on this notice was valid. *People ex rel. Myers v. Moynahan*, 114 N. Y. Supp. 417, 419, 130 App. Div. 46.

#### **OWNERSHIP IN FEE SIMPLE**

See Fee Simple.

#### **OX—OXEN**

See Yoke of Oxen.

As chattel, see Chattel.

#### **OXIDE**

##### **OXIDE OF ZINC**

In paragraph 57 of the tariff act of 1897, c. 11, § 1, Schedule A, 30 Stat. 154, providing for a tariff on "zinc, oxide of," and white paint or pigment containing zinc but not containing lead \* \* \* found in oil, white paint and "oxide of zinc" are not synonymous terms. *United States v. J. A. & W. Bird & Co.*, 167 Fed. 319, 320, 92 C. C. A. 631.

#### **OYER**

"By the 'oyer,' the bond is made a part of the declaration." *Cooke v. Graham*, 3 Cranch [7 U. S.] 229, 235, 2 L. Ed. 420.

The purpose of making "profer" of a deed, letters testamentary, letters of administration, or other instruments under seal, is to enable the opposite party to crave oyer thereof. The purpose of "oyer" is to enable the party craving it to hear the deed, etc., read, so that he may enter it upon the pleading and take advantage of any part thereof not already pleaded by his adversary. Thus a defendant may crave oyer and set out letters of administration if he wish to avail himself of any variance in the statement of them in the declaration. *Sautter v. Metropolitan Life Ins. Co.*, 63 Atl. 994, 995, 73 N. J. Law, 455 (citing 1 Chit. Pl. 431, 432).

**OYSTER**

As personal property, see Personal Property.

"'Oysters' are produced from eggs from which there hatches out a small free-swimming larva becoming in a few days spat. These seek and attach themselves to some solid support where they remain." The ownership of land whereon "oysters" are deposited is not a prerequisite to the owner-

ship of the oysters, and the fact that a person is guilty of trespass in planting and cultivating oysters on the land of another does not authorize the owner to take the oysters for his own use, though the owner may compel him to take them up or remove them as a nuisance. *Vroom v. Tilly*, 91 N. Y. Supp. 5152, 99 App. Div. 516 (citing *Enc. Amer.*).

**OYSTER BED**

As real estate, see Real Property.

## P

## P. A.

"P. a.," as used in a promissory note reciting, "Int. @ 6% p. a.," is an abbreviation for "per annum." *Belford v. Beatty*, 34 N. E. 254, 255, 145 Ill. 414.

## P. M.

After the general use of solar time became obsolete, the abbreviations "a. m." and "p. m." in designating time remained in use to distinguish between forenoon and afternoon. The accepted meaning of such an expression as "2 p. m." is afternoon, standard time, and it would have such meaning in a notice of foreclosure sale. *Orvik v. Casselman*, 105 N. W. 1105, 1106, 15 N. D. 34.

## PT.

The abbreviation "Pt.," written in a draft following the name of the president of the company, suggests his official position; but, as they do not seem to be commonly employed as indicating "president," parol proof was admissible. *Griffin v. Erskine*, 109 N. W. 13-15, 131 Iowa, 444, 9 Ann. Cas. 1193.

## PACE

See Common Traveling Pace.

## PACKAGE

See Cumbersome Package; Original Package; Unbroken Package.

Other packages, see Other.

See, also, Packet.

The term "in bulk" has long been understood in commercial circles as contradistinguished from "package" or "parcel," as where wheat, lard, and the like are sold in bulk. *Standard Oil Co. v. Commonwealth*, 82 S. W. 1020, 1022, 119 Ky. 75.

A "package" is a number of things bound together convenient for handling in conveyance. Generally the words "package" and "bundle," two words about as synonymous as can be, apply if they do not directly convey the exclusive idea of union or gathering together of several things attached or put up together. To put goods in a box or clothing in a trunk or bundle suggests the meaning of pack, and its derivative, "package," as including several things. Defendant bought sewing machines in Illinois where manufactured and the parts of the machine were put together and packed and shipped in separate packages, each machine placed in one package, and, as so delivered to defendant, were delivered by her to customers without breaking the package. It was held that these were packages exempt from taxation

and did not necessitate that the defendant have a peddler's license. *Henderson v. Ortte*, 38 South. 440, 441, 114 La. 523.

"Package" usually means a bundle put up for commercial handling. *State v. Neslund*, 120 N. W. 107, 108, 141 Iowa, 461.

The word "package," as used in the pure food law (Laws 1907, p. 243, c. 63), is liable to various interpretations, and applies to articles of food that are packed, bound, or put together in sizes determined by the manufacturer, and intended to pass as weighing one pound and so on through a great variety of foods, and does not apply to a ham or a side of bacon whose form, size, and weights are determined by the size, weight, and condition of the slaughtered animal. *State v. Swift & Co.*, 120 N. W. 1127, 1129, 84 Neb. 244.

## PACKERS' SKINS

The term "packers' skins" is used to designate skins removed from animals in large slaughterhouses, and are free from defects and are cleaner and better cured and can be worked into better leather than the skins which were known as "country skins." *Weil v. Stone*, 69 N. E. 696, 83 Ind. App. 112, 104 Am. St. Rep. 243.

## PACKET

The word "packet," as used in Rev. St. § 3982, prohibiting the establishment of any private express for the conveyance of letters or packets over post routes, is limited to its original meaning throughout the postal laws to cover only a written communication of four or more sheets, which by Act March 2, 1827, § 5, c. 61, 4 Stat. 238, was required to pay quadruple postage, and does not include a "packet of merchandise" not exceeding four pounds sent by mail. *Williams v. Wells Fargo & Co. Express*, 177 Fed. 352, 357, 101 C. C. A. 828, 35 L. R. A. (N. S.) 1084, 21 Ann. Cas. 699.

## PAGE

See Title Page.

## PAID

See Be Paid; Duly Paid; Erroneously Exacted or Paid; Money Paid; Unpaid.

It is sufficient to allege that defendant has not "paid" said sum, without adding that he has not paid any part of it. *Judson v. Eslava*, Minor (Ala.) 2, 3.

Under Rev. St. U. S. § 5198, declaring the charging a rate of interest by a national

bank greater than is allowed by the laws of the state where the bank is located, when knowingly done, to be a forfeiture of the entire interest, and providing that, where a greater rate has been "paid," the person paying it may recover in an action of debt of the bank receiving it twice the amount of interest paid, provided such action is commenced within two years from the time the usurious transaction occurred, a cause of action for the penalty arises immediately, and only when one who has given a bank a usurious note actually pays money thereon, which, with his knowledge and consent, it applies in payment of usurious interest, regardless of whether the principal debt has been paid. *McCarthy v. First Nat. Bank of Rapid City*, 121 N. W. 853, 860, 23 S. D. 269, 23 L. R. A. (N. S.) 835, 21 Ann. Cas. 437.

The words "shall be paid," in a will whereby testator gave his property to trustees to convert the same into cash and invest the proceeds in real estate producing a steady income and whereby he directed that the net income of the estate should be divided into shares and one-fifth of the income "shall be paid quarterly" to the widow for life, and on her death one-fifth of the principal of the estate, transferred and distributed as she might direct, whereby other shares of the income should be paid to designated persons for life and on their respective death, a fifth of the estate should go as directed, mean that the property was devised to the remaindermen, and there is nothing in them implying a conveyance of the title by the trustees. *In re Dunphy's Estate*, 81 Pac. 317, 318, 147 Cal. 95.

#### As payable

St. Louis City Charter, art. 6, § 25, as amended in 1901, providing that tax bills for public improvements shall be divided into not less than three nor more than 7 equal parts, payable in annual installments, the first payable 30 days after notice, provided that, where bills are not paid in installments, the lien thereof shall terminate within two years after their date, gives the right to pay special assessments in installments, and, where tax bills are so payable, an action is not barred in two years, though the holder of the bills elects to adjudge all the installments due on default in payment of the first installment, the word "paid" in the proviso meaning "payable," so that the proviso will read that, where bills are not payable in installments, the lien shall terminate within two years after their date. *Fruin v. Meredith*, 122 S. W. 1107, 1112, 145 Mo. App. 586.

#### As satisfied

The word "paid," as used in a finding that notes had been paid, means, *prima facie*, that the obligation has been satisfied and the demand extinguished. *Lynds v. Van Valkenburgh*, 93 Pac. 615, 621, 77 Kan. 24.

There is no substantial distinction between the words "paid" and "satisfied." Under Pen. Code, § 1205, providing that a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, a judgment fining defendant \$100 and directing his imprisonment "until said fine is paid, such imprisonment not to exceed one day for each \$20 of said fine that shall so remain unpaid," is not void for using the word "paid" instead of "satisfied," and does not deprive defendant of the right to discharge part of the fine by imprisonment for part of the time. *Ex parte Krouse*, 82 Pac. 1043, 1044, 148 Cal. 232 (citing *Ex parte Henshaw*, 15 Pac. 110, 73 Cal. 486).

#### PAID COMMUNICATION

The phrase "paid communication," as referring to a newspaper article published as a paid communication, means that the article is inserted as an advertisement, though it may appear in the editorial or literary part of the newspaper and possibly as notice that the paper does not hold itself responsible for the accuracy of the statements therein contained, but for that refers its readers to the persons over whose signature the article appears. *Del Ponte v. Societa Italiana Di M. S. Guglielmo Marconi*, 60 Atl. 237, 239, 27 R. I. 1, 70 L. R. A. 188, 114 Am. St. Rep. 17.

#### PAID DEPARTMENT

It was shown that six members of the fire department of defendant city were paid annual or monthly salaries, and all other members of the department were paid in accordance with the ordinance of the city: \$1 for the first hour, and 50 cents per hour for all subsequent time in the daytime, and 75 cents in the nighttime, for time spent in actual attendance at fires. Held, that such department was a paid department within the meaning of section 2968, Rev. Codes 1905, relating to distribution of certain funds. *Continental Hose Co. No. 1 v. City of Fargo*, 114 N. W. 834, 836, 17 N. D. 5.

#### PAID IN

See Fully Paid In.

#### PAID INTO COURT

A deposit by a guardian ad litem of infants of proceeds of actions brought for the infants in a savings bank, not a designated depository of funds of the court and not made under any order of the court, is not "money paid into court," within Code Civ. Proc. § 744a, and the court may not direct its transfer to the city chamberlain. *In re Harris*, 137 N. Y. Supp. 234, 235, 77 Misc. Rep. 590.

Money appropriated by the board of supervisors of a county to pay defalcations in the surrogate's office, and intrusting the distribution thereof to the surrogate in his administrative capacity, is not money "paid into court," within Laws 1892, c. 651, § 9, pro-



viding for the payment over of funds paid into court. In re City of New York (Special Fund), 122 N. Y. Supp. 656, 660, 137 App. Div. 803.

### PAID OFF

A reference in a pleading to a bond as "paid off" would seem to be a plainly implied admission that it was properly paid. Liberty Sav. Bank v. Campbell, 75 Va. 534, 543.

### PAID TAX

The words "paid tax," as used in Code N. C. § 1722, providing that grand jurors shall be selected from "such persons only as have paid tax for the preceding year," means that such person shall have paid all of the taxes assessed against him, and not merely a person who has paid a tax or part of the taxes. Breese v. United States, 143 Fed. 250, 253, 74 C. C. A. 388.

### PAID UP

See Full-Paid Stock.

A "paid-up policy" of insurance issues as a redemption from a forfeiture of the original policy which otherwise would cease and determine for nonpayment of premiums. Lenon v. Mutual Life Ins. Co., 98 S. W. 117, 119, 80 Ark. 563, 8 L. R. A. (N. S.) 193, 10 Ann. Cas. 467.

A 20-year insurance policy provided the manner in which the policy could, before the expiration of the period, on default in payment of premiums, be transferred into a fully "paid-up policy" for a certain percentage of the original amount, and among the requirements were the surrender of the policy and the acceptance of a new form of policy, and in the same connection provided that a "paid-up policy" would not entitle insured to the surplus for which provision was made in the 20-year policy. Insured, before the expiration of the period, and while his policy was still in force with all premiums paid, consulted the company's officers and stated that he wished to commute the premiums for the remaining time, and was told that the premiums would be commuted, but that, if he died, he would lose the premiums paid. A written memorandum of the commutation was made on the policy, which simply provided that a gross sum be paid in lieu with the premiums thereafter to become due, and concluded with the expression "making the policy paid up." Held, that the written memorandum would not make the policy a "paid-up policy" within the meaning of the other terms of the policy, so as to exclude insured from participation in the surplus. Mutual Life Ins. Co. of New York v. Murray, 75 Atl. 348, 350, 111 Md. 600.

A resolution adopted by a corporation's directors directed the secretary and president to issue to the stockholders the shares of stock subscribed by them respectively, and

later another resolution was passed that, in consideration of the assignment to the corporation of certain property, 240 shares of stock should be issued to R., 239 shares to B., and in consideration of \$1 and their good will and services other shares should be issued to certain others. Held, that under Const. art. 12, § 11, and Civ. Code, §§ 323, 359, prohibiting the issuance of certificates not paid up, the stock issued under such resolutions should be considered as "paid-up stock." Turner v. Fidelity Loan Concern, 83 Pac. 62, 66, 2 Cal. App. 122.

### PAIN

Where plaintiff demanded compensation for physical and mental pain, and the court charged that plaintiff demanded compensation for physical and mental pain, an instruction directing the jury in assessing the damages to consider the personal injury suffered, the pain already suffered, or which he might suffer in the future, etc., was not objectionable as restricting the damages to physical pain only, in the absence of any requested instruction on the subject, for the word "pain" was broad enough to include both physical and mental suffering. Hall v. Chicago, B. & Q. Ry. Co., 122 N. W. 894, 896, 145 Iowa, 291.

### PAINT

See White Paint.

### PAINTER

As mechanic, see Mechanic.

As machinist, see Machinist.

### PAINTINGS

As household goods, see Household Goods.

The term "paintings," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194, includes handpainted panels having a small calendar affixed, which is a trifling part of the entire article. A. A. Vantine & Co. v. United States, 168 Fed. 562.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194, for "paintings" in oil or water colors, does not include articles consisting of lithographic prints pasted on wood, and painted to a slight extent, and varnished. Steinhart & Bro. v. United States, 172 Fed. 168, 169.

Splash mats or screens, which have been crudely decorated at an expense of about 2½ cents apiece by stenciling and by hand painting, which are worth about 4 cents apiece, and which primarily are articles of utility rather than for decoration, are not dutiable as "paintings in oil or water colors" under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194. F. W. Woolworth & Co. v. United States, 152 Fed. 483, 484.

**PAINTS**

Persian berry extract, which is used in staining food products, and also as a dyestuff for coloring fabrics, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 58, 30 Stat. 154, as a color not belonging to the "paints, colors, pigments," etc., therein enumerated, nor, by similitude, under paragraph 20 or 22, 30 Stat. 152, relating respectively to berries advanced in value and to extracts of barks, etc., used for dyeing but is dutiable as an unenumerated manufactured article under section 6, 30 Stat. 205. *United States v. Berlin Aniline Works*, 154 Fed. 925, 926.

Enamel white paint, which contains zinc, but not lead, and is ground in oil, and to which, after grinding, ingredients are added to increase the gloss, is dutiable as "white paint \* \* \* containing zinc, but not containing lead, \* \* \* ground in oil," rather than "paints \* \* \* ground \* \* \* with solutions other than oil," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, pars. 57, 58, 30 Stat. 154. *United States v. J. A. & W. Bird & Co.*, 167 Fed. 319, 320, 92 C. C. A. 631.

**PAIR**

Primarily "pair" means two things of a kind, similar in form, identical in purpose, and matched or used together; but secondarily the word means a single thing composed essentially of two pieces or parts which are used only in combination and named only in the plural. For example, a pair of scissors has two blades, but one may be shorter than the other, and they are different types, etc. *Heywood Bros. & Wakefield Co. v. Syracuse Rapid Transit R. Co.*, 152 Fed. 453, 460.

**PAIS**

See Estoppel In Pais.

**PALM LEAVES**

As leaves, see Leaves.

Dutiable as ornamental leaves, see Ornamental Leaves.

Manufactures of, see Manufactures—Manufactured Articles.

**PALPABLE**

The word "evident" means "clear to the vision, especially clear to the understanding and satisfactory to the judgment." "Palpable" is a synonym. *State v. Kauffman*, 108 N. W. 246, 20 S. D. 620 (quoting with approval from *Webst. Dict.*).

**PALPABLY DANGEROUS**

Ky. St. § 831a, subsec. 11, provides that no child under 16 shall be engaged in sewing belts, or shall adjust any belt to any machinery; and subsection 12 (section 8248) makes it the duty of the owner of any manu-

factory, where any person under 16 is employed, to furnish some safe mechanical device for throwing belts on or off pulleys, and that all cogs, set screws, and palpably dangerous machinery shall be properly guarded. Plaintiff's intestate was a boy under 16, who worked at a nut-drilling machine, operated by a belt from shafting which stood more than his height from the floor, and while standing on a barrel to place the belt on the shafting he was caught by an unguarded set screw, and killed. It was part of his duty to place the belt on the shafting, and the defendant had furnished no belt shifter, or any device for throwing the belt on and off, and failed to exercise ordinary care to guard the set screw. Held, that the set screw was "palpably dangerous," that it was practicable to guard it, and that the defendant was liable. *Higgins Mfg. Co. v. Griesinger's Adm'r*, 139 S. W. 1059, 145 Ky. 1.

**PANNE VELVET**

So-called "panne velvet" is dutiable as "plush," and not as "velvets," under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 386, 30 Stat. 186. *United States v. Passavant & Co.*, 164 Fed. 912; *United States v. Silberstein, Castell & Co.*, 153 Fed. 965.

**PANORAMA**

See Theatrical Performance, Panoramas, etc.

A "panorama" is a picture which, representing scenes too extended to be seen at once, is exhibited a part at a time by being unrolled continuously before the spectators; and while a city ordinance imposing a license fee on and prescribing the location of museums, panoramas, cycloramas, kinetoscope, or phonograph parlors, does not specifically refer to the motion picture business, it is sufficiently covered by the words "panorama" and "kinetoscope," and must be held to be within the contemplation of the ordinance. *Laurelle v. Bush*, 119 Pac. 953, 955, 17 Cal. App. 409.

**PAPER**

See Commercial Paper; Crepe Paper; Handmade Paper; Printing Paper; Send on Your Paper; Sized and Super-calendered Paper; Surface-Coated Paper.

Any paper, see Any.

Manufactures of, see Manufactures—Manufactured Articles.

Other paper, see Other.

A paper exhibited to a person authorized to examine the condition of trust companies, as the unrecorded minutes of a meeting of directors, and containing a resolution for the purchase of shares of stock which the examiner had found among the assets of the company, is a "paper" within the meaning of

Trust Companies Act 1899 (P. L. 1899, p. 461) § 17, and if false and exhibited to the examiner with intent to deceive him, the officers exhibiting it were guilty of a crime under that section. *State v. Twining*, 62 Atl. 402, 64 Atl. 1073, 1076, 1135, 73 N. J. Law, 683.

Election Laws 1896, p. 925, c. 909, § 57, provides that a certificate of nomination for each separate "paper" thereof, if there be more than one paper, shall contain a declaration of intent of the subscribers to support at the poles the persons nominated therein. Held, that the word "paper" is not used in the sense of sheet, and a certificate of independent nomination composed of several sheets firmly bound together was but one paper, and the declaration provided for by the statute need not necessarily appear on each sheet, but was sufficient if the last sheet attached contained the notary's certificate. *In re Bulger*, 97 N. Y. Supp. 232, 233, 48 Misc. Rep. 584.

Plain paper was stamped by a single operation into shapes with lacelike effects, which are known as tops or dollies, and are used for placing on the tops of packages of candy, fruit, etc., or under finger bowls. Plain paper might have been used for the same purpose, except that it would not have been so pleasing. Held that, as the improvement of the original material had not interfered with its distinguishing characteristics, it was dutiable as "paper," rather than as "manufactures of paper," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, pars. 403, 407, 30 Stat. 189. *Hamilton v. United States*, 167 Fed. 796, 797, 93 C. C. A. 186.

So-called duplex lithographic transfer paper, which is used in transferring decalcomania designs to pottery, and is produced by pasting together two sheets of paper, one coated with a gummy substance and the other uncoated, is "paper," rather than "manufactures of paper," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, pars. 403, 407, 30 Stat. 189. *B. F. Drakenfeld & Co. v. United States*, 167 Fed. 798, 799, 93 C. C. A. 188.

#### **PAPER BAGS**

As printed matter, see Printed Matter.

#### **PAPER CURRENCY**

As property, see Property.

#### **PAPER CUTTER**

As apparatus, see Apparatus.

As tool, see Tools—Tools of Trade.

#### **PAPER ENVELOPES**

Pieces of paper which have been cut into shapes and sizes adapting them to be folded so as to constitute envelopes, but which are not shown to have been commercially known as envelopes at and prior to the time of the passage of the tariff act of July 24, 1897, c.

11, 30 Stat. 151, are not dutiable as "paper envelopes," under paragraph 399, Schedule M, § 1, of said act, 30 Stat. 188, but as manufactures of paper, under paragraph 407, 30 Stat. 189. *Hunter v. United States*, 134 Fed. 361, 67 C. C. A. 343.

Paper cut into particular shapes and sizes, ready to be folded and gummed, so as to constitute envelopes, and found to have been commercially known as "flat envelopes" at the time of the passage of the act, held dutiable as "paper envelopes, plain," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 399, 30 Stat. 188. *Hunter v. United States*, 143 Fed. 914, 915.

#### **PAPER STREET**

A street appearing on the recorded plat, but which has never been opened, nor prepared for use, nor used as a street, is known as a "paper street." *Raiolo v. Northern Pac. R. Co.*, 122 N. W. 489, 108 Minn. 431.

#### **PAPERS**

See Sight Draft Against Papers; Valuable Papers.

The word "papers," in Rev. St. 1899, § 292 (laws of administration), declaring it to be the duty of a public administrator to take into his charge and custody the estates of all deceased persons "in the following cases: \* \* \* When money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same," refers to papers constituting the assets or a part of the assets of the estate; that is, papers in which there is a property value. *Richardson v. Busch*, 95 S. W. 894, 896, 198 Mo. 174, 115 Am. St. Rep. 472; *De La Vergne v. Richardson*, 95 S. W. 898, 198 Mo. 189.

Bal. Ann. Codes & St. § 4269 (Pierce's Code, § 7070), provides that any stockholder or creditor of the company shall have the right to demand from an officer a certified copy of any paper placed on file in the office of the company. Section 4270 (section 7071) provides that if the officer having charge of any papers of the company shall refuse or neglect to exhibit them or allow them to be inspected, he shall be guilty of a misdemeanor or punishable by imprisonment in the county jail, or by fine, or by both. Held, that the papers referred to in section 4270 (section 7071) are the papers placed on file, within the meaning of the preceding section, meaning some paper lodged with and kept by the corporation, and pertaining to its corporate business, and, to subject an officer to the payment of the statutory penalty, there must be a demand for inspection of a designated paper or papers lodged with and kept by the corporation and pertaining to its corporate business by a person having an interest in inspecting the paper, and there must be a refusal to comply with the demand, and a sim-

ple demand to inspect the papers is not sufficient to subject the officer refusing it to the penalty. *Brown v. Kildea*, 108 Pac. 452, 58 Wash. 184.

## PAPERS AND DOCUMENTS

See Private Papers and Documents.

The common-law rule that a sheriff who begins service of an execution during his term of office shall finish it, although his term expires before he can do so, is not abrogated by Pub. St. R. I. c. 201, § 29, providing for the delivery by the sheriff to his successor of the "papers and documents" pertaining to his office. The term "papers and documents" as used in this section does not include writs or precepts delivered for service, and if a sheriff retains goods, levied on before the expiration of his term, for some time after such expiration, and then hands them over to his successor, who sells them on the execution, such retention of possession is legal. *Doliver v. Collingwood*, 8 Atl. 711, 712, 15 R. I. 510.

## PAPERS OR EVIDENCE

The primary election law (20 Laws 1897, p. 375, c. 393) provides that every election officer or person having the custody of any document or evidence of any description directed by the act to be made, filed, or preserved, who is guilty of stealing, willfully destroying, mutilating, or defacing, falsifying, or fraudulently removing or secreting the same, shall be guilty of a misdemeanor. Held, that ballots cast at a primary election were "papers or evidence" required to be preserved and delivered to the sheriff by section 29, p. 391, so that the destruction, mutilation, etc., thereof would constitute an offense. *State v. Tyre* (Del.) 67 Atl. 199, 203, 6 Pennewill, 343.

## PAPERS READ IN EVIDENCE

3 Starr & C. Ann. St. 1896, p. 8054, c. 110, par. 56, authorizing the jury to take to the jury room "papers read in evidence," other than depositions, empowers a jury to take to the jury room an X-ray photograph received in evidence. *Chicago & J. Electric R. Co. v. Spence*, 72 N. E. 798, 798, 213 Ill. 220, 104 Am. St. Rep. 213.

## PAR

The word "par," as used in a contract for a sale of town bonds at par, would seem to include accrued interest; nothing to the contrary appearing. *Diefenderfer v. State ex rel. First Nat. Bank*, 80 Pac. 667, 671, 13 Wyo. 387 (citing *Simonton, Mun. Bonds*, 145; *Illinois v. Delafield* [N. Y.] 8 Paige, 536; *Village of Ft. Edward v. Fish*, 50 N. E. 973, 156 N. Y. 363).

"The word 'par' is not to be confounded with the word 'similes'; it is used in opposi-

tion to it, as the expression, 'Magis pares sunt quam similes,' implying not likeness merely, but identity." *State v. Wirt County Court*, 59 S. E. 884, 888, 63 W. Va. 230.

## PAR VALUE

While it may be conceded that the words "par value" ordinarily are to be given the same meaning as face value when applied to bonds and stocks having a face value, yet when used as applied to surplus and undivided earnings, and not limited to bonds and stocks, the meaning may be very different. *People v. Miller*, 69 N. E. 1103, 1104, 177 N. Y. 461.

"Par value" means face value, and according to *Bouvier's Law Dict.* the term is commonly used to indicate the face value of bonds or stock. *Security Trust Co. v. Ford*, 79 N. E. 474, 475, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263.

Within Acts 1910, c. 99, authorizing the sale of interest-bearing state bonds at not less than "par," the "par value" is the amount of the principal, if the sale is at date of issuance of the bonds, and such amount, plus the value of the then accrued interest, if the sale is at a later date. *Smith v. State ex rel. McNeill*, 58 South. 179, 180, 99 Miss. 859, 35 L. R. A. (N. S.) 789.

The words "amount of capital stock represented by said additional stock," in Act March 4, 1850 (P. L. 130), providing for a preference as to additional stock of the company, and that the holders of other stock of the company should not be entitled to participate in any future dividend of the profits of the company until the holders of the additional stock should have been paid from the funds applicable to such dividend, 10 per cent. per annum on the amount of the capital stock of the company represented by the said additional shares is merely a clumsy paraphrase of the expression "par value," which the draftsman of the act probably regarded as too colloquial a term for use by the Legislature. *Sternbergh v. Brock*, 74 Atl. 166, 168, 225 Pa. 279, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877.

## PARAFFIN

In construing paragraphs 626, 633, § 2, Free List, Tariff Act July 24, 1897, c. 11, 30 Stat. 199, 200, providing, respectively, for a countervailing duty on "products of crude petroleum" and for the free entry of "paraffin," held, that the latter is the more specific, and governs the classification of paraffin, even though it be a product of crude petroleum. *Schoellkopf, Hartford & Hanna Co. v. United States*, 129 Fed. 58.

## PARAGRAPH

Act June 30, 1902, c. 1823, 32 Stat. 500, ratifying a supplemental agreement with the

Creek Indians, etc., by section 16 provides that lands shall not be alienated by allottees before the expiration of five years, except with the approval of the Secretary of the Interior. At the close of the section is the following provision: "Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity." By Act April 21, 1904, c. 1402, 33 Stat. 189, 204, all restrictions upon alienation of lands, except homesteads, were removed as to members of the Five Civilized Tribes "who were of full age and not of Indian blood." The above provisions of the earlier act are in separate paragraphs, grammatically considered. Held that, in view of the evident intent of Congress, the word "paragraph," as used in the second provision, must be construed to include the entire section, and that a conveyance made by an allottee, although not of Indian blood, while a minor and without the approval of the Secretary, was void, and could not be ratified after he reached majority. *Alfrey v. Colbert*, 168 Fed. 231, 234, 93 C. C. A. 517.

Webster defines "paragraph" as a distinct part of a discourse or writing; any portion of a section of writing or chapter which relates to a particular point, whether consisting of one sentence or many sentences. As used in Act Cong. June 30, 1902, c. 1323, § 16, providing that land allotted to a citizen of the Creek Nation shall not be alienated within five years, and that each citizen shall select from his allotment 40 acres as a homestead inalienable for 21 years, and providing the manner of selecting homesteads for certain classes of persons, and that the homesteads of citizens shall descend to their children, etc., and concluding by declaring any agreement or conveyance violative of any provision of this "paragraph" shall be void, etc., it means section. *Alfrey v. Colbert*, 104 S. W. 638, 646, 7 Ind. T. 838.

The term "paragraph," as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of count at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action. *Yates v. Jones Nat. Bank*, 105 N. W. 287, 290, 74 Neb. 734.

The word "paragraph," as used in section 16 of the Supplemental Agreement (Act June 30, 1902, c. 1323, 32 Stat. 503), which provides that "any agreement or conveyance of any kind or character, violative of the provisions of this paragraph shall be absolutely void," etc., is synonymous with the word "section." *Barnes v. Stonebraker*, 113 Pac. 908, 985, 28 Okl. 75.

## PARALDEHYDE

As medicinal preparation, see Medicinal Preparation.

## PARALLEL

The word "parallel," in an ordinance prohibiting any person to place or keep any sign projecting over any street or sidewalk unless it be attached and parallel to the building, was not uncertain or ambiguous, but the ordinance meant that no person should place any sign projecting over any sidewalk unless it should be attached to the building and parallel to the side of the building along which the sidewalk runs. *State v. Wightman*, 61 Atl. 56, 57, 78 Conn. 86.

### Parallel or nearly so

A recital that a street runs "parallel or nearly so" with another street intimates that the streets are not absolutely parallel with one another. *Reh fuss v. Hill*, 90 N. E. 187, 191, 243 Ill. 140.

### Parallel railroads

Where a foreign railroad reached the termini of a local road, but its line between such termini was longer and more indirect, requiring a change of cars and ferrying and ran no through trains between such termini, solicited no through business, and provided no terminal facilities at one terminus, and did not make any freight or passenger rates to compete with the local road, the two roads were not "parallel" or competing lines. *Illinois State Trust Co. v. St. Louis, I. M. & S. Ry. Co.*, 75 N. E. 562, 566, 217 Ill. 504.

### Parallel street

St. Louis City Charter, art. 6, § 14, provides that an assessment district for street improvements shall be made by drawing a line midway between the street to be improved and the next parallel or converging street on either side of the street to be improved, which line shall be the boundary of the district, except as otherwise provided. Held, that a parallel street within such section is not required to be one which parallels the street being improved for the whole distance of the improvement, but that the district line must deflect according as the street is paralleled, either in whole or in part by one street and partly by another. *Fruin-Bambrick Const. Co. v. St. Louis Shovel Co.*, 111 S. W. 86, 89, 211 Mo. 524.

## PARAMOUNT

### PARAMOUNT NECESSITY

The law of "paramount necessity" is the right of municipalities to secure an abundant supply of pure and wholesome water for daily use in domestic life, the flooding of sewers in preserving the public health, and the extinguishment of fires. *Penrhyn Slate*

Co. v. Granville Electric Light & P. Co., 73 N. E. 566, 569, 181 N. Y. 80, 2 Ann. Cas. 782.

## PARANOIA

"Paranoia" is a term used by medical experts, alienists, and authors on medical jurisprudence to designate the form of insanity characterized by systematized delusions; the term taking the place of "monomania" or "partial insanity." Taylor v. McClintock, 112 S. W. 405, 412, 87 Ark. 243.

## PARAPH

The "paraph" of a notary is his official signature, and where he paraphs a forged note he acts as a notary, and not as an individual, and one deceived by this paraph has a cause of action against the surety on his bond. While the paraph of a notary does not guarantee either the value of the property or the rank of the mortgage, it does guarantee the genuineness of the note and of the mortgage with which it is identified, and, where a notary fraudulently issues a note, the fraud gives rise to an action against him and his surety regardless of an absence of value, or of an act of mortgage. Harz v. Gowland, 52 South. 986-988, 126 La. 674.

## PARAPHERNAL

The word "paraphernal" is derived from the Greek "para," near or besides, and "pherna," meaning dowry or extra, and are words essentially related to marriage. Le Boeuf v. Melancon, 59 South. 102, 103, 181 La. 148.

### PARAPHERNAL PROPERTY

"Paraphernal property" is property brought to the marriage by one of the spouses, and as the word "paraphernal" connotes the idea of marriage, there can be no such thing as paraphernal property prior to marriage. Le Boeuf v. Melancon, 59 South. 102, 103, 181 La. 148.

## PARCEL

The term in "bulk" has long been understood in commercial circles as contradistinguished from "parcel," as where wheat, lard, and the like are sold in bulk. Standard Oil Co. v. Commonwealth, 82 S. W. 1020, 1022, 119 Ky. 75.

### As a tract of land

See Lots, Blocks, Tracts, and Parcels of Land.

The words "lot," "piece," and "parcel" apply peculiarly to the land itself, and are never employed to describe improvements. Cauty v. Staley, 123 Pac. 252, 254, 162 Cal. 379.

Laws 1890, p. 376, c. 132, § 32, provides that the assessor shall actually view when practicable and determine the true and full value of each lot of real property listed for

taxation and shall enter the value thereof in one column, etc., and the statutes further provide that the term "tract" or "lot" and "piece" or "parcel of real property," and "piece" or "parcel of land," whenever used in the act relating to revenue and taxation, shall be held to mean any contiguous quantity of land in the possession, owned by, or recorded as the property of, the same claimant, person, or company. Held, that under the statutes smaller tracts or subdivisions composing a larger tract could not be assessed as one tract where the land was owned by different persons under recorded titles or in joint ownership, and assessments in one tract of different ownerships or estates in different tracts seem to be inhibited where the different titles are of record. State Finance Co. v. Myers, 112 N. W. 76, 78, 16 N. D. 193.

Code, §§ 792, 816, 817, 818, 820, 821, 825, deal with the subject of street improvements, authorizing and providing the methods of assessments of special taxes therefor against "abutting" "lots" or "parcels" of ground. A portion of a lot sought to be assessed for paving improvements was separated from the street by another portion of the same original lot, but owned by a different person and used as a railroad right of way. Held only an assessment against the "parcel" or part of a lot which actually abuts on the street will be considered to be authorized. Kneeb v. Sioux City (Iowa) 137 N. W. 944, 945.

That the fee of the street where a railroad bridge is built across it, together with the fee thereof between that point and a distant block abutting on the street, is owned by the owner of such block, and not by the owners of the lots abutting at the point of the bridge and between it and such block, does not make the land under the bridge and such block one parcel, within the rule as to damages to the residue where part of a tract is taken. Coatsworth v. Lehigh Valley Ry. Co., 131 N. Y. Supp. 300, 301, 73 Misc. Rep. 645.

Under the provisions of section 5220. Rev. Codes, it is not necessary that the jury find the value of each legal subdivision of the tract sought to be condemned. If, however, there is more than one parcel of land, or several separate parcels or tracts, each separated from the other, then it is necessary for the jury to determine the value of each separate tract or parcel. But where the tract is a single or consolidated tract, the value may be fixed as a single parcel or tract. "Parcel" or tract of land, as used in this section, does not mean legal subdivision, but does mean a consolidated or single tract. Big Lost River Irr. Co. v. Davidson, 121 Pac. 88, 92, 21 Idaho, 160.

"The terms 'tract or lot,' and 'piece or parcel of real property,' or 'piece or parcel of land,' mean any contiguous quantity of land in the possession of, owned by, or re-

corded as the property of the same claimant, person, or company." In this connection the word "contiguous" means land which touches on the sides. Hence two quarters of the same section, which only touch at the corner, do not constitute, for the purpose of taxation, one tract or parcel of land. *Griffin v. Denison Land Co.*, 119 N. W. 1041, 1043, 18 N. D. 246 (quoting from Rev. Codes 1905, § 1480 [Rev. Codes 1890, § 1176]).

Laws 1903, p. 376, relating to opening and widening of streets, provides by section 16 that the superintendent of streets upon receiving a diagram shall assess the cost of an improvement upon the land in the district, including the property of any railroad. Held, in view of Civ. Code, § 3541, declaring that an interpretation which gives effect is preferred to one which makes void, that as all railroad land other than rights of way was subject to assessment under the general language used, it was intended to assess its rights of way, whether consisting of an easement, or title in fee, and that the use of the street for the purposes specified in its franchise constituted a piece or parcel of land within the meaning of the act subject to assessment for resulting benefits. *Los Angeles Pac. Co. v. Hubbard*, 121 Pac. 306, 309, 17 Cal. App. 646.

Where, on partition among cotenants of a tract of land to which pertained riparian rights to water for irrigation, the land was classified, each cotenant receiving a proportionate share of each class, and the prior right to all the water needed for irrigation was attached to the first class land though some of the allotments of such land did not abut on the stream, the water right belonging to such land, like other riparian rights, was in strict technical language "parcel of the land," and not a right appurtenant. *Rose v. Mesmer*, 75 Pac. 905, 907, 142 Cal. 322.

Flood waters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, may be taken at will by any person who can lawfully gain access to the stream, and conducted to lands not riparian, and even beyond the watershed, without the consent of the riparian owner and without compensation to him. They are not a part of the flow of the stream which constitutes "parcel" of his land within the meaning of the law of riparian rights. *Galatin v. Corning Irr. Co.*, 126 Pac. 864, 867, 63 Cal. 405.

## PARCELS

See Bill of Parcels.

## PARCENER

Rev. St. 1909, § 349, declares, that, when husband or wife dies leaving a child or children or other descendants, the widow or widower shall be entitled absolutely to a

share in the personal estate belonging to the husband or wife at the time of his or her death, equal to the share of a child. Section 337 provides that where any of the children of an intestate who shall have received in his lifetime any real or personal estate by way of advancement shall choose to come into partition with the other parceners, such advancement shall be brought into hotchpot with the estate descended. Held that, while a widow is entitled to a child's share in her deceased husband's estate she is not a "parcener" within section 337, so as to entitle her to compel children to whom advancements have been made to bring such advancements into hotchpot in determining the amount to which she was entitled as a child's share, under section 349. *Schaper's Ex'r v. Schaper*, 138 S. W. 896, 897, 158 Mo. App. 605.

## PARCHESI

The word "Parchesi" cannot be monopolized in the United States as a trade-mark for a game introduced from India, where it had long been known by a name similar in sound. *Selchow v. Chaffee & Selchow Mfg. Co.*, 132 Fed. 996, 997.

## PARCHMENT

See Imitation Parchment.

## PARDON

See Board of Pardons; Conditional Pardon.

Prerogative to grant, see Prerogative.  
See, also, Parole.

A "pardon" is a remission of guilt. *State ex rel. Collins v. Lewis*, 35 South. 816, 817, 111 La. 693 (citing *Territory v. Richardson*, 60 Pac. 244, 9 Okl. 579, 49 L. R. A. 440).

A "pardon" is an act of grace, and is regarded as a deed, which must be accepted by the convict to be valid. *People ex rel. Patrick v. Frost*, 117 N. Y. Supp. 524, 528, 133 App. Div. 179 (quoting and adopting definition in *United States v. Wilson*, 7 Pet. 150 [32 U. S.] 8 L. Ed. 640).

The word "pardon" includes a remission of the offense, or of the penalties, forfeitures, or sentences growing out of it. *Nelson v. Commonwealth*, 109 S. W. 337, 338, 128 Ky. 779, 16 L. R. A. (N. S.) 272 (citing *In Matter of —*, an Attorney, 86 N. Y. 563).

A "pardon" is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. *Ex parte Campion*, 112 N. W. 585, 588, 79 Neb. 364, 11 L. R. A. (N. S.) 865, 126 Am. St. Rep. 607, 16 Ann. Cas. 319 (quoting and adopting the definition in *United States v. Wilson*, 7 Pet. [32 U. S.] 150, 8 L. Ed. 640).

A "pardon" is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended. *Ex parte Ridley*, 106 Pac. 549, 551, 3 Okl. Cr. 350, 26 L. R. A. (N. S.) 110 (quoting and adopting definition in *United States v. Wilson*, 7 Pet. [32 U. S.] 150, 8 L. Ed. 640).

"A 'pardon' is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. \* \* \* It releases the offense and obliterates it in legal contemplation." *Fite v. State ex rel. Snider*, 88 S. W. 941, 943, 114 Tenn. 646, 1 L. R. A. (N. S.) 520, 4 Ann. Cas. 1108 (quoting and adopting definition in *United States v. Wilson*, 7 Pet. [32 U. S.] 150, 8 L. Ed. 640).

Under Const. p. 2, c. 2, § 1, art. 8, vesting the power to pardon offenses, except after conviction by impeachment, in the Governor, by and with the advice of Council, conditional pardons or commutations or respites of sentence can be granted only in conformity to the advice of Council; the words "power of pardoning offenses" including not only absolute pardons, but also lesser exercises of clemency. In *re Opinion of the Justices*, 98 N. E. 101, 210 Mass. 609.

A "pardon" or "amnesty" secures against the consequences of one's acts, and not against the acts themselves. It involves forgiveness; not forgetfulness. *United States v. Swift*, 186 Fed. 1002, 1017.

The power to pardon having been vested in the Legislature by the Constitution of Pennsylvania, as well as in the executive, the grant of power to the executive was no limitation on the right of the Legislature also to exercise the power; and hence the failure of the Legislature to exercise such power until the passage of Act March 31, 1860 (*Purd. Dig.* p. 469, par. 357), did not affect the validity of such act or pardons granted pursuant thereto. *United States v. Hughes*, 175 Fed. 238, 241, 242.

*Pub. Acts 1907*, p. 182, No. 144, making one abandoning his wife or children guilty of a felony, authorizing the court to suspend sentence on one convicted giving a bond conditioned that he will furnish his wife and children with necessary care, etc., is not invalid as invading the pardoning power of the executive, and confers no new power on courts possessing at common law inherent power to suspend sentence, which is a judicial function and distinct and different from the power to grant reprieves and pardons, since the suspension of the sentence postpones

the judgment, while the conviction and liability following it together with disabilities remain to become operative on sentence being given, while a pardon reaches both the punishment and the guilt, for it relieves the punishment and blots out the existence of the guilt. *People v. Stickle*, 121 N. W. 497, 499, 156 Mich. 557.

Const. art. 4, § 11, provides that, in all criminal cases except treason and impeachment, the Governor shall have power after conviction to grant reprieves, commutations of punishment, and pardons, etc. Acts 32d Leg. c. 44, provides that the district court judges may in prosecutions for certain offenses at defendant's request submit to the jury the issue as to whether or not the defendant has ever been charged with or convicted of crime, and, if the jury finds that he has not been, the judge may suspend the sentence on conviction. Such suspension is for an indefinite time with the power in the court to revoke on a violation of a requirement of good behavior, and compel the convict to undergo the penalty of the original sentence, or on good behavior for a time equal to double that of the sentence to bring the party into court and set aside and annul the former judgment. Held, that a pardon is an act of grace which exempts an individual on whom it is bestowed from the punishment the law inflicted for a crime which he has committed, and, although the word "pardon" is not used in the statute, as that is the effect of the statute, it is void within the constitutional provision prohibiting the exercise of powers delegated to one of the departments of government by either of the other two departments. *Snodgrass v. State (Tex.)* 150 S. W. 162, 165, 41 L. R. A. (N. S.) 1144.

#### Amnesty distinguished

"Pardon" is granted to an individual criminal by name, while "amnesty" is granted to classes of offenders or communities. They differ, not in kind, but solely in the number they severally affect. *United States v. Hughes*, 175 Fed. 238, 242.

"Amnesty," as defined by *Black's Law Dictionary*, is a sovereign act of pardon and forgetfulness for past acts of a criminal nature. It is at least coextensive in its meaning with the word "pardon" so far as its effect is concerned, because it effaces or wipes out the offense which has been committed; the difference between the two being that a pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction, and the court takes no notice of it unless pleaded or in some way claimed by the person pardoned, and it is usually granted by the crown or by the executive; but amnesty is extended to those who may be guilty, and is usually granted by Parliament or the Legislature, and to whole classes before trial. Amnesty is an abolition or oblivion of the offense. Pardon is its forgiveness. In re



Briggs, 47 S. E. 406, 411, 135 N. C. 118 (citing State v. Blalock, 61 N. C. 242).

## PARENT

The word "parent" means father or mother. Snyder v. Greendale Land Co., 91 N. E. 819, 822, 48 Ind. App. 178.

The word "parent," as used in a will, may have a bearing on the sense in which testator employed the phrase "living issue"; the word being confined in its original sense to a father or mother, but being sometimes used in construing wills to denote any lineal ancestor in furtherance of testator's intention. Rasquin v. Hamersley, 137 N. Y. Supp. 578, 583, 152 App. Div. 522.

"Parents," as used in a statute providing that every action for death shall be for the exclusive benefit of the wife, or husband and children, and, if there be neither of them, then of the "parents and next of kin of the person whose death shall be so caused," refers to the parents of the deceased person, and not the parents of his widow. Doyle v. Baltimore & O. R. Co., 90 N. E. 165, 167, 81 Ohio St. 184, 135 Am. St. Rep. 775.

The benefits under the certificate of a fraternal life insurance company, as designated in its constitution, were, in case the deceased left no widow or descendants, payable to his parents. The marriage of the insured's father to his own niece by the half blood was absolutely null and void without a divorce under the laws of Wisconsin, where the marriage was contracted; but by the laws of that state and of Minnesota, where the insured was born, the issue of such marriage was legitimate. Held, in view of the statute providing that all words, unless intended to be used in their technical sense, should be understood and construed according to the approved and common usage of the language, that the word "parent" was a common word, and meant "he that begets," "she that bears young," "a father or a mother"; and hence that the father was entitled as the designated beneficiary. Mund v. Rehaume, 117 Pac. 159, 161, 51 Colo. 129, Ann. Cas. 1913A, 1243.

### Adoptive parent

Ky. St. § 2071, provides that an adopted child shall be capable of inheriting as though he were the child of the petitioner. Section 1393, subsec. 1, provides that when a person dies intestate his real estate descends, first, to his "children" and their descendants. Section 1401 of the same chapter, limiting section 1393, provides that if an infant having title to real estate derived by gift, devise, or descent from one of its parents dies without issue such estate shall descend to that "parent" and his or her "kindred," and, if none, then to the other parent and his or her kindred. And section 460 declares that the common-law rule that statutes in derogation thereof should be strictly construed

does not apply to such revision, but that its provisions are to be liberally construed with a view to promote its object. Held, that the purpose of the limitation was to prevent the estate of the parent from being distributed to strangers to his blood; that the word "kindred" in section 1393 was not necessarily confined to blood relations, but might include a relation in law, as an adopted child, and that the word "children" in subsection 1 was not necessarily confined to children born in lawful wedlock, but might include children by adoption; that within section 1401 the foster parent of an adopted child was a "parent"; and hence that an adopted child inheriting from his parent was on the same footing as a natural child, so that where he inherited from his foster father, and then died in infancy without issue, the estate went back to the father's kindred, to the exclusion of his natural mother. Lanferman v. Vanzile, 150 S. W. 1008, 1011, 150 Ky. 751.

## PARENTAL RELATION

Compulsory Education Law, § 2, defines the phrase "persons in parental relation to a child" as including the parent, guardians, or other persons, whether one or more, lawfully having the care, custody, or control of such child. People ex rel. Brooklyn Children's Aid Soc. v. Hendrickson, 104 N. Y. Supp. 122, 125, 54 Misc. Rep. 337.

## PARENTIS

See In Loco Parentis.

## PARI DELICTO

See In Pari Delicto.

## PARI MATERIA

See In Pari Materia.

## PARISH

A "parish" precinct is not one of the subdivisions mentioned in Const. art. 232, authorizing special election to be held in any parish, municipal corporation, ward, or school district. Regard v. Police Jury of Avoyelles, 42 South. 438, 117 La. 952.

"The term 'religious society' had in the English ecclesiastical law and has in our law a well-defined meaning, and, as commonly used in our law, it is synonymous with 'parish,' 'precinct,' and designates an incorporated society created and maintained for the support of public worship." Riffle v. Proctor, 74 S. W. 409, 410, 99 Mo. App. 601.

Territorial areas, described in the nomenclature of Roman Catholic Church as "parishes," are not recognized by the law as corporate or political entities, and, if they were such, the church could not legislate concerning them. McEntee v. Bonacum,

92 N. W. 633, 634, 66 Neb. 651, 60 L. R. A. 440.

**As place**

See Place.

**As town**

See Town.

**PARISH PRECINCT**

As municipal corporation, see Municipal Corporation.

**PARK**

See Public Park.

A "park" is a place for the resort of the public for recreation, air, and light. *Village of Riverside v. MacLain*, 71 N. E. 408, 414, 210 Ill. 308, 66 L. R. A. 288, 102 Am. St. Rep. 164.

A "park" may be defined as a piece of ground set apart to be used by the public as a place for rest, recreation, exercise, pleasure, amusement, and enjoyment. *Northport Wesleyan Grove Campmeeting Ass'n v. Andrews*, 71 Atl. 1027, 1030, 104 Me. 342, 20 L. R. A. (N. S.) 976.

A "park" is defined in the Century Dictionary as a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye, as well as opportunity for open-air recreation. The term "park" is not applicable to private inclosures enjoyed by a few, nor to a game and fish preserve. *Commonwealth v. Hazen*, 56 Atl. 263, 265, 207 Pa. 52.

In the common understanding, a "park" is a piece of ground in or near a city or town for ornament and as a place for the resort of the public for recreation and amusement, and it is usually laid off in walks, drives, and recreation grounds. *South Park Com'rs v. Montgomery Ward & Co.*, 93 N. E. 910, 912, 248 Ill. 299, 21 Ann. Cas. 127.

The word "park" written on a parcel of land designated on a plat implies that such parcel is dedicated to the public for park purposes, and the sale of lots with reference to such plat, especially where such lots abut the park or are separated from it by a street only, carries with it the right on the part of the grantees to have the parcel used for public park purposes. *Florida E. C. R. Co. v. Worley*, 38 South. 618, 621, 49 Fla. 297.

"The word 'park' means to the sense of every person a place open to every one. It carries no idea of restriction to any part of the public or to any specific number of persons. Restrictions as to time of entrance or behavior of those entering are conceivable, but the idea that any class of the community is to be excluded would not be entertained primarily by any person in connection with the idea of a park within the limits of a city. The impression which any

person would receive by looking at a map delineating a tract of 60 acres with streets and a square or block marked 'park' would be that of a place of public resort. The popular and natural meaning of the term as so used is a place set apart for the enjoyment, comfort, and recreation of the inhabitants of the city or town in which it is located, and the legal effect of such platting, filing, and selling with reference thereto is not varied by the fact that the word 'park' is preceded by some qualifying word." Where a block on a plat of an addition to a city was marked "Ellwood Park," and the plat was filed in the deed records of the county, and lots were sold describing the property by lot and block number as shown by the plat, there was a dedication of a public park. *Sanborn v. City of Amarillo*, 93 S. W. 473, 474, 42 Tex. Civ. App. 115.

A tract of land designated on the plat of a village as a common extended about 18 rods to a new street. The owner divided the land surrounding the common into lots and sold the same by deeds, conveying to the grantees easements over the common, and later conveyed the fee in the common to a church. Dwelling houses were erected on lots on the north side of the common which afforded the only means of access to two of such lots. The common was accepted by the village as a street, and trees were permitted to grow thereon; but there was no ornamentation of the land on either side of the roadway. Held that the common did not constitute a park so as to be exempt from condemnation by a railroad company under Railroad Law (Laws 1899, c. 710) § 108; the term "park" being understood to signify an extensive area of land devoted exclusively to the use of the public, to be ornamented and embellished, and within the exclusive dominion of the public authorities, without easement or privilege on the part of individuals to occupy or use the same to the exclusion of the public. *Buffalo, L. & R. Ry. Co. v. Hoyer*, 132 N. Y. Supp. 31, 34, 147 App. Div. 205.

"A 'park' is a piece of ground set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open air recreation." A plan showing an open square marked "Alliquippa grove," colored in green with paths through it, and an announcement that the grove had been set apart as a public park, is sufficient to establish a dedication as a park; the fact that the word "grove" was used instead of "park" being immaterial. *Morrow v. Highland Grove Traction Co.*, 69 Atl. 41, 43, 219 Pa. 619, 123 Am. St. Rep. 677 (quoting and adopting *Commonwealth v. Hazen*, 56 Atl. 263, 207 Pa. 52).

Plaintiff's father filed a plat of a city addition containing a block designated "Eb-

men's Park." In an action in a state court, it was held by the state Supreme Court that the term "park," as used in the plat, meant a tract of ground set apart for purposes of public ornament or recreation, and that the annexation of the name in the plat in question did not prevent the plat from operating as a statutory dedication of the block to public use. Held, that such decision, even though not conclusive on the federal courts, being based on persuasive reasoning, would be followed under the doctrine of comity. *Ehmen v. City of Gothenburg, Neb.*, 200 Fed. 564, 566, 119 C. C. A. 44.

**As internal improvement**

See Internal Improvement.

**As place**

See Place; Public Place.

**As public use**

See Public Use (In Eminent Domain).

**As public utility**

See Public Utility.

**Square distinguished**

The word "park," written upon a block upon a map of city property, indicates a public use; and conveyances made by the owners of the platted land, by reference to such map, operate conclusively as a dedication of the block. There is little, if any, distinction between the words "park" and "square," and when used in this way they mean substantially the same thing. *Frauenthal v. Slaten*, 121 S. W. 395, 397, 398, 91 Ark. 350.

**PARKING**

Included in street, see Street.

The term "parking," as used in Code, § 792, providing that cities shall have power to improve any street by parking the same or any part thereof, is incapable of any plausible definition which does not involve the idea of beautifying those portions of the street not necessarily occupied by walks and roadways. Hence the parking need not be confined to that part of a street between the lot line and the driveway, but the driveway may be divided by a strip of parking along the center line. *Downing v. City of Des Moines*, 99 N. W. 1066, 1067, 124 Iowa, 289.

The parking of cars on private property does not constitute a nuisance, and there is no reason why the owner should not store them on his property, and an ordinance prohibiting the same is invalid. "Parking," literally speaking, is the assembling of things or animals within a park, as the parking of artillery, or the parking of deer; and, as applied to an ordinance forbidding the parking of cars at a certain place, it means the assembling of cars, few or many. *City of New Orleans v. Lenfant*, 52 South. 575, 578, 126 La. 455, 29 L. R. A. (N. S.) 642.

**PARKWAY**

As boulevard, see Boulevard.

**PAROL**

**PAROL CONTRACT**

If a written contract is relied on, the entire contract must be in writing, since, if only part of it be in writing, it will be deemed in law a parol contract. *Miller v. Sharp* (Ind.) 100 N. E. 108, 109.

**PAROL DEDICATION**

See Dedication.

**PAROL DEMURDER**

At common law, when the heir was sued at law upon a specialty obligation of the ancestor chargeable upon the inheritance, he might pray that "the parol demurrer"—that is to say, that the pleadings or proceedings be stayed till he should attain his majority. This privilege was based on feudal reasons, and was confined to heirs. It did not extend to devisees. *Plasket v. Beeby*, 4 East, 490. The privilege was not merely on account of the inability of the infant heir to defend himself by reason of his infancy, but from an absolute deficiency of funds, arising out of the nature of the feudal tenures. For during the subsistence of wardships the estate of the heir in chivalry was during his minority in the hands of the guardian in chivalry, who had the whole profits. How the privilege came to be extended at common law to other heirs is lost in antiquity. The rule remained in England and the older states, greatly modified by statutory provision, however, long after the policy on which it was founded became obsolete, and now the parol demurrer has been abolished by statute in England, New York, and probably other states. *Joyce v. McAvoy*, 31 Cal. 273, 280, 89 Am. Dec. 172 (citing Whart. Law Dict. 558; 2 Kent, Comm. 245, note "b").

**PAROLE**

A "parole" is a release of a convict from imprisonment, on specified conditions to be observed by him, and a suspension of his sentence during the liberty thus granted. *Ex parte Ridley*, 106 Pac. 549, 551, 8 Okl. Cr. 350, 26 L. R. A. (N. S.) 110.

The "parole" of a prisoner as the term is used in the Ohio statutes is a method of discipline and treatment. He remains, while on "parole," in the custody of the workhouse officials. Under Rev. St. §§ 5539, 5544, providing that persons convicted of offenses against the United States, and who are imprisoned in a jail or penitentiary of any state or territory, shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory, a federal prisoner sentenced to imprisonment in a workhouse in Ohio may

be paroled by the prison authorities. In re Naples, 142 Fed. 781.

## PARSEE

As white person, see White Person.

## PART

See Child's Part; Compact Part of Town; Each and Every Part; In Part; On the Part of; Reversal in Part; Tracks and Running Parts; Traveled Part; Traversing Parts of a Machine. Any part, see Any.

### Part of congregation

Under the statute inhibiting the disturbance of a congregation, or a "part of a congregation," any member of the congregation is a part of the congregation; and hence, where accused, before a large part of a Sunday school audience had left, unhitched an old shabby horse and buggy belonging to prosecuting witness, and, with the intent to mortify her, drove it up in front of the Sunday school, accused violated the statute. Wyatt v. State, 119 S. W. 1147, 1148, 56 Tex. Cr. R. 50.

### Part of criminal proceedings

It is a rule established by federal decision that the submission of an indictment to a grand jury, and the examination of witnesses before them in relation to the same, are no part of criminal proceedings against the accused within the meaning of the fifth constitutional amendment, but are merely to assist the grand jury in determining whether such proceedings shall be commenced, and where the accused, afterward indicted by the same grand jury, are brought before them as witnesses by subpoena, they are not parties to any proceeding then and there in progress, and must rest their claim of privilege or immunity upon the rights of a witness, and not those of a party. United States v. Price, 163 F. 904, 906.

### Part of franchise

A "franchise" is "a privilege or exemption from ordinary jurisdiction as for a corporation to hold pleas to such a value, etc., and sometimes it is an immunity from tribute, whether it is either personal or real" (quoting from Jacob's Law Dictionary). Though there are cases which seem to question this definition to its fullest extent and which do not extend it to exemptions from taxation, still it is held by the highest authority that such an exemption is "part of the franchise" and often a valuable or essential part of it. Columbia Water Power Co. v. Campbell, 54 S. E. 833, 837, 75 S. C. 84 (citing Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 20 L. Ed. 568; Gulf & S. I. R. Co. v. Hewes, 22 Sup. Ct. 26, 29, 183 U. S. 67, 74, 46 L. Ed. 86).

### Part of goods sold

The phrase "part of the goods sold," within the statute of frauds declaring that the acceptance and receipt of part of the goods sold shall take the contract of sale out of the operation of the statute, does not mean a sample which is merely used for the purpose of showing the quality, etc., of the goods offered for sale, but which is not itself to be sold; and where, during negotiations for a sale of cases of canned tomatoes, the seller took from his store shelves three cans, one of which was sampled by the buyer, and after an agreement was reached the buyer took the other two cans, the samples do not constitute a "part of the goods sold," and the delivery thereof did not satisfy the statute, since the bulk sold was not diminished by the samples delivered. Richardson v. Smith, 60 Atl. 612, 615, 101 Md. 15, 70 L. R. A. 321, 109 Am. St. Rep. 552, 4 Ann. Cas. 184.

### Part of judgment

See Integral Part of Judgment.

### Part of property

The word "part," used in Rev. Laws 1905, § 3590, providing upon divorce that the court may decree to the wife such part of the personal and real estate of the husband not exceeding one-third thereof as it deems just and reasonable, is equivalent to a share or portion, and authorizes the court to award to the wife as permanent alimony a gross sum or specific part of the husband's property. Longbotham v. Longbotham, 137 N. W. 387, 389, 119 Minn. 139.

### Parts of rifles

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 157, 30 Stat. 164 for "parts of rifles," is not limited to those in a finished condition, but embraces parts, such as rough-bored rifle barrels, advanced to a condition unfitting them for any other use than in connection with rifles. United States v. Riga, 171 Fed. 783.

### Part of railroad

A railroad owned, controlled, or operated by another, but not connecting therewith, is not a "part" thereof. Coal & Coke Ry. Co. v. Conley, 67 S. E. 613, 634, 67 W. Va. 129.

### Parts of watches

Certain incomplete watch movements, adjusted so as to run, the only parts lacking being the dial, or the dial, the various hands, and the minute wheel, are dutiable as "watch movements," and not as "parts of watches," not otherwise provided for, under paragraph 191, Schedule C, § 1, Tariff Act July 24, 1897, 30 Stat. 167. Hipp, Didisheim & Bro. v. United States, 123 Fed. 998, 999.

### Parts or fittings of guns

Rubber recoil pads, intended for reducing the shock from the discharge of a gun, but which are not a necessary attachment, are not dutiable as "parts or fittings of guns" un-

der the Tariff Act. *Schoverling, Daly & Gales v. United States*, 142 Fed. 302, 303.

#### Parts thereof

Possession of an untagged head of a moose which was lawfully killed is lawful; the words "parts thereof," in Laws 1905, c. 344, § 37 (Rev. Laws Supp. 1909, § 2249-40), providing for the tagging of game, and that, while the tags remain on such game and parts thereof, they may be kept in possession until consumed, referring to such parts of the game as are suitable for human food. *Hanson v. Storey*, 131 N. W. 481, 482, 114 Minn. 463.

#### PART PAYMENT

As part performance, see Part Performance.

The "part payment" required by the statute of frauds is the usual payment whereby the buyer unconditionally transfers money or property to the seller, which the latter unconditionally accepts in discharge pro tanto of the purchase price. *Leonard v. Roth*, 130 N. W. 208, 211, 164 Mich. 648.

During negotiations for the sale of certain logs, the seller, who was unable to talk English, refused to agree to load the logs at his own expense, and the buyer's agent would not agree to pay such expense, whereupon the seller was referred to the buyer himself; the agent inclosing an order on the buyer directing payment of \$230 to the seller on account of the logs. The letter and order having been delivered to the seller, he had them translated to him, and when he ascertained their contents returned them and sold the logs to another. Held, that the delivery of such order did not constitute "payment" of a part of the price, and that there was therefore no valid contract for the sale of the logs within the statute of frauds; there being neither delivery nor memorandum signed by the party to be charged. *Johnson v. Morrison*, 128 N. W. 243, 245, 163 Mich. 322.

"Part payment" of a debt does not of itself take the case out of the statute of limitations, but to have that effect it must appear that the payment was made on account of a debt for which action is brought, and that the payment was made as a part of a larger indebtedness and under such considerations as will warrant a finding of an implied promise to pay the balance. When a bank employed plaintiff to conduct business for its own benefit, but in his name, and money for use in the business was procured on plaintiff's notes indorsed by his brother, and plaintiff received a certain sum per month, which the bank understood was his compensation, but after the business was wound up, the bank, understanding that plaintiff was dissatisfied with the amount he had received, paid a further sum to plaintiff and his brother, and the minutes of the directors' meeting stated that such sum was

paid for services, and three days after the receipt of the check plaintiff sent a receipt for "part payment" for services, such payment was a gratuity, and did not affect the running of limitation against an action for further compensation. *Ryan v. Canton Nat. Bank*, 63 Atl. 1062, 1066, 103 Md. 428 (quoting and adopting definition in *Wood, Ltd.* § 97).

#### PART PERFORMANCE

Payment of a part, or even of the whole, of the purchase money, under an oral agreement for the sale of land, is not an act of "part performance" to take the contract out of the statute of frauds. *Cooper v. Colson*, 58 Atl. 337, 338, 66 N. J. Eq. 328, 105 Am. St. Rep. 660, 1 Ann. Cas. 997.

The most important acts which constitute a sufficient "part performance" to authorize specific performance of an oral contract to convey land are actual possession, permanent and valuable improvements, and the two combined. The possession constituting "part performance" within the rule as to enforcement of oral contracts for the sale of land must be taken with the consent of the vendor. *Steensland v. Noel*, 184 N. W. 207, 211, 28 S. D. 522.

A "part performance" to take an oral agreement to convey real estate out of the statute of frauds must be substantial, and of such a nature that the refusal to enforce the agreement would result, not merely in the denial of the right which the agreement was intended to confer, but in an "unjust and unconscientious" injury. In *re Bennett*, 132 N. W. 309, 311, 115 Minn. 342.

Payment of the purchase money by a purchaser under a parol contract of purchase is not alone such "part performance" of an agreement to sell real estate as to authorize a court to enforce its specific performance; but part payment and taking possession in good faith, or taking possession with the knowledge of the vendor and making valuable improvements, constitute such "part performance" as will ordinarily warrant a court in decreeing specific performance of the contract. *Sutherland v. Taintor*, 87 Pac. 900, 17 Okl. 427.

The doctrine as to "part performance" taking a transaction out of the statute of frauds, so that the relations between the parties may be dealt with judicially to prevent injustice, is grounded on the idea that the opposite party, by the statute and such "part performance," has obtained title to something of value, for which, independently of the statute, he should render an equivalent. *Rowell v. Smith*, 102 N. W. 1, 2, 123 Wis. 510, 3 Ann. Cas. 773.

Acts done under a parol contract for the sale of an interest in land most frequently held as such "part performance" as to take the same out of the statute of frauds, are:

(a) The delivery of possession to, or the assumption of exclusive and notorious possession by, the vendee under the verbal contract of sale, and with the knowledge of the vendor, accompanied by part payment of the consideration; (b) or the expenditure of money by the vendee in making improvements, permanently beneficial to the estate, with the knowledge of the vendor, and in pursuance of such parol agreement of sale; (c) or where the parties have so acted under the parol agreement as to alter their position so that a restoration to the former position is impractical or impossible; (d) or where the parties have so acted under the agreement that to allow the defendant to take shelter under the statute, would be to inflict an unjust and unconscientious injury or loss upon the other party. *Harris v. Arthur*, 127 Pac. 695, 697, 36 Okl. 33.

Payment by a purchaser of the purchase money, accompanied by his entry into possession of the premises in good faith, under the parol contract of sale, with the consent of the vendor, followed by the making of valuable improvements on the premises, is such a "part performance" as will support an action for specific performance. *Halsell v. Renfrow*, 78 Pac. 118, 123, 14 Okl. 674, 2 Ann. Cas. 286.

Payment of the purchase price, in whole or in part, does not constitute a sufficient "part performance" of an oral agreement to convey lands to take the same out of the statute of frauds. *Chamberlain v. Abrams*, 79 Pac. 204, 206, 36 Wash. 587.

While the phrase "part performance" is commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced, yet the whole doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation on the faith of the oral agreement that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. Hence the term "part performance" falls far short of expressing the whole doctrine and theory of courts of equity in this matter. The change of situation necessary to create this equitable estoppel must, of course, have been made in reliance upon and in pursuance of the oral agreement, and so connected with the performance of the contract that from the nature of the case the defendant should understand it was done in reliance upon his agreement. *Borrow v. Borrow*, 76 Pac. 305, 307, 34 Wash. 684.

Acts which do not unmistakably point to a contract existing between the parties, or which can be reasonably accounted for in some other manner than as having been done in pursuance of a contract, do not constitute a "part performance" sufficient in any case to take the contract out of the statute of

frauds. Prof. Pomeroy says a plaintiff cannot, in the face of the statute, prove a verbal contract and then show that it has been performed. He must first prove acts done by himself, or on his behalf, which point unmistakably to a contract between himself and defendant, which cannot in the ordinary course of human conduct be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract, and although these acts of part performance cannot of themselves indicate all the terms of the agreement sought to be enforced, they must be consistent with it and in conformity with its provisions, when these shall have been shown by the subsequent parol evidence. *Lozler v. Hill*, 59 Atl. 234, 238, 68 N. J. Eq. 300.

The phrase "part performance," although commonly used as a short statement of a general ground on which verbal agreements regarding real estate are enforced, rests on the principle of fraud, and proceeds on the idea that the party has so changed his situation on the faith of the oral agreement that it would be a fraud on him to permit the other party to defeat the agreement by setting up the statute. The change of situation necessary to create this equitable estoppel must have been in reliance on and in pursuance of the oral agreement, and so connected with the performance of the contract that from the nature of the case the other party to the contract should understand it was done in reliance on his agreement, and the acts done must be related to and connected with the contract and the other party's performance of it. *Veum v. Sheeran*, 104 N. W. 135, 136, 95 Minn. 315 (citing *Brown v. Hoag*, 29 N. W. 135, 35 Minn. 373; *Jorgenson v. Jorgenson*, 84 N. W. 221, 41 Minn. 428; *Browne, St. Frauds*, §§ 457, 458).

## PARTLY

Ordinarily the words "not wholly within" refer to a situation where a part is within. "Not wholly" is synonymous with "partly." *People ex rel. Donegan v. Dooling*, 125 N. Y. Supp. 783, 785, 141 App. Div. 31.

## PARTIAL

### PARTIAL ACCEPTANCE

A "partial acceptance" is a qualified acceptance, and such acceptances consist in a change of amount, of place, or date of payment. For one to change anything in the sense of offering to contract for its change presupposes that he knows of its original condition. A bank in Missouri, in response to an inquiry from a bank in Wisconsin, telegraphed that it would honor a person's draft for \$800. The draft had been drawn for that sum with exchange. The bank in Missouri did not know that the draft differed from the one it was asked to accept. Held, that there

was no "partial acceptance," so as to make the bank liable for \$800. *State Bank of Fox Lake v. Citizens' Nat. Bank of King City*, 90 S. W. 123, 124, 114 Mo. App. 663.

### PARTIAL EVICTION

A total eviction exists where the tenant is deprived of the whole of the premises leased, and it is "partial" when the tenant is deprived of a substantial part of the premises. *Jackson v. Paterno*, 108 N. Y. Supp. 1073, 1076, 58 Misc. Rep. 201.

### PARTIAL INSANITY

If the trial court see fit, it may recognize monomania, or so-called "partial insanity," as distinguished from "general insanity," when instructing the jury in a criminal case involving that form of mental derangement as a defense; but it is not imperative that it should do so, and, if the proper tests of criminal responsibility for the act in question be stated in the instructions, the substantial rights of the defendant are sufficiently protected. *State v. Moore*, 102 Pac. 475, 477, 80 Kan. 232.

### PARTIAL LIQUIDATIONS

The term "partial liquidations," when used in connection with corporations, means proceedings involving the surrender by a corporation of portions of its capital. *Smith v. Dana*, 60 Atl. 117, 123, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51.

### PARTIAL LOSS

In the case of insurance on goods from one port to another and until safely landed, where, after a part of the goods are landed, the residue on board are lost, this is frequently denominated a "total loss," though it is really a "partial loss," because the goods landed were not, until all the goods were landed, withdrawn from all the risks against which they were insured, although they were withdrawn from the particular risk by which the loss occurred. *American Ins. Co. v. Griswold* (N. Y.) 14 Wend. 399, 488.

### PARTIAL RESTRAINT

The terms "general restraint of trade" and "partial restraint of trade" have no longer a territorial meaning. In respect of time and territory, and in the absence of any affirmative showing that the public welfare is put in jeopardy, or that a monopoly is created, or the like, the validity of all contracts in restraint of trade must be made to depend upon the question as presented by each case, whether the restraint goes so far as to reasonably insure to the purchaser the full enjoyment of the right purchased by him in good faith and for a good and valuable consideration. *Swigert & Howard v. Tilden*, 97 N. W. 82, 86, 121 Iowa, 650, 63 L. R. A. 605, 100 Am. St. Rep. 374.

### PARTIAL VERDICT

A "partial verdict" is one of conviction as to a part of the charge and acquittal or silence as to the residue. *Blackshare v. State*, 128 S. W. 549, 551, 94 Ark. 548, 140 Am. St. Rep. 144 (quoting and adopting definition in 1 Bish. New Cr. Proc. § 1009).

#### Special verdict distinguished

See Special Verdict.

### PARTIALITY

The word "partiality," as used in *Burns' Ann. St.* 1901, §§ 5511, 5512, providing for a penalty recoverable against a telegraph company for "discrimination" and "partiality" in the transmission and delivery of messages, does not imply willfulness and positive wrongdoing on the part of a telegraph company as grounds for the penalty. *Western Union Telegraph Co. v. McClelland*, 78 N. E. 672, 673, 38 Ind. App. 578 (adopting definition in *Western Union Tel. Co. v. Braxtan*, 74 N. E. 985, 165 Ind. 165).

It is the rule of law that, independently of any statute, a railroad company must treat its patrons impartially and avoid unjust discrimination. "Partiality" is a term appropriately used to describe a distinction made between shippers in charges made for essentially similar services under essentially similar conditions. If the circumstances make the services or conditions different, a variation in the charge does not constitute "partiality." *Missouri, etc., R. Co. v. New Era Milling Co.*, 100 Pac. 273, 276, 79 Kan. 435.

Act April 8, 1885 (Laws 1885, p. 151, c. 48), provides that every telegraph company shall transmit messages impartially in good faith and in the order of time in which they are received, and shall in no manner discriminate in rates charged between any of its patrons, but shall serve individuals, corporations, and other telegraph companies with impartiality, and provides a penalty for violation. Held, that the terms "discrimination" and "partiality" as used in such act do not imply willfulness and positive wrongdoing, as distinguished from negligence. *Western Union Telegraph Co. v. Braxtan*, 74 N. E. 985, 987, 165 Ind. 165.

"Bias," as applied to the competency of jurors, is synonymous with "partiality." *Macon Ry. & Light Co. v. Barnes*, 49 S. E. 282, 284, 121 Ga. 443.

### PARTIALS

When a tubular belt is struck a blow by a hammer, the fundamental sound is followed by nascent, undulatory, longitudinal vibrations, extending the entire length of the tube. These vibrations are styled "over tones," or "partials." *Durfee v. Bawo*, 118 Fed. 853, 855.

## PARTICEPS CRIMINIS

"Mere presence at the scene of the perpetration of the crime does not render a person 'particeps criminis.' To constitute him a party to the criminal act, there must be not only presence upon the scene, but an actual participation and aiding and abetting in the crime committed." The failure of a spectator to interfere does not make him a participant in the crime. It is a circumstance to be considered with the other evidence in determining whether he was present as an aider and abettor. *State v. Fox*, 57 Atl. 270, 70 N. J. Law, 353.

## PARTICIPATE

Officers of a corporation "participate" in its conversion of state funds specially deposited with it for safe-keeping, so as to be guilty of larceny under B. & C. Comp. § 1807, where the disposition of funds by the corporation is with their knowledge, consent, and acquiescence. *State v. Ross*, 104 Pac. 596, 604, 55 Or. 450, 42 L. R. A. (N. S.) 601.

## PARTICIPANTS IN THE FORBIDDEN ACTS

Bankr. Act, July 1, 1898, c. 541, § 1, subd. 19, 30 Stat. 544, provides that "persons," when used with reference to the commission of acts which are forbidden, shall include persons who are "participants in the forbidden acts," and the agents, officers, and members of the board of directors, or trustees, or other similar controlling bodies of corporations. Held, that the term "participants in the forbidden acts" includes all persons who join with the bankrupt in the commission of the offenses created by chapter 4, § 29. *United States v. Young & Holland Co.*, 170 Fed. 110, 113.

## PARTICIPATING AND ASSENTING

Under Rev. St. 5239 (U. S. Comp. St. 1901, p. 3515), providing for the forfeiture of a franchise of a national banking association, if the directors knowingly violate or knowingly permit any of its officers, agents, or servants to "violate any of the provisions of this title," and further providing that every director who participated in or assented to such violation shall be held liable in his personal or individual capacity for all damages sustained, "participating and assenting" both imply affirmative action of some sort, as distinguished from mere silence and inaction. The statute does not preclude a liability at common law. *Mason v. Moore*, 76 N. E. 932, 936, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240.

## PARTICIPATING POLICY

A "participating policy" is one that is entitled to dividends, whether such dividends be paid yearly or at stated distribution periods. *National Protective Legion v. O'Brien*, 112 N. W. 1050, 1052, 102 Minn. 15 (quoting

and adopting Johnson's Definitions of Life Insurance).

## PARTICIPATION

See Final Participation.

## PARTICULAR

See Material Particular.

Where a workman employed to assist in constructing a building was directed, in company with another laborer, to take down some joists, no special part of the work being assigned to either man, the order was not a "particular" one, within Act March 4, 1893 (*Burns' Ann. St.* 1901, § 7083), authorizing a recovery by a servant injured by obedience to a particular instruction. *McElwaine-Richards Co. v. Wall*, 76 N. E. 408, 411, 106 Ind. 267.

## PARTICULAR AVERAGE

See, also, General Average.

A marine policy contained a clause, "Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire." The libel alleged that on November 18th, while the ship was lying in port and before discharge, a fire broke out in the after 'tween-decks of the ship and burned the bulkhead forward of the lazarette, the door thereof, and a considerable portion of dunnage and other parts of the ship. An exhibit, quoting from the ship's protest, recited that the master, on the alarm being given, went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette, which were then full of cargo, and that after considerable trouble the fire was extinguished, with considerable damage. Held, that the words "on fire," as used in the particular average clause, were not synonymous with the word "burnt," contained in former policies, but were indicative of a happening whereby the ship was endangered by actual fire burning some part of it, necessitating extraordinary efforts to prevent serious damage, and that under such definition the libel was not subject to exception as stating a loss from which the insurer was exempted by the "particular average" clause as matter of law. *Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co.*, 184 Fed. 947, 948.

## PARTICULAR ESTATE

Where A, the owner of land, gives it by deed or will to B, for life, and after his death to C. in fee, the estate of B. is called a "particular estate," because it is but a part of the general estate, which is finally to pass to C. *Archer v. Jacobs*, 101 N. W. 195, 197, 125 Iowa, 467.

## PARTICULAR STATE

The phrase "particular state," in Rev. St. § 5339, providing that every person com-



mitting murder on the high seas, or on any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any "particular state," etc., is used in contradistinction to the United States, and a murder committed on board a ship lying in the harbor of Honolulu is cognizable in the District Court of the United States for the territory of Hawaii. *Wynne v. United States*, 30 Sup. Ct. 447, 448, 217 U. S. 234, 54 L. Ed. 748.

### PARTICULAR STRIKE

A "particular strike" is a strike by an individual workman or by a particular body of workmen working for a particular master, as distinguished from a general strike, which has reference to a strike by all of those workmen engaged in a particular trade. *The Toronto*, 168 Fed. 886, 393.

### PARTICULARLY

"The word 'particularly' is frequently used as meaning especially." A release, executed by plaintiff to defendant city after he had notified it of his claim for damages suffered during a period of six years from maintenance of an improper sewer, which in the first part is broad enough to cover the whole claim, is not limited by the words, "Being particularly a release and discharge of all my claims of every nature, character, and kind \* \* \* by reason of damages suffered by the overflowing of the sewer \* \* \* on the 5th day of July, 1901"—the word "particularly" being used in the sense of "especially." *Murphy v. City of New York*, 83 N. E. 39, 190 N. Y. 418.

A contract to convey a farm "consisting of two hundred (200) acres, more or less, \* \* \* more particularly described," in a deed specified. Held that, as "particularly" is defined as "in a particular manner; expressly with a specific reference or interest; in particular; distinctly," the term "more particularly described" must mean exactly described. *Sweet v. Marsh*, 117 N. Y. Supp. 930, 934, 183 App. Div. 315.

The phrase "particularly described," as used in St. 1897, pp. 254, 272, c. 189, providing that an irrigation district, after adopting a plan, shall give notice calling for bids for the construction of the work or any portion thereof, and that, if less than the whole of the work is advertised, the portion so advertised must be "particularly described" in such notice, which shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, is not complied with by a notice for bids for a portion of the work, which does not refer to flumes, trestles, and chutes included in the plans and specifications, and calls for railroad crossings not shown by the plans, and containing

various other discrepancies between the plans and the notice. *Healy v. Anglo-Californian Bank*, 90 Pac. 54, 55, 5 Cal. App. 278.

### PARTICULARS

See Bill of Particulars; Full Particulars.

### PARTIES

See Party.

### PARTITION

Owelry of partition, see Owelty.

See, also, Repartimento.

"An action for 'partition' is where an owner of an individual interest in real estate comes before the court praying that the whole of such real estate be taken over by the court and parceled out among the respective owners, according to the extent of their several interests; or if that cannot be equitably done, that the whole be sold for the best obtainable price and the proceeds distributed. In this state, the right on the part of one or more co-owners to demand partition is regarded as an equitable one." Where plaintiff in partition did not ask that the real estate be divided, or, in the alternative, that it be sold and the proceeds be divided, but pleaded a contract between himself and his co-owner, by which the latter agreed to transfer her interest in the land and other property for \$14,000, and demanded that such undivided tract be sold to him for that sum in fulfillment of the contract, the suit should be considered as one for specific performance, and not for "partition." *Noecker v. Wallingford*, 111 N. W. 37, 39, 133 Iowa, 605 (citing and adopting *Wright v. Marsh* [Iowa] 2 Greene, 94; Code, c. 6, tit. 21; *Hornish v. Ringen Stove Co.*, 89 N. W. 95, 116 Iowa, 1).

"Partition" is not a suit on a contract, within Civ. Code, § 3701, providing that, where a contract is declared on, a plea of non est factum must be verified, and filed at the first term after service is perfected, but is a proceeding to have land in which the petitioner claims an undivided interest divided. *Webb v. Till*, 67 S. E. 1034, 1035, 134 Ga. 388.

"'Partition' is a matter of right, and is authorized by the statute, among joint owners or tenants in common holding lands, without reference to the duration of the estate. It may be compelled as well against a life tenant as obtained at his suit. The statute confers on the chancery court concurrent jurisdiction with the probate court to divide or 'partition,' or to sell for division or 'partition,' any property, real, personal, or mixed, held by joint owners or tenants in common." *Flitts v. Craddock*, 39 South. 506, 144 Ala. 437, 113 Am. St. Rep. 53 (quoting and adopting definition in *McQueen v. Turner*, 8 South. 863, 91 Ala. 273).

"Partition" is the division between two or more persons of lands which they jointly own as coparceners, joint tenants, or tenants in common, and before land purchased by one of them can be brought into a partition suit along with lands jointly owned, pursuant to a verbal agreement, a state of facts must be established which will authorize a specific performance of the verbal agreement. *Martin v. Martin*, 72 S. E. 680, 681, 112 Va. 731.

#### **Distribution distinguished**

See Distribution.

#### **As proceeding in rem**

See In Rem.

#### **As screen separating races**

In *Laws 1904*, p. 140, c. 90, requiring the separation of white and colored races on the street cars, but permitting the use for that purpose of adjustable "screens" or "partitions," the words "partitions" and "screens" ex vi termini import complete separation between the races, so that passengers in one compartment would be shut out from passengers in the other. The word "screens," as well as the word "partitions," imports that one race is to be shut out from any contact with the other. Signs 8 by 12 inches in size, having painted thereon the words "white" and "colored," respectively, and supported on the backs of seats in street cars, were not adjustable screens within the meaning of the law. *Southern Light & Traction Co. v. Compton*, 38 South. 629, 630, 86 Miss. 269.

#### **Partition at law and in equity**

"At the common law partition was both a legal and equitable remedy. \* \* \* In cases without complication of any sort the jurisdiction was concurrent. Depending upon variant circumstances, one court could grant the relief, where the other could not." An action for partition under *Rev. St. 1899*, § 4080, authorizing a compulsory partition, and prescribing the procedure therefor and forming a part of the *Civil Code*, section 3443 of which abolishes the distinction between actions at law and suits in equity, and the forms of such actions and suits, is a civil action. *Field v. Leiter*, 90 Pac. 378, 387, 16 Wyo. 1, 125 Am. St. Rep. 997.

#### **PARTITION FENCE**

A "gate" in a partition fence comes within the phrase "partition fence," within *Rev. St. Mo. 1899*, § 4573, forbidding under penalty the throwing down of "partition fences." *Robinson v. Schlitz*, 115 S. W. 472, 473, 135 Mo. App. 32.

#### **PARTITION IN KIND**

A "partition in kind" is but a transfer of the interest of the co-owners to one of the co-owners. It is but a sale of such interest to a co-owner, and this the law permits. If a co-owner can sell to a perfect stranger his interest in the property, subject to the usu-

fruct, or may mortgage it, and thus have such interest sold for him at judicial sale, how much greater reason is there that co-owners may partition the property among themselves! The result obtained in either instance is the same—a transfer of the interest of the co-owner to another. *Maguire v. Fluker*, 36 South. 231, 238, 112 La. 76.

#### **PARTITION SALE**

A "partition sale" is unlike an ordinary sheriff's sale under execution, being a judicial sale which must be reported to the court for confirmation, prior to which it is of no effect. *Thomas v. Elliott*, 114 S. W. 987, 988, 215 Mo. 598.

A "partition sale" as the result of an action brought for that purpose is not a sale in invitum like an ordinary sheriff's sale under execution, but is a sale by the act of the parties themselves. *Thompson v. McClernon*, 127 S. W. 384, 386, 142 Mo. App. 429.

#### **As judicial sale**

See Judicial Sale.

#### **PARTITION WALL**

A "partition wall" means, through usage, a solid wall. *Coggins & Owens v. Carey*, 66 Atl. 673, 678, 106 Md. 204, 10 L. R. A. (N. S.) 1191, 124 Am. St. Rep. 468.

#### **PARTLY**

See Reverse or Affirm Wholly or Partly. Not wholly synonymous, see Not Wholly Within.

#### **PARTNER**

See Dormant Partner; Nominal Partner; Ostensible Partner.

As dealer, see Dealer.

As real party in interest, see Real Party in Interest.

As security, see Security.

As trustee of express trust, see Trustee of Express Trust.

Cotenants as partners, see Cotenant.

Surviving partner as legal representative, see Legal Representative.

See, also, Fiduciary Capacity or Character.

#### **PARTNER'S INTEREST**

"A 'partner's interest' in firm property is only his proportion in the surplus after the payment of partnership debts and the settlement of the partnership accounts, and until that occurs it is impossible to determine the extent of his interest." Under *Rev. St. 1899*, § 2808, making it necessary for each member of a partnership to execute and acknowledge any instrument intended as a chattel mortgage for the partnership, it is a prerequisite to a valid chattel mortgage of firm property that every member of the firm should sign it. *Lellman v. Mills*, 87 Pac. 965, 969, 15 Wyo. 149.

**PARTNER'S LIEN**

"On a dissolution, every partner is entitled, as against the other partners and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets, after such payment, applied in payment of what may be due to the partners respectively, after deducting what may be due to the firm from them as partners. This right constitutes what is known as the 'partner's lien.'" "The 'partner's lien' attaches to all the partnership assets at the time of dissolution or the ascertainment of a partner's share, whether realty or personalty, and to such assets only." *Fouse v. Shelly*, 63 S. E. 208, 212, 64 W. Va. 425.

**PARTNERSHIP**

See Commercial Partnership; Copartnership; General Partnership; Limited Partnership; Mining Partnership; Nontrading Partnership; Private Person, Partnership, or Corporation; Quasi Partnership; Trading Partnership. Continuance of partnership, see Continuance.

Creditor of partnership, see Creditor.

Insolvency, see Insolvency—Insolvent.

Interest in partnership, see Interest.

See, also, Firm.

The phrase "partners," etc., following the names of the defendants to an action, is simply descriptive, and does not make the firm, as such, a party to the action. *Bastian v. Adams*, 97 N. W. 231, 5 Neb. (Unof.) 32.

Before there can be a "partnership," the parties must have joined to carry on a trade or adventure for their common benefit, each contributing property or services, and have a community of interest in the profits as such. *Roach v. Rector*, 123 S. W. 399, 401, 93 Ark. 521.

The essential requisite of a "partnership" is a community of interest between the parties for the purpose of profit, and though ordinarily the profits are expected to arise from the purchase and sale of some form of property, they may be produced by the skill and industry of the parties. *Morgart v. Smouse*, 77 Atl. 137, 138, 112 Md. 615.

An agreement between two persons that one will furnish a certain quantity of pine timber and the other the labor necessary to manufacture and market the turpentine and rosin to be extracted therefrom, and that each will share equally in the profits or losses accruing from the enterprise, constitutes such persons "partners." *Dawson v. Blitch*, 76 S. E. 596, 11 Ga. App. 840.

The community of a husband and wife is not a "partnership." *Well v. Jacobs' Estate*, 35 South. 599, 604, 111 La. 357.

In describing the relation of husband and wife as to property acquired after marriage as a "partnership," the word is used by analogy, "since the marital relation, viewed in its business aspect differs very evidently from the commercial 'partnership.'" *Reade v. Lea*, 95 Pac. 131, 133, 14 N. M. 442.

An association of farmers somewhat removed from the main highway, organized to construct and operate a telephone line to connect their various houses, each bearing their proportion of costs and expenses, is not a "partnership" as defined by Partnership Law (Consol. Laws, c. 39) § 2, since it was not organized for the purpose of engaging in trade or in business, and there were no profits contemplated from the 'business. *Branagan v. Buckman*, 122 N. Y. Supp. 610, 613, 67 Misc. Rep. 242.

"The requisites of a 'partnership' are that the parties must have joined together to carry on a trade or venture for their common benefit, each contributing property or services, and having a community of interest in the profits." The Virginia Pilot Association is an unincorporated association of pilots, formed for the purpose of controlling and regulating the business of its members, and through them, in effect, act by joint co-operation in performing their duties as pilots. The association elects officers, leases offices, owns property, including the pilot boats used, assigns its members to service in turn, and collects all pilotage fees earned by them, which are paid into bank to its credit, and divided between the members after payment of the expenses of the association. The members of the association were partners, and jointly liable for the negligent performance by one of its members of his duties as a pilot. *Donald v. Guy*, 127 Fed. 228, 232 (quoting *Meehan v. Valentine*, 12 Sup. Ct. 972, 145 U. S. 611, 36 L. Ed. 835).

The Associated Branch Pilots of the Port of New Orleans, an association created to pilot and assist in the salvage of vessels, the members sharing in the expenses and the profits equally, the association collecting the fees and being governed by a president and board of directors, is an ordinary "partnership" under the law of Louisiana and may select, control, and discharge any of its members. *The Joseph Vaccaro*, 180 Fed. 272, 276.

Where parties agree for the purchase and sale of land, and regard this agreement as a contract of partnership, there is an ordinary "partnership," whose nature is not changed by the incidental purchase or sale of timber cut on the partnership lands. *Drew v. Bank of Monroe*, 51 South. 683, 684, 125 La. 673.

In an action to recover money and property claimed to have been paid for patent rights, sold plaintiff by several defendants conspiring together to defraud him and induce him to purchase by fraudulent repre-

sentations, allegations that defendant R. was a "partner" in the unlawful scheme did not allege such a partnership as the statute requires to be denied under oath; the word "partner" as used being synonymous with "co-conspirator." *Rushing v. Spreen* (Tex.) 142 S. W. 49, 57.

Under Civ. Code S. D. § 1723, which provides that a "partnership" is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them, a business conducted in the name of a bankrupt and his brother as partners was not a partnership business, but the individual business of the bankrupt, where his brother had no capital invested and worked for a salary, and there was no agreement between them that he should share in either profits or losses. *In re Gibson*, 191 Fed. 665, 668.

A contract for loan of money, in consideration of an obligation to pay a fixed sum for its use, involving no agreement for the sharing of profits of the business, is not a contract of "partnership." *Turregano v. Barnett*, 53 South. 884, 887, 127 La. 620.

A "partnership" was not established by a contract whereby a street railroad company leased its property to another company, divesting itself of the possession and use of its property in consideration of a specified rent; the contract not providing that the latter should conduct the business in the name or for the benefit of the former, except in so far as the former was benefited by the consideration to be paid by the latter. *Moorshead v. United Rys. Co.*, 100 S. W. 611, 612, 203 Mo. 121.

To constitute a "partnership" there undoubtedly must be an association of two or more persons for the purpose of carrying on a trade or business or adventure together and dividing the profits, and the presence or absence of certain other incidents of a partnership by special arrangement between the parties would not seem to be of the essence of the matter. *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462, 467, 68 C. C. A. 336 (citing *Fleming v. Lay*, 109 Fed. 952, 955, 48 C. C. A. 748).

"Those persons are 'partners' who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions." *Price v. Middleton & Ravenel*, 55 S. E. 156, 157, 75 S. C. 105 (quoting and adopting definition in *Meehan v. Valentine*, 12 Sup. Ct. 972, 975, 145 U. S. 611, 620, 36 L. Ed. 835, and citing *Providence Mach. Co. v. Browning*, 46 S. E. 550, 68 S. C. 9; *Id.*, 52 S. E. 117, 72 S. C. 427; *Spool Cotton Co. v. King & Tiller*, 46 S. E. 1005, 68 S. C. 198).

A mere agreement by two persons to buy an article together does not amount to an agreement to form a "partnership," when

there is no agreement for a joint sale of the property and a sharing of the profits. *Harris v. Umsted*, 96 S. W. 146, 147, 79 Ark. 490.

"'Grubstake' contracts have sometimes been called prospecting 'partnerships,' and are said to partake of the character of 'qualified partnerships.' Yet, unless the agreement goes beyond the mere furnishing of supplies in consideration of a participation in the discoveries, the word 'partnership' is improperly used and is misleading. It is simply a common venture, wherein one, called the 'outfitter,' supplies the 'grub,' and the other, called the 'prospector,' performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement. The prospector has the right to insist on the outfitter performing his part of the agreement as a condition precedent to participation in such discoveries. Should he fail to do so, the prospector may discover and locate for his own advantage, free from any obligation to the outfitter. \* \* \* Is it essential to a right in property under a grubstake contract that such property be acquired by means of the grubstake furnished, and pursuant to such contract? \* \* \* The 'grubstake' contract, properly speaking, applies to the search for and location of mines on the public domain. \* \* \* We frequently encounter cases where the object of the venture is not only to search for and discover mines, but also to work and develop them and conduct a general mining business. This is something more than a 'grubstake' contract. Such an agreement constitutes a 'partnership.'" *Costello v. Scott*, 93 Pac. 1, 7, 30 Nev. 43 (quoting and adopting the definition in 2 *Lindley on Mines* [2d Ed.] § 858, p. 1565 et seq.).

"'Partnership' is the relation which subsists between persons carrying on a business in common with a view of profit. It is necessary to note the significance of the words 'carrying on a business,' which implies a relation entirely different from the enforced relation of tenants in common, as the owners of a ship or of a house, who must either let the property lie idle or keep it in some way occupied or used, deriving a return from such occupation or use." Where a petition in involuntary bankruptcy alleged that the two defendants owned a stock of goods as partners, and that therefore a partnership existed, which it was prayed might be adjudged a bankrupt, and such adjudication was made, it was a conclusive determination of the ownership of the stock of goods as between the parties to the proceeding, but could not bind the trustees in bankruptcy of one of the alleged partners, who had taken possession of and sold the goods as assets of his individual estate, and who were not permitted to become parties to the partnership proceeding. *Manson v. Williams*, 153 Fed. 525, 530, 82 C. C. A. 475 (quoting and adopting definition found in the partnership act of

1890 [St. 53 & 54 Vict. c. 39]; citing *Williams, Bankr.* [8th Ed.] 166, 167; *Pol. Partn.* [5th Ed.] 2, 3; *Meehan v. Valentine*, 12 Sup. Ct. 972, 145 U. S. 611, 618, 36 L. Ed. 835; *Paul v. Cullum*, 10 Sup. Ct. 151, 132 U. S. 539, 550, 33 L. Ed. 430).

An executory agreement to form a partnership does not create a "firm" until the contingency has happened and the partnership is actually launched, nor does it make the prospective members "partners"; the test of partnership being to ascertain from the agreement whether any time has to elapse or any act remains to be done before the parties have the right to share in the profits. *Dow v. State Bank of Sleepy Eye*, 93 N. W. 121, 123, 88 Minn. 355.

"A 'partnership' is a creature of the law merchant, and its origin is founded in that law which is the custom of merchants, recognized and enforced by the courts. One essential feature which must be always present to constitute a partnership is that it is formed for business purposes. It is a voluntary association, arising out of contract, for the purpose of carrying on a joint undertaking, with the object of making a profit to be shared among the partners. Every definition of a partnership includes the purpose of business and profit. It is a combination of two or more persons of capital, or labor, or skill, or some or all of these, for the purpose of business, for the common benefit. *Para. Partn.* 6. Each partner is an agent of the firm in the scope of its business, and the law relating to it is closely allied to the doctrines of agency. Plaintiff testified that the *Koreshan Unity* is an organization for religious and social purposes, the members putting in their property, living as one family, and having everything in common. According to her testimony, there is no profit sharing and no business, and the *Unity* is more in the nature of a tenancy in common, or of a club, than any thing else. A mere tenancy in common does not constitute a partnership. While they both have the element of joint ownership, a partnership is a business enterprise for the common benefit and profit. To such an association as this the doctrines of partnership will not apply." *Teed v. Parsons*, 66 N. E. 1044, 1046, 202 Ill. 455.

The subscribers to the stock of a proposed corporation before the incorporation is accomplished are "partners" in the business which they have in hand. *Mt. Carmel Tel. Co. v. Mt. Carmel & F. Tel. Co.*, 84 S. W. 515, 119 Ky. 461 (citing *Cincinnati Cooperage Company v. Bate*, 26 S. W. 538, 96 Ky. 356, 49 Am. St. Rep. 300; *Warring v. Arthur*, 32 S. W. 221, 98 Ky. 34).

Cotenants are not "partners," neither does the relation of principal and agent exist between them, except upon an express agreement or one necessarily implied. *Wright v. Kayner*, 113 N. W. 779, 782, 150 Mich. 7.

Where F. and L. agreed to engage in the plumbing business, F. agreeing to furnish the capital, and L. to furnish his tools and material and devote his time to the business, and to draw \$18 per week, and the profits in excess of such amount to be shared equally, and the business was carried on under the name of F. & L., under which name their place of business was leased, their bank account opened, their books and accounts kept, their checks drawn, and all contracts executed, there was a "partnership" between them, though no term was agreed on for the continuance of the business, for the situation created was one in which the parties became the common owners of the profits of the business, with a proprietary interest therein before any separation from the undivided stock. *Fruin v. Chotzianoff*, 63 Atl. 782, 783, 79 Conn. 65.

Where a horse is purchased as the joint property of three persons as equal owners, each to be liable for a third of the purchase price, and each to own a third interest in the horse after it is paid for, and one of them makes a cash payment on the horse, and with another executes a note for the balance of the purchase price, and the third person deposits collateral to cover his liability for his share of the purchase price, and as part of the agreement it is provided that the earnings from racing the horse, after payment of the expenses of the business, shall be applied to payment of the purchase-money note, and then to repaying the one who makes the cash payment, the residue to be divided among the three, a half to the one of them managing the horse, and a quarter to each of the others, there is a "partnership." A "partnership" is a contract of some kind involving mutual consent of the parties, and when entered into for the purpose of carrying on a trade or business, with the right of the parties thereto to participate in the profits, such a contract constitutes a "partnership," unless other facts and circumstances show that some relation exists. *Bryant v. Fitzsimmons*, 67 Atl. 356, 357, 106 Md. 421 (citing *Kerr v. Potter* [Md.] 6 Gill, 423; *Bull v. Schuberth*, 2 Md. 55; *Heise v. Barth*, 40 Md. 259; *Waring v. National Marine Bank of Baltimore*, 22 Atl. 140, 74 Md. 278).

An agreement whereby a husband puts certain property into a business and his wife turns over certain other property, and a third party transfers to the firm a lease and options on certain lands, and the profits to be drawn by each of the three parties to the agreement is stated, constitutes an express contract of "partnership." *Butler v. Frank*, 67 S. E. 884, 885, 7 Ga. App. 655.

The elements of a "partnership" are community of loss, of title, of expenses, and common right to dispose of property for purposes of a partnership. An agreement whereby a third person bound himself to advance

funds necessary to carry out a contract of sale, to manage the property, dispose of the same, and pay to the buyer a half of the net proceeds, does not create a partnership between the third person and the buyer. *L. Baldwin & Co. v. Patrick*, 91 Pac. 828, 829, 39 Colo. 347.

Seven persons associated themselves together to manufacture cheese at a factory owned by three of them, who received a certain sum for the use of the factory. The association adopted no name, and was known by several different names. All expenses of manufacture and sale were to be deducted from the proceeds of the sale of the product, and the balance divided in proportion to the amount of milk furnished by the parties. The association constituted a "partnership." *Sullivan v. Sullivan*, 99 N. W. 1022, 1025, 122 Wis. 326 (citing *Ellsworth v. Tartt*, 26 Ala. 733, 62 Am. Dec. 749).

An instruction in substance that, if the jury believed from the evidence beyond a reasonable doubt that defendant furnished the financial credit on which the business was founded, stored the liquors in a place kept by him which was charged with being a nuisance, assisted in caring for the liquors, and received a share of the profits of the business, he was a partner and might be convicted the same as though he had personally made the sales is held to state sufficiently the law of "partnership" as applied to the evidence, in view of the failure of defendant to request a more definite instruction upon the question. *State v. Tracy*, 127 Pac. 610, 88 Kan. 153.

#### Agency

While a business carried on by two or more persons for profit, with a community of interest, and a share of profits and losses, is essentially a "partnership," these requirements may exist without creating a partnership, and there can be no partnership unless the agreement contemplates an agency whereby each is the agent for the other or others. *Jackson v. Hooper*, 74 Atl. 130, 134, 76 N. J. Eq. 185.

The test of "partnership" is whether the parties are jointly interested as principals and may bind each other by their acts or engagements within the scope of the enterprise. *Keith v. Kellermann*, 169 Fed. 196, 199.

The incidents of a "partnership" are contribution to the common property, sharing in profits, and the existence between the parties of mutual agency in the conduct of the business. *Murray Drug Co. v. Harris*, 57 S. E. 1109, 1110, 77 S. C. 410 (citing *Price v. Middleton & Ravenel*, 75 S. C. 105, 55 S. E. 156).

A "partnership" is, in one sense, a species of agency; and where the parties to a contract do not themselves intend a partnership, it would seem, on principle, that the one

who is unknown to those who deal with the others should be held only on the same ground that an undisclosed principal would be bound. *Russell v. Herrick*, 111 N. Y. Supp. 974, 977, 127 App. Div. 503.

That connecting carriers agreed to associate themselves together, and form what to a shipper was a continuous line between the point of shipment and final destination on the line of the terminal carrier, and the contracts of carriage made with the initial carrier provided for carriage over both lines for an agreed sum for the entire trip which was prorated between them, did not make such carriers "partners" in transporting the freight; each company not having the right to manage the entire business of both between the points of shipment, and there being no division of profits and expenses. *Crockett v. St. Louis & H. Ry. Co.*, 126 S. W. 243, 248, 147 Mo. App. 847.

A "partnership" does not exist regarding animals and crops as to which the interest of the parties is in shares, and there is no common property which either has the right to manage or sell. *Beatty v. Clarkson*, 83 S. W. 1033, 1034, 110 Mo. App. 1 (citing *Pars. Partn.* § 61, and note; *Donnell v. Harshe*, 67 Mo. 170; *Ashby v. Shaw*, 82 Mo. 76).

The agreement of defendants, manufacturers of boxes and box materials, in terms creating an agency, placed in charge of a board of principals, on which each party had a single representative, giving such board authority to appoint a general agent with authority, subject to the supervision of the board, to act as the agent of each of the principals, "severally and respectively" for the sale of all manufactured products "covered by the agreement" and to collect "all proceeds of sales" passing through the agency, he to have only such powers as were "expressly conferred on him" by the agreement, or "may be conferred on him by resolution of the board, passed at a regular meeting and entered on its minutes; declaring the purpose of the agency to limit the production and fix the prices of the output of the mills of the parties"; expressly providing that the board was the agent of each of the principals "severally," and that it should not have power to "represent or act for the principals jointly or any number of them jointly," or to bind any principal "jointly with any other principal" or other than separately and severally, and that it should not "create any joint obligation as to the said principals or any number of them," does not create a "partnership," but only an agency. *National Lumber & Box Co. v. Grays Harbor Commercial Co.*, 127 Pac. 577, 579, 71 Wash. 81.

#### As an artificial person

A "partnership" is an entity distinct from that of its members, and is recognized in law as a person. *Clay, Robinson & Co. v.*

Douglas County, 129 N. W. 548, 549, 88 Neb. 363, Ann. Cas. 1912B, 756.

A "partnership" is a distinct entity, and a judgment against it is not a judgment against the individuals who compose it. *Lansing v. Bever Land Co. (Iowa)* 138 N. W. 833, 835.

The common law does not recognize a "partnership" as an entity existing and having rights and liabilities apart from its members, yet a judgment may be rendered against a "partnership" in a case where citation has been served on one of the partners, as well as against the partner cited. *State v. Cloudt* (Tex.) 84 S. W. 415, 416 (citing Rev. St. 1895, art. 1347).

A "partnership," unlike a corporation, is not an entity. A firm, as such, is not regarded as having any legal existence apart from the members composing it. When partners are libeled under their firm name, the wrong is done to individuals composing the copartnership, and as individuals they are entitled to redress and may maintain a joint several action. *Bergstrom v. Ridgway-Layer Co.*, 103 N. Y. Supp. 1093, 1094, 53 C. Rep. 95.

"There are two conceptions of a 'partnership'—one springing from the agreement on which it is founded, that it is an aggregation of persons associated together to share its profits and losses, owning its property and liable for its debts; the other that it is an artificial being, a distinct entity, separate in its rights, and in obligation from the partners who compose it. In most of its relations to persons and things the latter conception is the more accurate." Under the Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, a partnership is a distinct entity, a person separate from the partners who compose it. It has its property and owes its debts apart from the individual property of its members, and it does not own, and apart from the individual debts of its members, which it does not. It may be adjudged bankrupt although the partners who compose it are not adjudicated. The trustee of the estate of a bankrupt partnership is not the owner of the individual property of the individual partners, and has no more authority to administer that property than he has to administer the property of indorsers of commercial paper of the firm or the proprietors for its debts. He is not the assignee of the claims of the individual creditors, nor their agent nor authorized to collect those claims out of other partnership property, and where the partnership is adjudged bankrupt, he has no authority to enforce such claims against any individual except the partnership property, or any unadjudicated partner or other partner who has none of the partnership property. *Act March 2, 1867, c. 176, 14 Stat. 407, and the Massachusetts Insolvency*

Law of 1838 (Laws 1837-38, p. 449, c. 163), a partnership was an aggregation of partners, and the insolvency or bankruptcy of the partners conditioned the bankruptcy of the partnership. It is not so under the act of 1898, and therefore many of the rules of law applicable under the former acts do not obtain under the latter. In *re Bertenshaw*, 157 Fed. 363, 365, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 996 (citing *Walker v. Wait*, 50 Vt. 668, 676; *Robertson v. Corsett*, 39 Mich. 784; *Cross v. Burlington Nat. Bank*, 17 Kan. 340).

Bankr. Act July 1, 1898, c. 541, § 1, cl. 6, 30 Stat. 544, declares that "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association. Section 4 declares that private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts; and section 5 (30 Stat. 547) provides that a partnership during the continuance of its business or after its dissolution and before settlement may be adjudged a bankrupt. Held, that where an association of individuals was formed to carry on the business of a private bank, as authorized by Laning's Rev. Laws Ohio, § 4891 et seq. (*Bates' Ann. St. § 3170-1 et seq.*) but was not incorporated, it was a "partnership," and as such subject to be adjudged a bankrupt, though it was entitled to exercise some of the attributes of a corporation. *Burkhart v. German-American Bank*, 137 Fed. 958, 959.

Though a "partnership" may be regarded as a legal entity for the consideration of the rights of partners inter se, it has no legal existence apart from the members composing it, with reference to the rights of third persons. *State v. Krasher*, 83 N. E. 498, 500, 170 Ind. 43.

A partnership is a legal entity, as well as a corporation, except in a more limited sense. Though partners are not jointly liable, and cannot be sued as a firm for slanderous words spoken by one of them, unless by the direction or authority or approval of the others, they are liable as a firm for slander committed by a servant, whom they have directed or authorized to speak the words for them, or where, with knowledge of what their servant has done, they ratify it. *Duquesne Distributing Co. v. Greenbaum*, 121 S. W. 1026, 1028, 135 Ky. 182, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481.

A "partnership," under the Bankruptcy Act of 1898, is a distinct entity, and as such it may be adjudged to be a bankrupt, irrespective of any adjudication against the individual members; but when there is no adjudication against the firm, the partner-

ship assets cannot be administered, where there is one partner not adjudicated a bankrupt, unless he consents, and it is not an act of bankruptcy for which a firm may be adjudged a bankrupt that one of its members out of his individual estate prefers one of his own or one of the firm creditors. *Mills v. J. H. Fisher & Co.*, 159 Fed. 897, 899, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656 (citing *In re Meyer*, 98 Fed. 976, 39 C. C. A. 368; *In re Mercur*, 122 Fed. 384, 58 C. C. A. 472; *Loveland*, Bankr. [3d Ed.] §§ 96-98).

A "partnership" is really not a legal entity. It is not a person, and the use of the partnership name is of no value, except as it represents natural persons. *In re Levin Bros.' Estate*, 73 Pac. 159, 162, 139 Cal. 350.

A "partnership" is a legal, but not a social entity. It can own property, it can buy and sell, it can sue and be sued, and it can plead and be impleaded in the courts of the land; but it can neither marry or be given in marriage, nor perform any other social function essential to its being elevated to the dignity of becoming the head of a family. A member of a partnership firm, although the head of a family, cannot claim as exempt from a forced sale upon execution any portion of the partnership property which has been levied upon to satisfy the claims of the creditors of the firm. *Lynch v. Englehardt-Winning-Davison Mercantile Co.*, 96 N. W. 524, 525, 1 Neb. (Unof.) 528.

#### As association

See Association.

An unincorporated association is not a "partnership," and, to render a member liable as a principal on contracts made by persons or committees who manage and assume to act for it, it must be shown that they are expressly or impliedly authorized to represent him. *Brower v. Crimmins*, 121 N. Y. Supp. 648, 650, 67 Misc. Rep. 63.

#### As company

See Company.

#### As corporation

See Corporation.

#### As determined by intent of parties

While neither a writing, nor any other particular form of contract, is needed to create a trading or laboring partnership, a "partnership" is not created by implication or operation of law, as between the partners, apart from an express or implied agreement to constitute the relation; mutual consent of two or more competent minds being required to establish the same. *Watson v. Hamilton* (Ala.) 60 South. 63.

Except in cases in which parties have held themselves out as copartners and credit has been extended to them as such, when in fact they were not partners between themselves, a "partnership" is a relation between two or more competent persons, resulting

from a contract, and accordingly only exists where the parties intend to enter into a contract of partnership; for this, like other contracts, must be construed according to the manifest intention of the parties, and must be determined by the contract itself and the surrounding circumstances. *Mackie v. Mott*, 47 S. W. 897, 146 Mo. 230; *McDonald v. Matney*, 82 Mo. 365; *Priest v. Chouteau*, 85 Mo. 398, 55 Am. Rep. 375.

A "partnership" is a contractual relation created by agreement of the parties; but a person may be held liable as a partner even in the absence of a contract. *Butler v. Frank*, 67 S. E. 884, 885, 7 Ga. App. 655.

"Joint ownership" does not necessarily mean "partnership," and several persons who agree to buy property to hold jointly or in common are not partners, unless it was their intention to become partners. *Logan v. Oklahoma Mill Co.*, 79 Pac. 103, 104, 14 Okl. 402.

A "partnership" is a contract between two or more persons to combine their capital, labor, and skill, or some or all of them, in a business in which they are to have a community interest, as principals, for the purpose of joint profits; the question of the existence of the relation between one of intent and the sharing of profits not being a conclusive test. *T. E. Foley Co. v. McKinley*, 131 N. W. 316, 818, 114 Minn. 271.

"A person not a 'partner' in fact may be liable as such to third persons on the ground that he has held himself out to the world as such, or has permitted others to do so, and is estopped from denying that he is a 'partner,' as against those who have in good faith dealt with the firm, or with him as a member of it; and the holding out must have been by the authority or with the knowledge of the party sought to be charged. This is so self-evident and just a principle that it does not need to be supported by further reference to adjudged cases. It is obvious no one can be charged as a partner where the acts relied on for that purpose are neither his own acts, nor acts of others authorized by or made known to him. Even though it were generally supposed, believed, and understood that a person is a "partner" in a concern, this would be insufficient evidence to prove that he was a partner." *Lighthiser v. Allison*, 59 Atl. 182, 183, 100 Md. 103 (citing *Fletcher v. Pullen*, 16 Atl. 887, 70 Md. 205, 14 Am. St. Rep. 355).

"Partnership" is a contractual relation existing between persons who have combined their property, labor, and skill in an enterprise or business as principals for the purpose of joint profit. It exists when there is community of interest in the whole property, business, and responsibility of the concern. The question of partnership depends on the consent and intention of the parties ascertained from the circumstances of the case.



and where a partnership is the legal result of an agreement actually made, the parties thereto are partners, though they may have stipulated they are not to be partners. *McDonald Bros. v. Campbell & Bergeson*, 104 N. W. 760, 761, 96 Minn. 87, (citing *Baldwin v. Eddy*, 87 N. W. 349, 64 Minn. 425; *Meehan v. Valentine*, 12 Sup. Ct. 972, 145 U. S. 611, 36 L. Ed. 835; 1 Bates, Partn. § 15 et seq.; *Shumaker, Partn.* § 31).

A "partnership" is a relation arising out of a contract to do certain things, and exists only where parties intend to enter into a contract of partnership, and unless they have stopped themselves by holding themselves out to the world as partners, their intention derived from the contract is decisive of the question. A partnership exists as a result of a voluntary contract between the parties, and never solely by operation of law. A and C. entering into a contract, by which A is to have a one-half interest, one to form certain duties relative thereto, and other certain other duties, there being a joint ownership and a joint bearing of the costs and expenses, whatever they may be, as well as sharing jointly in the profits, constitutes a "partnership." *Citizens' Nat. Bank v. Hickasha v. Mitchell*, 103 Pac. 720, 728, 11 Cal. 488, 20 Ann. Cas. 371.

There is no arbitrary test by which to determine when a 'partnership' exists. It depends upon the intention of the parties, and the intention must be ascertained from the facts and all the circumstances of the case. If the evidence shows that the parties intended to combine their property, labor, and skill in an enterprise as principals for the purpose of enjoying the profits, it establishes a partnership. The question always arises there a joint business, or were the parties carrying on the business as principal and agents? If there is a joint business,

it naturally follows that the parties share the profits in some proportion, and if there is an agreement to share profit is evidence that the enterprise was to be carried on as a joint undertaking. As said by the court: 'An agreement that something be attempted with a view to gain, and the gain shall be shared by the parties to the agreement, is the grand characteristic of a partnership.' *Lindley*, Partn. § 1.

This inference may be overborne by showing that the profits were to be shared on some other basis than as joint profits. It was at one time thought that an agreement to bear losses, as well as to share profits, is essential to the existence of the partnership relation, and this idea finds exemplification in many of the definitions which have been collected by Lindley from statutes and common law writers. But the modern conception of a partnership as a relation entered into with a view to gain leaves the question of losses to be determined from the facts, and in the absence of any con-

tract to the contrary infers an agreement to share losses from an agreement to share profits. The management of the business and the extent to which the business shall be conducted and be under the control of any particular partner is also left to be arranged by the members of the partnership. The sole management may by agreement be vested in one partner." *McAlpine v. Millen*, 116 N. W. 583, 586, 104 Minn. 289.

Civ. Code, § 2395, defines a "partnership" as the association of two or more for carrying on business together and dividing the profits, and section 2397 declares that a partnership can be formed only by the consent of all the parties thereto. Held, that a partnership may be shown by acts and declarations of the parties; an express agreement to form a partnership not being necessary. *Niroad v. Farnell*, 106 Pac. 252, 253, 11 Cal. App. 767.

H. made a contract of purchase of plaintiff of mining lands and personal property thereon. H. and defendant made a contract reciting that H. contemplated the purchase of the mining property, and was desirous of borrowing \$25,000, and that defendant had agreed to loan it to him on the note of himself and others; that it should be paid to H. in certain amounts, at certain times; that, if H. did not make the purchase, he should at once return the money; that, if he did make it, he should take the title in his own name, and should execute a declaration of trust conveying to defendant a fourth interest in the land, as a bonus for making the loan; that, if H. should make the purchase, he should have the exclusive control and management of the land and the working thereof; and that the liability of the makers of the note did not in any wise depend on the contract or the success of the mining operations, but was fixed by the terms of the note. Held, that no "partnership" was created between H. and defendant by this contract, so as to make defendant liable to plaintiff for the breach by H. of his contract of purchase. *Diamond Creek Consol. Gold & Silver Mining Co. v. Swope*, 102 S. W. 561, 564, 204 Mo. 48 (quoting and adopting the definition in *Pars.* Part. p. 58).

A division of the profits of a business is not alone sufficient to constitute a "partnership." The essential test is whether the parties asserted to be in partnership intended to establish that relation. *Moorshead v. United Rys. Co.*, 96 S. W. 261, 266, 203 Mo. 121.

#### Foreign corporation doing business without authority

Where officers and members of a mercantile corporation, created by the law of another state with a capacity to exist and do business only in certain named counties in that state, attempt to establish the corporation under another name in the state of

Louisiana, the effect, so far at least as third persons are concerned, is the establishment of a mercantile partnership composed of the parties to such attempt, and where it appears that such partnership, in its own name, has acquired property and contracted debts, such property will be devoted to the payment, by preference, of the debts so contracted. *Campbell v. J. I. Campbell Co.*, 41 South. 696, 699, 117 La. 402 (citing *Cincinnati Cooperage Co. v. Bate*, 26 S. W. 538, 96 Ky. 356, 49 Am. St. Rep. 300; *Baldey v. Brackenridge*, 2 South. 410, 39 La. Ann. 662; *Williams v. Hewitt*, 17 South. 490, 47 La. Ann. 1076, 49 Am. St. Rep. 394; *Lehman v. Knapp*, 20 South. 674, 48 La. Ann. 1148).

#### **Joint-stock association distinguished**

See Joint-Stock Companies and Associations.

#### **As person**

See Person.

#### **Sharing profits**

While there may be a sharing of profits without a "partnership," there can be no partnership without a sharing of profits. A sharing of the gross returns, with or without a common interest in the property from which the returns come, does not amount to a sharing of profits, and does not of itself create a partnership. *Tyson v. Bryan*, 120 N. W. 940, 942, 84 Neb. 202.

"Partnership" is the relation subsisting between two or more persons who have contracted together to share, as common owners, the proceeds of a business carried on by all or any of them for the benefit of all. *Meinhart v. Draper*, 112 S. W. 709, 133 Mo. App. 50.

A "partnership" is a status resulting from contract, its essential elements being a contract to share, as common owners, the profits of the business. *Baum v. Stephenson*, 113 S. W. 225, 229, 133 Mo. App. 187.

A "partnership" is a contract relation, subsisting between two or more persons, by which they have combined their property, labor, or skill, in an enterprise or business as principals, for the purpose of joint profit. *Norton v. Brink*, 110 N. W. 669, 670, 75 Neb. 566, 7 L. R. A. (N. S.) 945, 121 Am. St. Rep. 822 (quoting and adopting the definition in *Bates*, Partn. § 1).

One is not necessarily a "partner" because of an agreement that he shall share in the profits; and while this may be one of the tests, it may be controlled by other considerations. *Beard v. Rowland*, 81 Pac. 188, 189, 71 Kan. 873.

The specific interest in the profits necessary to constitute a "partnership" is a proprietary one, existing before the division into shares. *Moscowitz v. Sassulsky*, 126 N. Y. Supp. 513, 514, 141 App. Div. 763.

"Partnership" is defined as the relation subsisting between two or more persons who have contracted together to share as common owners the profits of the business carried on by all or any of them on behalf of all of them. *Breinig v. Sparrow*, 80 N. E. 37, 38, 39 Ind. App. 455.

While a community of interest in the profits is not of itself conclusive of the existence of a "partnership," it is of the very essence of the contract, and a partnership cannot exist without it. *Bentley v. Brossard*, 94 Pac. 736, 742, 33 Utah, 396.

A "partnership" may be defined as the relation existing between two or more persons who have agreed to carry on a business together and to share the profits thereof as joint owners of the business. *Herman Kahn Co. v. A. T. Bowden & Co.*, 96 S. W. 127, 128, 80 Ark. 23, 10 Ann. Cas. 132 (citing *Meehan v. Valentine*, 12 Sup. Ct. 972, 145 U. S. 611, 36 L. Ed. 835).

To constitute a "partnership," the partners must share something by virtue of the partnership agreement, and that which they are to share must consist of profit to arise from the predetermined business, which is to be engaged in for the common benefit. An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the chief characteristic of every partnership, and is the leading feature of nearly every definition of the term (citing *Lindley*, Partn. p. 1). A partnership, as said by *Collyer*, results from "a voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or any or all of them, under an understanding that there shall be a communion of profits between them and for the purpose of carrying on a legal trade, business, or adventure." *Coons v. Coons*, 56 S. E. 576, 578, 579, 106 Va. 572.

The agreement between two parties, that all the commissions received by them for selling certain insurance stock should be equally divided between them, constituted a "partnership." *Pratt v. Fraser*, 129 S. W. 1068, 1069, 95 Ark. 405.

Under Rev. Codes, §§ 5466, 5469, 5482, defining a "partnership" as the association of two or more persons to carry on a business together and divide the profits, and providing that the interest of each member of a firm extends to every portion of its property, and that every general partner is agent for the firm in the transaction of its business, etc., it is essential to a partnership that there is community of ownership in the profits; but the sharing of profits is not a conclusive test of a partnership. *Weiss v. Hamilton*, 105 Pac. 74, 76, 40 Mont. 99.

A "partnership," as a general rule, exists where persons share in the profits of an

enterprise as profits, and not as a measure of compensation for services, property, or opportunity in aid of the business. A purchaser in an option contract to purchase real estate agreed to turn the option over to a third person, and to obtain from the vendor an extension thereof, and the third person agreed to look over the premises, and, if he could purchase them for a satisfactory price, he would do so, and resell within a reasonable time, and divide with the purchaser the net profits. Both parties considered the option of value, and the vendor proposed to comply therewith. It was understood that the purchaser should have the taxes and the expenses of examining the land and estimating the timber, and should pay interest on the price paid by the third person, though it was expected that these sums would be paid out of the purchaser's half of the profits. Held to show that the purchaser and the third person agreed to become partners to deal in real estate. *Langley v. Sanborn*, 114 N. W. 787, 788, 135 Wis. 178.

Where two or more parties are engaged in a joint business enterprise, in which they contribute either capital, skill, or labor upon an understanding, tacit or otherwise, that they will share in common the profits accruing from the venture, they are partners in fact and in law. Complainant and defendants entered into a written memorandum contract, which recited that they were "offering for sale a tract of land [about 17,000 acres]," and providing that in case of sale they should share equally in the net profits. The evidence showed that the land was timber land, and that it was the intention to acquire it by purchase from separate owners in small tracts; the expected profit being in aggregating such tracts and selling together some large lumbering concern. A number of options had previously been secured, and others were subsequently secured, aggregating in all some 25,000 acres. Some of these options expired, and one of the defendants viewed the same in his own name, as he was authorized to do for convenience. Nothing had been done toward terminating the agreement, and all parties were performing agreed services in furtherance of the same, when such defendant contracted to sell all of the land for his own benefit, claiming that the agreement expired with the options which were held when it was made. Held, that the agreement created a "partnership," that such defendant could not renew expiring options for his own benefit, but that renewals inured to the benefit of all partners, and all were entitled to share the profits of the sale. *Gaddie v. Mann*, Fed. 960, 963 (citing *In re C. F. Beck & Co.*, 130 Fed. 476; *George*, Partn. 30).

"A 'partnership' may as well be predicated of an agreement to share net profits as of an agreement to share the profits and

losses and the same rule applies. Hence participation in the profits of the business raises a presumption of the existence of a partnership." *Tamblyn v. Scott*, 85 S. W. 918, 111 Mo. App. 46 (quoting and adopting definition in *Torbert v. Jeffrey*, 61 S. W. 823, 161 Mo. 645, 656).

In order to constitute a "partnership," it is necessary that there should be something more than the joint ownership of property. A mere community of interest by ownership is not sufficient. This creates a tenancy in common, but not a partnership. The test of a partnership between the parties themselves is largely a question of intention; but, before there can be a partnership between the parties themselves, there must be an agreement from which a community of profit and loss arises. There is no presumption of a partnership from a mere joint ownership of the property. It is ordinarily considered that an agreement to share in the profits is an essential element of every partnership, and yet because one shares in the profits this does not necessarily constitute him a partner; but if there is an absence of a sharing in the profits, then there is no agreement by which it can be said a partnership exists. *La Cotts v. Pike*, 120 S. W. 144, 145, 146, 91 Ark. 26, 134 Am. St. Rep. 48.

An agreement between corporations operating distinct lines of steamers plying between the same points to pool their earnings, and, after paying the ordinary running expenses of all the steamers and certain extraordinary expenses, to divide the net earnings in certain proportions, does not and cannot create a "partnership." *White Star Line v. Star Line of Steamers*, 105 N. W. 135, 137, 141 Mich. 604, 113 Am. St. Rep. 551.

Where plaintiff and another agreed to put up an equal amount of margin for the purpose of conducting certain speculative transactions in cotton and divide the profits equally, and plaintiff contributed a certain sum on account of margin, which he later received on account of profits, the parties were "partners." *Jones v. Walker*, 101 N. Y. Supp. 22, 23, 51 Misc. Rep. 624.

An instrument by which plaintiff was to contribute to the business the use of his hotel, with its furnishings, make certain specified outside repairs, and pay taxes and insurance, and defendant was to manage the business, pay for the water, ice, and electric lights, and put in certain furnishings, and make certain inside repairs, the net profits of the business to be divided between them, was, although it recited that plaintiff "leased" the premises to defendant, a "partnership" agreement, as respects an accounting between the parties. *Mason v. Gibson*, 60 Atl. 96, 97, 73 N. H. 190.

#### Same—As compensation for services

Where one is employed by the owner of a mill to take charge of it as miller, he to

have a third of the profits for his services, he is not a "partner," liable for losses. *Jackson v. Haynie's Adm'r*, 56 S. E. 148, 106 Va. 365 (citing *Chapline v. Conant*, 3 W. Va. 507, 100 Am. Dec. 766; *Sodiker v. Applegate*, 24 W. Va. 411, 49 Am. Rep. 252).

The ultimate and conclusive test of a partnership is the co-ownership of the profits of a business. If there is community of profits, a "partnership" follows. When it appears that the parties are not joint owners in the business, or that one alone is principal and the other receives his share as compensation, it is not a "partnership." *Altgelt v. Alamo Nat. Bank* (Tex.) 79 S. W. 582, 586 (citing *Ruzard v. Bank of Greenville*, 2 S. W. 54, 67 Tex. 83, 84, 60 Am. Rep. 7; *Bates*, Partn. § 36; *George*, Partn. § 9).

Where several parties associated themselves together to prosecute a certain business, some of them contributing property and others services, with the understanding that there should be a community of interest in the profits in fixed proportions, there was a "partnership"; but a party who did not contribute property or services towards the capital of the firm, but was merely employed to perform services, for which he was to recover as compensation a certain portion of the profits, was not a partner. *Recton v. Robins*, 86 S. W. 667, 669, 74 Ark. 437.

It is not essential to constitute a "partnership" that the parties are by agreement to share in the losses of the business; but it is sufficient if they are to have a community of interest in the profits as such. It is, however, requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the benefit arising from some predetermined business engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and it is the leading feature of nearly every definition of the term. An agreement by which one party is to furnish the capital and the other his services, the profits to be divided between them, without any special agreement as to losses, constitutes a partnership. *Miller v. Simpson*, 59 S. E. 378, 380, 107 Va. 476, 18 L. R. A. (N. S.) 962.

"If one person advances funds, and another furnishes his personal services and skill in carrying on the business, and is to share in the profits, it amounts to a 'partnership.' It would be a valid partnership, notwithstanding the whole capital was in the first instance advanced by one partner, if the other contributed his time and skill to the business, and although his proportion of gain and loss was to be very unequal. It is sufficient that his interest in the profits be not intended as a mere substitute for a commis-

sion, or in lieu of brokerage, and that he be received into the association as a merchant, and not an agent." *Kelley Island Lime & Transport Co. v. Masterson*, 93 S. W. 427, 430, 100 Tex. 38.

Where plaintiff's testator, having purchased certain lands, placed them in the hands of B. for sale, agreeing that, if no sales were made within five years, the arrangement should be terminated; if sufficient sales were not made to enable testator to get his money back, with interest, B. should receive 5 per cent. commissions on sales made; and if testator was reimbursed within that time B. should receive one-half of the profits—the arrangement did not constitute a contract of "partnership" between them. *Corbin v. Holmes*, 154 Fed. 593, 600, 83 C. C. A. 367 (citing *Shaeffer v. Blair*, 13 Sup. Ct. 856, 149 U. S. 248, 37 L. Ed. 721).

A "partnership" is "an association of two or more persons for the purpose of carrying on business together and dividing its profits between them" (quoting Civ. Code, § 3180). Consequently one merely employed by another to buy and handle sheep, to rent ranches to winter them on, and to buy food for them, in consideration of which he is to receive a fixed compensation and one-third of the profits, is not a partner, and the relation between the parties is not that of a partnership. *Beasley v. Berry*, 84 Pac. 791, 792, 33 Mont. 477.

If the party's interest is that of owner, if he has a right to dispose of and control the profits of the enterprise as profits, then there is a "partnership." Where, however, a party makes no contribution to the capital stock of the concern, nor has any right to control the profits, but only is to receive a certain proportion of the net profits in compensation for his labor, the "partnership relation" does not exist. *Hand Trading Co. v. Jones*, 60 S. E. 154, 155, 129 Ga. 853 (quoting and adopting the definition in *Dawson Nat. Bank v. Ward*, 48 S. E. 313, 120 Ga. 861).

Wherever a community of interest exists in the profits of a business, as profits, there is a "copartnership"; a share in the profits of an enterprise, not as profits, but as compensation for service, property, or opportunity furnished in aid of the business, does not constitute a "partnership." *Wagner v. Buttes*, 139 N. W. 425, 428, 151 Wis. 668.

#### Same—As compensation for use of property

*Snyder's St.* § 4959, defines "partnership" as the association of two or more persons for the purpose of carrying on business together and dividing its profits. *Bates on Partnership* defines it as the contract relation subsisting between persons who have combined their property, labor, or skill in an enterprise or business as principals for the purpose of joint profit. It is defined in *Citizens' Nat. Bank of Chickasha v. Mitchell*, 103 Pac. 720.

726, 24 Okl. 488, 501, 20 Ann. Cas. 371, as existing as a result of a voluntary contract between the parties, and never solely by operation of law. It is a relation arising out of a contract to do certain things, and exists only where the parties intend to enter into the contract of partnership, and unless they have estopped themselves by holding themselves out to the world as partners, their intention, as derived from the contract, is decisive. The court in this case refuses to undertake the difficult task of giving any general definition of partnership, but holds that a contract by which one person leases to another machinery and tools for drilling an oil well, who agrees to pay the lessor 90 per cent. of the net profits derived from the well, and gives as security for his rent an order on the person for whom the well is being drilled for all moneys that are to be paid the lessee, and directs the lessor to pay the operating expenses out of such moneys, does not create a partnership. *McKallip v. Geese*, 118 Pac. 586, 587, 30 Okl. 33.

#### Sharing losses

"It is not necessary, in order to constitute a 'partnership,' that there be an express agreement that each party shall bear a share of any losses which may occur in the business. This may be inferred from the other provisions of the contract, and the nature of the business, and the relation of parties to the business to be transacted." *Jones v. Patrick*, 140 Fed. 403, 406 (quoting and adopting definition in *Richards v. Grinnell*, 18 N. W. 668, 63 Iowa, 44, 51, 50 Am. Rep. 727).

#### Sharing both profits and losses

Profit-sharing is not always a conclusive test of "partnership," but an agreement to share both profits and losses always creates partnership, and it is immaterial if the person furnishing the capital calls the other partner to the agreement an agent, as his opinion of their relations will not control as against the fact that they were to share the profits and losses of the business. *Bowman & Cockell v. Ed Blanton & Co.*, 132 S. W. 1041, 1042, 1 Ky. 407.

A mere participation in the profits and losses of a business does not necessarily create a "partnership." There must be such community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, and dispose of the whole property; a right which, on the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased. The fact that one agreed to divide with another a commission for selling land was insufficient to constitute them partners; no losses or expenses being contemplated or involved. *Sain looney*, 101 S. W. 1127, 1130, 125 Mo. App.

(quoting and adopting the definition in *Reberger v. Friede*, 23 Mo. App. 631).

A "partnership" can only be formed by voluntary agreement, express or implied, by two or more competent persons, joining together their property, labor, skill, and experience with one or more of them, in the transaction of business for their common benefit and profit, and it is this community of interest in sharing the profits and losses of the business which constitute a complete partnership, as well between the parties as in respect to strangers. *Jones v. Purnell* (Del.) 62 Atl. 149, 150, 5 Pennewill, 444.

An agreement to share in the losses and profits is not necessary to constitute a "partnership," but it is sufficient if there is an agreement to share in the profits only. *Leeds v. Townsend*, 81 N. E. 1069, 1070, 228 Ill. 451, 13 L. R. A. (N. S.) 191 (citing *Fougner v. First Nat. Bank*, 30 N. E. 442, 141 Ill. 124).

A "partnership contract" is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in a lawful business, and to divide the profits and bear the losses in certain proportions. *Chapin v. Cherry*, 147 S. W. 1084, 1092, 243 Mo. 375.

The mere sharing of profits will not be construed as establishing a "partnership relation," but is a circumstance to be taken in consideration. An agreement to share profits, nothing being said about losses, amounts prima facie to an agreement to share losses also, and accordingly persons engaged in any business or venture, sharing the profits, are "partners," unless an intention to the contrary can be shown. *Johnson Bros. v. Carter & Co.*, 94 N. W. 850, 852, 120 Iowa, 355 (citing *Ruddick v. Otis*, 33 Iowa, 402; *Winter v. Pipher*, 64 N. W. 663, 96 Iowa, 17; 1 *Lindl. Partn.* [Ewell] 30; *Richards v. Grinnell*, 18 N. W. 668, 63 Iowa, 44, 50 Am. Rep. 727).

"A 'partnership' is a status dependent on the contract between two or more persons. Its distinguishing, essential elements are the contract or agreement to become partners and the sharing of profits or loss proportionately. Its members may contribute money, property, or labor, or any of them; but, unless there is an express agreement to share profits (and impliedly, if not expressly, to bear losses) in a given proportion among the parties to the agreement, it is not a 'partnership,' whatever rights the parties have." Where an owner sold his stock of merchandise under an agreement that the business should be continued in his name, and that he was to hold the assets to indemnify him against loss and to secure the sum owing him, and where the buyer conducted the business in the owner's name, and bought goods in his name, the owner and buyer were not partners, either in fact or law. *Hartford Fire Ins. Co. of Hartford, Conn., v. McClain* (Ky.) 85 S. W. 699, 700 (citing *Miller v. Hughes*, 1 A. K. Marsh. [8 Ky.] 182, 10 Am. Dec. 710).

In an action against defendants, as partners, on an account for purchases made by one of them, an instruction that, if defendants were jointly engaged in extracting ore from the ground on the lots mentioned in the written contract introduced in evidence, and that each defendant was to share in the profit and loss according to their respective interests therein, then they were "partners," though there was no express agreement to become partners, or to share in profits and losses, was proper. *Dale & Bennett v. Goldenrod Min. Co.*, 85 S. W. 929, 110 Mo. App. 317.

It is not essential to a "partnership agreement" that it shall contemplate that the profits shall be liquidated in the form of money or property for division in the ratio of the interests of the respective members; but it is sufficient if the ultimate result of the business operations of the association contemplates a community of profits or of losses. Where cranberry producers agreed in forming an association for the sale of their product to bear the current running expenses in a ratio corresponding to their respective interests in the association regardless of the extent to which they might actually use the union in selling their berries, and to share profits in the agreed ratio of their respective interests, there was such a community of interest in profits and losses as to constitute the association a "partnership." *Briere v. Searls*, 105 N. W. 817, 818, 820, 126 Wis. 347.

#### PARTNERSHIP DEBTS

"Partnership debts" are the debts of each partner in solido and at law both separate and joint creditors may attach either separate or joint property and sell it on execution in satisfaction of their judgments, without regard to equities existing between their debtors. But in equity partnership effects must be applied in satisfaction of partnership debts, in preference to debts due creditors of the individual partners, and to the extent that partnership debts are not fully paid by the joint property, they stand the same as other debts against each partner's separate estate. *F. R. Patch Mfg. Co. v. Capeless*, 63 Atl. 938, 939, 79 Vt. 1 (citing *Cutler v. Thomas' Estate*, 25 Vt. 73; *Bardwell v. Perry*, 19 Vt. 292, 47 Am. Dec. 687; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Barton Nat. Bank v. Atkins*, 47 Atl. 176, 72 Vt. 33; 3 Kent's Com. 32).

A judgment on a note for a debt of a partnership, though signed by the partners individually, is a "partnership debt," within the discharge in bankruptcy of the partners from debts provable against the estate of the partnership. *Young v. Stevenson*, 84 S. W. 623, 624, 73 Ark. 480 (citing *Bates*, Partn. §§ 452, 453; *In re Mosler*, 112 Fed. 138; *Farwell v. Huston*, 37 N. E. 864, 151 Ill. 239, 42 Am. St. Rep. 287; *Trowbridge v. Cushman*, 24 Pick. [41 Mass.] 810; *Kendrick v.*

*Tarbell*, 27 Vt. 512; *Mix v. Shattuck*, 50 Vt. 421, 28 Am. Rep. 511; *Spalding v. Wilson*, 80 Ky. 589; *Clanton v. Price*, 90 N. C. 96; *Carson v. Byers*, 25 N. W. 828, 67 Iowa, 606; *McKee v. Hamilton*, 33 Ohio St. 7).

#### PARTNERSHIP PROPERTY

The fact that land belonging to a partner is made use of by the firm does not render it "partnership property." *Humes v. Higman*, 40 South. 128, 131, 145 Ala. 215.

Real estate not purchased with partnership funds does not become "partnership property," though used for partnership purposes, unless there is some agreement that it shall so be considered. *Clark v. Lyster*, 155 Fed. 513, 517, 84 C. C. A. 27 (citing *Story*, Partn. [7th Ed.] §§ 94, 95, note B; 1 Lindl. Partn. [2d Am. Ed.] p. 332 et seq.; *Appeal of Shafer*, 106 Pa. 49; *Alexander v. Kimbro*, 49 Miss. 529; *Ware v. Owens*, 42 Ala. 212, 94 Am. Dec. 672).

#### PARTRIDGE

Grouse including, see Grouse.

"Partridges" are considered game birds, within the law making it a misdemeanor to hunt any game on the Sabbath Day. *Gunn v. State*, 15 S. E. 458, 459, 89 Ga. 341.

#### PARTY

See GUILTY PARTY; MINORITY PARTY; POLITICAL PARTY; PRIVATE PARTY; THIRD PARTY.

CHARTER PARTY, see CHARTER PARTY.

OTHER PARTY, see OTHER.

The word "party" means as naturally a body composed of several individuals as a body sole and individually, and, though everywhere implying unity, it is properly used to signify a unit composed of many, as well as an individual. *State v. Alley*, 51 South. 487, 476, 96 Miss. 720.

In an action against a married woman on a note, an instruction that the material question to be decided was, "Did the parties at the time the note in suit was executed contract with reference to and upon the faith and credit of the separate estate of the defendant?" is not erroneous in the use of the word "parties," since that word referred to the parties to the contract and suit, including all. *Union Stockyards Nat. Bank of South Omaha v. Lamb*, 139 N. W. 216, 218, 92 Neb. 608.

In an action against principals and their agent to recover money lost at gaming, where the court instructed that, if defendant M. was agent for defendants A. and G. in the transaction of business in which plaintiff bought and sold stock, grain, etc., on a margin, and at the time of any such sale or purchase the delivery of the articles was not contemplated by the parties thereto, or their

agent, the jury should find for plaintiff, the words "parties thereto," so used, required the jury to believe that no delivery was contemplated by all the parties to the purchases or sales previously referred to in the instructions. *Paducah Commission Co. v. Boswell* (Ky.) 83 S. W. 144, 145.

#### Contract of sale

The word "party," contained in Gen. St. 1894, § 4191, providing that, to entitle any instrument affecting real estate to be recorded, it must be executed and acknowledged by the party executing the same, does not refer to a vendee who signs a contract, but to the party required to sign such an instrument, in order to constitute a valid conveyance under Gen. St. 1894, § 4213. *McPheeters v. Rong*, 103 N. W. 889, 890, 95 Minn. 164.

#### Deed

The words "party" or "parties" are commonly employed interchangeably in deeds, regardless of whether their antecedents are singular or plural. *Lawson v. Todd*, 110 S. 412, 413, 129 Ky. 132.

#### Insurance policy

Code 1906, § 2563, defines an "insurance contract" as "an agreement by which one party for a consideration promises to pay money, or its equivalent, or do some act in favor of the assured, upon the destruction, or injury of something in which the party has an interest." Held, that a policy in favor of a lumber company for property aggregating in value \$8,000, made by a manufacturing lumbermen's writers' association, composed of a number of persons, firms, etc., was an insurance contract falling literally within such definition, such organization being a "party" within the meaning of the statute. *State v. Al-South*, 467, 475, 476, 96 Miss. 720.

#### Gage

A trustee is not a "party" to the mortgage by the law of Massachusetts. In *Donald*, 173 Fed. 99, 102 (citing *Haskell*), 60 N. E. 485, 179 Mass. 120, 125.

A mortgagor's trustee in bankruptcy is not a "party" to the mortgage, within Rev. Stat. c. 198, § 1, providing that, unless the mortgage has been delivered to and accepted by the mortgagee, the mortgage shall be void against a person, other than the mortgagor, until it has been recorded as such. In *re Jules & Frederic Co.*, 133, 536.

A chattel mortgage covering after-acquired property was invalid as to such property under the local law except between the mortgagor and the mortgagee, the mortgagor's trustee in bankruptcy could not be regarded as taking the mortgage in such a sense as to make it a "party" to the mortgage, and hence, the trustee not having taken possession of the property prior to the mortgagor's ad-

judication as a bankrupt, the trustee, though taking the property in the same plight and condition in which the bankrupt held it at the time of adjudication, did not take subject to any lien or equity in favor of the mortgagee as against such after-acquired property, it being property which might have been levied on and sold under judicial proceedings against the bankrupt at that time, as provided by Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565. In *re Hurley*, 185 Fed. 851, 853, 854.

#### PARTY (In Practice)

See Adverse Party; Case in Which State is a Party; Coparty; Defect of Parties; Each Party; Either Party; Formal Parties; Indispensable Party; Losing Party; Necessary Parties; Non-joinder of Parties; Opposite Party; Prevailing Party; Proper Party; Real Party in Interest; Same Parties; Substantial Party; Successful Party; Surviving Party.

#### Allowance of costs

Under Rev. St. 1898, § 2049, providing that costs shall be allowed in the Supreme Court, irrespective of any costs taxed in the case below to the prevailing party, the word "party" is used in the plural or singular sense, according to the person or persons standing for the particular interest involved. *Harrigan v. Gilchrist*, 99 N. W. 909, 1012, 121 Wis. 127.

#### Attorney included

If a rigid construction is to be given to the word "party" as used in subdivision 1 of section 5876, Ballinger's Ann. Codes & St., providing that, if judgment be given against a public corporation, on the presentation of a certified transcript to the officers authorized to draw orders on the treasurer, he shall draw an order in favor of the party for whom the judgment was given, the word would have to be construed to mean the minor, instead of his attorneys, who would have to present a certified transcript; but such construction is not a practical one, and the proper construction is that the word "party" has reference to the party to the action or to his attorneys. *State ex rel. Lane v. Ballinger*, 82 Pac. 1018, 1021, 41 Wash. 23, 3 L. R. A. (N. S.) 72.

#### Challenge of jurors

Under a statute providing that "either party in a civil action or in any criminal proceeding may, at or before the time when the jury is called for the trial of the cause, challenge in writing addressed to the clerk of the court any jurors, not exceeding one in six, without alleging or showing any cause therefor," where there are one or more defendants in any indictment or other criminal proceeding, all of the defendants taken collectively and not individually are entitled to challenge peremptorily one juror out of ev-

ery six that are called for the trial of the cause. *State v. Sutton*, 10 R. I. 159, 161.

Where principal and agent are joined in an action for fraud, and the principal may be found liable only for the wrongful acts of the agent so that the interests of defendants may be adverse to each other, each defendant is a "party," within Code Civ. Proc. § 1176, entitling each party to six peremptory challenges. *Lane v. Fenn*, 120 N. Y. Supp. 237, 243, 65 Misc. Rep. 336.

In *Hurd's Rev. St.* 1903, p. 1406, § 48, providing that in all civil actions each party shall be entitled to a challenge of three jurors without showing cause for such challenge, the word "party" includes all persons, plaintiff or defendant, however numerous they may be, and all persons, plaintiff or defendant, are entitled in the aggregate to but three peremptory challenges. *Illinois, I. & M. R. Co. v. Freeman*, 71 N. E. 444, 446, 210 Ill. 270.

Code, art. 51, § 13, provides that in civil cases the lists of jurors furnished the parties must contain 20 names, and that the "parties" may each strike out 4 names from the lists, and the remaining 12 shall constitute the jury. Held that, where there are two defendants, they are not each entitled to strike four names. *Diamond State Telephone Co. v. Blake*, 66 Atl. 631, 632, 105 Md. 570.

Under *Ky. St.* 1903, § 2258, giving each party litigant the right to peremptorily challenge three jurors, "parties litigant" means the antagonistic sides of the controversy; and hence, where there were two defendants, they were entitled to only three peremptory challenges, and not to three each. *Pendly v. Illinois Cent. R. Co.* (Ky.) 92 S. W. 1 (citing and adopting *Sodousky v. McGee*, 4 J. J. Marsh. [27 Ky.] 267).

#### Change of venue

Excluding merely nominal parties, all who have appeared in an action and are interested on the same side, though not necessarily on the same side of the record, constitute one "party" as to making application for a change of venue, and must join to satisfy section 2625, *St. Crowie v. Stroh-meyer*, 136 N. W. 956, 977, 150 Wis. 401.

Under *Burns' Ann. St.* 1901, § 416, providing that venue shall be changed for certain named causes upon application of "either party," a change of venue may be granted on motion of but one of several defendants. *Dill v. Frazee*, 79 N. E. 971, 974, 169 Ind. 58 (citing *Krutz v. Howard*, 70 Ind. 174).

The term "party," as employed in Const. art. 4, § 8, and Code Pub. Gen. Laws, art. 75, § 102, providing that in all suits or actions at law, on suggestion in writing under oath of either of the parties to the proceedings that such party cannot have a fair and impartial trial, the court shall direct the record to be transmitted to some other court

when applied to civil actions, must be taken in a collective and representative sense, and joint defendants cannot remove a cause without the consent of all their codefendants. *Baltimore County Com'rs v. United Ry. & Electric Co.*, 57 Atl. 675, 676, 99 Md. 82.

#### Conclusiveness of judgment or decree

The term "party," in the sense of one who is concluded by a judgment, includes all those directly interested in the subject-matter, and who had the right to control or defend the proceedings, examine and cross-examine witnesses, and appeal from the judgment. *Allen v. McMannes*, 156 Fed. 615, 624.

The term "parties," as used in the statement of the rule that a judgment operates as an estoppel between the parties, includes those who are directly interested in the suit, know of its pendency, and have a right to control and direct or defend it. *Courtney v. William Knabe & Co. Mfg. Co.*, 55 Atl. 614, 616, 97 Md. 499, 99 Am. St. Rep. 456.

"Parties," within the rule making a prior judgment conclusive upon those who sustain that character, are not restricted to those who are parties upon the record; the term including all those having a direct interest in the subject-matter and a right to defend or control the proceedings. *Hendrick v. Biggar*, 122 N. Y. Supp. 162, 165, 66 Misc. Rep. 576.

"The term 'parties,' as used in connection with the doctrine of *res judicata*, includes all who are directly interested in the subject-matter of the suit and have a right and are given an opportunity to make a defense, control the proceedings, examine and cross-examine the witnesses, and appeal from the judgment or decree in case an appeal lies. Persons not having these rights, substantially, are regarded as strangers to the cause. A mere nominal party, having no control of or interest in the suit, is not bound by the judgment." *Perkins v. Goddin*, 85 S. W. 936, 940, 111 Mo. App. 429.

"It is a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound. Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. The right also involves the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause." *Womach v. City of St. Joseph*, 100 S. W. 443, 445, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (quoting and adopting definition in 1 Greenl. Ev. [16th Ed.] § 523).

While as a general rule judgments and decrees are conclusive only as between the



parties and privies to the litigation, the term "parties" includes all who are directly interested in the subject-matter and who have a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Where a person buying land, relying on an abstract which failed to show a certain lien, upon such lien being asserted, notified the abstract company and the sureties on its bond, and at their request instituted an injunction suit to test the validity of the lien, and gave them every opportunity, and requested them to take charge of the litigation, the judgment was conclusive against them as to the validity of the lien. *Goldberg v. Sisseton Loan & Title Co.*, 123 N. W. 266, 267, 24 S. D. 49, 140 Am. Rep. 775.

The term "parties," as understood in the law, is that no man ought to be bound by proceedings to which he was a stranger, includes all who are directly interested in the subject-matter and had a right to make a defense or control the proceedings and to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause, and to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claiming under them, or in privity with them, are equally concluded. Parties in the larger sense are all persons having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if appeal lies. Only those, therefore, who enjoyed all these privileges collectively, are concluded by decision, judgment, or decree. *Ottensmeyer v. Scott*, 37 South. 161, 7 Fla. 276, 66 L. R. A. 346, 110 Am. Rep. 137, 4 Ann. Cas. 1076 (quoting and citing *Greenl. Ev.* [16th Ed.] § 523).

*See* Sess. Laws 1881, p. 154, § 22 (Mills' Act, § 2421), providing that no claim of right to water rights of any person who refused or refused to offer evidence under subpoena shall be regarded by any commissioner in distributing water in scarcity until such "party," by application to the court having jurisdiction, has obtained leave, and made proof, to have a decree of the priority of right in his ditch is entitled, which leave is granted in all cases on terms as to other parties and payment of costs, affidavits or petitions sworn to show right claimed, and section 26, p. 156 (L. St. § 2425), authorizing a review of a decree entered in proceedings to adjudicate water rights act within two years thereafter, in case of a "party" thereto one who has such proceedings and filed his statement of claim, but refuses to offer must apply for a reargument or in two years, or the decree will

become res judicata as to him, notwithstanding section 22. *Crippen v. K. Y. Irrigating Ditch Co.*, 76 Pac. 794, 797, 32 Colo. 447.

"Parties" in the larger legal sense are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if an appeal lies." A manufacturer of an alleged infringing article, who voluntarily assists a purchaser from him in defending a suit for infringement of the patent by the use of such article, but who is not a party to the record, and is not shown to have assumed control of the defense, is not directly interested in the case, and is not concluded as to the validity of the patent by a decree in favor of the complainant, so as to be estopped thereby from setting up new defenses in a subsequent suit against him for its infringement by making and vending the same article. *Australian Knitting Co. v. Gormly*, 138 Fed. 92, 97 (quoting and adopting definition in *Green v. Bogue*, 15 Sup. Ct. 975, 985, 158 U. S. 503, 39 L. Ed. 1061).

#### Enforcement of judgment

The words "the party recovering a judgment," as used in Rev. St. § 916, providing that "the party recovering a judgment in any common-law cause in any Circuit or District Court shall be entitled to similar remedies" on the same as are provided in like causes by the laws of the state in which such court is held, include the government. *Allen v. Clark*, 126 Fed. 738, 740, 62 C. C. A. 58 (citing *Green v. United States*, 9 Wall. [76 U. S.] 855, 19 L. Ed. 806; *Fink v. O'Neil*, 1 Sup. Ct. 325, 106 U. S. 272, 27 L. Ed. 196).

#### Exception

The right of exception in an action at law is limited by Rev. St. c. 79, § 65, to a party aggrieved, and a subsequent grantee of property attached who appears only to oppose a motion for an order of notice is not a "party" having a right to except if the motion is overruled. *Abbott v. Abbott*, 75 Atl. 323, 106 Me. 113.

#### Examination as witness and production of evidence

The relatrix in bastardy is not a party to the action, within *Burns' Ann. St.* 1908, § 533, providing that a "party" to an action may be examined before trial. *Walker v. State ex rel. Laboyteaux*, 86 N. E. 502, 503, 43 Ind. App. 605.

Where an action was brought against a railroad company for alleged violation of the interstate commerce act, the corporation's officers and agents were not "parties," within Rev. St. § 724, authorizing federal courts on notice to require the parties to produce books or writings in their possession or papers containing evidence pertinent to the issue. *Cassatt v. Mitchell Coal & Coke Co.*, 150 Fed. 32, 36, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99.

Code 1906, § 1938, providing that, where the testimony of a nonresident "party" shall be desired by the adverse party, interrogatories may be filed and a copy thereof given to the party, and where he fails to answer the interrogatories his plea shall be dismissed, includes corporations; and a foreign corporation, prosecuted by the state for a violation of the anti-trust laws, must answer interrogatories filed by the state. *Cumberland Telephone & Telegraph Co. v. State*, 53 South. 489, 98 Miss. 159.

#### Intervener

"Parties" in the larger legal sense are all persons having a right to control proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies, and does not include mere interveners joining at the foot of the judgment as creditors. *Knickerbocker Trust Co. v. Tarrytown, W. P. & M. Ry. Co.*, 123 N. Y. Supp. 954, 956, 139 App. Div. 305.

One by intervening in opposition to the application of a receiver appointed in an action, to make a certain expenditure, and by consenting to the order settling the receiver's account, does not become a "party" to the action, or any other special and collateral proceeding therein other than that in which he intervenes. *In re Elliott*, 77 Pac. 1109, 1112, 144 Cal. 501, 103 Am. St. Rep. 102.

Code Civ. Proc. § 452, requiring the court to direct "parties" whose presence is necessary for a complete determination of the controversy to be brought in, and to permit persons who have an interest in the subject of the action to intervene on their application, applies to interested persons who are not made parties at the time the action is brought and who ask to intervene, and does not apply where a party dies after suing and his estate seeks to intervene in his place. The section refers to parties who, after their interests were known, were either proper or necessary parties when suit was brought. *Callanan v. Keeseville*, 95 N. Y. Supp. 513, 515, 48 Misc. 476.

#### Next friend

While a next friend is not technically speaking a "party" to the suit, he is a party within the contemplation of the statutes, and the practice of courts as to the conduct of the suit. *Swoope v. Swoope*, 55 South. 418, 420, 173 Ala. 157.

#### Officer of municipality

B. & C. Comp. § 843, providing that if either "party" request it the judge may exclude from the courtroom any witness of the adverse party not at the time under examination does not authorize the exclusion of a party; but in an action against a municipality its recorder is not a party and may be excluded, especially where no showing is made that he possessed any special information or knowledge concerning the case on trial which

would render it necessary that he should remain in the courtroom to protect the interests of the defendant. *Trotter v. Town of Stayton*, 77 Pac. 395, 396, 45 Or. 301.

#### Qualification of judge

Const. art. 5, § 11, and statute, providing that no judge shall sit in any cause where either of the parties may be connected with him by affinity or consanguinity within the third degree, does not disqualify a judge from trying an action merely because he is the father-in-law of the attorney of plaintiff, who is, under the contract with plaintiff, to receive for his services a specified part of the amount recovered; the word "party" being applied only to the parties to the suit. *Missouri, K. & T. Ry. Co. of Texas v. Mitcham*, 121 S. W. 871, 875, 57 Tex. Civ. App. 134.

Under Const. Ark. 1874, art. 7, § 20, providing that no judge shall try a case in which he may be interested, or where either of the "parties" is related to him, by consanguinity or affinity, within such degree as may be prescribed by law, a judge is disqualified where he is related within the fourth degree, the line fixed by statute, to one pecuniarily interested directly in the result of the suit, though not a party to the record, and not necessarily bound by the judgment, and a judge related within such degree to an attorney, whose fee depends substantially, if not wholly upon the determination of a cause, is disqualified. *Johnson v. State*, 112 S. W. 143, 145, 87 Ark. 45, 18 L. R. A. (N. S.) 619, 15 Ann. Cas. 531 (*Roberts v. Roberts*, 41 S. E. 616, 115 Ga. 259, 90 Am. St. Rep. 108; *Crook v. Newborg*, 27 South. 432, 124 Ala. 479, 82 Am. St. Rep. 190; *Howell v. Budd*, 27 Pac. 747, 91 Cal. 342; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114).

The word "party," as used in the constitutional provision forbidding a judge from sitting in any case where either party was connected with him by affinity or consanguinity, was not used in its technical sense. "The word 'party' there is unquestionably a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or in equity, the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons. They are parties in the writ, and parties on the record; and all others who may be affected by the writ indirectly or consequentially, are persons interested, but not parties." A judge who is the father-in-law of a daughter of an intestate is disqualified from hearing an action by the widow, suing in her capacity as survivor and representative of the community estate on a note executed to the intestate. *Duncan v. Herder*, 122 S. W. 904, 905, 57 Tex. Civ. App. 542.

Gen. St. 1902, § 496, provides that when there shall be so near a relationship between any judge and any party in any proceeding before him, as between father and son, broth-

ers, uncle or nephew by nature or marriage, etc., he shall be disqualified. Held, that the word "party" does not mean any one who has a pecuniary interest in the result of the suit, and did not include an attorney for one of the parties to the record, and especially was a judge not disqualified by the fact that his brother was one of the entered attorneys for the plaintiffs, where he withdrew his appearance on the day the case was called for trial and took no part therein. *Casmento v. Barlow Bros. Co.*, 76 Atl. 361, 362, 83 Conn. 180.

Where a sheriff is sued in conversion for property levied on, and the plaintiff in the original action has indemnified the sheriff, such plaintiff, without intervention, became party to the action for conversion, within Rev. Codes, § 6315, authorizing a "party" to disqualify the judge by filing an affidavit of prejudice. *Gehlert v. Quinn*, 98 Pac. 369, 10, 38 Mont. 1.

Const. art. 5, § 11, and Rev. St. 1895, art. 29, provide that no judge is qualified to sit in a case in which any party to the suit is related to him within the third degree. Held, that the word "party" was not limited to one named as parties in the pleadings, but included all persons directly interested in the subject-matter and result of the suit, including a purchaser of property sold at a guardian's sale pursuant to an order of the court. *Jirou v. Jirou* (Tex.) 136 S. W. 493.

#### Timing of deposition

B. & C. Comp. § 826, authorizing the giving of the deposition of a "party" to an action before trial, does not authorize the giving of the deposition of the secretary of a defendant corporation where such secretaries were not individually a party. *Armstrong v. Portland Ry. Co.*, 97 Pac. 715, 52 Or. 7.

#### Testimony by or for party

Rev. St. 1898, § 4069, providing that no person shall testify to any transaction or communication with a deceased person, where the adverse party claims under the will, does not preclude an officer of a corporation from testifying. In *re* *Will's*, 78 N. W. 169, 170, 102 Wis. 189, *New Jersey Trust & Safe-Deposit Co. v. Camden Safe-Deposit & Trust Co.*, 33 N. J. Law, 196; *Ullman v. Brunstle Guaranty & Loan Co.*, 24 S. E. 2d 625; *Bopple v. Supreme Tent of the Order of Maccabees of the World*, 45 N. W. 1096, 18 App. Div. 489.

Where a witness who had died insane after a former trial to be a party, the term "party" in a will, such as a lessee would be to a party, the other party cannot testify in his own favor. Held, that the word "party"

Under a statute providing that a party shall not testify where the adverse party is the guardian or trustee of either a deaf mute or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, or legatee of a deceased person, the term "party" refers to one who is a party to an action, and not one who may be interested in the result of the litigation, for a party may be also a witness within the statute, but a witness is not a party. *Powell v. Powell*, 85 N. E. 541, 543, 78 Ohio St. 331.

A person named as executor in a will is not really legally such until the will is proved and he has given bond in a contest as to its execution. He is not within the exception provided by Rev. St. 1857, c. 82, § 83, relating to competency of witnesses, and providing that the provisions of preceding sections shall not apply to cases where at the time of taking the testimony or the time of trial the "party" prosecuting or defending is an executor. *McKee v. Frost*, 46 Me. 239, 249.

Under Rev. St. 1909, § 6354, providing that "in actions where one of the original parties to the contract or cause of action in issue, and on trial, is dead, or is shown to the court to be insane, the other party to such contract or cause of action" shall not testify in his own favor, where a party sued on a contract is insane, another party thereto cannot testify in his own favor, though he be not a party to the action, his incompetency arising from defendant's insanity and not from his own interest, so that in a real estate broker's action for commissions for exchanging land against an insane owner, another broker who acted for the other party to the exchange under an agreement with plaintiff to divide the commissions received from their respective principals, could not testify for plaintiff, though not himself a party to the action; such other broker being a "party" to the contract sued on within the statute. *McClure v. Clements*, 143 S. W. 82, 83, 161 Mo. App. 23.

The word "party," within Code Civ. Proc. § 320 (Gen. St. § 5914), prohibiting a party from testifying concerning personal transactions and communications with a person since deceased, does not include one not technically a party to the action, however much he may be interested in the result thereof. *Hess v. Hartwig*, 112 Pac. 99, 100, 83 Kan. 592.

Rev. St. 1899, § 4652 [Ann. St. 1906, p. 2520], provides that, when one of the original parties to a contract or cause of action is dead, the other party to such contract or cause of action shall not be permitted to testify in his own favor, or in favor of any party to the action claiming under him, and that, when an executor or administrator is a party, the other party cannot testify in his own favor. Held, that the word "party"

in the latter clause means "party to such contract or cause of action," as written in the first clause; and hence, where plaintiffs' parents executed a note secured by deed of trust on their homestead to plaintiffs' grandfather, who on the death of plaintiffs' father agreed that, if their mother would convey to plaintiffs her interest in the land, he would transfer the note to plaintiffs, and the mother conveyed the land to plaintiffs, testimony of plaintiffs as to what the grandfather said to them, and as to what he said in their presence concerning the contract, was inadmissible in an action against his administrator to recover the note, since, though the contract was not made with plaintiffs, it was for their benefit, and was accepted by them. *Howard v. Hardy*, 107 S. W. 466, 467, 128 Mo. App. 349.

Code Civ. Proc. § 322, which prohibits a "party" from testifying in his own behalf in respect to any transaction or communication had personally with a deceased person, applies only to a party to the suit, and does not exclude the officers of a corporation, which may be a party, or other interested persons not parties to the action. *Mendenhall v. School Dist. No. 83 of Jewell County*, 90 Pac. 773, 774, 78 Kan. 173.

In an action against an estate for services rendered a decedent in his lifetime, where it appears that plaintiff paid no consideration for the assignment of the claim in suit, and that the assignor is the real party in interest, the court should stay further proceedings until the declaration is amended by the insertion of an averment that the suit is brought for the use and benefit of the assignor, and the assignor is thereby made a "party," within the meaning of P. L. 1900, p. 363, § 4, providing that a party to an action on a claim against the estate of a decedent shall not be permitted to give testimony regarding transactions with or statements by the deceased, so that the assignor will be disqualified as a witness, as intended by the law. *Platner v. Ryan*, 69 Atl. 1007, 1008, 78 N. J. Law, 239.

Under section 4069, St. 1898, originally, an officer or stockholder of a corporation was not included in the designation "party" nor to be considered as such by reason of the corporation being a party, and therefore not incompetent to testify in an action in which the corporation was a party. *Johnson v. Fraternal Reserve Ass'n*, 117 N. W. 1019, 1020, 136 Wis. 528.

Under Rev. St. 1899, § 4652 (Ann. St. 1906, p. 2520), excluding the surviving party to a contract from testifying after the other party's death to transactions had with him, in an action by a corporation on notes, it was improper to allow defendants to testify as to an agreement by the deceased agent of the corporation to cancel the notes; the term "party to a contract," as applied to a

contract by a corporation, meaning the person who negotiated the contract, rather than the corporation. *Columbia Brewery Co. v. Rohling & Menke*, 112 S. W. 767, 768, 133 Mo. App. 65.

A "party or a person interested in an event," within Code Civ. Proc. § 829, relating to competency of witnesses, is one who will gain or lose by the event, because the record might be used as evidence for or against him, and, being interested in the question, is not being interested in the event, and he is not interested within the statute, though he might be liable in an action against him for contribution, unless the judgment itself would be evidence against him in such action. In *re Herrington's Estate*, 132 N. Y. Supp. 486, 488, 73 Misc. Rep. 182.

Where, in probate of a will revoking former wills, beneficiaries in a prior will became parties on their own application and contested the probate, they were incompetent to testify to personal transactions with decedent; they being interested in the event and "parties to the proceeding" within Code Civ. Proc. § 829. In *re Jeffrey's Will*, 114 N. Y. Supp. 667, 672, 129 App. Div. 791.

Under a statute providing that no person shall be excluded from being a witness in any civil suit or proceeding at law or in equity by reason of his interest in the event of the same, as "party" or otherwise the respondent in a bastardy proceeding is a competent witness. *Murray v. Joyce*, 44 Me 342, 348.

#### Verification of pleading

An officer of a domestic corporation is a "party" for the purpose of verifying a pleading, within Code Civ. Proc. § 525, subd. 1, providing for verification by a party, by an officer of a domestic corporation, or by an agent or attorney of a foreign corporation having knowledge of the facts. *Henry v. Brooklyn Heights R. Co.*, 89 N. Y. Supp. 525, 526, 43 Misc. Rep. 589.

#### As witness

See Witness.

#### PARTY ACCOUNTING

On a reference for an accounting by defendant under a decree finding infringement of a patent, the defendant is the only "party accounting" within the meaning of equity rule 79, and complainant cannot be required to bring in an account as therein provided. *Goss Printing Press Co. v. Scott*, 148 Fed. 393, 394.

#### PARTY AGGRIEVED

See Aggrieved Party.

#### PARTY BENEFICIALLY INTERESTED

See Beneficially Interested.

#### PARTY COMMITTEE

A "party committee," like other committees, is an individual, or a body, to whom

others have committed or delegated a particular duty, or who have taken upon themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for. No one is bound by the act of the committee. It depends for its authority wholly upon the ratification or adoption of the body for which it has acted. In re Daniel, 184 N. Y. Supp. 254, 257, 149 App. Div. 777 (concurring opinion).

#### PARTY FAILING

Where a subcontractor for the construction of a school building sued to enforce mechanic's lien on the balance of the fund due the contractor and he was induced by both the contractor and the school directors to accept a settlement for a substantial sum, though less than the face of his claim, and on such stipulation dismissed his case, he was not a "party failing," within Code, § 3103, authorizing the court in such an action to assess a reasonable attorney's fee against the party failing in favor of such corporation. Her v. Independent School Dist. of Keota, N. W. 545, 546, 154 Iowa, 125.

#### PARTY IN POSSESSION

Where the bill of lading provided that the water carrier or "party in possession" was not be liable for any loss or damage resulting from fire, a carrier is not liable for loss of goods by fire, not occurring from its negligence, while on its wharf, before notice was given to the consignee, even if it were not then a party in possession as to the goods; it being a "party in possession." Jennings v. S. S. Co., 133 N. Y. Supp. 298, 302, 148 App. Div. 615; Seacoast Lumber Co. v. Same, N. Y. Supp. 303, 148 App. Div. 622.

#### PARTY INJURED

Injured party, see Injured Person.

#### PARTY INTERESTED

Interested.

#### PARTY LIABLE

Code Civ. Proc. § 1627, subd. 1, providing that "party liable" to the plaintiff for payment of a debt secured by mortgage may be a defendant, applies to an assignor of a mortgage guaranteeing the collection hereof. Robert v. Kidansky, 97 N. Y. 913, 916, 111 App. Div. 475.

#### PARTY NOMINATION

Party nominations are made by large groups of people organized as parties, hold-ings and conventions. In re Smith, N. Y. Supp. 14, 41 Misc. Rep. 501.

#### PARTY REQUIRING EXAMINATION

Code Act March 23, 1900 (P. L. p. 100) and Act April 11, 1908, amendatory of Code Act March 23, 1900 (P. L. p. 277), relating to taxation on the taking of depositions and providing the taking of such examination shall be

at expense thereof, apply as well to testimony taken by consent under the fifty-seventh section of the evidence act as to depositions taken under order of court. Hite v. Dell, 73 Atl. 72, 73, 78 N. J. Law, 239.

#### PARTY TO BE CHARGED

See Signed by the Parties to be Charged.

#### PARTY TO SUIT OR PROCEEDING

The word "party" may mean "person" or "party to the proceeding." In re Nathanson, 155 Fed. 645, 649.

The term "parties" includes all persons who are directly interested in the subject-matter in issue and who have a right to make a defense, to control the proceedings, or to appeal from the judgment. Strangers to the suit are persons not possessing these rights. Burrell v. United States, 147 Fed. 44, 46, 77 C. C. A. 308.

A "party to an action or suit" is one who is directly interested in the subject-matter in issue, who has a right to make a defense, control the proceedings, or appeal from the judgment. Raper v. Dunn, 99 Pac. 889, 890, 53 Or. 203 (quoting 6 Words and Phrases, p. 5203).

"Parties and privies" include all who are directly interested in the subject-matter, and who have the right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Rumford Chemical Works v. Hygienic Chemical Co., 148 Fed. 862, 864 (citing Theller v. Hershey, 89 Fed. 575).

The term "party," as used in Code Civ. Proc. § 1949, providing that, in a suit to try title to an office, judgment may be given on the right of the "party alleged to be entitled to the office," should be construed to mean the "party to the action" alleged to be so entitled. People v. McClellan, 104 N. Y. Supp. 447, 451, 119 App. Div. 416.

The word "party," as used in Wilson's Rev. & Ann. St. 1903, § 4318, providing when affidavit is made by agent or attorney it must set forth why it is not made by the party himself, means party to the suit, whether a natural person or a corporation. Chicago, R. I. & P. Ry. Co. v. Mitchell, 101 Pac. 850, 852, 19 Okl. 579.

A third party, examined under Code Civ. Proc. § 2241, in proceedings supplementary to execution, is a "party to the proceedings," and entitled to costs under sections 2432 and 2456. Howe v. Stuart, 123 N. Y. Supp. 971, 972, 68 Misc. Rep. 352.

A daughter petitioned for her appointment as guardian for her mother, an alleged incompetent. On the hearing the daughter consented to the denial of the petition so far as it asked that she be appointed guardian. The court appointed a third person. The daughter was not a "party to the action,"

under Code Civ. Proc. §§ 1763, 1764, providing for the appointment of guardians for incompetent persons on the petition of relative or friend, nor an "adverse party," within section 940, requiring notice of appeal to be served on the adverse party, so that on appeal by the incompetent she was not entitled to notice. *In re Sullivan*, 77 Pac. 153, 154, 143 Cal. 462.

A motion to quash an execution or set aside a sheriff's sale thereunder is in the nature of a new suit or legal controversy, calling for the judgment on rights that have arisen since the final judgment, and it is between a person who files the motion and the purchaser at the sheriff's sale, and each, as to that controversy or new suit, may well be called a "party to a suit," within the meaning of Acts 1891, p. 70, giving an appeal to parties from interlocutory orders, etc. *Thomas v. Elliott*, 114 S. W. 987, 989, 215 Mo. 598.

Under Rev. St. § 3162, postponing sale of mortgaged premises on judgments of foreclosure to one year from the date of the judgment of sale, but providing that the "parties" may, by stipulation in writing, consent to an earlier sale, the word "parties" must mean "parties to the action." *Hiles v. Milwaukee Power & Lighting Co.*, 55 N. W. 175, 176, 85 Wis. 90.

Under Ky. St. 1903, § 14a, providing that judicial sales shall, "unless otherwise agreed upon by the 'parties,'" be advertised in a newspaper, an infant party to proceedings for the sale of real estate of which such infant is part owner may, with the chancellor's approval, consent, through his statutory guardian, to a sale without newspaper advertisement. *Hieatt v. Schmidt*, 84 S. W. 740, 741, 119 Ky. 612.

Rev. St. 1895, art. 333, declares that all applications for certiorari to the county court shall be made to the district court or a judge thereof, and shall state the names and residences of the "parties adversely interested," and set forth the error in the proceedings sought to be reviewed. Held that, where testator's heirs sought certiorari to review an order admitting his will to probate, the executor was the person adversely interested, and a petition stating his name and residence was sufficient. *Heaton v. Buhler (Tex.)* 127 S. W. 1078.

Under Rev. St. 1899, § 4211, relating to mechanic's lien, and providing that "the parties to the contract" may be made parties, the expression "parties to the contract" has been held to signify the parties to the particular contract which is the subject of inquiry in the action, and as between whom a personal judgment may be rendered. The original contractor is a necessary party defendant in a suit by a subcontractor to enforce a mechanic's lien; but one acquiring title to premises after a mechanic's lien has attached is not a necessary "party to an action" on the

lien, nor is one conveying all his title to the premises after a mechanic's lien has attached a necessary party, but the suit may be brought against the purchaser alone. *McLundie & Co. v. Mount*, 123 S. W. 966, 968, 145 Mo. App. 660.

The executor or administrator, in actions affecting decedent's personal property in due course of administration, is the proper "party to prosecute or defend," but an exception to that rule permits an heir or legatee to appear in a suit to protect his own rights where there is collusion between parties asserting adverse interests and the legal representative of decedent. *Rine v. Rine*, 135 N. W. 1051, 1053, 91 Neb. 248.

Where fees of a referee were taxed under a stipulation of the parties before judgment, an order directing payment thereof by defendant pursuant to such stipulation, without any pleadings framed between defendant and the referee, was not a judgment for costs enforceable by execution, under Rev. St. 1899, § 1573, providing that, in a case where costs shall be awarded before or on final disposition of the case, execution shall be issued forthwith, unless otherwise ordered by the "party in whose favor the costs shall be awarded," since such provision applies only to a party litigant. *Manewal v. Proctor*, 87 S. W. 30, 32, 112 Mo. App. 315.

Rev. St. 1906, § 1230, provides that poundage shall be paid the sheriff on all moneys actually made and paid to him on execution, decree, or sale of real estate (except on writs for the sale of real estate in partition); but when such real estate is bid off and purchased by a "party" entitled to a part of the proceeds, the sheriff shall not be entitled to poundage, except on the amount over and above the claims of such party. Held, that the word "party" is not used in that section in a strictly legal and technical sense, and does not deprive the sheriff of poundage where the purchaser was a party to the action and proceedings in which the decree was taken and the order of sale made. *Major v. International Coal Co.*, 81 N. E. 240, 242, 76 Ohio St. 200.

## PARTY WALL

As incumbrance, see Incumber—Incumbrance (On Title).

"The words 'party wall' may mean a wall of which the adjoining owners are tenants in common, and the words 'wall in common' may mean a wall possessed in severalty by such owners. Primarily either term means a wall for the common benefit and convenience of both the tenements which it separates." *Lederer & Strauss v. Colonial Inv. Co.*, 106 N. W. 357, 358, 130 Iowa, 157. 6 Ann. Cas. 317.

A "party wall" is a dividing wall between two houses, to be used as an exterior

wall for each house. The term may designate a wall divided longitudinally in two moieties; each moiety being subject to a cross-encumbrance in favor of the owner of the other moiety. Every wall of separation between two buildings is presumed to be a common or party wall, if the contrary be not shown; and this is not only a rule of positive ordinance, but a principle of ancient law. *Bellenot v. Laube's Ex'r*, 52 S. E. 698, 699, 700, 104 Va. 842.

"The term 'party wall' is said to express a meaning rather popular than legal. It has been defined broadly as a wall between adjoining estates which is used for the common benefit of both, chiefly in supporting the timbers used in the construction of contiguous buildings on such estates. It has been said that, strictly speaking, a party wall is one built or supposed to have been built at the joint expense and upon grounds owned in common, so that each adjoining proprietor has an undivided interest in every part of the wall and in the ground on which it stands." *Att v. Baird*, 108 N. W. 737, 739, 145 Mich.

#### Solid structure

"The term 'party wall' is usually applied to such walls as are built on the land of another for the common benefit of both, in supporting timbers used in the construction of contiguous buildings. And a division wall becomes a 'party wall' by agreement, effectual or presumed" (quoting and adopting the definition in *Barry v. Edlavitch*, 35 Md. 171, 84 Md. 111, 33 L. R. A. 294; and *My v. Habersack*, 35 Atl. 97, 84 Md. 126). Usage the words 'party wall' and 'party wall' have come to mean a solid wall. 'Party wall' is intended to serve the purpose of a complete division between adjoining uses" and "must ordinarily be construed to mean a solid wall without windows or doors." *Coggins & Owens v. Carey*, 68 S. W. 2d, 106 Md. 204, 10 L. R. A. (N. S.) 34 Am. St. Rep. 468.

#### Entirely on land of one owner

A wall need not necessarily rest equally on adjoining lots to constitute it a "party wall." It may even be wholly on one of the lots and still be a party wall if so intended by the builder, or subsequently recognized by the owners as a party wall. *Le Library Co. v. University of Pennsylvania*, 69 Atl. 861, 862, 220 Pa. 328.

A wall erected as a dividing line between buildings built at the same time for the benefit and convenience of the adjoining owners, and erected under a contract between the owners, with flues to be used by the owners, with openings left for the insertion of rafters on both sides, is a "party wall"; a wall built entirely on the land of one owner, and never used by the owner for any purpose, or a wall

not built at joint expense, nor under a contract between the parties, and containing windows in it without openings for joists or rafters, is not a party wall. *Kiefer v. Dickson*, 84 N. E. 523, 525, 41 Ind. App. 543.

## PASS

See Duly Passed; Free Pass; Wagon Pass.

Shipper's pass, see Shipper's Pass—Shipper's Ticket.

#### Body of water

A defined channel, extending between Padre and Mustang Islands, through which the tide flows and ebbs, leading from the interior end of a strait to Corpus Christi Bay, one of the coast waters of Texas on the Gulf of Mexico, through which channel the Gulf waters flow, is a part of the Corpus Christi "pass," within Pen. Code 1895, art. 529g, as amended by Acts 31st Leg. (1st Ex. Sess.) c. 23, prohibiting the taking of fish, except by hook and line, from all waters within one mile on either side of all passes leading from the Texas coast waters into the Gulf of Mexico. *Gibson v. Sterrett (Tex.)* 144 S. W. 1189, 1191.

#### Coin or bank note

The plain or ordinary or usual sense of the word "pass," as applied to coin or bank notes, is to deliver in exchange for something else, and is equally expressed by the words "sell," "exchange," or "deliver." *State v. Standifer*, 108 S. W. 17, 20, 209 Mo. 264 (quoting *State v. Watson* 65 Mo. 115).

The word "pass," as applied to coin or bank notes, is to deliver in exchange for something else, and is equally expressed by the words "sell," "exchange," or "deliver." Therefore selling, exchanging, or delivering a bank bill or a piece of money is, in common parlance, passing the bill or money. *State v. Harroun*, 98 S. W. 467, 470, 199 Mo. 519.

#### Forged instrument

The gravamen of the offense of forgery is not the act of "passing or uttering an alleged forged instrument," but the knowledge that such instrument was forged at the time it was passed. *Gaut v. State*, 94 S. W. 1034, 1036, 49 Tex. Cr. R. 493.

#### Loan

A representation by a vendor that a third person had accepted a loan on the premises for a specified amount, while the third person had as a fact declined to "pass" a loan for that amount because of the construction of a wall on the premises, is a material representation as to value and the facility with which the purchaser may complete the purchase by mortgaging the property; the word "pass" being equivalent to "accept." *Kreshover v. Berger*, 119 N. Y. Supp. 737, 738, 135 App. Div. 27.

**Property**

As revert, see Revert.

The estate of a wife, a resident, dying intestate, leaving a husband and no descendants, does not "pass" to the husband under the intestate laws, within Tax Law (Consol. Laws 1909, c. 60) § 220, imposing a tax on the transfer of property "passing under intestate laws," but the estate devolves on the husband by operation of law. In re Green's Estate, 129 N. Y. Supp. 54, 144 App. Div. 232; 124 N. Y. Supp. 863, 68 Misc. Rep. 1.

The term "pass by will or by the intestate laws of this state," in the collateral inheritance tax law (Acts 1896, p. 38, No. 46), imposing a tax on all property which shall "pass by will or by the intestate laws of this state," means to pass by virtue of the law governing intestate or testate succession, and, as the succession of debts due to a decedent domiciled within the state from non-residents of the state is governed by the state of the residence of the debtors, the act does not impose a tax on such debts. Miller v. Wilbur, 56 Atl. 280, 281, 76 Vt. 73.

The title, "An act to amend an act entitled 'An act to tax intestates' estates, gifts, legacies, devises and collateral inheritance in certain cases,'" is sufficiently comprehensive to include the subject-matter of section 1, subd. 2, providing that a tax may be imposed when the transfer is by will of property within the state and decedent was a nonresident at death; the word "transfer" being used as synonymous with "passing," "change of title," or "change of possession." Dixon v. Russell, 73 Atl. 51, 53, 78, 78 N. J. Law, 296.

Laws 1909, c. 490, pt. 4, § 1, provides that a succession tax shall be imposed upon all property which shall "pass by will." A will leaving practically all of the property of the testator to her two nephews was contested by a sister of the testator and an heir at law, and the parties therein made an agreement by which the sister was to have one-half of the estate and each of the two nephews was to have one-quarter, which agreement was confirmed by the probate court and a decree entered thereon under Rev. Laws, c. 148, §§ 15-17. Held, that the phrase "pass by will" describes only property that passes by the terms of the will as written, and not as changed by an agreement for compromise, and the amount of the tax was to be determined in accordance with the terms of the will. Baxter v. Stevens, 95 N. E. 854, 856, 209 Mass. 459.

St. 1905, c. 314, authorizing an inheritance tax, provides in sections 1, 2, 7, 9 and 28 that all property which shall pass by will shall be subject to a tax, and provides for the rate of tax and method of collection, and also by section 12 provides that, when any debt shall be proven against the estate after the

tax has been paid, etc., a refund of a proportion of the tax shall be made. Code Civ. Proc. § 1465, provides that during the administration the probate court may set apart a homestead for the surviving spouse and minor children. Code Civ. Proc. §§ 1466, 1467, provides that the probate court may make a reasonable allowance for maintenance of the family, which shall be paid in preference to all debts, except funeral charges and expenses of administration. Held, that the homestead set apart by the probate court and the allowance as well did not pass under the will, but by the order of the probate court, especially in view of section 12, and hence the words in the taxing act, shall "pass by will," did not cover such property, and a tax on their value was erroneous. In re Kennedy's Estate, 108 Pac. 280, 282, 157 Cal. 517, 29 L. R. A. (N. S.) 428.

**PASSABLE HIGHWAY**

Where a part of a consideration of a deed was an agreement by the grantee to open a "passable highway" for public utility, the width of the highway not being specified, the parties contemplated that the way should be suitable to the particular locality. Vannatta v. Waterhouse, 71 N. E. 159, 160, 33 Ind. App. 516.

**PASSAGE**

See Continuous Passage; Final Passage; Prior to the Passage.

**PASSAGE OF ACT**

The word "passed," in the constitutional provision that an act, when passed, shall be presented to the Governor, who may approve or withhold his approval, means passed in the manner prescribed by the Constitution; and, if the Governor does approve, his approval is not conclusive of the validity of the statute. Rash v. Allen (Del.) 76 Atl. 370, 381, 1 Boyce, 444.

**As time of becoming a law**

Act approved March 26, 1911 (Laws 1911, p. 283), changing the time for holding terms of circuit court in the Eleventh judicial district, and requiring the terms in Desha county to be held on the third Monday in January and the fourth Monday in August, and providing that it shall "take effect and be in force ninety days from and after its passage," became effective August 24, 1911, the word "passage" meaning approval of the Governor. Jackson v. State, 142 S. W. 1153, 1154, 101 Ark. 473.

The term "passage of this act," in Act March 15, 1907 (Laws 1907, p. 398, c. 173), requiring an action to cancel a tax deed to be brought within three years from the issuance of the deed, provided that the act shall not apply to actions on deeds heretofore issued is they be commenced within one year after the "passage of this act," means the time the act was actually passed by the Leg-



islature and approved by the Governor, and not the time, 90 days after the adjournment of the Legislature, when the act went into effect, there being nothing in the act requiring a resort to technical or secondary meanings of the words to give the act meaning and effect. *Cordner v. Dear*, 104 Pac. 780, 5 Wash. 479.

The word "passage," as used in Colorado Act March 14, 1902 (Laws 1902, p. 23, § 2, providing that every railroad company shall, within six months after the passage of the act, build and maintain fences on the sides of its roads, etc., means six months after the approval of the act, so that fences built six months after the approval of the act were built within the time required by the act. *Denver & R. G. R. Co. v. Annaman*, 100 Pac. 414, 415, 45 Colo. 264.

#### Is time of taking effect

While an act of the Legislature is passed when it is approved by the Governor, the decisions are uniform in holding that the phrase "at the time of the passage of the act" means when the act takes effect. *Mills v. State Board of Osteopathic Registration Examination*, 98 N. W. 19, 135 Mich. 3 Ann. Cas. 735.

In view of the constitutional provision no act shall take effect until 90 days after its passage, the expression "after the passage of the act," used in a law not containing an emergency clause, means after it goes into force. *Harding v. People*, 672, 10 Colo. 387, 392.

The word 'passage' is used in connection with legislation in several senses. The passage of a measure by either House is known as its 'passage' through that House.

The final adoption of a bill by both House and the Senate is commonly known as its 'passage.' Again, after such action by the Legislature, the approval of the Governor is properly called its 'passage.' Where acts take effect from their date, the time of approval by the Governor of final adoption over his veto or of becoming laws without his signature is called the time of their 'passage'; where the word is employed in an act finally passed at one time to take effect at a later time, it may by reason of a common usage be taken as referring to the latter date, unless such a construction is contrary to the intention appearing from the whole statute." *Scales v. Marshall*, 70 S. W. 945, 946, 96 Tex. 140. Article 17, § 1, St. 1879 (art. 3352, Sayles' Ann. 1897), as amended, and approved by Governor April 1, 1895, removed the disability of married women entitled to come to the recovery of real property by article, but postponed its operation until one year "after the passage of the act." Acts of the Legislature take

effect 90 days after the adjournment of the Legislature. Held, that the words "after the passage of this act" meant after the act took effect, and hence a married woman bringing suit March 29, 1901, was not barred by the five-year statute of limitation. *Shook v. Laufer* (Tex.) 100 S. W. 1042, 1045 (quoting and adopting definition in *Scales v. Marshall*, 70 S. W. 945, 96 Tex. 140, and citing *Galveston, H. & S. A. Ry. Co. v. State*, 17 S. W. 72, 81 Tex. 598).

Under Laws 1903, p. 684, c. 445, directing Gove county commissioners at their first regular meeting after the passage of the act to publish a notice for six weeks that they would consider a petition for the establishment of a county high school, the words "passage of the act" must be construed as meaning the time of its taking effect, and a notice published for seven weeks, only five of which were after the date when the act took effect, is insufficient. *State v. Bentley*, 101 Pac. 1073, 1075, 80 Kan. 227.

#### PASSAGEWAY

"The word 'passageway' cannot be any broader in its signification than 'way' or 'highway,' and can have essentially no different meaning." Hence the reservation of the privilege of a passway, reading "passway" as "passageway," was merely the reservation of a way or right of passage over the ground. *Chandler v. Goodridge*, 23 Me. 78, 82.

Greater New York Charter (Laws 1897, c. 378) § 762, makes the manager of a theater subject to penalty for causing or permitting any person to stand or sit in the aisles and passageways during performances, or for neglecting or refusing to cause such persons to forthwith vacate such aisles or passageways on being notified of their occupancy thereof. Held that, where the only entrance to the main floor of a theater is through a center door, and persons entering such door are compelled to pass behind the rows of seats to gain the aisle on either side of such floor, the space in the rear of the seats between the said aisles is embraced within the term "aisles and passageways" of the charter; and, where the gallery is so arranged that the only way a person can pass from one side to the other, without going down the stairs, crossing on the main floor and ascending the stairs is by passing back of the seats, the space back of the seats is a "passageway" within the charter. *Waldo v. Seelig*, 126 N. Y. Supp. 798, 800, 70 Misc. Rep. 254.

"A 'passageway,' within the meaning of the statute (Charter, § 762), is that portion of the building through which persons going to or from their seats are accustomed to, and must of necessity, pass." Where a theater has a front and a side entrance, both

of which are permitted to be used, and people are permitted to stand in a space necessary for a passageway in the use of the side entrance alone, the manager is liable to the penalty imposed by Laws 1897, pp. 263, 272, c. 378 (Charter, §§ 762, 773), forbidding the manager to cause or permit any person to occupy a "passageway" during a performance. *Sturgis v. Hayman*, 84 N. Y. Supp. 126, 127 (quoting and adopting definition in *Sturgis v. Grau*, 79 N. Y. Supp. 843, 39 Misc. Rep. 330).

#### **As structure**

See Structure.

### **PASSBOOK**

A "passbook" issued by a savings bank, even when construed in the light of the statute pertaining thereto, is an evidence of the contract between the bank and the depositor, though the statement in the book may be conclusive as between them. Therefore a depositor may assign or transfer his interest in his deposit without the delivery of the "passbook" representing the deposit, and the bank is bound to recognize such an assignment, though the transferee may not have possession of the "passbook." *Augsbury v. Shurtliff*, 99 N. Y. Supp. 989, 993, 114 App. Div. 626.

### **PASSED UPON**

Under P. S. 1896, which prohibits review of questions of variance not raised and passed upon in the trial court, unless the variance is material and substantially affects the "right of the matter," a question of variance raised in the county court cannot be deemed to have been passed upon within the meaning of the section where the variance did not affect the right of the matter and the proceedings below were pro forma, since in dealing with a variance not affecting the right of the matter the court has a discretionary power which cannot be exercised pro forma. *Fitzsimons v. Richardson, Twigg & Co.*, 84 Atl. 811, 814, 86 Vt. 229.

### **PASSWAY**

See Private Passway.

### **PASSWAY FOR ALL PURPOSES**

The natural and ordinary import of a grant of a passway for all purposes is that a general right of passage for whatever purpose and between whatever termini might best suit the convenience of or be deemed most beneficial to grantee was intended to be created, and there is nothing in it intimating that the way was created for the special purpose of providing a means of ingress and egress to or from grantee's land and from or to the street. *Sweeney v. Landers, Frary & Clark*, 69 Atl. 566, 567, 80 Conn. 575.

## **PASSENGER**

See Actually Riding as a Passenger; Common Carrier of Passengers; Foot Passenger.

Engaged in becoming a passenger, see Engaged.

The relation of carrier and passenger may exist independent of any contract between the parties for transportation. The test in determining who are "passengers" is whether the person desiring passage in good faith offered himself for the purpose of being carried as a passenger, and that he was as such accepted and received by the carrier, who undertook to transport him. *Schuyler v. Southern Pac. Co.*, 109 Pac. 458, 470, 37 Utah, 581.

The relation of passenger and carrier begins when one puts himself in the care of the carrier, or directly within its control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier, and of necessity the existence of the relation is commonly to be implied from the attending circumstances. *Strong v. North Chicago St. R. Co.*, 116 Ill. App. 246, 250.

The fact that a plaintiff claiming that he was a passenger made statements upon cross-examination which tended to show that he was not a passenger does not establish his nonstatus as a passenger where there was ample evidence in the case without such statement to establish that he was in fact a "passenger." *Chicago Union Traction Co. v. Lowenrosen*, 78 N. E. 813, 222 Ill. 506.

The relation of passenger and carrier begins when one intending to become a passenger enters on the carrier's premises, and continues until the passenger knows of his arrival at the place of destination, and has a reasonable time to alight and leave the premises. *Powell v. Philadelphia & R. Ry. Co.*, 70 Atl. 268, 270, 220 Pa. 638, 20 L. R. A. (N. S.) 1019.

Where plaintiff, with certain other excursionists, engaged an ordinary passenger car for transportation to another city and return, with the right to use the car while on the switch, awaiting return, plaintiff was not a passenger in going to the car, for her own accommodation, as it was standing on the switch sometime before it was due to leave on its return trip. *Archer v. Union Pac. Ry. Co.*, 85 S. W. 934, 935, 110 Mo. App. 349.

Where a carrier leased motive power, the use of its tracks, and train operatives to a circus company, under a contract exempting the carrier from liability for all injuries, the relation of "passenger and carrier" did not exist between the railroad company and an employé of the circus company, travelling solely by virtue of his employment, who was not a party to such transportation contract, so as to entitle such employé to recover

against the railroad company for injuries sustained in a collision between two sections of the circus train. *Clough v. Grand Trunk Western R. Co.*, 155 Fed. 81, 84, 85 C. C. A. 1, 11 L. R. A. (N. S.) 446.

Where a "passenger" on a street car was refused change by the conductor, and, after voluntarily dismounting from the car and awaiting the conductor on his return trip, spoke to him in an office of the street railway company to which he had gone, and was there assaulted by him, the company was not liable for the assault, inasmuch as the relation of passenger and carrier had ceased, and the conductor was not at the time in performance of his duty. *Reilly v. New York City Ry. Co.*, 91 N. Y. Supp. 319, 321, 46 Misc. Rep. 72.

Where defendant and another street railway company operated cars over two parallel tracks in common, and plaintiff, a passenger on a car of the other company, was injured by alighting on one of the tracks in front of one of defendant's cars, the companies being distinct, defendant was not liable as a common carrier, plaintiff being a traveler upon the street as far as defendant was concerned, and hence it was immaterial whether the other company was negligent in leaving open the gate on its platform next the parallel track, as the negligence of that company could not be imputed to defendant. *Foreman v. Norfolk, Portsmouth & Newport News Co.*, 56 S. E. 805, 806, 106 Va. 770.

One becomes a passenger on a railroad when he puts himself into the care of the company to be transported under a contract, and is received and accepted as such by the company; and, while the relation is commonly to be implied from circumstances, these must be such as to warrant an implication that the one has offered himself to be carried and the other has accepted his offer and received him; and, where the existence of the relation is in controversy, the question is whether the person has presented himself in readiness to be carried under such circumstances in reference to time, place, manner, and condition that the company must be deemed to have accepted him as a passenger. *Hogner v. Boston Elevated Ry. Co.*, 84 N. E. 464, 465, 198 Mass. 260, 15 L. R. A. (N. S.) 960.

An employé of an express company employed to load and unload express matter into and from railroad cars at a station was not a passenger. *Piper v. Boston & M. R. R.*, 72 Atl. 1024, 1030, 75 N. H. 228.

One who has not presented himself at the passenger station of a railway company or other place provided for the reception of passengers, and who has done nothing to indicate to the company's agents or employes that he intends becoming a passenger, and has in no way committed himself to the care or control of the company or placed himself

in its custody, has not established the reciprocal relation of carrier and "passenger," and cannot be regarded as a passenger being transported, and under protection of the statute of the state. *Hicks v. Union Pac. R. Co.*, 107 N. W. 798, 799, 76 Neb. 496.

#### Person about to take passage

One who, for the purpose of waiting for a train on which he is to take passage, enters the waiting room, is a passenger. *Philadelphia, B. & W. R. Co. v. Green*, 71 Atl. 986, 988, 110 Md. 32.

The relation of passenger and carrier begins as soon as one, intending in good faith to become a "passenger," enters the carrier's premises for that purpose, and the carrier's responsibility dates from that time. *Riley v. Vallejo Ferry Co.*, 173 Fed. 331, 333.

"To give rise to the relation of passenger and carrier, there must be not only an intent on the part of the former to avail himself of the facilities of the latter for transportation, but also an express or implied acceptance by the latter of the former as a 'passenger.'" One intending to board a street car, who approached it from the rear, and was in a position where the conductor, in looking out for intending passengers, would not ordinarily have seen her, and who was not seen by the conductor, who did look out towards the rear before giving the signal to start, was not a "passenger." *Foster v. Seattle Electric Co.*, 76 Pac. 995, 998, 35 Wash. 177 (quoting and adopting definition in 6 Cyc. p. 538).

"So long as a person merely intends to be carried but has not reached any place provided for passengers or used for their accommodation, he is not a 'passenger.'" Where one intending to become a passenger had not, within a reasonable time prior to the arrival of the train which he intended to take, placed himself on the platform provided for the use of passengers, and where he attempted to cross a track with a view to reaching the platform and was struck by a train, he was not a "passenger." *Gregg v. Northern Pac. R. Co.*, 94 Pac. 913, 915, 49 Wash. 183.

It is not necessary to constitute one a "passenger" that he should have had a ticket, or that he should have been actually upon the train of the defendant. If the jury believe that it was the bona fide intention of plaintiff's intestate, at the time of the accident, to board defendant's train, and that defendant had knowledge of that fact, or that the acts and conduct of deceased and the other facts and circumstances were such as to reasonably inform or notify defendant that he intended to board the train, he was entitled to such care and protection on the part of defendant as is required under the law, where the relation of passenger and carrier exists. *MacFeat v. Philadelphia, W. &*

**B. R. Co. (Del.)** 62 Atl. 898, 906, 5 Pennewill, 52.

Under a rule of the Railroad Commission that at junction points railroad companies shall open their depot waiting room for the accommodation of the traveling public at least 30 minutes before the schedule time of the arrival of all passenger trains, and that at local or nonjunction points such waiting rooms shall likewise be open, provided they shall not be required to be opened nor kept open after 10 o'clock p. m., except after delayed trains due before that hour, in which case the rooms shall be kept open until the actual arrival of the delayed trains, one whose coming to the depot to take a train is not within the limitations of the rule is not a passenger. *Smith v. Seaboard Air Line Ry. Co.*, 73 S. E. 523, 526, 10 Ga. App. 227.

One having a mileage book good on a railroad and undertaking to board a train by passing along the platform of a freight house, where he had been to check his trunks by the invitation of the railroad, was a "passenger." *Pineus v. Atlantic Coast Line R. Co.*, 53 S. E. 297, 140 N. C. 450, 111 Am. St. Rep. 858.

One holding a permit to ride on a freight train while on his way to the yards of a company to board a caboose which does not carry passengers except by special permission is not a passenger being transported over the road within *Cobbey's Ann. St.* 1903, § 10,039, and the duty which the company owes to him is only that of ordinary care. *Chicago, B. & Q. R. Co. v. Mann*, 111 N. W. 379, 381, 78 Neb. 541.

Ordinarily, when one goes to a railroad's station to take the next train, he becomes in contemplation of law a passenger, whether he has actually bought a ticket or not, provided he goes within a reasonable time before the schedule time for the departure of the train, and, where his arrival is not within such reasonable time, the carrier owes him no duty, save such as it owes to a licensee. *Texas Midland R. R. v. Griggs (Tex.)* 106 S. W. 411, 412.

Where plaintiff entered the ferry house of a railroad company in Philadelphia, intending to purchase a ferry ticket, having a ticket of defendant, another railroad company, which entitled her to transportation including the ferriage, and was injured in the ferry house while on her way to the ticket office, and used the ferry ticket to pay her fare, and the railroad ticket was afterwards used by her husband, she was not a passenger of defendant railroad company at the time of the injury. *Vandegrift v. West Jersey & S. R. Co.*, 60 Atl. 184, 185, 71 N. J. Law, 637.

#### **Same—Going to train with ticket**

A person who has purchased a ticket for his transportation and is at the station await-

ing arrival of the train is a "passenger," and entitled to protection as such. *Kelfner v. Pittsburg, C. & St. L. Ry. Co.*, 72 Atl. 253, 254, 223 Pa. 50.

#### **Same—Signaling car to stop**

One who in good faith signals, in the recognized manner, an interurban car with a view to board it, which signal is responded to by the motorman by whistling or setting his brake, is a "passenger." *Karr v. Milwaukee Light, Heat & Traction Co.*, 113 N. W. 62, 64, 132 Wis. 662, 13 L. R. A. (N. S.) 283, 122 Am. St. Rep. 1017.

#### **Same—Boarding car**

A person in the act of getting upon a street car is a "passenger." *Benjamin v. Metropolitan St. Ry. Co.*, 151 S. W. 91, 94, 245 Mo. 598.

The law deems the relation of carrier and passenger to exist and treats one as a "passenger" who is properly on the steps, entering the car. *Devoy v. St. Louis Transit Co.*, 91 S. W. 140, 143, 192 Mo. 197 (citing *Clark, Street Rys.* [2d Ed.] § 3; *Schepers v. Union Depot R. Co.*, 29 S. W. 712, 126 Mo. 665; *Barth v. Kansas City EL Ry. Co.*, 44 S. W. 778, 142 Mo. 535; *Booth, Street Ry. Law*, § 326).

One who attempts to board a rapidly moving train does not become a passenger, though he may have a ticket for it. *Illinois Cent. R. Co. v. Cotter*, 103 S. W. 279, 280.

A person becomes a "passenger" on a street car by contract, express or implied. He may become one in attempting to get on a car at a place provided for that purpose, and where people are expected to take passage, though his attempt fails. But a man does not become a passenger by making such an attempt at a place where he is not expected, and when the carmen are ignorant of his presence. The case differs from that of a man who, by license of a defendant, was at a place so usually occupied by persons that the defendant was under the duty of looking out for his welfare. *McCarty v. St. Louis & S. R. Co.*, 80 S. W. 7, 8, 105 Mo. App. 596 (citing *Webster v. Fitchburg R. Co.*, 37 N. E. 165, 161 Mass. 298, 24 L. R. A. 521; *Chicago & E. I. R. Co. v. Jennings*, 60 N. E. 818, 190 Ill. 478, 54 L. R. A. 827).

The phrase "as a passenger," as used in *Pen. Code*, § 426, subd. 2, prohibiting persons from getting on any car while in motion for the purpose of obtaining transportation as a passenger, limits the application of the section to obtaining transportation on passenger trains, as those are the only trains on which a person can obtain transportation "as a passenger." *East v. Brooklyn Heights R. Co.*, 101 N. Y. Supp. 364, 366, 115 App. Div. 683.

Where plaintiff approached an electric car standing at a station, and the motorman

being asked by plaintiff's companion which car would leave first, replied "this one," and plaintiff walked around the front of the car toward the rear of the same and attempted to board it, the relation of carrier and "passenger" arose, though he had no ticket, and the car was not going directly towards his direction. *Snipes v. Norfolk & S. R. Co.*, 56 S. E. 477, 478, 144 N. C. 18 (citing *Clark v. Durham Traction Co.*, 50 S. E. 518, 138 N. C. 77, 107 Am. St. Rep. 526).

There is some conflict in the authorities as to when the relation of carrier and passenger begins with reference to railway depots and grounds; but it cannot be doubted that when a person is on the steps or platform of the car which is open for the reception of passengers, in the act of entering for the purpose of becoming a "passenger," this relation exists. A person occupies the position of a railroad passenger, as respects the railroad company, who, having approached the railroad for that object, undertakes, with its express or implied consent, to travel in the car provided by it for the purpose; and the relation of passenger may thus arise, although the conveyance has not started on its journey. *Georgia Ry. & Electric Co. v. Cole*, 57 S. E. 1026, 1027, 1 Ga. App. 33 (citing *Baldwin, American Railroad Law*, 300; *Hutch. Car.* § 565; *Chattanooga, R. & O. R. Co. v. Huggins*, 15 S. E. 848, 89 Ga. 494).

Where a street car company stops a car equipped for carrying passengers at a place selected by it to receive passengers, a person who, desiring to be transported, boards or attempts to board the car for such purpose, becomes a "passenger," as the stopping of the car at the customary place is an implied invitation to those waiting to take passage. *Hall v. Terre Haute Electric Co.*, 76 N. E. 334, 336, 38 Ind. App. 43.

#### Same—Transferring from one car to another

"Plaintiff, with his transfer in his pocket, approached the car with two other passengers, and at the time of the injury had one foot upon the steps of the car and his right hand hold of the rod. These facts plainly make him a 'passenger.' \* \* \* The person in transferring from one car to another is still a 'passenger'; the transfer being but a part of the trip for the whole of which the company agrees to convey in safety." *Clark v. Durham Traction Co.*, 50 S. E. 518, 519, 138 N. C. 77, 107 Am. St. Rep. 526 (citing *Joyce, Electric Law*, § 528; *Washington & G. Ry. Co. v. Patterson*, 9 App. D. C. 423; *North Chicago St. Ry. Co. v. Kaspers*, 85 Ill. App. 316; *Keator v. Scranton Traction Co.*, 43 Atl. 86, 191 Pa. 102, 44 L. R. A. 546, 71 Am. St. Rep. 758).

#### Person on conveyance

The relation of carrier and passenger arises only from a contract, express or im-

plied. One who gets on the train of one railway company, mistaking it for that of another road, and, discovering his mistake after the cars are in motion, attempts to alight, but, finding while he is on the bottom step that the train is running too fast, changes his mind, and decides to pay his fare to the next station, is not, while thus on the car steps, a "passenger." *De Vane v. Atlanta, B. & A. R. Co.*, 60 S. E. 1079, 1080, 4 Ga. App. 136.

A "passenger" is one who enters the vehicle of the carrier with the intention of paying, in money, the usual fare for his transportation, or who is supplied with a ticket or pass entitling him to ride to a given point. *Powell v. St. Louis & S. F. R. Co.*, 129 S. W. 963, 970, 229 Mo. 246.

A "passenger" who purchased a ticket to a certain point, but who on reaching such point decides to go further, need not, in order to preserve his protection as a passenger, alight from the train and then re-enter, nor expressly notify the conductor of his purpose to continue his journey. *Anderson v. Missouri Pac. R. Co.*, 93 S. W. 394, 399, 196 Mo. 442, 113 Am. St. Rep. 748.

An allegation that plaintiff took passage on a street car at a designated point to be carried to another designated point shows the relation of carrier and "passenger." *Indiana Union Traction Co. v. McKinney*, 78 N. E. 203, 205, 39 Ind. App. 86.

An arrangement made by a conductor in charge of a train, with respect to the carriage of a person on the train, is binding on the carrier, and confers on such person the rights of a "passenger." *St. Louis Southwestern Ry. Co. of Texas v. Fowler (Tex.)* 93 S. W. 484, 487.

#### Same—Employé of carrier

A servant, employed in the power house of a railway company, and furnished with a free pass entitling him to ride upon the cars at any time, and about his own business, is a passenger when riding to and from his place of labor, and not a fellow servant of the motorman in charge of the car. *Harris v. City & E. G. R. Co.*, 70 S. E. 859, 69 W. Va. 65, Ann. Cas. 1912D, 59.

Libelant was employed by the owners of a steamer to go with her from Mobile to Cuba, and there operate a gasoline launch under directions of the master, his pay to start at once, but he was to perform no service until he reached the Cuban port. Held, that he was not a passenger entitled to accommodations as such. *The Vueltabajo*, 163 Fed. 594, 596.

A railroad flagman, who received as compensation for his services a weekly sum of money and transportation tickets on the railroad to convey him to and from his work, was a passenger while riding home on one of the tickets after his day's work had been

fully completed. As a general rule every one on a passenger train of a railroad company, who is there for the purpose of carriage with the consent of the company, is presumptively a "passenger." An employé being carried to and from his working place is not a passenger, but, if he is carried for his own convenience or business, he is a passenger, and if an employé pays a consideration for passage, no matter in what form, he is generally regarded as a passenger. *Enos v. Rhode Island Suburban Ry. Co.*, 67 Atl. 5, 6, 28 R. I. 291, 12 L. R. A. (N. S.) 244 (citing *Elliott, Railroads*, § 1578; *McNulty v. Pennsylvania R. Co.*, 38 Atl. 524, 525, 182 Pa. 479, 483, 38 L. R. A. 376, 61 Am. St. Rep. 721; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. 239, 98 Am. Dec. 336; *Vick v. New York Cent. & H. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; 2 Labatt, *Master & Servant*, § 642e, pp. 1833, 1834; *Dickinson v. West End St. Ry. Co.*, 59 N. E. 60, 177 Mass. 365, 368, 52 L. R. A. 326, 83 Am. St. Rep. 284; *Chattanooga Rapid Transit Co. v. Venable*, 58 S. W. 861, 105 Tenn. 460, 469, 51 L. R. A. 886; and distinguishing *Ionnone v. New York, N. H. & H. R. R. Co.*, 44 Atl. 592, 21 R. I. 452, 46 L. R. A. 730, 79 Am. St. Rep. 812; *Shannon v. Union R. Co.*, 63 Atl. 488, 27 R. I. 475).

A ship carpenter employed on a steamer, being taken by a tug to New York after the completion of his work on the steamer, is not a "passenger." *The Downer*, 171 Fed. 571, 573.

An employé of a stone quarry company who has no connection with the operation of the train while being transported to and from work is a "passenger" of the railroad company over whose track the train is operated by the quarry company with the railroad company's consent. *Gregory v. Georgia Granite R. Co.*, 64 S. E. 686, 688, 132 Ga. 587.

An employé of a street railroad company while riding on a car to his place of work is a "passenger," if he so rides of his own volition and pays his fare in coupons issued to him by the company as a part of his wages. *Hebert v. Portland R. Co.*, 69 Atl. 266, 269, 103 Me. 815, 125 Am. St. Rep. 297, 13 Ann. Cas. 886.

A section hand, riding to work on a freight train, is not a "passenger" within the common meaning of the term, but the railroad owes him the duty of exercising ordinary care for his protection. *St. Louis, I. M. & S. Ry. Co. v. Harmon*, 109 S. W. 295, 297, 85 Ark. 503.

Plaintiff, having been sent a pass by one of defendant's officers that he might begin a contemplated employment as a bridge carpenter for defendant, boarded one of defendant's trains. After the conductor had first accepted the pass, he asked plaintiff to see it again, and then in the presence of others refused to return it, saying he had orders to take it up, and after demanding that plaintiff pay his

fare said: "You s—— of a b——, this pass does not belong to you." Held, that plaintiff was a "passenger" at the time, and that, if he was injured by the conductor's misconduct, the carrier was liable therefor. *St. Louis Southwestern Ry. Co. of Texas v. Hill* (Tex.) 103 S. W. 227, 228.

A laborer employed to work on the tracks of a street car company, who travels on the company's car on a laborer's free pass to the place where he is ordered to work, is a "passenger," entitled to the protection of a passenger. *Haas v. St. Louis & S. Ry. Co.*, 90 S. W. 1155, 111 Mo. App. 706.

An employé of a terminal company, killed while riding home on a car operated by the company, after finishing his day's work, on a ticket given him for that purpose by the company's foreman in accordance with a custom of the company, was a "passenger," and not a "fellow servant," of employés operating the car, though he did not pay for the ticket, and the ticket was not furnished as a part of the contract of employment. *Indianapolis Traction & Terminal Co. v. Romans*, 79 N. E. 1068, 1078, 40 Ind. App. 184 (citing *Dickinson v. West End St. R. Co.*, 59 N. E. 60, 177 Mass. 365, 52 L. R. A. 326, 83 Am. St. Rep. 284; *Peterson v. Seattle Traction Co.*, 63 Pac. 539, 65 Pac. 543, 23 Wash. 615, 53 L. R. A. 586; *Chattanooga Rapid Trans. Co. v. Venable*, 58 S. W. 861, 105 Tenn. 460, 51 L. R. A. 886; *Doyle v. Fitchburg R. Co.*, 37 N. E. 770, 162 Mass. 66, 25 L. R. A. 157, 44 Am. St. Rep. 335; *Doyle v. Fitchburg R. Co.*, 44 N. E. 611, 166 Mass. 492, 33 L. R. A. 844, 55 Am. St. Rep. 417; *Louisville & N. R. Co. v. Weaver*, 56 S. W. 674, 108 Ky. 392, 50 L. R. A. 381; *Williams v. Oregon Short Line R. Co.*, 54 Pac. 991, 18 Utah, 210, 72 Am. St. Rep. 777, and distinguishing *McDaniel v. Highland Ave. & B. R. Co.*, 8 South. 41, 90 Ala. 64).

Men engaged in constructing railroad tracks were taken to and from the place of work in a special car furnished by the company for the mutual accommodation of the men and the company. The men paid no fare. Held, that the men were not "passengers." *Kilduff v. Boston Elevated Ry. Co.*, 81 N. E. 191, 195 Mass. 307, 9 L. R. A. (N. S.) 873.

An employé of a railroad company traveling on a train pursuant to a direction of the company was entitled to protection as a "passenger." *Johnson v. Texas Cent. R. Co.*, 93 S. W. 433, 434, 42 Tex. 604.

#### Same—Express messenger

An express messenger, carried in a special car under a contract of the carrier with the express company for transportation of express matter, is a "passenger" for hire. *Davis v. Chesapeake & O. Ry. Co.*, 92 S. W. 339, 340, 122 Ky. 528, 5 L. R. A. (N. S.) 458, 121 Am. St. Rep. 481, 12 Ann. Cas. 723.

An express messenger, while riding in a railway car in the performance of the du-

ties of his employment, is not a "passenger," nor does the railroad company occupy the relation of common carrier toward him, but of a private carrier only, and there is no public policy which forbids the parties from contracting for its exemption from liability for negligence in the carrying of such messenger; and a contract with the express company by which the messenger, as a condition of his employment, assumes all risk of injury while so riding, and one between the express and railroad companies by which the former agrees to hold the latter indemnified against claims for injuries to its employees, whether arising from negligence or otherwise, are valid and effective to prevent a messenger injured in collision due to the negligence of railroad employees from recovering therefor against the railroad company. *Long v. Lehigh Valley R. Co.*, 130 Fed. 870, 873, 65 C. C. A. 354 (citing *Blair v. Erie Ry. Co.*, 66 N. Y. 313, 23 Am. Rep. 55).

The definitions that have been given of the word "passenger" are nearly as numerous as the different occasions that have arisen to state its meaning. There is abundance of authority that an express messenger is a passenger; and, as he is present upon the train in pursuance of an agreement from which the railway company receives a financial benefit, he is essentially a passenger for hire. He is a passenger in the sense that he is neither a mere licensee, a trespasser, nor an employee of the railroad company, but one who, through his employer, the express company, has bargained for the privilege of riding upon the train. He is not a passenger in the sense that his primary object in so doing was to be conveyed from one point to another. *Sewell v. Atchison, T. & S. F. Ry. Co.*, 96 Pac. 1007, 1008, 78 Kan. 1 (citing 6 Words and Phrases, p. 5218).

#### Same—Leaving car temporarily

A passenger during his journey may alight from the car without losing his status as a "passenger." *Zeccardi v. Yonkers R. Co.*, 83 N. E. 31, 32, 190 N. Y. 389, 17 L. R. A. (N. S.) 770.

A "passenger" who alights at an intermediate station on his trip for any purpose consistent with the character of a passenger, with the express or implied consent of the carrier and the knowledge by it that he expects to return and continue his passage on the same train, does not lose his character as a passenger. *Missouri, K. & T. Ry. Co. of Texas v. Price*, 106 S. W. 700, 701, 48 Tex. Civ. App. 210.

A "passenger" on a freight train does not lose his character as a passenger by leaving the train to talk with an acquaintance during the time cars are being switched at a station. *Arkansas Cent. R. Co. v. Bennett*, 102 S. W. 198, 201, 82 Ark. 393.

A "passenger" on a railway train may alight at an intermediate station from motives of business or curiosity, and does not thereby forfeit his right to that care and precaution required to be exercised by the railway company for his safety as such, and one does not cease to be a "passenger" by so doing. *Texas Midland R. R. v. Ellison*, 87 S. W. 213, 216, 39 Tex. Civ. App. 172.

Where plaintiff paid his fare from T. to S., which also entitled him to a transfer to B., which the conductor promised him at a certain point, but at the point named, plaintiff did not see the conductor, and at S., where it was necessary for him to change cars, he asked for the transfer, and the conductor requested him to get out of the way of the other passengers, and he got off the car, whereupon a dispute arose over the transfer, and plaintiff was assaulted by the conductor, held, that the relation of passenger and carrier had not terminated. *Blomness v. Puget Sound Electric Ry.*, 92 Pac. 414, 417, 47 Wash. 620, 17 L. R. A. (N. S.) 763.

Where a passenger on a crowded street car alighted from the front platform at a transfer point to go to the rear platform, where the conductor was standing, to procure a transfer, he did not lose his status as a passenger, defeating recovery from the company for an assault by the motorman and the conductor. *Miller v. Brooklyn Heights R. Co.*, 108 N. Y. Supp. 960, 961, 124 App. Div. 537 (citing *Parsons v. New York Cent. & H. R. R. Co.*, 21 N. E. 145, 118 N. Y. 355, 362, 3 L. R. A. 683, 10 Am. St. Rep. 450; *Zeccardi v. Yonkers R. Co.*, 83 N. E. 31, 190 N. Y. 389, 17 L. R. A. [N. S.] 770).

#### Same—News agent

A news company's agent, who is permitted to ride on trains under a contract between the railroad company and his employer, is not a "passenger." *Smallwood v. Baltimore & O. R. Co.*, 64 Atl. 732, 733, 215 Pa. 540, 7 Ann. Cas. 525.

#### Same—Newsboy

A newsboy, entering a street car for the purpose of selling papers, and without paying fare, is not a "passenger" but a mere licensee or trespasser, and the company owes him no duty, except to use ordinary care for his preservation after discovering his peril, and to refrain from inflicting willful, reckless, and wanton injury. *Rosenkovitz v. United Rys. & Electric Co. of Baltimore City*, 70 Atl. 108, 111, 108 Md. 306.

Where a boy boards a railroad train for the purpose of selling newspapers under a custom which permitted such sale, but did not contemplate continuance on such train while in motion, he does not become a "passenger," in the absence of his declaration of an intention so to do, notwithstanding he may have in his pocket sufficient money with

which to pay his fare. *Chicago, R. I. & P. R. Co. v. Moran*, 117 Ill. App. 42, 45.

#### Same—Palace car employé

One not in the employment of a railroad company, but using its facilities under a contract between the railroad company and his employer, the Pullman Car Company, which simply permits his carriage for and in connection with the business of his employer conducted on the railroad, is not a "passenger," but a fellow servant, under Act April 4, 1868 (P. L. 58), of the trainmen. *Lewis v. Pennsylvania R. Co.*, 69 Atl. 821, 822, 220 Pa. 317, 18 L. R. A. (N. S.) 279, 13 Ann. Cas. 1142.

#### Same—Payment of fare

Where one boards a railroad train without any intention to pay fare for his transportation, he does not become a "passenger." *Gates v. Quincy, O. & K. C. Ry. Co.*, 102 S. W. 50, 53, 125 Mo. App. 334.

It is not essential to establish the status of a "passenger" to show that fare was either paid or intended to be paid. *Wabash R. Co. v. Jellison*, 124 Ill. App. 652, 662.

A "passenger" is one who goes upon the train of a railway in good faith, intending to pay fare, and who is able, ready, and willing to do so. *Trinity & B. V. R. Co. v. Bradshaw (Tex.)*, 107 S. W. 618 (citing *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 42 S. W. 855, 91 Tex. 255).

One who fails to provide himself with a ticket before entering a car, or who fails to tender enough money to pay fare when requested, is not a "passenger" but a trespasser. *Louisville & N. R. Co. v. Cottengim (Ky.)*, 104 S. W. 280, 281, 13 L. R. A. (N. S.) 620.

The word "passenger" means one who travels in some public conveyance by virtue of a contract, express or implied, with a carrier on the payment of fare or that which is accepted as an equivalent therefor. *Birmingham Ry., Light & Power Co. v. Adams*, 40 South. 385, 386, 146 Ala. 267, 119 Am. St. Rep. 27 (quoting and adopting definition in 6 Words and Phrases, pp. 5218, 5219).

The fact that no fare was paid for a child by the person in charge of him upon the train did not deprive him of the character of a "passenger," where he was riding with the knowledge of and without objection by the conductor. *Southern Ry. Co. in Kentucky v. Lee (Ky.)*, 101 S. W. 307, 308, 10 L. R. A. (N. S.) 837.

A small child, riding on a street car in company with his mother, who pays a fare for herself, is a "passenger," although no fare is paid for such child, where there is a general custom on the part of the street railway not to charge fare for the carriage of small children. *Ball v. Mobile Light & R.*

*Co.*, 39 South. 584, 585, 146 Ala. 309, 119 Am. St. Rep. 32, 9 Ann. Cas. 962.

One who pays a brakeman on a passenger train a sum of money to be carried to a certain point, and is told to ride upon the platform of the baggage car, and get off the train at all stops, and keep out of sight, and who follows such instructions, is not a "passenger." *Mendenhall v. Atchison, T. & S. F. Ry. Co.*, 71 Pac. 846, 66 Kan. 438, 61 L. R. A. 120, 97 Am. St. Rep. 380.

One who, under a plea that he had no money, was permitted by the engineer to ride on the back of the engine from which he was jerked off was not a lawful "passenger" without reward, within Civ. Code Cal. § 2096, providing that a carrier of persons without reward must use ordinary diligence for their safety, but was a trespasser, so that defendant's only liability was to prevent injuring him after his peril was discovered. *Roberts v. Southern Pac. Co.*, 150 S. W. 717, 718, 166 Mo. App. 639.

One does not need to have paid his fare, or even to have entered a carrier's car, to become entitled to the rights of a "passenger," but if he has entered the carrier's station with the good faith intent to take passage and ability to pay his fare, he becomes a passenger, and, if he has boarded a car prepared and willing to pay his fare in case he could not obtain a free ride, the fact that he asks for a free ride does not deprive him of his character as a passenger; it being the refusal to pay fare on proper demand or the entry upon a car, with intent not to pay which has such effect. *Lugner v. Milwaukee Electric Ry. & Light Co.*, 131 N. W. 342, 344, 146 Wis. 175.

A special contract with a street car company, based on the payment of fare, is not essential to make a person boarding a car stopping at the customary place a "passenger." *Hall v. Terre Haute Electric Co.*, 78 N. E. 334, 336, 38 Ind. App. 43.

A person carried gratuitously by a common carrier is as much a passenger as if he were paying full fare, and, if he is injured by the negligence of the carrier, is entitled to recover therefor. A street railroad company offered the free use of three of its cars to take members of a women's convention for a ride about the city. The offer was accepted, and during the progress of the ride a collision occurred between two of the cars, by which one of the women was injured. The cars were operated by regular employes of the company. Held, that the women were "passengers," and the one injured was entitled to recover on showing that the collision was occasioned by the negligence of the employes in charge of the car; there being no contract relieving the company of risk of personal injury from the negligence of its employes. *Indianapolis Traction & Terminal*



Co. v. Klentschy, 79 N. E. 908, 909, 167 Ind. 598, 10 Ann. Cas. 869 (citing Russell v. Pittsburgh, C. & St. L. Ry. Co., 61 N. E. 678, 157 Ind. 305, 312, 313, 55 L. R. A. 253, 87 Am. St. Rep. 214, and cases cited; 2 Hutch. Carr. [3d Ed.] §§ 1021, 1022; 6 Cyc. 544).

The relation of carrier and passenger is one of contract. There must be an agreement by the carrier and generally a consideration paid by or for the passenger to bring the relation into being. Where plaintiff, upon the invitation of his brother, a switch brakeman, attempted to ride upon a portion of a freight train being switched in railroad yards and was injured, he was neither a "passenger" nor a licensee. *Skirvin v. Louisville & N. R. Co.* (Ky.) 100 S. W. 308.

It is competent to show the possession of sufficient money to pay fare as tending to establish the status of the plaintiff as a "passenger." *Chicago Union Traction Co. v. Lundahl*, 117 Ill. App. 220, 224; *Id.*, 74 N. E. 155, 215 Ill. 289.

A person who obtains free passage on a passenger train from the conductor by means of fraud or misrepresentation, or with knowledge of the want of authority on the part of the conductor to allow such free passage, is not a lawful "passenger" without reward within Civ. Code, § 2096, requiring ordinary care and diligence for his safe carriage, but is a mere trespasser, entitled only to demand that he be not willfully or recklessly injured. *Sessions v. Southern Pac. Co.*, 114 Pac. 982, 983, 159 Cal. 590.

A "passenger" on an electric car, although carried free, is still a passenger, and the carrier owes him the duty of exercising such skill as is consistent with the situation and the service undertaken and the greatest possible care for his safety, and any negligence by which the passenger is injured is actionable. *Indianapolis Traction & Terminal Co. v. Lawson*, 143 Fed. 834, 836, 74 C. C. A. 630, 5 L. R. A. (N. S.) 721, 6 Ann. Cas. 666.

A person riding on a train under an arrangement made by the conductor is a "passenger." *St. Louis Southwestern R. Co. of Texas v. Fowler* (Tex.) 93 S. W. 484, 487.

#### **Same—Person carried beyond destination**

A "passenger" who fails to alight from the train at the destination to which he purchased a ticket is not a trespasser, and if he remain on the train, which is one on which passengers are entitled to ride, it must be presumed that he intends to pay the proper fare, and, until this presumption is overcome by evidence that he intends to be carried without payment of fare, he is entitled to the protection of a passenger. *Forbes v. Chicago, R. I. & P. R. Co.*, 113 N. W. 477, 478, 135 Iowa, 679.

#### **Same—Person in charge of stock**

A person traveling on a freight train on a stock shipper's pass to attend to the live stock being shipped thereon sustains the relation of "passenger" in a restricted sense. *Chicago, B. & Q. R. Co. v. Troyer*, 103 N. W. 680, 681, 70 Neb. 298.

A caretaker in charge of a shipment of live stock and riding free according to an established custom was a "passenger." *St. Louis, I. M. & S. Ry. Co. v. Loyd*, 150 S. W. 864, 866, 105 Ark. 340.

A "passenger" is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as payment of fare, or that which is accepted as an equivalent therefor. Where an employé accompanies live stock in transit, and his transportation has been included in the price paid by the owner, he is a "passenger" within Act April 4, 1868 (P. L. 58), which relieves a railroad company from liability for injuries received by any person not a passenger, and, being a passenger, he cannot at the same time be an employé or a quasi employé within the provisions of the act. *Rowdin v. Pennsylvania R. Co.*, 57 Atl. 1125, 1126, 208 Pa. 623 (quoting *Pennsylvania R. Co. v. Price*, 96 Pa. 256).

One who under contract with a railroad company accompanies a shipment of live stock is not a "passenger," within *Cobbey's Ann. St.* 1903, § 10,039, and, in an action for injuries received, the common law, and not the statutory rule of liability, applies. *Riley v. Chicago, B. & Q. R. Co.*, 111 N. W. 847, 78 Neb. 748.

A shipper of stock, who by his contract of shipment is entitled to free transportation, but is required to ride in the caboose when the train is in motion, is a "passenger," but must ride in the caboose. *Illinois Cent. R. Co. v. Jennings*, 75 N. E. 457, 458, 217 Ill. 140.

A person in charge of a car load of cattle and riding under a contract in which it is stipulated that in consideration of a free pass and other valuable considerations the company is exempt from any liability for any injury which such person may sustain while in charge of the cattle is a "passenger for hire." *Weaver v. Ann Arbor R. Co.*, 102 N. W. 1037, 1042, 139 Mich. 590, 5 Ann. Cas. 764.

A person transported on a freight train for the purpose of caring for certain stock while en route, the carrier being thereby relieved from such care, is a "passenger for hire." *Lake Shore & M. S. Ry. Co. v. Teeters*, 74 N. E. 1014; *Id.*, 77 N. E. 599, 602, 166 Ind. 335, 5 L. R. A. (N. S.) 425.

A caretaker accompanying a shipment of cattle under a contract with a railroad, based on the same consideration as a contract of shipment, is a "passenger for hire." *Spring's*

*Adm'r v. Rutland R. Co.*, 60 Atl. 143-146, 77 Vt. 347.

A person traveling on a freight train on a shipper's pass, in charge of a car of live stock, is a "passenger." *Evansville & T. H. R. Co. v. Mills*, 77 N. E. 608, 609, 37 Ind. App. 598; *Southern R. Co. v. Roach* (Ind.) 77 N. E. 606, 607.

One who, being the agent of the owner of horses, rode on the freight train on which they were shipped, was a "passenger," and did not assume the risk of injury from negligence of the carrier. *Southern Ry. Co. v. Roach*, 78 N. E. 201, 202, 38 Ind. App. 211.

#### Same—Policeman

A street railroad carrying a police officer free of charge as required by a municipal ordinance is liable for injuries sustained by him through the negligence of its motorman in charge of the car, though the ordinance is in conflict with Const. art. 2, § 39, and article 12, § 20, prohibiting the granting of passes to officers. *Bradburn v. Whatcom County Ry. & Light Co.*, 88 Pac. 1020, 1022, 45 Wash. 582, 14 L. R. A. (N. S.) 526 (citing *Buffalo*, etc., *R. R. Co. v. O'Hara*, 9 Am. & Eng. R. Cases, 317).

#### Same—Postal clerk

"Whether or not, in a strict sense, the relation of carrier and 'passenger' exists between the railroad company and the postal clerk, courts hold with substantial unanimity that a postal clerk upon a railway train is entitled to the same measure of care as an ordinary passenger for hire. He has as good a right to be upon the train as the ordinary passenger, and his life is just as valuable." *Barker v. Chicago*, 90 N. E. 1057, 1059, 243 Ill. 482, 26 L. R. A. (N. S.) 1058, 134 Am. St. Rep. 382.

A postal clerk, while riding in a mail car in the performance of his duties, is not a "passenger," within an accident policy insuring him against bodily injuries while riding as a passenger in or on any railway passenger car propelled by mechanical power, provided by a common carrier for passenger service, etc. *Bogart v. Standard Life & Accident Ins. Co.*, 187 Fed. 851, 852.

Where a beneficiary in an accident policy was a United States railway mail clerk, and was killed while riding in a mail car in the performance of his duties, he was not "actually riding as a passenger in or on any regular passenger conveyance provided by a common carrier," within an accident policy insuring the person named as beneficiary under certain circumstances against loss by accident while actually riding as a passenger in or on any regular passenger conveyance. *Wood v. General Acc. Ins. Co. of Philadelphia*, 160 Fed. 928, 927, 88 C. C. A. 108.

A mail clerk in the employ of the United States government is a "passenger" of the de-

fendant carrier as well while in transit as during the ensuing period, when he, pursuant to a long-continued custom, remained in the yards of the defendant at work in his car. *Wabash R. Co. v. Jellison*, 124 Ill. App. 652, 660.

A United States railway mail clerk is a "passenger," when on a train in the performance of his duties. *Southern Pac. Co. v. Calvin*, 144 Fed. 348, 352, 75 C. C. A. 350; *Yarrington v. Delaware & H. Co.*, 143 Fed. 535, 567 (citing *Nolton v. Western R. Corp.*, 15 N. Y. 444, 69 Am. Dec. 623; *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Gleeson v. Virginia Midland R. Co.*, 11 Sup. Ct. 859, 140 U. S. 435, 35 L. Ed. 458; *Baltimore & O. S. W. R. Co. v. Voigt*, 20 Sup. Ct. 385, 176 U. S. 498, 44 L. Ed. 560; *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. 165; *Farley v. Cincinnati, H. & D. R. Co.*, 108 Fed. 14, 47 C. C. A. 156; *Ohio & M. Ry. Co. v. Voight*, 23 N. E. 774, 122 Ind. 288; *Cleveland, C. & St. L. Ry. Co. v. Ketcham*, 33 N. E. 116, 133 Ind. 346, 19 L. R. A. 339, 36 Am. St. Rep. 550; *Baltimore & O. R. Co. v. State to Use of Wiley*, 18 Atl. 1107, 72 Md. 36, 6 L. R. A. 706, 20 Am. St. Rep. 454; *Norfolk & W. R. Co. v. Shott*, 22 S. E. 811, 92 Va. 34; *Houston & T. C. Ry. Co. v. Hampton*, 64 Tex. 427; *Gulf, C. & S. F. Ry. Co. v. Wilson*, 15 S. W. 280, 79 Tex. 371, 11 L. R. A. 486, 23 Am. St. Rep. 345; *Hammond v. North Eastern R.*, 6 S. C. 130, 24 Am. Rep. 467; *Libby v. Maine Cent. R. Co.*, 26 Atl. 943, 85 Me. 84, 20 L. R. A. 812; *Magoffin v. Missouri Pac. Ry. Co.*, 15 S. W. 76, 102 Mo. 540, 22 Am. St. Rep. 798; *Mellor v. Missouri Pac. Ry. Co.*, 16 S. W. 549, 105 Mo. 455, 10 L. R. A. 36; *Louisville & N. R. Co. v. Kingman* [Ky.] 35 S. W. 264; *Weaver v. Baltimore & O. R. Co.*, 3 App. D. C. 436; *Chesapeake & O. Ry. Co. v. Patton*, 23 App. D. C. 113; *Decker v. Chicago, M. & St. P. Ry. Co.*, 112 N. W. 901, 102 Minn. 99; *Wood v. Philadelphia, B. & W. R. Co. (Del.)* 76 Atl. 613, 616, 1 Boyce, 336; *Sproule v. St. Louis & S. F. R. Co. (Tex.)* 91 S. W. 657, 658; *Hodkins v. Northern Pac. Ry. Co.*, 102 Pac. 988, 990, 39 Mont. 394; *Illinois Cent. R. Co. v. Porter* (Tenn.) 94 S. W. 666, 667; *Schuyler v. Southern Pac. Co.*, 109 Pac. 458, 467, 37 Utah, 581.

#### Same—Riding on elevator

Employees using a freight elevator in the employer's building in going to and from their work, instead of the ample stairways provided, are not "passengers." *Kappes v. Brown Shoe Co.*, 90 S. W. 1158, 1160, 116 Mo. App. 154.

Where one engaged in moving the effects of a tenant from a building was, according to custom, riding on a freight elevator, the relation of "passenger and carrier" existed between him and the owner of the building, who was liable for injuries sustained by such person through the negligence of the operatives of the elevator. *Orcutt v. Century*

Bldg. Co., 99 S. W. 1062, 1064, 201 Mo. 424, 8 L. R. A. (N. S.) 929.

A person riding in a passenger elevator in a building on his way to the office of a tenant of the building to ascertain if the tenant required his services was not a "passenger," so as to entitle him to recover for injuries resulting from the falling of the elevator, where prior thereto he had been permanently prohibited from riding in the elevator in consequence of misconduct furnishing reasonable ground for such prohibition. In order to make effectual defendant's prohibition against plaintiff's riding in the former's passenger elevator, it was not necessary to repeat it every time plaintiff came about the building. *Ferguson v. Truax*, 112 N. W. 513, 514, 132 Wis. 478, 14 L. R. A. (N. S.) 350, 13 Ann. Cas. 1092.

#### **Same—Riding on engine**

The mere silent acquiescence of the conductor in a person's riding on an engine did not make him a "passenger," and he did not become a passenger on the train merely because he went to the station for that purpose. But where one goes to a railway station at a reasonable time before the departure of a train, for the purpose of traveling thereon, he may be regarded as a passenger in so far as it may relate to an injury received through the negligence or carelessness of the company while in or about the station or attempting to board the train. *Radley v. Columbia R. Co.*, 75 Pac. 212, 214, 44 Or. 332, 1 Ann. Cas. 447.

Where a carrier contracted to carry a cattle shipper's agent upon the train, and the cars, after being loaded by the shipper, were met by a switching crew with a locomotive, which was to take the cars to yards where they were to be put into a train being made up, but there was no caboose attached to the cars during the run to the yards, a servant of the shipper, who had been instructed to accompany the cars, and who rode upon the locomotive, was a "passenger." *Southern Ry. Co. v. Cullen*, 77 N. E. 470, 471, 221 Ill. 392; *Id.*, 122 Ill. App. 293.

#### **Same—Riding on freight car or train**

The fact that one had a private arrangement between a railroad company and himself whereby he could ride on freight trains did not render the road's relation to him other than that of a common carrier. *Gardner v. St. Louis & S. F. R. Co.*, 93 S. W. 917, 919, 117 Mo. App. 138.

A contract by a brakeman of a freight train to allow a person to ride on the train in consideration of his rendering assistance in the loading and unloading of freight was outside the scope of the brakeman's authority, not binding the railroad company, and the person so riding was a trespasser. *O'Donnell v. Kansas City, St. L. & C. R. Co.*, 95

S. W. 196, 198, 197 Mo. 110, 114 Am. St. Rep. 753.

Plaintiff was the servant of one who had contracted with a railroad company to erect fences along the right of way; the contract requiring the railroad to transport the contractor's servants. When the road was sufficiently completed, the railroad put on a train, consisting of a water tank car, some freight cars, and a "passenger" coach. When the conductor and crew of such train were preparing to take the locomotive and tank car to a certain place, the contractor requested the conductor to carry plaintiff there on the tank car, and, while riding thereon, plaintiff was injured, owing to the derailment of the train. There was a rule of the company forbidding freight conductors to allow "passengers" on freight cars. Held that under the facts, a contention that the relation of passenger and carrier did not exist between plaintiff and the railroad because of the rule forbidding the carrying of passengers on freight cars was of no merit. *Gray v. Columbia Cent. R. Co.*, 88 Pac. 297, 298, 49 Or. 18.

#### **Same—Riding on hand car**

No person can become a "passenger" without the consent, express or implied, of the carrier. To entitle an administratrix to recover for an injury to her intestate, caused by being negligently run over by defendants' train, while he was riding between stations on a hand car at the invitation of the foreman of a section, it must appear that the company was a common carrier of passengers by hand cars. *Hoar v. Maine Cent. R. Co.*, 70 Me. 65, 35 Am. Rep. 299.

#### **Same—Void ticket or pass**

One who pays his fare on a street car, and receives a transfer punched as of an earlier hour than it should be and boards another car within the life of the transfer if properly punched, though after it has on its face become void, is a "passenger." *Little Rock Ry. & Electric Co. v. Goerner*, 95 S. W. 1007, 1009, 80 Ark. 158, 7 L. R. A. (N. S.) 97, 10 Ann. Cas. 273.

One riding on a ticket procured at a reduced rate by false representations to the effect that she was a student at a certain school is not a "passenger." *Fitzmaurice v. New York, N. H. & H. R. Co.*, 78 N. E. 418, 419, 192 Mass. 159, 6 L. R. A. (N. S.) 1146, 116 Am. St. Rep. 236, 7 Ann. Cas. 586.

A "passenger" may become such without a contract, even against the will of the carrier. The carrier has no right to refuse a passenger without sufficient reasons, and such reasons so rarely occur, and are so exceptional, as to vary the general rule too slightly for practical consideration. A person riding on a pass void under a statute, is a passenger. *McNeill v. Durham & C. R. Co.*, 47 S. E. 765, 767, 135 N. C. 682, 67 L. R. A. 227.

One who entered a train, having a ticket which he believed to be good and to entitle him to ride on the train, was not a trespasser, and was entitled to be treated as a "passenger," until he was notified that his ticket was not good and he refused to pay his fare. *Gulf, C. & S. F. Ry. Co. v. Bunn*, 95 S. W. 640, 641, 41 Tex. Civ. App. 503.

#### Person leaving car or grounds

The law deems the relation of carrier and passenger to exist, and treats one as a "passenger" who is properly on the steps, leaving the car. *Devo v. St. Louis Transit Co.*, 91 S. W. 140, 143, 192 Mo. 197 (citing *Clark, Street Rys.* [2d Ed.] § 3; *Schepers v. Union Depot R. Co.*, 29 S. W. 712, 126 Mo. 665; *Barth v. Kansas City El. Ry. Co.*, 44 S. W. 778, 142 Mo. 535; *Booth, Street Ry. Law*, § 326).

Where a "passenger" has safely alighted from a car at his destination, he ceases to be a passenger. *Columbus R. Co. v. Asbell*, 66 S. E. 902, 903, 133 Ga. 573.

The relation of passenger and carrier ceases at the end of the journey when the passenger has had a reasonable time and opportunity to leave the premises of the carrier. *Illinois Cent. R. Co. v. McMillion*, 129 Ill. App. 27, 37.

The relation of a street car passenger does not end when he leaves the car, but continues until he has reasonable opportunity to leave the carrier's roadway, after the car reaches the place to which he is entitled to be carried. *Melton v. Birmingham Ry., Light & Power Co.*, 45 South. 151, 153 Ala. 95, 16 L. R. A. (N. S.) 467.

Where a woman, who had been a "passenger," left the train, and in passing through the depot fell over a cuspidor on the floor and was injured, she had ceased to be a passenger, and the burden was on her to show affirmatively negligence on the part of defendant. *Green v. Baltimore & O. R. Co.*, 63 Atl. 603, 214 Pa. 240.

A person injured while attempting to alight from a moving street car was a "passenger" thereon, within the meaning of an accident insurance policy providing for the payment of double insurance if insured was injured while riding as a passenger in any passenger conveyance. *King v. Travelers' Ins. Co.*, 28 S. E. 661, 662, 101 Ga. 64, 65 Am. St. Rep. 288.

Where a person becomes a "passenger," he continues one until he is safely deposited at his point of destination, and until he has left or had reasonable time within which to leave the premises of the carrier, unless the relation of carrier and passenger be sooner terminated by the voluntary act of the passenger. *McBride v. Georgia Ry. & Electric Co.*, 54 S. E. 674, 676, 125 Ga. 515.

Where a carrier has made proper arrangements for the exit by passengers from its station grounds, a passenger must use the ways provided, and where he knowingly fails to do so, and without invitation makes his exit in some other way, he ceases to be a passenger, and becomes at most a mere licensee; and it makes no difference that he goes where others, with the knowledge of the carrier, have gone before him, unless there is some invitation on the part of the carrier, and knowledge of such use does not of itself amount to such invitation. *Legge v. New York, N. H. & H. R. Co.*, 83 N. E. 367, 368, 197 Mass. 88, 23 L. R. A. (N. S.) 633.

A passenger on a railroad train alighted in the night at the town where he resided. The station, the town, and his home were all on the west side of the track, and the doors of the cars, which were vestibuled, were opened on that side. After his train had departed, he was killed by another train on a track to the eastward. Held, that he had ceased to be a "passenger" prior to his death, and the company at that time owed no duty to him as such. *Payne v. Illinois Cent. R. Co.*, 155 Fed. 73, 76, 83 C. C. A. 589.

Whether a person who has alighted from a standing train at a station, and who is crossing the railway tracks, by a planked way provided by the company for that purpose, after the train from which he has alighted has moved out, is still a "passenger," entitled to so cross without looking or listening, is a question of fact for the jury, where, under the proof, reasonable men may differ as to whether he was proceeding from the station platform to a place of safety within a reasonable time after he had alighted from the train. The relation of "passenger" and carrier, when established, does not terminate until the "passenger" has reached his destination, alighted from the train, and has had reasonable time in which to leave the place where "passengers" are discharged. *Atlantic City R. Co. v. Kiefer*, 66 Atl. 930, 931, 932, 75 N. J. Law, 54.

When a person on a coach of a railway company pays his fare to a point of destination on its line, he becomes a "passenger," and remains such till the journey for which he has paid has ended, and until a reasonable time, to be determined from all the attendant circumstances, within which he should have left the carrier's premises, has elapsed; and this is true without regard to the object of the passenger's journey or his reason for stopping at the station which is the end of the journey. *Houston & T. O. R. Co. v. Batchler*, 83 S. W. 902, 904, 37 Tex. Civ. App. 116.

Where defendant's street car conductor committed an unprovoked assault on plaintiff, an old man, as he was endeavoring to alight, and pushed or threw him from the

car, but plaintiff attempted to get his umbrella, which remained on the platform, and the conductor kicked him, plaintiff had not entirely ceased to be a "passenger" at the time he was kicked, and the company was liable therefor. *Flynn v. St. Louis Transit Co.*, 87 S. W. 560, 562, 113 Mo. App. 185.

The rule is, that the relation of passenger and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged. A traveler on a railroad train ceases to be a "passenger" when, after alighting from his train upon the railroad platform, he has passed from that platform and off the railroad property to a public highway on which he intends to cross the tracks. *Garrett v. Atlantic City & S. R. Co.*, 74 Atl. 273, 274, 79 N. J. Law, 127.

#### PASSENGER BEING TRANSPORTED

From the time a passenger places himself under the charge of the carrier as he begins his journey until he is afforded the opportunity to leave the premises of the carrier at its termination, he is a "passenger being transported," unless by some act not attributable to the carrier the relation ceases. *Fremont, E. & M. V. R. Co. v. Hagblad*, 101 N. W. 1033, 1037, 106 N. W. 1041, 1042, 72 Neb. 773, 4 L. R. A. (N. S.) 254, 9 Ann. Cas. 1096.

One who has not presented himself at any place provided by a railway company for the reception of passengers, and who has not indicated to the company's employes that he intends to become a passenger, and has not committed himself to the care or control of the company, cannot be regarded as a "passenger being transported" and under protection of the statutes of the state. *Hicks v. Union Pac. R. Co.*, 107 N. W. 798, 799, 76 Neb. 496.

#### PASSENGER CAR

As car, see Car.

#### PASSENGER DEPOT

See, also, Depot.

In Act March 9, 1889, § 1, providing that every corporation, company, or person operating a railroad within the state shall place in each passenger depot of such company, located at any station in this state at which there is a telegraph office, a blackboard on which such company or person shall post the fact whether each scheduled passenger train is on time or not, by the words "passenger depot" was not meant merely a station house built for the accommodation of passengers, but the grounds prepared and used as depot grounds for the benefit of persons traveling on the particular railroad, and used by the company at such point in operating it as a

common carrier of passengers. *State v. Indiana & I. S. R. Co.*, 32 N. E. 817, 818, 133 Ind. 69, 18 L. R. A. 502.

Under Code Miss. 1892, § 3549, providing that it shall be unlawful to back a train of cars into or along a "passenger depot" at a greater rate of speed than three miles an hour, and that a train backed along such depot within 50 feet thereof shall, for 300 feet before it comes opposite such depot, be preceded by a servant of the railroad company on foot, not exceeding 40 or under 20 feet in advance, to give warning, and that, for every injury inflicted by a railroad company while violating such section, full damages may be recovered without regard to contributory negligence, the term "passenger depot" must be limited so as to include only the whole of the building, a part of which is used in connection with the passenger service. *King v. Illinois Cent. R. Co.*, 114 Fed. 855, 862, 52 C. C. A. 489.

#### PASSENGER FROM A FOREIGN PORT

An unmarried woman, a native of Porto Rico, who was an inhabitant of that island at the time of its cession to the United States by the treaty with Spain, is not, on her arrival at the port of New York from Porto Rico, a "passenger from a foreign port," but is a passenger from territory or other place subject to the jurisdiction of the United States. *Gonzales v. Williams*, 24 Sup. Ct. 177, 181, 192 U. S. 1, 48 L. Ed. 317.

#### PASSENGER OR FREIGHT AGENT

In a statute providing that summons may be served on a railroad company's "passenger or freight agent" stationed at or nearest to the county seat of the county where suit is brought, the term "passenger or freight agent" refers to a person in the service of defendant and stationed by it at some point. Hence, in an action against the last of several connecting carriers by a shipper for negligence in transporting goods, service on the agent of the first carrier is insufficient. *Louisville & N. R. Co. v. S. D. Chestnut & Bro.*, 72 S. W. 351, 353, 115 Ky. 43.

#### PASSENGER PAYING FARE

A person is a "passenger paying one single fare," within Laws 1892, p. 1406, c. 676, § 104, requiring street railways to give a transfer to each passenger paying one single fare, though his fare was paid not by himself but by another for him. *McLaughlin v. New York City Ry. Co.*, 94 N. Y. Supp. 653, 658, 106 App. Div. 1.

A wife, whose husband had paid her fare on defendant's street car, was a "passenger paying one single fare," as used in Laws 1892, p. 1406, c. 676, requiring street car companies on demand and without extra charge to give to each "passenger paying one single fare" a transfer, and making the refusal thereof grounds for the recovery of a

forfeiture of \$50. *Carpenter v. New York City Ry. Co.*, 93 N. Y. Supp. 600, 601.

### PASSENGER TICKET

As contract, see Contract.

As property, see Property.

### PASSENGER TRAIN

See Regular Passenger Train.

The expressions "passenger train" and "freight train" have a well-defined meaning, and the carrying of passengers in a caboose, attached to a freight train does not change the freight train into a "passenger train." *Southern Ry. in Kentucky v. Commonwealth*, 110 S. W. 372, 373, 129 Ky. 87.

A railroad train composed of an engine and tender, two or more freight cars, combined baggage, mail and passenger car, and a passenger coach, is a "passenger train" within Laws 1907, p. 180, requiring railroad carriers to run at least one passenger train over its road each way every day. *State v. Missouri Pac. Ry. Co.*, 117 S. W. 1173, 1175, 219 Mo. 156.

### PASSENGERS AND FREIGHT

See Train for Both Passengers and Freight.

### PASSION

See Heat of Passion; Sudden Heat and Passion; Sudden Passion.

"In common use among the people in the everyday affairs of life, the words 'anger' and 'passion' are interchangeable and mean practically the same thing." *Morris v. Territory*, 99 Pac. 760, 768, 1 Okl. Cr. 617.

The word "passion," as applied to a jury's action, means anger, resentment, heat, absence of reflection, disregard of the rights of others, and kindred motives. *Murphy v. Southern Pac. Co.*, 101 Pac. 322, 327, 31 Nev. 120, 21 Ann. Cas. 502.

Passion is the state of mind when it is powerfully acted on and influenced by something external to itself; the state of any particular faculty, which, under such conditions, becomes extremely sensitive or uncontrollably excited. The term "passion," as used to describe an essential element of the defense of manslaughter, includes both anger and terror. *Hocker v. Commonwealth*, 111 S. W. 676, 681.

### PASSION OR PREJUDICE

The words "passion or prejudice," within Comp. Laws, § 3290, authorizing a new trial for excessive damages given under the influence of passion or prejudice, mean anger, resentment, heat, absence of reflection, disregard of the rights of others, and kindred motives. *Murphy v. Southern Pac. Co.*, 101 Pac. 322, 324, 327, 31 Nev. 120, 21 Ann. Cas. 502.

A finding that a verdict for \$38,750 for personal injuries was excessive by \$28,750 is a finding as a matter of law that the verdict was the result of "passion or prejudice," within Code, § 217, subd. 5, authorizing a new trial for excessive damages given under the influence of passion or prejudice, and defendant has the absolute right to a new trial and the court may not enter judgment for \$10,000 on the mere consent of plaintiff to accept it. *Tunnel Mining & Leasing Co. v. Cooper*, 115 Pac. 901, 903, 50 Colo. 390, 39 L. R. A. (N. S.) 1064, Ann. Cas. 1912C, 504.

### PASSIVE TRUST

See, also, Active Trust.

A will leaving property in trust to the widow, to be used by her until the testator's youngest child should become 21 years old, when it should be divided between the widow and the children equally, created a "passive trust," which transmitted no title to the trustee, but devolved it directly upon those entitled to the ultimate beneficial estate, under Real Property Law (Laws 1896, p. 570, c. 547, § 73), providing that disposition of land shall be made directly to the person in whom the right to possession and profits is intended to be vested, and that, if made to a person in trust for another, no interest, legal or equitable, vests in the trustee. *Jacoby v. Jacoby*, 80 N. E. 676, 677, 188 N. Y. 124.

An "active," and not a "passive," trust is created by a deed of trust to sell and re-invest, and to pay to the grantor the income and such part of the principal as the trustee may deem proper, and after her death the principal over to her issue or such persons as she may designate by her will. *Newton v. Jay*, 95 N. Y. Supp. 413, 418, 107 App. Div. 457.

A grantee in a quitclaim deed who executed an instrument that in the purchase of an undivided part of the real estate he had used the means of and had acted for the benefit of persons named, and that he held an undivided one-sixth of the premises in trust for one of such persons, thereby created a "passive trust" within Comp. Laws, §§ 8829, 8831, abolishing passive trusts, and the title passed at once to the beneficiary, who could compel the execution of a quitclaim deed of his interest. *Rothschild v. Dickinson*, 134 N. W. 1035, 1037, 169 Mich. 200.

### PASSPORT

A "passport" from a foreign government to its citizen is merely written permission from the government to travel, and does not affect his status in the United States, in the absence of treaty provision, and hence is no defense to proceedings to deport him. *United States v. Redfern*, 180 Fed. 506, 508.

"It [a 'passport'] is a document which, from its nature and object, is addressed to

foreign powers, purporting only to be a request that the bearer of it may pass safely and freely, and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen, and which, by usage and the law of nations, is received as evidence of the fact. But this is a very different light from that in which it is to be viewed in a court of justice, where the inquiry is as to the fact of citizenship. It is a mere *ex parte* certificate; and if founded upon any evidence produced to the secretary of state, establishing the fact of citizenship, that evidence, if of a character admissible in a court of justice, ought to be produced upon the trial as higher and better evidence of the fact." *Urtetiqui v. D'Arcy*, 9 Pet. 692, 699, 9 L. Ed. 276.

## PAST AND CLEAR

Where a schooner, which had left Norfolk and was beating down the channel against a head wind, when she was overtaken and passed by a tug and tows, which left Norfolk later, was on the starboard tack, moving toward Old Point Comfort and away from the tug and tows, the latter were "finally past and clear," within the meaning of article 24, of the Inland Navigation Rules (Act June 7, 1897, c. 4, 30 Stat. 101, and when the schooner came about on the port tack, heading toward the tug and tows, and being more than two points abaft their beam, an entirely new risk of collision arose, as to which she was the overtaking vessel, and bound under such rule to keep out of the way, while the tug and tows were required by article 21 to keep their course and speed. *The Mary E. Morse*, 179 Fed. 945, 947.

## PAST CONSIDERATION

A "past consideration" is one which has served its purpose in a former transaction, and it is not sufficient to support a contract of guaranty; and, where such a contract is created subsequently to the main contract, it must be supported by a new consideration. *Musgrove v. D. E. Luther Pub. Co.*, 68 S. E. 52, 54, 5 Ga. App. 279 (citing *Hargroves v. Cook*, 15 Ga. 321; *Green v. Thornton*, 49 N. C. 230; 20 Cyc. p. 1417).

## PASTE

Manufactures of, see *Manufactures—Manufactured Articles*.

Congress in its tariff legislation having distinguished between glass and the form of glass known as paste, articles in chief value of paste, cut, are not within the provision of Schedule B, par. 100, § 1, in Tariff Act, for goods in chief value of cut "glass," but are dutiable as manufactures of "paste," under paragraph 112. *United States v. New York Merchandise Co.*, 167 Fed. 684.

So-called rhinestones, articles composed of metal and paste, the latter being the more valuable component, which are merely used to decorate and ornament women's outer apparel, are dutiable as manufactures of "paste," not specially provided for, under the Tariff Act. *B. Blumenthal & Co. v. United States*, 135 Fed. 254; *Id.*, 144 Fed. 384, 385, 75 C. C. A. 322.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 112, 30 Stat. 158, for manufactures of "paste," includes only the form of paste which is a variety of glass, and does not embrace articles made from rice paste. *Morimura Bros. v. United States*, 169 Fed. 279, 280, 94 C. C. A. 555.

"Paste cameos," in imitation of shell cameos, which imitate certain descriptions of precious stones, are dutiable as imitation precious stones, under paragraph 435, Schedule N, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 192. *United States v. Goldberg*, 139 Fed. 706, 707.

## PASTERS

As writing, see *Write—Writing*.

## PASTURE

As ground under cultivation, see *Cultivation*.

## PATENT

It is now a well-settled rule of law in this state that, if the defects in the appliances are "patent" (that is to say, such as the servants would have discovered if ordinarily observant in using them), he becomes chargeable with knowledge of their defective condition, and, if injured thereby, cannot recover of the master. *Pohlmann v. American Car & Foundry Co.*, 100 S. W. 544, 546, 123 Mo. App. 219 (quoting and adopting definition in *Marshall v. Kansas City Hay Press Co.*, 69 Mo. App. 260).

Where complainant sold pills that were not patented under the name "Beecham's Patent Pills," the word "patent" was employed in a mere proprietary sense, to indicate that the pills were made according to Beecham's secret formula, and not necessarily that they were manufactured under letters patent, and hence did not constitute such a misrepresentation as to preclude plaintiff from relief in equity against the infringement of plaintiff's trade-mark, "Beecham's Pills." *Beecham v. Jacobs*, 159 Fed. 129, 130, 86 C. C. A. 623.

### PATENT (Of Invention)

See *Letters Patent*; *Primary Inventions and Patents*; *Secondary Patent*.  
Infringement of, see *Infringement*.  
Interest in patent, see *Interest*.  
Issuance of patent, see *Issuance—Issue*.

Operating under a patent, see Operate.

Pioneer patent, see Pioneer.

See, also, Anticipation; Combination (In Patent Law); Equivalent (In Patent Law); Prior Public Use.

"Patents" granted under the laws of the United States pursuant to Const. art. 1, § 8, are grants made in consideration of discoveries which "promote the progress of science and useful arts," and are to be construed liberally so as to effect their real intent. *Bossert Electric Const. Co. v. Pratt Chuck Co.*, 179 Fed. 385, 387, 103 C. C. A. 45.

A "patent" has been defined as that which brings out from the realm of mind something which never existed before, and gives it to the country. In this sense patented articles cannot be the subject of monopoly, since monopoly restrains trade or commerce in articles, which before were the subjects of trade or commerce. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 142 Fed. 531, 537.

Under Rev. St. U. S. § 4886, providing that any person who has invented any new and useful art, machine, or composition of matter, or any new and useful improvement thereof, etc., may obtain a patent therefor, books and the right to sell books are not "patents" or patent rights, and a note given for books and for the right to sell the same need not comply with Kirby's Dig. §§ 513, 514, requiring the note given for a patent or patent right to be in certain form, with certain statements to be shown on the face thereof. *Hogg v. Thurman*, 117 S. W. 1070, 1072, 90 Ark. 93, 17 Ann. Cas. 383.

The word "patents," as used in a conveyance by a corporation of all its property, including its good will, "patents," trademarks, etc., including every patent which was assignable by the assignor, and such conveyance was effective as an assignment of a patent then owned by the corporation, although not described there. *Delaware Seamless Tube Co. v. Shelby Steel Tube Co.*, 160 Fed. 928, 929, 88 C. C. A. 110.

#### As a contract

A "patent" is a contract, and it must be interpreted by the same rules of construction as other contracts. *Century Electric Co. v. Westinghouse Electric & Mfg. Co.*, 191 Fed. 350, 354, 112 C. C. A. 8.

A "patent" is a contract made by the acceptance by the government of the proposition made by the inventor in his application. *O. H. Jewell Filter Co. v. Jackson*, 140 Fed. 340, 343, 72 C. C. A. 304.

A "patent" is a contract, and the rules for the construction of contracts generally control in its interpretation; and when its terms are plain, and the intention of the parties clearly manifest therefrom, they must prevail; but if its expressions are ambiguous,

or its validity or any claim is doubtful, that construction will be given which will sustain rather than destroy the patent. *Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey*, 169 Fed. 793, 799, 85 C. C. A. 259.

#### As a monopoly

A "patent" secures the exclusive right to make, the exclusive right to use, and the exclusive right to vend the invention it protects. *Paulus v. M. M. Buck Mfg. Co.*, 129 Fed. 594, 596, 64 C. C. A. 162.

A "patent" is a grant of a right to exclude all others from making, using, or selling the invention covered by it. *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172, 190.

A "patent" is a monopoly created by law, and gives the right to exclude all others from making, using, and selling the invention or articles made in accordance therewith. *National Hollow Brake Beam Co. v. Bakewell*, 123 S. W. 561, 566, 224 Mo. 203.

The monopoly authorized by a "patent" is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and it rests with the owner what part of this property he will transfer to others and upon what terms he will make the transfer. *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 735, 64 C. C. A. 594.

#### PATENT (Of Land)

See Call Patent; Perfect and Effective Patent; Suit to Invalidate Patent.

Date of patent, see Date.

See, also, Royal Title.

The expression "patent," used in Act of March 3, 1891, § 8, requiring suits to annul patents to be brought within six years after issuance, means a grant of land from the government. *United States v. La Roque*, 198 Fed. 645, 648, 117 C. C. A. 349.

The patent of a lode claim confirms the original location, with the right of exclusive possession, and conveys title to the tract covered by the location, together with all veins, lodes, and ledges which have their apex therein; whereas the patent to a placer claim, while confirming the original location and conveying title to the placer ground, does not necessarily convey the title to all veins, lodes, and ledges within its area. A patent of a placer claim will not convey the title to a known vein or lode within its area, unless that vein or lode is specifically applied and paid for. *Clipper Min. Co. v. Eli Min. & Land Co.*, 24 Sup. Ct. 632, 635, 194 U. S. 220, 48 L. Ed. 944.

Indian Treaty June 9, 1855, 12 Stat. 945, constituted a cession of the Umatilla Indian reservation to the United States, and authorized the President to provide a permanent home for such Indians in his discretion. Act March 3, 1885, c. 319, 23 Stat. 340, provided



for the allotment of lands in such reservation to Indians in severalty according to the size of the families, etc. The act provided for the issuance of patents for the allotments, but that the legal title should be held in trust by the United States for the allottee and his heirs for 25 years in fee, provided that the law of alienation and descent in force in the state of Oregon should apply after the issuance of patents. Held, that the word "allot" is not a term of sale or grant, but of apportionment of that to which the parties are entitled as of right, and the word "patents" is merely designed to denote a paper or writing improperly called a "patent," showing that at a particular time in the future, unless it was extended by the President, he (the Indian) would be entitled to a regular patent conveying the fee. *Parr v. United States*, 153 Fed. 462, 468.

The word "patents," in General Allotment Act (Act Feb. 8, 1887), as amended, authorizing the issuance of "patents" for lands allotted to Indians, conditioned that the United States will hold the land for 25 years in trust for the use of the allottee or his heirs, provided that the law of descent and partition in force in the state or territory where the land is situated shall apply there-to after patents have been executed and delivered, etc., imports only instruments in writing designed to show that for 25 years the United States will hold the land allotted in trust for the use of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period, convey the fee in discharge of the trust, and the United States retains the legal title, giving the Indian allottee a writing showing that at a particular time in the future he will be entitled to a regular patent conveying the fee, and the proviso adopting the laws of descent of the state is merely to provide a rule by which the heirs shall be determined. *United States v. Bellm*, 182 Fed. 161, 165 (quoting and adopting the definition in *United States v. Rickert*, 23 Sup. Ct. 478, 188 U. S. 432, 47 L. Ed. 532).

#### As a deed, grant, or conveyance

A "patent" for public land is the government deed for the premises. *Jordan v. Smith*, 73 Pac. 308, 310, 12 Okl. 703.

A "patent" is only another name for a land grant. *State v. Harman*, 50 S. E. 828, 830, 57 W. Va. 447.

A "patent" is a conveyance by which the government, state or federal, conveys its lands. *Williams v. White Castle Lumber & Shingle Co.*, 38 South. 414, 415, 114 La. 448.

A "patent" is the instrument by which the fee-simple title to a mining claim is granted. *Creede & C. C. Min. & Mill. Co. v. Unta Tunnel Min. & Transp. Co.*, 25 Sup. Ct. 266, 271, 196 U. S. 337, 49 L. Ed. 501.

A "patent" is a government deed for premises, and a homesteader is not entitled to his deed on mere final proof. A homestead claimant may make final and, on the face of it, satisfactory proof of occupancy and compliance with the land laws, and still not be entitled to the government deed, since he may abandon the claim, or fail to pay for it, or sell his right. *Hamilton v. Foster*, 82 Pac. 821, 822, 16 Okl. 220.

#### As evidence of title

In the legislation of Congress, a "patent" has a double operation. It is a conveyance by the government when the government has any interest to convey, but, where it is issued upon the confirmation of a claim of a pre-existing title, it is documentary evidence having the dignity of a record of the existence of that title, or of such equities representing the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of a previously existing right because it also embodies words of release or transfer from the government. In such a case, while the courts cannot go back to the original grant for the purpose of passing upon its validity, yet they may do so merely to ascertain whether it purported to convey absolute title to the land, as a means of ascertaining the full scope of the adjudication by Congress. *Catron v. Laughlin*, 72 Pac. 26, 31, 11 N. M. 604 (quoting and adopting definition in *Langdeau v. Hanes*, 21 Wall. 521, 22 L. Ed. 606, and citing *Glasgow v. Baker*, 9 Sup. Ct. 154, 125 U. S. 560, 32 L. Ed. 513).

#### As a judgment

A "patent" to land is the judgment of the Land Department and the conveyance of the title in execution of it to the party adjudged entitled, and, when the land described was within the jurisdiction and subject to the disposition of the Land Department, it is impervious to collateral attack. *Neff v. United States*, 165 Fed. 273, 277, 91 C. C. A. 241.

A "patent" to land, of the disposition of which the department has jurisdiction, is both the judgment of that tribunal and a conveyance of the legal title to the land. *Le Marchel v. Teegarden*, 133 Fed. 826, 827; *Id.*, 152 Fed. 662, 665 (citing *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *United States v. Winona & St. P. R. Co.*, 67 Fed. 948, 955, 15 C. C. A. 96, 103).

#### PATENT AMBIGUITY

A "patent ambiguity" in an instrument is an uncertainty that arises at once on a reading of it. *Wolff Truck Frame Co. v. American Steel Foundries*, 195 Fed. 940, 944, 115 C. C. A. 628 (citing definition in *Strong v. Waters*, 50 N. Y. Supp. 257, 27 App. Div. 209).

A "patent ambiguity" is one produced by the uncertainty, contradictoriness, or deficiency of the language of an instrument, so that no discovery of facts or proof of declarations

can restore the doubtful sense without adding ideas which the words used do not sustain. *Teague v. Sowder*, 114 S. W. 484, 488, 121 Tenn. 132.

The "patent ambiguity" of a written contract which cannot be explained by parol is that which remains uncertain after the court has received evidence of the surrounding circumstances throwing light on the intent of the parties, and where the court, after placing itself in the situation of the parties at the time of executing the instrument, and with full understanding of the words, cannot ascertain the intent of the parties from the language of the instrument, it cannot be sustained by the introduction of evidence adding new terms. *Shannon Copper Co. v. Potter*, 108 Pac. 486, 488, 13 Ariz. 245.

Ambiguities in a will are "patent," where the uncertainty arises upon the words of the will, and before any attempt is made to apply them to the object which they describe. *Jennings v. Talbert*, 58 S. E. 420, 421, 77 S. C. 454.

The phrase "for value received," as used in a note, is a "patent ambiguity," and the actual consideration of the note may be shown by parol. *J. P. Byrd & Co. v. Marietta Fertilizer Co.*, 56 S. E. 86, 87, 127 Ga. 30 (citing *Brewer v. Grogan*, 42 S. E. 525, 116 Ga. 60; *Boynton v. Twitty*, 53 Ga. 214; *Pitts v. Allen*, 72 Ga. 69).

Testator gave his residuary estate to his sister J. and to his nephew S. "and his sister, my niece, all residing in" L., Germany. By codicil he recited that his sister J. was dead, and gave her share to "the other two residuary legatees therein named, S., and to his sister, my niece, whose name is K. and whose residence is S., Germany, share and share alike." S. had an only sister, who, at the time of the making of the will and codicil, was a resident of L., and the testator had a niece, the married daughter of another sister, whose name was K., and whose residence was S. Held, that the will presented a latent ambiguity within Civ. Code, § 1340, permitting extrinsic evidence to correct imperfect descriptions in wills, etc., and not a "patent ambiguity" within section 1318, requiring the court to ascertain the intention of a testator from the words of his will and the circumstances under which it was made. In re *Dominici's Estate*, 90 Pac. 448, 450, 151 Cal. 181.

#### PATENT CERTIFICATE

The term "patent certificate" seems to have been intended to refer solely to certificates issued after confirmation of the grant to the state by the general government. *Hibben v. Malone*, 109 S. W. 1008, 1009, 85 Ark. 584 (citing *Hempstead v. Underhill*, 20 Ark. 337; Act Jan. 20, 1855 [Laws 1855, p. 202]).

#### PATENT DANGER

The fact that an employé of a mine knows that water percolated through the roof of a chamber does not necessarily show the condition of the mine was a "patent danger," or that he knew the place was unsafe. *Bird v. Utica Gold Min. Co.*, 84 Pac. 256, 257, 2 Cal. App. 674.

#### PATENT MEDICINES

"Patent medicines," within a statute making it an offense to practice medicine without having secured a certificate from the state board of medical examiners, but providing that it shall not prevent the advertising and sale of patent and proprietary medicine, means medicines which some person or company, other than a person indicted for prescribing certain medicines without a license, manufactured, advertised, and sold. *State v. Kendig*, 110 N. W. 463, 465, 133 Iowa, 164.

#### PATENT RIGHT

"A conveyance of an interest in the right to sell a patented article in a given territory is as much a sale of a 'patent right' as a conveyance of the entire right to sell in the territory. No distinction can be made between the transactions in this regard." *John Woods & Sons v. Carl*, 87 S. W. 621, 622, 73 Ark. 328.

Under Rev. St. U. S. § 4886, providing that any person who has invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, etc., may obtain a patent therefor, books and the right to sell books are not patents or "patent rights," and a note given for books and for the right to sell the same need not comply with Kirby's Dig. §§ 518, 514, requiring the note given for a patent or "patent right" to be in certain form, with certain statements to be shown on the face thereof. *Hogg v. Thurman*, 117 S. W. 1070, 1072, 90 Ark. 93, 17 Ann. Cas. 353.

A bankrupt's incorporeal interest in an alleged invention pending application for a patent does not pass to his trustee in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 70a, cl. 2, 30 Stat. 566, declaring that the bankrupt's interest in patents, "patent rights," etc., shall be vested in the trustee by operation by law as of the date he was adjudged a bankrupt, since the words "interest in patents, patent rights," etc., should be construed as referring to rights acquired under a patent to a third party. In re *Dann*, 129 Fed. 495, 496.

Literally the "sale of a patent right" is the sale of the interest of the patentee, or one of the letters patent, and is consummated generally by a transfer of the letters patent. It is universally recognized, however, that a sale of the rights conferred by letters patent within a certain territory is a sale of the patent right, and, where the owner sells

the right to use and to manufacture for sale and use during only a portion of the life of the patent and for a prescribed territory, it is a sale of a patent right. *Nyhart v. Kubach*, 90 Pac. 796, 797, 76 Kan. 154.

**As property**

See Property.

**PATENTABLE COMBINATION**

See Combination (In Patent Law).

**PATENTABLE INVENTION**

See Invention.

**PATENTABLE NOVELTY**

See Novelty.

**PATENTABLE PROCESS**

See Process.

**PATENTED**

Approval of an application for a patent is not the equivalent of a patent granted and issued within a contract for the sale of an interest in a patent granted and issued; the term "patented" meaning the actual issuance of a patent by the government. *Spicer v. Hurley*, 118 Pac. 249, 251, 161 Cal. 1.

**PATENTED ARTICLE**

An unpatented lock-bar joint pipe, made in this country only by patented machinery, is not a "patented article," within Greater New York Charter, Laws 1901, p. 642, c. 466, § 1554, prohibiting the purchase of patented articles without opportunity for competition. *Holly v. City of New York*, 112 N. Y. Supp. 797, 798, 128 App. Div. 499.

**PATENTING**

The word "patenting," as used in Act Cong. Feb. 8, 1887 (24 Stat. 389) § 6, providing that on the completion of allotments to lands to Indians, "and the patenting of the lands to said allottees," each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside, means the preliminary patent that is issued as soon as the allotment is made. *United States v. Kiya*, 126 Fed. 879, 881.

**PATH**

See 'Towpath.

**PATHS AND ROADS, THE USE OF**

Code Civ. Proc. § 1238, provides that the right of eminent domain may be exercised to obtain land for toll roads, by-roads, plank and turnpike roads, paths and roads, either on the surface, elevated, or depressed, for the use of bicycles, tricycles, vehicles, steam, electric, and horse railroads, etc. Civ. Code, § 465, subd. 7, gives to a railway company power to purchase lands, etc., to be used in the con-

struction and maintenance of its road, and other necessary appendages and adjuncts, or acquire them by condemnation. Held, that the words "paths and roads for the use of" merely qualified the words "bicycles, tricycles, motor cycles and other horseless vehicles," and not the phrase "steam, electric and horse railroads," so that a railroad's power to condemn land was not limited to its right of way, but extended to land adjacent to its station grounds required for a freight house, under the rule that, while a statute conferring the power of eminent domain should be strictly construed and not extended by implication, it must be applied to effectuate the legislative intent. *Central Pac. Ry. Co. v. Feldman*, 92 Pac. 849, 850, 152 Cal. 303.

**PATIENT**

Where a physician is called to treat a patient against his will, the latter becomes a patient by operation of law, and any information which is acquired by the physician in order to enable him to act is acquired in attending a patient in a professional capacity, within Code Civ. Proc. § 834, and is privileged. *Meyer v. Supreme Lodge K. P.*, 70 N. E. 111, 112, 178 N. Y. 63, 64 L. R. A. 839.

A statute giving the superintendent of an insane asylum authority to discharge a "patient" refers only to one who has been committed to the asylum and has remained there (except in case of a temporary absence, as on parole) for care and treatment. *Aldrich v. Barton*, 95 Pac. 900, 904, 153 Cal. 488.

**PATRIARCHAL MARRIAGE**

The term "patriarchal marriage," as used in the provision of the Constitution prohibiting any one from voting or holding office "who is a bigamist or polygamist, or is living in what is known as 'patriarchal or celestial marriage,'" is used in the sense of bigamous or polygamous marriage, while the term as used by the Mormon church signifies a marriage solemnized by the church and binding throughout the life to come. Under the doctrines of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church, marriages celebrated and solemnized by mere civil authority and with only the sanction of the law are regarded as marriages for time only, while a marriage solemnized by a duly constituted church authority or "by the holy and eternal priesthood of the Saints" is designated a "celestial or patriarchal marriage," binding not only during this life but throughout the life to come. As used in Const. Idaho, art. 6, § 3, disqualifying as voters, jurors, or officers, among others, one who is a bigamist, polygamist, or living in what is known as patriarchal or celestial marriage, the words "bigamous," "polygamous," "plural," "celestial," and "patriarchal" marriages were meant, and it was in-

tended to prohibit and forbid any man having more than one wife at one time under whatever name or designation he might choose to style his marriage; and the use of each of these words was directed against bigamous and polygamous marriages. The "celestial" or "patriarchal" marriage, in order to come within the prohibition of the Constitution, must be "bigamous" or "polygamous." One who teaches or practices having more than one wife at any one time or belonging to an organization teaching such doctrine is disqualified for the duties of an elector, and consequently for holding any civil office within the laws of the state, but it is not intended by the Constitution to interfere with the religious beliefs and opinions of any one. *Toncray v. Budge*, 95 Pac. 26, 35, 38, 14 Idaho, 621.

## PATROL

### PATROL LIMITS

"The term 'patrol limits' does not appear in the Minneapolis charter, but it is there provided that no intoxicating liquors shall be sold within certain limits. It was assumed during the argument, and by the trial court, that in Minneapolis 'patrol limits' meant that territory within which saloons are licensed, and which for that reason requires special patrol by the police. Not being defined by any law, its meaning depends upon usage, and, so far as we are informed, the meaning above suggested is limited to the city of Minneapolis. In the city of St. Paul the charter confers upon the city council authority to establish "patrol limits" within the city, and to prevent, suppress, and prohibit the sale of intoxicating liquors within such limits, and prescribes certain territory within which no liquors shall be sold, and also provides that no liquors shall be sold within 200 feet of the boundary limit so established, while the charter of the city of Duluth is silent upon the subject of 'patrol limits.' It follows that, at the time of the passage of this act, 'patrol limits' meant one thing in Minneapolis, as generally understood by its citizens, viz., that district within which liquors were sold and which required special alertness on behalf of the police, whereas in St. Paul it meant directly the opposite and referred to that district within which no licenses were permitted, and as to Duluth it had, and could have, no application whatever." *State v. Schrapa*, 106 N. W. 106, 107, 97 Minn. 62.

### PATROLMAN

*Sess. Laws 1907, c. 186 (Rev. Codes, §§ 3304-3317)*, providing for the organizing of the police departments of cities upon a civil service basis, refers to persons serving on the police force as "members" or "officers" of the police force or department. An ordinance enacted thereunder creating the police de-

partment of a city mentioned certain officers by a special title, and classified all other members as "policemen" or "patrolmen," and provided that the number of "policemen or patrolmen" should be reduced, etc. Held, that as a "patrolman" is defined as a member of the police force of a town or city who patrols a certain beat, and a "policeman" as one of the ordinary police force, whose duty it is to patrol a certain beat for the protection of property, lives, etc., and also, in its generic sense, was applicable to any member of the police force whatever his rank, the terms as used in the ordinance were synonymous, so that one appointed under the ordinance under the designation of "patrolman" was a policeman, and hence not a purely municipal officer. *State ex rel. Quintin v. Edwards*, 106 Pac. 695, 697, 40 Mont. 287, 20 Ann. Cas. 239.

## PATRONS

In any year the "patrons" of a school within Burns' Ann. St. 1908, § 6417, providing for relocation of schoolhouses on petition by the patrons, are the legal patrons living in the district who were enumerated in that year, or who have made satisfactory proof that they were actually the parents or guardians or custodians of children of school age living in the district, though not enumerated. Persons who were living in a school district in July and August, and had children of school age whom they intended to send to school in the district the following winter, were "patrons" within Burns' Ann. St. 1908, § 6417, which provides for relocation of schoolhouses on petition by patrons. *Willan v. Richardson* (Ind.) 98 N. E. 1094, 1095.

## PATTERN

See *Molder's Pattern*.

### PATTERNS FOR MACHINERY

The provision in *Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 616, 30 Stat. 199*, for "models of inventions and of other improvements in the arts, including 'patterns' for machinery," is not limited to the class of patterns known as "model patterns," intended to show the working of the thing illustrated, but includes also molders' patterns, which are used as models about which to form sand molds in which castings may be made and which may be made and which are fitted for successive use in that way. *R. Hoe & Co. v. United States*, 141 Fed. 488, 489; *United States v. R. Hoe & Co.*, 147 Fed. 201, 203, 77 C. C. A. 427. The *Standard Dictionary*, while giving a general definition of the word "patterns" to be "an original or model proposed for imitation, something used or worthy to be used as a copy," specially describes the word so as to expressly include what are known as "iron moulders' patterns," namely, as a "model," usually of wood or iron, and

often in several parts to facilitate removal, about which to form a sand mould, in which a casting may be made. *United States v. R. Hoe & Co.*, 147 Fed. 201, 203, 77 C. C. A. 427.

## PAUPER

See Support as Pauper.

See, also, Poor; Poor Person; Public Charge.

### Indigent pensioner

Confederate soldiers, referred to in the expression "indigent pensioners," as used in Acts 1909, p. 173, § 2, providing for the payment of fees to ordinaries for services to indigent pensioners from the county treasury, cannot be classed as paupers, within the meaning of that term as employed in statutes relating to the county poor. *Clark v. Walton*, 73 S. E. 392, 393, 137 Ga. 277.

### Insane person

The statute with reference to the support of insane persons at an insane asylum provides that: "An insane person shall be held to be a 'pauper' if unable to pay six months board in advance or if married, but unable to pay said board besides providing for others naturally dependent, or if a minor the parent of said persons are unable to pay board besides supporting others naturally dependent on them." *Holburn v. Pfanmiller's Adm'r*, 71 S. W. 940, 941, 114 Ky. 831.

### Person receiving public aid

The word "pauper" is used to designate those persons whose support imposes a burden on the public treasury. One may be ever so destitute of estate or ability to earn a livelihood, and yet not be a pauper. He may be cared for by the voluntary action of friends or relatives. The duty to care for him may be, by law, cast on relatives, and he becomes a member of the pauper class only when, the other means of support failing, he becomes a public charge. *Weeks v. Mansfield*, 80 Atl. 784, 786, 84 Conn. 544.

## PAVE—PAVEMENT

See Repave—Repayment.

Cost of paving, see Cost.

Kind of pavement, see Kind.

### Construction of gutters, curbing, catch-basins, and sewer connections

"Pave" is a word, the meaning of which, like most any other, will depend on where, and the connection in which, it may be used. In a resolution of intention to pave certain streets, it would include the construction of gutters, catch-basins, and sewer connections, so that an ordinance enacted pursuant to the resolution would include such work. *Muff v. Cameron*, 114 S. W. 1125, 1126, 134 Mo. App. 607.

Rev. St. 1889, § 1592, as amended by Laws 1893, p. 107, authorizing cities of the

fourth class to cause streets "to be graded, constructed, reconstructed, paved," etc., authorizes a city of the class to issue special tax bills to pay for the cost of curbing, especially in view of the provision in the section authorizing the issuance of tax bills for special assessments for "paving, macadamizing and curbing," for the terms "constructed" and "paved" refer to the entire pavement of the street and include curbing, which is a necessary part thereof. *City of Excelsior Springs v. Ettenson*, 96 S. W. 701, 705, 120 Mo. App. 215; *Same v. Mississippi Valley Trust Co. (Mo.)* 96 S. W. 707.

The charter of Mobile, providing that a street railway company should pay the cost of "paving" between the rails of its tracks and 18 inches on either side, could not include underground drainage or sewerage. After citing cases holding that the words "pave" or "pavement" included curbs and gutters, cross streets and crosswalks, such cases are distinguished because the issue was between respective cities and property owners over paving the entire street. The court says: "We do not pretend to hold in this case that paving does not include curbing and certain kinds of drainage, or that the railroad would not be liable for the preparation of the foundation for the reception of the pavement, or for such curbing as might be deemed necessary for drainage, and which has been placed within that territory between its rails of within 18 inches on either side thereof. But we cannot conceive of any liability on the part of this company, under the terms of the statute, for any cost that may have been incurred by the city of Mobile for curbing or drainage beyond the confines of the railroad's territory." *City of Mobile v. Mobile Light & R. Co.*, 38 South. 127, 129, 141 Ala. 442 (citing *Williams v. Mayor, etc., of City of Detroit*, 2 Mich. 577; *Warren v. Henly*, 31 Iowa, 31; *Booth, Street Railways*, 240).

An improvement district known as a paving district was organized under a petition and ordinance to pave a street from curb to curb. *Kirby's Dig.* § 5667, relating to the formation of municipal districts, provides that the petition of the property owners shall designate the nature of the improvement to be undertaken; and section 5672 provides for an improvement board to be appointed by the municipal council which shall form plans for the improvements within their district as prayed by the petition. Held, that the improvement board has a discretionary power as to the construction of the improvement, although the nature of the undertaking is fixed by the petition, and, where it did not appear that the cost was excessive or that surface drainage was practical, the improvement board could provide for storm sewers to carry off the surface waters; the word to "pave" being generally understood

to include the power to macadamize streets or cover them with a hard surface, so as to make them convenient for travel, and to provide for their proper drainage. Board of Improvement of Paving Dist. No. 7 of City of Ft. Smith v. Brun, 150 S. W. 154, 156, 105 Ark. 65.

The word "paving," in Code, § 792, giving to cities power to improve any street by grading, parking, curbing, paving, and guttering, and to assess the cost on abutting property, subject to the limitation of a maximum assessment, includes both curbing and guttering when a city undertakes to pave a street not already curbed and guttered; and, where a city curbs, gutters, and paves a street as a part of one improvement, it may not treat the work as independent items, and make them the subject of separate contracts and assessments, though in the outlying parts of a city it may curb or gutter unpaved streets, and thereafter pave the streets when demanded by the growth of the city and increase of traffic. Bailey v. City of Des Moines (Iowa) 138 N. W. 853, 856.

#### Macadamizing

The term "pave," in its generic sense, means to place some substance on the street so as to form an artificial roadway or wearing surface, which shall change the natural condition of the street. The word is much more comprehensive than the term "macadamize," but it embraces all that the term "macadamize" covers. Ross v. Gates, 81 S. W. 1107, 1109, 183 Mo. 338.

#### Repaving

Under Milwaukee City Charter, c. 7, § 6, authorizing the board of public works, in conjunction with the council to pave a street without a petition of property owners, the word "paving" applies to a second pavement as well as to a first, and hence ordering of a repavement without a petition was authorized. Loewenbach v. City of Milwaukee, 119 N. W. 888, 889, 139 Wis. 49.

#### PAVING FUND

Code, § 894, authorizes any city to levy an "improvement fund tax" to pay for street improvements. Section 830 provides for payment of street improvements out of the "city improvement fund." Held, that both statutes refer to the same fund, and contracts for paving which provide for payment of difference between amount due for paving and amount raised by special assessments out of the "paving fund" and "general paving fund" refer to the fund specified in the statutes. Corey v. City of Ft. Dodge, 111 N. W. 6, 7, 133 Iowa, 666.

#### PAWN

A "pawn" is a pledge to a pawnbroker or person who keeps a shop for the purchase or sale of goods and takes goods by way of

security for money advanced thereon. Levison v. Boas, 88 Pac. 825, 150 Cal. 185, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661.

#### PAWNBROKER

The word "pawnbroker" has been variously defined as any person whose business or occupation is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise or any kind of personal property whatever, as security for payment of money loaned thereon. One who makes a business of loaning money for interest and receives personal property in security for the payment of the same. Or, again, a pawn is a pledge to a pawnbroker or person who keeps a shop for the purchase or sale of goods and takes goods by way of security for money advanced thereon. Under Pen. Code, § 338, declaring that every person who carries on the business of a pawnbroker, by receiving goods in pledge for loans at a greater rate of interest than 10 per cent. per annum, except by authority of a license, is guilty of a misdemeanor, one is a pawnbroker who carries on the business of receiving goods in pledge for loans, exacting interest for the loans. One is no less a pawnbroker because making loans on pledges of no other kinds of goods than jewelry and diamonds. Levison v. Boas, 88 Pac. 825, 150 Cal. 185, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661 (citing And. Law Dict. p. 759; Rapalje & Lawrence Dict. p. 940).

Under a statute providing for the licensing of persons "to carry on the business" of "pawnbroking," there may be one or more acts of receiving articles on pawn without engaging in the business, or there may be the occupation of pawnbroking without the completion of an actual contract of pawnbroking. Commonwealth v. Schwartz, 83 N. E. 326, 327, 197 Mass. 107.

#### PAY

See Absolute Refusal to Pay; Covenant to Pay; Current Yearly Pay; Day's Pay; Personally Pay; Promise to Pay.

"The word 'pay' is defined as meaning to satisfy; to discharge one's obligation to; to make due return to; to compensate; to remunerate; to deliver the amount or value to the person to whom it is owing." Starr v. Board of Com'rs of Delaware County, 76 N. E. 1025, 1026, 79 N. E. 390, 40 Ind. App. 7.

"To 'pay' is defined by lexicographers, to discharge a debt; to deliver a creditor the value of a debt, either in money or in goods, to his acceptance, by which the debt is discharged." La Montagne v. Bank of New York, 88 N. Y. Supp. 21, 31, 94 App. Div. 219 (citing Beals v. Home Ins. Co., 36 N. Y. 322).

"To pay" is defined as: "To deliver that which is or is regarded as the equivalent or compensation to, as to an employé or a

creditor for services or goods; to remunerate; to recompense; to give as pay;" "to requite; remunerate; reward, as to pay workmen or servants." So where it is shown that six members of a fire department of a city were paid annual or monthly salaries, and all other members of the department were paid in accordance with the ordinance of the city, \$1 for the first hour and 50 cents per hour for all subsequent time in the daytime and 75 cents in the nighttime, for the time spent in actual attendance at fires, such department was a paid department, within the meaning of a statute relating to distribution of certain funds. *Continental Hose Co. No. 1 v. City of Fargo*, 114 N. W. 834, 836, 17 N. D. 5 (citing *Century and Standard Dictionaries*).

To "pay" means primarily to transfer or deliver money or other agreed medium from the debtor to the creditor, and while the word "payment" is often used merely to signify satisfaction or discharge of an obligation by any means, as by setting off some other or the like, that is a secondary and somewhat loose use of the term; "payment" of course, works satisfaction of an obligation; but the two are not equivalents, for satisfaction and discharge may be accomplished without payment. *Onelda County v. Tibbetts*, 102 N. W. 897, 899, 125 Wis. 9.

The way to discharge a tax being to "pay" it, the property owner, who once pays taxes on his property in good faith, is thereby discharged from further liability for taxes thereon for the year for which the taxes paid were assessed. *Nyce v. Schmoll*, 82 N. E. 539, 540, 40 Ind. App. 555.

The various expressions that the payor must "pay," or "furnish," or "advance" the consideration, used interchangeably in defining a resulting trust, all imply that the payor does something, and that he has the intention, in so doing, to acquire at least an equitable interest in the land. *Merrill v. Hussey*, 64 Atl. 819, 821, 101 Me. 439.

Where a charterer of a vessel was to "pay for lighterage" between Astoria and Portland, the port of discharge, it was not his duty to furnish or provide the lighterage, but only to pay for it. A bill of lading for a cargo of coal, providing for its carriage to a port of delivery, and there delivered, consignee "to tow vessel in and out of Back Bay free," did not bind the consignee to pay for the towage, but only to provide the same, so that after the vessel arrived in port, and notified the consignee, the duty and risk of the towage was upon him. *Thompson v. Winslow*, 128 Fed. 73, 77 (citing and adopting *Barrett v. Oregon Ry. & Nav. Co.*, 22 Fed. 452; *Smith v. Lee*, 66 Fed. 344, 13 C. C. A. 506; *The Somers N. Smith*, 120 Fed. 570).

The difference between a contract of indemnity and a contract to pay a legal liability

of another is that on the contract of indemnity an action cannot be brought and a recovery had until the liability is discharged; while upon the other the cause of action is complete when the liability attaches. *Poe v. Philadelphia Casualty Co.*, 84 Atl. 476, 479, 118 Md. 347.

#### Conversion into personality implied

The term "pay over" is used generally with reference to money, and not as equivalent to a conveyance or transfer of real property; thus, where a will required trustees to "pay over" a portion of the trust fund to certain grandchildren, it contemplated a sale of the property contained in the fund and a delivery of the proceeds in money to the beneficiaries. *Burnham v. White*, 102 N. Y. Supp. 717, 719, 117 App. Div. 515.

The phrase "pay over," as used in a will providing that, on the death of the life tenant, the executors should "pay over" his portion of the estate to the children of said life tenant, does not necessitate the conversion of the estate into money by the trustees, but is equivalent to the expression "should go to such children." *Bascom v. Weed*, 105 N. Y. Supp. 459, 464, 465, 53 Misc. Rep. 496.

#### Payment in money

The word "pay," as used in the provision of the interstate commerce act, which authorizes the interstate commerce commission to order a carrier to pay damages on account of an unreasonable freight rate collected, should not be interpreted in the narrow sense of a money transaction. It is equally a payment, within the contemplation of this provision, to be relieved from an obligation which the law imposes; and an order to remit the excess above a reasonable charge which the commission has fixed is in substance and effect an order for the recovery of damages. *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667, 673.

#### PAY ALL MY JUST DEBTS

"In any case, the testator may direct that the mortgage debt be paid, or use such words as clearly show such intent. Some stress is laid upon the direction in the first clause of the will to 'pay all my just debts'; but in this case we attach little importance to the words used in the formal manner in which they are used. They are much like the formal, meaningless terms of endearment and pious phrases printed in the formal part of blanks for making wills." *In re Porter's Estates*, 72 Pac. 173, 174, 138 Cal. 618.

#### PAY CHECK

The terms "pay check" and "money order" mean practically the same thing. *Barnes v. State*, 35 South. 227, 228, 46 Fla. 96.

#### PAY DIRT

The term "pay dirt," as used in a placer mining lease, requiring the lessees to remove all "pay dirt as low as 2 cents per pan," held

properly construed by the court in the light of all the surrounding circumstances and conditions pertaining to the working of the claim as not meaning all dirt in the mine averaging two cents per pan, but all such that it would pay to mine by the use of minerlike methods. *Belsea v. Tindall*, 190 Fed. 440, 449, 111 C. C. A. 244.

### PAY PROPER

"Pay proper," as used in Acts Cong. May 26, 1900, c. 586, and March 2, 1901, c. 803, mean the regular, ordinary pay which an army officer may be entitled to under the facts in his case, and if, by virtue of length of service, he is entitled to receive the compensation provided for in Rev. St. § 1262, that compensation is his "pay" or his "pay proper," as distinguished from other probable compensation by any allowance or commutations, or otherwise. The "pay proper" on which the percentage of increased pay to an officer serving in the Philippine Islands is to be computed, under acts of May 26, 1900, and March 2, 1901, includes the longevity pay to which he is entitled, under Rev. St. § 1262, as well as the minimum pay prescribed by section 1261, for his grade. *Irwin v. United States*, 38 Ct. Cl. 87; *United States v. Mills*, 25 Sup. Ct. 434, 436, 197 U. S. 223, 49 L. Ed. 732.

### PAY THE PURCHASE MONEY INTO COURT

The phrase "pay the purchase money into court," in an order requiring the purchaser to pay into court either the whole amount of his purchase money or such sum as would indemnify the mortgagee for the failure to complete the purchase, is synonymous with the phrase "complete his purchase." *State Bank v. Wilchinsky*, 112 N. Y. Supp. 1002, 1005, 128 App. Div. 485.

### PAY ROLL

As written instrument, see Written Instrument.

### PAYABLE

See Demand Payable; Not Be Payable; Now Due and Payable.  
Otherwise payable, see Otherwise.

Ordinarily, the words "due," "owing," and "payable" are conclusions of law, denial of which raises no issue. *Irwin v. Insurance Co. of North America*, 116 Pac. 294, 295, 16 Cal. App. 143.

The word "payable" is defined as that which may, can, or should be paid; suitable to be paid; that may be discharged or settled by delivery of value; matured; now due. A direction in a check to the drawee bank that it is payable through another named bank means that it is to be paid in that way. *Farmers' Bank of Nashville v. Johnson, King & Co.*, 68 S. E. 85, 88, 134 Ga. 486, 30 L. R. A. (N. S.) 697, 137 Am. St. Rep. 242.

By the terms of a mortgage, the mortgagor covenanted to pay the taxes within 40 days after they became due. If he made default, the mortgagee might pay the same, and in that case the sum so paid became a further lien on the premises and payable forthwith with interest. If the principal, interest, or taxes were not paid "when the same become payable," and remained unpaid for 30 days, then the option was given the mortgagee to declare the whole sum due. Held, that the expression "when the same become payable," as it related to taxes, meant when payable to the mortgagee as provided in the mortgage; that is, forthwith, after payment by the mortgagee as authorized by the mortgage, and not when payable to the tax collector. *Union Trust Co. v. Grant*, 111 N. W. 1039, 1040, 148 Mich. 501.

### As paid

See Paid.

### PAYABLE AS IT ACCRUES

In an action on eight notes, due on or before the 5th day of March of eight successive years, said notes being due in monthly installments, and each note and installment thereof bearing interest at 8 per cent. per annum, "said interest payable as it accrues," the words "payable as it accrues," mean "annually"; that is 8 per cent. interest per annum. *O'Shields v. Poff* (Tex.) 144 S. W. 1044, 1045.

### PAYABLE AT BANK

The words "payable at bank," in a note bearing date at Providence, mean that the note is to be payable at Providence, though the holder may know that the maker resided elsewhere. *Hazard v. Spencer*, 23 Atl. 729, 731, 17 R. I. 561.

### PAYABLE AT A DETERMINABLE FUTURE TIME

A note, containing a stipulation whereby the sureties, guarantors, indorsers, and makers waive notice of the granting of any extension of time for payment and waive the right of defense on the ground that extension has been made without notice to them or either of them, is not a negotiable promissory note, within the Negotiable Instrument Law (Sess. Laws 1903, p. 380) § 1, subd. 3, requiring that an instrument, to be negotiable, must be payable on demand or at a fixed or determinable future time, and section 4 declaring that an instrument is "payable at a determinable future time" which is payable at a fixed rate period after date or sight, or on or before a fixed or determinable future time specified therein, or on or at a fixed period after the occurrence of a specified event certain to happen, and that an instrument payable upon a contingency is not negotiable. *Union Stockyards Nat. Bank of South Omaha v. Bolan*, 93 Pac. 508, 510, 14 Idaho, 87, 125 Am. St. Rep. 146.



**PAYABLE AT THE RATE OF \$50 A MONTH**

Under Code Civ. Proc. § 1864, providing that, when different constructions of a provision of a contract are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision is made, the concluding clause of a note for \$4,000 in form a one-day note, providing for interest on the full amount thereof at 1 per cent. per annum till paid, that it was "payable at the rate of \$50 a month," is to be construed, in favor of the payee, as not controlling the entire instrument, and so not limiting the payments to \$50 a month, without payment at the same time of interest. *San Francisco Credit Clearing House v. McDonald*, 122 Pac. 964, 966, 18 Cal. App. 212.

**PAYABLE IN EQUAL ANNUAL INSTALLMENTS**

The power to issue bonds "payable in equal annual installments" means "that an equal amount of each bond or of the whole debt shall become due each year; that the payment thereof shall become legally enforceable against the city; that it is the right of the city to make annual payments of the principal, and the duty of the holders of the bonds to accept such payment;" and not that the city issuing the bonds may place annually in its sinking fund an amount to meet the obligations at maturity. *City and County of Denver v. Hallett*, 83 Pac. 1066, 1067, 34 Colo. 393.

**PAYABLE ON DEMAND**

See On Demand.

**PAYEE**

As trustee of express trust, see Trustee of Express Trust.

**PAYING**

See False Auditing and Paying of Claims; Passenger Paying Fare.

"A mere reserving of a discount or the including of usurious interest in a renewal note, while it may be the 'reserving or charging' of usury, is not the 'paying' of same." *McCarthy v. First Nat. Bank of Rapid City*, 121 N. W. 853, 856, 23 S. D. 269, 23 L. R. A. (N. S.) 335, 21 Ann. Cas. 437.

**PAYING OUT**

A delivery by an executor to his successor in a trust is not a "paying out" of moneys, within the language of Code Civ. Proc. § 2730, relating to commissions of executors and administrators on moneys paid out by them. In *re Ingraham*, 112 N. Y. Supp. 763, 767, 60 Misc. Rep. 44 (citing *Matter of Hurst*, 97 N. Y. Supp. 697, 111 App. Div. 460).

**PAYING QUANTITIES**

Where an oil and gas lease provided for a term of two years and as much longer as oil and gas are found in "paying quantities," as a matter of law, the lessor had no right to forfeit the lease at the end of two years because during that time no oil or gas had been marketed, where the evidence showed that a well on the land produced 1,000,000 feet per day, worth, when conveyed to a market, from 3 to 5 cents per 1,000 feet. *Summerville v. Apollo Gas Co.*, 56 Atl. 876, 877, 207 Pa. 334.

A provision in an oil lease that, after the completion of the first well, the lessee should drill a specified number of wells, in case oil should be found in "paying quantities," did not mean that, if oil was found in the test or first well in a sufficient quantity to pay a profit, however small, in excess of the cost of producing it, excluding the cost of drilling the well and of equipment, then oil was found in "paying quantities," within the meaning of the contract, but meant that additional wells were to be drilled only in case oil was found in such quantities as would, taken in connection with other conditions, induce ordinarily prudent persons in a like business to expect a reasonable profit on the whole sum required to be expended; and whether oil was found in "paying quantities" was to be exclusively determined by the operator, acting in good faith. *Manhattan Oil Co. v. Carrell*, 73 N. E. 1084, 1086, 164 Ind. 526.

**PAYING STOCK**

See Dividend Paying Stock.

**PAYMENT**

See Actual Payment; Bond for the Payment of Money; Cash Payment; Compulsory Payment; Contract for Payment of Money; Direct Payment; Giving in Payment; Instrument for the Payment of Money; Involuntary Payment; Personally Pay; Priority in Payment; Voluntary Payment.

On Payment, see On—Upon.

Payment forthwith, see Forthwith.

Payment in contemplation of insolvency, see Contemplation of Insolvency.

Payment of debt as legacy, see Legacy.

Payment of fare, see Passenger.

Payment on account of the accident, see On Account of.

Presentment for payment, see Presentment.

Tender of payment, see Tender.

"Payment" is the discharge of an obligation by the delivery and acceptance of money or of something equivalent to money which is regarded as such at the time by the party to whom the payment is due. *Cranston v. West Coast Life Ins. Co.*, 128 Pac. 427, 430,

63 Or. 427 (citing 6 Words and Phrases, p. 5247).

"Payment," in its broadest signification, is a satisfaction of an obligation. There must be an intent upon the part of the obligor or debtor to discharge the obligation or extinguish the debt." *Town of Manitou v. First Nat. Bank of Colorado Springs*, 86 Pac. 75, 78, 37 Colo. 344.

"Payment" is not a contract, but is the discharge of a debt. *Porter v. Title Guaranty & Surety Co.*, 106 Pac. 299, 302, 17 Idaho, 364, 27 L. R. A. (N. S.) 111.

The word "payment" in its legal sense has a well-defined meaning, and to constitute payment there must be a delivery by the debtor or his representative, to the creditor or his representative, of money or something accepted by the creditor as the equivalent thereof, with the intention on the part of the debtor to pay the debt in whole or in part, and accepted as payment by the creditor. *Union Biscuit Co. v. Springfield Grocer Co.*, 126 S. W. 996, 998, 143 Mo. App. 300 (citing 30 Cyc. p. 1181); *Smith v. Pitts*, 52 South. 402, 404, 167 Ala. 461.

To "pay" means primarily to transfer or deliver money or other agreed medium from the debtor to the creditor, and while the word "payment" is often used merely to signify satisfaction or discharge of an obligation by any means, as by settling off some other or the like, that is a secondary and somewhat loose use of the term; "payment," of course, works satisfaction of an obligation, but the two are not equivalents, for satisfaction and discharge may be accomplished without payment. *Oneida County v. Tibbetts*, 102 N. W. 897, 899, 125 Wis. 9.

"Payment" involves more than the passing of money, or its accepted equivalent, from one to another. The acceptance of money or other thing of value, in satisfaction of a debt, or in exchange for labor, goods, or other commodity, will be a payment, where it was so intended by the payor. Generally, there must be something shown in addition to the mere passing of money from one to the other. *Galbraith v. Starks*, 79 S. W. 1191, 1192, 117 Ky. 915.

The term "payment," as used in Civ. Code, art. 2131, means, not only the delivery of a sum of money when such is the obligation of the contract, but the performance of that which the parties respectively undertook, either expressly or impliedly or by law, to give or to do. *Morgan's Louisiana & T. R. & S. S. Co. v. Stewart*, 44 South. 138, 143, 119 La. 392.

"Payment" of a bill is a discharge of the indebtedness represented by such bill, and is also an admission that the person making payment has funds in his hands to pay the

bill. *Bank of Indian Territory v. First Nat. Bank*, 83 S. W. 537, 538, 109 Mo. App. 665.

"Payment," as used in Comp. Laws, § 9725, precluding suit on a mortgage after 15 years from the last payment thereon, implies that the payer has parted with money or other valuable thing, and that the payee has received it in part liquidation of the debt. The statute is not satisfied with indorsement without an actual payment, and an agreement to forbear a part or whole of the debt without any consideration therefor is not a "payment." *Rogers v. Robson*, 111 N. W. 193, 147 Mich. 656 (citing *Blanchard v. Blanchard*, 122 Mass. 558, 23 Am. Rep. 397; *Erpelding v. Ludwig*, 40 N. W. 829, 39 Minn. 518; *Young v. Alford*, 18 S. E. 84, 113 N. C. 130; *Areux v. Mayeux*, 23 La. Ann. 172).

"Money paid by an indorser to an indorsee is not for the benefit of the maker, but rather to protect the indorser's contract with the indorsee; and it operates as a purchase, and not as a 'payment,' so far as concerns the maker, and cannot be taken advantage of by him." On payment of a note by the indorser on the failure of the maker so to do, the indorser can recover the amount from the maker, though the note was not protested. *McGowan v. Hover*, 91 N. Y. Supp. 892, 893, 45 Misc. Rep. 138 (quoting and adopting the definition in 7 Cyc. p. 1021).

Under the rule that payment by a joint maker extinguishes the obligation, "payment" means payment in full for everything due on the obligation. Under Civ. Code § 1543, providing that a release of one or more joint debtors does not extinguish the obligation of any of the others, a decree of distribution of the estate of the payee of a joint note, awarding the note to one of the joint makers, does not constitute a payment of the note, nor an extinguishment of the obligation of the other debtor for his proportion of the same. *Enscoe v. Fletcher*, 82 Pac. 1075, 1077, 1 Cal. App. 659.

Ordinarily the "payment" of a note by the maker "terminates the liability of the indorser, but the receipt of a preferential payment, contrary to the statute, of an indorsed note is in the contemplation of law no payment at all and does not release the indorser." The receipt by a creditor from an insolvent corporation of a preferential payment, contrary to the statute, of an indorsed note is in contemplation of law no payment and does not release the indorser. *Perry v. Van Norden Trust Co.*, 103 N. Y. Supp. 543, 545, 118 App. Div. 288 (citing *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 54 C. C. A. 387; *Brandt, Sur.* [3d Ed.] § 368; *Williams v. Gilchrist*, 11 N. H. 535; *Watson v. Poague*, 42 Iowa, 582).

In Laws 1899, p. 1593, c. 712, § 46, providing that if, when a street railway franchise tax is due, the company has paid to a

for its use, under any agreement thereunder any statute requiring the same sum based on a percentage of gross earnings or any other income, or any license tax, any sum on account of the special franchise.

"which payment was in the nature of," all amounts so paid shall be deducted the franchise tax, the term "payment" includes all the sums designated, so that right to the deduction in each case depends on whether it is in the nature of a tax. *wagen v. Crosstown St. Ry. Co.*, 86 N. pp. 218, 224, 90 App. Div. 275.

#### word distinguished

"Payment" means full satisfaction, as stated with an "accord," which involves acceptance of something as satisfaction, release," which is a conclusive acknowledgment of satisfaction. *Robinson v. St. Shury & L. C. R. Co.*, 66 Atl. 814, 818, t. 129, 9 L. R. A. (N. S.) 1249, 12 Ann. 1060.

#### Meaning of payment

The term "payment" means a payment in money. Where it is by a promissory note anything else but cash, it must be accepted by the payee as payment. *Sjoli v.uson*, 122 N. W. 1008, 1012, 19 N. D. 82. In order to constitute a "payment," the creditor must give something, either in money, property, or right, or must perform some act. *White v. Black*, 90 S. W. 1153, 1154, 40 App. 28.

Payment is made by the debtor delivered to the creditor money or some other valuable thing to extinguish the debt, which is received by the creditor for the same purpose.

*Persons v. Gardner*, 106 N. Y. Supp. 116, 619, 122 App. Div. 167.

Where "payment" is pleaded, the plea is to mean payment in money, and, if the debt is other than by money or if it is on an independent agreement, the substantive facts of the agreement must be proved, and cannot be shown under a general denial or a simple plea of payment. *Peo-Bank v. Stewart*, 117 S. W. 99, 102, 136 App. 24.

In its restricted sense, "payment" has been defined to be the discharge in money of a sum due. In more liberal and general terms, it may be defined as anything which the creditor accepts, or in law should accept, in satisfaction and discharge of the debt due.

The performance of services, if accepted by the creditor to be accepted, in payment, is sufficient. A transfer of credit by consent of the parties is equivalent to payment." *Boulton v. Hill*, 38 N. Y. Supp. 498, 501, 4 App. 251.

"Payment," in its broadest sense includes payment in other things than money, although by commercial usage it may be restricted to payment in money. Payment can

result only from the mutual agreement of the parties that the transaction shall have that effect. It is the intention of the parties derivable from their contract which gives the transaction its legal effect. National Banking Act, § 30, giving a remedy to a debtor of a national bank who has paid to the bank a greater rate of interest than that allowed by law, to recover back twice the amount of the interest paid, comprehends payment of the usurious interest by transfer of property as well as in money, but to constitute a "payment" by transfer of property the parties must intend that the property be accepted as such. Rev. St. U. S. § 5198, contemplates an actual payment of the usury, and, where property is accepted as payment, its market value at the time must exceed the principal and lawful interest, to amount to payment and receipt of illegal interest. *First Nat. Bank of Blakely v. Davis*, 70 S. E. 246, 247, 135 Ga. 687, 36 L. R. A. (N. S.) 134 (citing *Claffin v. Continental Jersey Works*, 11 S. E. 721, 85 Ga. 27; *Hicks v. Marshall*, 67 Ga. 713; *Harris v. Hull*, 70 Ga. 831; *Heath v. Page*, 48 Pa. 130).

#### Same—Bills or notes

While the mere taking of the note of the debtor or of a third person for an antecedent debt is not payment of the latter, yet where that is the intention of the parties, and their agreement, such effect is given to it. *Lomax v. Colorado Nat. Bank*, 104 Pac. 85, 88, 46 Colo. 230.

Where, in an action for assault, defendant pleaded that plaintiff accepted a note in satisfaction of the cause of action, it was not error to refuse to charge that a note given and received in payment for a personal injury resulting from a tort is "prima facie payment" therefor, as a note, given and received in payment, is "payment." *Belknap v. Billings*, 62 Atl. 56, 78 Vt. 214.

The taking of a promissory note not governed by the law merchant, by the creditor from his debtor, for an existing debt, is not a payment of the debt, unless it is so agreed to be by the parties, and the onus of proving such agreement would lie upon the debtor; but the taking of a bill of exchange, or a promissory note governed by the law merchant, by the creditor, for an existing debt, is a payment of the debt, unless it is otherwise agreed by the parties, and the onus of proving such agreement would lie upon the creditor, and this rule is the same whether the negotiable paper be executed by the debtor or by some third person. *Smith v. Bettger*, 68 Ind. 254, 259, 34 Am. Rep. 256.

Where a pledgee accepted the note of one of the joint obligors for the amount of the debt, without any agreement that it should be taken in extinguishment of the debt, the other obligor was not thereby released, since the acceptance of a note is not payment, unless the creditor agrees to take

it as payment. *Chorn v. Zollinger*, 128 S. W. 213, 214, 143 Mo. App. 191.

A guaranty provided that if the debtor should fail to pay any notes, when due, given in "payment" of the debt, the guarantors would make good the amounts which might be due the creditor in accordance with his contract with the debtor. Thereafter the creditor sent a letter acknowledging the receipt of two notes, and continuing, "Inclosed please find statement in settlement." The statement set forth the amount due and credited the debtor with receipt of two notes. To the statement was added, "Settled as above." Held, that it was incumbent on the guarantors to establish the fact that the words "in settlement" in the latter statement were used in a different sense than the word "payment" in the guaranty. *Providence Mach. Co. v. Browning*, 52 S. E. 117, 120, 72 S. C. 424.

The transfer by a debtor to a creditor of the note of a third person, accompanied by an agreement that it was transferred "for the purpose of making payment" for merchandise previously bought, that all sums collected thereon in excess of the indebtedness should be paid to the debtor, and that all costs and disbursements of litigation and attorney's fees should be paid by the debtor, did not constitute payment of the debt, but merely collateral security to which the creditor was first required to resort. *Hutkoff v. Glazer*, 138 N. Y. Supp. 328, 329, 78 Misc. Rep. 362.

An employer's liability policy provided that no action shall lie against the company as respects any loss under the policy, unless brought by the assured to reimburse himself for loss actually sustained and paid in money by him after the trial of the issue. Plaintiff employer executed its note in a sum sufficient to pay a judgment, with costs, rendered against it in an action for injuries to an employé, and the note was discounted at a bank and the proceeds paid to satisfy the judgment. Held, that the payment to satisfy the judgment for the employé's injuries was sufficient, though not in money, so that the employer could recover over against the insurance company on the policy. *Herbo-Phosa Co. v. Philadelphia Casualty Co.*, 84 Atl. 1093, 1097, 34 R. I. 567.

#### Same—Checks

Accepting a check is not an agreement that it is itself a "payment" of the money named therein. *Groomer v. McMillan*, 128 S. W. 285, 286, 143 Mo. App. 612.

"Checks are expected to be paid on presentation. Reliance on that expectation, the receipt of the check, depositing it for collection or credit, and drawing against the account thus created or augmented, do not make the check 'payment,' unless it is itself actually paid." *Charleston & W. O. Ry. Co.*

*v. Pope & Fleming*, 50 S. E. 374, 376, 122 Ga. 577.

A bank holding a note for collection delivered it to an indorser on the day of maturity, in exchange for the indorser's check upon another bank, and after inquiring by telephone of the drawee bank about the check, and being told through a mistake as to what check was meant that it would be paid, entered the amount to the credit of the owner of the note. On the next day, payment of the check, which at no time was good, was refused for want of funds, and the collecting bank delivered it to the drawer and in return received the note of its principal. Held, that these transactions did not effect the "payment" of the note. *Interstate Nat. Bank v. Ringo*, 83 Pac. 119, 122, 72 Kan. 116, 3 L. R. A. (N. S.) 1179, 115 Am. St. Rep. 176.

A national bank went into voluntary liquidation for the purpose of merging itself with a trust company, to which all of the capital stock of the bank was transferred; the trust company taking over the various deposits, accounts, and certain of its discounts, which were considered good, not including certain notes of the C. Company. After the liquidation, the bank ceased to make new loans. On the notes of the C. Company becoming due, the president of the bank informed P., who had been cashier of the bank and was manager of the trust company, that he wished to renew them, whereupon the old notes were taken up and marked, "Paid," and for them checks were drawn by the C. Company on the trust company, and the C. Company's deposit account with the trust company was immediately credited with the proceeds of the new notes, and the trust company did not repudiate the acts of the manager. Held to constitute a "payment" of the old notes and the making of a new loan either by the trust company or by the bank, acting with the assent of the trust company as its sole stockholder. *First Nat. Bank of Pawtucket v. Littlefield*, 67 Atl. 594, 596, 28 R. I. 411.

Where, in response to a telegram from a bank, the indorsee of his note, B. telegraphs the bank to have P., the indorser, take it up and draw on him with note attached, and where the bank pursuant thereto sent said telegram to P., who, acting thereon, sends to the bank the check of G. drawn on funds in said bank, together with a sight draft drawn on B. in favor of said bank for the amount of said note and interest, directing the maker, on demand, to pay to said bank said amount, "note and telegram March 2d attached with exchange," and where said bank accepts said check, charges it to the account of G., credits its "bill receivable" with the amount, stamps on its "discount ledger" opposite the entry of the note "March 2, 1906," as the date "when paid," charges said draft

remittance ledger to its correspondent and forwards same with note attached. *Section*, held that, by so accepting and cashing said check, said note was paid by indorser. *Bierce v. State Nat. Bank of Memphis, Tenn.*, 127 Pac. 856, 857, 88 Okl.

#### 1c—Deposit

Where a bank, to which the bankrupt was already indebted on the day the bankrupt became insolvent, closed its account and credited the balance, including a deposit just on the bankrupt's indebtedness to it, the deposit amounted to a payment pro of the loan, and not a deposit to the bankrupt's account, since a bank account constitutes the right of the depositor to draw on it. *Ernst v. Mechanics' & Metals Bank of New York*, 200 Fed. 295, 298.

#### 1c—Draft

As used in a statute requiring railroad stations to transport property "on payment of tolls," the quoted words do not constitute a prepayment. Hence there was a payment, when, on the making out of the bill of lading, a draft was given the carrier for freight and was forwarded with the bill of lading and paid on presentation. *Dorland & Co. v. International & G. B. R. Co.*, W. 561, 563, 103 Tex. 200.

#### 1c of payment

A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a "payment of a check." It is the same as if the check had been paid over the counter on the spot, and then immediately paid back to the account. *State v. Ross*, 104 Or. 601, 55 Or. 450, 42 L. R. A. (N. S.) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The difference between "payment" of a debt by a debtor to his creditor, and "payment" of money by a debtor to a third person at the request of a creditor, technical though it may be, it is nevertheless substantial. In the first case, it is presumed to be a payment on the debt, while, in the second, it may be payment of the debt if the parties so agree, or it may be a matter of set-off for which an action would lie. *Copriviza v. Riley*, 37 Pac. 398, 400, 4 Cal. App. 26.

In *St. 1909, § 5202*, relating to the payment of mortgages, was intended to embrace payment by agreement amounted to a settlement of the mortgage, and giving a mortgage on real estate, in lieu of the mortgage, and the mortgage to a satisfaction of it. *Baker v. Central Nat. Bank of Elkhart, Ind.*, 120 Pac. 549, 550, 86 Kan. 298.

The word "deposit," as used in an agreement by the consignee of a ring obligating the consignee "to deposit" with the consignor a certain sum on the execution of the agreement and on sums on certain days thereafter,

means "payment," because of the agreement that the deposit should become the absolute property of the consignor. *People v. Gluck*, 80 N. E. 1022, 1024, 188 N. Y. 167.

Where a case is appealed from a justice's court, payment may be shown as a defense on trial of the appeal without being pleaded, and though not urged before the justice, but "payment" within such rule does not include the purchase of an outstanding claim by defendant against plaintiff of the assignment of which to defendant plaintiff had no notice prior to the appeal. *Beckman Lumber Co. v. Glendale Lumber Co.*, 138 S. W. 90, 91, 158 Mo. App. 809.

Defendant insurance society appointed a bank as its depository and collecting agent, directing the bank to stamp the members' call "paid," and mail the addressed postal card to defendant; that, unless specially authorized, the bank should not receive any money after the month in which the call was payable. Decedent, a member of the association and a depositor at the bank, paid his assessments there quarterly, and on one occasion stated to the cashier, that, if decedent should ever forget to pay his assessments, the cashier should pay it for him and charge the amount to decedent's account, to which the cashier agreed. The assessment due on decedent's policy prior to April 30, 1907, was not paid until his death on May 14th following, though at all times decedent had had a greater balance in the bank than was necessary to pay such assessment. Held, that the agreement between decedent and the cashier did not constitute payment of the assessment, and the policy had lapsed. *Griffith v. Merchants' Life Ass'n of Burlington*, 119 N. W. 694, 695, 141 Iowa, 414, 133 Am. St. Rep. 177.

On a cigar manufacturer being adjudged a bankrupt, claimant was entitled to receive from him 40,750 cigars, for which claim was filed before the referee in bankruptcy. Thereafter a corporation was organized to continue the bankrupt's business, purchase his assets, etc., and, desiring claimant to continue to act as its sales agent, agreed to protect claimant in its claim, and suggested that, as the claim was a legal one against the bankrupt's estate, if claimant would assign the same to the corporation's attorney, he would prove the claim before the receiver, to which claimant replied that it would present its claim to the receiver, and, if the corporation so shipped the cigars, claimant would return to it any dividend received on its claim. Held, that such arrangement did not operate as a "payment" of the claim against the bankrupt, and that claimant was entitled to prove the same against his estate. *Haas-Baruch & Co. v. Portuondo*, 138 Fed. 949, 951 (citing *Merryman v. State, to Use of Murray* [Md.] 5 Har. & J. 423; *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297; *Smille v. Walton*, 41 Vt. 174; *Casco Nat. Bank v. Shaw*, 10 Atl. 67, 79 Me. 376, 1 Am. St. Rep. 319).

**As preference**  
See Preference.

**As purchase**  
See Purchase.

**As transfer**  
See Transfer.

#### **PAYMENT AS DUE**

See In Monthly Payments as Due.

#### **PAYMENT FORTHWITH**

See Forthwith.

#### **PAYMENT IN CASH**

See Cash Payment.

#### **PAYMENT IN CONTEMPLATION OF INSOLVENCY**

See Contemplation of Insolvency.

#### **PAYMENT IN FULL**

See In Full.

#### **PAYMENT INTO COURT**

The Constitution provides that private property shall not be taken or damaged for public use without just compensation, and until the same shall be paid to the owner or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein vested. Kansas City Charter, art. 10, § 28, provides that the city shall not be entitled to possession of any parcel of property taken under the provisions of the article until full payment of the compensation therefor as determined be made or paid into court for the use of the persons in whose favor such judgment may have been rendered, or who may be lawfully entitled to the same. Kansas City brought proceedings to condemn land belonging to plaintiff and her husband by the entirety. Notice was given to the husband and others possibly interested, but no notice was given to the wife. Damages were assessed and approved by the court, but, before title was decreed in the city, it filed another suit in the nature of a bill of interpleader against the husband and others, to which the wife was not a party, in which the parties named were required to interplead and show their respective rights to the fund, and the damage assessed was paid into court in the interpleader suit. Held, that the term "into court," as used in the Constitution and charter, means in condemnation proceedings, and the payment in the interpleader suit was not a payment into court for the benefit of the wife, and, by failing to mention the wife in this bill of interpleader, the suit negated the idea that any money had ever been paid into court for the use of the wife. *Holmes v. Kansas City*. 108 S. W. 9, 14, 209 Mo. 513, 123 Am. St. Rep. 495.

#### **PAYMENT INTO TREASURY OF STATE**

Under Burns' Ann. St. 1908, § 9247, requiring every person making payment into

the treasury of the state to furnish to the auditor of state a description of the liability on account of which the payment is to be made, and the auditor shall certify to the treasurer the amount to be paid, and shall make his draft in favor of the treasurer on the person making the payment, etc., and section 10,216, requiring every foreign insurance company to pay taxes "into the treasury of the state," payment of taxes by a foreign insurance company is not accomplished by a payment to the auditor of state. *Dalley v. State ex rel. Bigler*, 87 N. E. 4, 6, 171 Ind. 646.

#### **PAYMENT OF TAXES**

Under the constitutional provision that no sale of property for taxes shall be set aside for any cause except on proof of dual assessment or payment of the taxes, "payment of the taxes" means payment, not of a part, but of the whole. *Doullut v. Smith*, 41 South. 913, 918, 117 La. 491.

Under a statute providing that in a suit or proceeding against a tax sale purchaser to recover land sold for taxes except in "cases where the taxes have been paid or the land redeemed as provided by law," shall be commenced within five years of the time of recording the tax deed, the purchase of land at a tax sale by the agent of the owner does not amount to a "payment of taxes" by the owner, so as to except the land so purchased from the bar of the statute. *Morris v. Gregory*, 103 Pac. 137, 139, 80 Kan. 626, 631.

Defendant, holding land under a quitclaim deed, when traveling for his health, directed an agent to pay the taxes on the land in question for the year 1897. By a mistake the agent, instead of paying the taxes, purchased the land at tax sale in the name of the defendant, who paid all subsequent taxes assessed and did not procure a tax deed under the certificate of sale. Held that, in the absence of bad faith, the purchase was void and operated as a payment, within Rev. Codes 1905, § 4928, establishing title in one in adverse possession of land for 10 years with payment of taxes. *Stiles v. Granger*, 117 N. W. 777, 779, 17 N. D. 502.

Rev. St. 1890, § 4268, provides that when real estate, the title to which shall have emanated from the government more than 10 years, is in the lawful possession of any person, and shall be claimed by another, and shall not have been in possession of the person claiming the same nor any one under whom he claims for 30 consecutive years and on which neither the person claiming the same nor those under which he claims have paid any taxes for all that period, the claimant shall, within one year from the date of his possession, sue to recover the same or be forever barred. Held, that the payment of costs and judgment for costs by a purchaser at a tax sale, by reason of his bid being

equal to or in excess of the judgment and costs, is not a "payment of taxes" within the statute. *Dunnington v. Hudson*, 118 S. W. 1083, 217 Mo. 93.

### PAYMENT STOPPED

The writing of the words "payment stopped" upon a note payable at a bank simply announces the intention of the maker that his funds in that bank shall not be applied to the payment of the note, and does not necessarily discredit it nor import that he will not provide for it at some other place, nor does it affect the liability of the maker or indorser. *McKinley v. American Exch. Bank*, 30 N. Y. Super. Ct. 663, 664.

### PAYMENT UNDER PROTEST

See Protest.

### PEA COAL

Under a coal lease defining "pea coal" to be coal which passes with the dirt through a screen of three-fourths of an inch mesh, a lessee cannot avoid payment of royalties on coal known as "buckwheat," "rice," and "barley" coal, all of which pass through a screen of three-fourths of an inch mesh, on the ground that such sizes are not known as "pea coal." *Glick v. Lehigh Valley Coal Co.*, 70 Atl. 810, 811, 221 Pa. 428.

### PEACE

See Bill of Peace; Breach of the Peace; Conservator of the Peace.

By "peace" is meant the tranquility enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right among all persons in a political society. *Town of Neola v. Reichart*, 109 N. W. 5, 6, 131 Iowa, 492.

### PEACE OFFICER

A policeman is a "peace officer," and has the right without a warrant to arrest for an offense against a municipal ordinance, happening in his presence. *Springer v. State*, 48 S. E. 907, 908, 121 Ga. 155.

A chief of police of a city engaged in assisting a deputy sheriff to make an arrest is a "peace officer," within the meaning of the statutes defining the offense of attempting to bribe a peace officer. *Lee v. State*, 85 S. W. 804, 805, 47 Tex. Cr. R. 620.

By the express provisions of Cr. Code Prac. § 26, sheriffs, constables, coroners, jailers, marshals, and policemen are "peace officers," within section 36, authorizing a peace officer to make arrests under conditions specified. *Commonwealth for Use of Barth v. McCann*, 94 S. W. 645, 647, 123 Ky. 247 citing Cr. Code Prac. § 26).

Laws 1891, p. 244, c. 106, relating to the Village of Mechanicville, in Saratoga coun-

ty, provides in title 2 (page 246) for the appointment of police constables, and in title 7, § 7 (page 281), provides that such constables shall have the same power and authority in criminal cases as constables in any of the towns of Saratoga county, and, in addition, the powers conferred on them by the act, also providing that they shall be entitled to receive of the village, towns, and county the same fees and in the same manner that constables in towns are entitled to receive for similar services, etc. By Code Cr. Proc. § 117, a peace officer may arrest without a warrant a person for a crime committed in his presence. Section 154 defines a peace officer as the sheriff, etc., or a constable, marshal, police constable, or policeman of a city, town, or village. Section 900 provides that, unless when otherwise provided, the term "peace officer" signifies any one of the officers mentioned in section 154. By Liquor Tax Law, Laws 1896, p. 79, c. 112, § 40, intoxication in a public place is made a misdemeanor, and the person so intoxicated may be arrested without a warrant. Held, that police constables of the village have the powers of town constables, and may arrest without a warrant one found intoxicated in the highways of any town in the county. *People ex rel. Conway Bros. Brewing & Malt-ing Co. v. Board of Auditors of Town of Stillwater*, 110 N. Y. Supp. 745, 746, 747, 126 App. Div. 487.

### PEACEABLE AND ADVERSE POSSESSION

Sayles' Ann. Civ. St. 1897, art. 8344, declaring that a "peaceable and adverse possession" shall be construed to embrace not more than 160 acres, including the improvements, or the number of acres actually inclosed should the same exceed 160 acres, though not requiring that all the land in the possession of one who seeks title by limitation should be actually enclosed or improved, calls for adverse possession thereof, which necessarily includes a claim to all of it; the statute never contemplating the conferring of rights where none were claimed, and adverse possession may extend to an entire tract of land not exceeding 160 acres, though all of it was not actually inclosed. *Webb v. Lyster*, 94 S. W. 1095, 1096, 43 Tex. Civ. App. 124.

Rev. St. 1895, art. 3348, limits the bringing of actions for the recovery of land held by another under "peaceable and adverse possession" to 10 years. Article 4348 defines "peaceable possession" as "continuous and not interrupted by adverse suit." Article 3349 defines "adverse possession" as the visible appropriation of land held under a claim inconsistent and hostile to another's claim. Held, that where defendant claimed land by the limitation of the statute, it was error prejudicial to him to instruct the jury that to recover his possession must have been "peaceable, distinct, notorious, continued, and hos-

tile" and that his appropriation must have been "actual, open and peaceable under a claim inconsistent with the rights of the true owner, and must dispossess the owner." *Logan v. Meade*, 98 S. W. 210, 212, 43 Tex. Civ. App. 477.

In trespass to try title to land, even though a tract of land claimed by adverse possession was not within Act March 25, 1891 (Laws 1891, p. 76, c. 57), providing that land owned by one person entirely surrounded by tracts owned or fenced by another shall not be considered inclosed by the fence inclosing the circumscribing tract, and possession by the owner of the circumscribing tract of the interior tract is not peaceable and adverse possession within Rev. St. 1895, art. 3343, providing for the recovery of lands held by another peaceably and adversely, within 10 years after the accrual of the cause of action, unless the interior tract be separated by a fence, or one-tenth of it be cultivated, and also providing that possession of land belonging to another by a person owning 5,000 acres or more of land inclosed by a fence in connection therewith shall not be peaceable and adverse possession within Rev. St. 1895, art. 3343, unless the land so belonging to another be separated by a fence from the adjoining lands, or one-tenth thereof be cultivated, the land owned by defendant being less than 5,000 acres, and the land claimed by plaintiff not being entirely surrounded by the land owned by defendant, and there being evidence tending to show that defendant had been in possession of a part of the tract long enough to bring it within the 10-year statute of limitations, it was error to refuse to charge on the statute. *Sellman v. Daniel* (Tex.) 110 S. W. 81.

#### PEACEABLE ENTRY

In the amendment added in 1879, extending the remedy of forcible entry given by Code 1907, § 4262, to cases where there was a peaceable entry, the "peaceable entry" intended is an intrusion, though peaceable, upon plaintiff's prior actual possession. *Self v. Comer*, 52 South. 336, 337, 166 Ala. 68.

#### PEACEABLE POSSESSION

According to Rev. St. 1895, art. 3348, "peaceable possession" is such as is continuous and not interrupted by adverse suit to recover the estate. *White v. Pingnot*, 90 S. W. 672, 674, 49 Tex. Civ. App. 641.

Quiet occupation, under claim of title, is "peaceable possession," within P. L. 1870, p. 20, providing that a person in peaceable possession of lands may sue in chancery to settle a disputed title thereto. *Powell v. Mayo*, 24 N. J. Eq. 178, 181.

One in peaceable possession under a claim of ownership, as distinguished from possession which is disputed, is within the statute authorizing one in "peaceable posses-

sion," actual or constructive, to sue to quiet title, and the fact that the right to the possession is disputed does not defeat the right to sue; but where the possession, as distinguished from the right to it, is disputed, the suit will not lie. *Central of Georgia Ry. Co. v. Rouse* (Ala.) 57 South. 706, 707.

The word, "peaceable," as used in an answer in a suit to quiet title, in which answer defendant denies that complainant is in the peaceable possession of the land involved in the suit, is used to contradistinguish peaceable possession from disputed or contested possession under claim of ownership. *Southern R. Co. v. Hall*, 41 South. 135, 136, 145 Ala. 224 (citing *Adler v. Sullivan*, 22 South. 87, 115 Ala. 587).

"If the possession has been uninterrupted, of necessity it has been 'peaceable.' If it has been interrupted, of necessity it has not been peaceable. The words are therefore interchangeable and synonymous in the pleading of prescriptive title." *Montecito Valley Water Co. v. Santa Barbara*, 77 Pac. 1113, 1119, 144 Cal. 578 (citing *American Co. v. Bradford*, 27 Cal. 360; *Chauvet v. Hill*, 28 Pac. 1066, 93 Cal. 407; *Smith v. Hawkins*, 42 Pac. 453, 110 Cal. 122).

"Peaceable possession," in the statute authorizing the maintenance of a bill to quiet title to real property where complainant is in peaceable possession of the lands, is not a possession which is peaceable as to third persons, but only peaceable as to the defendant, and, as to the defendant, that it is a possession undisturbed by any act of the defendant in or upon the locus in quo for which the defendant would be suable in an action by which the title to the property could be determined. *Bradley v. McPherson* (N. J.) 53 Atl. 105, 106.

Under Code 1896, § 809, providing that any person in "peaceable possession" of land, etc., may maintain a suit to quiet title to the land, it was held, that a bill to quiet title to land is sustained where it is shown that complainants were in the "peaceable possession" of the land at the time of filing the bill, and such a showing makes out a prima facie case. *George E. Wood Lumber Co. v. Williams*, 47 South. 202, 203, 157 Ala. 73.

Peaceable and undisturbed possession means actual and immediate possession, such possession as a man has of the house in which he lives or the field he tills or the land whereon he pastures his cattle. The words "peaceable" and "undisturbed," when applied to such possession, convey a clear meaning. *Chezum v. Campbell*, 85 Pac. 48, 50, 42 Wash. 560, 7 Ann. Cas. 921.

#### PEACOCK FEATHERS

Dutiable as ornamental feathers, see Ornamental Feathers.



**RL**

Certain drilled pearls of exceptionally size and fine quality were imported to-r, arranged in collections according to the largest in the center. It appeared these collections had not been selected special piece of jewelry, but that the s were to be sold separately on their idual merits, and that they had not advanced to a special value beyond the gate amount of their individual values n assortment and selection that fitted for immediate transformation into a ace or string of pearls. Held that, un-he similitude clause in the tariff act, bear a closer resemblance to "pearls in natural state not strung or set" than to ls set or strung." *Neresheimer & Co. v. d States*, 136 Fed. 86, 88, 68 C. C. A.

oose drilled pearls, unset and unstrung, ver carefully matched or desirable for klace, are dutiable at 10 per cent. ad em under the tariff act, as "pearls in natural state, not strung or set," and ot classifiable by similitude as jewelry, ling "pearls set or strung," because at time, or from time to time previous to rtation, such pearls had been strung rarily for purposes of display. *United s v. Citroen*, 32 Sup. Ct. 259, 260, 223 U. 7, 56 L. Ed. 486.

Half pearls, consisting of the better part e true pearl, from which blemishes or have been removed by sawing or split-and which are not adapted for stringing, re chiefly used for jewelry settings, are ble by similitude, under the paragraph e tariff act, covering "pearls in their al state, not strung or set." *United s v. Hahn*, 185 Fed. 349, 68 C. C. A. 130.

Drilled pearls, which had been assembled natched abroad and were ordered to be into a necklace in New York, but had been strung as a necklace, except tem-ily, for purposes of display, are not eryl" under the tariff act, but are duti-ither directly or by similitude as "pearls ir natural state." *United States v. Tif- & Co.*, 172 Fed. 300, 301.

earls which, though they had been ten-ly worn as a necklace abroad, were im-d loose and were increased by the add- of others after importation for comple-into a necklace, are not dutiable as "jew-' under the tariff act, but as "pearls in natural state," by similitude. *Citroen ited States*, 166 Fed. 693, 697, 92 C. C. 5.

**RL BEADS**

The term "pearl beads," as understood ide, does not include genuine pearls drill-ut refers to articles of glass made to

imitate pearls. *United States v. American Gem & Pearl Co.*, 142 Fed. 283, 284.

**PECULIAR**

Whilst the word "peculiar" sometimes has an offensive meaning, yet its natural and usual meaning is particular or special. *St. Louis, M. & S. E. R. Co. v. Continental Brick Co.*, 96 S. W. 1011, 1015, 198 Mo. 698.

**Special synonyms**

An instruction, in an action for damages for change of grade of a street, that the jury should assess plaintiff's damage at the excess of the market value immediately before the grading was commenced, over the market value thereof immediately after the grading was finished, less the value "of any special benefits \* \* \* which are peculiar" to the property, is not erroneous for the use of the word "peculiar," which is simply synonymous with the word "special." *Powell v. City of Columbia*, 134 S. W. 76, 77, 154 Mo. App. 239.

**PECUNIARY****PECUNIARY ABILITY**

The term "pecuniarily able," used with reference to the financial condition of a proposed purchaser procured by an agent of the vendor, does not mean that such purchaser must necessarily have all the money in his pocketbook or to his credit at the bank, but that he is able to command the necessary money to close the deal on reasonable notice, or within the time limited by the vendor, if a time be limited. *McCabe v. Jones*, 124 N. W. 486, 487, 141 Wis. 540.

**PECUNIARY AID**

"Pecuniary aid" for which recovery may be had for wrongful death means everything that can be of value, and in the case of minor children includes the reasonable pecuniary value of the nurture, care, and education, if any, they would have received from decedent during their minority, had he lived. *Missouri, K. & T. Ry. Co. of Texas v. Williams (Tex.)* 117 S. W. 1043, 1047.

In an action for death, the court charged the jury to determine the probable amount and value of the "pecuniary aid," if any, which decedent would probably have "contributed" to plaintiffs after his death, if he had not been killed, and to allow the present pecuniary value thereof. The court also charged the jury to allow decedent's children in addition the pecuniary value of any counsel and advice which they would probably have received but for decedent's wrongful death. Held, that the word "contributed" indicates that the "pecuniary aid" referred to meant something more tangible than counsel and advice, and that the instruction was therefore not objectionable as permitting a double recovery as to the children. *International & G. N. R. Co. v. White (Tex.)* 120 S. W. 958, 960.

# PECUNIARY BENEFIT

By "pecuniary benefits" is meant not only money, but everything that can be valued in money, and includes, in case of a minor child who is suing for the death of a parent, the reasonable value of such nurture, care, and education as the child would have received from the deceased parent had such parent lived. But neither sorrow for the death of the deceased relative nor the loss of his or her society are recoverable in such cases. *International & G. N. Ry. Co. v. McVey*, 87 S. W. 328, 329, 99 Tex. 28.

In an action by the widow, children, and mother of one negligently killed, held, that an instruction that they could recover such sum as would represent the present worth of the pecuniary benefits plaintiffs could reasonably expect that decedent would have contributed in the future, had he lived, to be apportioned among plaintiffs as they were entitled to it, was not erroneous as authorizing the mother to recover beyond her life expectancy. Held, further, that instructions that plaintiffs could recover the present worth of the pecuniary benefits they could reasonably expect that decedent would have contributed; that "pecuniary benefits" meant, not only money, but everything that could be valued in money; that in the case of plaintiff children it included the reasonable pecuniary value of the nurture, care, and training they would have received during minority, had he lived; and that they could not recover for grief, sorrow, or loss of society, affection, or companionship—were not objectionable as allowing recovery for loss of care, nurture and training having no pecuniary value. *Missouri, K. & T. Ry. Co. of Texas v. Wallace*, 115 S. W. 302, 303, 53 Tex. Civ. App. 127.

# PECUNIARY DAMAGE

"Pecuniary damages" are those which can be accurately estimated as loss of wages, cost of medical attendance, etc. *L. W. Pomerehne Co. v. White*, 97 N. W. 232, 234, 70 Neb. 171.

The word "pecuniary," as used in a statute providing for the recovery of "pecuniary damages" resulting from the death of a relative, is used in distinction to those injuries to the affections and sentiments which arise from the death of relatives and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. This term also excludes those losses which result from the deprivation of the society and companionship of relatives which are equally incapable of being defined by any recognized measure of value. But infant children, however, sustain a loss from the death of their parents, and especially their mother, of a different kind. She owes them the duty of nurture, and of an intellectual, moral, and physical training, and such instruction can only proceed from a mother. *Carter v.*

*West Jersey & S. R. Co.*, 71 Atl. 253, 254, 76 N. J. Law, 602, 19 L. R. A. (N. S.) 128, 16 Ann. Cas. 929 (citing *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, 475).

# PECUNIARY INJURY

"Pecuniary injury," resulting from death of another, means a deprivation of reasonable expectation of a pecuniary advantage, which would have resulted by a continuance of the life of the deceased." Under a statute allowing recovery for "pecuniary injury" resulting from death of a relative, damages may be allowed in case of children for the deprivation of the care which "they could naturally expect from the continuance of their mother's life." *Carter v. West Jersey & S. R. Co.*, 71 Atl. 253, 76 N. J. Law, 602, 19 L. R. A. (N. S.) 128, 16 Ann. Cas. 929 (quoting and adopting a definition in *Paulmier v. Erie R. Co.*, 34 N. J. Law, 151, 158).

Loss of the attentions and kindness of children to parents might, under some circumstances, be a "pecuniary injury." Of course, loss of income or loss of estate would be pecuniary injuries. So would be the loss of a reasonable prospect of additional income and estate in the future. If a son had settled an annuity during his own life upon his parents, his death would be a pecuniary loss to them as well as to his wife and children. Generally, where there exists a reasonable probability of pecuniary benefit to one from the continuing life of another, whether arising from legal or family relations, the untimely extinction of that life is a "pecuniary injury." *McKay v. New England Dredging Co.*, 43 Atl. 29, 30, 92 Me. 454.

The "pecuniary injury resulting from death" recoverable under the New Jersey statute is nothing more than the deprivation of a reasonable expectation of the pecuniary advantage which would have resulted by a continuance of the life of the deceased. The pecuniary injury resulting from the death of a minor child is the lost value of the child's prospective services to the parent during minority. Surgical expenses incurred by the parent in consequence of the injury causing death are not recoverable. *Hutchinson v. West Jersey & S. R. Co.*, 170 Fed. 615, 616.

The word "solatium," as used by the courts in stating that for a particular injury solatium will be allowed, means "a compensation as a soothing to the affections or wounded feelings, and for loss of the comfort and social pleasure there is in the association between members of a family. Solatium is sentiment, love, or affection, as distinguished from a property loss." The declaration in Rev. St. 1899, § 2866, that in an action for a death the jury may give such damages as they may deem fair and just with reference "to the necessary injuries resulting from" such death, is equivalent to limiting the re-

covery to "pecuniary injury," and therefore the statute by necessary implication excludes solatium. *Marshall v. Consolidated Jack Mines Co.*, 95 S. W. 972, 973, 119 Mo. App. 270.

### PECUNIARY LOSS

The word "pecuniary," as used in a statute authorizing recovery for pecuniary loss, is not restricted to loss of money, or of things purchasable by money. *Carter v. West Jersey & S. B. Co.*, 71 Atl. 253, 254, 76 N. J. Law, 602, 19 L. R. A. (N. S.) 128, 16 Ann. Cas. 929.

In an action for death, brought by decedent's widow and minor children, plaintiffs may, under proper allegations and proof, recover for the loss of advice and counsel of decedent, though such loss is not a pecuniary loss within the statute restricting the right of recovery to the pecuniary injury sustained, since the only pecuniary loss within the statute is the loss of maintenance and support. *Houston & T. C. R. Co. v. Davenport* (Tex.) 110 S. W. 150, 154.

Plaintiff contracting for certain repairs upon a house owned by his wife procured a bond from a surety company to himself, to which the wife was not a party, conditioned to indemnify him for any pecuniary loss from breach of any of the terms of the contractor's agreement, and afterwards paid judgments obtained on subcontractors' liens. Held, that he had sustained "pecuniary loss" within the terms of the bond. *Taylor v. Massachusetts Bonding & Ins. Co.*, 142 S. W. 1096, 161 Mo. App. 293.

### PECUNIARY OBLIGATION

A silver certificate issued by the United States is a "pecuniary obligation" or security of the government and an article of value within Rev. St. § 5467, subjecting to punishment any person employed in any department of the postal service who shall secrete any letter containing any note, bond, certificate of stock, or other pecuniary obligation or security of the government. *Bromberger v. United States*, 128 Fed. 346, 351, 63 C. C. A. 76.

A resolution of the borough council of the borough of Elmer, providing for the purchase of lands, tends to impose a "pecuniary obligation" on the borough, and must, under section 27 of the borough act of 1897, be submitted to the mayor for his approval. *Sturr v. Borough of Elmer*, 67 Atl. 1059, 1060, 75 N. J. Law, 443.

### PECUNIARY PROFIT

A foreign corporation organized for benevolent, religious, or philanthropic purposes, required by its charter to set apart for such purposes its entire receipts, so that no member or employé shall receive any pecuniary profit except reasonable compensation for services in effecting the purposes of the cor-

poration, etc., is not a corporation for "pecuniary profit" within Rev. St. 1895, arts. 745, 746, requiring foreign corporations for pecuniary profit to obtain a permit to transact business in the state, and need not obtain such a permit as a condition precedent to its right to sue. *City of San Antonio v. Salvation Army* (Tex.) 127 S. W. 860, 861.

Where an academy was farmed out by the trustees to the principal, who conducted it under their supervision, they reserving all of their powers under the charter, the rental which they received from the principal, and which was applied by them to erecting buildings and improving the grounds of the institution, without any personal gain to themselves, was not a "pecuniary profit," within the meaning of Laws 1896, p. 797, c. 908, § 4, subd. 7, which provides for the taxation of educational institutions if any officer thereof shall be entitled to receive pecuniary profit therefrom other than reasonable compensation for services rendered in effecting its educational purposes. *People v. Meager*, 90 N. Y. Supp. 488, 490, 98 App. Div. 237.

A will contained bequests to "St. Vincent's Hospital" and "Old Men's Home." It was not questioned but that the testator by the term "Old Men's Home" meant St. Benedict's Home for the Aged. Neither the hospital nor the home was incorporated, but each was merely a charitable enterprise conducted by the Sisters of St. Benedict, a corporation organized not for pecuniary profit. Held, that since the bequest was in effect to the corporation, and merely specified the particular enterprises to which the testator wished it devoted, it was a bequest to a corporation organized under the chapter relating to corporations not for pecuniary profit, within the meaning of Code, § 3270, providing that no bequest to such corporations shall be valid in excess of one-fourth of testator's estate, if a spouse, child, or parent survive the testator. *In re Ihmes' Estate*, 134 N. W. 429, 430, 154 Iowa, 20.

### PED

A "ped" in Norfolk, according to Wedgwood's Dictionary on Etymology, is "a pannier or wicker basket; a pedder or peddler; a packman; one who carries on his back goods for sale." *Citizens' Bank v. Crittenden* Record-Press, 150 S. W. 814, 815, 150 Ky. 634.

### PEDDLER

See, also, Hawker; Itinerant Vendor.

A "peddler" is defined as one who travels about, retailing small wares. *Eaton v. People*, 104 Pac. 407, 408, 46 Colo. 361.

The word "peddler" in its ordinary sense means a traveling trader; one who travels about retailing small wares. *In re Watson*, 97 N. W. 463, 466, 17 S. D. 486, 2 Ann. Cas. 321 (quoting Webst. Dict.).

A "peddler" is understood to be one who goes around from house to house, or from customer to customer and sells goods. *Ex parte Henson*, 90 S. W. 874, 876, 49 Tex. Cr. R. 177 (citing 6 Words and Phrases, p. 5262).

Any person who peddles is a "peddler" within Act No. 295 of 1908, requiring a license for hawkers and peddlers, without reference to the kind of merchandise purchased and sold. *Flournoy v. Walker*, 52 South. 673, 674, 126 La. 489.

Rev. St. 1899, § 8861, defines a peddler as one who deals in selling goods, etc., excepting pianos, etc. *State v. Webber*, 113 S. W. 1054, 1055, 214 Mo. 272, 15 Ann. Cas. 983.

A "peddler," within Kirby's Dig. § 5438, authorizing licensing of peddlers, is one who goes from place to place and from house to house carrying for sale and exposing to sale the goods, wares, and merchandise he carries. *City of Conway v. Waddell*, 118 S. W. 398, 399, 90 Ark. 127 (quoting 6 Words and Phrases, p. 5260).

Aside from statute, a "peddler" may be defined as any person who, by solicitation or outcry, takes anything from house to house in any manner, and offers to sell the same for money, or barter the thing for any other thing, or whoever goes from house to house for the purpose of taking orders for anything for future delivery to be sold or bartered. *Fallis v. Gas City*, 82 N. E. 1056, 1057, 169 Ind. 508.

The word "peddler" is a well-known common-law term covering itinerant vendors, and the statute provides a license for this class of retail vendors by name. *Ky. St. 1903, § 4224*, imposing a penalty for retailing oil without a license, provides for a different class of retailers from peddlers, and, where a petition in an action to recover a penalty for retailing oil without a license made no allusion to peddlers, it would be presumed that it was brought for the penalty imposed by section 4224. *Commonwealth v. Standard Oil Co.*, 87 S. W. 1090, 120 Ky. 724.

"The primary idea of a 'hawker and peddler' is that of an itinerant or traveling trader who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a 'trader,' who has goods for sale and sells them in a fixed place of business." "In the absence of a definition by statute or municipal ordinance, a 'peddler or hawker,' within the generally accepted meaning of the words, is a small retail dealer who carries his merchandise with him, traveling from place to place, or from house to house, exposing his or his principal's goods for sale and selling them." As under the common law and by statutory recognition there has been a well-recognized use of highways and streets by

hawkers and peddlers carrying their wares on their persons or otherwise, the presence in a street of a push-cart peddler, who was injured in a collision, was not contributory negligence per se precluding a recovery of damages. *Collender v. Reardon*, 123 N. Y. Supp. 587, 589, 138 App. Div. 738 (citing *Commonwealth v. Ober*, 12 Cush. [66 Mass.] 493; 21 Cyc. p. 887).

Where oil is sold and delivered from a tank wagon, if such sales are to others than retail dealers, the transactions are "peddling," requiring a peddler's license, and payment of a fee of \$50 per year for one person with a two-horse wagon. *Standard Oil Co. v. Commonwealth*, 83 S. W. 557, 119 Ky. 1.

Sales of oil delivered from wagons to retail dealers for resale are within *Ky. St. 1903, § 4224*, requiring payment of an annual license fee of \$5 for each wagon; but sales from wagons to others than retail dealers constitute "peddling" within section 4215, requiring peddlers to take out licenses. *Commonwealth v. Standard Oil Co.*, 112 S. W. 902, 903, 129 Ky. 744.

That one sold liniment and lemon extract by going from place to place to sell the same, and sold one bottle to one person and two to another shows that he was a peddler within *Rev. St. 1899, § 8861*, defining a "peddler" to be one who deals in the selling of goods, wares, and merchandise, etc. *State v. Webber*, 113 S. W. 1054, 1055, 214 Mo. 272, 15 Ann. Cas. 983.

Since a theater ticket is a mere license, evidence of a right to enter a theater and occupy a definite seat during a performance, and not merchandise, the offering of such ticket for sale does not constitute "hawking" and "peddling," so as to require a license for the sale thereof; such terms referring to the manner in which the business is carried on, and not to the business itself. *People v. Marks*, 120 N. Y. Supp. 1106, 1106, 64 Misc. Rep. 679.

"Persons who travel from town to town, from one plantation to another, by land or by water, carrying to sell or exposing to sale any rum, sugar, or other goods, wares, or merchandises, are included in the general terms 'hawkers' and 'peddlers.'" "Hawkers and peddlers are persons who practice carrying merchandise about from place to place for sale, as opposed to traders who sell at established shops." *State v. Ivey*, 53 S. E. 428, 430, 73 S. C. 282 (quoting and adopting definition in *State v. Belcher* [S. C.] 1 McMul. 42).

#### Delivery of goods

The term "peddler" generally includes any one who goes from place to place to peddle goods, and, as used in *Ky. St. § 4223*, making notes given to a peddler void if not so indorsed thereon, being one who has the thing he sells with him and delivers it at

me of sale. *Citizens' Bank v. Crittenden*, 150 S. W. 814, 815, 150 Ky.

where delivery of goods to a customer is peddling," within Ky. St. 1903, § 4215, requiring peddlers to take out licenses; "peddling" consisting in hawking goods about offering and selling to any one who will. *Commonwealth v. Standard Oil Co.*, 129 Ky. 902, 904, 129 Ky. 744.

A foreign manufacturer of ranges employed traveling salesmen to take orders in various states. The orders were forwarded to a person acting as superintendent in Arkansas, who indicated the credit of the buyers. The ranges were shipped by the manufacturer to various states to fill the orders secured, and deliveries were made by employees called deliverymen. Held, that the traveling salesmen and deliverymen were "peddlers," within the peddling statute of 1909, requiring a license of persons traveling through any county peddling or selling enumerated goods. *Shaw v. State*, 130 S. W. 569, 570, 95 Ark. 464.

An agent of a foreign corporation employed in making portraits by photographic process, who delivers such portraits to persons who have previously ordered the same, made and collects therefor, is not a peddler or "hawker" within the meaning of an ordinance imposing a license tax on persons engaged in such occupations merely in passing, as an incident to delivery, he sells the customer a frame for the portraits if ordered. "The leading primary idea of a peddler or 'peddler' is that of an itinerant traveling trader, who carries goods about in order to sell them, and who actually sells the goods to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place." *Chicago Portrait Co. v. City of Macon*, 147 Fed. 967, 969 (quoting and citing definition in *Emert v. State of Missouri*, 15 Sup. Ct. 367, 156 U. S. 296, 39 L. Ed. 430, which quotes with approval language of Chief Justice Shaw of Massachusetts in *Commonwealth v. Ober*, 12 Cush. [Mass.] 493).

#### Farmer retailing crops

The word "peddler," as used in a municipal ordinance providing that no person shall exercise the vocation of a peddler within the municipality without first paying an annual license, includes one peddling the produce of his own farm or garden, as well as one peddling farm or garden products which he has purchased from others. *State v. Jensen*, 100 N. W. 644, 645, 93 Minn. 88.

A farmer who takes his farm products to market and sells them from place to place is a hawker or peddler within the underlying meaning of such terms. The terms "hawker" and "peddler," as used by the courts of this country are treated as equivalent

terms in law. "Hawkers" and "peddlers" are persons who carry merchandise from place to place for sale, as opposed to "traders," who sell at an established shop. *City of St. Louis v. Meyer*, 84 S. W. 914, 918, 185 Mo. 558 (citing *Hall v. State*, 28 South. 121, 39 Fla. 668; *Commonwealth v. Ober*, 12 Cush. [66 Mass.] 493; *Bish. St. Crimes*, § 1074; *Fisher v. Patterson*, 13 Pa. 336; *City of South Bend v. Martin*, 41 N. E. 315, 142 Ind. 31, 29 L. R. A. 531; *Emert v. Missouri*, 15 Sup. Ct. 367, 156 U. S. 296, 39 L. Ed. 430).

#### Hawker synonymous

See Hawker.

#### Permanent stand

The statute of 1909 (Laws 1909, p. 292), providing that before any person either as owner, manufacturer, or agent shall travel through any county and peddle or sell enumerated articles, he shall procure a license, does not reach one who simply brings his wares into a county and sells them, but there must be added the element of traveling from place to place through the county for the purpose of selling. *Crenshaw v. State*, 130 S. W. 569, 95 Ark. 464.

A person operating a lunch wagon at a fixed place in a street daily between certain fixed hours is not a "hawker" or "peddler" within a statute defining "hawkers" and "peddlers" as persons who travel about, either on foot or in wagons, carrying and exposing for sale goods. *Commonwealth v. Morrison*, 83 N. E. 415, 197 Mass. 199, 14 L. R. A. (N. S.) 194, 125 Am. St. Rep. 338.

A hawker or peddler is an itinerant or traveling trader who carries goods about in order to sell them, and who actually sells them to purchasers by delivering the goods at the time of the sale, in contradistinction to the trader who has goods to sell and sells them in a fixed place of business. *State v. Bayer*, 97 Pac. 129, 131, 34 Utah, 257, 19 L. R. A. (N. S.) 297.

#### Sales to dealers

Sales of oil delivered from wagons to retail dealers for resale are within Ky. St. 1903, § 4224, requiring payment of an annual license fee of \$5 for each wagon; but sales from wagons to others than retail dealers constitute "peddling," within section 4215, requiring peddlers to take out licenses. *Commonwealth v. Standard Oil Co.*, 112 S. W. 902, 903, 129 Ky. 744.

#### Sales by order or sample

The license taxation of commercial salesmen or travelers selling by sample or taking orders for future delivery is not germane to the license taxation of "peddlers or hawkers" selling and delivering goods carried by them on foot or on horseback, or in vehicles, or in water craft. *Beary v. Narran*, 87 South. 961, 113 La. 1034.

A hawker or peddler, as defined by Laws 1909, p. 293, c. 248, § 1, is one who has

no fixed place of trade, but travels from place to place and from house to house, though he sells by sample and does not carry his wares with him, or even if he does not make an immediate sale, but enters into an executory contract for a future sale and future delivery. *State ex rel. Mudeking v. Parr*, 123 N. W. 408, 409, 109 Minn. 147, 134 Am. St. Rep. 759.

A traveling salesman, who carries samples and takes orders for brooms from merchants in lots of a dozen or more, and afterwards delivers the brooms, which are shipped to him from the factory, is not a "peddler" requiring a license, within Act April 16, 1903, § 50, as amended, defining as such all persons who carry goods from place to place for sale, and all persons who offer goods for sale without having a regular place of business. If he had gone from place to place in the state and taken orders for the brooms manufactured by his principal, and sent such orders to the latter at his place of business, to be filled by him, he could not be regarded as a peddler. Neither would he be a peddler if, instead of sending such orders to his principal to be filled, he had notified him of the amount of brooms necessary to fill the orders taken, and the brooms had been shipped to him from the factory, or he had gone to the factory and gotten the goods, and filled the orders theretofore taken by him. *Kloss v. Commonwealth*, 49 S. E. 655, 656, 103 Va. 864 (citing *Village of Stamford v. Fisher*, 35 N. E. 500, 140 N. Y. 187; *Commonwealth v. Ober* [Mass.] 12 Cush. 493; *Commonwealth v. Eichenberg*, 21 Atl. 258, 140 Pa. 158; *State v. Frank*, 41 S. E. 785, 130 N. C. 724, 89 Am. St. Rep. 885).

A foreign manufacturer of ranges employed traveling salesmen to take orders in Arkansas. The orders were forwarded to a division superintendent in Arkansas, who investigated the credit of the buyers. The ranges were shipped by the manufacturer to Arkansas to fill the orders secured, and deliveries were made by employees called deliverymen. Held, that the traveling salesmen and the deliverymen were "peddlers," within the peddling statute of 1909, requiring a license of persons traveling through any county peddling or selling enumerated goods. *Crenshaw v. State*, 130 S. W. 569, 570, 95 Ark. 464.

A merchant in Chicago employed an agent, who solicited orders for merchandise in a city in Missouri and reported the orders. The merchant put up each article ordered in a package, and all the packages were shipped to the agent, who took the goods from the depot and delivered them to the customers and collected the price. Held, that the agent was not a "peddler," within an ordinance of the city imposing a license for selling merchandise from wagons. *Jewel Tea Co. v. Lee's Summit, Mo.*, 189 Fed. 280, 281.

"Peddling," as used in *Rev. St. Wis. 1898, § 1570 et seq.*, as amended, prohibiting peddling without a license, included a resident of a state who traveled from house to house in a city with a single horse and wagon, taking orders for teas and coffees, etc., by means of samples carried by him, the orders being filled at a store and the parcels delivered by defendant on his next trip, such parcels being made up for each individual purchaser, no goods being delivered by him at the time of taking the orders. *State v. Whitcom*, 99 N. W. 463, 469, 122 Wis. 110.

"Peddling" is the occupation of an itinerant peddler of goods, who sells and delivers the identical goods he carries with him. It is not the business of selling by sample and taking the order for goods to be thereafter delivered, and to be paid for, wholly or in part, upon their subsequent delivery. Neither a person exhibiting a sample of a range, nor a person making delivery of such ranges, after their sale, in the original packages, are peddlers, within the meaning of a provision in the revenue law that any person carrying a wagon, cart, or buggy, or traveling on foot, for the purpose of exhibiting or delivering any wares or merchandise, shall be considered a peddler, and imposing a license tax. *Wrought Iron Range Co. v. Campen*, 47 S. E. 658, 664, 135 N. C. 506.

An agent of a corporation, having its place of business in another state, took orders for unframed crayon portraits to be made at the corporation's place of business, and left with each purchaser a memorandum of the agreement which recited that a certain price should be paid for the portrait on delivery, and that, while the purchaser was not obliged to take a frame, all portraits would be delivered in frames. Subsequently defendant delivered the portraits as agent of the corporation, and urged the purchasers to purchase the frames. The facts warranted a finding that defendant was within *Rev. St. 1899, §§ 8861, 8862, 8863*, making it a misdemeanor to deal as a peddler without a license and defining a peddler as one selling goods, wares or merchandise, by going from place to place to sell the same. *State v. Looney*, 97 S. W. 934, 936, 214 Mo. 216, 29 L. R. A. (N. S.) 412.

A city ordinance made it an offense to pursue the occupation of a hawker or peddler, without a license, and defined a hawker or peddler as including any person who should travel from house to house for the purpose of selling, offering for sale, or soliciting orders for goods, wares, or merchandise, by sample. A New Jersey corporation engaged in the sale and distribution of teas and spices maintained a warehouse in another city in Michigan, from which its trade in Michigan was supplied. The corporation furnished defendant with a horse and wagon,

and he solicited orders from door to door, and at intervals ordered from the warehouse in Michigan sufficient goods to fill the orders, whereupon he delivered the goods, collected the price, retained a commission, and remitted the balance. Held, that not having had a license, he was properly convicted under the ordinance. *City of Alma v. Okow*, 109 N. W. 853, 146 Mich. 443.

A traveling soliciting agent who takes orders for goods similar to his samples subject to the approval of his employer who, upon approval of the orders, prepares the goods for delivery and turns them over to him for delivery which he makes, collecting and remitting the price, is not within the statute imposing a tax on peddlers and defining "peddlers" to include all transient merchants and itinerant venders, selling by sample, or by taking orders whether for immediate or future delivery. *State v. Bristow*, 109 N. W. 199, 200, 181 Iowa, 664.

#### Sales to regular customers

An oil company, which fills tanks of regular customers every week under a standing order, is not a "peddler," within Ky. St. 1903, § 4215, requiring "peddlers" to take out licenses. *Commonwealth v. Standard Oil Co.*, 112 S. W. 902, 903, 904, 129 Ky. 744.

#### Single sale

A single sale of merchandise by a person does not establish the fact that he is a "peddler." *City of Kinsley v. Dyerly*, 98 Pac. 228, 229, 79 Kan. 1, 19 L. R. A. (N. S.) 65 (quoting and adopting definition in *City of Kansas v. Collins*, 8 Pac. 865, 34 Kan. 34).

#### PEDDLER'S NOTES

Notes given for the exclusive right to all articles in a certain territory are "peddler's notes," within a statute making void note given for rights by a peddler, unless dorsed "peddler's note." *McAfee v. Mercer at. Bank* (Ky.) 104 S. W. 287.

Ky. St. § 4223, makes notes given to a peddler void if not so indorsed thereon. Section 4216 defines as peddlers itinerant persons vending goods, wares, and merchandise, welry, and other things not therein specifically exempt; and section 4218 exempts from the previous section tinware, agricultural implements, sewing machines, portable mills, oaks, meat, etc., and things sold by sample merchants. Section 4224, fixing the amount of the license tax paid by peddlers, provides that one with a two-horse wagon could pay a certain sum, one on horseback another sum, and one on foot, carrying articles on his person, another sum. The notes given were given for an automobile, diners, and other articles, sold to defendants by the traveling agent of plaintiff's insurer, a manufacturing company, under a tract which did not pass title until the

order from the purchaser was accepted by the agent's principal; the articles not being delivered until after the order was accepted, and the agent's only duty being to take and forward the order and explain his scheme of contest therefor, to be conducted by the purchaser. Held, that the notes sued on were not "peddlers' notes," within the statute. *Citizens' Bank v. Crittenden Record-Press*, 150 S. W. 814, 815, 150 Ky. 634.

#### PEDERASTY

As cruelty within the divorce act, see Cruelty.

#### PEDIGREE

The word "pedigree" means "a line of ancestors, and a requirement to prove lineage of an animal back of the immediate progenitors only to the grandparents was a limitation of proof, rather than an extension. *Borden v. United States*, 132 Fed. 205, 206.

The term "pedigree" includes the facts of birth, marriage, and death and the times when such events happened. *Rowan v. State*, 124 S. W. 668, 670, 57 Tex. Cr. R. 625, 136 Am. St. Rep. 1005.

"The term 'pedigree' embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happen." *Topper v. Perry*, 95 S. W. 203, 205, 197 Mo. 531, 114 Am. St. Rep. 777 (citing *Copes v. Pearce* [Md.] 7 Gill, 247); *Imboden v. St. Louis Union Trust Co.*, 86 S. W. 263, 267, 111 Mo. App. 220 (quoting and adopting the definition in *Copes v. Pearce* [Md.] 7 Gill, 247).

"The term 'pedigree,' however, embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened. These facts therefore may be proved in the manner above mentioned, in all cases where they occur incidentally and in relation to pedigree. Thus, an entry by a deceased parent or other relative, made in a Bible, family missal, or any other book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child or other relative, is regarded as a declaration of such parent or relative in a matter of pedigree." *Travelers' Ins. Co. v. Henderson Cotton Mills*, 85 S. W. 1090, 1091, 117 Am. St. Rep. 585, 9 Ann. Cas. 162 (quoting and adopting definition in 1 Greenl. Ev. § 104).

"Pedigree" is the history of family descent, which is transmitted from one generation to another by both oral and written declarations, and, unless proved by hearsay evidence, not competent in general issues, it cannot in most instances be proved at all. Matters of 'pedigree' consist of descent and relationship evidence by declarations of particular facts, such as births, marriages, and

deaths." *Layton v. Kraft*, 98 N. Y. Supp. 72, 74, 111 App. Div. 842.

"Pedigree" is the history of the family descent, which is transmitted from one generation to another both by oral and written declarations, and, unless proved by hearsay evidence, it cannot in most instances be proved at all. Hence declarations of deceased members of a family, made ante litem motam, are received to prove family relationship, including marriages, births, and deaths, and the facts necessarily resulting from those events. Before the declarations can be received as evidence of pedigree it must appear that the person making them was a member of the family, and that he is dead, incompetent, or beyond the jurisdiction of the court. An entry in a family record of the age of a child, made by, or at the instance of, her father, is not admissible in evidence where he is alive and is a witness in the case. *State v. Miller*, 80 Pac. 51, 52, 71 Kan. 200, 6 Ann. Cas. 58 (quoting *Young v. Shullenberg*, 59 N. E. 385, 165 N. Y. 385, 80 Am. St. Rep. 730).

## PEDIS POSSESSIO

The phrase "pedis possessio" means actual possession. *Kendrick v. Latham*, 25 Fla. 819, 6 So. 871, 876; *Goldberg v. Bruschi*, 81 Pac. 23, 25, 146 Cal. 708.

## PEERS

See Judgment of His Peers.

## PEN.

In a verdict fixing punishment at three years in the "pen.," the word "pen." is an abbreviation of the word "penitentiary." *Denham v. Commonwealth*, 84 S. W. 538, 539, 119 Ky. 508.

## PEN

In an action against a railway company for damages for keeping plaintiff's cattle at a certain station in muddy "pens," without feed and water, etc., the proof showed that the cattle were kept in what was known as the "quarantine lane," which was from 100 to 300 yards wide and about one mile in length, through which cattle received might be driven from the pens in the Cherokee Nation to the Osage Nation and avoid the quarantine regulations. Held, that "a 'pen,' in the sense under consideration, is but an inclosure of greater or less dimensions, and with no requisite form," and, since the lane was inclosed and seems to have been but an extension of what was generally designated as the pens, the evidence was admissible under the allegation. *Atchison, T. & S. F. Ry. Co. v. A. S. Veale & Co.*, 87 S. W. 202, 203, 39 Tex. Civ. App. 37.

## PENAL

An obligation is "penal" in substance when its amount is measured neither by the obligee's loss nor by the valuation placed by him upon what he has given in exchange. In *re Capongri*, 193 Fed. 291, 292.

The words "penal" and "penalty" strictly and primarily denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. *Schick v. United States*, 24 Sup. Ct. 826, 830, 195 U. S. 65, 49 L. Ed. 99, 1 Ann. Cas. 585 (quoting and adopting definition in *Huntington v. Attrill*, 13 Sup. Ct. 224, 227, 146 U. S. 657, 667, 36 L. Ed. 1123, 1127).

In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly, and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. But they are also commonly used as including any extraordinary liability to which the laws subject a wrongdoer in favor of the person wronged, not limited to the damage suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond. *State ex rel. Rodes v. Warner*, 94 S. W. 962, 964, 197 Mo. 650; *Southern R. Co. v. Melton*, 65 S. E. 665, 671, 133 Ga. 277 (citing *Huntington v. Attrill*, 13 Sup. Ct. 224, 227, 146 U. S. 657, 667, 36 L. Ed. 1123).

### Criminal distinguished

"Penal" is a much broader term than "criminal" and includes many statutory enforcements of police regulations the violations of which are in no sense crimes. *Marter v. Kepp*, 77 Atl. 1080, 1031, 80 N. J. Law. 530.

## PENAL ACTION

A civil action brought under Laws 1879, c. 47, against bank officers for the recovery of deposits received by them while the bank is insolvent or in a failing condition, is upon a liability created by statute, and is not a "penal action," and is governed by the three years' statute of limitations. *Frame v. Ashley*, 53 Pac. 474, 475, 59 Kan. 477.

"A 'penal action' is a civil suit brought for the recovery of a statutory forfeiture when inflicted as punishment for an offense against the public." Such actions are "civil actions," on the one hand closely related to criminal prosecutions and on the other to actions for private injuries in which the party aggrieved may, by statute, recover punitive damages. *State ex rel. McNamee v. Stoble*, 92 S. W. 191, 212, 194 Mo. 14.

A proceeding, authorized by Acts 31st Leg. c. 17, §§ 9a, 9b, 9c, 9f, 9g, for the recovery



cation by the Comptroller of Public Accounts of liquor licenses for violations of the law by liquor dealers is not a suit by the state for a "forfeiture" or "penalty," within Const. art. 5, § 8, conferring on the district court exclusive jurisdiction of such suits; for, though an official act may be judicial as involving the exercise of discretion and judgment, yet, when discretion is conferred on an executive officer in the discharge of administrative or executive duties, the acts of the officer are not judicial. *Baldacchi v. Goodlet* (Tex.) 145 S. W. 325, 328.

An action under section 7 of the Anti-Trust Law, Act July 2, 1890, c. 647, 26 Stat. 210, providing that any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the act may sue therefor in any Circuit Court of the United States, and shall recover threefold the damages by him sustained, is not a "penal action" within the meaning of Rev. St. § 1047, prescribing a limitation of five years for a suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States. But the action is one for the enforcement of a civil remedy given by statute for a private injury, compensatory in its purpose and effect. *City of Atlanta v. Chattanooga Foundry & Pipe Works*, 127 Fed. 23, 29, 61 C. C. A. 387, 64 L. R. A. 721.

#### As civil action

See Civil Action, Case, Suit, etc.

#### As prosecution

See Prosecution.

#### As qui tam action

See Qui Tam Action.

### PENAL BOND

At common law a "penal bond" conditioned for the payment of money was an obligation to pay a certain sum of money on a day certain under penalty of a larger sum, usually, but not necessarily, double the principal. A bond to pay a monthly allowance to the obligor's wife as alimony is a simplex obligation and not a penal bond. *Burnside v. Wand*, 71 S. W. 337, 342, 347, 170 Mo. 531, 62 L. R. A. 427.

### PENAL LAWS

See Breach of Penal Laws.

A "penal law" "denotes punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its law." *Cary v. Schmeltz*, 125 S. W. 582, 583, 141 Mo. App. 570 (quoting and adopting definition in *Huntington v. Attrill*, 13 Sup. Ct. 224, 146 U. S. 657, 36 L. Ed. 1123; citing *Black, Interp. Laws*, 292; *Whitman v. National Bank of Oxford*, 20 Sup. Ct. 477, 176 U. S. 559, 44 L. Ed. 587).

A "penal statute" is one which inflicts a forfeiture for transgressing its provisions. It affords a remedy and supplies defects in the common or statutory law. It involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by civil or criminal procedure. *Lagler v. Bye*, 85 N. E. 36, 37, 42 Ind. App. 592.

A "penal statute" is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited. "Penal" is a much broader term than "criminal" and includes many statutory enforcements of police regulations the violations of which are in no sense crimes. *Marter v. Repp*, 77 Atl. 1080, 1031, 80 N. J. Law, 530.

Penal laws are those imposing a punishment for an offense against the state, and which are subject to the pardon power. Where statutes or valid rules give one person a private right against another, neither the liability nor the remedy is, in general, strictly or properly penal. *State v. Atlantic Coast Line R. Co.*, 47 South. 969, 980, 56 Fla. 617, 32 L. R. A. (N. S.) 639.

"Penal statutes," strictly and properly, are those imposing punishment for an offense against the state. And the expression "penal statutes" does not ordinarily include statutes which give a private action against a wrongdoer. *Davis v. Mills*, 121 Fed. 703, 704, 58 C. C. A. 123 (citing *Plumb v. Griffin*, 50 Atl. 1, 74 Conn. 132).

"Penal statutes" are "such acts of Parliament whereby a forfeiture is inflicted for transgressing provisions therein enacted," otherwise defined as such statutes as inflict a forfeiture of money or goods by way of penalty for breach of their provisions and not by way of fine for a statutory crime or misdemeanor. *State ex rel. McNamee v. Stoble*, 92 S. W. 191, 212, 194 Mo. 14 (quoting and adopting definition in 3 Black. Com. 160).

"Penal statutes" are those by which punishments are imposed for transgressions of the law. They are construed strictly and more or less so according to the severity of the penalty. But the provisions that enforce the wrong for which a penalty is provided, and those which define the punishment, are penal in their character and are construed accordingly. And the same statute may be remedial for certain purposes and liberally construed therefor and at the same time be of such a nature and operate with such harshness upon a class of offenders subject to it that they are entitled to invoke the rule of strict construction. *Casey v. St. Louis Transit Co.*, 91 S. W. 419, 424, 116 Mo. App. 235 (quoting and adopting the definition in 2 Suth. St. Const. [2d Ed.] § 337).

"Penal laws" are those imposing punishment for an offense against the state, and which, by the American and English Consti-

tutions, the executive of the state has the power to pardon. *Smith v. Colson*, 123 Pac. 149, 151, 31 Okl. 703 (quoting 6 Words and Phrases, p. 5269); *Southern Ry. Co. v. Melton*, 65 S. E. 665, 779, 133 Ga. 277; *Schick v. United States*, 24 Sup. Ct. 826, 830, 195 U. S. 65, 49 L. Ed. 99, 1 Ann. Cas. 585 (quoting and adopting definition in *Huntington v. Attrill*, 13 Sup. Ct. 224, 227, 146 U. S. 657, 667, 36 L. Ed. 1123, 1127; *The Antelope*, 10 Wheat. 66, 123, 6 L. Ed. 268, 282; citing *United States v. Reisinger*, 9 Sup. Ct. 99, 101, 128 U. S. 398, 402, 32 L. Ed. 480, 481).

"Penal laws," however strictly and properly, are those imposing punishment for an offense committed against the state. The test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. *Whitlow v. Nashville, C. & St. L. R. Co.*, 84 S. W. 618, 114 Tenn. 344, 68 L. R. A. 503 (citing *Huntington v. Attrill*, 13 Sup. Ct. 224, 146 U. S. 657, 36 L. Ed. 1123).

"Penal laws," strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions the executive of the state, has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal." *United States v. Illinois Cent. R. Co.*, 156 Fed. 182, 185 (citing *Huntington v. Attrill*, 13 Sup. Ct. 224, 227, 146 U. S. 657, 667, 36 L. Ed. 1123); *State ex rel. Rodes v. Warner*, 94 S. W. 962, 964, 197 Mo. 650 (quoting and adopting definition in *Huntington v. Attrill*, 13 Sup. Ct. 224, 146 U. S. 657, 36 L. Ed. 1123).

"Penal laws," strictly and properly, are those imposing punishment for an offense committed against the state, and which by the English and American Constitutions the executive of the state has the power to pardon. "Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. \* \* \* 'Penal statutes are acts by which a forfeiture is imposed for transgressing the provisions of the act. \* \* \* A penal law may also be remedial, and a statute may be remedial in one part and penal in another.' \* \* \* It is said: 'A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited.' It is the effect, not the form, of the statute that is to be considered; and, when its object is clearly to inflict a punishment on a party for violating it—I. e., doing what is prohibited or failing to do what is commanded to be done—it is penal in its character. In the

decision the distinction between a penal and a contractual liability is made. In the one case the liability arises by a violation of the law. But, where the statute declares that the corporation may transact business and the stockholders shall be liable for debts contracted, then the liability is primary and based upon contract." *Southern R. Co. v. Melton*, 65 S. E. 665, 679, 680, 133 Ga. 277 (citing *Huntington v. Attrill*, 13 Sup. Ct. 224, 146 U. S. 657, 36 L. Ed. 1123, *Sedgwick on Stat. Potter's Dwarria*, Stat., 74, and 10 Cyc. p. 853).

"A 'penal law' is one which prohibits an act and imposes a penalty for the commission of it; or one which requires the act to be done and imposes a penalty for the neglect or omission to do it." The provision of *Immigration Act Feb. 20, 1907, c. 1134, § 15, 34 Stat. 903*, that the master of any vessel bringing aliens into the United States who shall fail to deliver to the immigration officers at the port of arrival lists or manifests of all aliens on board as required by sections 12 and 13, and containing the information therein specified, "shall pay to the collector of customs at the port of arrival the sum of ten dollars for each alien concerning whom the above information is not contained in any list as aforesaid," is penal in its nature. *United States v. Four Hundred and Twenty Dollars*, 162 Fed. 806, 805 (citing *Black, Law Dict.*).

The meaning of the phrase "penal laws," as used in *Const. art. 6 § 6*, providing that the proceeds of fines for any breach of the penal laws shall be exclusively applied to the support of the common schools, must be ascertained according to the ordinary methods of interpretation. *State v. Rose*, 97 Pac. 788, 789, 78 Kan. 600.

The "Revenue Acts" are not properly speaking, penal statutes. Hence they are not to be construed with strictness in favor of a defendant. *United States v. Three Tons Coal*, 28 Fed. Cas. 149, 154 (*United States v. Breed*, 24 Fed. Cas. 1222).

*Rev. Laws, c. 104, § 1*, authorizing certain cities, for the prevention of fire, to regulate buildings and to prescribe penalties for violation of such regulations, is a penal statute and in derogation of common right. *Commonwealth v. Hayden*, 97 N. E. 783, 784, 211 Mass. 296.

A statute requiring corporations to file with a state officer a report of certain facts and making the corporate officers and directors personally liable for corporate debts on failure to file such reports, is penal in character, and cannot be enforced by the courts of another state. *Cary v. Schmeltz*, 125 S. W. 532, 533, 141 Mo. App. 570.

*Rev. St. Mo. 1899, § 2864*, providing that a railroad shall forfeit \$5,000 for death, occurring through the negligence of its officers,

employés, etc., is a "penal statute" and in derogation of the common law, and is to be strictly construed. *Casey v. St. Louis Transit Co.*, 91 S. W. 419, 423, 116 Mo. App. 235.

Section 3057, Ind. Ter. St. (section 4746, Mans. Dig.), making a mortgagee who fails, within 60 days after request, to acknowledge satisfaction of a mortgage that had been paid forfeit to the party aggrieved an amount not exceeding the amount of the mortgage money, is not a "penal statute," within the sense of that term as used in section 2040, Ind. Ter. St. (section 4482, Mans. Dig.), constituting a part of the statute of limitations in the Indian Territory, and requiring that all actions based upon penal statutes shall be commenced within two years after the offense shall have been committed or the cause of action shall have accrued. *Smith v. Colson*, 123 Pac. 149, 150, 31 Okl. 703.

Act No. 206, p. 316, Pub. Acts 1901, § 1, as amended, imposing a penalty on foreign corporations doing business in the state without filing its articles of incorporation, to be recovered by an action in the name of the people of the state, is a penal statute; it being within the definitions that a penal statute is one imposing a penalty for doing that which the statute prohibits, or for omitting to do that which a statute requires, or is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited. *People v. Crucible Steel Co. of America*, 115 N. W. 705, 706, 151 Mich. 618.

A statute which subjects one person to the payment of money to another, without reference to any actual injury, and without requiring him either to allege or prove the actual injury, is a penal statute and hence *Ballinger's Ann. Codes & St. § 4269* (Pierce's Code, § 7070), making it the duty of the trustees of a corporation to keep a book containing the names of stockholders showing the number of their shares, which book, during the usual business hours, shall be open for inspection of stockholders and creditors, and providing that any stockholder or creditor of the company shall have the right to make extracts from such book or demand from an officer a certified copy of any paper placed on file in the office of the company, and section 4270 (section 7071), providing that if the officer having charge of such book or of any papers of the company shall refuse or neglect to exhibit them or allow them to be inspected, he shall be guilty of a misdemeanor or punishable by imprisonment in the county jail or by fine, or by both, under 2 *Ballinger's Ann. Codes & St. § 7435* (Pierce's Code, § 1548), and shall forfeit a penalty of not less than \$100 or more than \$1,000, such penalty being not as compensation, but as a part of the punishment is a penal statute, and should be strictly construed. *Brown v. Kildea*, 108 Pac. 452, 458, 58 Wash. 184.

## PENAL SUM

Where the parties to a contract for an exchange of land each bound himself in a "penal sum" of \$100 for the performance of the contract, on a breach by one of them the other was entitled to recover such sum as liquidated damages. *Westbay v. Terry*, 103 S. W. 160, 161, 83 Ark. 144.

## PENALTY

See Compounding Penalties; Suit for Penalty or Forfeiture.

Action for, as criminal action, see Criminal Action.

Proceeding to recover penalty as civil action, see Civil Action—Case—Suit—etc.

Subject to penalty, see Subject to Penalty.

"With reference to penal actions, the word 'penalty' means the forfeiture inflicted by a penal statute." *State ex rel. McNamee v. Stobie*, 92 S. W. 191, 212, 194 Mo. 14.

"The term 'penalty' denotes money recoverable by virtue of a statute imposing a payment by way of punishment." *United States v. Four Hundred and Twenty Dollars*, 162 Fed. 803, 805 (citing *Black, Law Dict.*).

A penalty is a sum of money which the law exacts the payment of by way of punishment for doing some act which is prohibited, or omitting to do some act which is required to be done. The imposition of a fine or imprisonment is not in any legal sense a penalty. *People ex rel. Kane v. Sloan*, 90 N. Y. Supp. 762, 763, 98 App. Div. 450 (citing *Village of Lancaster v. Richardson* [N. Y.] 4 Lans. 136).

The word "penalty," as used in V. S. § 2019 (P. S. 2381), includes the punishment by confinement as well as fines and forfeitures. *Fay v. Barber*, 47 Atl. 180, 181, 72 Vt. 55.

The "fines," "penalties," and "forfeitures" contemplated by Code Crim. Proc. § 332, providing that all fines and penalties imposed and all forfeitures incurred in any county shall be paid into the treasury to the support of common schools are all pecuniary—moneys which are paid into the treasury and placed in the school fund and altogether they make a single class, moneys recovered by some sort of punishment, and not as damages by way of compensation or reparation. *State v. Rose*, 97 Pac. 788, 789, 78 Kan. 600.

While by the word "penalty" may be understood punishment inflicted by law for its violation, it includes also an equivalent by way of damages for a civil wrong. The word "penalty" is used in the latter sense in Laws 1905, c. 232, giving a civil action for the recovery of money or the value of property wagered or deposited on any bet, or the purchase of a pool, and declaring that this

penalty is exclusive of all other penalties. In re Opinion of the Justices, 63 Atl. 505, 510, 78 N. H. 625, 6 Ann. Cas. 689 (citing in support of definition, Bouv. Law Dict.).

In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly, and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. But they are also commonly used as including any extraordinary liability to which the laws subject a wrongdoer in favor of the persons wronged, not limited to the damage suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond. State ex rel. Rodes v. Warner, 94 S. W. 962, 964, 197 Mo. 650 (citing *Huntington v. Attrill*, 13 Sup. Ct. 224, 146 U. S. 657, 36 L. Ed. 1123).

"The term 'penalty' has been variously defined by the courts of last resort in this country. It is applied in the sense of punishment for crime. It may mean, in a civil action, a sum of money payable as an equivalent for an injury, or a sum of money imposed by statute to be paid as a punishment for the commission or omission of a certain act. The term is also used to designate a gross sum of money to be paid for the non-performance of an agreement; and the legal operation of this is to cover the damages which the party in whose favor the consideration is made may have sustained from the breach of a contract by the opposite party. In several states the words 'penalty' and 'forfeiture' are used as synonymous and interchangeable. \* \* \* In this state, however, statutory penalties whether affixed to violations of civil or of criminal statutes, convey the idea of punishment either for the breach of a public duty by omission or commission, or designate the punishment to be meted out to one who has committed a crime under the laws of the state. So far as those penalties, which are civil in their nature, are concerned, a prescribed sum is recoverable only by the state, and at its instance." *Pemington & Evans v. Douglas, A. & G. Ry. Co.*, 60 S. E. 485, 489, 3 Ga. App. 665.

"Penalties," as used in Const. art. 14, § 7, declaring that the General Assembly in addition to all other "penalties" shall provide for the removal from office of county, city, town, or township officers on conviction of willful, corrupt, or fraudulent violation of official duties, means punishments, fines, forfeitures, deprivation of some office or right for some offense, misconduct, misdemeanor, or delinquency, and the entire section means that the Legislature must provide for the removal of an officer on conviction, but it leaves the question of other "penalties" solely with-

in the realm of legislative enactment. State ex rel. Henson v. Sheppard, 91 S. W. 477, 480, 192 Mo. 497.

Sess. Acts 1907, p. 188, imposing a penalty on a telegraph company for its failure to transmit and deliver messages promptly, with impartiality, and in good faith, does not impose a penalty for the failure to deliver a message at a point where no office is maintained, and, where a contract for the transmission of a message to such point is breached, relief may be had only in an action therefor; the word "penalty" meaning a fine or punishment imposed for a violation of a duty which the wrongdoer is under obligation to perform. *Cowan v. Western Union Telegraph Co.*, 129 S. W. 1066, 1067, 149 Mo. App. 407.

"Penalty" is a mere security for a performance of a contract, and not the price for doing that which the man has expressly agreed not to do. A court of equity fastens upon the real contract and compels the execution of the very thing covenanted to be done. *Lanyon v. Garden City Sand Co.*, 79 N. E. 313, 317, 223 Ill. 616, 9 L. R. A. (N. S.) 446 (quoting with approval from *Ropes v. Upton*, 125 Mass. 258).

Penalties imposed on a corporation for failure to return increase of capital stock, file reports, etc., are not taxes within the meaning of any law, and are not entitled to priority under the bankruptcy act, and under Bankr. Act July 1, 1898, c. 541, § 57(j), 30 Stat. 560, cannot be allowed except for the amount of the pecuniary loss sustained by the act or transaction out of which the penalty arose. A penalty is a fine or punishment or forfeiture, and does not become an obligation until imposed by lawful authority, and the penalties so imposed on the corporation are different from penalties for nonpayment of taxes, the latter being exacted in lieu of interest, while those on the corporation are by way of punishment. In re *York Silk Mfg. Co.*, 188 Fed. 735, 739.

Witnesses examined under a commission issued by a court in Massachusetts, in an action to enjoin the infringement of plaintiff's trade-mark, will not be excused from answering questions on the ground that their answers would tend to show a violation of an injunction theretofore granted, which would subject the offender to the consequences of a civil contempt; the fine or imprisonment that might follow not being a "penalty," within Code Civ. Proc. § 837, providing that a witness will not be required to give an answer tending to expose him to a penalty or forfeiture. *Russie Cement Co. v. F. W. Woolworth & Co.*, 125 N. Y. Supp. 82, 66 Misc. Rep. 454.

"In general, a sum of money in gross, to be paid for the amount of nonperformance of an agreement, is considered as a 'penalty,' the legal operation of which is to cover the

damages which the party in whose favor the stipulation is made may be sustained from the breach of contract from the opposite party." State ex rel. Rodes v. Warner, 94 S. W. 962, 964, 197 Mo. 650 (quoting and adopting the definition in Tayloe v. Sandiford, 7 Wheat. [20 U. S.] 13, 17, 5 L. Ed. 384; quoted in Huntington v. Attrill, 13 Sup. Ct. 224, 146 U. S. 657, 36 L. Ed. 1123).

A lease, reciting that it was made in consideration of the covenants of the lessee and of \$1,500 paid to the lessor, and providing that the payment should be credited on the rent for the last two months of the term, on the lessee performing the contract, but otherwise the payment should belong to the lessor as a part of the consideration for the lease, merely stipulated that the \$1,500 should be applied in payment of rent on a specified contingency, and the \$1,500 was not a deposit in the nature of a penalty, but was a payment for which the lease was a full consideration, and, where the lessee voluntarily abandoned the premises, he could not recover the \$1,500; a penalty being an agreement to pay a certain sum if the obligor shall fail to fulfill a contract. Dutton v. Christie, 115 Pac. 856, 857, 63 Wash. 372.

By the terms of two notes of \$100 each, and the mortgage securing them—given as commission for procuring a loan of \$1,000 each of the \$100 notes being payable in five annual installments, the first installment of one of them being payable one year after the time for payment of the last installment of the other, which said notes were not to bear interest if the installments were paid when due, and which second note was to be void if the note for the \$1,000 loan was paid within five years, and no default was made in payment of the interest on the \$1,000 note, or in the payment of the other \$100 note—all the installments on the two \$100 notes were not only to become due, but were to bear 12 per cent. interest from such time, on any default in payment of an installment thereof or of interest on the \$1,000 note. Held, that the default provision did not constitute a "penalty," within Rev. Civ. Code, § 1273, declaring void penalties imposed by contract for any nonperformance thereof. Russell v. Wright, 121 N. W. 842, 844, 23 S. D. 388.

#### Claim on forfeited recognizance

A claim of the United States on a forfeited recognizance for bail in a criminal case is a "penalty" or a "forfeiture," within Bankr. Act July 1, 1898, c. 541, § 571, 30 Stat. 560 which provides that debts due the United States as a penalty or forfeiture shall not be allowed in bankruptcy, except as to the pecuniary loss actually sustained. In re Caponigri, 193 Fed. 291, 292.

#### Damages synonymous

See Damage—Damages.

#### As debt

See Debt.

#### Fine synonymous

"Penalties" have been held to be fines and capable of collection by indictment or presentment as well as by civil suit." United States v. Tsokas, 163 Fed. 129, 130 (citing United States v. Moore, 11 Fed. 248).

The word "fine" in its ordinary acceptance has the distinct meaning of a pecuniary penalty, and has that restricted meaning in Const. art. 85, limiting the jurisdiction of the Supreme Court in cases where a fine is imposed, and hence the forfeiture of the right to conduct a barroom, pursuant to section 7 of the Gay-Shattuck law (Act No. 176, p. 239, of 1906), imposed in addition to the fine prescribed by section 6 for its violation, forms no part of such fine, the amount of which determines jurisdiction of an appeal in a prosecution thereunder. State v. Price, 50 South. 794, 795, 124 La. 917, 134 Am. St. Rep. 523, 18 Ann. Cas. 881.

The term "penalties" is synonymous with fines. So the word "penalties," as used in a statute imposing penalties for failure of a railroad to erect water closets at passenger stations, is synonymous with the word fines, and a judgment rendered for the penalty imposed for the violation of such statute does not bear interest. Missouri, K. & T. R. Co. of Texas v. State (Tex.) 97 S. W. 724, 725 (citing State v. Galveston, H. & S. A. R. Co., 97 S. W. 71, 100 Tex. 153).

As used in section 9, Immigration Act March 3, 1903, making it unlawful to bring into the United States any alien afflicted with a loathsome or with a dangerous contagious disease, and providing that if it shall appear to the satisfaction of the Secretary of Commerce and Labor that any alien so brought was afflicted with such disease at the time of foreign embarkation and that the existence of such disease might have been detected by means of a competent medical examination at such time such transportation company shall pay to the collector of customs, \$100 for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, the word "fine" means a penalty, and if suable at all, recoverable, in debt, and not through criminal proceedings, and therefore the statutory provision does not create a crime so as to render it unconstitutional because it does provide for a jury trial. International Mercantile Marine Co. v. Stranahan, 155 Fed. 428, 431.

The word "fine," as used in Rev. St. 1898, c. 150, providing for the punishment of civil contempt, is not confined to mere indemnity to the injured party. The provisions of this chapter clearly warrant the imposition of a fine or imprisonment or both, in cases where no actual loss or injury is shown, and, in case

of actual loss or injury resulting from the alleged misconduct, instead of imposing a fine, a sum is ordered paid to him to indemnify for such loss or injury, and when a fine is imposed it is in the nature of a "penalty" which is to be paid into the state treasury for the benefit of the school fund. *Emerson v. Huss*, 106 N. W. 518, 522, 127 Wis. 215.

#### Forfeiture synonymous

The words "penalty" and "forfeiture" are generally used synonymously, and a statute is penal when it inflicts a forfeiture by way of penalty for breach of its provisions. *Southern Ry. Co. v. Inman, Akers & Inman*, 75 S. E. 908, 910, 11 Ga. App. 564 (citing 6 Words and Phrases, pp. 5272, 5273).

"Forfeiture" and "penalty" are sometimes used as synonymous and interchangeable terms. *Pennington & Evans v. Douglas, A. & G. R. Co.*, 60 S. E. 485, 489, 3 Ga. App. 665; *Casey v. St. Louis Transit Co.*, 91 S. W. 419, 423, 116 Mo. App. 235.

Provision in a contract that one party shall "forfeit" a certain amount if he breaches the contract does not necessarily imply that the sum specified is intended to be a "penalty." *Ross v. Loescher*, 116 N. W. 193, 194, 152 Mich. 386, 125 Am. St. Rep. 418 (citing *Western Gas Const. Co. v. Dowagiac Gas & Fuel Co.*, 109 N. W. 29, 146 Mich. 119, 10 Ann. Cas. 224).

An action against a carrier to recover an overcharge brought under a statute which fixes maximum freight rates and provides that for a violation of the act the company should "forfeit" to the person injured five times the charges illegally taken, is one to recover a statutory "penalty"; the essential idea of "forfeiture" being a loss of property inflicted by way of punishment. *Herriman v. Burlington, C. R. & N. Ry. Co.*, 9 N. W. 878, 879, 10 N. W. 340, 57 Iowa, 187.

With reference to penal actions the word "penalty" means the forfeiture inflicted by a penal statute. *State ex rel. McNamee v. Stoble*, 92 S. W. 191, 212, 194 Mo. 14.

A contract provided that for a failure to complete in time the contractor would "forfeit" to the city as liquidated damages a certain sum. Held that though the word "forfeit" ordinarily means "penalty," in view of the fact that it was necessary to complete the contract in the summer months and damage might reasonably follow, a failure to so complete, the damages would be considered liquidated damages. *Barber Asphalt Pav. Co. v. City of Wabash*, 86 N. E. 1034, 1036, 43 Ind. App. 167.

The term forfeiture in a contract does not necessarily exclude a purpose to make the sum named a "penalty" merely to which the parties may resort for the recovery of the actual damages resulting from breach of the contract. *McMillan v. First Nat.*

*Bank of Bowie*, 119 S. W. 709, 710, 56 Tex. Civ. App. 45.

#### Interest or usury distinguished

The "penalty" is the fine or forfeiture imposed for the offense of usury, usually amounting to a greater sum than the illegal interest contracted to be paid, while "usury" is the illegal interest itself. *Sanford v. Kunz*, 71 Pac. 612, 613, 9 Idaho, 29.

Legal interest is the measure of damages for failure to pay debts when they are due, and hence a contract to pay an amount in excess of such interest on account of a default in the payment of money when it is due is an agreement for a "penalty" which the courts will not enforce. *United Shoe Machinery Co. v. Abbott*, 158 Fed. 762, 763, 86 C. C. A. 118.

The statute providing for the collection of ten per cent. interest on special tax bills for the first 6 months excluding the first 30 days and for 15 per cent. per annum thereafter until paid, and allowing interest on a judgment thereafter from the date of its rendition at 15 per cent. per annum, imposed a "penalty." *City of St. Joseph ex rel. Gibson v. Forsee*, 84 S. W. 1138, 1139, 116 Mo. App. 237 (citing *City of St. Louis v. Allen*, 53 Mo. 57; *Seaboard Nat. Bank v. Wooten*, 75 S. W. 464, 176 Mo. 60; *Town of Tipton v. Norman*, 72 Mo. 380; *Eyerman v. Blaksley*, 78 Mo. 145).

The term "interest," when used to designate a rate per cent. to be paid for the use of money, has a distinct significance derived from commercial usage, meaning simply the market value of the use of money, which value may be limited by law; while the term "penalty" is used to designate a clause in an agreement by which the obligor agrees to pay a certain sum of money, if he shall fail to fulfill the contract contained in another clause of the same agreement. A "penalty" always includes two distinct agreements, so that when the first is fulfilled the second is void; and when a breach has taken place the obligee has the option to require the fulfillment of the first obligation or payment of the penalty, but not before. *National Life Ins. Co. v. Hall*, 125 Pac. 1108, 1109, 34 Okl. 395 (citing Words and Phrases).

#### Liquidated damages distinguished

See Liquidated Damages.

#### Personal punishment included

The words "penal" and "penalty" strictly and primarily denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. *Schlick v. United States*, 24 Sup. Ct. 826, 830, 195 U. S. 65, 49 L. Ed. 99, 1 Ann. Cas. 585 (quoting and adopting definition in *Huntington v. Attrill*, 13 Sup. Ct. 224, 227, 146 U. S. 657, 667, 36 L. Ed. 1123, 1127; *The Antelope*, 10 Wheat. 66, 123, 6 L. Ed. 268, 282, citing *United States v. Reising-*

er, 9 Sup. Ct. 99, 101, 128 U. S. 398, 402, 32 L. Ed. 480, 481).

In Gen. St. 1901, § 7342, providing that the repeal of a statute does not affect "any penalty incurred," the words "penalty incurred" are used in their ordinary meaning, which is a punishment brought upon one's self, and therein are especially, if not solely, applicable to criminal cases. In *re* Schneck, 96 Pac. 43, 44, 78 Kan. 207.

#### **Punishment synonyms**

In a prosecution for larceny, a verdict finding accused guilty as charged, and fixing his "penalty" at one year in the penitentiary, was not insufficient; the word "penalty" being synonymous with the word "punishment," and being evidently used with that meaning. *Russell v. State*, 133 S. W. 188, 191, 97 Ark. 92.

#### **Liability for statutory damages**

An action to recover for timber taken and converted by trespassers on land owned by the state for the enhanced damages above its value brought under Laws 1895, c. 168, § 7, is for a penalty within the limitation acts. *State v. Buckman*, 104 N. W. 240, 241, 95 Minn. 272.

The delayage charge fixed by demurrage and delayage rule No. 10 of the Railroad Commission, adopted June 8, 1904, for detention of cars in transit, is not a penalty, within Code 1906, § 3101, requiring suits for penalties to be brought within one year; the charge being intended as fixed compensation for the delay. *Keystone Lumber Yard v. Yazoo & M. V. R. Co.*, 53 South. 8, 10, 97 Miss. 483.

In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond. In Acts 1905, p. 120, § 2, providing that the railroad commission shall by rules provide the time in which cars shall be furnished after being ordered, and the "penalty" per day, per car, to be paid by the railroad company if the cars are not furnished as ordered, the word "penalty" was not employed in its strict sense, but as meaning reasonable amount to be fixed by the rule of the commission recoverable by the shipper on account of a failure to furnish to carry his freight within a reasonable time named in the rule. *Southern R. Co. v. Melton*, 65 S. E. 665, 671, 672, 138 Ga. 277 (citing *Hunt-*

*ington v. Attrill*, 13 Sup. Ct. 224, 227, 146 U. S. 657, 667, 36 L. Ed. 1123; *United States v. Reisinger*, 9 Sup. Ct. 99, 128 U. S. 398, 402, 32 L. Ed. 480; *United States v. Chouteau*, 102 U. S. 603, 611, 26 L. Ed. 246).

#### **Liability of corporate officer or stockholder**

Where the charter of a corporation prohibited loans of corporate funds to its officers and employees, and declared that the parties consenting to any such loan should be liable for the amount so loaned and all losses or expenses that might result therefrom, "the losses and expenses" incurred should be recovered in equity, although not "the amount so loaned," independent of actual losses and expenses, as that would be a mere penalty. *Murphy v. Penniman*, 66 Atl. 262, 268, 105 Md. 452, 121 Am. St. Rep. 568.

#### **Liability on liquor dealer's bond**

Rev. St. Tex. 1895, art. 3380, requires that a liquor dealer give a bond to the state, in the sum of \$5,000, with two sureties, conditioned that the dealer will not sell or give liquor to minors, and provides that the bond may be sued on by a person aggrieved by its violation, and such person may recover the sum of \$500 "as liquidated damages" for each infraction. Held, that the sum recoverable was a "penalty," and an action therefor did not survive, and on the death of the principal on the bond it should be abated as to the sureties. *Johnson v. Rolls*, 79 S. W. 518, 514, 97 Tex. 453.

## **PENCIL**

So-called soap pencils, for cleaning spectacle and eyeglass lenses, in which soap is the material of chief value, are dutiable as non-enumerated manufactured articles under section 6 of the tariff act of July 24, 1897, c. 11, 30 Stat. 205, and not as pencils under paragraph 456 (chapter 11, § 1, Schedule N, 30 Stat. 194. *United States v. American Express Co.*, 136 Fed. 594, 595, 69 C. C. A. 368.

## **PENDENCY OF ACTION**

See During Pendency of Action.

## **PENDENTE LITE**

See Injunction Pendente Lite.

"No decree bindeth any that cometh in bona fide by conveyance of the defendant before the bill exhibiteth, and is made no party, neither by bill or order; but when he comes in 'pendente lite,' and while the suit is in full prosecution, and without any order of allowance or privy by the court, then regularly the decree bindeth." This rule had its origin in the civil law, and was pungently stated in the legal maxim "Pendente lite, nihil innovetur." *Jones v. Williams*, 71 S. E. 222, 224, 155 N. C. 179, 36 L. R. A. (N. S.) 426

(quoting and adopting definition in 4 Bacon's Works, p. 515).

## PENDING

See Freight Pending; Lately Pending.

The word "pending," legally speaking means a matter undecided. *Smalley v. State* (Tex.) 127 S. W. 225, 226.

A matter is deemed to be "pending" until it reaches a final determination in the appellate court. In *re Egan*, 123 N. W. 478, 488, 24 S. D. 801.

### Appeal

An appeal is "pending" when undecided. A case would be pending as well after the appeal is perfected as required by law as if the transcript was on the docket and unsubmitted for review. *Gordon v. Rhodes & Daniels* (Tex.) 104 S. W. 786, 787 (citing 6 Words and Phrases, p. 5276).

### Civil action or suit

Suit pending, see, also, Suit.

An action is deemed to be "pending" until the time for appeal has passed. *Grannis v. Superior Court of City and County of San Francisco*, 77 Pac. 647, 649, 143 Cal. 630.

Under the direct provisions of Code Civ. Proc. § 1049, an action is "pending" from the time of its commencement until its final termination upon appeal, or until the time for appeal has expired. *Anderson v. Schloesser*, 94 Pac. 885, 153 Cal. 219; *Di Nola v. Allison*, 76 Pac. 976, 978, 143 Cal. 106, 65 L. E. A. 419, 101 Am. St. Rep. 84.

A suit is said to be "pending" in any court of the United States from the time it is commenced, and it cannot be pending until it is commenced. In *re Connaway*, 20 Sup. Ct. 951, 954, 178 U. S. 494, 44 L. Ed. 1134.

A judgment, abating an appeal rendered on a plea in abatement, disposes of what is as between the parties to the proceeding, a "pending cause" within Gen. St. 1902, § 4840, allowing costs to the prevailing party in causes pending in the Supreme Court of Errors. *Slak v. Meagher*, 74 Atl. 880, 881, 82 Conn. 483.

Code Civ. Proc. N. Y. § 390a, relating to the limitation of actions brought on causes of action arising outside of the state, and providing that it shall not "affect any pending action or proceeding," applies to causes of action existing at the time of its enactment, but on which action had not then been brought. *Lehigh Val. R. Co. v. Comar*, 151 Fed. 559, 560, 81 C. C. A. 39.

Since the statute allows an application for suit money to be made at any time "pending suit," where plaintiff's petition in divorce contained a formal application for suit money, this was a sufficient foundation for an order allowing the same, though such order

was made after final hearing; a suit being "pending" until a final judgment is rendered. *Robbins v. Robbins*, 119 S. W. 1075, 1076, 138 Mo. App. 211 (citing 7 Words and Phrases, p. 5277).

Under Rev. St. Idaho 1887, § 2472, providing that while an action for divorce is "pending" the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action, and section 4927, providing that an action is deemed to be "pending" from the time of its commencement until its final determination upon appeal, the court referred to in section 2472 is the district court in which such actions are originally commenced, so that the district court has jurisdiction in divorce cases, after appeal has been taken from the judgments of such courts, to make orders directing the payment of costs and expenses necessary in the preparation and perfection of the appeal, and for attorney's fees in prosecuting the same. *Roby v. Roby*, 74 Pac. 957, 9 Idaho, 371, 3 Ann. Cas. 50.

Under Code Civ. Proc. § 1049, providing that an action is pending from the time of its commencement until its determination on appeal, and Civ. Code, § 187, empowering the court, where an action for divorce is pending, to require the husband to pay alimony for the support of his wife and children, or suit money, the court, granting to a wife an interlocutory decree of divorce and permanent alimony, may, on the motion of the wife, desiring to appeal from the judgment fixing the alimony, allow her temporary alimony pending the appeal, together with suit money, notwithstanding section 139, empowering the court, on granting a divorce for an offense of the husband, to compel him to provide for the maintenance of the wife and children, which is inapplicable to orders for payments "pending the action." *Bruce v. Bruce*, 116 Pac. 66, 67, 160 Cal. 28.

Rev. St. 1906, § 2375, authorizes the court in a divorce proceeding on application of either party to alter the decree as to alimony and maintenance, and provides that the court may decree alimony "pending the suit for divorce," where the same would be just. Held that, where a divorce decree gave the custody of the children to plaintiff until further order of the court, and also required defendant to pay plaintiff \$75 a month alimony until otherwise ordered, and defendant thereafter applied for modification to obtain the custody of the children, and to be relieved from the payment of alimony, the suit for divorce would be regarded as "still pending" within such section, and the court was therefore authorized to grant plaintiff's application for temporary alimony to enable her to defend against such application. *Smith v. Smith*, 132 S. W. 312, 313, 151 Mo. App. 649.



St. 1907, c. 290, effective April 13, 1907, relating to the dissolution of certain corporations, provided (section 2) that nothing in the act should affect any suit pending by or against any corporation mentioned in the first section thereof. Held, that the word "suit," as used in such section, included every proceeding in a court of justice by which a person might pursue a remedy afforded by law, including an action at law, and that the word "pending" was descriptive of the action from the date of the writ, so that, the writ in a suit by a corporation having been dated April 9, 1907, the suit was pending, and was not abated by the dissolution of the corporation under such act, notwithstanding the reference in section 1, to St. 1903, c. 437, §§ 52, 53, continuing the corporate existence of dissolved corporations for three years only, to prosecute and defend suits. *Worcester Col. Co. v. Henry Wood's Sons Co.*, 95 N. E. 392, 395, 209 Mass. 105.

Under Code, § 3514, providing that an action in a court of record shall be commenced by serving defendants with a notice informing him of plaintiff's name, that a petition is or will be filed, etc., an action is begun by the actual serving of the notice upon defendant, and is "pending" from that time until its final disposition, within the rule that, where two or more suits are instituted between the same parties to determine the same rights, the suit first pending will be continued and the others abated. *Boone v. Boone* (Iowa) 137 N. W. 1059, 1061.

#### Criminal prosecution

A criminal case is "pending" in the sense that a court may correct its records until the judgment is fully satisfied. *Ex parte Howland*, 104 Pac. 927, 928, 3 Okl. Cr. 142, Ann. Cas. 1912A, 840.

Loc. Acts 1907, p. 289, abolishing the county court of Lee county, creating the Lee county law and equity court, and declaring that all cases "pending" in the county court of Lee county are transferred to such law and equity court, includes in the term "pending" proceedings in which a warrant for the arrest of a person had been issued, but not served, at the time of such transfer. *Bryant v. State*, 48 South. 543, 544, 158 Ala. 26.

#### Proceeding

The adoption of the preliminary resolution declaring the necessity of a street improvement, such as a pavement or sewer, is, in the absence of a petition by property owners for the improvement, the beginning of a proceeding, which is thereafter "pending" within the meaning of Rev. St. § 79, and unaffected in respect to limitation of rate of assessment by an amendatory act not expressly retroactive. *City of Toledo v. Marlow*, 28 Ohio Cir. Ct. R. 298, 308.

The levy of an execution and an advertisement of the property levied on for sale

is not a "pending proceeding" within the meaning of a statute providing that a petition to stay a "pending proceeding" may be brought in the county where the proceeding is pending. *Malsby v. Studstill*, 56 S. E. 988, 989, 127 Ga. 726 (citing *Rounsaville v. McGinnis*, 21 S. E. 123, 93 Ga. 579; *Macon Navigation Co. v. Stallings*, 35 S. E. 647, 110 Ga. 352; *Townsend v. Brinson*, 43 S. E. 748, 117 Ga. 375).

Where an election at which local option was voted in the county was held to be illegal on an appeal to the Court of Civil Appeals in an election contest, on the judgment becoming final, the contest was no longer "pending" within Acts 30th Leg. (1st Ex. Sess.) p. 447, providing that pending a contest of any local option election the enforcement of the local option law shall not be suspended. *Savage v. State* (Tex.) 138 S. W. 211, 213.

A forcible entry proceeding under Civ. Code 1895, § 4823, is, after service of notice, a "pending proceeding," within Civ. Code 1895, § 4950, which will authorize the judge of the superior court of a county in which it is instituted to entertain an application to enjoin the same at the instance of defendant, though plaintiff may be resident of another county. *Ellis v. Stewart*, 51 S. E. 321, 123 Ga. 242.

A statute providing that when any bill of exceptions, etc., on motion for new trial is lost or destroyed, and no other record of the trial can be obtained and the action or proceeding is subject to review by motion for new trial "pending" and it is "by the court in which such action or proceeding is pending" deemed impossible to restore the proceedings, etc., the court shall have power to grant a new trial, has reference to a trial court in which the action or proceeding is pending. After the superior court has denied a motion for a new trial in a criminal case and the defendant has appealed, the motion is no longer "pending" in that court. *People v. Napoli*, 93 Pac. 500, 7 Cal. App. 79 (citing and adopting *Peycke v. Keefe*, 46 Pac. 78, 114 Cal. 213; *Vosburg v. Vosburg*, 70 Pac. 473, 137 Cal. 493).

#### PENHOLDER

Fountain pens without the pen points are not "penholders," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 187, 30 Stat. 166. *Schrader & Ehlers v. United States*, 180 Fed. 953.

#### PENITENTIARY

See Jail; Prison.

#### PENKNIFE

Whether an article is a toy depends on whether it is a plaything; and small knives,

with odd-shaped handles, which could not be effectively used for most of the ordinary purposes of a pocketknife, are not in fact used as playthings, are less properly classed as "toys," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191, than as "penknives," under Schedule C, par. 153, 30 Stat. 163. *A. Kastor & Bros. v. United States*, 167 Fed. 993, 994.

## PENNY ARCADE

A "penny arcade" is a place where a number of machines are kept for profit, each of which, by a mechanical arrangement, exhibits pictures to a person who drops a penny into a slot. *Fichtenberg v. Atlanta*, 54 S. E. 933, 126 Ga. 62.

## PENSION

"A 'pension' is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a valid law is no reason why that law may not be repealed and the pension cease." *Eddy v. Morgan*, 75 N. E. 174, 178, 216 Ill. 437.

A "pension" is a stated and certain allowance made and granted by the government for valuable services performed in its behalf. It is a reward for continuous faithfulness in the discharge of public duty, and is a compensation for the hazard of the employment. In *re Roche*, 126 N. Y. Supp. 766, 768, 141 App. Div. 872.

"'Pension' has been defined to be an annuity from the government for services rendered in the past. Under this definition an act requiring fire insurance companies to pay annually a specified sum on premiums to create a pension fund for disabled firemen violates a constitutional provision prohibiting the granting of a pension except for military and naval services." *Aetna Fire Ins. Co. v. Jones*, 59 S. E. 148, 152, 78 S. C. 445, 13 L. R. A. (N. S.) 1147, 125 Am. St. Rep. 818.

### As credits

See Credits.

## PENSIONER

As pauper, see Pauper.

## PEON

"A 'peon' is one who is compelled to work for his creditor until his debt is paid." *Bailey v. State of Alabama*, 31 Sup. Ct. 145, 151, 219 U. S. 219, 242, 55 L. Ed. 191.

A "peon" is defined as "a debtor held by his creditor in a qualified servitude to work out the debt." The involuntary servitude prohibited by the federal Constitution is a personal servitude. An unwilling servitude

enforced by the stronger to collect a debt is to reduce the victim to the condition of a peon, and logically to a condition of peonage. *United States v. McClellan*, 127 Fed. 971, 976 (quoting Black, Law Dict.).

## PEONAGE

See Condition of Peonage; Voluntary Peonage.

"Peonage" is a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. *Young v. State*, 62 S. E. 558, 4 Ga. App. 827; *United States v. Cole*, 153 Fed. 801, 806.

"Peonage" is a condition of compulsory service, based on the indebtedness of the peon to the master, which indebtedness is the criminal cord by which the peon is held to the master's service. In *re Peonage Charge*, 138 Fed. 686, 687.

"Peonage," within the meaning of Rev. St. §§ 1990, 5526, which make the same unlawful, and the holding of any person to peonage a criminal offense, is the holding of persons in unwilling servitude in payment of debts, by means either of force or intimidation. *United States v. Clement*, 171 Fed. 974, 977.

"'Peonage,' however created, is compulsory service, involuntary servitude. A clear distinction exists between peonage and the voluntary performance of labor or rendering of service in payment of the debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages or breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service." *United States v. Cole*, 153 Fed. 801, 805 (quoting and adopting definition in *Clyatt v. United States*, 25 Sup. Ct. 429, 197 U. S. 215, 216, 49 L. Ed. 726).

Peonage, within Rev. St. §§ 1990, 5526, making it an offense for any person to hold, arrest, return, etc., any person to a condition of peonage, is the holding of any person to service or labor to pay a debt due from the laborer to the employer, when such employé desires to leave the employment before his debt is paid off; and it is immaterial whether the contract of employment was voluntarily made by the laborer or not, and whether it was made for a present or pre-existing consideration. *Peonage Cases*, 136 Fed. 707, 708.

The system of "peonage" is a legacy of the Spanish government in the territory of New Mexico. Under the peonage system, a laborer is absolutely compelled to labor until he has paid his indebtedness to his employer. If he attempts to leave or leaves, he can be restrained or forced to return. The employer can sell his unexpired term to any one

who will pay the amount due and assume the obligations of the master. One who has obtained money on agreement to work cannot complain of involuntary servitude on an indictment charging the violation of a labor contract under which the accused received and advanced on the date he entered into the contract where he does not controvert the averment of indictment that he has not performed any work at all. *State v. Murray*, 40 South. 930, 931, 116 La. 655, 7 Ann. Cas. 957.

The statute punishing by fine, a part of which is to go to the injured party, an employé who, with intent to injure or defraud, contracts in writing to perform services and receives money or property, and, without refunding the same, fails to perform such services, or any person who, with like intent, contracts in writing to rent land and thereby obtains any money or property, and, without refunding the same, refuses to cultivate the land or comply with the contract, is not unconstitutional on the ground that it imposes on accused involuntary servitude similar to the "peonage system" once prevailing in New Mexico. *Bailey v. State*, 40 South. 886, 888, 161 Ala. 75.

"Peonage" is a term descriptive of a condition which has existed in Spanish America and especially in Mexico. The essence of the thing is compulsory service in payment of debt. A 'peon' is one who is compelled to work for his creditor until his debt is paid." Hence Code Ala. 1896, § 4730, as amended by Gen. Acts 1903, p. 345, and Gen. Acts 1907, p. 636, providing that the refusal without just cause to perform labor called for in a written contract for employment under which the employé has obtained money which has not been refunded shall be prima facie evidence of an intent to defraud and punishable as a criminal offense, is invalid, tending to cause peonage in violation of Const. U. S. Amend. 13, and Rev. St. § 1990, 5526. *Bailey v. Alabama*, 31 Sup. Ct. 145, 151, 219 U. S. 219, 242, 246, 55 L. Ed. 191.

"Peonage" is a status or condition of compulsory service based upon the indebtedness of the peon to the master. "Voluntary peonage" exists where the debtor voluntarily contracts to enter the service of his creditor, while "involuntary peonage" is forced upon the debtor by some provision of law. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for a breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. Cr. Code S. C. 1902, § 357, declaring a laborer under contract to labor on farm lands, who shall receive advances and thereafter willfully and

without just cause fail to perform the reasonable service required by the contract, guilty of a misdemeanor, is in violation of Const. U. S. Amend. 13, prohibiting slavery or involuntary servitude, except as a punishment for crime, and of U. S. Comp. St. 1901, p. 1266, § 1990, enacted pursuant thereto, abolishing peonage. *Ex parte Hollman*, 60 S. E. 19, 24, 79 S. C. 9, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105.

"Peonage" is a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness." Cr. Code S. C. 1902, § 357, providing that any laborer working for a share of a crop, or for wages in money or other valuable consideration, under a contract to labor on farm land, who shall receive advances either in money or supplies, and thereafter willfully and without just cause fail to perform the reasonable services required of him by the terms of the contract, shall be liable to prosecution for misdemeanor and punished by imprisonment, etc., constituted an attempt to secure compulsory service in payment of a debt, which was not within the state's police power to create and punish offenses. Such section, being intended to cover agricultural laborers only, was invalid as a violation of the equality clause of the fourteenth amendment of the federal Constitution. The act also authorizes the creation of a system of peonage or involuntary servitude, in violation of Const. U. S. Amend. 13, declaring that neither slavery nor involuntary servitude, except as punishment for crime whereof the parties have been duly convicted, shall exist within the United States or any place subject to their jurisdiction. *Ex parte Drayton*, 153 Fed. 986-988 (quoting and adopting definition in *Clyatt v. United States*, 25 Sup. Ct. 429, 197 U. S. 207, 49 L. Ed. 726).

"Peonage" may be defined as a "status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion on *Jaremillo v. Romero*, 1 N. M. 190, 194: 'One fact existed universally—all were indebted to their masters. This was the cord by which they seemed bound to their master's service.' Upon this is based a condition of compulsory service. 'Peonage' is sometimes classified as voluntary or involuntary; but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But 'peonage,' however created, is compulsory service—involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between 'peonage' and the voluntary per-

formance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject, like any other contractor, to an action for damages for breach of that contract, can elect at any time to break it; and no law or force compels performance or a continuance of the service." The enactment of the prohibition against "peonage" in any state or territory of the United States, contained in Rev. St. U. S. §§ 1990, 5526, was authorized by the provisions of Const. Amend. U. S. 13, forbidding slavery or involuntary servitude within the United States or any place subject to their jurisdiction, and granting to Congress the power to enforce the prohibition by appropriate legislation. *Clyatt v. United States*, 25 S. Ct. 429, 430, 197 U. S. 207, 49 L. Ed. 728.

## PEOPLE

Restraint of, see *Restraints of Kings or Princes*.

The word "people," as used in the Constitution, means the political society considered as a unit comprising the entire population of all ages, sexes, and conditions. *People ex rel. Elder v. Sours*, 74 Pac. 167, 188, 31 Colo. 369, 102 Am. St. Rep. 34 (dissenting opinion).

The word "people," in Bill of Rights, § 4, providing "that people have the right to bear arms for their defense and security," refers to the people as a collective body. *City of Salina v. Blaksley*, 83 Pac. 619, 620, 72 Kan. 280, 3 L. R. A. (N. S.) 168, 115 Am. St. Rep. 196.

The word "people," as used in Const. art. 1, § 2, providing that all political powers are inherent in the people, means the aggregate or mass of the individuals who constitute the state. *Solon v. State*, 114 S. W. 349, 353, 54 Tex. Cr. R. 261.

### Citizen synonymous

The words "the people," as used in a constitutional sense, although as precise and comprehensive as "population," do not include all of the inhabitants of the state in its broadest sense. "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican constitutions, have the sovereignty and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty." If "the people" in a constitutional sense means "citizens," it is equally true that in a general sense "people" constitute "population." "People" is defined as "persons generally, an indefinite number of men and women, folks, population, or part of

population." The word "population" as used in Const. art. 6, § 20, forbidding a surrogate of any county having a population exceeding 120,000 to practice as an attorney in any court of record, includes only the citizens of the county and not aliens. In re *Silkman*, 94 N. Y. Supp. 1025, 1030, 88 App. Div. 102 (citing *Scott v. Sandford*, 19 How. [60 U. S.] 403, 15 L. Ed. 691; *Webst. Dict.*).

### Inhabitants

The word "people," in 23 St. at Large, p. 1199, § 14, providing that courts and officers of old counties should have full jurisdiction and power in and over the people of the territory within the limits of a new county taken from their respective old counties until officers should be elected and qualified in the new county, is, in a comprehensive sense, clearly intended to embrace the inhabitants of the territory with respect to their personal and property rights and liabilities, and also all personal and property rights and liabilities over which the courts of the several old counties would have had jurisdiction, and concerning which the officers of the several old counties would have had power to act before the new county was created. *Rushton v. Woodham*, 46 S. E. 943, 944, 68 S. C. 110.

### As state

See *State*.

### Voters

The word "people," in Acts 1909, p. 425, providing for the creation of a board of commissioners for a county, defining their duties, and declaring that the act shall not go into effect until ratified by the "people" of the county, means the qualified voters of the county. *Tolbert v. Long*, 67 S. E. 826, 828, 134 Ga. 292, 137 Am. St. Rep. 222.

## PEOPLE OF THE STATE

The phrase "the people of the state," in a contract "between the people of the state of New York, represented by the Board of Managers of the New York State Reformatory" and a convict labor contractor, is used to signify the people as a body politic or as a political entity called the "state," and not as meaning the people as the sovereign power in the state. *F. H. Mills Co. v. State*, 97 N. Y. Supp. 676, 677, 681, 110 App. Div. 843.

When the term "people of the state" is used to designate the beneficiaries of the trust in navigable waters, all the people who may choose to enjoy the same within the state are referred to, whether citizens of the state or persons who come within its territory for the purpose of enjoying such public rights. *Rossmiller v. State*, 89 N. W. 833, 844, 114 Wis. 169, 58 L. R. A. 93, 91 Am. St. Rep. 910.

## PEPPER

See *Pure Pepper*.

Unground pepper, see *Unground*.

**PER**

See *As Per*.

The word "per" means "by." *Johnson v. State (Tex.)* 99 S. W. 404, 405.

The term "per 100" in a contract for the sale of "500 sax Bayo, at \$3.50 per 100," meant that the sale was of 500 sacks of Bayou beans at \$3.50 per 100 pounds. *Gardiner v. McDonough*, 81 Pac. 964, 966, 147 Cal. 313.

**PER ACRE**

When one uses in a clause of admeasurement such words as "per acre," he ordinarily means an entire unit of the quantity designated and not a fractional interest therein, and, when he prefixes the phrase "at the rate of," such conclusion is strengthened. *Ward v. Foley*, 141 Fed. 364, 367, 72 C. C. A. 140.

**PER ANNUM**

See *Per Cent. Per Annum*.

The term "per annum," in a municipal bond providing for a payment of 5 per cent. "per annum," means annually, and the specified interest is payable annually. *Murphy v. City of San Luis Obispo (Cal.)* 48 Pac. 974, 976.

Civ. Code Alaska, § 255, fixing the rate of interest which may be agreed on, construed and held, that the words "per annum" are understood according to standard rules of grammar; that the section is not ambiguous. *Raymond v. Hemple*, 2 Alaska, 343.

In a contract between a city and a telephone company, whereby the company should not charge more than a certain amount "per annum" for a telephone in a party residence, the term "per annum" should be construed to designate the rate of charge, and not to imply that subscribers must make contracts on an annual basis. *Colorado Telephone Co. v. Fields*, 110 Pac. 571, 572, 15 N. M. 431, 30 L. R. A. (N. S.) 1088.

A statute prohibiting the making of loans, secured by mortgage or pledge, at a rate of interest greater than 12 per cent, without a license, is not vague and uncertain, and therefore void, in that it does not designate the period of time for which the charge over 12 per cent. is made unlawful; the words "per annum" or "for a year" being understood. *Commonwealth v. Morris*, 56 N. E. 896, 897, 176 Mass. 10.

**PER CAPITA**

As share, see *Share and Share Alike*.

Equally divided as creating division per capita, see *Equally Divided*.

**PER CURIAM**

A "per curiam" decision announces, in effect, that all the justices of the court are

of one mind regarding the same, and that the case is so clear as to render discussion thereof unnecessary. *Minor v. Pike*, 93 Pac. 264, 77 Kan. 806 (citing 6 Words and Phrases, p. 5285).

**PER DIEM**

As fees, see *Fees*.

**PER DOZEN**

When one uses in a clause of admeasurement such words as "per dozen," he ordinarily means an entire unit of the quantity or number designated, and not a fractional interest therein, and, when he prefixes the phrase "at the rate of," such conclusion is strengthened. *Ward v. Foley*, 141 Fed. 364, 367, 72 C. C. A. 140.

**PER POUND**

When one uses in a clause of admeasurement such words as "per pound," he ordinarily means an entire unit of the quantity or number designated, and not a fractional interest therein, and, when he prefixes the phrase "at the rate of," such conclusion is strengthened. *Ward v. Foley*, 141 Fed. 364, 367, 72 C. C. A. 140.

**PER SE**

See *Negligence Per Se*; *Nuisance Per Se*.  
*Libelous per se*, see *Libel*.

*Slander per se*, see *Slander*.

*Steal as actionable per se*, see *Steal*.

**PER STIRPES**

Equally divided as creating division per stirpes, see *Equally Divided*.

The expression "per stirpes" means to take by stock or through a common source, and when applied to estates signifies that the particular descendants shall take among themselves the share of their deceased parent. *Parish v. Mills (Tex.)* 102 S. W. 184, 188.

**PER TON**

When one uses in a clause of admeasurement such words as "per ton," he ordinarily means an entire unit of the quantity or number designated, and not a fractional interest therein, and, when he prefixes the phrase "at the rate of," such conclusion is strengthened. *Ward v. Foley*, 141 Fed. 364, 367, 72 C. C. A. 140.

**PER YEAR**

"The words 'per year' are equivalent to the word 'annually.'" In the absence of terms indicating a contrary intention, a covenant in a gas and oil lease to drill a well on the leased premises within two years, or thereafter to pay \$80 "annually", until a well is drilled, does not require the annual payments to be made in advance, and the covenant is performed by a single payment of the entire sum at any time before the end of the year for which it is made. *Rhodes v. Mound City Gas, Coal & Oil Co.*

104 Pac. 851, 852, 80 Kan. 702 (citing *Curtiss v. Howell*, 39 N. Y. 211, 213).

## PER CENT.

See *Five and One Per Cent.*

The apportionment of benefits by percentages held valid.

(a) The placing of the words "per cent." at the head of a column of decimal fractions, apportioning such decimal fractional part of the total benefits as is received by the specific tract opposite such decimal fraction to it, does not indicate that the tax to be calculated thereon shall be computed by taking such decimal fractional part of one per cent. of the entire cost of construction, but, instead, such decimal fractional part of the entire cost. The words "per cent." as so used mean the decimal fractional part or share by decimal part or percentage of the whole. Such schedule of apportionment of benefits by decimal fractional part or percentage thereof will be calculated under the usual interpretation instead of by a strained construction. *Hackney v. Elliott*, 137 N. W. 433, 439, 23 N. D. 373.

## PER CENT. OFF FOR CASH

The words "six per cent. off for cash," as used in a bill of sale, are equivocal in character, and in such a case it is competent to prove to the jury how they are understood by a custom or usage among men engaged in the same class of trade with the plaintiff. *Linsley v. Lovely*, 26 Vt. 122, 137.

## PER CENT. PER ANNUM

The words "interest," "rate," and "per cent. per annum" as applied to compensation for the use of money have a fixed and settled meaning in law, and a creditor is required to account for all payments as of the date when received, and if such payments exceed the interest, then earned, they operate to reduce the principal debt by the amount of the excess and in the same proportion reduce the burden of interest thereafter accruing. *Iowa Deposit & Loan Co. v. Matthews*, 102 N. W. 817, 820, 126 Iowa, 743.

## PERAMBULATION

See *Writ of Perambulation.*

## PERCENTAGE

A statute authorizing a city to order any improvements and charge the "cost to abutting property when it does not exceed 50 per cent. of the real estate valuation, exclusive of improvements, within the proposed improvement district, and providing that this limit may be exceeded when any improvement shall be petitioned for by three-fourths of the property owners to be assessed, and when such petition specifies not to exceed a certain higher "percentage," places no limit on the

value of the improvements when petitioned by property owners, except that specified in the petition, and the use of the word "percentage" did not limit the assessment to a fractional part of the valuation. *James v. City of Seattle*, 95 Pac. 273, 276, 49 Wash. 347.

## PERCOLATE—PERCOLATION

Movement of water underground through sand and gravel constitutes "percolation." *Katz v. Walkinshaw*, 74 Pac. 766, 768, 141 Cal. 116, 64 L. R. A. 236, 99 Am. St. Rep. 85.

## PERCOLATING WATERS

There will always be great difficulty in fixing a line beyond which the water in the sands and gravel over which a stream flows and which supply and uphold the stream ceases to be a part thereof and becomes what is called "percolating water." *Hudson v. Dailey*, 105 Pac. 748, 753, 156 Cal. 617.

"Percolating waters" may either be rain waters which are slowly infiltrating through the soil, or they may be waters seeping through the banks or bed of a stream, which have so far left the bed and other waters as to have lost their character as part of the flow. *Montecito Valley Water Co. v. City of Santa Barbara*, 77 Pac. 1113, 1116, 144 Cal. 578 (citing *Vineland Irr. Dist. v. Azusa Irr. Co.*, 58 Pac. 1057, 126 Cal. 486, 46 L. R. A. 820).

"Percolating waters," in the common-law sense of the term, are those that are vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance. The term does not include waters percolating only in the sense that they form a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet in conformity with the physical laws to attain a uniform level. *City of Los Angeles v. Hunter*, 105 Pac. 755, 757, 156 Cal. 603.

"Percolating waters" are such as come or percolate through the earth. Underground waters are presumed to be percolating waters until it is shown that they exist in a known and well-defined channel. *Pence v. Carney*, 52 S. E. 702, 704, 58 W. Va. 296, 112 Am. St. Rep. 963, 6 L. R. A. (N. S.) 266 (citing *Boyc v. Cupper*, 61 Pac. 642, 37 Or. 256).

Waters passing through the sand and gravel constituting the bed of a stream and the lands so nearly adjacent that the only and natural outlet would be through such channel are not "percolating waters," but are a part of the waters of the stream. *Buckers Irr. Mill & Imp. Co. v. Farmers' Independent Ditch Co.*, 72 Pac. 49, 52, 31 Colo. 62.

"In the absence of statutory regulations or private agreements, all waters are, in contemplation of law, regarded as either 'flowing' or 'percolating.' The former consists of

those bodies, such as lakes, ponds, and streams, which are upon or beneath the surface of the earth, and whose boundaries and course are well defined and reasonably ascertainable, and whose existence is not of a temporary or ephemeral character. As to these the owner of land has no title. His right to use or divert is measured by its reasonableness and limited to the premises along, through, or over which the waters flow. The reason for this rule is found in the fact that all such riparian owners have rights therein, and one may not unreasonably interfere with another. All waters, not within the above description of 'flowing waters,' are deemed 'percolating.' They are so regarded because, practically, they constitute themselves parts of the substances in which they exist or through which they pass. When found in land, they may not be distinguished in law from the land. They are a part of the same, and the owner of the land is the absolute owner. He may use them where and in such manner as he chooses or dispose of them to others for like use. He is subject only to the general limitation, which has application to all ownership of property, that in its acquisition and enjoyment he may not unreasonably injure or interfere with the rights of others." *Hathorn v. Dr. Strong's Saratoga Springs Sanitarium*, 106 N. Y. Supp. 553, 554, 55 Misc. Rep. 445.

## PEREMPTORY

### PEREMPTORY CHALLENGE

"Peremptory challenges" to jurors is not the right to select jurors but to reject. *Nicholson v. People*, 71 Pac. 877, 879, 31 Colo. 58.

A "peremptory challenge" is an objection to an individual juror for which no reason need be given. *State v. Ju Nun*, 97 Pac. 96, 98, 53 Or. 1 (citing B. & C. Comp. § 118).

A "peremptory challenge" is not one for cause. It is one which the law in its humanity gives to an accused, to be exercised by him without giving or being able to give any reason why the juror should not serve. This challenge excludes a juror on what may be merely the whim of the accused; so great is the law's concern that he shall be tried only by those against whom he does not have even a capricious prejudice. *Commonwealth v. Evans*, 61 Atl. 989, 212 Pa. 369.

### PEREMPTORY EXCEPTION

"Peremptory exceptions," founded on law, are those which, without going to the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished." *Labarre v. Burton-Swartz Cypress Co.*, 53 South. 113, 116, 126 La. 962 (quoting and adopting definition in *Cross*, Plead. p. 156).

## PERFECT

Under Comp. Laws 1897, §§ 10000, 10083, providing that one arrested on a capias shall be entitled to his discharge on executing a bond and perfecting such bail according to the rules and practice of the court, etc., bail is not "perfected" when the sureties justify by affidavit without notice and without allowance, and the statute recognizes the right of the court to make rules regulating the manner of perfecting bail and makes it the duty of defendant to comply with such rules. *Ludwick v. Kent Circuit Judge*, 101 N. W. 66, 67, 138 Mich. 106.

Under Code Civ. Proc. § 569 (Gen. St. 1909, § 6164), an appeal is "perfected" so as to give the Supreme Court jurisdiction when notice of appeal with proof of service has been filed with the clerk of the trial court, and failure of such clerk to send up the papers until after a year from the judgment or order appealed from will not defeat the court's jurisdiction or prejudice appellant. *Schmuck v. Missouri, K. & T. Ry. Co.*, 116 Pac. 818, 85 Kan. 447.

Act March 26, 1903, provides that any persons aggrieved by judgment assessing damages for the grading of a highway may appeal by filing an affidavit as required in civil cases, but that the appeal shall be "perfected" within 30 days from the rendition of judgment on the verdict or report. Held, that an appeal was not "perfected" by the filing of appellant's affidavit for appeal and the granting thereof by the trial court, and hence, where no bill of exceptions was filed within the 80 days specified, the Supreme Court has no jurisdiction to consider the appeal. *Grading Bledsoe Hill, Buchanan County v. Bledsoe*, 120 S. W. 1184, 1186, 222 Mo. 604.

"Where a gift *inter vivos* has been 'perfected' (that is, where nothing more is to be done to vest title in the donee), such gift can be no more revoked by the donor than a sale or any other executed contract." Hence plaintiff, having given all his property to the head of a religious sect absolutely and without reservation as a freewill offering to the Lord, expecting that it would be used for the advancement of the sect and that he would be given a home and cared for at the home of the community, cannot revoke the gift as falling within the rule authorizing revocation of gifts induced by spiritualistic meetings. *Williams v. Johnston*, 104 S. W. 789, 791, 84 Ark. 109 (quoting and adopting definition in 20 Cyc. p. 1212).

### PERFECT AND EFFECTIVE PATENT

A patent under the public land laws of the United States becomes a "perfect and effective patent" when it is executed and is recorded in the office of the recorder of the General Land Office at Washington, and no further act is essential to pass title. *Lonsbaugh v. United States*, 179 Fed. 476, 480,

108 C. C. A. 56 (quoting and adopting definition in *United States ex rel. McBride v. Schurz*, 102 U. S. 378, 26 L. Ed. 167).

### PERFECT AND SATISFACTORY TITLE

See, also, Perfect Title.

The term "perfect and satisfactory title," as used in a contract for the sale of land, is such a title as is free from grave and reasonable objections, and such title as would satisfy a person of ordinary prudence who is capable of passing upon the title. *Smith v. Lander (Tex.)* 106 S. W. 703, 704.

### PERFECT CONDITION

The amount the lessor is entitled to recover of the lessee for noncompliance with the provision of the lease to turn over machinery, at the end of the term, in "perfect condition" is not what it will cost to repair a broken engine shaft, where it cannot be repaired so as to be as good as before broken, but the cost of a new shaft. *Peper v. St. Louis Brass Mfg. Co.*, 123 S. W. 1012, 1015, 146 Mo. App. 187.

### PERFECT GRANT

There is a "perfect grant" of public lands where absolute title takes effect in present. *Sena v. American Turquoise Co.*, 98 Pac. 170, 171, 14 N. M. 511.

### PERFECT INSTRUMENT

Instruments are said to become "perfect" on registration being had or on noting for registration, because they are then good as to all the world from that time. *Wilkins v. McCorkle*, 80 S. W. 834, 837, 112 Tenn. 688.

### PERFECT OWNERSHIP

Ownership is "perfect" when it is perpetual. Where a claim against a city was assigned to a person in payment of a debt due him, and on further condition and consideration that he should devote the balance to be collected pro tanto to the payment of the debts due to the assignor's other creditors in whose favor to that extent such person bound himself by written contracts, as to such proportion of the claim as was needed to pay the debt due to such person his ownership was perfect, being perpetual and unincumbered by conditions. *Sintes v. Commerford*, 86 South. 656, 659, 112 La. 706.

### PERFECT PATENT

See Perfect and Effective Patent.

### PERFECT SATISFACTION

A contractor, agreeing to remodel houses to the "perfect satisfaction" of the owner, must perform the work in such a manner that the owner, acting as a reasonable man under the circumstances, must be satisfied with it. *Tobin v. Kells*, 93 N. E. 596, 597, 207 Mass. 804.

### PERFECT TITLE

See Good and Perfect Title; Perfect and Satisfactory Title.

"A 'perfect title' is one which shows the absolute right of possession and of property in a particular person." *Henderson v. Beatty*, 99 N. W. 714, 718, 124 Iowa, 163 (citing *Wilcox Lumber Co. v. Bullock*, 35 S. E. 52, 109 Ga. 532).

It is settled in this state that, where the contract of sale calls for a "perfect title," the purchaser may insist upon a "good title of record." *Gwin v. Calegaris*, 73 Pac. 851, 852, 139 Cal. 384 (quoting and adopting definition in *Turner v. McDonald*, 18 Pac. 262, 76 Cal. 177, 9 Am. St. Rep. 189; *Benson v. Shotwell*, 25 Pac. 249, 87 Cal. 49; *Sheehy v. Miles*, 28 Pac. 1046, 93 Cal. 288).

#### As good both in law and equity

A perfect title is one free from litigation, palpable defects, and grave doubts, and consists of both legal and equitable title fairly deductible of record. *Campbell v. Harsh*, 122 Pac. 127, 129, 81 Okl. 486.

#### As good and valid beyond reasonable doubt

A "perfect title" is one that is good and valid beyond reasonable doubt. *Dobson v. Zimmerman*, 118 S. W. 236, 240, 55 Tex. Civ. App. 394 (citing *Reynolds v. Borel*, 25 Pac. 67, 86 Cal. 538; *Sheehy v. Miles*, 28 Pac. 1047, 93 Cal. 288); *Henderson v. Beatty*, 99 N. W. 716, 718, 124 Iowa, 163 (citing *Turner v. McDonald*, 18 Pac. 262, 76 Cal. 177, 9 Am. St. Rep. 245).

#### As merchantable or marketable title

A "perfect title" is one that is merchantable or marketable. *Dobson v. Zimmerman*, 118 S. W. 237, 240, 55 Tex. Civ. App. 394 (citing *McClearly v. Chipman*, 68 N. E. 320, 32 Ind. App. 489; *Ross v. Smiley*, 70 Pac. 766, 18 Colo. App. 204; *Birge v. Bock*, 44 Mo. App. 69).

### PERFECTLY GOOD

The term "perfectly good," as applied to a note, is tantamount to saying that the maker is responsible. *Weeks v. Burton*, 7 Vt. 67, 69, 70.

### PERFECTLY PURE

A company sold defendants tobacco to be paid for in "No. 1. ground Angostura tonka beans," and in a letter stated, "Understand we want the best article and 'perfectly pure.'" Various quantities of apparently unadulterated ground beans were furnished; the company not knowing that they were adulterated. The company's receiver notified defendants that they would be released from the cost of grinding the beans remaining undelivered, and that only unground ones would be accepted. Held, that the contract required defendants to deliver pure, unadulterated ground tonka beans, and that an adulteration



containing 85 per cent. barytes and exhausted ginger was not a compliance with the contract, and authorized the receiver to stop the grinding and refuse the adulterated product tendered. *Neal & Binford v. Taylor*, 56 S. E. 580, 592, 106 Va. 651.

## PERFORM

See Being Performed; Do and Perform.

A count in a complaint, alleging that plaintiff duly discharged all his duties under a contract and has performed all the conditions of such agreement on his part to be performed, etc., is sufficient, and states a cause of action, as it alleges in effect that plaintiff "performed" all conditions that were to be performed—that is, fulfilled—by him, since one does not undertake to perform conditions. *Wertheim v. Maintenance Co.*, 119 N. Y. Supp. 909, 910, 185 App. Div. 760.

Under Civ. Code Prac. § 72, which provides that suit against a corporation must be brought in the county in which its office or place of business is situated or its chief officer or agent resides, or, if the suit be on a contract, in such county or in the county where the contract is made or is to be performed, suit on a contract does not lie in a county where it is to be only partly performed, if the corporation has no office, place of business, chief officer, or agent there; the word "performed" as used in the statute being properly understood in its ordinary sense as "carry through," "execute," "accomplish," "make complete," or "perfect." *Job Iron & Steel Co. v. Clark*, 150 S. W. 367, 369, 150 Ky. 246.

### Mechanic's Lien

The words "every person who shall perform labor," as used in B. & C. Comp. § 5668, as amended by Laws 1907, p. 294, providing that "every person who shall perform labor" about a mine shall have a lien, etc., applies to ordinary laborers who perform actual, visible toil with their hands or muscles, other kinds of service not being expressly mentioned, and does not embrace superintendents or managers. *Durkheimer v. Copperopolis Copper Co.*, 104 Pac. 895, 896, 55 Or. 37.

### Statute of frauds

A contract guaranteeing the condition of a roof for five years was not an agreement which by its terms was not to be performed within a year from the making thereof within the statute of frauds. *Philip Carey Mfg. Co. v. Southern Const.*, 56 South. 746, 747, 2 Ala. App. 292.

A contract, employing a physician to remain with a lumber company at a certain place, until it "cut out" certain timber, and reciting that the company would be there only about two years, expressed a contingency, which might have happened within one year, and the contract thereby be fully per-

formed, and so was not obnoxious to the statute of frauds, requiring contracts to be "performed within one year" to be in writing. *Texarkana Lumber Co. v. Lennard*, 104 S. W. 506, 507, 47 Tex. Civ. App. 116.

The word "performance," within the statute of frauds, providing that an agreement which cannot be performed within one year from the date of making it must be in writing, means complete and full performance according to the terms of the agreement, and an agreement fixing a definite period for performance to continue to a date more than one year from the making of the agreement is within the statute, and an agreement which cannot be performed in one year, though it may be performed in one year from the time performance is to begin, is also within the statute. *Blest v. Ver Steeg Shoe Co.*, 70 S. W. 1081, 1086, 97 Mo. App. 187.

## PERFORMANCE

See Part Performance; Specific Performance; Substantial Performance.

"Performance" means the doing or completing of an act. *Knudtson v. Robinson*, 118 N. W. 1051, 1053, 18 N. D. 12.

"Performance" is, as the term implies, such a thorough fulfillment of a duty as puts an end to obligations by leaving nothing more to be done." *McGuire v. J. Nells Lumber Co.*, 107 N. W. 180, 182, 97 Minn. 293 (quoting and adopting definition in *Hare*, Cont. 569).

## PERFORMANCE OF DUTY

See Die in Performance of Duty.

## PERFORMANCE OF THE WHOLE WORK

Where contractors agreed to make all the improvements and repairs and alterations that the owner of a building would need in the future at the regular price, the net price, adding 10 per cent. to the regular price of days' work and ordinary pay for material, and from time to time when work was ordered it was performed, each performance being individual, the only thing agreed upon being the price to be paid, this was not an agreement for the "performance of the whole work." in the sense in which that phrase is currently used in connection with building contracts. *Fitzpatrick v. Ernst*, 113 N. W. 4, 5, 102 Minn. 195.

## PERFORMING

"Performing on a musical instrument" does not consist only in the playing on it in a common way, or fingering the keyboard of a piano, or the strings of a guitar, drawing the bow of a violin across the strings, or breathing into a horn. *Rev. St. 1899, § 3018* (Ann. St. 1906, p. 1729), forbids a dramshop keeper to keep, exhibit, or use, or suffer to be kept, exhibited, or used in his dramshop, a piano, organ, or other musical instrument

whatever, "for the purpose of performing upon or having the same performed upon in such dramshop." Held that, while a Regina Concerto, which is a musical machine set playing by dropping a coin in a slot, and thereby releasing the spring setting the machinery in motion, is a musical instrument, and winding it up and dropping a coin in the slot constitutes performing on it, it is not such a musical instrument as the Legislature meant to designate in the statute, which meant the keeping of an instrument with the intention of the dramshop keeper to perform on it himself or engaging some one else to do so; the word "having" in the phrase "having the same performed on" not being synonymous with "permitting," but importing making an arrangement to have an act done. *Thiebes-Stierlin Music Co. v. Weiss*, 121 S. W. 1099, 1101, 142 Mo. App. 598.

## PERIL

See *Discovered Peril*; *Specially Excepted Peril*.

## PERILS OF THE SEA

By "dangers of the sea" is meant those accidents peculiar to navigation which are of an external nature and arise from irresistible force or overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. *Tuckerman v. Stephens & C. Transp. Co.*, 32 N. J. Law, 320, 323; *Stephens & C. Transp. Co. v. Tuckerman, Milligan & Co.*, 33 N. J. Law, 543, 551.

By the words "dangers of the sea," in a bill of lading, are meant no other than inevitable perils, or accidents upon that element; and, by such perils or accidents, common carriers are prima facie excused, whether there is any express exception or not. *Fergusson et al. v. Brent*, 12 Md. 9, 33, 71 Am. Dec. 582 (citing *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235).

"The phrase 'danger of the seas,' whether understood in its most limited sense as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." *The Ninfia*, 156 Fed. 512, 522 (quoting and adopting definition in *The Reeside*, 20 Fed. Cas. 458, 2 Sumn. 567).

"Dangers of navigation" or "perils of the sea," as used in bills of lading or concerning shipping, mean only those dangers which are inevitable, and do not excuse the vessel from liability for loss caused by negligence. *Pettyjohn v. Oregon Coal & Navigation Co.*, 113 Pac. 438, 440, 58 Or. 392.

The expression "peril of the sea" has sometimes been used as equivalent to peril on the sea, and the distress or danger from which a vessel has been saved need not, to justify a recovery of salvage compensation, have arisen solely by reason of a "peril of the sea," in the strict legal acceptation of the words. *Simmons v. The Jefferson*, 39 Sup. Ct. 54, 57, 215 U. S. 130, 54 L. Ed. 125, 17 Ann. Cas. 907.

"Tempests and rough weather are common incidents in sea transit. How long a voyage may continue is beyond the power of prophecy to foretell at the inception of it. Fair winds may serve, or head winds may drive the vessel off her course. The voyage policy continues until the port of discharge shall have been reached, and, if upon goods, until they may have been safely landed. If the goods be of a perishable nature, and decay from a protracted voyage before they can be landed, the loss would not be from a 'peril of the sea.' If the cargo be shaken and stove from the inherent weakness of the packages, unsuited to withstand the roughness of sea transit, or caused by the effect of their contents during the voyage, it would not be from a sea peril, but from natural causes produced either by the fault of the shipper, or by the inherent nature of the goods. The condition of the cargo when landed does not raise the inference that its injury resulted from a sea peril, but the burden rests upon the plaintiff to prove the fact. The general rule is that everything which happens through the inherent vice of the thing, or by the act of the owners, master, or merchant shipper, shall not be reputed a peril, if not otherwise borne on the policy. If the inherent vice be stimulated by a protracted voyage, it is still no loss from a peril of the sea. It is not always easy to mark the line between the ordinary operation of the elements and their perilous action. The latter must be the proximate cause of the loss. Lord Bacon's reason is: 'It were infinite for the law to consider the causes of causes, and their impulsions one on another. Therefore it contenteth itself with the immediate cause.'" *Perry v. Cobb*, 34 Atl. 278, 280, 281, 88 Me. 435, 49 L. R. A. 389 (citing *Emerig. Ins.* 290; *Providence Washington Ins. Co. v. Adler*, 4 Atl. 121, 65 Md. 162, 57 Am. Rep. 314; *Baker v. Manufacturers' Ins. Co.*, 12 Gray [78 Mass.] 603; *Cory v. Boylston Fire & Marine Ins. Co.*, 107 Mass. 140, 9 Am. Rep. 14; *Gow, Ins.* §§ 92, 137).

### Act of God

"Perils of the sea" is sometimes construed as equivalent to an act of God, but it has grown to have a wider significance, and the expression is generally construed to denote those accidents at sea peculiar to navigation arising from irresistible forces or overwhelming power which do not happen by the intervention of man, and cannot be guarded

against by the ordinary exertions of human skill and prudence." *Cook v. Southeastern Lime & Cement Co.*, 146 Fed. 101, 102.

#### Fire

Loss of goods by fire upon shipboard is not included within an exception in a bill of lading exempting from liability for loss by "perils of the sea." *Jennings v. Clyde S. S. Co.*, 133 N. Y. Supp. 298, 301, 148 App. Div. 615; *Seacoast Lumber Co. v. Same*, 133 N. Y. Supp. 303, 148 App. Div. 622.

#### Jettison

If the jettison of cargo or damage thereto is rendered necessary by or due to any fault or breach of contract on the part of the owner or master of the vessel, the loss must be attributed to that cause, rather than to the "sea peril," although that may enter into the case. *Corsar v. J. D. Spreckels & Bros. Co.*, 141 Fed. 260, 262, 72 C. C. A. 378.

#### Negligent stowage of cargo

The phrases "dangers of the sea" and "dangers of navigation" and "perils of the seas" do not indicate any different intent, as used in exceptions in bills of lading, and all are treated as convertible terms. The exception, however, does not embrace losses flowing from culpable or negligent stowage of cargo or other improper acts of the master which are proximate causes of loss. *Baxter v. Leland*, 2 Fed. Cas. 1048, 1050, 1 Abb. Adm. 348.

#### Stress of weather

Rough seas, although not extraordinary, are sea perils, and, if sufficient to account for damage to cargo properly stowed, the loss is within the exception of such perils in bills of lading. *The Newport News*, 190 Fed. 968, 971.

The term "dangers of the sea," as used in a bill of lading, means those accidents peculiar to navigation that are of an extraordinary nature or arise from irresistible force or overwhelming power which cannot be guarded against by the ordinary exercise of human skill and prudence; the foundering of a vessel in a storm is nothing of an extraordinary nature, and, to establish the exception, the carrier must go further and prove that the particular storm was of such irresistible force and overwhelming power as that it could not have been guarded against by the ordinary exercise of human skill and prudence. *Tuckerman v. Stephens & C. Transp. Co.*, 32 N. J. 320, 323.

"Perils of the sea" is sometimes construed as equivalent to an act of God, but it has grown to have a wider signification, and the expression is generally construed to denote those accidents at sea peculiar to navigation arising from irresistible forces or overwhelming power which do not happen by the intervention of man, and cannot be guarded against by the ordinary exertions of hu-

man skill and prudence. Any loss which might have been avoided by the exercise of reasonable skill or diligence, at the time when it occurred, is not deemed such a loss by the 'perils of the sea' as will exempt the carrier from liability; but a loss from the effect of storms and tempests and straining the ship or causing her to leak, whereby damage is done to the goods, may be well attributed to the 'perils of the sea,' although in one sense they may be ordinary accidents. Where it is shown that a wooden vessel was seaworthy at the inception of her voyage, that the cargo was properly stowed and protected, that she was properly provided with pumps and the same were properly worked, that her hatches were properly secured, and that she encountered on her voyage heavy seas of unusual violence adequate to strain her seams and cause her to take in an unusual quantity of water, damage to her cargo therefrom, which it is not shown could have been avoided by the exercise of ordinary skill and care, is within the exception of 'dangers of the sea,' in the bill of lading, for which she is not liable." *Cook v. Southeastern Lime & Cement Co.*, 146 Fed. 101, 102.

#### Wetting of cargo

"The words 'perils of the seas' embrace all kinds of marine casualties, such as shipwreck, foundering, stranding, etc., and every species of danger done to the ship or goods at sea by the violent and immediate action of the wind and waves, not comprehended in the ordinary wear and tear of the voyage, or directly referable to the acts and negligence of the assured as its proximate cause." The iron ship *Ninfa*, 20 years old, was purchased, and soon thereafter chartered by the new owner to carry a cargo of cement from London to the ports of Los Angeles, Cal., and Portland, Or. At the time of the sale, she was examined cursorily by agents of the purchasers, one of whom tested the deck somewhat with a hammer and a small knife, but no thorough inspection was made. In the north Atlantic she encountered rough weather for several days, during which the seas washed over her decks, and at the end of that time it was found that there was a considerable quantity of water in the hold, which was pumped out. Such water admittedly entered through her deck seams, which were open in places and were partially calked by the master before reaching Portland. The weather encountered was no worse than might have been anticipated, and the ship during the most of the time did not greatly shorten sail and did not suffer material injury. On reaching port the cargo was found to have been seriously damaged by water; the cement in the lower tier of barrels being completely solidified. Held, that the damage was not due to "perils of the sea," in a legal sense, but to the unseaworthiness of the ship, and that the owners did not exercise due diligence in

inspection and to make her seaworthy before the commencement of the voyage, such as to relieve the ship from liability. *The Nina*, 156 Fed. 512, 522 (quoting and adopting definition in *Tuckerman v. Stephens & C. Transp. Co.*, 32 N. J. Law, 320).

"'Dangers of the seas,' whether understood, in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood, in its most extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." A failure to discover and repair the rent in the "mast coat" broken in the night, and not discovered or repaired until 4 p. m. the next day, stowing salt over iron and anvils, and stowing iron crates and salt around the mast, without leaving space for water that might come through the mast coat to pass down without coming in contact with the cargo, caused a loss which was not to be attributed to dangers or "perils of the sea." *The Nith*, 86 Fed. 86, 95, 96.

## PERIOD

See Continuous Period; Limited Period.  
Such period, see Such.

### As continuous period

The word "period," as used in Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1415, which prohibits a carrier to require or permit any employé subject to the act to remain on duty for a longer period than 16 consecutive hours, and requires that after an employé has been continuously on duty for 16 hours he shall be relieved, and not permitted to go on duty again until he has had at least 10 consecutive hours off duty, and that no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be permitted to continue or again go on duty without having had at least 8 consecutive hours off duty, provided that no operator, train dispatcher, or other employé dispatching train orders shall be permitted to remain on duty for a longer period than 9 hours in any 24-hour period at stations continuously operated night and day, or for more than 13 hours in stations operated only in the daytime, did not mean a continuous cycle of time without intermission, and hence the fact that a telegraph operator employed by a carrier went on duty at 6:30 a. m. and worked until 12 m., was then given an intermission until 3 p. m., and then worked until 6:30 p. m., making in all 9 hours' actual service, but 12 hours from the beginning to the end, did not constitute a violation of the act. Train dispatchers, being "employés," are within the

protection of the main part of the section giving to all employés "at least eight consecutive hours off duty" in each day, counting from some point in the next day, so that it would be impossible for carriers to require of them short service periods spread over the entire 24 hours, giving no opportunity for real recuperation. *Atchison, T. & S. F. R. Co. v. United States*, 177 Fed. 114, 118, 100 C. C. A. 534.

## PERIOD OF GESTATION

The "period of gestation" may be safely stated as a general proposition at from 252 to 285 days. "Allowing the greatest latitude of inquiry, I think it should be confined to a period of time between the lowest period of time above stated and that of 300 days before the birth of the child." *Soucek v. Karr*, 111 N. W. 150, 151, 78 Neb. 488 (quoting and adopting definition in *Masters v. Marsh*, 27 N. W. 438, 19 Neb. 458).

## PERIOD OF IMPRISONMENT

The term "period of imprisonment," as used in Laning's Rev. St. § 11,197, means the term of the sentence less the time deducted for good conduct. In re *Bailus*, 29 Ohio Cir. Ct. R. 632.

## PERIODIC TENANCY

While the reservation or payment of rent at stated periods of a year or month is, in the absence of express agreement, the principal criterion to determine the duration of the successive terms of a periodic tenancy, yet, if the basic period is a shorter one than a year, the holding over creates a "periodic tenancy," not from year to year, but for a recurring period fixed by the express or implied terms of the parties. Where a lease expressly reserves a monthly rent, and the tenant holds over after the first month with the landlord's consent, the tenancy becomes a "periodic" one, in which the basic or recurring period is a month. A lease reserving a rent of \$60 per month for each month of occupancy prior to July 1, 1909, and \$75 for each subsequent month, but containing no agreement as to the time of termination of the lease, was a lease from month to month, though the tenant had the option of converting his tenancy into one for a five-year term. *Wall v. Stimpson*, 76 Atl. 513, 514, 83 Conn. 407.

## PERIODICALS

A German "periodical" published weekly and forwarded to subscribers as soon as published, each number including several serial or continued stories, to which were appended several short articles on other subjects of a miscellaneous character, including a few humorous anecdotes, is not classifiable for duty under the Tariff Act as a "book": the term "book" as so used being considered a complete book. *Schmidt v. United States*, 150 Fed. 238, 239.

Although a publication complies formally with the conditions of Act Cong. March 3, 1879, c. 180, § 14, it will not be entitled to second-class postage rates, unless, as required by section 10, it is a "periodical publication," which means that it shall not only have the feature of periodicity, but shall be a periodical in the ordinary sense of the term. *United States ex rel. Reinoch v. Cortelyou*, 28 App. D. C. 570, 575, 12 L. R. A. (N. S.) 166.

The refusal by the Postmaster General to admit to the mails, as a "periodical publication" entitled to second-class rates, a monthly musical publication, each issue of which is complete in itself, treating of the works of a single master musician, with a greater portion of its pages devoted to specimens of his genius, is not so clearly an erroneous exercise of his discretion as to call for interference by the courts. *Bates & Guild Co. v. Payne*, 24 Sup. Ct. 595, 596, 194 U. S. 106, 48 L. Ed. 894.

"A 'periodical,' as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature, or some special branch of learning, or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel, or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects. A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential), but, in fact, that it ordinarily contains a story, essay, or poem, or a collection of such by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character." Books complete in themselves are not, because published at stated intervals and in consecutive numbers, "periodical publications," within Act March 3, 1879, c. 180, § 10, 20 Stat. 359, declaring that mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals. *Houghton v. Payne*, 24 Sup. Ct. 590, 592, 194 U. S. 88, 48 L. Ed. 888.

Books, being expressly embraced in mail matter of the third class by the act of March 3, 1879, § 17, cannot be removed from that class and given the benefit of second-class postal rates accorded by section 14 to periodical publications, by the simple device of publishing them in a series, at regular intervals of time, whether such publications be reprints of well-known works or new matter. Weekly 32-page publications, each containing a single story, complete in itself, which are generally by the same author, and carry the same character through the series, and leave the reader to expect further tales, but which contain nothing else except a roll of honor, some laudatory letters with insignificant comment, and a page or two containing answers to inquiries, are not "periodical publications" entitled to second-class postal rates, under the act of March 3, 1879, § 14, but are "books," which, by section 17, take the higher third-class rate. *Smith v. Hitchcock*, 33 Sup. Ct. 6, 8, 226 U. S. 53, 57 L. Ed. 109.

## PERIPHERY

By "periphery" generally is meant the outside or superficial part of a body. When applied to a sphere, it is of course the whole of the exterior surface. When applied to a disk, it means, we think, unless a larger meaning is implied, the outer edge of the disk. *Motsinger Device Mfg. Co. v. Hendricks Novelty Co.*, 149 Fed. 995, 998, 79 C. O. A. 505.

## PERISHABLE PROPERTY

### Corn

Corn is "perishable freight," within Ky. St. 1903, § 785, authorizing a carrier having unclaimed freight not perishable in its possession for one year to sell the same at public auction, on giving notice to the consignor and consignee, etc., and to sell perishable freight as soon as it deems a sale necessary, on giving similar notice thereof, and to retain out of the proceeds the expenses of transportation, storage, advertisement, sale, etc. *Chesapeake & O. Ry. Co. v. Saulsberry*, 103 S. W. 254-255, 126 Ky. 179.

## PERJURY

See Subornation of Perjury.

See, also, Attempt at Subornation; False Oath; False Swearing.

Etymologically, the signification of the word "perjury" is the false swearing upon oath lawfully administered in some judicial proceeding. *United States v. Howard*, 132 Fed. 325, 338 (citing *Worcester Dict.*; 2 *Bouv. Dict. tit. "Perjury"*).

The offense of "perjury" is committed when a lawful oath is administered in some judicial proceeding or in due course of justice to a person who swears willfully, absolutely, and falsely in a matter material to

the issue or point in question. *State v. Rash* (Del.) 78 Atl. 405, 406, 2 Boyce, 77; *State v. Thomas* (Del.) 78 Atl. 640, 641, 2 Boyce, 20.

"Perjury" is an offense at common law, and consists of willfully, absolutely, and falsely swearing to a material matter in issue, where a lawful oath was administered in a judicial proceeding or in due course of justice. *State v. Shaffner* (Del.) 69 Atl. 1004, 1005, 6 Pennewill, 576.

The elements of the crime of "perjury" to be alleged and proved are a judicial proceeding or course of justice; the swearing of defendant to give evidence therein; his testimony; its falsity; and its materiality to the issue or point of inquiry. *People v. Tatum*, 112 N. Y. Supp. 36, 38, 60 Misc. Rep. 311.

The essential features of "perjury" at common law are the willful making, when under oath in a judicial proceeding or court of justice, of a false statement material to the issue or point of inquiry. The offense consists in the swearing falsely and corruptly and not through mistake. *State v. Mercer*, 61 Atl. 220, 221, 101 Md. 535.

False testimony circumstantially material, or supporting or giving credit to a witness, or discrediting him with respect to the main facts in issue, is "perjury." *People v. Collins*, 92 Pac. 513, 516, 6 Cal. App. 492.

"Perjury" is committed when a lawful oath is administered in some judicial proceeding or due course of justice to a person who swears willfully, absolutely, and falsely to a matter immediately in issue or to a material circumstance having a legitimate tendency to prove or disprove the fact immediately in issue. *State v. Cline*, 64 S. E. 591, 592, 150 N. C. 854.

To constitute "perjury," the party charged must take an oath before some competent tribunal or officer that he will testify, declare, depose, or certify truly that his written testimony, declaration, or certificate by him subscribed was true, when in fact some material matter so testified, declared, or certified by him was false and untrue, and known by him at the time of taking such oath to have been false and untrue. *United States v. Richards*, 149 Fed. 443, 449.

"Perjury" is the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath, or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. *Herring v. State*, 46 S. E. 876, 879, 119 Ga. 709 (quoting Whart. Cr. Law).

A defendant on trial for crime, falsely testifying in response to questions on cross-examination for the purpose of impeachment by showing an inconsistent statement made to a third person, is guilty of "perjury," though the impeaching questions did not specify the time and place of the making of the statement, so that he might have refused to answer them. *State v. Carey*, 65 N. E. 527, 528, 159 Ind. 504.

"Perjury" may be committed in the giving of a deposition which, by reason of some informality, would have prevented its reception in evidence if it had been offered at the trial. *State v. Woolridge*, 78 Pac. 333, 336, 45 Or. 389 (citing *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196).

"Perjury" cannot be assigned on the construction by a witness of a written or oral contract, or a modification of such contract, where it is not alleged that accused has denied that he made any certain statements, or that he in terms promised to do any certain thing. *Schoenfeld v. State*, 119 S. W. 101, 104, 56 Tex. Cr. R. 103, 22 L. R. A. (N. S.) 1216, 133 Am. St. Rep. 956.

"Perjury" is the willful giving, under oath, in a judicial proceeding or in the course of justice, of false testimony material to the issue. An indictment alleging that accused, after being duly sworn by a justice of the peace to testify the truth on the examining trial of accused and others charged with murder, then pending before the justice, who had authority to administer such oath, unlawfully, willfully, etc., testified that he did not at a certain time and place have a certain conversation with deceased, when in fact accused had such conversation, and that his testimony so given was material and false, charged "perjury," within Cr. Code Prac. § 134, providing that an indictment for perjury is sufficient if it sets forth the substance of the controversy in respect to which the offense was committed, the court or officer before whom the oath alleged to be false was taken, that such court or person had authority to administer the oath with proper allegations of the falsity of the matter on which the "perjury" is assigned. *Commonwealth v. Combs*, 101 S. W. 312, 314, 125 Ky. 273 (quoting and adopting the definition in *Commonwealth v. Maynard*, 15 S. W. 52, 91 Ky. 131).

Defendant and others conspired to defraud entrymen on public lands of the location fees, and, in order to induce them to enter the lands, M. represented to them that he was the agent of a fictitious corporation of whom a fictitious person was president, which corporation desired to purchase the land, and would do so from the entrymen, either for a specified amount, or in accordance with an estimate of timber thereon. Pursuant to such conspiracy, defendants induced the entrymen to sign and swear to

entry affidavits declaring that the entrymen were purchasing the land for their own benefit, and not for speculation, and that they had no contract or agreement to transfer the same after they had contracted to convey the land to such corporation. Held that, since M. would have been personally liable on such contracts under the rule that one who holds himself out as an agent of a nonexistent principal is personally liable, the affidavits were in fact false and constituted "perjury," though there was no intention on defendant's part at any time to carry them out or purchase the land. *Nickell v. United States*, 161 Fed. 702, 707, 88 C. C. A. 562.

#### Statutory definitions

The term "false," as used in Pen. Code, § 118, defining "perjury," and providing that every person who, having taken an oath that he will testify truly, willfully and contrary to such oath states as true any material fact which he knows to be false, is guilty of perjury, means "false in fact," as distinguished from legal falsity. *People v. Wong Fook Sam*, 79 Pac. 848, 850, 146 Cal. 114.

Under the statute defining "perjury" as the willful false swearing to a material matter, a sworn notice delivered to a sheriff, in which defendant testified that he was the owner of certain property levied on, and had bought and paid for the same, could not constitute perjury, except on a finding that such statements were untrue in fact. *State v. Hulsman*, 126 N. W. 700, 701, 147 Iowa, 572.

Pen. Code, § 96, declares that a person who swears or affirms that any testimony, declaration, deposition, certificate, affidavit, or other writing by him subscribed is true on any occasion in which an oath is required by law, and who willfully and knowingly testifies, declares, deposes, or certifies falsely in any material matter, or states in his testimony, declaration, deposition, affidavit, or certificate any material matter to be true which he knows to be false, is guilty of "perjury." *People ex rel. Hegeman v. Corrigan*, 113 N. Y. Supp. 504, 511, 129 App. Div. 62.

*Snyder's Comp. Laws 1909*, § 2176, defines "perjury" as follows: Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath state any material matter which he knows to be false is guilty of "perjury." An indictment under this statute, alleging that the clerk of the court before whom the false oath was alleged to have been taken had authority to administer it sufficiently, averred that the court had jurisdiction of the cause in which the perjury was committed. *Gray v. State*, 111 Pac. 825, 827, 4 Okl. Cr. 292, 32 L. R. A. (N. S.) 142.

*Construing Ballinger's Ann. Codes & St. § 7185 (Pierce's Code, § 1695)*, declaring guilt of "perjury" a person who, having sworn to testify truly, willfully, and contrary thereto, states as true material matter which he knows to be false, with section 7191 (section 1701), making an unqualified statement of what one does not know to be true equivalent to a statement of what he knows to be false, the common-law and statutory crimes are substantially, if not identically, the same, and a common-law indictment is good under the statute. *State v. Eaid*, 104 Pac. 275, 276, 55 Wash. 302, 33 L. R. A. (N. S.) 946.

Section 2183, *Comp. Laws 1909*, which declares that an "unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false," is no part of the definition of "perjury." *Rose v. State*, 127 Pac. 873, 879, 8 Okl. Cr. 294.

#### Proceedings in which oath was administered

It is necessary to constitute "perjury," under, as well as independently of, *Rev. St. § 2033 (Ann. St. 1906, p. 1348)*, that the false oath or testimony be given in some matter or proceeding before some court, tribunal, or public body or officer. *State v. Koslowsky*, 128 S. W. 741, 743, 228 Mo. 351.

Under *B. & C. Comp. § 82*, requiring every pleading to be verified to the effect that the party believes it to be true, and under section 1875, making it "perjury" for one of whom an oath is required by law to willfully swear falsely respecting any matter concerning which the oath is required, a verification of a complaint by a plaintiff stating that the complaint was true as he verily believed was perjury, if willfully false. *State v. Luper (Or.)* 95 Pac. 811, 814.

The false swearing of any officer of any benefit society or co-operative insurance corporation on any examination by the superintendent of insurance, under *Laws 1909, c. 300*, adding section 63 to the insurance law (*Consol. Laws, c. 28*), upon a subject material thereto, constitutes "perjury." *People v. Reed*, 123 N. Y. Supp. 305, 309, 66 Misc. Rep. 425.

Under *Timber & Stone Act June 3, 1878, c. 151, § 1, 20 Stat. 89*, which requires applicants to purchase land thereunder to file a verified written statement, and after the required publication of notice to "furnish to the register of the Land Office satisfactory evidence" of certain facts, the regulations of the Land Department, requiring such evidence to be in the form of depositions under oath, are in furtherance of the purposes of the statute and valid, and false swearing in either the preliminary statement or in such depositions constitutes the crime of "perjury" and an offense against the United States, under *Rev. St. § 5392. Van Gesner v. United States*, 153 Fed. 46, 47, 52, 82 C. C. A. 180.

Rev. St. § 5392, declares that whoever, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he shall testify truly, etc., shall willfully and contrary to such oath state any material matter which he does not believe to be true, is guilty of perjury and shall be fined not more than \$2,000 and imprisoned not more than five years. Section 5393 provides that whoever procures another to commit perjury is guilty of subornation of perjury and punishable as prescribed in the preceding section. Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554, provides that a person shall be punished by imprisonment for not to exceed two years on conviction of having knowingly and fraudulently made a false oath in or in relation to any proceeding in bankruptcy. Held, that false swearing in bankruptcy proceedings, constituted "perjury," within sections 5392, 5393, Bankr. Act 1898, § 29, being regarded merely as changing the punishment for perjury committed in bankruptcy proceedings; and hence suborning a witness at a hearing in bankruptcy to commit perjury constituted an offense within sections 5392, 5393. Epstein v. United States, 196 Fed. 354, 356, 116 C. C. A. 174.

#### **Administration, form, and making of oath**

"Perjury" cannot be assigned of an oath not required by law. United States v. Dupont, 176 Fed. 823, 824.

In an indictment for "perjury," a direct averment that accused was sworn is unnecessary, since the term "perjury," of its own force, implies an oath lawfully administered, whether the crime charged is common-law perjury or statutory false swearing. State v. Webber, 62 Atl. 1018, 1019, 78 Vt. 463.

To make a valid oath for the falsity of which "perjury" will lie, there must be in some form, in the presence of a person authorized to administer it, an unequivocal and present act, by which affiant consciously takes upon himself the obligation of an oath. If the false oath charged is a written statement, sworn to by defendant, it is immaterial whether the oath was administered before or after the statement was reduced to writing and signed; the material point being that defendant was sworn. Markey v. State, 37 South. 53, 59, 47 Fla. 38.

"Perjury" is a false statement, written or verbal, deliberately and falsely made under the sanction of an oath or affirmation legally administered, under circumstances where an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice. Warren v. State (Tex.) 122 S. W. 541, 542.

By section 356 of article 27 of the Code, false swearing in an affidavit required by

law to be taken is made "perjury." The oath in such cases must have been taken in the presence of an officer or tribunal authorized to administer it, but the competency of the person who reads the words of the oath to the witness and does the ministerial part of its administration is not material. He may be a clerk or his deputy or other person. State v. Mercer, 61 Atl. 220, 221, 101 Md. 535.

#### **Knowledge of falsity of oath**

A criminal and corrupt intent is a vital element of "perjury." Rose v. State, 127 Pac. 873, 879, 8 Okl. Cr. 294.

"Perjury" consists not merely in swearing to some material statement which is not true, but in willfully, intentionally, and corruptly falsifying under oath. State v. Loos, 123 N. W. 962, 963, 145 Iowa, 170.

"Perjury" consists in swearing willfully and corruptly contrary to witness' belief, not in swearing rashly and inconsiderately according to his belief. Pilgrim v. State, 104 Pac. 383, 388, 3 Okl. Cr. 49.

The crime of "perjury" or false swearing involves a willful, corrupt misstatement of a fact, in that the witness willfully testifies to a fact as true which he knows to be untrue, or so testifies to a fact as being within his knowledge when he knows that it is not, and does not consist in swearing rashly or inconsiderately, according to belief. Johnson v. Featherstone, 133 S. W. 753, 754, 141 Ky. 793.

"Perjury" consists in the willful giving, under oath or affirmation, of false testimony material to the issue or point of inquiry, before a court or tribunal having legal authority to inquire into the cause or matter under investigation, and, in a prosecution therefor, it is incumbent on the state to show that the accused made the alleged false statements, knowing them to be false, or under circumstances from knowledge may be imputed to him. In other words, that the oath was willfully and corruptly false. State v. Smith, 83 Pac. 865, 866, 47 Or. 485 (citing Hughes, Crim. Proceed. § 1582).

Under Burns' Ann. St. 1908, § 2375, making one guilty of "perjury" who swears willfully and falsely touching a matter material to the point in question, perjury is the willful giving of false testimony, and it exists only where there is the specific intent to testify falsely, and the falsity of the testimony and knowledge thereof are the elements of the offense, and a false statement made through surprise, mistake, or inadvertence is not perjury. Indianapolis Traction & Terminal Co. v. Henby, 97 N. E. 313, 319, 178 Ind. 239.

At common law "perjury" was defined to be a "willful, false oath, by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely



in a matter material to the point in question, whether he believed it or not." 2 Chit. Cr. L. 302. 'Thus the offense had to be "willful," but it was well settled at common law that the use of that identical word in an indictment was not necessary; it being implied from the words "falsely, maliciously, wickedly, and corruptly." 2 Chit. Cr. L. 309; Ar. Cr. Pl. 429; Id. 51, 52. This seems to be contrary to the ruling in *United States v. Edward*, 43 Fed. 67. Hawkins lays it down in discussing the word "willful," "it must appear by the proof to have been so;" and he defines it as being an oath taken with some degree of deliberation; and if it was the result of weakness in the witness, rather than perversity, or was occasioned by surprise or inadvertency, it could not be taken at common law to be voluntary and corrupt perjury. 1 Hawk. P. C. 319, § 2. If the testimony was induced by duress, it could not be said to be willful, and it may be safely affirmed that, at common law, use of equivalents for the word "willful" was well established, but the question assumes a different phase when we come to consider the authorities arising under the English Statute of Elizabeth (5 Eliz. c. 9), in which the words were "willfully and corruptly commit any manner of willful perjury." *United States v. Howard*, 132 Fed. 325, 350.

#### Materiality of statement

It is fundamental that, to sustain a charge of "perjury," the alleged unlawful swearing must be with reference to a matter that is material in the action in which the testimony which is alleged to be false is given. *Shevalier v. State*, 123 N. W. 424, 425, 85 Neb. 366, 19 Ann. Cas. 361 (citing *Coke*, Inst. 164; *Hood v. State*, 44 Ala. 81; *People v. Collier*, 1 Mich. 137, 48 Am. Dec. 699; *State v. Anderson*, 2 N. E. 332, 103 Ind. 170; *State v. Hayward* [S. C.] 1 Nott & McC. 546; *Dilcher v. State*, 39 Ohio St. 130; 30 Cyc., p. 1435; *Gandy v. State*, 36 N. W. 817, 23 Neb. 436).

To constitute "perjury," the false testimony must be given concerning a material matter under investigation. A witness cannot be convicted of "perjury" for false testimony which he immediately thereafter fully explained, so that the whole constituted a truthful statement of the fact. *People v. Gillette*, 111 N. Y. Supp. 133, 138, 126 App. Div. 665 (citing *Wood v. People*, 59 N. Y. 117; *People v. Root*, 87 N. Y. Supp. 962, 94 App. Div. 84).

"Perjury" is a crime committed when a lawful oath is administered by any one that hath authority, to any person, in any judicial proceeding, who sweareth absolutely and falsely in a matter material to the issue, or cause in question, by their own act, or by the subordination of others." The materiality of the false testimony is an essential element of "perjury," both at common law and under the

statutes. *People v. Teal*, 89 N. E. 1086, 1089, 186 N. Y. 372, 25 L. R. A. (N. S.) 120, 17 Ann. Cas. 1175 (quoting and adopting the definition in *Coke*, 3 Inst. 165).

To constitute "perjury," the false statements must be material or such as tend to influence the determination of the issues. It is not necessary that the matter should be directly and immediately material, but it is sufficient if so connected with the matter at issue as to have a legitimate tendency to prove or disprove some fact that is material, and it may be assigned on false statement affecting credibility of a witness whose testimony was material to the main issue. Ordinarily the materiality of the testimony is for the court. *Coleman v. State*, 118 Pac. 594, 600, 6 Okl. Cr. 252.

A willfully false statement in an oath to an application for a patent, made as required by Rev. St. § 4892, that the applicant verily believes himself to be the original, first, and sole inventor of the device for which the patent is sought, is of a material matter, and constitutes "perjury," within Rev. St. § 5392. *United States v. Patterson*, 172 Fed. 241, 247.

Under Pen. Code, § 118, providing that every person who, having taken oath to testify truly before a competent tribunal, states as true and material matter which he knows to be false is guilty of "perjury," an indictment for perjury must show the alleged false statement to be material to the issue, either by showing an action at issue in a court of competent jurisdiction, and alleging that the testimony was willfully and feloniously false, and was material to the issue, or by setting forth the nature of the issue and the evidence given thereon, so that it may be seen that the testimony on which the perjury is assigned was material as a matter of law. *People v. Schweichler*, 117 Pac. 939, 940, 16 Cal. App. 738.

On a trial for "perjury," committed by accused while a witness on the preliminary examination of L. on a charge of murder, it appeared that the state sought to show that L. rode a gray horse to the place where the killing occurred, and that he returned after killing decedent. The defense was an alibi. Accused testified on the examination that, on the day of the killing, he saw T. riding a gray horse in the town near the place where the killing occurred, and that he remained there for about an hour. Held, that the court properly determined that the testimony was material. *Barre v. State*, 139 S. W. 641, 642, 99 Ark. 629.

Kirby's Dig. § 1968, defines "perjury" as the willful and corrupt swearing falsely to any material matter in any cause, etc., before any court officer having authority by law to administer oaths. Section 1970 makes it sufficient, in indictments, to set forth the substance of the offense, together with the prop-

er averments to falsify the matter wherein the perjury is charged, without setting forth any part of the record, proceeding, or process. Held, that the false testimony may be shown to be material, either by direct averment, or by allegations from which their materiality appears, and, if a direct averment is made, the question of materiality becomes one of proof of that averment; the indictment being insufficient only if no averment of materiality is made. *Smith v. State*, 120 S. W. 985, 986, 91 Ark. 200.

"If the matter falsely sworn to is circumstantially material, or tends to support and give credit to the witness in respect to the main fact, it is 'perjury.'" Code Cr. Proc. § 569, relating to the qualifications of bail, provides that a surety must be a resident and a householder or free holder, worth the amount specified in the undertaking, exclusive of exempt property. Section 572 requires the sureties to justify in all cases by affidavit taken before the magistrate. Section 573 permits the district attorney or magistrate to further examine sureties upon oath concerning their sufficiency in such manner as the magistrate may deem proper. Section 575 provides that, when the examination is closed, the magistrate must make an order either allowing or disallowing bail, etc. A proposed surety on a bail bond appeared before a magistrate and answered questions as to his qualifications, and signed the bail bond and affidavit of qualification, in which he swore that he was a resident freeholder and was worth \$1,000 over and above his just debts and liabilities; that his property consisted of a certain described house and lot of land worth a certain sum; and that the title was recorded in his name at the office of the register of the county. His statements as to the ownership of the property were false, and were known by him to be false. Held, that the false statements constituted "perjury," since the sufficiency of the surety on a bail bond is the subject of judicial inquiry, and the statements made in the affidavit of the proposed surety were material to such issue. *People v. Davis*, 107 N. Y. Supp. 426, 429, 122 App. Div. 569.

Willfully and knowingly testifying to an immaterial fact is not "perjury." It is not necessary, however, that the indictment charge that any or all of the statements therein alleged to have been made by defendant were material or were of and concerning a matter material in the proceeding then being conducted, provided the facts which are set forth therein are sufficient in themselves to show that the sworn statements alleged to be false were material. But the materiality must be shown in the indictment itself, either by direct statement or by the facts stated therein. An indictment for "perjury," committed during an examination of accused in a proceeding by the superintendent of in-

surance, relating to the affairs of the insurance company of which he was an officer, alleged that it became material in such inquiry whether a contract between accused and the corporation, requiring it to pay him three cents from each quarterly capita tax paid by every member, and one-half cent from each monthly rate payment on certificates issued, was a liability of the corporation, whether the contract was valuable and was binding and a legal claim against it, and whether the corporation owed defendant thereunder, and that defendant falsely and willfully testified that he thought the contract was a liability of the corporation and believed that it was binding upon it and was valuable, and that he considered that the corporation owed him thereunder, when accused well knew that the facts were contrary to his statement of what he thought, believed, or considered them to be. Held, that the indictment did not show false testimony as to a material question of fact, the validity and existence of the contract being questions of law upon which accused's opinion could not be material, and hence the indictment was insufficient. *People v. Peck*, 130 N. Y. Supp. 967, 969, 146 App. Div. 266.

## PERMANENCY—PERMANENT

The word "permanent" is not equivalent to "perpetual" or "unending" or "lifelong" or "unchangeable." *Soule v. Soule*, 87 Pac. 205, 208, 4 Cal. App. 97 (citing *Bishop, Mar., Div. & Sep. § 1386; And. Law Dict., q. v.; Abbott Law Dict.; Bouv. Law Dict.*).

"Permanency," in the legal acceptance of the term, does not include the idea of absolute, but only of practical, irremediability. *Coleman v. Bennett*, 69 S. W. 734, 737, 111 Tenn. 705.

The term "permanent" as used in decisions indicating that personal property of a tangible character, to become taxable, must have acquired a situs of a permanent nature within the jurisdiction of the authority seeking to levy the tax, while it may not mean the continued and unchangeable location of the property at a given place, does intend to include the idea of location which is not of a temporary or fleeting character. *Gromer v. Standard Dredging Co.*, 32 Sup. Ct. 490, 505, 224 U. S. 362, 377, 56 L. Ed. 801.

Citizens of a city, through plaintiff, as trustee, donated conditionally a sum of money to defendant, for which he gave his note, payable in 10 years, but subject to certain conditions, evidenced by a written contract attached, which provided that defendant should reconstruct and operate a manufacturing plant in the city and employ therein a number of workmen, estimated at from 40 to 75; that he should be credited on the note with 10 per cent. of the amount paid out in salaries and wages in the business, and

should continue to operate the plant in good faith until the note was fully paid in such manner. It further provided that, in the event of the "abandonment and permanent stopping of the operation of said plant" before the note was so paid, any balance due thereon should be repaid and should become at once due and payable. Held, that the word "permanent," as employed in this contract, did not mean forever fixed and unchangeable, but was used in contradistinction to "temporary," as therein defined, and meant a continued condition of stoppage for other than the temporary causes stated, and which is indefinite and uncertain as to the time it will endure, and that temporary stoppages in operation, caused by strikes, fire, elements, unavoidable accidents or other legitimate causes for the temporary stopping of said business, were not to be construed as a breach of the contract. *Castle v. Logan*, 140 Fed. 707, 709, 72 C. C. A. 201.

#### **Temporary distinguished**

See Temporary.

#### **PERMANENT ABODE**

A "permanent abode" is a home which a party may leave as interest or whim may dictate, but which he has no present intent to abandon. *Sullivan v. Detroit*, Y. & A. A. R. Co., 98 N. W. 758, 760, 135 Mich. 661, 64 L. R. A. 673, 106 Am. St. Rep. 403 (citing *Dale v. Irwin*, 78 Ill. 170).

In determining a voter's residence, within General Election Law, § 66, providing that a "permanent abode" is necessary to constitute a residence, the rules are reasonably well settled that a man must have a residence or domicile somewhere, which, when once gained, remains until a new one is acquired, and that a man can have but one domicile at a time. *Welch v. Shumway*, 83 N. E. 549, 550, 359, 232 Ill. 54.

#### **PERMANENT ALIMONY**

"Permanent alimony" is a gross sum awarded to the wife on dissolution of a marriage to aid in her support. Primarily it signifies not a certain portion of the husband's estate; the controlling element being a compulsory contribution on his part for her support and maintenance under the obligations of the marriage contract. *Kiplinger v. Kiplinger*, 138 N. W. 230, 232, 172 Mich. 552.

"Permanent alimony" is an incident to and flows from the decree of legal separation, and is granted only after the merits of the case have been determined. *McFarlane v. McFarlane*, 73 Pac. 203, 205, 43 Or. 477 (quoting and adopting definition in *Stewart, Mar. & Div.* § 392).

"Maintenance" and "permanent alimony" are synonymous terms, and mean an allowance in money to be recovered on decree of divorce from the party in fault for the support of the innocent party." *Huffman* v.

*Huffman*, 86 Pac. 593, 595, 47 Or. 610, 114 Am. St. Rep. 943.

"Permanent alimony" is that provision which the law makes for the support of a wife, or of her who was a wife, out of the estate of the husband after separation, in lieu of his common-law obligation to support her as his wife if they should have continued living together. *Tuttle v. Tuttle*, 128 N. W. 695, 697, 26 S. D. 545.

The word "permanent" is not equivalent to "perpetual" or "unending" "lifelong" or "unchangeable"; and the term "permanent alimony," as used in the decree of a court, merely designates the character of the alimony which is awarded, rather than the amount to be paid, or the time during which the payment should continue. Alimony awarded by a final decree of divorce is designated as "permanent" in contradistinction from that which is awarded during the pendency of the action, which is designated as "temporary." Permanent alimony is therefore subject to increase or diminution by the court. *Soule v. Soule*, 87 Pac. 205, 208, 4 Cal. App. 97 (citing *Bishop, Mar. Div. & Sep.* § 1386; *And. Law Dict.*, q. v.; *Abbott, Law Dict.*; *Bouv. Law Dict.*; *Stewart, Mar. & Div.*, § 360; *Ex parte Spencer*, 23 Pac. 395, 83 Cal. 460, 17 Am. St. Rep. 266; *Wolff v. Wolff*, 36 Pac. 767, 102 Cal. 433; *Ex parte Hart*, 29 Pac. 774, 94 Cal. 254).

#### **PERMANENT DAMAGE**

"Permanent damages" are those for which but one recovery may be had; compensation for all the injury the property has sustained in the past and will sustain in the future being included. *McHenry v. City of Parkersburg*, 66 S. E. 750, 751, 66 W. Va. 533, 29 L. R. A. (N. S.) 860.

Where a railway company has entered land under a claim of right to do so, and has constructed a road thereon, and is operating it under a legislative charter, ejectment does not lie to oust it, and it cannot be subjected to successive actions of trespass; the owner's remedy being an award of "permanent damages" including recovery for the entire wrong, past, present, and prospective, and, on payment of such damages, an easement passes to the company as in condemnation proceedings. *Porter v. Aberdeen & R. F. R. R.*, 62 S. E. 741, 743, 148 N. C. 563.

#### **PERMANENT DOOR**

A door intended to be maintained in a mine as long as coal remains to be mined and removed is, regardless of the amount of coal in the entry closed by the door, a "permanent door," within the meaning of *Hurd's Rev. St.* 1903, p. 1261, c. 93, § 19, cl. "e," requiring permanent doors to be so adjusted as to close automatically. *Madison Coal Co. v. Hayes*, 74 N. E. 755, 756, 215 Ill. 625.

**PERMANENT EMPLOYMENT**

"Permanent employment" means employment for an indefinite time, which may be severed by either party. The term "permanent employment," as used in a contract whereby a corporation agreed to give an attorney permanent employment as counsel if he would render certain services and the scheme involved should prove a success, is satisfied by his employment thereafter for the period of a year at a fixed salary. *Sullivan v. Detroit, Y. & A. A. R. Co.*, 98 N. W. 756, 760, 135 Mich. 661, 64 L. R. A. 673, 106 Am. St. Rep. 403 (quoting *Bouv. Law Dict.*).

"Permanent employment" is understood as meaning that so long as an employer is engaged in his present work, and has work which the employé can do, and desires to do, and so long as the employé is able to do the work satisfactorily, the employer will employ him. *Hall v. Hardaker*, 55 South. 977, 980, 61 Fla. 267 (adopting definition in *Carnig v. Carr*, 46 N. E. 117, 167 Mass. 544, 35 L. R. A. 512, 57 Am. St. Rep. 488).

Where, as a part of a contract for the settlement of a cause of action for injuries to a servant, it was agreed that he should have subsequent "permanent employment" as a switch tender, it was necessarily implied that the contract should continue only as long as the road continued in business at the place where plaintiff was employed, and he remained willing and able to render the services properly, and conformed to defendant's rules. *Louisville & N. R. Co. v. Cox*, 141 S. W. 389, 392, 145 Ky. 667.

**PERMANENT ESTABLISHMENT**

As used in an agreement to give to a railroad company a certain sum of money, in consideration of which the company agreed to permanently establish its terminus and offices at the certain city, did not mean forever or lasting forever. The covenant did not amount to a covenant that the company would never cease to make its terminus at such city, and that whatever might be the changes of time and circumstances of railroad rivalry and assistance, these things alone should remain forever unchangeable. *Lucas v. New York, N. H. & H. R. Co.*, 130 Fed. 436, 438, 64 C. C. A. 638 (quoting *Texas & P. R. Co. v. City of Marshall*, 10 Sup. Ct. 846, 136 U. S. 393, 34 L. Ed. 385).

Where a railroad company establishes and keeps a depot in a certain city, and sets in operation car works and machine shops, and keeps them going for eight years, until the interests of the company and the public demand the removal of some or all of them, it is a "permanent establishment," within the fair meaning of a contract to permanently establish a terminus of its line of railroad at such place, and to construct and maintain its main car works and machine shops there, in consideration of a bonus given by the city. *St. Louis, M. & S. E. R. Co.*

*v. Houck*, 97 S. W. 963, 968, 120 Mo. App. 634 (citing *Texas & P. R. Co. v. Marshall*, 10 Sup. Ct. 846, 136 U. S. 395, 34 L. Ed. 385).

A contract by a railroad to permanently establish its terminus at a certain city is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place. This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words "permanent establishment," as there was no intention at the time of removing or abandoning them. The word "permanent" does not mean forever, or lasting forever, or existing forever. *Western Union Tel. Co. v. Pennsylvania Co.*, 129 Fed. 849, 867, 64 C. C. A. 285, 68 L. R. A. 968 (citing *Texas & P. R. Co. v. City of Marshall*, 10 Sup. Ct. 846, 136 U. S. 393, 34 L. Ed. 385).

**PERMANENT FIXTURES**

Other permanent fixtures, see *Other*.

A sawmill and machinery therein, intended to be used permanently and not adapted to any other use, were "permanent fixtures," as between the mortgagor and mortgagee of the land, notwithstanding that the mill site was subject to overflow from a river, and an unfavorable and unsuitable site. *Humes v. Higman*, 40 South. 128, 129, 130, 145 Ala. 215.

**PERMANENT FORM OF GOVERNMENT**

The word "permanent," as used in an act to provide a "permanent form of government," implies that prior systems had been temporary and provisional. *State v. Harden*, 58 S. E. 715, 723, 62 W. Va. 313.

**PERMANENT FUND**

Where a bequest contained a direction that it should "constitute a 'permanent fund,' the income whereof \* \* \* shall be used for the purpose of keeping my burial plot in the Masonic cemetery \* \* \* in good and proper condition," the trust was not limited to the life of the trustees, but was perpetual in its operation. In *re Gay's Estate*, 71 Pac. 707, 708, 138 Cal. 552, 94 Am. St. Rep. 70.

**PERMANENT IMPROVEMENT**

See *Permanent Street Improvement*.

"Permanent improvements" made by a parol donee of land are not necessarily everlasting in character, but are only such as rest on or are attached to the soil, and are reasonably enduring, and not intended for removal at the end of a limited term. They include beneficial changes in the premises, like the moving of buildings, the construction of roads, the grubbing of stumps and trees, and

It is not essential that the value thereof should aggregate a larger sum, or be equal to the rental value of the land. *Albright v. Albright*, 133 N. W. 737, 740, 153 Iowa, 397.

Crops of wheat and potatoes were of no permanent value to land, and fertilizers used with the wheat crop, being for the special benefit of that crop, was not a permanent improvement within Code 1904, § 2760, permitting recovery for "permanent improvements." *Wright v. Johnson*, 62 S. E. 948, 951, 108 Va. 855.

Within Mechanic's Lien Law, giving a lien on land to any person making improvements thereon, and defining "improvement" as work done upon the property, or materials furnished for its "permanent improvement," the tearing down of an old building is not an improvement, since it does not permanently improve the land. *Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 98 N. Y. Supp. 128, 130, 111 App. Div. 358.

While it is recognized as the general rule that the plowing and cultivation of land theretofore under cultivation does not constitute a "permanent improvement," the breaking and reducing of wild lands to cultivation does constitute such improvement. Where one in possession of lands under a tax deed has been defeated of the possession by the holder of the legal title, and claims compensation for permanent improvements and taxes paid, reasonable rent of the premises without the improvements should be offset, but not rent as increased by the improvements. *Gibson v. Fields*, 98 Pac. 1112, 1113, 79 Kan. 38, 20 L. R. A. (N. S.) 378, 131 Am. St. Rep. 278, 17 Ann. Cas. 405.

Rev. St. 1909, c. 121, creates the "general state road fund," and section 11,915 requires such fund to be used in the construction of "permanent or continuing improvements, \* \* \* and for no other purpose," and defines the words "permanent or continuing improvements" to be the surfacing of any road with gravel and rock, or with a mixture of sand and earthy material, commonly termed a "sandy clay" road, the grading of the road, and the construction of concrete or masonry culverts, and requires the plans to be approved by the county court and state highway engineer. Section 11,916 provides that the funds cannot be used by a county until it provides for half of the expense of the proposed improvement. Section 11,917 makes the taxable valuation of the counties the basis for distributing the fund, and section 11,918 provides that no part of the fund shall be used for rights of way, or damages to abutting owners. Section 10,229 provides that the funds arising from the sale of stamps required in certain cases to be used in case of future sales of goods shall constitute a "road fund" which the State Auditor shall distribute annually to the counties

and in St. Louis city in the same proportion and in like manner as the state school funds are distributed. Held, that the latter statute was not inconsistent with the others, so that the funds arising from the stamp act should not be paid into the "general state road fund." *Gasconade County v. Gordon*, 145 S. W. 1160, 1164, 241 Mo. 569.

An elevated roadway constructed in a street, partly on posts resting on mudsills and partly on piles, the posts and piles being surmounted with capping or stringers and the whole overlaid with planks, constitutes a "permanent improvement" for which an assessment may be levied against the benefited property, though a permanent fill along the roadway is contemplated if it appears that the roadway is intended to be used as such as long as it can be safely used. *Knickerbocker Co. v. City of Seattle*, 124 Pac. 920, 922, 69 Wash. 336; *Id.*, 124 Pac. 922, 923, 69 Wash. 365.

Under Lien Law, § 2, defining a contractor as one entering into a contract with the owner of real property for the improvement thereof, and defining a materialman as any person other than the contractor furnishing materials for such improvement, and defining the term "improvement" as including the erection, alteration, or repair of any structure on real estate, and any work done on the property or materials furnished for its improvement, a contract requiring one to furnish all the window frames, sash, glass, and trim in and to buildings in course of construction for a lump sum, payable in installments as the work progressed, and requiring him to make a large part of the materials according to plans, is a contract for the permanent improvement of real estate within the lien law, and he is entitled to a lien for the materials furnished and work done. *Western Sash, Door & Lumber Co. v. Gaul Const. Co.*, 126 N. Y. Supp. 1110, 1112.

#### PERMANENT INABILITY TO LABOR

The term "permanent inability to labor," in an instruction as to measure of damages for personal injury, is not the precise equivalent of "permanent reduction in his power to earn money"; and allowing remuneration for "inconvenience" suffered is too latitudinous. *Louisville & N. R. Co. v. Sights*, 89 S. W. 132, 133, 121 Ky. 203.

#### PERMANENT INCAPACITY

In an action on a benefit certificate, an instruction defining "permanent incapacity" as such as would exist throughout all time could not be complained of by insurer. *Grand Lodge Brotherhood of Locomotive Firemen v. Orrell*, 69 N. E. 68, 69, 206 Ill. 208.

#### PERMANENT INHABITANT

A petition was presented for the incorporation of Haines Mission under the act of Congress (33 Stat. p. 529) providing for the

incorporation of any community in Alaska having 300 or more permanent inhabitants. The proofs showed and the court found that there were 216 white persons living within the proposed town and 151 Indians. Held, the act of Congress requires at least 300 permanent white inhabitants to incorporate, that Indians are neither electors nor citizens, and cannot be counted, and the petition denied. On the hearing of a petition for the incorporation of Haines Mission, the court held that the Indians living within the town limits were neither electors nor citizens of the United States, and should not be considered in calculating the 300 permanent inhabitants necessary to incorporate. In re Incorporation of Haines Mission, 3 Alaska, 588, 592.

### PERMANENT INJURY

See, also, Permanent Personal Injury.

An allegation of "permanent injuries" is not equivalent to alleging loss of time or of earnings. Scholl v. Grayson, 127 S. W. 415.

A "permanent injury" to real property, as distinguished from a temporary or continuing injury, is one of such a character, and existing under such circumstances, that it will be presumed to continue indefinitely. A "temporary or continuing injury" is one that may be abated or discontinued at any time. Worden v. Bielenberg, 138 N. W. 314, 315, 119 Minn. 330.

The fact that a railway embankment and bridge, which cause injury to land by flooding, are of a permanent character would not necessarily render the injuries permanent, the term "permanent," used in connection with such an injury, having reference not alone to the character of the structure producing it, but also to the character of the injury. Hughes v. Chicago, B. & Q. Ry. Co., 119 N. W. 924, 926, 141 Iowa, 273, 133 Am. St. Rep. 164.

In an owner's action for damages from the diversion of a natural stream by a railroad construction, the injury is to be regarded as permanent, where the cost of remedying it would be so great as to justify the railroad in condemning the property and taking it under the power of eminent domain; but if the injury can be remedied at a reasonable expense, it may be regarded as temporary, and the question whether the injury is temporary or permanent is for the jury. Madisonville, H. & E. R. Co. v. Graham, 144 S. W. 737, 738, 147 Ky. 604.

In an action for personal injuries, the court instructed for defendant that there was no evidence of "permanent injury," and also instructed that the jury should consider the injury to plaintiff's health in the future. Held, that the instructions were not contradictory. Wood v. Chicago, B. & Q. Ry. Co., 95 S. W. 946, 947, 119 Mo. App. 78 (citing

Ballard v. Kansas City, 86 S. W. 479, 110 Mo. App. 396).

By "continuing nuisance" or "constantly recurring grievance" or "permanent injury" is meant a nuisance which occurs so often, and is so necessarily an incident of the use of property complained of, that it can be fairly said to be continuous, although not constant or unceasing. Central of Georgia R. Co. v. Americus Constr. Co., 65 S. E. 555, 858, 133 Ga. 392.

"Permanent injury," as applied to a nuisance, is defined as whenever the nuisance is of such character that its continuance is necessarily an injury, and, where it is of a permanent character that will continue without change from any cause except human labor, there the damage is an original damage, and may be at once fully compensated. The term "permanent," so often made use of in connection with the right to recover original damages, has reference not alone to the character of the structure or the thing which produces the alleged injury, but also to the character of the injury produced by it. In other words, the structure or thing producing the injury may be as permanent and enduring as the hand of man can make it; yet if the resulting injury be temporary or intermittent, depending on future conditions which may or may not arise, the damages are continuing, and successive actions will lie for successive injuries. Harvey v. Mason City & Ft. Dodge R. Co., 105 N. W. 958, 961, 129 Iowa, 465, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483.

A case of "permanent injury" to lands, where the damages are the consequent depreciation in the market value of the lands, is made both by a declaration averring that the overflow, by wrongful obstruction of a creek, washed the soil from plaintiff's land, and rendered it practically worthless, and by evidence that the land was good bottom land, and did not overflow before the erection of the obstruction; that by reason of the overflow and filling of the channel of the creek, caused by the obstruction, the land was practically worthless as farm land; that the overflow ruined it so it would be worthless to cultivate; and that sand was washed on it, and deep gullies made through it. Coleman v. Bennett, 69 S. W. 734, 737, 111 Tenn. 705.

### Continuing injury distinguished

An injury is a "permanent" one, as distinguished from a continuing one, when it is done at once by the unlawful act or the negligent omission from which the loss results without any repetition of the act, there being only one act and one damage, though the latter may be composed of several items or consist, for example, in the destruction of several pieces of property, the wrong produces one continuous train of consequences,

and the loss is all traceable back to the single origin. *Mast v. Sapp*, 53 S. E. 350, 351, 140 N. C. 533, 5 L. R. A. (N. S.) 379, 111 Am. St. Rep. 864, 6 Ann. Cas. 384.

#### PERMANENT INTEREST

A "license" is a permission to do some act or series of acts on the land of the licensor, without having a permanent interest in the land, and is distinguished from an "easement" in that an easement is a right with reference to certain land conferring on the owner of the easement a permanent interest in the land; the word "permanent," being used not in the sense of perpetual, but as relating to a specific period. *Borough Bill Posting Co. v. Levy*, 129 N. Y. Supp. 740, 742, 144 App. Div. 784.

#### PERMANENT MERCHANT

"Permanent merchants" are those who have a permanent place of business, and "transient merchants" are transitory or temporary traders, who have no intention of locating permanently. *State ex rel. Mudeking v. Parr*, 123 N. W. 408, 409, 109 Minn. 147, 134 Am. St. Rep. 759.

#### PERMANENT MONUMENT

"A mining claim is a 'permanent monument,' as mentioned in a relocation certificate, and, when such claim is mentioned in a location certificate, it will be so construed unless the contrary appears." A certificate of a mining location stated that it was located in a designated mining district and county, and described the claim as lying west of claims designated. The certificate did not give distances or directions. Held, that the certificate was prima facie sufficient, within Rev. St. 1899, § 2546, providing that a certificate of a mining location shall contain a description of the claim by such designation of natural or fixed objects as shall identify the claim. *Slothower v. Hunter*, 88 Pac. 36, 40, 15 Wyo. 189 (citing *Riste v. Morton*, 49 Pac. 656, 20 Mont. 139; *Hammer v. Garfield Min. & Mill. Co.*, 9 Sup. Ct. 548, 130 U. S. 291, 32 L. Ed. 964).

#### PERMANENT NUISANCE

A "permanent nuisance" is one of such a character and which exists under such circumstances that it will be presumed to continue indefinitely. *Bischof v. Merchants' Nat. Bank*, 106 N. W. 996, 998, 75 Neb. 838, 5 L. R. A. (N. S.) 486.

#### PERMANENT ORDINANCE

Municipal Code Act (Acts 1907, p. 831) § 81, provides that no ordinance intended to be of permanent operation shall become a law unless on its final passage the majority of the members elected to the council, including the mayor, of cities of less than 6,000, shall vote in its favor. Held that, generally speaking, a permanent statute or ordinance is understood to continue in force till repealed,

and that this was the obvious sense to be accorded to the word "permanent" as used therein, and hence an ordinance determining officers pursuant to sections 17 and 33 (Acts 1907, pp. 799, 811), providing that until validly repealed the offices provided for should exist, to be filled by each succeeding administration, carried on its face an intent to form a permanent rule of government until repealed, and until such time continued in force. *Michael v. State ex rel. Welch*, 50 South. 929, 933, 163 Ala. 425.

#### PERMANENT PERSONAL INJURY

"Permanent personal injury" is different from future pain and suffering, and relates to a condition lasting during all the future life of the party injured. *Du Cate v. Town of Brighton*, 114 N. W. 103, 105, 133 Wis. 628.

#### PERMANENT RECEIVER

General Corporation Law, art. 11 (Consol. Laws, c. 23), defines (section 106) a permanent receiver as a receiver appointed by or pursuant to a final judgment or a temporary receiver who is continued by a final judgment. *Strauss v. Casey Machine & Supply Co.*, 124 N. Y. Supp. 32, 34, 68 Misc. Rep. 474.

#### PERMANENT REDUCTION IN POWER TO EARN MONEY

As permanent inability to labor, see Permanent Inability to Labor.

#### PERMANENT RESIDENT

Resident indicating, see Resident.

#### PERMANENT STREET IMPROVEMENT

The appropriation of money for "permanent street improvements" is not so indefinite as to amount to an invalid delegation of legislative power to executive officers, where, in the year prior to the passage thereof, the committee appointed to investigate the question of permanent improvements reported in favor of a plan for permanent streets paved with asphalt, and an appropriation for such purpose had been made, and a contract let, and work satisfactorily performed on some of the streets of the city. *Hett v. City of Portsmouth*, 61 Atl. 596, 597, 73 N. H. 334.

#### PERMANENT STRUCTURE

The word "permanent" does not always embrace the idea of absolute perpetuity, or lasting forever. A structure erected without lawful authority in a street by a corporation organized to hold a street fair, for the purpose of giving a free exhibition connected with such fair, is "permanent" and is a nuisance per se. *Richmond v. Smith*, 43 S. E. 345, 347, 101 Va. 161.

A tile drain is not a "permanent structure," so as to prevent a purchaser of land

injured by its construction from enjoining its removal. *Costello v. Pomeroy*, 94 N. W. 490, 120 Iowa, 213.

A railroad is a "permanent structure," as that term is used in law. But it does not follow that the failure of the owner of the road to maintain a crossing which it had agreed to do as a condition of a grant of right of way is also a permanent thing, or is included in the building of the road originally omitting to build the crossing. *Stein v. Chesapeake & O. Ry. Co.*, 116 S. W. 733, 736, 132 Ky. 322 (citing *Chicago, St. L. & N. O. R. Co. v. Wilson* [Ky.] 76 S. W. 138; *Wilson v. Illinois Central R. Co.* [Ky.] 92 S. W. 602).

A railroad embankment is generally considered, and properly so, as a "permanent structure." The measure of damages to land made subject to inundation by the negligent construction of a permanent railroad embankment is the difference between the market value of the land immediately before and such value immediately after the construction of the embankment. *Texas Cent. R. Co. v. Brown*, 86 S. W. 659, 660, 38 Tex. Civ. App. 610.

As affecting the damages to be recovered for overflowing land by a structure obstructing a water course, when it would cost as much to alter the structure causing the obstruction, as to build it in the first instance, and it is of a durable character, evidently intended to last indefinitely, it may be regarded as "permanent." *City of Richmond v. Gentry*, 124 S. W. 337, 338, 136 Ky. 319, 136 Am. St. Rep. 255.

#### PERMANENTLY

Under Civ. Code La. art. 468, providing that all movables attached by the owner to the land "permanently" are likewise immovables by destination, the word "permanently" is a translation from the French phrase "a perpetuelle demeure," which may be rendered as "to remain perpetually." *Morton Trust Co. v. American Salt Co.*, 149 Fed. 540, 543.

#### PERMANENTLY DEPRIVE THE OWNER

An information for receiving stolen goods, knowing the same to have been stolen, which alleges that accused received goods, knowing that the same had been taken and carried away from the owner with the intent on the part of the thief "to permanently deprive the owner" of the use thereof, etc., is fatally bad for failing to allege that accused knew that the property had been stolen; the word "stolen" meaning that a larceny has been committed, while the words "to permanently deprive the owner" of his property may not necessarily mean that a crime has been committed. *State v. Mayer*, 107 S. W. 1085, 1086, 209 Mo. 391.

#### PERMANENTLY DISQUALIFIED

The laws of a fraternal order, organized for the protection of switchmen, provided that any member who should become totally blind should be considered "permanently disqualified" and should receive the full amount of his certificate, and likewise any physical disability that might "permanently disqualify" a member from performing the duties of a switchman. A member sustaining the loss of an arm, which disabled him from being employed as switchman, is "permanently disqualified," within the meaning of his insurance contract. *Switchmen's Union of North America v. Colehouse*, 81 N. E. 696, 697, 227 Ill. 561.

#### PERMANENTLY DONE

See Permanently Employed.

#### PERMANENTLY EMPLOYED

Act May 1, 1905, to provide for the protection of mechanics, etc., employed in the construction and repair of railway equipment, makes it unlawful for a railroad company or corporation, or other persons who own, control, or operate any lines of railroad in the state, to build or repair railroad equipment without first maintaining at every division point a building or shed over the repair tracks where such work is permanently done, so as to provide that all men permanently employed in the construction and repair of railroad equipment shall be under shelter during inclement weather. Held, that the phrase, "where such work is permanently done," means where constantly done, and the phrase "permanently employed" means regularly employed, and the act applies to repair tracks where the "running repairs" were made consisting of the substitution of new for broken parts on cars and supplying missing parts so as to keep the cars in transit. *St. Louis, I. M. & S. Ry. Co. v. State*, 112 S. W. 150, 151, 86 Ark. 518.

#### PERMISSION—PERMIT

See Indeterminate Permit; Knowingly Permit; May Permit; Unloading Without Permit; Water Permitting.  
See, also, Suffer.

The word "permit" means to resign; to allow; to suffer; to put up with; not to prohibit. *Murphy v. Roney* (Ky.) 82 S. W. 396, 398.

There is no difference between "permitting" and "directing" a verdict so far as those terms relate to the action of the judge or the effect upon the parties. *Brooks v. Boyd*, 57 S. E. 1093, 1096, 1 Ga. App. 65.

The words "suffer" and "permit," in the statute punishing one who suffers or permits gaming on premises in his possession or under his control, mean that accused must have suffered or permitted gaming, with knowledge that money was bet and won or lost



thereby; or the evidence must show facts by which the jury may infer such knowledge. *Lancaster Hotel Co. v. Commonwealth*, 149 S. W. 942, 943, 149 Ky. 443.

"'Permission' involves leave and license, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right. It is an excuse or license so that a party cannot be treated as a trespasser." *Flaherty v. Nie-man*, 101 N. W. 280, 281, 125 Iowa, 546.

The word "permit" means: "(1) To allow by tacit consent or by not hindering; take no steps to prevent; consent tacitly to; suffer. (2) To grant leave to by express consent or authorization; empower expressly." Its use is in the latter sense, in *Sayle's Ann. St. 1897*, art. 5060g, specifying as one of the conditions of a liquor dealer's bond that he will not give, or permit to be given, any liquor to a minor, and binds the dealer to affirmatively prevent the making of any such gifts in his place of business. *A. E. Holly & Co. v. Simmons*, 85 S. W. 325, 327, 38 Tex. Civ. App. 124.

"To permit" is defined as meaning to authorize or to give leave; but the term "permit" has often been used synonymously with "suffer," so that it may be said that one who suffers the doing of a thing which he might have prevented permits it. It is in this latter sense that the term is used in Act April 14, 1903, § 24, as amended, making it unlawful to permit a dog to run at large in woods or field inhabited by rabbits. An owner who knowingly allows his dog to run loose, out of his control, in the field of his neighbor where there are rabbits, and where the dog runs and kills a rabbit, "permits such dog to run at large in a field inhabited by rabbits," within the statute. *Conner v. Fogg*, 67 Atl. 338, 339, 75 N. J. Law, 245 (citing *McHenry v. Winston* [Ky.] 49 S. W. 4).

By a "permit to close a street" to travel is probably meant a permit to occupy the street; it cannot be taken to be a vote by the proper authorities closing the street to public travel. A permit, although called a "permit to close," implies that the way has not been technically closed to the public travel by the proper authorities. *Jones v. City of Boston*, 74 N. E. 295, 297, 188 Mass. 53 (citing and following *Jones v. Collins*, 59 N. E. 64, 177 Mass. 444).

Code Civ. Proc. § 2282, subd. 4, authorizes summary proceedings to recover real property against a person who has "intruded into" or "squatted upon" real property, and has so continued without permission from the person entitled to possession, or after permission given by him has been revoked by notice. Held, that the word "permission," as used in the latter part of such subdivision, had reference to permission given to a person to occu-

py the premises after such person had intruded into or squatted on the same, and not to permission given to a vendee to occupy the premises under a contract of sale. *Stockwell v. Washburn*, 111 N. Y. Supp. 413, 415, 59 Misc. Rep. 543.

Under Rev. Laws 1905, § 1806, providing that no person shall employ or "permit" any child under the age of 16 years to have the care, management, or operation of any elevator, and employer is not liable for the act of a boy 10 years of age starting an elevator in full control of an employé; the boy not being an employé, and it only appearing that he had operated the elevator once or oftener on the day of the accident to the knowledge of some employés. *La Belle v. Powers Mercantile Co.*, 114 N. W. 1131, 1132, 103 Minn. 515.

Laws 1901, c. 411, authorizes county boards to place the clerk of the circuit court on a salary basis by resolution, and provides that such salary shall be full compensation for all services by the clerk as such, and requires him to pay to the county treasurer all fees, and other emoluments received by him. Naturalization Act, 59th Congress, June 29, 1906, c. 3592, § 13, 34 Stat. 600, authorizes clerks of circuit courts to charge certain fees in naturalization proceedings, one-half of which they are authorized by the act to retain, and the balance they are required to pay over to the Bureau of Immigration and Naturalization. Held, that the words "authorized" and "permitted," as used in the Act of Congress, referred solely to the adjustment between the clerks and the Bureau of Immigration, and did not entitle clerks on a salary basis to hold any part of such fees as against the counties, but that such fees were earned in official capacity, and must be accounted for to the county treasurer. *Baron County v. Beckwith*, 124 N. W. 1030, 1032, 142 Wis. 519, 30 L. R. A. (N. S.) 810, 135 Am. St. Rep. 1079.

#### Allow synonymous

See Allow.

#### Franchise distinguished

A franchise to be a corporation and conduct business comes from the commonwealth and is different in kind from a "permit" or location to such corporation to use the streets of a city. A "permit" or location is inferior and subsidiary to the franchise. Sometimes the terms of a permit from, or a contract with, local authorities are incorporated in a franchise; but the functions of a franchise cannot be performed by a permit. A franchise involves a greater or less degree of comprehensiveness and generality, and its exercise something of time and development. A permit, specification, or location is narrow and definite, adapted to immediate or early use or service, and depending upon present conditions. *Metropolitan Home Tel. Co. v. Emerson*, 88 N. E. 670, 671, 202 Mass. 402.

A privilege granted by a city to an ordinary railroad company to lay and operate its railroad across or along the streets of a city is termed a "permit," a "license," an "easement," or a "right of way," but never a "franchise." *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, 15, 17, 87 C. C. A. 619 (citing *City of Denver v. Bayer*, 2 Pac. 6, 7 Colo. 113; *Denver Circle R. Co. v. Nestor*, 15 Pac. 714, 10 Colo. 403, 405, 415, 419, 420, 423; *Jackson v. Kiel*, 22 Pac. 504, 13 Colo. 378, 381, 6 L. R. A. 254, 16 Am. St. Rep. 207; *Jackson v. Ackroyd*, 26 Pac. 132, 15 Colo. 583; *People ex rel. Dyett v. McMurray*, 61 Pac. 226, 27 Colo. 277, 281; *Barber Asphalt Pav. Co. v. City of Denver*, 72 Fed. 336, 337, 19 C. C. A. 139; *Metropolitan City Ry. Co. v. Chicago W. D. Ry. Co.*, 87 Ill. 317, 322; *Lincoln St. Ry. Co. v. City of Lincoln*, 84 N. W. 802, 807, 61 Neb. 109, 126; *Crowder v. Town of Sullivan*, 28 N. E. 94, 128 Ind. 486, 13 L. R. A. 647; *People v. Ft. Wayne & E. Ry. Co.*, 52 N. W. 1010, 92 Mich. 522, 16 L. R. A. 752; *Hayes v. Michigan Cent. R. Co.*, 4 Sup. Ct. 369, 111 U. S. 228, 229, 28 L. Ed. 410; *East Alabama Ry. Co. v. Doe*, 5 Sup. Ct. 869, 114 U. S. 340, 29 L. Ed. 136; *City of Knoxville v. Africa*, 77 Fed. 501, 507, 23 C. C. A. 252, 258; *Detroit Citizens' St. Ry. Co. v. City of Detroit*, 64 Fed. 628, 633, 643, 12 C. C. A. 365, 370, 380, 26 L. R. A. 667; *City of Detroit v. Detroit City R. Co.*, 56 Fed. 867, 874; *Linden Land Co. v. Milwaukee Electric Railway & Light Co.*, 83 N. W. 851, 107 Wis. 493).

**Have synonymous**

See Having.

**Knowledge and consent implied**

The word "permitting," in a charge in an action for injuries to an employé injured by an unguarded machine, which deals with a question of the employer's negligence in "permitting" the guide to be and remain in a defective condition, presupposes the idea of knowledge. *Texas & N. O. R. Co. v. Gelger*, 118 S. W. 179, 184, 55 Tex. Civ. App. 1.

Under an indorsement slip attached to an insurance policy, reading "2,500 total concurrent insurance permitted," the use of the word "permitted" shows that the insurer intended to give its consent to something that was prohibited by the policy. *L'Engle v. Scottish Union & National Fire Ins. Co.*, 37 South. 462, 465, 48 Fla. 82, 5 Ann. Cas. 748.

The words "suffer" and "permit," as used in Ky. St. 1903, § 1978, and in an indictment based thereon, mean that defendant must have suffered or permitted the game with knowledge that money or property was being bet, won, or lost thereby, or that some fact or circumstance must appear from which such knowledge might be inferred. *Bunnell v. Commonwealth (Ky.)* 99 S. W. 237, 239.

Under the provisions of the act of March 11, 1903 (Laws 1903, p. 223), the "permit," when granted as therein provided for, gives

the applicant an inchoate right, which will ripen into a legal and complete appropriation only upon the completion of the works and the application of the water to a beneficial use. The right given by such permit may ripen into a complete appropriation, or may be defeated by the failure of the holder to comply with the requirements of the statute. The permit, therefore, is not an appropriation of the public waters of the state, but is the consent of the state given in the manner provided by law to construct and acquire real property. *Speer v. Stephenson*, 102 Pac. 365, 366, 16 Idaho, 707.

In an action against a carrier for injuries to plaintiff, a passenger, through being shot by a fellow passenger, an allegation that defendant's brakeman "permitted" the shooting embraced the element of knowledge of the danger threatened or of the facts from which it might have been anticipated; the verb "permit" importing knowledge of the act permitted. *Pittsburg, C. & St. L. Ry. Co. v. Richardson*, 82 N. E. 536, 537, 40 Ind. App. 503.

In an action for injuries to a railroad brakeman owing to his having stumbled over a clinker on the track, an instruction that, if defendant "permitted" the clinker to remain on the track, it was an act of negligence proximately causing the injury, and plaintiff was entitled to recover, the word "permitted" did not import knowledge of the presence of the clinker. *Missouri, K. & T. Ry. Co. of Texas v. Keefe*, 84 S. W. 679, 682, 37 Tex. Civ. App. 588.

That a tenant of a building and his subtenant without the knowledge of the owner sold liquors therein did not show a violation by the owner of an injunction against selling or permitting liquors to be sold, since she was not bound to assume that her tenant or his subtenant would violate the law; to permit being to authorize or give leave, and to allow being to acquiesce in or tolerate, and knowledge, express or implied, is essential to be guilty of either. *Sawyer v. Mould*, 122 N. W. 813, 814, 144 Iowa, 185, 25 L. R. A. (N. S.) 602.

The word "permits," in the statute punishing any man who "permits" the placing of his wife in a house of ill fame, or allows or permits his wife to remain therein, is almost identical in meaning with the word "allows," and implies a sort of assent on the part of the husband, and there must be some active wish, or at least willingness in his mind, after he has knowledge of her presence in the house, that she shall continue there, and means something more than mere indifference to her whereabouts, or passive suffering in a case where the circumstances do not call on him to interfere with her conduct. *People v. Conness*, 88 Pac. 821, 824, 150 Cal. 114.

The word "permit" as used in Rev. Codes 1890, § 7610, providing that if any person

shall permit his premises to be used for the sale of liquor contrary to law, the premises shall be subject to lien for all the fines and costs assessed against such occupant, is to be construed as authorizing the enforcement of a lien on the premises on which a nuisance is maintained, in violation of Rev. Codes 1899, § 7605, when the proof shows that the owner knowingly permitted such use. *Larson v. Christiansen*, 106 N. W. 51, 52, 14 N. D. 476.

**License synonymous**

See License (Government Regulation).

**Power to prevent implied**

The word "permitted" necessarily implies power to prevent; hence, in a personal injury action by a servant, a complaint charging that the rock which fell upon and injured plaintiff was loose and to the employer's knowledge likely to fall, that the employer permitted plaintiff to work so near the rock that if it fell it would injure him, charges the employer with negligence. *Mitchell Lime Co. v. Nickless (Ind.)* 85 N. E. 728, 729.

**Require synonymous**

In Bankr. Act July 1, 1898, § 3, providing, as to the four months' time after the commission of an act of bankruptcy within which a petition may be filed, that such time shall not expire until four months after the date of the recording or registering of the transfer or assignment, when the act consists in having made a transfer with intent to hinder, delay, or defraud creditors or for the purpose of giving a preference as thereinafore provided, or a general assignment for the benefit of creditors, if by law such recording or registering is required or permitted, etc., the words "required" and "permitted" in the connection used are of synonymous legal meanings. If the instrument giving the preference is one which is "permitted" to be recorded in order to give it validity as against certain classes of persons, though perfectly valid without record as to other classes, it is an instrument "required" to be recorded within the meaning of the word as there used. *Loeser v. Savings Deposit Bank & Trust Co.*, 148 Fed. 975, 980, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233.

**PERMISSIVE USE**

By "permissive" use is meant a license exercised in subordination to another's claim and ownership. *Alper v. Tormey*, 93 Pac. 402, 404, 7 Cal. App. 8.

**PERMISSIVE WASTE**

"Permissive waste" is such as is merely permitted by the tenant, and consists in the neglect or omission to do what will prevent injury to the estate or freehold, as, for example, to suffer a house to become decayed for want of proper repair. *Norris v. Laws*, 64 S. E. 499, 501, 150 N. C. 599.

**PERPETRATE—PERPETRATION**

Before a jury can find a defendant guilty of murder "perpetrated by means of poison," or by any other means whatever, they must first find that there has been an unlawful killing with malice aforethought. The mere fact that a killing has been accomplished by means of poison does not of itself establish malice aforethought. *State v. Phinney*, 89 Pac. 634, 13 Idaho, 307, 12 L. R. A. (N. S.) 935, 12 Ann. Cas. 1079.

Where two entered on the perpetration of a burglary, and on being discovered, and while trying to escape, one of the burglars, at a short distance from the building and on another lot, shot and killed a police officer, who had commanded him to halt, the court properly found that the killing was "in the perpetration of the burglary," and that it was murder in the first degree. *Conrad v. State*, 78 N. E. 957, 958, 75 Ohio St. 52, 6 L. R. A. (N. S.) 1154, 8 Ann. Cas. 966.

**PERPETUAL**

**PERPETUAL SUCCESSION**

The term "perpetual succession" or "continued succession" means only a capacity of succession for a period limited in the charter of a corporation or a period fixed by general statutes. *State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co.*, 86 S. W. 170, 174, 187 Mo. 439.

Where a corporate charter does not prescribe the corporate terms, but does provide that it shall have "perpetual succession," the term "perpetual succession" means only the capacity of succession for a period limited in the charter or a period fixed by the general statutes in force at the time. *State v. Louisiana, B. G. & A. G. Road Co.*, 92 S. W. 153, 163, 116 Mo. App. 175 (quoting definitions in *State ex rel. Walker v. Payne*, 31 S. W. 797, 129 Mo. 468, 33 L. R. A. 576).

The general rule is that where a special act creating a corporation uses the term "perpetual succession" in connection with the charter, it implies nothing more than a continuance of succession during the existence of the company, which, in the absence of some special provision to the contrary, is for a period of 20 years as provided for by the general corporation law. *State ex rel. Major v. German Mut. Life Ins. Co.*, 123 S. W. 19, 20, 224 Mo. 84, 19 Ann. Cas. 1210.

"Perpetual succession," as used in a charter of a corporation limiting its corporate existence to 50 years, and providing that it should have perpetual succession, implied nothing more than a continued succession during the term fixed by its charter, and did not create a corporation in perpetuity. Chancellor Kent, in 2 Kent, Comm. 267, announced the true meaning of the words "perpetual succession" in corporate charters, wherein he

says: "It is sometimes said that a corporation is an immortal, as well as an invisible and intangible, being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is so far from being immortal that it is well known that most of the private corporations recently created by statute are limited in duration to a few years." In 7 American & English Encyclopedia of Law (2d Ed.) p. 684, it is well said: "When it is said that one of the distinguishing features of a corporation is the capacity of perpetual succession, this must be understood to mean a potential, not an actual, perpetuity; a capacity, as contradistinguished from partnerships and other voluntary associations, to continue in existence indefinitely up to the period of its constitutional or statutory limitation, in spite of the withdrawal or death of any of its members." And in 10 Encyclopedia of Law and Procedure, p. 148, it is laid down that these words "perpetual succession" mean in a general sense that the corporation is endowed with the faculty of existing forever, unless the same or another statute or the Constitution has fixed and limited the term of its existence. In other words, the term "perpetual succession" is understood to mean indefiniteness of duration, and not to refer to length of time, but rather convey the idea of regularity or unbroken continuity of existence. *State ex rel. Hines v. Scott County Macadamized Road Co.*, 105 S. W. 752, 207 Mo. 54, 13 Ann. Cas. 656 (citing *State ex rel. Walker v. Payne*, 31 S. W. 797, 129 Mo. 468, 33 L. R. A. 576; *State ex rel. Allison v. Hannibal & Ralls County Gravel Road Co.*, 39 S. W. 910, 188 Mo. 332, 86 L. R. A. 457).

### PERPETUALLY

P. L. 1871, p. 444, authorizing a canal corporation created by Act Dec. 31, 1824, to lease its canal or any part thereof with appurtenances and franchises either "perpetually" or for such shorter time as may be agreed on between the parties, merely authorizes the corporation to lease its property for a term not exceeding the period fixed for its existence, the word "perpetually" not giving the corporation any property or franchise that it did not previously have. *McCarter v. Lehigh Valley R. Co.*, 79 Atl. 93, 99, 78 N. J. Eq. 346.

Act March 27, 1874, § 8, regulating the acts of the State Board of Canal Commissioners, gives the commissioners control of the Illinois and Michigan canal, its feeders and property belonging thereto, and authorizes them to lease from time to time any of the canal lands owned by the state, provided that no lease shall be for more than 20 years. The act also authorizes them to sell canal lands and riparian rights along the Desplaines river, other than the 90-foot strip along the canal, to the highest bidder after giving 30

days' previous notice of the contemplated sale. Held, that a contract by which the commissioners granted certain riparian rights together with the right to flow certain canal lands belonging to the state, not limited to a specified term, and providing that the grantee should raise the towpath on the canal between certain points, and should "perpetually" maintain the same in good condition, not made either by public sale or after advertised notice, should be construed as a lease of such rights for 20 years within the authority of the commissioners, under the rule that where one attempts to grant a greater estate than he has the conveyance will be effective to pass what he has, though the grant is inoperative as to the larger estate; the word "perpetually" being construed to mean "during the term of the rights granted," and not "forever." *People v. Economy Light & Power Co.*, 89 N. E. 760, 777, 241 Ill. 290.

### PERPETUITY

A "perpetuity" is any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being and 21 years beyond. *Armstrong v. Barber*, 88 N. E. 246, 248, 239 Ill. 389.

The word "perpetuity," as applied to charitable trusts, means an inalienable and indestructible interest, subject to unforeseen social changes or eventualities destroying the property or rendering the enforcement of the trust impossible. *Maxcy v. City of Oshkosh*, 128 N. W. 899, 907, 144 Wis. 238, 31 L. R. A. (N. S.) 787.

A "perpetuity" is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being, and 21 years thereafter, and in the case of a posthumous child, a few months more, allowing for the period of gestation. *Johnson v. Preston*, 80 N. E. 1001, 1003, 226 Ill. 447, 10 L. R. A. (N. S.) 564 (citing *Bouv. Law Dict.*; *Waldo v. Cummings*, 45 Ill. 421; *Rhoads v. Rhoads*, 43 Ill. 239; *Lunt v. Lunt*, 108 Ill. 307; *Hart v. Seymour*, 35 N. E. 246, 147 Ill. 598; *Howe v. Hodge*, 38 N. E. 1083, 152 Ill. 252).

"Perpetuity" is a future limitation, whether executory or by way of remainder, and either of real or personal property, which is not to vest until after the expiration of or will not necessarily vest within the period fixed and prescribed by the law for the creation of future interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation." *Starcher Bros. v. Duty*, 56 S. E. 524, 526, 61 W. Va. 373, 9 L. R. A. (N. S.) 913, 123 Am. St. Rep. 990.

A "perpetuity" is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or

will not necessarily vest within, the period prescribed by law for the creation of future estates and interests, and which is not destructible by the person for the time being entitled to the property subject to the future limitations, except with the concurrence of the individual interested under that limitation. *Hollander v. Central Metal & Supply Co. of Baltimore City*, 71 Atl. 442, 447, 109 Md. 131, 23 L. R. A. (N. S.) 1185.

"Perpetuities" are grants of property, where the vesting of an estate or interest is unlawfully postponed, and they are called perpetuities, not because the grant, as written, would make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title, or of its vesting, or, as is sometimes with less accuracy expressed, to a perpetual prevention of alienation. It is any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and 21 years beyond, and, in case of a posthumous child, a few months more, allowing for the term of gestation; or it is such a limitation of property as renders it unalienable beyond the period allowed by law. *Buxton v. Kroeger*, 117 S. W. 1147, 1161, 219 Mo. 224 (quoting definition in *Lockridge v. Mace*, 18 S. W. 1145, 109 Mo. 166).

"Perpetuities" have been defined to be grants of property wherein the vesting of an estate or interest is unlawfully postponed. And again: Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being and 21 years beyond. Where, under a will, an estate vested on the death of the testator, and only possession was postponed, no perpetuity was created. *Flanner v. Fellows*, 68 N. E. 1057, 1059, 206 Ill. 136 (quoting 2 Wash. Real Prop. 652; 2 Bouv. Law Dict. p. 326).

Remainders created by the will of a life tenant under a power of appointment to the descendants of persons who were themselves not in esse when the grantor of the power died and his will conferring it took effect are in violation of the rule against perpetuities, for the period fixed and prescribed by law for the future vesting of an estate is a life or lives in being at the time of its commencement, and 21 years and a fraction of a year beyond, to cover the period of gestation; and where property is rendered inalienable, or its vesting is deferred for a longer period, the law denounces the devise or grant as a perpetuity and declares it void. *Graham v. Whitridge*, 57 Atl. 609, 611, 99 Md. 248, 66 L. R. A. 408.

The "rule as to perpetuities" has been thus defined: "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within 21 years after some life in being at the creation of the interest." A "perpetuity" has been stated

to be: "Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and 21 years beyond, and, in case of a posthumous child, a few months more, allowing for the term of gestation." The rule is against the postponement of the vesting of estates and not against the postponement of possession. An interest which begins within lives in being and 21 years thereafter, although it may end beyond them, does not come within the rule. An immediate devise to trustees of testator's property with unconditional power to sell and dispose of the same does not violate the rule against perpetuities, though the trusteeship may, in the discretion of the trustees, and over the objections of the cestui que trust, continue 10 years from the probate of the will, for the estate in the trustees vests in interest and possession at testator's death. *Armstrong v. Barber*, 88 N. E. 246, 248, 239 Ill. 389 (citing *Flanner v. Fellows*, 68 N. E. 1057, 206 Ill. 136; *Pearson v. Hanson*, 82 N. E. 813, 230 Ill. 610; *Scofield v. Olcott*, 11 N. E. 351, 120 Ill. 362; *Gray Perp.* [2d Ed.] §§ 201, 232; *Quinlan v. Wickman*, 84 N. E. 38, 233 Ill. 39, 17 L. R. A. (N. S.) 216; 2 Bouv. Law Dict. 326; *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356).

A "perpetuity" is defined as a limitation taking the subject-matter of the perpetuity out of commerce for a period of time greater than a life or lives in being, and 21 years thereafter. Such limitation is held to apply to future interests in both realty and personality, whether legal or equitable, and to every kind of conveyance or devise, and to every form of limitation or condition by which such future estate or interests may be created. The rule against perpetuities is not violated where a testator directs that his farm be not sold during the lifetime of his three daughters and the survivor of them, but that the same be held in trust, and the net rents therefrom paid to his daughters equally during their joint lives, and, on the death of any daughter, her share to her children, if any, and that, after the death of the survivor, the farm should be sold and the proceeds divided among testator's grandchildren and the children of such grandchildren as had died, as the farm is withheld from sale only during the lives of the three daughters. *Dwyer v. Cahill*, 81 N. E. 1142, 1143, 228 Ill. 617 (citing *Bigelow v. Cady*, 48 N. E. 974, 171 Ill. 229, 63 Am. St. Rep. 230; *Flanner v. Fellows*, 68 N. E. 1057, 206 Ill. 136; *Howe v. Hodge*, 38 N. E. 1083, 152 Ill. 252).

"In determining whether a particular devise is contrary to the rule against 'perpetuities,' the inquiry is, not whether the contingency upon which the estate is to vest actually occurs within the time limited by the rule, but whether it is possible that the event may not happen within the time. If it is possible that the event upon which the executory devise, or shifting or springing use, is to vest

in some person may not happen within the time, the executory estate is void, although in fact the event actually happens within the time." Provision in a will directing that a certain portion of testator's estate shall be allowed to accumulate for the benefit of his grandchildren, and that such accumulation and income shall be equally divided among them when a designated grandchild, 2 years old at the date of testator's death, arrived at the age of 35 years, does not violate the rule against "perpetuities," but the direction for accumulation will be enforced for a period of 21 years after the testator's death, and then the amount accumulated will be distributed among the grandchildren. *Hussey v. Sargent*, 75 S. W. 211, 215, 116 Ky. 53 (citing 1 *Perry, Trusts* [5th Ed.] § 381).

A provision in a will for the deposit of money in bank, the interest to be used to keep testator's burial lot in good condition yearly, creates a "perpetuity," in violation of a constitutional prohibition thereof. *McIlvain v. Hockaday*, 81 S. W. 54, 55, 36 Tex. Civ. App. 1.

"A lease for any number of years, whether for 99 or 999, is not in violation of the statute of 'perpetuities,' for in neither is the lessor precluded thereby from disposing of it at will, nor the lessee hindered in selling or assigning the lease, and by uniting in a conveyance the lessor and lessee may freely and without restraint convey both the fee and the leasehold interest." *Hubbell v. Hubbell*, 113 N. W. 512, 515, 135 Iowa, 637, 13 L. R. A. (N. S.) 496, 14 Ann. Cas. 640.

A trust deed directing that on the death of the grantor's daughter, the property shall go to her "children and their descendants, if any such survive her," is not void as contrary to the rule against "perpetuities"; the words "children" and their descendants," employed in the deed, referring to those surviving at the time of the death of the daughter. *Cribbs v. Walker*, 85 S. W. 244, 247, 74 Ark. 104.

A will which gives property to two persons, to be paid them from time to time in certain amounts when they attain certain ages, the last payment to be made when they are 45 years old, does not violate the rule against "perpetuities" by the provision that, if they die without issue, all payments which shall not have become due shall be paid to certain others, as this, at the most, only postpones the vesting of the estate in the latter persons for two lives in being. *Hull v. Osborn*, 113 N. W. 784, 787, 151 Mich. 8.

A will giving the residue of the estate to testator's two granddaughters, certain amounts to be paid to each on her arriving at different ages, and the remainder of half the residue when she is 45 years old, though providing that, if either die without issue before attaining such age, such portions of

her half as shall not have then become due shall be paid to the other, and that, if both die without issue, all payments which shall not have become due shall be paid to certain others, does not violate the rule against "perpetuities," as it vests the title of the residue in such grandchildren at the death of testator, subject to its being divested by their dying before completion of the payments. *Hull v. Osborn*, 113 N. W. 784, 787, 151 Mich. 8.

A devise of a life estate, and, after the death of the life tenant, to his widow and children, is not a "perpetuity," under Ky. St. § 2360, as the remainder must vest within 21 years after a life in being; but a conveyance of a life estate after the death of the life tenant, to go to his children until the youngest reaches the age of 25 years, when the estate is to be divided, is a perpetuity. *Johnson's Trustee v. Johnson* (Ky.) 79 S. W. 293, 294.

Defendant city entered into a contract with a water company, by which the city agreed not to grant to any other person the right to furnish water for fire hydrants during the life of the contract, which was for 25 years, and the city to have the privilege of buying the waterworks, but if the city did not exercise the option to purchase, the contract to continue until the city finally purchased the works. Held, that the exclusive privilege granted by the contract was a "perpetuity" and monopoly, in contravention of Const. art. 1, § 26, prohibiting the granting of a perpetuity or monopoly, which rendered the contract entirely void; and hence the city could not recover for damages arising out of the water company's failure to furnish sufficient water pressure, whereby the city market house was burned. *Hartford Fire Ins. Co. v. City of Houston* (Tex.) 110 S. W. 973, 977.

## PERQUISITE

In *Bouvier's Law Dictionary*, after giving its meaning in its most extensive sense, "perquisite" is defined thus: "In a more limited sense, it means something gained by a place or office beyond the regular salary or fee." The word was used in such limited sense in the Constitution, which, after limiting the amount of compensation of clerks of court in Baltimore, provides that they shall be entitled to no other "perquisite" or compensation. *Vansant v. State*, 53 Atl. 711, 714, 96 Md. 110.

The occupancy by the Governor during his term of office of the executive mansion provided by the state, in which he is required by law to maintain his residence, is not a "perquisite of office or other compensation," and is not prohibited by the Constitution. *State v. Sheldon*, 111 N. W. 372, 373, 78 Neb. 552.

## PERSISTENCE—PERSIST

To satisfy the proviso of the Act of 1792 (3 Smith's Laws Pa. p. 73), "persistence," in the settlement of public land to save its forfeiture, "must mean something real; not merely the wishing or even attempting to do an act impossible, or so dangerous that no man could be expected to attempt it." Such proviso only dispenses with the forfeiture incurred, according to the law, by not making a settlement and continuing it, within and during the time prescribed by the enacting clause, and requires that it must be made as soon as the prevention ceases. *Huldekoper v. Burrus*, 12 Fed. Cas. 6848, pp. 840, 843, 1 Wash. 100, 118.

## PERSON

See Artificial Persons; Colored Person; Credible Person; Disorderly Person; Existing Person; From the Person; Great Many Persons; Guardian of the Person; Injury to Person and Property; In Person; Larceny from the Person; Natural Person; No Person; Plea to the Person; Poor Person; Private Person; Proper Person; Prudent Person; Qualified Persons; Suitable Person; Suspicious Person; Third Person; White Person; With Every Other Person.

All persons, see All.

Any other person, see Any Other.

Any person, see Any.

Any person interested, see Any.

Every person, see Every.

Exposure of the person, see Exposure.

Other persons, see Other.

Such person, see Such.

As used in the statute limiting actions upon the penal statutes, where the penalty goes to the state, or county, or "person" suing for the same, the word "person" means simply any person who sues as a common informer and not one having a special interest by reason of any injury or grievance. *Nebraska Nat. Bank v. Walsh*, 59 S. W. 952, 953, 68 Ark. 436, 82 Am. St. Rep. 301.

The word "person," as used in Act Cong. July 1, 1903, c. 1362, § 22, 32 Stat. 643 providing that, if any person whose name appears on the rolls shall die before receiving his allotment the land to which he would have been entitled shall be allotted in his name, etc., includes members, citizens, and freedmen. *Hancock v. Mutual Trust Co.*, 103 Pac. 566, 569, 24 Okl. 391.

### Construed in plural

The word "person," as provided by Ky. St. § 457, may extend and be applied to persons. *Commonwealth v. Adams Express Co.*, 97 S. W. 386, 387, 123 Ky. 720.

The word "person," as used in Laws 1901, p. 61, c. 62, § 1, imposing an inheritance

tax upon property passing by will or the statutes of inheritance to any person in trust or otherwise, though importing the singular, includes the plural. *Dixon v. Rickets*, 72 Pac. 947, 949, 26 Utah, 215.

The word "person," as used in the statutes relating to railroad commissioners, includes persons (Gen. St. 1901, § 5997). *Kansas City, Outer Belt & Electric R. Co. v. Board of Railroad Com'rs*, 84 Pac. 755, 756, 73 Kan. 168.

Rev. St. § 1024, provides that when there are several charges against any person for the same act or transaction, or for two or more connected acts or transactions, or for two or more acts or transactions in the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in several counts; and, if two or more indictments are found, in such case the court may order them to be consolidated. Held, that under section 1, providing that words importing the singular number may apply to several persons or things, section 1024 was not limited to indictments against a single person, but embraced consolidated indictments against several defendants. *Emanuel v. United States*, 196 Fed. 317, 320, 116 C. C. A. 137.

Rev. St. c. 23, § 68, relating to ways, provides that when a way is changed in grade by a road commissioner or "person authorized," to the injury of an abutting owner, he may apply in writing to the municipal officers for an assessment of damages occasioned thereby to be paid by the town. Chapter 53, § 19, relating to street railroads, provides that such road shall be constructed and maintained in such manner and upon such grades as the municipal officers of the towns where they are located may direct, and when, in the judgment of such corporation, it shall be necessary to alter the grade of any road the alteration shall be made at the expense of the corporation in accordance with the directions of the municipal officers. Held, that the two sections should be construed together, and under Rev. St. c. 1, § 2, rules 2 and 14, by which the word "person" may include a corporation and singular words include plural, where a grade was established by municipal officers at the request of a railroad company, it must be deemed to have been done by a "person authorized" within the meaning of section 68, and though section 68 provides that the damages shall be assessed by the municipal officers to be paid by the town, and section 19, that the alterations shall be at the expense of the corporation, yet the word "expense" in section 19 will include the damages to landowners, which, if paid by the town, are a part of the expense of the alteration, and are recoverable by the town from the railroad corpora-

tion. *Hurley v. Inhabitants of South Thomaston*, 74 Atl. 734, 736, 105 Me. 301.

#### Construed as witness

Under Bankr. Act July 1, 1898, c. 541, § 41, 30 Stat. 556, providing that certain acts committed by any "person" before a referee in bankruptcy shall constitute a contempt of court, the word "person" is not limited to the bankrupt, but extends to a witness guilty of perjury before the referee. *In re Bronstein*, 182 Fed. 349, 353.

Code Civ. Proc. § 870, provides for the examination of a party, and section 871 authorizes the examination of a "person not a party" to the action. Held, that the word "person" in section 871 means a person who can testify as a witness; and hence such section did not authorize the examination of officers of a corporation before trial, where the corporation was not a party. *Chartered Bank of India, Australia, and China v. North River Ins. Co.*, 121 N. Y. Supp. 399, 400, 136 App. Div. 646.

#### Bankrupt

Bankr. Act 1898, § 29b, provides that a "person" shall be punished by imprisonment on conviction of having concealed property belonging to his estate in bankruptcy. Section 1, cl. 19, provides that "persons" shall include corporations, except where otherwise specified. A careful reading of this clause, in connection with the terms of section 29b, convinces that it can have no effect to extend the terms or broaden the true interpretation of the latter subsection. All who are punishable under this subsection 29b are persons who are or who have been bankrupts. Hence none of those whom the word "persons" is made to include under section 1, cl. 19—no officers, partnerships, women, participants in forbidden acts, agents, officers, or members of any board of directors or trustees—can be guilty of the offense specified in this subsection, unless they are either bankrupts when they conceal the property or have been such and have obtained their discharges before that time. Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute. *Field v. United States*, 137 Fed. 6, 7, 69 C. C. A. 568.

Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554, provides that a person shall be punished on conviction of having concealed, while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate. Held, that though there can be no offense unless the concealment is accomplished while there is a person in bankruptcy, or after his discharge, not only the bankrupt, but others aiding and abetting in the concealment, are punishable. *United States v. Young & Holland Co.*, 170 Fed. 110-112.

#### Body of persons

The provisions of section 2134, Code Civ. Proc., directing that "each person upon whom a writ of certiorari is served \* \* \* must make a return," etc., is not in conflict with the view that the return of a body or board may be made by a majority of its members, because the noun "person" is clearly used to denote any person or legal entity to whom a writ is directed. *People ex rel. Lester v. Eno*, 68 N. E. 868, 870, 176 N. Y. 513.

The use of the word "person" in Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property, without due process of law, includes the natural persons who compose a corporation, and who are the beneficial owners of all its property, the technical and legal title to which is in the corporation. *State v. Atlantic Coast Line R. Co.*, 47 South. 969, 982, 56 Fla. 617, 32 L. R. A. (N. S.) 639.

In view of Rev. St. 1909, § 10,160, defining the word "persons" as including a body of persons whether incorporated or not, under sections 2528 and 3881, respectively, providing that if any person disobey an injunction, the circuit court to which it is returned, or any judge in vacation thereof, shall issue an attachment for the contempt, and that every court of record shall have power to punish as for criminal contempt, persons guilty of willful disobedience of any order, the circuit court has power to punish a corporation for civil contempt. *Fiedler v. Bambrick Bros. Const. Co.*, 142 S. W. 1111, 1116, 162 Mo. App. 528.

#### Carrier

Code 1897, § 2419, provides that if any common carrier or person, or any one as agent or employé thereof, shall transport to any person within the state any intoxicating liquors without first being furnished with a certificate that the consignee is the holder of a permit to sell intoxicating liquors in the county to which the shipment is made, such carrier or person shall on conviction be fined, etc. Held, that the word "person," as used in such section, means a public or private carrier, and did not include one who transported several interstate shipments of liquor from the railroad company's depot to the consignee's place of residence as a mere gratuity. *State v. Wignall*, 128 N. W. 935, 937, 150 Iowa, 650, 34 L. R. A. (N. S.) 507.

#### Children

The word "person," as used in a statute forbidding persons to walk along railroad tracks, should not be construed to include children so young as to be incapable of contributory negligence, under the rule that where a statute seeks to change an existing status of a portion of a community, the change must be made in language so clear as to unmistakably manifest such legislative purpose. *Erie R. Co. v. Swiderski*, 197 Fed. 521, 524, 117 C. C. A. 17.



**Citizen**

The word "persons" in the extradition treaty between the United States and Italy, entered into in 1868 (15 Stat. 629) and amended in 1884 (24 Stat. 1001), providing for the surrender of persons charged with enumerated crimes, is sufficiently broad to embrace citizens and subjects of the contracting parties, and a citizen of the United States, who while in Italy commits an offense, and who then flees to the United States, is within the treaty and may be extradited thereunder, though Italy has always construed the word so as not to include its citizens and subjects. *Ex parte Charlton*, 185 Fed. 880, 884.

**Custom officer**

Section 5445, Rev. St., relating to "every person" who aids in effecting the illegal entry of imports, while ordinarily not intended to apply to those individuals (customs officers) covered by the preceding section of the law, does not exclude an officer of the service if the facts bring him within the definition of the "person" at whom this provision is aimed, and may therefore include a customs weigher who aids in the way prohibited. *United States v. Mescall*, 164 Fed. 587, 588.

**Deceased person or estate of deceased person**

A corpse is not a "person." That which constitutes a person is separated from the body by death. *Brooks v. Boston & N. St. Ry. Co.*, 97 N. E. 760, 211 Mass. 277.

A "person" includes a corporation and a joint-stock company, but it does not include an estate, or where an action is brought by the representative of an estate or trust as such; for the estate or the trust, and not the person who represents it, is really the party. *Cole v. Manson*, 85 N. Y. Supp. 1011, 42 Misc. Rep. 149.

Primary Election Law (Laws 1903, c. 451) § 18, subd. 1, provides that the person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election. Held, that a dead man is not a "person" within the statute; such word meaning a living human being. *State ex rel. Bancroft v. Frear*, 128 N. W. 1068, 1071, 144 Wis. 79, 140 Am. St. Rep. 992.

Laws 1904, No. 80, § 81, provides that certain sections pertaining to taxes upon persons receiving property passing from decedents shall also apply to all "persons" dying before the passage of the act, but whose estates shall not have been at that time decreed or distributed, etc. Held, that "persons" refers to decedents mentioned in that section, and not to the beneficiaries. *In re Howard's Estate*, 68 Atl. 513, 514, 80 Vt. 489.

Where a wife loaned her husband money which was made payable on demand, and they both died without the wife having demanded, or received the money, her estate was a creditor of his estate, and a "person" within Rev. St. 1898, § 3840, providing for an order within which creditors shall present their claims and section 3844, providing that every person having a claim, who shall not, after notice given, exhibit it within the time limited, shall be forever barred. *Barry v. Minahan*, 107 N. W. 488, 491, 127 Wis. 570.

**Employé**

A mere ticket taker at a theater is not within Pen. Code, § 200, providing for the punishment of any "person" who admits to any theater, museum, or skating rink, or any place where wines or liquors are kept, any child under the age of 16 years, unless accompanied by its parent or guardian. *People ex rel. Jacques v. Sheriff of Kings County*, 105 N. Y. Supp. 387, 54 Misc. Rep. 8.

**Forwarding agent**

A forwarding agent is a "person" within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379, forbidding preferences and discrimination in rates. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 31 Sup. Ct. 392, 396, 220 U. S. 235, 55 L. Ed. 448.

**Infant or minor**

A child of immature and tender years is a "person," within Rev. Codes N. D. 1905, § 7686, authorizing an action for the death of a "person" by the wrongful act of another. *Scherer v. Schlager*, 122 N. W. 1000, 1006, 18 N. D. 421, 24 L. R. A. (N. S.) 520.

Under the bankruptcy act providing that any natural person may be adjudged an involuntary bankrupt, the word "person" does not include an infant. *In re Kehler*, 153 Fed. 235, 237.

Bankr. Act July 1, 1898, c. 541, § 1, subd. 11, 30 Stat. 544, provides that "debt" shall include any debt, demand, or claim provable in bankruptcy; section 4 declares that any "person" who "owes debts," except a corporation, shall be entitled to the benefits of the act as a voluntary bankrupt; and section 63 declares that debts shall be a fixed liability, absolutely owing at the time of the filing of the petition, etc. Held, that the words "owes debts" mean an obligation for which a debtor is legally liable, and hence the bankruptcy act includes an infant, where he owes debts for which his property is legally chargeable. *In re Walrath*, 175 Fed. 243, 244.

**Inhabitant**

An inhabitant of the province of Benguet, in the Philippine Islands, was a "person," within Organic Act July 1, 1902, c. 1369, providing that no laws shall be enacted in the Islands which shall deprive any "person" of life, liberty, or property without due process

of law; or deny to any person therein the equal protection of the laws. *Carino v. Insular Government of Philippine Islands*, 29 Sup. Ct. 334, 336, 212 U. S. 449, 53 L. Ed. 594.

#### **Lunatic**

Under the bankruptcy act providing that any natural person may be adjudged an involuntary bankrupt, the word "person" does not include a lunatic. *In re Kehler*, 153 Fed. 235, 237.

#### **Marshal**

Where defendant used loud and offensive language in a conversation with a village marshal, as one of a crowd engaged in disturbing the peace, and the marshal neglected to restrain defendant or preserve order, he was not a "person" whose peace could be disturbed, within a village ordinance providing that, if any person shall willfully disturb the peace of any other person by loud and unusual noise, loud and offensive conversation, etc., he shall be adjudged guilty of a misdemeanor. *Village of Salem v. Coffey*, 88 S. W. 772, 113 Mo. App. 675.

#### **Nonresident**

"In the statutes authorizing issuance of garnishment on the application of any 'person,' the word 'person' has been held to include all individuals, nonresidents as well as residents, corporations, and sovereignties." *Disconto Gesellschaft v. Umbreit*, 106 N. W. 821, 828, 127 Wis. 651, 15 L. R. A. (N. S.) 1045, 115 Am. St. Rep. 1063 (dissenting opinion by Cassoday, C. J.).

The use of the word "person," in Laws 1905, p. 126, c. 105, amending Rev. St. 1898, c. 2948, by adding the provision that if there be none of such persons in the state, and the defendant corporation has or holds itself out as having an office or place of business in the state, or does business, then service may be made upon the person doing such business or in charge of such office or place of business, the word "person" shows that the Legislature intended to reach a class not covered by the word "agents" used elsewhere in the section, but it is not broad enough to include one merely temporarily in the state, to whom though not connected with the business, was intrusted for collection a bill due a foreign corporation. *Honerine Min. & Mill. Co. v. Tellerday Steel Pipe & Tank Co.*, 88 Pac. 9, 11, 31 Utah, 326.

#### **Officer of corporation**

The president of a corporation is a "person," within Comp. Laws. § 4804, declaring that any person, agent, manager, or clerk of a corporation, with whom any money shall be deposited or intrusted, who shall appropriate it to his own use, shall be guilty of embezzlement. *State v. Weber*, 103 Pac. 411, 412, 31 Nev. 385.

Bankr. Act July 1, 1898, c. 541, § 1, cl. 7, 30 Stat. 544, provides that the term "court"

shall include a referee, and clause 19 declares that the word "persons" includes corporations and officers. By section 2, cl. 7, bankruptcy courts are invested with such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as otherwise provided, and section 23, par. "a," confers jurisdiction on the United States Circuit Courts in certain circumstances over controversies between trustees and adverse claimants concerning property claimed by the trustee, except as to proceedings in bankruptcy, jurisdiction over which rests exclusively in bankruptcy courts, and by paragraph "b" suits brought by the trustee, except those to recover property under certain specified sections of the act, can be brought in the bankruptcy court only by consent of the proposed defendant. Held, that a referee in bankruptcy had jurisdiction of a proceeding to compel the officers of a corporation to pay over the proceeds of stock sales alleged to belong to the corporation, and also to pay an amount assessed against them for unpaid shares. *In re Kornit Mfg. Co.*, 192 Fed. 392, 394.

#### **Partnership, firm, company, society, joint-stock company, or association**

A "person" includes a joint-stock company. *Cole v. Manson*, 85 N. Y. Supp. 1011, 42 Misc. Rep. 149.

A partnership is an entity distinct from that of its members, and is recognized in law as a "person." *Clay, Robinson & Co. v. Douglas County*, 129 N. W. 548, 549, 88 Neb. 363, Ann. Cas. 1912B, 756.

A partnership cannot sue, for it is not a natural or artificial "person." *Phillips v. Holmes*, 51 South. 625, 626, 165 Ala. 250.

A partnership is a "person" in the sense in which that term is used in the federal bankruptcy act (Act Cong. July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544). *In re Everybody's Grocery & Meat Market*, 173 Fed. 492.

Laws 1892, p. 1487, c. 677, § 5, defines the term "person" to include a corporation or joint association, as well as a natural person. *People v. Taylor*, 85 N. E. 750, 760, 192 N. Y. 398.

The word "person" or "persons" shall be held to include firms, companies, and associations. Revenue Law (Acts 1898, No. 170, p. 346, § 91). *National Fire Ins. Co. v. Board of Assessors*, 46 South. 117, 118, 121 La. 108, 126 Am. St. Rep. 313; *General Electric Co. v. Board of Assessors*, 46 South. 122, 123, 121 La. 116.

The word "person," as provided by Ky. St. § 457, may extend and be applied to bodies politic and corporate, societies, communities, and the public generally, as well as individuals, persons, and joint-stock com-

panics. *Commonwealth v. Adams Exp. Co.*, 97 S. W. 386, 387, 23 Ky. 720.

The word "person," as used in the statutes relating to railroad commissioners, includes partnerships or joint-stock companies. *Gen. St. 1901, § 5997. Kansas City, Outer Belt & Electric R. Co. v. Board of Railroad Com'rs*, 84 Pac. 755, 756, 73 Kan. 168.

Under Const. art. 9, § 18, giving the Corporation Commission power to regulate all transmission companies doing business in the state in all matters relating to the performance of their public duties and their charges therefor, and section 34, providing that the term "transmission company" shall include any company or other person holding or operating for hire any telegraph or telephone line, and that the term "person" shall include individuals, partnerships, and corporations, the Corporation Commission has supervision of a telephone company owned solely by an individual and operated for hire in all matters relating to the performance of its public duties and charges. *Hine v. Wadlington*, 109 Pac. 301, 26 Okl. 389.

Laws 1901, p. 19, c. 3, making it unlawful to permit minors in saloons, etc., provides (section 7) that the word "person," as used in the act, shall be deemed to mean firm or corporation, as well as natural person, and the person managing the business of such firm or corporation shall be liable to the penalties prescribed by this act. *Territory v. Church*, 91 Pac. 720, 721, 14 N. M. 226.

While it is true that section 59 of the Bankrupt Act contains the only provision of the act expressly defining who may file a petition to have a debtor adjudged an involuntary bankrupt, and that that provision is confined to creditors, and section 5, read with section 59, seems to confine the right to creditors, yet section 4a declares that any "person" owing debts, except a corporation, shall be entitled to the benefit of this act as a voluntary bankrupt, and section 1 declares that the word "persons," unless inconsistent with the context, shall include partnerships. *In re J. M. Ceballos & Co.*, 161 Fed. 445, 448.

An unincorporated association is not a "person," and has not the power to sue or be sued; but when it has been organized and conducted for profit it will be treated as a partnership, and its members held liable as partners. *Slaughter v. American Baptist Publication Society (Tex.)* 150 S. W. 224, 226.

The word "person," in section 2, art. 2, of the general revenue act approved March 10, 1900, providing that "a person moving into this state from another state between March 1st and September 1st shall list his personal property acquiring an actual situs therein before September 1st and the same shall be assessed and placed upon the tax roll and the taxes thereon collected, etc.," includes a firm; and where a firm moves in-

to the state between March 1st and September 1st, moving personal property into the state that acquires a situs therein before September 1st, said property shall be assessed and taxes thereon collected for the current year, notwithstanding one member of the firm was a resident of the state before the 1st day of March, and the other member was, and has been at all times, a resident of another state. *Bivins & Carroll v. Bird*, 121 Pac. 1080, 1081, 31 Okl. 286.

Under the bankruptcy act of July 1, 1898, a partnership is insolvent if the partnership property is insufficient to pay the firm debts, because it is a "person" (section 1 [19], c. 541, 30 Stat. 545), because any "person" is insolvent under that act whose property is insufficient to pay its debts (section 1 [15], c. 541, 30 Stat. 544), and the only property a partnership has or can apply to its debts is the firm property, and the only debts it owes are the firm debts. *In re Bertenshaw*, 157 Fed. 363, 368, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986.

Neither the judicial recognition by the courts of a state of the partnership entity, nor the provisions of the bankruptcy act, which define a partnership to be a "person" within the meaning of the act, and authorize it to be adjudged a bankrupt (*Bankr. Act July 1, 1898, c. 541, §§ 1a [19], 5a, 80 Stat. 544, 547*), work a change of the established rule fixing the substantive rights of creditors respectively, of the partnership and of its individual members. *In re Telfer*, 184 Fed. 224, 226, 106 C. C. A. 366.

#### **Pregnant woman**

Laws Del. vol. 17, p. 523, c. 226, § 2 (Rev. Code 1852, amended in 1893, p. 930), makes it a crime for any person to administer to or advise a pregnant woman with intent to procure a miscarriage, or to "aid, assist, or counsel any person so intending to procure a miscarriage." Held, that the word "person," in the quoted clause, means some person other than the pregnant woman, and an indictment under such clause, charging defendants with having counseled a pregnant woman who was intending to procure her own miscarriage, is bad. *State v. Parm (Del.)* 60 Atl. 977, 978, 5 Pennewill, 556.

#### **Private corporation**

The words "person" or "persons" includes corporations. *In re Charge to Grand Jury*, 151 Fed. 834, 845; *Cole v. Manson*, 85 N. Y. Supp. 1011, 42 Misc. Rep. 149.

A corporation by both the civil and common law is a "person," an artificial person. *Davoust v. City of Alameda*, 84 Pac. 760, 761, 149 Cal. 69, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847.

A corporation is included in the term "person" as used in the statutes. *Goldzler v. Central R. Co. of New Jersey*, 88 N. Y. Supp. 214, 215, 43 Misc. Rep. 667 (citing

Scharmann & Sons v. De Palo, 72 N. Y. Supp. 1008, 66 App. Div. 29).

Under Civ. Code, § 14, the word "person," as used in the statutes, includes a corporation as well as a natural person. Western Union Telegraph Co. v. Superior Court of Sacramento County, 115 Pac. 1091, 1098, 15 Cal. App. 679.

In the construction of statutes the term "person," being generally understood as denoting a natural person, will be taken in that sense, unless from the context or other parts of the act it appears that artificial persons, such as corporations, were also intended to be expressed. Commonwealth v. Real Estate Trust Co., 60 Atl. 551, 553, 211 Pa. 51.

Laws 1892, p. 1487, c. 677, § 5, defines the term "person" to include a corporation or joint association, as well as a natural person. People v. Taylor, 85 N. E. 759, 760, 192 N. Y. 398.

The word "person" or "persons" shall be held to include corporations. National Fire Ins. Co. v. Board of Assessors, 46 South. 117, 118, 121 La. 108, 126 Am. St. Rep. 313; General Electric Co. v. Assessors, 46 South. 122, 123, 121 La. 116 (citing Revenue Law, Acts 1898, No. 170, p. 346, § 91).

V. S. 21, provides that the word "person" may extend and be applied to bodies corporate and political. Gokey v. Boston & M. R. Co., 180 Fed. 994, 995.

The word "person," as provided by Ky. St. § 457, may extend and be applied to bodies politic and corporate, societies, communities, and the public generally, as well as individuals, persons, and joint-stock companies. Commonwealth v. Adams Exp. Co., 97 S. W. 386, 387, 123 Ky. 720.

A corporation is a "person" within the meaning of the fourteenth amendment to the federal Constitution of the United States and other constitutional clauses. Hammond Beef & Provision Co. v. Best, 40 Atl. 338, 340, 91 Me. 431, 42 L. R. A. 523.

Corporations are persons within the federal and state Constitutions, guaranteeing to all persons due process of law. Kiley v. Chicago, M. & St. P. Ry. Co., 119 N. W. 309, 312, 138 Wis. 215; United States v. McHie, 194 Fed. 894, 898; Lawrence v. Rutland R. Co., 67 Atl. 1091, 1092, 80 Vt. 370, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475; Ex parte Case, 116 Pac. 1037, 1038, 20 Idaho, 128; Kansas Natural Gas Co. v. Haskell, 172 Fed. 545, 566 (quoting and adopting definitions in Charlotte, C. & A. R. Co. v. Gibbs, 12 Sup. Ct. 255, 142 U. S. 386, 35 L. Ed. 1051); Chicago, R. I. & P. Ry. Co. v. State, 111 S. W. 456, 460, 86 Ark. 412; American De Forest Wireless Telegraph Co. v. Superior Court of City and County of San Francisco, 96 Pac. 15, 16, 153 Cal. 533, 17 L. R. A. (N. S.) 1117, 126 Am. St. Rep. 125; Ward Lumber Co. v. Hen-

derson-White Mfg. Co., 59 S. E. 476, 477, 107 Va. 626, 17 L. R. A. (N. S.) 324; Portland Ry., Light & Power Co. v. Railroad Commission of Oregon, 109 Pac. 273, 274, 56 Or. 468; Arkansas Stave Co. v. State, 125 S. W. 1001, 1003, 94 Ark. 27, 27 L. R. A. (N. S.) 255, 140 Am. St. Rep. 103; Chicago, R. I. & P. Ry. Co. v. State, 111 S. W. 456, 460, 86 Ark. 412; Louisville & N. R. Co. v. Central Stockyards Co., 97 S. W. 778, 797, 133 Ky. 148; Southern R. Co. v. Greene, 49 South. 404, 409, 160 Ala. 396; Hammond Beef & Provision Co. v. Best, 40 Atl. 338, 340, 91 Me. 431, 42 L. R. A. 523; Huber v. Martin, 105 N. W. 1036, 1038, 127 Wis. 412, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400 (citing Covington & L. Turnp. Road Co. v. Sanford, 17 Sup. Ct. 198, 164 U. S. 578, 41 L. Ed. 560; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 8 Sup. Ct. 737, 125 U. S. 181, 189, 31 L. Ed. 650; Santa Clara County v. Southern P. R. Co., 6 Sup. Ct. 1132, 118 U. S. 394, 30 L. Ed. 118); Willis v. McKinnon, 70 N. E. 957, 962, 178 N. Y. 451 (citing Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 8 Sup. Ct. 737, 125 U. S. 181, 31 L. Ed. 650).

Corporations are "persons" within the provisions of the federal and state Constitutions guaranteeing to all persons the equal protection of the laws. Kiley v. Chicago, M. & St. P. Ry. Co., 119 N. W. 309, 312, 138 Wis. 215; United States v. McHie, 194 Fed. 894, 898; Lawrence v. Rutland R. Co., 67 Atl. 1091, 1092, 80 Vt. 370, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475; Carrithers v. City of Shelbyville, 104 S. W. 744, 745, 126 Ky. 769, 17 L. R. A. (N. S.) 421; Ex parte Case, 116 Pac. 1037, 1038, 20 Idaho, 128; Chicago, R. I. & P. Ry. Co. v. State, 111 S. W. 456, 460, 86 Ark. 412; Missouri & N. A. R. Co. v. State, 121 S. W. 930, 931, 92 Ark. 1, 31 L. R. A. (N. S.) 861, 135 Am. St. Rep. 164; McGuire v. Chicago, B. & Q. R. Co., 108 N. W. 902, 905, 131 Iowa, 340, 33 L. R. A. (N. S.) 706; American De Forest Wireless Telegraph Co. v. Superior Court of City & County of San Francisco, 96 Pac. 15, 16, 153 Cal. 533, 17 L. R. A. (N. S.) 1117, 126 Am. St. Rep. 125; Beaumont Traction Co. v. State, 122 S. W. 615, 618, 57 Tex. Civ. App. 605; Boone v. State, 54 South. 109, 110, 170 Ala. 57, Ann. Cas. 1912C, 1065; Portland Ry., Light & Power Co. v. Railroad Commission of Oregon, 109 Pac. 273, 274, 56 Or. 468; Arkansas Stave Co. v. State, 125 S. W. 1001, 1003, 94 Ark. 27, 27 L. R. A. (N. S.) 255, 140 Am. St. Rep. 103; State v. Texas & P. Ry. Co., 143 S. W. 223, 225; Chicago, R. I. & P. Ry. Co. v. State, 111 S. W. 456, 460, 86 Ark. 412; Louisville & N. R. Co. v. Central Stockyards Co., 97 S. W. 778, 797, 133 Ky. 148; Southern R. Co. v. Greene, 49 South. 404, 409, 160 Ala. 396; Hammond Beef & Provision Co. v. Best, 40 Atl. 338, 340, 91 Me. 431, 42 L. R. A. 523; Huber v. Martin, 105 N. W. 1036, 1038, 127 Wis. 412, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400 (citing Covington

*T. Turnp. Road Co. v. Sanford*, 17 Sup. Ct. 198, 164 U. S. 578, 41 L. Ed. 560; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 8 Sup. Ct. 737, 125 U. S. 181, 189, 31 L. Ed. 650; *Santa Clara County v. Southern P. R. Co.*, 6 Sup. Ct. 1132, 118 U. S. 394, 30 L. Ed. 118; *Willis v. McKinnon*, 70 N. E. 957, 962, 178 N. Y. 451 (citing *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 8 Sup. Ct. 737, 125 U. S. 181, 31 L. Ed. 650).

While corporations are entitled to the equal protection of the law with individuals, the inherent rights of a corporation are entirely separate and distinct from those of a natural person; they being created by the statute, with no powers except those conferred thereby. *State v. Central Lumber Co.*, 123 N. W. 504, 513, 24 S. D. 136, 42 L. R. A. (N. S.) 804.

A corporation doing business within a state other than that of its creation, having an office and agents therein, and subject to the process of its courts, is a "person," within the meaning of the equality clause of the fourteenth amendment of the federal Constitution. *Adams v. Standard Oil Co. of Kentucky*, 53 South. 692, 694, 97 Miss. 879.

Since a corporation is a person within the federal Constitution guaranteeing to all persons equal protection of the laws, corporations are also within the protection of the fourth, and fifth, amendments of such Constitution. *United States v. McHie*, 194 Fed. 894, 898.

A corporation is not a "person" within the fifth amendment of the federal Constitution, providing that no person shall be compelled in any criminal case to be a witness against himself. *In re Bornn Hat Co.*, 184 Fed. 506, 508.

A foreign corporation applying for admission to do business in a state, although a "person," is not within the jurisdiction of such state within Const. U. S. Amend. 14, forbidding a state to deny to any "person within its jurisdiction" the equal protection of its laws. *State ex rel. Atlantic Horse Ins. Co. v. Blake*, 144 S. W. 1094, 1096, 241 Mo. 100, Ann. Cas. 1913C, 1288.

A corporation is not a "person" within the meaning of the concluding clause of the first section of the fourteenth amendment of the Constitution, which declares that no state shall deprive any person of personal property without due process of law or deny to any person within its jurisdiction the equal protection of its laws. A corporation is a mere creature of the local law whereby it has its existence, and has no right, because of its chartered powers, to exercise corporate power beyond the territorial limits of the state which created it. Any state may absolutely and entirely exclude corporations organized under the laws of another state or may impose such conditions for the admission of

foreign corporations within the limits of its jurisdiction as its lawmaking body may consider to be requisite for protection of its interest and policies. *In re Speed's Estate*, 74 N. E. 809, 811, 216 Ill. 23, 108 Am. St. Rep. 189.

While a corporation is not a "citizen" within the meaning of the federal Constitution, yet it is a "person" within its terms. *Southern R. Co. v. Greene*, 49 South. 404, 409, 160 Ala. 396.

A foreign corporation, though a person, under Statutory Construction Law, § 5, is not a citizen, within the provision of the United States Constitution that citizens of each state shall be entitled to the privileges and immunities of citizens of the several states. *In re Avery's Estate*, 92 N. Y. Supp. 974, 979, 45 Misc. Rep. 529.

A will established a trust, and gave a power of appointment to A., the beneficiary of the trust. A. died, leaving a last will under which the trustee of the first will was appointed executor and by which A. exercised in full the power of appointment. Held, that the power of appointment to such "persons" and in such manner as she shall have directed was not limited to natural persons, but included a foreign charitable corporation. *Farmers' Loan & Trust Co. v. Shaw*, 107 N. Y. Supp. 337, 339, 56 Misc. Rep. 201 (citing *In re Fox*, 52 N. Y. 530, 11 Am. Rep. 751; *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 8 Sup. Ct. 741, 125 U. S. 189, 31 L. Ed. 650).

A statute of a general nature concerning parties to an action includes corporations, though the words "person" and "he" and similar designations pointing to natural persons only in their literal sense are used. *Norwich Pharmacal Co. v. Abaly*, 113 N. W. 963, 964, 133 Wis. 530.

The word "person," as used in the statutes relating to railroad commissioners includes corporations. *Kansas City, Outer Belt & Electric R. Co. v. Board of Railroad Com'rs*, 84 Pac. 755, 756, 73 Kan. 168 (citing *Gen. St. 1901*, § 5997).

A corporation has been held to be a "person" within the meaning of the statute of limitations, providing that when a "person" is out of the state limitations shall not run against a cause of action against him. *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.*, 103 N. W. 915, 917, 14 N. D. 147, 70 L. R. A. 814, 116 Am. St. Rep. 642, 8 Ann. Cas. 1160 (citing *Olcott v. Tloga R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393).

In the absence of special disability, any person may be a beneficiary under a will; and a statute of wills, designating any persons as capable of taking, includes corporations. *In re Beck's Estate*, 121 Pac. 784, 786, 44 Mont. 561.

Under St. 1908, § 457, providing that the word "person" may extend and be applied to corporations, the court under a statutory authority to appoint some discreet, fit "person" to act as public administrator, was authorized to appoint a corporation for that office, the corporation being organized under an act giving it authority to act as guardian, executor, or administrator. *Louisville & N. R. Co. v. Herndon's Adm'r*, 104 S. W. 732, 735, 126 Ky. 589.

A corporation is not a person within Laws 1876, c. 296, by which certain sections of Laws 1875, c. 299, which originally required all "persons" to comply with certain restrictions, was amended by extending the provisions of the act to "corporations" and in another section to the officers or agents of corporations, thus making the amended sections read "persons or corporations" and "person or officer or agent of any corporation" as it was evident intention of the Legislature not to confound the two terms. *Tewksbury v. Schulenberg*, 41 Wis. 584, 596.

Chancery Act April 3, 1902 (P. L. p. 511, art. 2, § 5), providing for the method of service of process for appearance on defendant, does not mention corporations by name, but as the name "person" includes corporations if they fall within the general design of the act, this section warrants such service of process on a corporation defendant as is equivalent to personal service on an individual. *Martin v. Atlas Estate Co.*, 65 Atl. 881, 882, 72 N. J. Eq. 416.

The word "person," as used in the mechanic's lien acts of West Virginia, includes a corporation, the state Constitution declaring that the word "person" includes corporations, if not restricted by the context. A corporation employed to supervise the construction of an electric railway by means of the personal services of its officers and servants is entitled to a lien therefor. *Wetzel & T. R. Co. v. Tennis Bros. Co.*, 145 Fed. 458, 462, 75 C. O. A. 266, 7 Ann. Cas. 426.

Code W. Va. 1899, c. 75, § 7, which provides that "every workman, laborer, or other 'person' who shall do or perform any work or labor by virtue of any contract for any incorporated company" shall have a lien for the value of such work, gives a lien to a corporation which comes within its terms, under chapter 13, § 17, giving rules for the construction of the statutes, and providing that "the word 'person' includes corporations if not restricted by the context." *Tennis Bros. Co. v. Wetzel & T. R. Co.*, 140 Fed. 193, 199.

The word "person" within a provision in a water power company's charter that it should not prevent any "person" owning land on the river from operating mills, etc., includes a corporation. *Roanoke Rapids Power Co. v. Roanoke Navigation & Water Power Co.*, 75 S. E. 29, 33, 159 N. C. 393.

An indictment, which alleged that the false pretense was made to a certain corporation, sufficiently alleged the "person" to whom the false pretense was made; Code 1907, § 1, providing that the word "person" includes a corporation. *Bailey v. State*, 48 South. 791, 792, 159 Ala. 4, 17 Ann. Cas. 623.

Where a city ordinance provided that any person who should obstruct any street, etc., should be liable, etc., the word "person" included corporations. *McKee v. Peters*, 128 S. W. 255, 256, 142 Mo. App. 286.

A city ordinance providing that it shall be unlawful for any engineer, conductor, or other "person" to run or permit to be run on any railroad track within the limits of the city any locomotive engine, car, or train at a greater speed than eight miles per hour applies to railroad corporations operating railroads within the city. *Southern R. Co. v. Jones*, 71 N. E. 275, 276, 33 Ind. App. 333.

The statute providing that, after the adoption of the stock law in any county, "no person within the county" shall be required to fence against stock not permitted to run at large, exempts a railway company from the obligation to fence its tracks in a county in which the stock law has been adopted; the word "person" in the statute including corporations. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Tex.)* 90 S. W. 508, 509.

A charter fee would not accrue to the state upon the consolidation of several existing corporations, so as to form a new corporation by virtue of P. S. 4287, as amended by Acts 1908, No. 103, providing that "three or more persons of age" may form a corporation; the word "persons" not including corporations. *State v. Rutland Ry., Light & Power Co.*, 81 Atl. 252, 253, 85 Vt. 91.

The word "person" in federal legislation includes corporations. *United States v. First Nat. Bank of Anamoose*, 190 Fed. 336, 346.

A corporation is a "person" within the Sherman Anti-Trust Act. *Union Pac. Coal Co. v. United States*, 173 Fed. 737, 739, 97 C. C. A. 578.

A "corporation" is a "person" within the express provision of Bankr. Act, § 1, subd. 19. *Dressel v. North State Lumber Co.*, 107 Fed. 255, 256.

The expression "person engaged chiefly in farming or the tillage of the soil" in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, providing that any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, and any corporation principally engaged in manufacturing, may be adjudged an involuntary bankrupt, applies only to natural persons, and not to corporations. In re *Lake Jackson Sugar Co.*, 129 Fed. 640, 643.

A corporation is a "person," within the meaning of Civ. Code 1910, § 4413, relating

to the liability of the master for the torts of the servant. *Louisville & N. R. Co. v. Hudson*, 73 S. E. 30, 81, 10 Ga. App. 169.

A private corporation is a "person," within Rev. St. 1895, art. 3017, authorizing a recovery for death caused by the wrongful act or negligence of another person. *Hugo Schmeltzer & Co. v. Paiz*, 141 S. W. 518, 520, 104 Tex. 563.

A private corporation is included in Rev. St. 1895, art. 3017, which gives a right of action for death caused by the wrongful act of another "person." *Williams v. Coca-Cola Co. (Tex.)* 150 S. W. 759, 761.

Code 1896, § 27, provides that personal representatives may recover for decedent's death, caused by the wrongful act, omission, or negligence of any person or persons, or corporation. Section 1 provides that the use of the word "person," used in the Code, "includes a corporation as well as natural persons." Held, that the personal representative of a person injured by a city sewer ditch had a cause of action against the city. *City of Anniston v. Ivey*, 44 South. 48, 49, 151 Ala. 392.

The word "person" in Gen. St. 1909, § 9752, providing that a person who, by himself or his servant, etc., or as the servant or agent of another, uses a false weight, or exposes for sale less than the quantity which he represents, shall be guilty of a misdemeanor, etc., includes a corporation as well as a natural person. *State v. Belle Springs Creamery Co.*, 111 Pac. 474, 477, 83 Kan. 389.

The word "persons," in Mills' Ann. St. § 413, providing that any person who shall employ a child under 14 years of age in a mill shall be guilty of a misdemeanor, applies to corporations as well as to natural persons. *Overland Cotton Mill Co. v. People*, 75 Pac. 924, 925, 32 Colo. 263, 105 Am. St. Rep. 74.

A corporation is a "person" within Laws 1896, p. 1052, c. 803, requiring registration of employing plumbers in the city of New York, and, as registration involves the holding of a certificate of competency which cannot be given to a corporation, plumbing work by a corporation is unlawful, and the price thereof cannot be recovered. *Milton Schnaier & Co. v. Grigsby*, 117 N. Y. Supp. 455, 457, 132 App. Div. 854; *Id.*, 113 N. Y. Supp. 548, 61 Misc. Rep. 325.

The statutory construction law provides that the term "person" includes a corporation and joint-stock association. As used in Laws 1900, p. 699, c. 327, § 45, providing that a person engaged in the business of employing or master plumber shall submit to an examination before the examining board of plumbers as to his experience, etc., the word "person" applies to a corporation. *William*

*Messer Co. v. Rothstein*, 113 N. Y. Supp. 772, 777, 778, 129 App. Div. 215.

In the absence of statutory enactment to the contrary, the name "person" in a statute includes a corporation if it falls within the general reason and design of the act, both as to the benefits and restrictions of the act. A statute that authorizes the doing of a certain act by a corporation or by its agent should be given effect by permitting the corporation to act either per se through its officer or per alium through its agent. *American Soda Fountain Co. v. Stolzenbach*, 68 Atl. 1078, 1083, 75 N. J. Law, 721, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822.

Under the express provisions of the Code, the word "person" in the act of December 15, 1871, providing that money or property stolen from the state or the Western Atlantic Railroad Company, or fraudulently obtained from the same, may be recovered from the person perpetrating the fraud or conversion, the word "person" includes a corporation. *Scofield, etc., Co. v. State*, 54 Ga. 635, 638.

A corporation is in law a "person" or entirely entirely distinct from its stockholders and officers, and it may have interests distinct from theirs, and their interests may be adverse to its interests, and knowledge on the part of the president of the corporation of a fraud committed by an entryman in procuring and commuting a homestead entry is imputed to the corporation so as to deprive it of the position of a bona fide purchaser under a conveyance from the president who had taken a deed from the patentee; the president being one of the incorporators and together with the secretary owning a large majority of the stock, being intrusted with the management and control of the corporate business, and his interest and that of the corporation being identical. *J. J. McCaskill Co. v. United States*, 30 Sup. Ct. 386, 391, 216 U. S. 504, 54 L. Ed. 590.

"In the statutes authorizing issuance of garnishment on the application of any 'person,' the word 'person' has been held to include all individuals, nonresidents as well as residents, corporations, and sovereignties." *Disconto Gesellschaft v. Umbreit*, 106 N. W. 821, 828, 127 Wis. 651, 15 L. R. A. (N. S.) 1045, 115 Am. St. Rep. 1063 (dissenting opinion by Cassoday, C. J.).

A corporation, though an artificial "person," was not embraced within the meaning of the word "person" as used in the first statute relating to foreign attachment providing that a writ of foreign attachment may issue against any person not an inhabitant of the state when certain requirements were met. *Fowler v. Dickson (Del.)* 74 Atl. 601, 603, 1 Boyce, 113 (citing *Vogle v. New Granada Canal & Steam Nav. Co. of New York (Del.)* 1 Houst. 294).

Under Code, § 48, par. 13, providing that the word "person" may be extended to bodies

in some person may not happen within the time, the executory estate is void, although in fact the event actually happens within the time." Provision in a will directing that a certain portion of testator's estate shall be allowed to accumulate for the benefit of his grandchildren, and that such accumulation and income shall be equally divided among them when a designated grandchild, 2 years old at the date of testator's death, arrived at the age of 35 years, does not violate the rule against "perpetuities," but the direction for accumulation will be enforced for a period of 21 years after the testator's death, and then the amount accumulated will be distributed among the grandchildren. *Hussey v. Sargent*, 75 S. W. 211, 215, 116 Ky. 53 (citing 1 Perry, Trusts [5th Ed.] § 381).

A provision in a will for the deposit of money in bank, the interest to be used to keep testator's burial lot in good condition yearly, creates a "perpetuity," in violation of a constitutional prohibition thereof. *McIlvain v. Hockaday*, 81 S. W. 54, 55, 36 Tex. Civ. App. 1.

"A lease for any number of years, whether for 99 or 999, is not in violation of the statute of 'perpetuities,' for in neither is the lessor precluded thereby from disposing of it at will, nor the lessee hindered in selling or assigning the lease, and by uniting in a conveyance the lessor and lessee may freely and without restraint convey both the fee and the leasehold interest." *Hubbell v. Hubbell*, 113 N. W. 512, 515, 135 Iowa, 637, 13 L. R. A. (N. S.) 496, 14 Ann. Cas. 640.

A trust deed directing that on the death of the grantor's daughter, the property shall go to her "children and their descendants, if any such survive her," is not void as contrary to the rule against "perpetuities"; the words "children" and their descendants," employed in the deed, referring to those surviving at the time of the death of the daughter. *Cribbs v. Walker*, 85 S. W. 244, 247, 74 Ark. 104.

A will which gives property to two persons, to be paid them from time to time in certain amounts when they attain certain ages, the last payment to be made when they are 45 years old, does not violate the rule against "perpetuities" by the provision that, if they die without issue, all payments which shall not have become due shall be paid to certain others, as this, at the most, only postpones the vesting of the estate in the latter persons for two lives in being. *Hull v. Osborn*, 113 N. W. 784, 787, 151 Mich. 8.

A will giving the residue of the estate to testator's two granddaughters, certain amounts to be paid to each on her arriving at different ages, and the remainder of half the residue when she is 45 years old, though providing that, if either die without issue before attaining such age, such portions of

her half as shall not have then become due shall be paid to the other, and that, if both die without issue, all payments which shall not have become due shall be paid to certain others, does not violate the rule against "perpetuities," as it vests the title of the residue in such grandchildren at the death of testator, subject to its being divested by their dying before completion of the payments. *Hull v. Osborn*, 113 N. W. 784, 787, 151 Mich. 8.

A devise of a life estate, and, after the death of the life tenant, to his widow and children, is not a "perpetuity," under Ky. St. § 2360, as the remainder must vest within 21 years after a life in being; but a conveyance of a life estate after the death of the life tenant, to go to his children until the youngest reaches the age of 25 years, when the estate is to be divided, is a perpetuity. *Johnson's Trustee v. Johnson* (Ky.) 79 S. W. 293, 294.

Defendant city entered into a contract with a water company, by which the city agreed not to grant to any other person the right to furnish water for fire hydrants during the life of the contract, which was for 25 years, and the city to have the privilege of buying the waterworks, but if the city did not exercise the option to purchase, the contract to continue until the city finally purchased the works. Held, that the exclusive privilege granted by the contract was a "perpetuity" and monopoly, in contravention of Const. art. 1, § 26, prohibiting the granting of a perpetuity or monopoly, which rendered the contract entirely void; and hence the city could not recover for damages arising out of the water company's failure to furnish sufficient water pressure, whereby the city market house was burned. *Hartford Fire Ins. Co. v. City of Houston* (Tex.) 110 S. W. 973, 977.

## PERQUISITE

In *Bouvier's Law Dictionary*, after giving its meaning in its most extensive sense, "perquisite" is defined thus: "In a more limited sense, it means something gained by a place or office beyond the regular salary or fee." The word was used in such limited sense in the Constitution, which, after limiting the amount of compensation of clerks of court in Baltimore, provides that they shall be entitled to no other "perquisite" or compensation. *Vansant v. State*, 53 Atl. 711, 714, 96 Md. 110.

The occupancy by the Governor during his term of office of the executive mansion provided by the state, in which he is required by law to maintain his residence, is not a "perquisite of office or other compensation," and is not prohibited by the Constitution. *State v. Sheldon*, 111 N. W. 372, 373, 78 Neb. 552.



## PERSISTENCE—PERSIST

To satisfy the proviso of the Act of 1792 (3 Smith's Laws Pa. p. 73), "persistence," in the settlement of public land to save its forfeiture, "must mean something real; not merely the wishing or even attempting to do an act impossible, or so dangerous that no man could be expected to attempt it." Such proviso only dispenses with the forfeiture incurred, according to the law, by not making a settlement and continuing it, within and during the time prescribed by the enacting clause, and requires that it must be made as soon as the prevention ceases. *Huidekoper v. Burrus*, 12 Fed. Cas. 6848, pp. 840, 843, 1 Wash. 109, 118.

## PERSON

See Artificial Persons; Colored Person; Credible Person; Disorderly Person; Existing Person; From the Person; Great Many Persons; Guardian of the Person; Injury to Person and Property; In Person; Larceny from the Person; Natural Person; No Person; Plea to the Person; Poor Person; Private Person; Proper Person; Prudent Person; Qualified Persons; Suitable Person; Suspicious Person; Third Person; White Person; With Every Other Person.

All persons, see All.

Any other person, see Any Other.

Any person, see Any.

Any person interested, see Any.

Every person, see Every.

Exposure of the person, see Exposure.

Other persons, see Other.

Such person, see Such.

As used in the statute limiting actions upon the penal statutes, where the penalty goes to the state, or county, or "person" suing for the same, the word "person" means simply any person who sues as a common informer and not one having a special interest by reason of any injury or grievance. *Nebraska Nat. Bank v. Walsh*, 59 S. W. 952, 953, 68 Ark. 436, 82 Am. St. Rep. 301.

The word "person," as used in Act Cong. July 1, 1903, c. 1362, § 22, 32 Stat. 643 providing that, if any person whose name appears on the rolls shall die before receiving his allotment the land to which he would have been entitled shall be allotted in his name, etc., includes members, citizens, and freedmen. *Hancock v. Mutual Trust Co.*, 103 Pac. 566, 569, 24 Okl. 391.

### Construed in plural

The word "person," as provided by Ky. St. § 457, may extend and be applied to persons. *Commonwealth v. Adams Express Co.*, 97 S. W. 386, 387, 123 Ky. 720.

The word "person," as used in Laws 1901, p. 61, c. 62, § 1, imposing an inheritance

tax upon property passing by will or the statutes of inheritance to any person in trust or otherwise, though importing the singular, includes the plural. *Dixon v. Rickets*, 72 Pac. 947, 949, 26 Utah, 215.

The word "person," as used in the statutes relating to railroad commissioners, includes persons (Gen. St. 1901, § 5997). *Kansas City, Outer Belt & Electric R. Co. v. Board of Railroad Com'rs*, 84 Pac. 755, 756, 73 Kan. 168.

Rev. St. § 1024, provides that when there are several charges against any person for the same act or transaction, or for two or more connected acts or transactions, or for two or more acts or transactions in the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in several counts; and, if two or more indictments are found, in such case the court may order them to be consolidated. Held, that under section 1, providing that words importing the singular number may apply to several persons or things, section 1024 was not limited to indictments against a single person, but embraced consolidated indictments against several defendants. *Emanuel v. United States*, 196 Fed. 317, 320, 116 C. C. A. 137.

Rev. St. c. 23, § 68, relating to ways, provides that when a way is changed in grade by a road commissioner or "person authorized," to the injury of an abutting owner, he may apply in writing to the municipal officers for an assessment of damages occasioned thereby to be paid by the town. Chapter 53, § 19, relating to street railroads, provides that such road shall be constructed and maintained in such manner and upon such grades as the municipal officers of the towns where they are located may direct, and when, in the judgment of such corporation, it shall be necessary to alter the grade of any road the alteration shall be made at the expense of the corporation in accordance with the directions of the municipal officers. Held, that the two sections should be construed together, and under Rev. St. c. 1, § 2, rules 2 and 14, by which the word "person" may include a corporation and singular words include plural, where a grade was established by municipal officers at the request of a railroad company, it must be deemed to have been done by a "person authorized" within the meaning of section 68, and though section 68 provides that the damages shall be assessed by the municipal officers to be paid by the town, and section 19, that the alterations shall be at the expense of the corporation, yet the word "expense" in section 19 will include the damages to landowners, which, if paid by the town, are a part of the expense of the alteration, and are recoverable by the town from the railroad corpora-

tion. *Hurley v. Inhabitants of South Thomaston*, 74 Atl. 734, 736, 105 Me. 301.

#### Construed as witness

Under Bankr. Act July 1, 1898, c. 541, § 41, 30 Stat. 556, providing that certain acts committed by any "person" before a referee in bankruptcy shall constitute a contempt of court, the word "person" is not limited to the bankrupt, but extends to a witness guilty of perjury before the referee. *In re Bronstein*, 182 Fed. 349, 353.

Code Civ. Proc. § 870, provides for the examination of a party, and section 871 authorizes the examination of a "person not a party" to the action. Held, that the word "person" in section 871 means a person who can testify as a witness; and hence such section did not authorize the examination of officers of a corporation before trial, where the corporation was not a party. *Chartered Bank of India, Australia, and China v. North River Ins. Co.*, 121 N. Y. Supp. 399, 400, 136 App. Div. 646.

#### Bankrupt

Bankr. Act 1898, § 29b, provides that a "person" shall be punished by imprisonment on conviction of having concealed property belonging to his estate in bankruptcy. Section 1, cl. 19, provides that "persons" shall include corporations, except where otherwise specified. A careful reading of this clause, in connection with the terms of section 29b, convinces that it can have no effect to extend the terms or broaden the true interpretation of the latter subsection. All who are punishable under this subsection 29b are persons who are or who have been bankrupts. Hence none of those whom the word "persons" is made to include under section 1, cl. 19—no officers, partnerships, women, participants in forbidden acts, agents, officers, or members of any board of directors or trustees—can be guilty of the offense specified in this subsection, unless they are either bankrupts when they conceal the property or have been such and have obtained their discharges before that time. Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute. *Field v. United States*, 137 Fed. 6, 7, 69 C. C. A. 568.

Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554, provides that a person shall be punished on conviction of having concealed, while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate. Held, that though there can be no offense unless the concealment is accomplished while there is a person in bankruptcy, or after his discharge, not only the bankrupt, but others aiding and abetting in the concealment, are punishable. *United States v. Young & Holland Co.*, 170 Fed. 110-112.

#### Body of persons

The provisions of section 2134, Code Civ. Proc., directing that "each person upon whom a writ of certiorari is served \* \* \* must make a return," etc., is not in conflict with the view that the return of a body or board may be made by a majority of its members, because the noun "person" is clearly used to denote any person or legal entity to whom a writ is directed. *People ex rel. Lester v. Eno*, 68 N. E. 868, 870, 176 N. Y. 513.

The use of the word "person" in Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property, without due process of law, includes the natural persons who compose a corporation, and who are the beneficial owners of all its property, the technical and legal title to which is in the corporation. *State v. Atlantic Coast Line R. Co.*, 47 South. 969, 982, 56 Fla. 617, 32 L. R. A. (N. S.) 639.

In view of Rev. St. 1909, § 10,160, defining the word "persons" as including a body of persons whether incorporated or not, under sections 2528 and 3881, respectively, providing that if any person disobey an injunction, the circuit court to which it is returned, or any judge in vacation thereof, shall issue an attachment for the contempt, and that every court of record shall have power to punish as for criminal contempt, persons guilty of willful disobedience of any order, the circuit court has power to punish a corporation for civil contempt. *Fiedler v. Bambrick Bros. Const. Co.*, 142 S. W. 1111, 1116, 162 Mo. App. 528.

#### Carrier

Code 1897, § 2419, provides that if any common carrier or person, or any one as agent or employé thereof, shall transport to any person within the state any intoxicating liquors without first being furnished with a certificate that the consignee is the holder of a permit to sell intoxicating liquors in the county to which the shipment is made, such carrier or person shall on conviction be fined, etc. Held, that the word "person," as used in such section, means a public or private carrier, and did not include one who transported several interstate shipments of liquor from the railroad company's depot to the consignee's place of residence as a mere gratuity. *State v. Wignall*, 128 N. W. 935, 937, 150 Iowa, 650, 34 L. R. A. (N. S.) 507.

#### Children

The word "person," as used in a statute forbidding persons to walk along railroad tracks, should not be construed to include children so young as to be incapable of contributory negligence, under the rule that where a statute seeks to change an existing status of a portion of a community, the change must be made in language so clear as to unmistakably manifest such legislative purpose. *Erie R. Co. v. Swiderski*, 197 Fed. 521, 524, 117 C. C. A. 17.

**Citizen**

The word "persons" in the extradition treaty between the United States and Italy, entered into in 1868 (15 Stat. 629) and amended in 1884 (24 Stat. 1001), providing for the surrender of persons charged with enumerated crimes, is sufficiently broad to embrace citizens and subjects of the contracting parties, and a citizen of the United States, who while in Italy commits an offense, and who then flees to the United States, is within the treaty and may be extradited thereunder, though Italy has always construed the word so as not to include its citizens and subjects. *Ex parte Charlton*, 185 Fed. 880, 884.

**Custom officer**

Section 5445, Rev. St., relating to "every person" who aids in effecting the illegal entry of imports, while ordinarily not intended to apply to those individuals (customs officers) covered by the preceding section of the law, does not exclude an officer of the service if the facts bring him within the definition of the "person" at whom this provision is aimed, and may therefore include a customs weigher who aids in the way prohibited. *United States v. Mescall*, 164 Fed. 587, 588.

**Deceased person or estate of deceased person**

A corpse is not a "person." That which constitutes a person is separated from the body by death. *Brooks v. Boston & N. St. Ry. Co.*, 97 N. E. 760, 211 Mass. 277.

A "person" includes a corporation and a joint-stock company, but it does not include an estate, or where an action is brought by the representative of an estate or trust as such; for the estate or the trust, and not the person who represents it, is really the party. *Cole v. Manson*, 85 N. Y. Supp. 1011, 42 Misc. Rep. 149.

Primary Election Law (Laws 1903, c. 451) § 18, subd. 1, provides that the person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election. Held, that a dead man is not a "person" within the statute; such word meaning a living human being. *State ex rel. Bancroft v. Frear*, 128 N. W. 1068, 1071, 144 Wis. 79, 140 Am. St. Rep. 992.

Laws 1904, No. 80, § 81, provides that certain sections pertaining to taxes upon persons receiving property passing from decedents shall also apply to all "persons" dying before the passage of the act, but whose estates shall not have been at that time decreed or distributed, etc. Held, that "persons" refers to decedents mentioned in that section, and not to the beneficiaries. In *re Howard's Estate*, 68 Atl. 513, 514, 80 Vt. 489.

Where a wife loaned her husband money which was made payable on demand, and they both died without the wife having demanded, or received the money, her estate was a creditor of his estate, and a "person" within Rev. St. 1898, § 3840, providing for an order within which creditors shall present their claims and section 3844, providing that every person having a claim, who shall not, after notice given, exhibit it within the time limited, shall be forever barred. *Barry v. Minahan*, 107 N. W. 488, 491, 127 Wis. 570.

**Employé**

A mere ticket taker at a theater is not within Pen. Code, § 290, providing for the punishment of any "person" who admits to any theater, museum, or skating rink, or any place where wines or liquors are kept, any child under the age of 16 years, unless accompanied by its parent or guardian. *People ex rel. Jacques v. Sheriff of Kings County*, 105 N. Y. Supp. 387, 54 Misc. Rep. 8.

**Forwarding agent**

A forwarding agent is a "person" within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379, forbidding preferences and discrimination in rates. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 31 Sup. Ct. 392, 396, 220 U. S. 235, 55 L. Ed. 448.

**Infant or minor**

A child of immature and tender years is a "person," within Rev. Codes N. D. 1905, § 7686, authorizing an action for the death of a "person" by the wrongful act of another. *Scherer v. Schlager*, 122 N. W. 1000, 1006, 18 N. D. 421, 24 L. R. A. (N. S.) 520.

Under the bankruptcy act providing that any natural person may be adjudged an involuntary bankrupt, the word "person" does not include an infant. In *re Kehler*, 153 Fed. 235, 237.

Bankr. Act July 1, 1898, c. 541, § 1, subd. 11, 30 Stat. 544, provides that "debt" shall include any debt, demand, or claim provable in bankruptcy; section 4 declares that any "person" who "owes debts," except a corporation, shall be entitled to the benefits of the act as a voluntary bankrupt; and section 63 declares that debts shall be a fixed liability, absolutely owing at the time of the filing of the petition, etc. Held, that the words "owes debts" mean an obligation for which a debtor is legally liable, and hence the bankruptcy act includes an infant, where he owes debts for which his property is legally chargeable. In *re Walrath*, 175 Fed. 243, 244.

**Inhabitant**

An inhabitant of the province of Benguet, in the Philippine Islands, was a "person," within Organic Act July 1, 1902, c. 1369, providing that no laws shall be enacted in the Islands which shall deprive any "person" of life, liberty, or property without due process

of law; or deny to any person therein the equal protection of the laws. *Carino v. Insular Government of Philippine Islands*, 29 Sup. Ct. 334, 336, 212 U. S. 449, 53 L. Ed. 594.

#### **Lunatic**

Under the bankruptcy act providing that any natural person may be adjudged an involuntary bankrupt, the word "person" does not include a lunatic. *In re Kehler*, 153 Fed. 235, 237.

#### **Marshal**

Where defendant used loud and offensive language in a conversation with a village marshal, as one of a crowd engaged in disturbing the peace, and the marshal neglected to restrain defendant or preserve order, he was not a "person" whose peace could be disturbed, within a village ordinance providing that, if any person shall willfully disturb the peace of any other person by loud and unusual noise, loud and offensive conversation, etc., he shall be adjudged guilty of a misdemeanor. *Village of Salem v. Coffey*, 88 S. W. 772, 113 Mo. App. 675.

#### **Nonresident**

"In the statutes authorizing issuance of garnishment on the application of any 'person,' the word 'person' has been held to include all individuals, nonresidents as well as residents, corporations, and sovereignties." *Disconto Gesellschaft v. Umbreit*, 106 N. W. 821, 828, 127 Wis. 651, 15 L. R. A. (N. S.) 1045, 115 Am. St. Rep. 1003 (dissenting opinion by Cassoday, C. J.).

The use of the word "person," in Laws 1905, p. 126, c. 105, amending Rev. St. 1898, c. 2948, by adding the provision that if there be none of such persons in the state, and the defendant corporation has or holds itself out as having an office or place of business in the state, or does business, then service may be made upon the person doing such business or in charge of such office or place of business, the word "person" shows that the Legislature intended to reach a class not covered by the word "agents" used elsewhere in the section, but it is not broad enough to include one merely temporarily in the state, to whom though not connected with the business, was intrusted for collection a bill due a foreign corporation. *Honerine Min. & Mill. Co. v. Tellerday Steel Pipe & Tank Co.*, 88 Pac. 9, 11, 31 Utah, 326.

#### **Officer of corporation**

The president of a corporation is a "person," within Comp. Laws, § 4804, declaring that any person, agent, manager, or clerk of a corporation, with whom any money shall be deposited or intrusted, who shall appropriate it to his own use, shall be guilty of embezzlement. *State v. Weber*, 103 Pac. 411, 412, 31 Nev. 385.

Bankr. Act July 1, 1898, c. 541, § 1, cl. 7. 30 Stat. 544, provides that the term "court"

shall include a referee, and clause 19 declares that the word "persons" includes corporations and officers. By section 2, cl. 7, bankruptcy courts are invested with such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as otherwise provided, and section 23, par. "a," confers jurisdiction on the United States Circuit Courts in certain circumstances over controversies between trustees and adverse claimants concerning property claimed by the trustee, except as to proceedings in bankruptcy, jurisdiction over which rests exclusively in bankruptcy courts, and by paragraph "b" suits brought by the trustee, except those to recover property under certain specified sections of the act, can be brought in the bankruptcy court only by consent of the proposed defendant. Held, that a referee in bankruptcy had jurisdiction of a proceeding to compel the officers of a corporation to pay over the proceeds of stock sales alleged to belong to the corporation, and also to pay an amount assessed against them for unpaid shares. *In re Kornit Mfg. Co.*, 192 Fed. 392, 394.

#### **Partnership, firm, company, society, joint-stock company, or association**

A "person" includes a joint-stock company. *Cole v. Manson*, 85 N. Y. Supp. 1011, 42 Misc. Rep. 149.

A partnership is an entity distinct from that of its members, and is recognized in law as a "person." *Clay, Robinson & Co. v. Douglas County*, 120 N. W. 548, 549, 88 Neb. 363, Ann. Cas. 1912B, 756.

A partnership cannot sue, for it is not a natural or artificial "person." *Phillips v. Holmes*, 51 South. 625, 626, 165 Ala. 250.

A partnership is a "person" in the sense in which that term is used in the federal bankruptcy act (Act Cong. July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544). *In re Everybody's Grocery & Meat Market*, 173 Fed. 492.

Laws 1892, p. 1487, c. 677, § 5, defines the term "person" to include a corporation or joint association, as well as a natural person. *People v. Taylor*, 85 N. E. 759, 760, 192 N. Y. 398.

The word "person" or "persons" shall be held to include firms, companies, and associations. Revenue Law (Acts 1898, No. 170, p. 346, § 91). *National Fire Ins. Co. v. Board of Assessors*, 46 South. 117, 118, 121 La. 106, 126 Am. St. Rep. 313; *General Electric Co. v. Board of Assessors*, 46 South. 122, 123, 121 La. 116.

The word "person," as provided by Ky. St. § 457, may extend and be applied to bodies politic and corporate, societies, communities, and the public generally, as well as individuals, persons, and joint-stock com-

panies. *Commonwealth v. Adams Exp. Co.*, 97 S. W. 386, 387, 23 Ky. 720.

The word "person," as used in the statutes relating to railroad commissioners, includes partnerships or joint-stock companies. *Gen. St. 1901, § 5997. Kansas City, Outer Belt & Electric R. Co. v. Board of Railroad Com'rs*, 84 Pac. 755, 756, 73 Kan. 168.

Under Const. art. 9, § 18, giving the Corporation Commission power to regulate all transmission companies doing business in the state in all matters relating to the performance of their public duties and their charges therefor, and section 34, providing that the term "transmission company" shall include any company or other person holding or operating for hire any telegraph or telephone line, and that the term "person" shall include individuals, partnerships, and corporations, the Corporation Commission has supervision of a telephone company owned solely by an individual and operated for hire in all matters relating to the performance of its public duties and charges. *Hine v. Wadlington*, 109 Pac. 301, 26 Okl. 389.

Laws 1901, p. 19, c. 3, making it unlawful to permit minors in saloons, etc., provides (section 7) that the word "person," as used in the act, shall be deemed to mean firm or corporation, as well as natural person, and the person managing the business of such firm or corporation shall be liable to the penalties prescribed by this act. *Territory v. Church*, 91 Pac. 720, 721, 14 N. M. 226.

While it is true that section 59 of the Bankrupt Act contains the only provision of the act expressly defining who may file a petition to have a debtor adjudged an involuntary bankrupt, and that that provision is confined to creditors, and section 5, read with section 59, seems to confine the right to creditors, yet section 4a declares that any "person" owing debts, except a corporation, shall be entitled to the benefit of this act as a voluntary bankrupt, and section 1 declares that the word "persons," unless inconsistent with the context, shall include partnerships. *In re J. M. Ceballos & Co.*, 161 Fed. 445, 448.

An unincorporated association is not a "person," and has not the power to sue or be sued; but when it has been organized and conducted for profit it will be treated as a partnership, and its members held liable as partners. *Slaughter v. American Baptist Publication Society (Tex.)* 150 S. W. 224, 226.

The word "person," in section 2, art. 2, of the general revenue act approved March 10, 1900, providing that "a person moving into this state from another state between March 1st and September 1st shall list his personal property acquiring an actual situs therein before September 1st and the same shall be assessed and placed upon the tax roll and the taxes thereon collected, etc.," includes a firm; and where a firm moves in-

to the state between March 1st and September 1st, moving personal property into the state that acquires a situs therein before September 1st, said property shall be assessed and taxes thereon collected for the current year, notwithstanding one member of the firm was a resident of the state before the 1st day of March, and the other member was, and has been at all times, a resident of another state. *Bivins & Carroll v. Bird*, 121 Pac. 1080, 1061, 31 Okl. 286.

Under the bankruptcy act of July 1, 1898, a partnership is insolvent if the partnership property is insufficient to pay the firm debts, because it is a "person" (section 1 [19], c. 541, 30 Stat. 545), because any "person" is insolvent under that act whose property is insufficient to pay its debts (section 1 [15], c. 541, 30 Stat. 544), and the only property a partnership has or can apply to its debts is the firm property, and the only debts it owes are the firm debts. *In re Bertenshaw*, 157 Fed. 363, 368, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986.

Neither the judicial recognition by the courts of a state of the partnership entity, nor the provisions of the bankruptcy act, which define a partnership to be a "person" within the meaning of the act, and authorize it to be adjudged a bankrupt (*Bankr. Act July 1, 1898, c. 541, §§ 1a [19], 5a, 30 Stat. 544, 547*), work a change of the established rule fixing the substantive rights of creditors respectively, of the partnership and of its individual members. *In re Telfer*, 184 Fed. 224, 226, 106 C. C. A. 366.

#### **Pregnant woman**

Laws Del. vol. 17, p. 523, c. 226, § 2 (Rev. Code 1852, amended in 1893, p. 930), makes it a crime for any person to administer to or advise a pregnant woman with intent to procure a miscarriage, or to "aid, assist, or counsel any person so intending to procure a miscarriage." Held, that the word "person," in the quoted clause, means some person other than the pregnant woman, and an indictment under such clause, charging defendants with having counseled a pregnant woman who was intending to procure her own miscarriage, is bad. *State v. Parm (Del.)* 60 Atl. 977, 978, 5 Pennewill, 556.

#### **Private corporation**

The words "person" or "persons" includes corporations. *In re Charge to Grand Jury*, 151 Fed. 834, 845; *Cole v. Manson*, 85 N. Y. Supp. 1011, 42 Misc. Rep. 149.

A corporation by both the civil and common law is a "person," an artificial person. *Davoust v. City of Alameda*, 84 Pac. 760, 761, 149 Cal. 69, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847.

A corporation is included in the term "person" as used in the statutes. *Goldzler v. Central R. Co. of New Jersey*, 88 N. Y. Supp. 214, 215, 43 Misc. Rep. 667 (citing

private corporations not possessed by individuals or partnerships," a state is a person, and under section 64b (5) is entitled to priority for a debt due it from the estate of a bankrupt which is given priority by its own insolvency law. In re Western Implement Co., 166 Fed. 576, 582.

Laws 1905, p. 370, c. 175, in amendment of Code Civ. Proc. § 1391, authorizing an execution against the wages or salary of the judgment debtor, and making it the duty of any person or corporation, municipal or otherwise, to whom the execution shall be presented, and who shall be indebted to the judgment debtor, to pay over to the officer the amount of the debt, does not authorize the issuance of an execution against the salary of a state officer; the state being neither a person nor a corporation nor a municipal corporation. *Osterhoudt v. Keith*, 117 N. Y. Supp. 809, 810, 133 App. Div. 83.

The champerty act (1 Rev. St. p. 739 [1st Ed.] p. 2, c. 1, tit. 2, § 147) provides that "every grant of land shall be absolutely void, if at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor." Section 5 of the statutory construction law (Laws 1892, p. 1487, c. 677) provides that "the term 'person' includes a corporation and a joint-stock association," and when used to designate a party whose property may be the subject of any offense, the term "person" also includes the state. *Held*, that the state could therefore only be included as a "person" when the statute relates to any of its property which may be the subject of an offense, and hence the champerty act does not apply to the possession of the state, and that, if the forest commission could be regarded as in actual possession for the state, it would not render the statute applicable as it is no more a "person" than is the state. *Saranac Land & Timber Co. v. Roberts*, 109 N. Y. Supp. 547, 125 App. Div. 333; *Id.*, 88 N. E. 753, 760, 195 N. Y. 303.

#### **Same—United States**

The United States is not a "person" within the meaning of Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563. *Title Guaranty & Surety Co. v. Guarantee Title & Trust Co.*, 174 Fed. 385, 387, 98 C. C. A. 603.

#### **Selectmen**

Under Gen. St. 1902, § 2067, authorizing persons interested in altering highways to remonstrate against the report of the committee assessing benefits and damages, and empowering the court to order a jury and "grant relief to the person or persons making such application," when construed in connection with section 2070, providing that, if the report of the jury shall not increase the damages allowed or diminish the assessment of benefits, the court shall order the applicant for the jury to pay the costs of the applica-

tion, etc., the court, in proceedings to assess damages and benefits for the change of the grade of a highway, may not order a jury to make a reassessment of damages and benefits on the application of the town by its selectmen; the selectmen not being referred to by the words "person or persons," in the quoted clause. *Selectmen of Town of Montville v. Alpha Mills Co.*, 81 Atl. 1051, 1052, 85 Conn. 1.

#### **Women**

A woman is a "person" within the contemplation of Const. U. S. Amend. 14, § 1, and entitled to the equal protection of the laws. *Carrithers v. City of Shelbyville*, 104 S. W. 744, 745, 128 Ky. 769, 17 L. R. A. (N. S.) 421 (citing *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. 385).

#### **PERSON AGGRIEVED**

See Aggrieved.

#### **PERSON APPEARING OF RECORD AS OWNER**

See Owner of Record.

#### **PERSON ARRIVING IN THE UNITED STATES**

Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 697, 30 Stat. 202, provides for "personal effects of persons arriving in the United States," with a proviso relating to "residents of the United States returning from abroad." *Held*, that the first provision is only for immigrants, and that the proviso concerns Americans only. *United States v. Bernays*, 158 Fed. 792, 794, 86 C. C. A. 52.

#### **PERSON ASSESSED**

See, also, Assess.

Assignors in a common-law assignment for the benefit of creditors to the assignee in trust to pay preferred claims including taxes are the "persons assessed" for taxes within Rev. Laws 1902, c. 13, § 32, authorizing a tax collector to collect a tax by action against the "persons assessed," and they are properly made parties defendant in an action for taxes as the persons primarily liable therefor. *Boston v. Turner*, 87 N. E. 634, 637, 201 Mass. 190 (citing *Ricker v. Brook*, 29 N. E. 534, 155 Mass. 400).

#### **PERSON AUTHORIZED**

See Authorized by Law; Authorized Person.

#### **PERSON BENEFICIALLY INTERESTED**

See Beneficially Interested.

#### **PERSON BENEFITED**

See Benefit.

#### **PERSON CAUSING DEATH**

See Cause (verb).

#### **PERSON CAUSING EXCAVATION**

See Cause (verb).

**PERSON CONCERNED**

See Concern.

**PERSON CONVICTED**

See Convicted—Conviction.

**PERSON DEPENDENT**

See Dependent.

**PERSON DERIVING AN INTEREST**

See Interest.

**PERSON DIRECTLY INTERESTED**

See Directly Interested.

**PERSON DOING BUSINESS**

See Doing Business.

**PERSON DOING CONTRACT WORK**

The phrase "persons doing contract work," within an ordinance levying an occupation tax upon such persons, is broader than the word "contractors," including, besides them, all persons engaged in any kind of work, pursuant to a contract, express or implied. In re Unger, 98 Pac. 999, 1000, 1 Okl. Cr. 222.

**PERSON EXERCISING SUPERINTENDENCE**

See Superintendence.

**PERSON FLEEING FROM JUSTICE**

See Flee from Justice.

**PERSON HAVING CUSTODY OR CONTROL**

See Control.

**PERSON HOLDING STOCK AS TRUSTEE**

Rev. St. § 5152, providing that persons holding stock in national banks as trustees shall not be personally liable as stockholders, applies to every one holding stock as trustee, and a father who, as trustee for his children, invested funds belonging to them in such stock, is not personally liable for an assessment thereon, although the fund invested arose from an investment of his own money previously made by him in their behalf. Fowler v. Gowing, 165 Fed. 891, 892, 91 C. C. A. 569.

**PERSON IN CHARGE**

See Charge.

**PERSON INJURED**

See Injured Person.

**PERSON IN PARENTAL RELATION**

See Parental Relation.

**PERSON INTERESTED**

See Interest.

Other person interested, see Other.

**PERSON LOSING**

All those who have lost more than they have won during a sitting by playing at

cards are "persons losing," within the meaning of Hurd's Rev. St. 1901, c. 38, § 132, which provides that any person who shall at any time or sitting by playing at cards lose to any person so playing any money amounting to \$10, and shall pay the same, may sue and recover the money by action in assumpsit. Zellers v. White, 70 N. E. 669, 672, 208 Ill. 518, 100 Am. St. Rep. 243.

**PERSON MAKING ENTRY**

One who makes an entry of coal lands avowedly for his own use and benefit is "the person who made such entry," within the meaning of the act of June 16, 1880 (21 Stat. at L. 287, chap. 244, § 2, providing for the repayment of the purchase price in case of subsequent cancellation, although he made the entry at the instance of a corporation, with its money and for its benefit. United States v. Colorado Anthracite Co., 32 Sup. Ct. 617, 619, 225 U. S. 219, 56 L. Ed. 1063.

**PERSON NAMED ON ITS FACE**

Person to whom it is issued synonymous, see Person to Whom Issued.

**PERSON OF AFRICAN DESCENT**

See African Descent.

**PERSON OF COLOR**

See Colored Person.

**PERSON OF THE FAMILY**

The word "person," as used in Rev. St. Mo. 1899, § 570, providing for service of a summons by leaving a copy of the petition and writ at defendant's usual place of abode with some person of his family, is synonymous with the word "member" as used in a return showing that a copy of the writ and petition was left with a member of defendant's family. The words may be used interchangeably. One could not be a person of a family without being a member nor could he be a member without being a person. Colter v. Luke, 108 S. W. 608, 609, 129 Mo. App. 702.

Where, in an action for divorce, the complaint alleged that plaintiff and defendant had been living together as husband and wife until the day before the suit was commenced, and implied that, though prior thereto the parties had a joint residence in M. county, such residence had been severed, and that the plaintiff had the custody of the minor children, an order authorizing service of process on the defendant, temporarily residing without the state, by publication, was not objectionable by reason of the fact that the affidavit did not negative the possibility of substituted service by delivering a copy to some person of defendant's family, above the age of 14 years, at his dwelling house or usual place of abode. Then when a suit for a divorce has been commenced, it must be inferred that the marital relations have been interrupted, and, the defendant being tempo-

rarily absent, the plaintiff and the children, occupying the dwelling house or usual place of abode of the defendant, are not "persons of the family" within the meaning of the term as used in the statute. *McFarlane v. Cornelius*, 73 Pac. 325, 327, 828, 43 Or. 513.

#### PERSON OF INDIAN BLOOD

See Indian.

#### PERSON OF INDIAN DESCENT

See Indians by Descent

#### PERSON OF ORDINARY CARE

See Ordinary Care.

#### PERSON OF UNSOUND MIND

See Unsound Mind.

#### PERSON PRIMARILY LIABLE

See Primarily Liable.

#### PERSON TO WHOM ISSUED

The phrase "person to whom it is issued," as used in a commutation ticket containing a stipulation that if it should be offered by any other than the person to whom it is issued it would be forfeited and taken up by the conductor, is synonymous with "person named on its face." *Colton v. Delaware, L. & W. R. Co.*, 77 Atl. 1020, 80 N. J. Law, 592.

#### PERSON WHO BUILDS

The phrase "person who built it," contained in the statute providing that the owner of a building lot might rest one-half of the building wall on his neighbor's land and that the neighbor should have the right thereafter to make it a wall in common by paying one-half of the value to the "person who built it," means the owner, whether he became such by building the wall in person or hiring it done by another, or by purchasing it with the lot after it is built. *Southworth v. Ferring*, 82 Pac. 785, 787, 71 Kan. 755, 2 L. R. A. (N. S.) 87, 114 Am. St. Rep. 527 (citing *Thomson v. Curtis*, 28 Iowa, 229).

#### PERSON WHO MAKES, ALTERS, OR REPAIRS

A statute providing that a "person who makes, alters, or repairs" any article of personal property, or who, by labor or skill, improves such article, may have a special lien thereon, and may retain possession until his charges are paid, creates a lien in favor of a bailee for hire, to whom property is delivered in the way of his trade or occupation, and who by his labor and skill imparts additional value thereto, but does not create a lien in favor of a person who performs services with reference to personal property in his possession as a mere servant. *Michaelson v. Fish*, 81 Pac. 661, 662, 1 Cal. App. 116.

#### PERSON WHO MANAGES

See Manager.

#### PERSON WHO PERFORMS LABOR

In the statute which grants a lien to "every person who shall perform labor" upon a mine and provides that "every laborer or materialman" claiming under the act shall take certain steps to perfect his lien, the phrase "person who shall perform labor," etc., applies to ordinary laborers who perform actual, visible toil with their hands or muscles, other kinds of service not being expressly mentioned, and does not embrace superintendents or managers. *Durkheimer v. Copperopolis Copper Co.*, 104 Pac. 895, 896, 55 Or. 37.

#### PERSON WHO WOULD INHERIT AS HEIR

Testator devised certain property to defendant for life, and, on his death, to his child or children and their heirs, and, in case of defendant's death without leaving a child or children or descendants, to such persons as would under the laws of Maryland inherit the same as the heirs of defendant had he died intestate. Held, that the phrase "such persons as would inherit as heirs" had the same effect as if the limitation over had been to defendant's heirs, and hence defendant acquired the fee under the rule in *Shelley's Case*. *Cook v. Councilman*, 72 A. 404, 109 Md. 622.

#### PERSON WITHIN THE STATE

See Within the Jurisdiction.

#### PERSONAL

The adjective "personal" is defined by Webster as pertaining to the external or bodily appearance. It is defined in the *Century Dictionary* as things of or pertaining to the person. *Choctaw, O. & G. R. Co. v. Zwirtz*, 73 Pac. 941, 942, 13 Okl. 411.

#### PERSONAL ACTION

An action under an act authorizing the recovery of money paid and lost on a wager, for money lost and paid on a bet on the result of an election, is a "personal action" and survives the death of plaintiff. *Motlow v. Johnson*, 44 South. 42, 151 Ala. 276.

Mandamus is a "personal action," within Rev. Code 1852, amended to 1898, p. 787, c. 105, § 2, declaring that all personal actions, with specified exceptions, shall survive, and is a "suit at law," within Const. art. 4, § 26, providing that no suit at law shall abate at the death of any party, where the cause of action survives. *State v. Jessup & Moore Paper Co. (Del.)* 80 Atl. 350, 351.

Where a tenant's property was sold under an agreement that the proceeds should be deposited in a bank for the purpose of satisfying the landlord's and other claims out of them, an equitable proceeding by the landlord to satisfy his claim out of the deposit, in which the bank, the tenant, and other claim-



ants were made parties, was a "personal action," and not one against the deposit, so that it could be brought against all of defendants in the county within which any of them resided, under Code, § 3501, requiring personal actions to be brought in a county in which some of defendants actually reside. *Kean v. Rogers* (Iowa) 118 N. W. 515, 517.

#### PERSONAL AILMENT

Confinement in childbirth is not a "personal ailment" within the meaning of such a provision in a contract of insurance. *Rasicot v. Royal Neighbors of America*, 108 Pac. 1048, 1053, 18 Idaho, 85, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180.

#### PERSONAL AND LAWFUL HEIR

Where a testator to prevent any trouble about the property which he might leave to his heirs at his death gave his wife a life estate in all his real and personal property, with power to dispose of any portion of the personality that should suit her convenience, the residuary clause reading, "The balance of all my estate, both personal and real, I give and bequeath to my dear children," naming them, "and to their personal and lawful heirs, share and share alike," the words "personal and lawful heirs" are not equivalent to "heirs of the body begotten," so that the testator's children would only take a life estate, such words no more indicating the bodies out of which the heirs shall issue than if the word "personal" had been omitted, but that the testator intended to give the children named in the residuary clause an estate in fee in the real estate. *Webbe v. Webbe*, 84 N. E. 1054, 1056, 234 Ill. 442, 17 L. R. A. (N. S.) 1079.

#### PERSONAL BAGGAGE

See, also, *Personal Luggage*.

The personal baggage of a passenger includes jewelry carried for his personal use, but not that carried for sale or for the use of another. *Brick v. Atlantic Coast Line R. Co.*, 58 S. E. 1073, 1074, 145 N. C. 203, 122 Am. St. Rep. 440, 13 Ann. Cas. 328.

The term "personal baggage" means whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purposes of the journey. This includes not only all articles of apparel, whether for use or ornament, but also the gun case, or fishing apparatus of the sportsman; the easel of the artist on a sketching tour or the books of the student or other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. Memoranda and papers in the possession of an agent, but relating exclusively to the business of his principal, and carried by him solely

for business purposes, are not "baggage" when put by the agent into his trunk, and, in the absence of a consent or custom of the railroad to accept such papers as "baggage," no damages can be recovered for their loss or for delay in their shipment and delivery. *Yazoo & M. V. R. Co. v. Georgia Home Ins. Co.*, 37 South. 500, 85 Miss. 7, 67 L. R. A. 646, 107 Am. St. Rep. 265.

Merchandise for sale is not within the usual definition of "personal baggage," nor within Rev. St. § 2799, relating to the duty of persons arriving in the United States to declare their personal baggage. *United States v. One Trunk*, 175 Fed. 1012, 1015.

There seems to be no good reason why an article for use at the end of the journey, or for the use of the traveler's wife, child, or other member of his immediate family, should not fall within the definition of the term "personal baggage." *Kansas City Southern Ry. Co. v. Skinner*, 113 S. W. 1019, 1020, 88 Ark. 180, 21 L. R. A. (N. S.) 850 (citing 3 Hutch. on Carr. § 1246; *Withey v. Pere Marquette R. Co.*, 104 N. W. 773, 141 Mich. 412, 1 L. R. A. [N. S.] 352, 113 Am. St. Rep. 533, 7 Ann. Cas. 57).

A carrier need not carry goods, articles, furniture, etc., or anything not fairly to be regarded as "personal baggage" reasonably required for the convenience and comfort of the passenger, as baggage, and may refuse to carry such articles except as freight. Under the customary methods for carrying freight, stage costumes, scenery, etc., making up the paraphernalia of a traveling theatrical company do not constitute the personal baggage which a carrier impliedly contracts to carry without additional compensation, and along with the passenger. *Saunders v. Southern R. Co.*, 128 Fed. 15, 20, 21, 62 O. C. A. 523 (citing and adopting *Oakes v. Northern Pac. R. Co.*, 26 Pac. 230, 20 Or. 392, 12 L. R. A. 318, 23 Am. St. Rep. 126; 3 Thomp. Neg. § 8417).

#### PERSONAL CHATTEL

See *Chattels Personal*.

#### PERSONAL COMMUNICATION

A statute prohibiting testimony of a party in respect to any transaction or communication "by him personally" with a deceased person does not forbid testimony of transactions or communications between deceased and third persons in the witness' presence if the witness did not participate therein and they were not affected by his presence. Unless the transactions or communications are personal and had with the deceased by the party either literally or in practical effect as by participating in or influencing them, they do not fall under the prohibition of the statute. *Wollman v. Ruehle*, 80 N. W. 919, 920, 104 Wis. 608.

The word "personally," in St. 1893, § 4212 (Wilson's Rev. & Ann. St. 1903, § 4509), providing that no party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, etc., is not limited to conversations had with a deceased, but includes any transaction or communication had with a deceased person individually. *Conklin v. Yates*, 83 Pac. 910, 912, 16 Okl. 266.

In an action by an administrator to recover money lent to defendant by decedent, testimony by defendant that money for payment of the debt was inclosed in an envelope, taken to the post office, and that certain steps were there taken to have the postmaster register the letter and send it to decedent in a distant state, and also that in due time defendant received a writing acknowledging receipt of the money, which writing was identified and introduced in evidence was not incompetent, under Code Civ. Proc. § 320 (Gen. St. 1909, § 5914), providing that no party shall testify in his own behalf in respect to any transaction or communication had personally by him with a decedent, where the adverse party is the administrator of such decedent; witness' acts not constituting a personal transaction or communication. *Bryan v. Palmer*, 111 Pac. 443, 444, 83 Kan. 298, 21 Ann. Cas. 1214.

Under Code, § 4604, prohibiting testimony of an interested witness concerning personal transactions or communications with a deceased person in an action against her administrator, evidence by plaintiff, in an action to establish a note signed by his father and stepmother as a claim against the latter estate, that he gave the father an order to obtain the note from the party in whose custody it was, and that he afterwards saw it in his father's possession, and evidence of the father to the same effect, was admissible, since such evidence does not constitute "personal transactions" or "personal communications." *Curd v. Wisser*, 95 N. W. 266, 267, 120 Iowa, 743 (citing *Gable v. Hainer*, 49 N. W. 1024, 83 Iowa, 457; *Dysart v. Furrow*, 57 N. W. 644, 90 Iowa, 59; *McElhenney v. Hendricks*, 48 N. W. 1056, 82 Iowa, 657; *Walkley v. Clarke*, 78 N. W. 70, 107 Iowa, 451).

#### PERSONAL CREDIBILITY

The expression "personal credibility," as used in Civ. Code, § 5146, which provides that in determining where the preponderance of evidence lies the personal credibility of witnesses may be considered so far as the same legitimately appears from the trial, means that which would lead the jury to believe or disbelieve what the witness had said by reason of his appearance before them, his manner of conducting himself in their presence, his manner of testifying, and those other numerous and largely indescribable things which make one man believe or disbelieve an-

other simply from seeing and hearing him; especially as considered apart from the inherent probability or lack of probability of the particular thing he has testified to, and apart from the corroboration or refutation which his testimony has received during the progress of the trial. *Western & A. R. Co. v. Henderson*, 85 S. E. 48, 50, 6 Ga. App. 385.

#### PERSONAL CREDIT

Negotiable Instruments Law (Laws 1897, p. 722, c. 612, § 20), requires that an instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money, and section 22 defines an unconditional promise as therein used as: "An unqualified promise or order to pay is unconditional within the meaning of this act, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, in a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional." It was claimed that the statute was but a codification of the former law, and that it was always the rule that it was essential to negotiability that the "general credit" of the maker be pledged to the obligation, the court says: "Many decisions and text-books are cited in support of this contention; and it must be conceded that they contain general broad statements of the rule and definitions tending to sustain it. The facts upon which the adjudications were had, however, were not analogous to those now before the court; and it will, we think, be found in all of them that the expressions 'general credit' and 'personal credit' were used, not as indicating that the entire general or personal credit of the maker must be pledged to the obligation, but rather to show that general or personal credit must be pledged, as contradistinguished from limiting the liability to a particular or specific fund, which would make the obligation in effect an assignment pro tanto of the fund, and not a negotiable bill of obligation of the maker." *Hibbs v. Brown*, 98 N. Y. Supp. 353, 357, 112 App. Div. 214 (citing *Laws 1894*, p. 412, c. 235; *Code Civ. Proc.* § 1919-1924; *In re Jones' Estate*, 65 N. E. 570, 172 N. Y. 575, 60 L. R. A. 476; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *People ex rel. Winchester v. Coleman*, 31 N. E. 96, 133 N. Y. 279, 16 L. R. A. 183).

#### PERSONAL EFFECTS

"The words 'personal effects' in a will, when not restricted by the context, mean everything embraced within the description 'personal property.'" *Gallagher v. McKeague*, 103 N. W. 233, 234, 125 Wis. 116, 110 Am. St. Rep. 821.

Merchandise for sale is not within the usual definition of "personal effects," nor within Customs Administrative Act June 10,

1890, c. 407, § 4, 26 Stat. 181, providing that, except in case of "personal effects," no importation of any merchandise shall be entered without invoice. *United States v. One Trunk*, 17b Fed. 1012, 1015.

#### PERSONAL ESTATE

See Visible Personal Estate.  
Any personal estate, see Any.

#### PERSONAL EXEMPTION

"Personal exemptions" from taxation are "such as have been by legislative enactment granted either directly to persons or corporations that are named in the acts thus granting them or granted to such persons or corporations as may comply with the requirements of such legislative enactment, and thus bring themselves within the granting clause thereof, and by so doing make themselves the beneficiaries of such granting clause." *Grand Canyon R. Co. v. Treat*, 95 Pac. 187, 189, 12 Ariz. 69.

#### PERSONAL FREIGHT

A contract to carry the "personal freight" of certain parties between designated points free of charge means freight owned by them individually, and is not too indefinite to be executed. *Hurley v. Big Sandy & C. Ry. Co.*, 125 S. W. 302, 304, 137 Ky. 216.

#### PERSONAL HEIR

See Personal and Lawful Heir.

#### PERSONAL IMMUNITY

The theory that every one has a right to privacy, and that the same is a personal right, growing out of the inviolability of the person, defined by Judge Cooley, in his work on Torts (2d Ed. p. 29), as: "Personal Immunity." The right to one's person may be said to be a right of complete immunity, to be let alone." And that a person is entitled to relief at law or in equity for an invasion of the same is generally understood to have been first publicly advanced in an article entitled "The Right to Privacy," published in 4 Harv. Law Rev. 193 (December, 1890), wherein some of the necessities for invoking such relief are set out as follows: "Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons, and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case,

brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration. Of the desirability—indeed, of the necessity—of some such protection, there can, it is believed, be no doubt the press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry, as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand." This right to be let alone does entitle to relief one whose picture has without his permission been printed in a mercantile advertisement, the right going only so far as to protect the individual from bodily injury. *Henry v. Cherry & Webb*, 73 Atl. 97, 99, 100, 30 R. I. 13, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

#### PERSONAL INCONVENIENCE

"Personal inconvenience" resulting from physical disability belongs to the same class as pain and suffering. In an action by a married woman for personal injuries, plaintiff may recover damages for physical or personal inconvenience resulting from the injury. In an action against a street railway for injuries received by plaintiff through stepping on an electrified metal plate on defendant's car, allegations in the petition that as a result of the injuries plaintiff's lower limbs were partially paralyzed, her nervous system injured and diseased, and she suffered severe pains, etc., and that as a result of the injury she was for a considerable period of time confined to her bed and was unable to perform her household duties, etc., were broad enough to include damages on account of physical inconvenience. *McRae v. Metropolitan St. Ry. Co.*, 102 S. W. 1032, 1035, 125 Mo. App. 562.

**PERSONAL INDIGNITY**

Personal indignities rendering life burdensome, which are made a ground for divorce by the statute, include conduct short of actual personal violence, or such conduct as renders further cohabitation dangerous or unsafe. *Sullivan v. Sullivan*, 100 Pac. 321, 323, 52 Wash. 160.

**PERSONAL INJURY**

See Permanent Personal Injury; Serious Bodily Harm or Injury.

Right of action for as chose in action, see Chose in Action.

An injury to a person within the meaning of the law does not necessarily involve any element of personal contact with the person complaining of the injury. *Riddle v. MacFadden*, 94 N. E. 644, 645, 201 N. Y. 215.

An action by a husband for the loss of services of his wife resulting from injuries through the alleged negligence of defendant is an "action for injuries to the person" within the statute of limitations. *Mulvey v. City of Boston*, 83 N. E. 402, 403, 197 Mass. 178, 14 Ann. Cas. 349.

The damages for failure to deliver a telegram, or delay in delivering it, are not "injuries to the person," within the meaning of Ky. St. 1903, § 2515, prescribing limitations of one year in actions against corporations for injuries to the person. *Western Union Telegraph Co. v. Witt* (Ky.) 110 S. W. 889, 890.

An "injury to the person," as used in Rev. St. 1898, § 4222, subd. 5, requiring service of notice within one year in an action to recover damages for such an injury, does not include a father's loss of service and expenses of medical attendance and nursing resulting from an injury sustained by a minor son. *Wysocki v. Wisconsin Lake Ice & Cartage Co.*, 104 N. W. 707, 708, 125 Wis. 638.

Supplement of March 24, 1896, to the statute of limitations (P. L. p. 119), providing that action for "injuries to persons" shall be brought within two years, applies only to actions for personal injuries, and hence not to an action to recover for injury to a vessel caused by a negligent collision. *Dailey v. Kiernan*, 67 Atl. 1027, 1028, 75 N. J. Law, 275.

In prosecution of a husband for knowingly persuading his wife to go from one state to another with intent that she should practice prostitution in violation of the white slave act (Act Cong. June 25, 1910, c. 395, § 3, 36 Stat. 825), prohibiting white slave traffic, such offense was in the nature of a "personal injury" to her person so as to entitle her to testify against her husband. *United States v. Rispoli*, 189 Fed. 271, 272.

Code Civ. Proc. § 549, declares that a defendant may be arrested in an action for

damages for a personal injury. Section 3343, subd. 9, provides that a personal injury includes libel or other actionable injury to the person either of the plaintiff or of another. Held, that an injury inflicted through the negligence of defendant's servant is a personal injury within section 3343. *Ossmann v. Crowley*, 92 N. Y. Supp. 29, 30, 101 App. Div. 597 (citing *Lasche v. Dearing*, 53 N. Y. Supp. 58, 23 Misc. Rep. 722; *David v. Brooklyn Heights R. Co.*, 93 N. Y. Supp. 285, 104 App. Div. 23).

Code Civ. Proc. § 549, authorizes the arrest of defendant in an action for damages for "personal injury." By section 3343, subd. 9, "personal injury" is stated to include, among other things, assault, battery, false imprisonment, or "other actionable injury" to the person. Held, that the words "other actionable injury" to the person mean other like to assault, or in an action in which defendant was himself at fault, and hence the statute does not authorize the arrest of defendant in an action for negligence or assault where the act causing the injury was that of his servant, but which is imputed to be his act, though not authorized by him. *David v. Brooklyn Heights R. Co.*, 92 N. Y. Supp. 220, 45 Misc. Rep. 208.

Decedent Estate Law (Consol. Laws 1909, c. 13), § 120, provides that for wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrongdoer, an action may be brought after the injured person's death by his executors, etc., but that such section shall not extend to an action for personal injuries, as such action is defined in Code Civ. Proc. § 3343, except that the right of action for injuries resulting in death is not affected. Code Civ. Proc. § 3343, subd. 9, provides: "Personal injury" includes libel, slander, criminal conversation, seduction and malicious prosecution," etc. Held that, the right of privacy being in its nature personal, an action for violation thereof through the unauthorized use of plaintiff's name and picture, brought under Civil Rights Law (Consol. Laws 1909, c. 6) §§ 50, 51, does not survive plaintiff's death. *Wyatt v. Hall's Portrait Studio*, 128 N. Y. Supp. 247, 248, 71 Misc. Rep. 199.

**Alienation of affections**

Injury to a wife by the alienation of her husband's affections resulting in mental suffering, ill-health and the destruction of her home, is within Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550, 551, excepting from the operation of a discharge in bankruptcy judgments in actions for willful and malicious "injuries to the person." *Leicester v. Hoadley*, 71 Pac. 318, 319, 320, 66 Kan. 172, 65 L. R. A. 523.

The phrase "injury to the person," as used in Gen. Laws 1896, c. 260, § 10, providing that no person who shall be committed

on execution in any action for malicious injury to the person, health, or reputation of another shall be deemed within the meaning of section 1 of the act, authorizing persons imprisoned for debt to apply to be admitted to take the poor debtor's oath, includes an action for alienation of the affection of a wife, the gist of the action being depriving him of companionship and a wounding of his feelings. *Taylor v. Bliss*, 57 Atl. 939, 940, 26 R. I. 16.

An action for alienating a wife's affections, for enticing her away, and for criminal conversation is in effect an action upon the case and barred only after six years; it is not an action for injury to the person and barred after two years under section 3 of the Statute of Limitations as amended in 1896 (P. L. 1896, p. 119; 3 Comp. St. 1910, p. 3164). *Crane v. Ketcham*, 84 Atl. 1052, 1053, 83 N. J. Law, 327.

#### Breach of marriage promise

A "personal injury," as defined by Code Civ. Proc. § 3343, subd. 9, includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff or another. An action for breach of promise to marry, though seduction is alleged as the ground of damage, is not an action for a personal injury within section 373, providing that in actions for personal injuries the defendant may have an order for physical examination. *Pitt v. Dunlap*, 105 N. Y. Supp. 846, 847, 54 Misc. Rep. 115.

#### Death

The words "personal injuries," as used in Laws 1886, c. 572, p. 801, relating to actions against municipal corporations for damages for personal injuries, includes injuries resulting in death. *Crapo v. City of Syracuse*, 90 N. Y. Supp. 553, 555, 98 App. Div. 376; *Id.*, 76 N. E. 465, 466, 183 N. Y. 395.

In view of Kirby's Dig. § 6288, providing that for wrongs done to the person or property of another an action may be maintained against the wrongdoers, the expression "injury to the person" is confined to injury or damage of a physical nature and no other, and will not include the injuries suffered by a husband arising out of the killing of his wife. *Billingsley v. St. Louis, I. M. & S. R. Co.*, 107 S. W. 173, 174, 84 Ark. 617, 120 Am. St. Rep. 95.

Laws 1853, p. 97, entitled "An act requiring compensation for causing death from wrongful act, neglect or default," provides that, when the death of the person is caused by wrongful act, such as would have entitled the party injured to maintain an action in respect thereof if death had not ensued, the person who would have been liable if death had not ensued shall be liable to

an action for damages resulting to a widow and next of kin from such death. Held, that an action for wrongful death under such act was not an action for "personal injuries" within Laws 1905, p. 111, entitled "An act concerning suits at law for personal injuries and against cities, villages and towns," requiring as a condition to the maintenance thereof that the specified notice shall be served on the defendant, and hence the service of such notice was not a necessary element of a cause of action by plaintiff against a city for the wrongful death of plaintiff's decedent. *Prouty v. City of Chicago*, 95 N. E. 147, 148, 250 Ill. 222.

#### Deceit

In view of Code Civ. Proc. § 3343, subd. 9, defining a "personal injury" as an actual injury to the person, an action for deceit is not for a personal injury, within section 1910, providing that any claim or demand can be transferred except where it is to recover damages for a personal injury or for breach of promise to marry. *Keeler v. Dunham*, 99 N. Y. Supp. 669, 671, 114 App. Div. 94.

#### False imprisonment

"False imprisonment" is an injury to the person and is embraced within the provision of the Code authorizing the plaintiff to unite in the same complaint two or more causes of action for personal injuries. *Paul v. Ford*, 102 N. Y. Supp. 359, 361, 117 App. Div. 151 (quoting *De Wolfe v. Abraham*, 43 N. E. 455, 151 N. Y. 187).

Where plaintiff sued for false imprisonment, in that he was arrested as a witness and taken by an officer from defendant's train, a prayer that it was the duty of the carrier to use all reasonable care to protect plaintiff from "personal injury" and insult was not objectionable as abstract, since the false arrest and imprisonment constituted a "personal injury"; such term being defined to include libel, slander, criminal conversation, seduction, malicious prosecution, assault and battery, false imprisonment, and other actionable injuries to the person. *New York, P. & N. R. Co. v. Waldron*, 82 Atl. 709, 714, 116 Md. 441, 39 L. R. A. (N. S.) 502 (citing 6 Words and Phrases, p. 5341).

#### Libel or slander

Code Civ. Proc. 1895, § 3476, divides injuries into two classes, viz., injuries to the person and injuries to the property, and section 3477 declares that injury to property is a deprivation of the owner of the benefit thereof by taking, withholding, deteriorating, or destroying it, and section 3478 provides that every other injury is an "injury to the person." Held that, under Code Civ. Proc. 1895, § 66, providing that justices of the peace shall have civil jurisdiction in actions for damages for "injury to the person" if the damages claimed do not exceed \$300, prior to its amendment by Laws 1907, p.

186, expressly depriving justices of the peace of jurisdiction of an action for slander, such action was for an "injury to the person" within the jurisdiction of the justice of the peace, provided the amount claimed did not exceed \$300; the phrase "injury to the person" not being limited to those injuries which would support an action for trespass vi et armis at common law. *McKenzie v. Doran*, 104 Pac. 677, 678, 39 Mont. 593.

"In modern parlance the words 'personal injury' are often used to designate a physical injury to the party. But usually, when there is any attempt to put the matter into legal phraseology, these and equivalent words are understood to import the meaning in which they have long been used by recognized authorities, whether in legal text-books and commentaries or precise definition by courts, in classifying the rights of individuals. In 1 Bl. Comm. 129 et seq., the author classifies and distinguishes those rights which are annexed to the person, *jura personarum*, and acquired rights in external objects, *jura rerum*; and in the former he includes personal security, which consists 'in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.' And he makes the corresponding classification of remedies. The idea expressed is that a man's reputation is a part of himself, as his body and his limbs are, and that detraction of it is an injury to his personality, and Chancellor Kent in his twenty-fourth lecture shows that the same classification of rights was expressed in our colonial legislation and has always been observed, and, on page \*16 of the second volume of his Commentaries, he says: 'As a part of the rights of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection.'" A judgment for libel is for an "an injury to the person" and is not released by a discharge in bankruptcy. *Thompson v. Judy*, 169 Fed. 553, 555, 556, 95 C. C. A. 51.

Injuries to character and mental suffering resulting from a libelous publication are "personal injuries," within the meaning of Act La. No. 68, p. 95, of 1902, amendatory of Rev. Civ. Code La. 1870, art. 2402, which provides, *inter alia*, that "damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone," and under such provision a wife may maintain an action to recover damages for a libel affecting herself. At common law, libel and slander were regarded as injuries to the person, or "personal injuries." Where the terms "injury to the person" and "personal in-

juries" are used in the statutes of the United States, and of the several states, they are generally held to include libel. *Times-Democrat Pub. Co. v. Mozee*, 136 Fed. 761, 763, 69 C. C. A. 418 (citing 3 Bl. 119; Cooley, Torts [2d Ed.] 23, 24; Bouv. Law Dict. verbo "Injury"; *McDonald v. Brown*, 51 Atl. 213, 23 R. L. 546, 58 L. R. A. 768, 91 Am. St. Rep. 659; *Johnson v. Bradstreet Co.*, 13 S. E. 250, 87 Ga. 79, 80; *Sanderson v. Hunt*, 76 S. W. 179, 116 Ky. 435, 3 Ann. Cas. 168; *Fay v. Parker*, 53 N. H. 342, 359, 16 Am. Rep. 270; *Ott v. Great Northern Ry. Co.*, 72 N. W. 833, 70 Minn. 50, 54; *Calloway v. Laydon*, 47 Iowa, 458, 29 Am. Rep. 489; *Smith v. Sherman*, 4 Cush. [58 Mass.] 408; *State v. Clayborne*, 45 Pac. 303, 14 Wash. 622).

#### Mental injury

The words "personal injuries," as used in a statute providing that actions for personal injuries to a wife shall be brought in her name, extend to injuries to her feelings, resulting from abuse, slander, or libel. *Martin v. Derenbecker*, 40 South. 849, 850, 116 La. 495.

Mental suffering is included in the term "personal injuries," as used in *Sayles' Ann. Civ. St.* 1897, art. 3353a, providing that causes of action upon which suit has or may be brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health, the reputation, or the person of the injured party, shall not abate by reason of his death, but shall survive in favor of his heirs, etc. *Western Union Telegraph Co. v. Kaufman* (Tex.) 107 S. W. 630, 631.

#### Seduction

An action for seduction is an action for "personal injuries," within Pub. Acts 1890, No. 155, barring actions for personal injuries, unless brought within three years from the occurrence; a "personal" wrong or injury being an invasion of a personal right and pertaining to the person. *May v. Wilson*, 128 N. W. 1084, 1085, 164 Mich. 26, Ann. Cas. 1912B, 654.

#### PERSONAL LIBERTY

See, also, Right of Privacy.

"'Personal liberty consists,' says Blackstone, 'in the power of locomotion, of changing situation, or removing one's person to whatever places one's own inclination may direct, without restraint, unless by due course of law.'" *Civil Rights Cases*, 3 Sup. Ct. 18, 109 U. S. 3, 39, 27 L. Ed. 835.

"Personal liberty" is the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint, except by course of law. It includes not only the right to go where one pleases, but to maintain himself in a lawful manner

while there, to live and work where he chooses, to earn his livelihood by a lawful calling, to enter into contracts essential to carry out his avocation, as well as mere freedom from imprisonment. It also includes the right of one to use his faculties in all lawful ways. *Henry v. Cherry & Webb*, 78 Atl. 97, 107, 30 R. I. 13, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

"Personal liberty" includes not only freedom from physical restraint, but the right to be let alone to determine one's own mode of life, whether it shall be one of publicity or of privacy, and to order one's life and manage one's affairs in a manner that will be most agreeable to him, so long as he does not violate the rights of others or of the public. *Pavesich v. New England Life Ins. Co.*, 50 S. E. 68, 70, 122 Ga. 190, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561. "The right of 'personal security' is not fully accorded by allowing an individual to go through life in possession of all of his members, and his body unmarred; nor is his right to 'personal liberty' fully accorded by merely allowing him to remain out of jail, or free from other physical restraints. The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint. The term 'liberty' is not to be so dwarfed, 'but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.' 'Liberty,' in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." "The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner, is embraced within the right of 'personal liberty.' The right to withdraw from the public gaze 'at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of 'personal liberty.' Publicity in one instance, and privacy in the other, are each guaranteed. If 'personal liberty' embraces the right of publicity, it no less embraces the correlative right of privacy." *Pavesich v. New England Life Ins. Co.*, 50 S. E. 68, 70, 122 Ga. 190, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561 (citing *Brannon*, Fourteenth Amendment, 111).

The "right to personal liberty," which exists independent of any express provision of law, includes not only absolute freedom of travel, but the preservation of the person inviolate against attack or compulsory strip-

ping or exposure. *People ex rel. Gow v. Bingham*, 107 N. Y. Supp. 1011, 1014, 57 Misc. Rep. 66.

### PERSONAL LUGGAGE

See, also, *Personal Baggage*.

"Whatever a passenger takes with him for his personal use or convenience either with reference to immediate necessities or the ultimate purposes of the journey, must be considered 'personal luggage.'" The term would include money for expenses and diamond rings suitable for the passenger's station in life. *Hasbrouck v. New York Cent. & H. R. R. Co.*, 118 N. Y. Supp. 735, 739, 742, 64 Misc. Rep. 478 (quoting and adopting definition in *Ray*, Neg. Imp. Duties, p. 561).

### PERSONAL MORTGAGE

A "personal mortgage" is more than a mere security. It is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee subject only to be defeated by the full performance of the condition. In *re Riggs Restaurant Co.*, 130 Fed. 691, 693, 66 C. C. A. 48 (citing *Butler v. Miller*, 1 N. Y. 500).

### PERSONAL NOTICE

"Personal notice" to an absent defendant of an attachment of his real estate implies more than casual information of the suit or of the seizure of his property, but it relates to his receiving or learning of the copy of the writ that he is entitled to have left for him. *Wade v. Wade's Adm'r*, 69 Atl. 826, 827, 81 Vt. 275.

### PERSONAL OBLIGATION

A contract giving D. exclusive right to drill in defendant's land with a view of finding commercial substances, and in case of success within 90 days thereafter to pay defendant \$100 per arpent for a conveyance of the land, did not impose a "personal obligation" on D. within Civ. Code, art. 2000, declaring an obligation personal when the obligor undertakes to perform anything that requires his personal skill and attention; and hence the contract was assignable. *Anse La Butte Oil & Mineral Co. v. Babb*, 47 South. 754, 755, 122 La. 415.

### PERSONAL ORNAMENTS

As goods and chattels, see *Goods*.

### PERSONAL PROPERTY

All personal property, see *All*.

Other personal property, see *Other*.

Tangible personal property, see *Tangible Property*.

Personal property is the right or interest which a person has in things personal. *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 36 South. 91, 97, 111 La. 982.

Ordinarily the term "personal property" includes money, goods, chattels, etc. *Brom-*

berg v. McArdle, 55 South. 805, 172 Ala. 270, Ann. Cas. 1913D, 855.

"Personal property" is any right or interest which a man may have in things movable and includes chattels, things in action, and evidence of debt." Fishburn v. Londershausen, 92 Pac. 1060, 1062, 50 Or. 363, 14 L. R. A. (N. S.) 1234, 15 Ann. Cas. 975 (quoting and adopting definition in 2 Bouv. Law Dict. p. 662).

The term "personal property," as used in the statute relating to taxation, means and includes all property not included in the term "real estate." Copper Queen Consol. Min. Co. v. Territorial Board of Equalization, 84 Pac. 511, 518, 9 Ariz. 383.

The words "personal property" as used in Rev. St. Wis. 1878, § 2317, providing that no contract for the sale of personal property by the terms of which the title is to remain in the vendor and possession in the vendee until the purchase price is paid shall be valid against any other person than the parties, without filing, is not limited to property sold to be used and not resold. Mishawaka Woolen Mfg. Co. v. Smith, 158 Fed. 885, 888.

The provision of Comp. Laws 1897, § 3834, that the personal property of corporations organized for the purpose of maritime commerce and navigation shall be assessed only in the city or township which is stated in their articles of association, is not confined to vessel property so called, but extends to all the "personal property of corporations engaged in maritime commerce or navigation." Teagan Transp. Co. v. Board of Assessors of City of Detroit, 102 N. W. 273, 274, 139 Mich. 1, 69 L. R. A. 431, 111 Am. St. Rep. 391.

Burns' Rev. St. 1901, § 8454, provides that "in entering personal property upon the proper tax books for the purpose of taxation it shall be a sufficient description of the same to use the words 'personal property,' and such phrase shall comprehend and embrace all species of personal property belonging to the person charged therewith on the tax books, and no more specific description or designation thereof shall be necessary." Brunson v. Starbuck, 70 N. E. 163, 165, 32 Ind. App. 457.

Testatrix gave specific personal property and specified sums to beneficiaries and directed the executor to sell the remainder of household furniture, goods, chattels, and stock, and to convert "all other personal property" into money and divide the same equally between two beneficiaries. Held, that the term "personal property" was sufficiently comprehensive to include all goods, chattels, notes, bonds, mortgages, choses in action, and money possessed by testatrix at the date of her death, so that all her personal property was disposed of by the will. Skinner v. Spann, 93 N. E. 1061, 1070, 175 Ind. 672.

In Rev. Laws, c. 140, § 2, providing that such parts of the "personal property" as the probate court, having regard to all the circumstances of the case, may allow as necessities to the widow for herself, shall not be taken as assets for the payment of debts, legacies, or charges of administration, the term "personal property" means the personal property left by the deceased at the time of his death, and as to this property, upon the appointment of an executor or administrator, jurisdiction of the court attaches for the purpose of allowing to the widow as necessities whatever she ought to receive. It is not the personal property that is in the hands of the administrator at the time of filing the petition for an allowance which the law appropriates for payment of necessities, but it is all that comes into his hands, so far as it may be needed under the decree of the court. Whitcomb v. Taylor, 78 N. E. 536, 537, 192 Mass. 555.

Rev. St. Ohio 1890-92, § 2731, providing that "all property, whether real or personal, in this state, \* \* \* and all money, credits, investments and bonds, stocks and otherwise, of persons residing in this state, shall be subject to taxation," when construed in connection with the related sections, which require the listing for taxation of property held by trustees or agents for others, includes, and subjects to taxation as "personal property," every form of such property having a situs in the state, including such forms as money, credits, bonds, or stocks, whether such situs is given by reason of the residence of the owner in the state, in which case such forms of property are taxed without regard to the place of their deposit, or whether by reason of their being held within the state by an agent of a nonresident owner; and municipal bonds deposited with the state superintendent of insurance by a foreign insurance company for the protection of Ohio policy holders, as required by section 3660, are taxable, and when not returned by either the company or the superintendent of insurance may properly be listed by the auditor of the county in which they are held. Western Assur. Co. of Toronto v. Halliday, 126 Fed. 257, 265, 61 C. C. A. 271.

#### Statutory definitions

"Personal property" includes money, goods, chattels, things in action, and evidences of debt. Gibson v. Gibson, 43 Wis. 23, 33, 28 Am. Rep. 527 (quoting and adopting definition in Rev. St. c. 5).

Statutory construction law defines the term personal property as follows:—"The term 'personal property' includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharg-



ed or defeated, wholly or in part, and everything except real property, which may be the subject of ownership." *Morgan v. Mutual Ben. Life Ins. Co.*, 104 N. Y. Supp. 185, 188, 119 App. Div. 645 (citing *Laws 1892*, p. 1486, c. 677, § 4).

*Bates' Ann. St. Ohio*, § 2781a, providing that the term "personal property" applies to all kinds of omitted property for the taxation of which, for any of the years in which it was omitted, provision was not made by law, considered in connection with other provisions for the listing, valuing, levying, and collection of taxes on taxable property which is not returned to the taxing officers or has been omitted from tax duplicates, should be construed as if reading, "all kinds of 'omitted' property," etc., and as intended to apply only to property which was properly taxable in such years but which was not returned or properly returnable for taxation thereon. *Western Assur. Co. of Toronto v. Halliday*, 127 Fed. 830, 831, 837, 838.

The term "personal property," as employed in a tax law, includes bonds, notes, credits, and choses in action. *Sayles' Ann. Civ. St. Tex.* 1897, art. 5068, providing that personal property shall, for the purposes of taxation, be construed to include goods, moneys, and evidences of debt, "owned by citizens of the state," does not, when considered in connection with all the provisions of the law relating to the subject of taxation, operate to exclude from taxation property owned by nonresidents that has a taxable situs within the state. It embraces a deposit of securities with the State Treasurer by a foreign guaranty company as required by *Acts 25th Leg. p. 244*, c. 165, approved June 10, 1897, as security for the performance of its obligations. *State v. Fidelity & Deposit Co. of Maryland*, 80 S. W. 544, 553, 35 Tex. Civ. App. 214.

"Gen. St. 1909, § 9215, provides the term 'personal property' shall include every tangible thing which is the subject of ownership, not forming part of real property; also the capital stock, undivided profits, and all other assets of every company, incorporated or unincorporated, and every share or interest in such stock, profit, or assets, by whatever name the same may be designated, provided the same is not included in other personal property subject to taxation or listed as the property of individuals." *Hunt v. Board of Com'rs of Allen County*, 109 Pac. 106, 107, 82 Kan. 824.

The object of the provision, "all goods, chattels, and effects belonging to inhabitants of this state, situated without this state, except the property actually and permanently invested in business in another state shall not be included," in *Burns' Ann. St. 1901*, § 8411, defining what the term "personal property" shall include for the purpose of taxation, was not to avoid double taxation, since the

purpose of that section was not to exempt any property from taxation, but to define the term "personal property" as used in the taxing law. *Hasely v. Ensley*, 82 N. E. 809, 811, 40 Ind. App. 598.

#### Bonds

Bonds are "personal property." *Wuller v. Chuse Grocery Co.*, 89 N. E. 796, 798, 241 Ill. 898, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522 (citing *Cooper v. Corbin*, 105 Ill. 224).

For purposes of taxation "personal property" includes bonds. *Buck v. Beach*, 71 N. E. 963, 967, 164 Ind. 37, 108 Am. St. Rep. 272.

Bonds in which a foreign insurance company is required by *Rev. St. Ohio*, § 8660, as a condition of doing business in Ohio, to invest a portion of its capital stock, to be deposited with the superintendent of insurance for the protection of the local policy holders, are "personal property" within the meaning of section 2744, requiring insurance companies to list for taxation all their personal property, which, by the terms of that section, is to include moneys and credits within the state, and is also defined in section 2780 as including the capital stock, although the taxation of investments in bonds, provided for in sections 2730, 2731, extends only to such securities as are in the hands of individual residents, owned by themselves or held by them for others, since these last sections were not intended to limit other sections of the tax law, but were enacted to carry out a general purpose to tax all personal property within the state. *Scottish Union & National Ins. Co. v. Bowland*, 25 Sup. Ct. 345-351, 196 U. S. 611, 49 L. Ed. 619.

#### Building

A dwelling house erected on a city street, though by mistake extending onto an adjoining lot, under a permit conditioned that the builder will remove it on 30 days' notice from the city, built on wooden shoes extending its entire width, and resting on wooden blocks laid on the ground, so that removal will not disturb the freehold, remains "personal property." *Page v. Urlick*, 72 Pac. 454, 455, 31 Wash. 601, 96 Am. St. Rep. 924 (citing and adopting *Cobbey*, *Replevin* [2d Ed.] § 373; *Jewett v. Patridge*, 12 Me. 243, 27 Am. Dec. 173; *Board of Com'rs of Rush County v. Stubbs*, 25 Kan. 322).

Claimant purchased certain land along a street to be widened, and, having previously acquired a building, which had been taken by the city and paid for in another street opening proceeding, moved the building to the land so acquired after the commencement of the proceeding, and placed the same with reference to the prior existing street lines, though the land purchased was sufficient in depth to have enabled him to have located the building with reference to the proposed line of the street. After this, claimant sold

to his grantor the rear part of the lot, so as to preclude a relocation of the building on the lot with reference to the proposed line. Held, that the building was not located in good faith, and, having been once severed from the soil, it became "personal property," and should be so considered in determining the question of damages for the part of the lot required for the street. *In re Briggs Ave. in City of New York*, 89 N. E. 814, 816, 196 N. Y. 255, 36 L. R. A. (N. S.) 273, 17 Ann. Cas. 1032.

#### Chattel real

A "chattel real" is personal property. *Townsend v. Boyd*, 66 Atl. 1099, 1101, 217 Pa. 386, 12 L. R. A. (N. S.) 1148.

#### Check

A check drawn by the Treasurer of the United States in settlement of a claim against the government is "personal property" within Code, § 105 (21 Stat. 1206, c. 854), providing that publication may be substituted for personal service of process on nonresidents of this district in suits to enforce liens against real or personal property within the District of Columbia. *Jones v. Rutherford*, 26 App. D. C. 114, 119.

#### Chose in action

Generally speaking, a "chose in action" is personal property. *In re Morace* (Del.) 74 Atl. 375, 376, 1 Boyce, 67.

For purposes of taxation "personal property" includes choses in action. *Buck v. Beach*, 71 N. E. 963, 967, 164 Ind. 37, 108 Am. St. Rep. 272.

"Personal property" includes things in action and evidences of debt. *Gibson v. Gibson*, 43 Wis. 23, 33, 28 Am. Rep. 527; *Fishburn v. Londershausen*, 92 Pac. 1060, 1062, 50 Or. 363, 14 L. R. A. (N. S.) 1234, 15 Ann. Cas. 975 (citing Rev. St. c. 5; 2 Bouv. Law Dict. p. 662).

"Choses in action" are "personal property" within the statute against fraudulent conveyances. *Hall & Farley v. Alabama Terminal & Improvement Co.*, 39 South. 285, 288, 143 Ala. 464, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363.

In *Hurd's Rev. St.* 1903, c. 3, p. 125, § 122, providing that actions to recover damages for injury to real or "personal property" shall survive, the term "personal property" was not intended to be applied to a right of action occasioned by the malicious interfering by one person with the business of another, but was intended to apply only to actions for damages to tangible articles and things movable—to chattels—as distinguished from actions for damages to one's business. *Jones v. Barmm*, 75 N. E. 505, 506, 217 Ill. 381.

Choses in action in the hands of a trustee subject to a lien or pledge are "personal property," within the purview of Pub. St. 1901, c. 245, § 28, providing that, if a trustee

is chargeable for any personal property subject to mortgage or other lien, the court may appoint a receiver and dispose of it if more can be obtained for it than the claims upon it. *Musgrove v. Goss*, 72 Atl. 371, 372, 75 N. H. 208 (citing *Fling v. Goodall*, 40 N. H. 208).

Act Pa. June 7, 1870 (P. L. 58), providing for the issuance of a special writ of *seri facias* on a judgment against a corporation after return of execution unsatisfied and the sale thereunder of "the personal, mixed or real property, franchises and rights of such corporation," as construed by the Supreme Court of the state, does not authorize the sale under such writ of a chose in action or claim in tort belonging to the corporation. *International Coal Min. Co. v. Pennsylvania R. Co.*, 152 Fed. 554, 555.

An assignment by one of several purchasers of real estate conveyed to a trustee with directions to sell and divide the proceeds among the several purchasers of his interest in the trust agreement to a bank in which he is depositor as security for a note is an assignment by way of a pledge of a chose in action constituting "personal property" within Code Civ. Proc. § 17, and the bank notwithstanding section 726 may off-set its matured claim on the note against the deposit without proceeding to collect the security. *John M. C. Marble Co. v. Merchants' Nat. Bank of Los Angeles*, 115 Pac. 59, 62, 15 Cal. App. 347.

Civ. Code, § 4662, subsec. 3, provides that "personal property" includes things in action. Code Civ. Proc. § 1218, provides that all property or any interest therein of the judgment debtor not exempt by law is liable to execution, and all property not capable of manual delivery may be attached on execution in like manner as on writs of attachment. Section 1224 requires the sheriff to execute a writ by collecting or selling the things in action, etc. Section 1232 provides that the officer making the sale must execute and deliver to the purchaser of real (personal) property not capable of manual delivery a certificate of sale upon payment of the purchase money. Section 895, as amended by Laws 1899, p. 139, provides for attachment of debts, credits, and other personal property not capable of manual delivery by serving upon the debtor or person responsible a copy of the writ, etc. Held, that a wife who obtained a judgment against her husband for separate maintenance had a remedy against persons who had converted the husband's property by execution against her husband to collect amounts due under her judgment under which his claim against such persons might have been sold and bought in by her, whereupon she could sue them at law, and that she could not otherwise maintain an action against them in equity, since equity will aid only where an adequate remedy is not found in the provi-

sions of law. *Raymond v. Blancgrass*, 93 Pac. 648, 653, 86 Mont. 449, 15 L. R. A. (N. S.) 876.

Code 1907, § 3765, provides that the surviving husband of a woman who dies intestate shall be entitled absolutely to half the personalty of her separate estate. Section 4486 provides that all property of a wife, held by her previous to her marriage, is her separate property. Section 2486, giving to the administrator a right of action for negligence causing death, provides that the damages recovered shall not be liable for the debts of the deceased, and shall be distributed according to the statute of distributions. Held, the right of action being expressly vested in the administrator alone, so as not to be assignable, which right is inseparable from the idea of property, and the action by the administrator being more as an agent to effect the legislative policy to prevent homicide, and as trustee of any recovery, than as the representative of deceased in reducing property of the estate to possession, that, where a widow remarried and died pending a suit by the administrator of the first husband to recover for his death, the surviving second husband was not entitled to share in the subsequent recovery, the wife having had no "property" right in the cause of action, within the meaning of the statutes of distribution, her interest being merely personal, especially in view of Code 1907, § 2, defining "personal property" as money, goods, chattels, things in action, and evidences of debt; the use of the phrase "things in action," in connection only with assignable property, indicating the legislative intent that it shall have a similar meaning. *Holt v. Stollenwerck*, 56 South. 912, 913, 174 Ala. 213.

#### **Claim ex contractu or ex delicto**

A claim for damages for death by wrongful act is "personal property" within the meaning of Code 1899, c. 13, § 17, subsec. 16, providing that the words "personal property" include goods, chattels real and personal money credits, investments, and the evidences thereof. *Richards v. Riverside Ironworks*, 49 S. E. 437, 438, 56 W. Va. 510.

A sale of the property of a corporation by a sheriff under a special writ of fieri facias, under the provisions of Act Pa. April 7, 1870 (P. L. 58), which authorizes the issuance of such writ on the return of an execution unsatisfied, and the sale thereunder of "any personal, mixed, or real property franchises and rights of such corporation" as such statute has been construed by the Supreme Court of the state, does not pass title to a claim for damages existing in favor of the corporation, and, on its subsequent adjudication as a bankrupt, a pending action on such a claim may be prosecuted to judgment by its trustee. *International Coal Min. Co. v. Pennsylvania R. Co.*, 152 Fed. 551, 553.

#### **Claims**

When claims are reclaimed from nature and transplanted to a bed, so marked by stakes as to show that they are in the possession of a private owner, they are "personal property," and may become the subject of larceny. *People v. Morrison*, 86 N. E. 1120, 1121, 194 N. Y. 175, 128 Am. St. Rep. 552.

#### **Clearing house certificate**

Under Code 1907, § 7324, making felonious taking, etc., of personal property of a certain value grand larceny, an indictment alleging taking of clearing house certificates, personal property of another, sufficiently alleges taking of property subject to larceny, in absence of evidence of their nature; section 2 providing that "personal property" shall include money, evidences of debt, etc. *Johnson v. State*, 48 South. 792, 159 Ala. 113.

#### **Corporation stock**

Shares of stock in a corporation are "personal property." *Gundry v. Reakirt*, 173 Fed. 167, 169 (citing 2 Cook, Corp. [5th Ed.] § 485); *Wuller v. Chuse Grocery Co.*, 89 N. E. 796, 798, 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522 (citing *Cooper v. Corbin*, 105 Ill. 224).

The term "personal property" as used in the tax law includes the capital stock of corporations. *Abrahams v. Medlicott*, 119 Pac. 375, 376, 86 Kan. 106, 38 L. R. A. (N. S.) 137.

Shares of stock in a corporation are regarded as "personal property" situated at the domicile of the owner, for the purposes of taxation. *Darnell v. State*, 90 N. E. 769, 772, 174 Ind. 143.

"Stock" in a corporation is a right which a shareholder has by reason of his ownership of stock, and is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after payment of debts, and this right is personal property. In re *Osborne*, 153 App. Div. 312, 138 N. Y. Supp. 18, 20.

In jurisdictions possessing attachment laws with language similar to that of ours, it has been held that shares of stock are not included within the phrase "real and personal property." *Fowler v. Dickson* (Del.) 74 Atl. 601, 606, 1 Boyce, 113 (citing *Foster v. Potter*, 37 Mo. 525).

Trover will lie for the wrongful conversion of shares of stock of a corporation. *Herrick v. Humphrey Hardware Co.*, 103 N. W. 685, 687, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201.

Shares of stock of a corporation are "personal property," within Wilson's Rev. & Ann. St. 1903, § 957, declaring that, when the capital stock of any corporation is divided into shares and certificates therefor are is-

sued, the shares are personal property. *Haynes v. Brown*, 89 Pac. 1124, 1125, 18 Okl. 389.

Under the act of 1903 (P. L. 1903, p. 394) exempting the personal property owned by citizens or corporations of this state situate and being out of the state upon which taxes shall have been actually assessed and paid within 12 months, stock is "personal property." *Trenton v. Standard Fire Ins. Co.*, 68 Atl. 1111, 1112, 76 N. J. Law, 79.

Code 1899, c. 106, § 9, giving plaintiff in attachment a lien on personalty of his debtor on the levy of the attachment or service on garnishee on all choses in action and other securities of defendant from the suing out of the attachment, includes shares of stock in the terms "personal property, choses in action, and other securities." *Lipscomb's Adm'r v. Condon*, 49 S. E. 392, 393, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938.

Stock held by a resident in a foreign corporation whose property is all outside the state is not such "property" or "personal property" as is taxable under Rev. St. 1909, §§ 11,348, 11,415, 11,519; the last section defining property to include every tangible or intangible thing being the subject of ownership, whether animate or inanimate, real or personal. *State ex rel. Koeln v. Lesser*, 141 S. W. 888, 890, 237 Mo. 310.

Shares of stock in a corporation are the property of the holder thereof, separate and distinct from the property of the corporation itself, and, in the absence of any more specific definition by the Legislature, would be held to be subject to taxation as "personal property." *Hasely v. Ensley*, 82 N. E. 809, 810, 40 Ind. App. 598.

Under a statute providing that for the purpose of taxation "personal property" shall include all chattels belonging to inhabitants of the state unless permanently invested in another state and shares in foreign corporations owned by the citizens of the state, shares in a foreign corporation owned by a citizen of the state are taxable as "personal property," although corporate property is assessed where situated. *Thrall v. Guiney*, 104 N. W. 646, 648, 141 Mich. 392, 113 Am. St. Rep. 528.

"Personal property" defined by Gen. St. Kan. 1909, § 9215, relating to taxation, to include every tangible thing which is the subject of ownership not forming a part or parcel of real property, includes shares of stock in a corporation organized in another state where its principal office is located, and this though practically all of the capital of the corporation was invested in real and personal property in Kansas which was itself taxed. *Hunt v. Board of Com'rs of Allen County*, 109 Pac. 106, 107, 82 Kan. 824.

Shares of corporate stock are personal property within Civ. Code 1895, § 4976, pro-

viding that, in a suit to quiet title to property in the state to which a nonresident claims title, such nonresident may be served by publication. An equitable petition alleged that by agreement with a stockholder and promoter of a domestic corporation plaintiff's intestate was to have certain shares of stock, when paid for in the manner provided, that this had been done, and plaintiff's intestate became the real owner, but the executors of the other contracting party had refused to transfer, or have transferred, such stock. Held, that the shares of stock were "personal property," and for the purpose of a suit to quiet title their situs was the domicile of the corporation. *Hamil v. Flowers*, 65 S. E. 961, 962, 183 Ga. 216.

Shares of stock in an incorporated company held and claimed by a nonresident of the district where the company has its domicile or is engaged in business cannot be considered "personal property within the district," so as to authorize the court, in a suit in which complainant sets up title to the stock, to order the holder to be constructively served in the manner provided by statute. *McKane v. Burke*, 132 Fed. 688, 690 (citing *Kilgour v. New Orleans Gaslight Co.*, 14 Fed. Cas. 468; 2 Woods, 144).

Under Civ. Code, § 324, declaring that shares of stock in a corporation are "personal property" and may be transferred by indorsement and delivery of the certificate, and providing that such transfer is not valid, except as to the parties thereto, until the same is entered on the books of the corporation, etc., a bona fide transfer of corporate shares, though unregistered, takes precedence over a subsequent attachment or execution levied on the stock for the debt of the vendor, in whose name the shares stand on the corporation books. *National Bank of Pacific v. Western Pac. Ry. Co.*, 108 Pac. 676, 677, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391.

Shares of stock in a corporation are personal property belonging to the respective shareholders, and are within the scope and operation of Const. art. 3, § 51, which declares that the personal property of residents in the state shall be subject to taxation in the county or city where the resident bona fide resides for the greater part of the year for which the tax may be levied, and not elsewhere, except goods and chattels permanently located, which shall be taxed in the city or county where they are so located. *City of Baltimore v. Allegany County Com'rs*, 57 Atl. 632, 636, 99 Md. 1.

Tax Act April 11, 1866, § 5, provided that all real and personal estate should be taxable, except stocks and other personal estate owned by citizens of the state and being out of the state, upon which taxes should have been paid within 12 months. Tax Act April 8, 1903, in revision of Tax Act 1866, provides

for the taxation of all property not "expressly exempted," and contains the exact words of exemption, save that the words "personal property" are substituted for "stocks and other personal estate" in the older act. Held, that stock in a foreign corporation owned by a resident is exempt, under Tax Act April 8, 1903, where taxes have been paid on the corporation's property in its own state within 12 months. *Inhabitants of City of Trenton v. Standard Fire Ins. Co. of New Jersey*, 73 Atl. 606, 607, 77 N. J. Law, 757.

#### Credits

For purposes of taxation, "personal property" includes bonds, notes, choses in action, and other evidences of credit within the domestic state. *Buck v. Beach*, 71 N. E. 963, 967, 164 Ind. 37, 108 Am. St. Rep. 272.

As used in Rev. St. Wis. 1849, c. 15, § 1, providing for the assessment of personal property, and declaring that the term should be construed to mean all debts due from solvent debtors, whether on account, note, contract, bond, mortgage, or other security, whether due or to become due, all credits constituted "personal property" subject to taxation. *Kingsley v. Merrill*, 99 N. W. 1044, 1045, 122 Wis. 185, 67 L. R. A. 200, 2 Ann. Cas. 748.

#### Crop

Growing crops are "personalty" which pass by deed as appurtenant to the realty, but may be severed therefrom by reservation, either by parol agreement or instrument in writing. *Cooper v. Kennedy*, 124 N. W. 1131, 1132, 86 Neb. 119, 31 L. R. A. (N. S.) 761, 136 Am. St. Rep. 701.

Corn standing in the field on the homestead of a bankrupt and which had fully matured at the date of the bankruptcy is "personal property" and cannot be held exempt as a part of the realty. *In re Sullivan*, 142 Fed. 620, 621.

Where there was a sale of all the strawberry plants growing on a certain tract of land, the property falls clearly within the classification of fruits of industry and not natural products, and must be treated as "personal property" and the subject of replevin. *Cannon v. Mathews*, 87 S. W. 428, 430, 75 Ark. 336, 69 L. R. A. 827, 112 Am. St. Rep. 64, 5 Ann. Cas. 478.

The common products of the soil which are treated like "personal property" are the usual annual crops, such as cereals, maize, vegetables, and the annual products of perennial plants and shrubs, but personal property does not include ginseng, of which the root alone has commercial value, and which requires from seven to fifteen years to mature. *Kuehn v. City of Antigo*, 120 N. W. 823, 824, 139 Wis. 132, 131 Am. St. Rep. 1043.

"Grass rooted to the ground is, for the purpose of sale, 'personal property'; and the

purchaser has possession sufficient to sustain trespass, though he is not the owner of the land, or the tenant thereof." Where the tenant of a farm, on leaving the state, sold to plaintiffs the right to graze their stock on grass and stalks growing on the farm, plaintiffs to care for the leased premises during the tenant's absence, it did not convert the stalks and grass into "real estate," and hence the landlord, in turning out the stock and locking the gates of the premises, was guilty of a conversion of the stalks and grass, which were "personal property." *Ledy v. Carson*, 90 S. W. 754, 755, 115 Mo. App. 1 (quoting and adopting definition in *Avitt v. Farrell*, 68 Mo. App. 665).

Possessory warrant lies only for the recovery of personality, and immature growing crops are not "personal property," but realty, so that a landlord cannot bring possessory warrant against his cropper for such crops, under Civ. Code 1910, § 3706, giving a landlord the right to repossess crops by such proceeding. *Gainous v. Martin*, 72 S. E. 1100, 10 Ga. App. 210.

#### Debts

Where two parties contract for the sale of real estate, and the purchaser makes a partial payment and is to pay the remainder in installments, and the seller is to convey the legal title on payment in full of the price, it creates a debt from the purchaser to the seller, which is "personal property" within Gen. St. 1909, § 9215, defining personal property as including every tangible thing which is the subject of ownership; "tangible" being defined as something capable of being possessed or realized; real; substantial; evident—and is subject to taxation under Gen. St. 1909, § 9214, providing for taxation of all property real and personal. *Williams v. Board of Com'rs of Osage County*, 114 Pac. 858, 84 Kan. 508, 34 L. R. A. (N. S.) 1221.

#### Domestic animal

Under Pen. Code 1895, art. 867, which provides that, within the meaning of "personal property which may be the subject of theft" are included all domesticated animals or birds, when they are proved to be of any specific value, on a prosecution for the theft of a chicken, failure to prove its value necessitates a reversal of a judgment of conviction. *Hasley v. State*, 94 S. W. 899, 50 Tex. Cr. R. 45.

Pen. Code, § 484, defines larceny as the felonious stealing, etc., of personal property of another. Held, that the phrase "personal property of another," as so used, means property in the possession of another who is entitled, as bailee or otherwise to retain possession, for some benefit or profit to himself to the exclusion of all others, and not absolute ownership as defined by Civ. Code, § 679, so that a taking of a heifer by the general owner thereof from the possession of an

agister entitled to hold the same under a lien for pasturage, with the intent to deprive the latter thereof, constituted larceny. *People v. Cain*, 93 Pac. 1087, 1039, 7 Cal. App. 163.

#### Same—Dog

Dogs are personal property, for the negligent killing of which a railroad company is liable. *St. Louis, I. M. & S. Ry. Co. v. Rhoden*, 123 S. W. 798, 800, 93 Ark. 29, 137 Am. St. Rep. 73, 20 Ann. Cas. 915.

A dog is "personal property" within the statute providing that "larceny" is the felonious stealing, taking and carrying, riding or driving away personal property of another, and that it shall embrace every theft which unlawfully deprives another of his money or other personal property. *State v. Soward*, 103 S. W. 741, 742, 83 Ark. 264, 11 L. R. A. (N. S.) 1117, 119 Am. St. Rep. 136, 13 Ann. Cas. 79.

#### Electricity

Electricity is "personal property" capable of sale. *Fickelsen v. Wheeling Electrical Co.*, 67 S. E. 788, 789, 67 W. Va. 335, 27 L. R. A. (N. S.) 893.

#### As estate

See Estate.

#### Fishery

"As a right of property, a fishery is real and not 'personal property.'" *Hume v. Rogue River Packing Co.*, 92 Pac. 1065, 1068, 51 Or. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732.

#### Good will

Laws 1892, p. 1486, c. 677, § 4, defines "personal property" as including everything, except real property, which may be the subject of ownership, and hence the good will of a business firm is taxable under the Transfer Tax Law. In *re Dun's Estate*, 82 N. Y. Supp. 802, 803, 40 Misc. Rep. 509.

#### Income and income producing investments

The term "personal property," as used in a will directing the executors to convert all personal property into money, is not limited to personal property of a tangible nature, but includes income-producing investments. *Curtis v. Osborn*, 65 Atl. 968, 970, 79 Conn. 555.

#### Insurance policy

Laws 1892, p. 1486, c. 677, § 4, provides as follows: "The term 'personal property' includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien, or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property,

which may be the subject of ownership. The term chattels includes goods and chattels." Rev. St. p. 4, c. 1, tit. 7, § 33; Code Proc. § 463; Code Civ. Proc. (1880) § 3343, subd. 7. Where a foreign insurance company doing business in the state under the laws thereof issued a policy to a resident, who, with the company's consent, assigned it to another resident as collateral security for advanced premiums, and the assignee died a resident of the state, and his trustees held the policy as an asset of his estate, the subject-matter of an action by the trustees against the company and the beneficiaries to recover the amount of premiums advanced is "personal property" within the state, within Code Civ. Proc. § 438, subd. 5, authorizing the service of summons on a nonresident defendant by publication, where the complaint demands judgment that defendant be excluded from an interest in "personal property" within the state, and the nonresident beneficiaries may be served by publication. *Morgan v. Mutual Benefit Life Ins. Co.*, 82 N. E. 438, 440, 189 N. Y. 447; *Morgan v. Mutual Ben. Life Ins. Co.*, 116 Pac. 385, 388, 16 Cal. App. 85.

#### Judgment

A judgment is "personal property," subject to levy and sale on execution, under Rev. Code Civ. Proc. §§ 336, 340. *Acme Harvesting Mach. Co. v. Hinkley*, 122 N. W. 482, 23 S. D. 509, 21 Ann. Cas. 743.

#### Land certificate

An unlocated land certificate is "personal property." *Phillips v. Palmer*, 120 S. W. 911, 913, 56 Tex. Civ. App. 91; *McLain v. Pate* (Tex.) 124 S. W. 718, 720.

#### Leasehold

A lease for a term of years is "personal property," a chattel real, so that a judgment is not a lien on a leasehold estate acquired by the debtor under a lien executed subsequent to the judgment, under Code Civ. Proc. § 671, making a judgment a lien on all the real property of the judgment debtor not exempt from execution owned by him at the time, or any which he may afterwards acquire. *Summerville v. Stockton Milling Co.*, 76 Pac. 243, 246, 142 Cal. 529.

An unexpired three-year lease on premises condemned was "personal property," and not "real estate," within the constitutional provision conferring appellate jurisdiction on the Supreme Court in cases involving title to real estate. *Springfield S. W. Ry. Co. v. Schweitzer*, 151 S. W. 128, 131, 246 Mo. 122; *Ellis v. Bingham* (Tex.) 150 S. W. 602.

An unexpired lease of real property for 20 years or any longer term is "personal property," both at common law and under the statutes of Missouri, and therefore, on the death of the lessee, passes to his administrator, except as to the interest of the widow, under Rev. St. 1899, § 2933, giving her

dower in a leasehold. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 492, 225 Mo. 414, 20 Ann. Cas. 1072.

Under Ky. St. 1903, § 458, providing that "the words 'real estate,' or 'land' shall be construed to mean lands, tenements, and hereditaments and all rights thereto and interests therein other than a chattel interest; and the words 'personal estate' shall include chattels, real and other estate, such as, on the death of the owner intestate, would devolve on his personal representatives," a leasehold interest in a store building is "personal estate" rather than "real estate" or "land." *Combs Lumber Co. v. Chinn* (Ky.) 90 S. W. 251.

"Personal property," defined by Acts 1905, c. 35, p. 309, to include " \* \* \* all things of value, movable and tangible which are the subject of ownership; all chattels, real and personal," etc., includes a lease of land for coal mining and coke manufacturing purposes for a period of 30 years, with the right to erect buildings, etc., upon payment of a rent or royalty of ten cents per ton for all coal mined, and with a clause for forfeiture—constituting a chattel real—so as to make it taxable as personal property to the lessee. *Harvey Coal, etc., Co. v. Dillon*, 53 S. E. 928, 936, 59 W. Va. 605, 6 L. R. A. (N. S.) 628.

A lease granting oil and gas mining privileges for a term of years is a "chattel real." (a) A chattel real is "personalty." (b) A lease for such purposes, made by the guardian of a minor, permission of the court having first been obtained thereto, and such lease having been approved and confirmed by the court, though without the preliminary notices essential for the order of sale and confirmation of the same in case of the sale of real estate of minors by guardians, is valid against a collateral attack. *Duff v. Keaton*, 124 Pac. 291, 295, 33 Okl. 92, 42 L. R. A. (N. S.) 472.

### Money

As money, see Money.

"Personal property" includes money. *Gibson v. Gibson*, 43 Wis. 23, 33, 28 Am. Rep. 527; *Bromberg v. McArdle*, 55 South. 805, 172 Ala. 270, Ann. Cas. 1913D, 855.

Under Rev. St. 1887, § 16, subd. 3, money is "personal property." *Sencerbox v. First Nat. Bank of Omaha*, 93 Pac. 369, 372, 14 Idaho, 95.

Code 1907, § 2, which defines personal property and includes money in its classification, is limited with respect to such words to their use in the codification and has no application in the interpretation of the term "personal property" as used in a bequest or devise. *Bromberg v. McArdle*, 55 South. 805, 172 Ala. 270, Ann. Cas. 1913D, 855.

Testatrix left her surviving two sons and two daughters, and gave articles of jewelry

to each of her daughters, and all her household goods, wearing apparel, and personal property to be divided between the daughters, and directed her executors to sell the remainder of her estate, and divide it "equally among my four children." Held, that the words "personal property" should be limited to articles of a personal character of the same species as those mentioned, and did not include cash in bank. In *re Gibbons' Estate*, 73 Atl. 183, 224 Pa. 37.

Testatrix owned three houses and lots, certain personal property, and two saving deposits. She devised one of these houses to each of her three nieces, and by the second clause of her will bequeathed to her niece Q. all of her household furniture and "personal property of whatsoever kind" in her W. street house. The will disposed of all testatrix's property, and contained no residuary clause. After execution of will, she sold one of the houses, and deposited the proceeds with other money to the credit of her saving bank deposits. The passbooks for these deposits, together with certain other money, and jewelry, were in testatrix's possession at her W. street residence when she died. Held, that the proceeds of the property sold did not pass to the devisee of testatrix's residence under the description "personal property of whatsoever kind," but that as to this testatrix died intestate. In *re Delaney's Will*, 117 N. Y. Supp. 838, 133 App. Div. 409.

Code Civ. Proc. § 2713, subd. 5, provides that necessary household furniture or other personal property, to a value not exceeding \$150, shall remain in the possession of a widow while she lives with and provides for minor children, and shall not be deemed assets; section 2514, subd. 13, declares that "personal property" signifies every kind of property which survives a decedent other than real property; General Construction Law (Consol. Laws 1909, c. 22) § 39, provides that the term "personal property includes chattels, money \* \* \* and everything except real property"; and Poor Law (Consol. Laws 1909, c. 42) §§ 84, 85, relating to burial of soldiers, etc., provides that counties shall inter any honorably discharged resident soldier, whether dying in a state institution or not, who does not leave sufficient means to defray his funeral expenses, but such expenses shall not exceed \$50. Deceased, an honorably discharged veteran, died in a state home, leaving \$54, and no other money or property. Held, in a proceeding against the comptroller to pay funeral expenses claimed by undertakers, that the money left was exempt, belonged to the widow, and was not assets out of which to pay funeral expenses, and hence that the county was liable. *People ex rel. Brown v. Prendergast*, 131 N. Y. Supp. 441, 443, 146 App. Div. 713.

**Mortgage**

Under statutes defining larceny as the taking of any personal property, etc., and declaring that the words "personal property" includes money, goods, chattels, things in action, and evidences of debt, deeds, and conveyances, a mortgage may be the subject for larceny. *Shannon v. Sims*, 40 South. 574, 575, 146 Ala. 673.

Rev. St. 1881, § 6271, provided that all personal property within the state owned by nonresidents should be subject to taxation; section 6273 required the term "personal property" to be construed to include all rights, credits, and choses in action; sections 6279, 6330, provided for agents listing property; *Burns' Ann. St. 1901*, § 8410, provides that all property within the jurisdiction of the state, not expressly exempt, shall be subject to taxation; sections 8429, 8458, make provision for agents listing property; section 8421 provides that personal property of nonresidents shall be assessed to the owner, or to the person having control thereof, in the township, town, or city where the same may be; section 8460 requires all notes to be valued in the schedule; and section 8463 requires the schedule to be attested by oath, and to contain a full list of property held or belonging to the person making the same. *H.*, living in P. county, handled money for *L.*, a nonresident, for whom she made collections and new loans, and took notes and mortgages to secure them in *L.*'s name. All the business was done and the property covered by the mortgage was situated in P. county, where all papers, etc., were kept, under *H.*'s control, to be handled as necessary in conducting the business for and under the direction of *L.*, from whom *H.* had a power of attorney. The notes, etc., were not listed for taxation by *H.*, but subsequently they were assessed for omitted taxes upon notice given to *H.* as agent for *L.*, and the taxes were extended in the name of *H.* Held, that the notes and mortgages were properly taxed in P. county, and injunction would not lie to restrain the collection of the taxes. *Hathaway v. Edwards*, 85 N. E. 28, 30, 42 Ind. App. 22.

**Natural gas**

Natural gas, when extracted from the earth and put into a pipe line, is "personal property"; and when the pipe line is opened, and the gas extracted and consumed, without the knowledge or consent of the owner, the act constitutes conversion. *Crystal Ice & Cold Storage Co. v. Marion Gas Co.*, 74 N. E. 15-16, 35 Ind. App. 295.

**Oysters**

When oysters are reclaimed from nature and transplanted to a bed, so marked by stakes as to show that they are in the possession of a private owner, they are "personal property" and may become the subject

of larceny. *People v. Morrison*, 86 N. E. 1128, 1121, 194 N. Y. 175, 128 Am. St. Rep. 552.

**Petroleum**

Petroleum oil is a mineral, and while it is in the earth it forms a part of the realty; and when it reaches a well and is produced on the surface it becomes "personal property," and belongs to the owner of the well. If it moves from place to place by percolation or otherwise it forms a part of the tract of land in which it tarries for the time being, and if it moves to the next adjoining tract it becomes a part and parcel of that tract; and it forms a part of the same tract until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty. It becomes the property of and belongs to the person who reaches it by means of a well and severs it from the realty. *Nonamaker v. Amos*, 76 N. E. 949, 951, 73 Ohio St. 163, 4 L. R. A. (N. S.) 980, 112 Am. St. Rep. 708, 4 Ann. Cas. 170 (citing *Kelley v. Ohio Oil Co.*, 49 N. E. 399, 57 Ohio St. 317, 39 L. R. A. 765, 63 Am. St. Rep. 721; *Northwestern Ohio Natural Gas Co. v. Ullery*, 67 N. E. 494, 68 Ohio St. 259).

**Pew**

The right to a pew in a house of public worship is "personal property," under Rev. Laws, c. 36, § 38, and is an exclusive right to occupy a particular portion of the house under restrictions, and the owner is not a tenant in common of the estate on which the house stands, and where the house is taken down when fit for occupancy, and the pew is destroyed in the process of alteration or repair, and this merely on the ground of expediency, the pew owner is entitled to indemnity, and where the house is abandoned, not unreasonably nor with intent to injure the pew holder, he is without remedy. *Massachusetts Baptist Missionary Soc. v. Bowdoin Square Baptist Soc.*, 98 N. E. 1045, 1046, 212 Mass. 198, Ann. Cas. 1913C, 472.

**Promissory note**

Promissory notes are "personal property." *Wuller v. Chuse Grocery Co.*, 89 N. E. 796, 798, 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522 (citing *Cooper v. Corbin*, 105 Ill. 224).

For purposes of taxation "personal property" includes notes. *Buck v. Beach*, 71 N. E. 963, 967, 164 Ind. 37, 108 Am. St. Rep. 272.

A note received by a bank in payment for bank stock is "personal property," within Const. art. 11, § 9, providing that no corporation may issue its stock except for labor done, services performed, or money or property actually received, and, as such property is an asset of the bank, collectible to discharge its debts. *Mehollin v. Carlson*, 107 Pac. 753, 762, 17 Idaho, 742, 134 Am. St. Rep. 286.

Rev. St. 1899, § 3710, providing that, in actions for the enforcement of liens upon



"personal property pledged or mortgaged" to secure indebtedness, proof that the party holding the lien had exacted usurious interest shall render such pledge invalid, did not use the words "personal property" as distinguished from choses in action, but the words would include incorporeal property, such as a promissory note. *Winfrey v. Strother*, 128 S. W. 849, 850, 145 Mo. App. 115.

Notes in the hands of a trustee subject to a lien or pledge are "personal property," within the purview of Pub. St. 1901, c. 245, § 28, providing that, if a trustee is chargeable for any personal property subject to mortgage or other lien, the court may appoint a receiver and dispose of it, if more can be obtained for it than the claims upon it. *Musgrove v. Goss*, 72 Atl. 371, 372, 75 N. H. 208 (citing *Fling v. Goodall*, 40 N. H. 208).

Transfer Tax Law, § 220, imposes a tax upon the transfer, where the transfer is by will or intestate law, of property within the state, when deceased was a nonresident at his death. General Construction Law, § 89, defines the term "personal property" as including all things in action and all written instruments themselves as distinguished from the rights to which they relate, by which any right in property or any debt, etc., is created. Held, that promissory notes owned by a nonresident, and part of which were executed by nonresidents, and which were secured by property situated in another state but were, at the owner's death, and for some time prior thereto, in a safe deposit box in this state, were taxable under the transfer tax law. In *re Tiffany's Estate*, 128 N. Y. Supp. 106, 107, 148 App. Div. 327.

Rev. St. 1895, art. 5063, provides that "personal property" shall, for purposes of taxation, be construed to include all goods, chattels, and effects, and all moneys, credits, bonds, and other evidences of debt, owned by citizens of the state, whether the same be in or out of the state, etc. A nonresident owning lands in Texas sold them to agents, who took in part payment the purchasers' negotiable notes, secured by a vendor's lien on the land. These notes were kept by the agents in Texas for collection, the proceeds when collected, being deposited in a bank for the owner's benefit. It did not appear that any limitation was imposed on the power of the agents to take at maturity of the notes, such steps as they deemed proper to enforce collection. Held, that the notes were subjects of taxation within the state under said article. *Hall v. Miller (Tex.)* 110 S. W. 165, 169 (citing *Jesse French Piano & Organ Co. v. City of Dallas [Tex.]* 61 S. W. 942).

Under Gen. St. § 7503, defining "personal property" as including every tangible thing which is the subject of ownership not forming part or parcel of real property; also tax sale certificates, notes, and all evidences of

debt secured by lien on real estate, which must be listed and taxed each year in the county, township, and school district in which it is located, notes belonging to a resident of Kansas, given by a resident of Missouri and secured by trust deeds of real estate in Missouri, which were never taken into Kansas, but were left for safe-keeping only in the vault of a bank in Missouri, constituted "personal property" in Kansas, having its location in the county, township, and school district where the owner resides. *Board of Com'rs of Johnson County v. Hewitt*, 93 Pac. 181, 183, 76 Kan. 816, 14 L. R. A. (N. S.) 493.

A suit in equity in a federal Circuit Court to enjoin the further prosecution therein of an action at law against complainant, on a promissory note, by a citizen and resident of a state in which the suit is brought, and to have such note canceled and delivered up to complainant, on the ground that it was one obtained by fraud, is one to enforce an equitable claim to "personal property" within the district, within the meaning of Judiciary Act March 3, 1875, c. 137, § 8, 18 Stat. 472, and the court is authorized by an order made thereunder to bring in the nonresident payee of the note, who is alleged in the bill to have or claim some interest therein, the note being personal property. *Manning v. Berdan*, 132 Fed. 382, 383.

Rev. St. 1881, § 6271, provided that all personal property within the state owned by nonresidents should be subject to taxation; section 6273 required the term "personal property" to be construed to include all rights, credits, and choses in action; and sections 6279, 6330, provided for agents listing property. *Burns' Ann. St. 1901*, § 8410, provides that all property within the jurisdiction of the state, not expressly exempt, shall be subject to taxation; sections 8429, 8458, make provision for agents listing property; section 8421 provides that personal property of nonresidents shall be assessed to the owner, or to the person having control thereof, in the township, town, or city where the same may be; section 8460 requires all notes to be valued in the schedule; and section 8463 requires the schedule to be attested by oath, and to contain a full list of property held or belonging to the person making the same. *H.*, living in P. county, handled money for *L.*, a nonresident, for whom she made collections and new loans, and took notes and mortgages to secure them in *L.*'s name. All the business was done and the property covered by the mortgage was situated in P. county, where all papers, etc., were kept, under *H.*'s control, to be handled as necessary in conducting the business for and under the direction of *L.*, from whom *H.* had a power of attorney. The notes, etc., were not listed for taxation by *H.*, but subsequently they were assessed for omitted taxes upon notice given to *H.* as agent

for L., and the taxes were extended in the name of H. Held, that the notes and mortgages were properly taxed in P. county, and injunction would not lie to restrain the collection of the taxes. *Hathaway v. Edwards*, 85 N. E. 28, 30, 42 Ind. App. 22.

#### As property

See Property.

#### Property attached to realty

At common law fixed and movable machinery are alike regarded as "personal property." *Commissioners of Anne Arundel County v. Baltimore Sugar Refining Co.*, 58 Atl. 211, 212, 99 Md. 481.

Accused having detached parts of machinery in a leather factory for the purpose of stealing them, they became "personal property" the instant they were severed from the realty. *State v. Wolf* (Del.) 66 Atl. 739, 740, 6 Pennewill, 323.

An engine, boiler, and machinery do not lose the character of "personalty" by being installed by the seller under a conditional sale in the buyer's building for a laundry, where they may be removed, with foundations and connections, without injury to the building. *Monarch Laundry v. Westbrook*, 63 S. E. 1070, 1072, 109 Va. 382.

A bill of sale of "personal property" on certain premises would not cover gas logs, gas chandeliers, and window screens, put in by the owner, as against the mortgagee of the real estate; the same being fixtures. *Cunningham v. Seaboard Realty Co.*, 58 Atl. 519, 67 N. J. Eq. 210.

Fixtures attached to real property, which would pass under a deed, may retain their character as personal property as between the owner of the realty and the owner of the fixtures; and where such divided ownership exists it is improper to assess such property as realty. *People ex rel. Knickerbocker Safe Deposit Co. v. Wells*, 91 N. Y. Supp. 283, 285, 99 App. Div. 455.

Wire fastened to posts for the purpose of fencing a part of the public domain, for temporary use as a summer pasture for live stock, is "personal property"; and one who cuts or tears it from the posts and carries it away with larcenous intent, without the consent of the owner, may be convicted of larceny. *Junod v. State*, 102 N. W. 462, 463, 73 Neb. 208, 119 Am. St. Rep. 890.

Where the seller takes purchase-money notes and delivers possession of an engine and boiler, retaining title as security, and the contract of sale is registered pursuant to statute, the property retains its character as personalty both as between the parties and others claiming adversely to the lien, though attached to the realty, and is "personalty" within the meaning of a fire policy thereon, which avoided the policy if the subject of insurance was personalty, and was, or there-

after became, incumbered by a chattel mortgage. *Lancaster v. Southern Ins. Co.*, 69 S. E. 214, 216, 153 N. C. 285, 138 Am. St. Rep. 665.

Mirrors resting on mantels or slabs, and secured at the top by iron spikes driven into the wall, through which screws were driven into the mirror frames, which had been treated by the owners both of the personal property and the realty as personal property, are held to be "personal property," although the frames were painted in the same style as the woodwork of the room. *Cranston v. Beck*, 56 Atl. 121, 122, 70 N. J. Law, 145, 1 Ann. Cas. 686.

"An agreement between landlord and tenant giving the right to the tenant to remove his fixtures, thereby makes them 'personal property' as between the parties. \* \* \* The mere intention of a tenant to remove a fixture put in by him before the expiration of his lease would not have the effect of making the same personal property, because its removal might have the effect of injuring the realty." *McLain Inv. Co. v. Cunningham*, 87 S. W. 605, 606, 113 Mo. App. 519.

Where plaintiffs sold a gasoline engine to L. under an express agreement that the title thereto should remain in plaintiffs until the purchase price was paid in full, and that on default plaintiffs were authorized to remove the engine without process of law, such agreement operated as a matter of law to preserve the character of the engine as "personal property," though it was substantially affixed to real estate purchased by L. from defendant, not only as against L., but also as against defendant, on her electing to resume possession of the real estate for L.'s default in paying the installments of the price. *Davis v. Bliss*, 79 N. E. 851, 852, 187 N. Y. 77, 10 L. R. A. (N. S.) 458 (citing *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Kerby v. Clapp*, 44 N. Y. Supp. 116, 15 App. Div. 37; *Godard v. Gould & Strong* [N. Y.] 14 Barb. 662; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542).

#### Railroad

"By intention things fixed to 'realty' and in a sense physically a part thereof, may be deemed to be 'personalty.' By the union of land, and rights granted by the public classed as personalty, forming a thing of itself in which the personal element predominates, and which could not be separated from the other element without disintegration to the point of destruction, and to the detriment of public and private interests as well, the combination may be deemed to be 'personalty' of an inseparable nature. \* \* \* A railroad system, while largely land and tangible things of a movable character attached or appurtenant thereto, the thing that gives the great value and special character to the whole is

the franchise element, creating the public duty; so such special element is deemed to be the principal thing, impressing all minor parts with its character, and making the entire combination one entire machine of a personal nature." *Chicago & N. W. R. Co. v. State*, 108 N. W. 557, 588, 128 Wis. 553.

#### **Real property**

The term "personal estates" in a will may pass real property, where such is the manifest intention. *Rue v. Connel*, 62 S. E. 306, 308, 148 N. C. 302.

#### **Receipted voucher**

A "receipted voucher" is an acknowledgment of the payment agreed on as due, and is a written instrument by which a pecuniary obligation is created and acknowledged and defeated and discharged. A "receipted voucher" may be the subject of larceny, within Gen. St. 1894, § 6842, providing that, in construing the Penal Code, the term "personal property" shall include every description of money, goods, chattels, effects, evidences of rights in action, and all written instruments by which pecuniary obligation is created, acknowledged, defeated, or discharged. *State v. Scanlan*, 94 N. W. 686, 89 Minn. 244.

#### **Rents or royalty**

Rent is "personalty," vesting in the representative of a deceased, as provided by Civ. Code 1895, § 3353, and the fact that it is payable in cotton, and not money, does not change the rule. *Strickland v. Thornton & Nasworthy*, 58 S. E. 540, 2 Ga. App. 377.

The husband conveyed by quitclaim the upper half of his placer mining claim to his wife, who leased it for mining purposes until the mineral should all be extracted. Subsequently the wife died intestate, and the husband was appointed administrator of her estate. He received her royalty of the gold and gold dust extracted from her part of the mining claim by her lessees, and on final account retained one-half thereof as surviving husband, and paid the other half to her children and heirs. Held, that the gold dust delivered into the hands of the administrator by the wife's lessees was "personal property," and under section 169 of the Civil Code of Alaska the surviving husband was entitled to receive one-half. In *re McCarty's Estate*, 3 Alaska, 242, 250.

#### **Slag**

Slag, dumped as refuse from an ore smelter or mill, while ordinarily appurtenant to the land on which it is dumped, may be treated by the owner of both the land and dump as "personalty," and may be sold and delivered as such. *Manson v. Dayton*, 153 Fed. 258, 263, 82 C. C. A. 588.

#### **Timber**

Where timber reserved in a deed is cut and made into railroad ties within the time allowed by the reservation, it is no longer

realty, but "personal property," for the removal of which trespass will not lie. *Richmond Land Co. v. Watson*, 107 S. W. 1045, 129 Mo. App. 554.

#### **Turpentine**

Crude turpentine that is collected in cavities or boxes cut in the pine trees which supply it is "personal property," for the unlawful conversion of which trover may be maintained. *Quitman Naval Stores Co. v. Conway*, 58 South. 840, 63 Fla. 253.

Crude turpentine, collected in boxes cut in pine trees in a condition to be dipped up and used in the manufacture of spirits of turpentine and kindred products, is "personal property." *Melrose Mfg. Co. v. Kennedy*, 51 South. 595, 596, 59 Fla. 312.

Crude turpentine in turpentine boxes in the pine trees in a state, to be dipped up, is "personal property," and the turpentine crop is properly classed with "fructus industriales," as it requires annual labor and cultivation. *Richbourg v. Rose*, 44 South. 69, 74, 53 Fla. 173, 125 Am. St. Rep. 1061, 12 Ann. Cas. 274.

"Turpentine, when in the boxes in the state to be dipped up, is 'personalty.' It no longer forms a part of the tree, but it exists separate from the tree, and has been separated by a process of labor and cultivation. The box, though in the tree, is but a convenient receptacle for the turpentine, after it has been extracted or has been made to exude from the pores, which contained it, while in the tree, as a part of it. When it ceases to be a part of the tree, it necessarily becomes a chattel." *Dickens v. State*, 39 South. 14, 15, 142 Ala. 49, 110 Am. St. Rep. 17 (quoting and adopting definition in *State v. Moore*, 33 N. C. 70, and citing *State v. King*, 4 S. E. 44, 98 N. C. 648).

#### **Wages**

Wages are "personal property" within Civ. Code Proc. § 521, exempting \$500 in personal property to the head of a family having neither lands, town lots nor houses which are exempt. *Jones v. Union Pac. R. Co.*, 120 N. W. 946, 947, 84 Neb. 121.

#### **Watermains, hydrants, and underground piping**

Where a water company was organized to furnish water for the town of G. and C., and maintained its office, works, and principal place of business in C., its underground piping, water mains, and hydrants laid in the streets of G. were taxable in C. as "personal property" attached to and connected with its establishment within Gen. St. 1902, §§ 2328, 2329, providing that the personal property of a corporation shall be liable to taxation in the town in which it has its principal place of business or exercises its corporate powers. *Field v. Guilford Water Co.*, 63 Atl. 723, 724, 79 Conn. 70.

**Water right**

A "water right" is the legal right to the use of any unappropriated water of any natural stream, water course, or source of supply, and exists only in contemplation of law, and is for purposes of taxation "personal property," within Const. art. 12, § 17, and Pol. Code 1895, §§ 16, 3680, defining "property" as including money, franchises, and other things capable of private ownership, and defining "real estate" as including the possession or ownership of land, mines, minerals, and quarries, and "improvements" as including all buildings, structures, etc., and "personal property" as including everything which is the subject of ownership, not included within real estate or improvements, so that under section 3716, providing that the personal property and franchises of water companies must be assessed in the district where the principal works are located, a water company owning a water right without the limits of a school district and conveying water by pipe lines into the district, where it is distributed to the inhabitants thereof, is properly assessed in the district; that being the place of business and principal works of the company. *Helena Waterworks Co. v. Settles*, 95 Pac. 838, 37 Mont. 237.

**Wild animal**

"Wild animals, while living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his 'personal property,' so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, as growing fruit was, considered as part of the reality." *State v. Mallory*, 83 S. W. 955, 958, 73 Ark. 236, 67 L. R. A. 773, 3 Ann. Cas. 852.

**PERSONAL REMEDY**

A "personal remedy" is where the injured party seeks redress of the party who inflicted the wrong and thus obtains a remedy for the wrong committed, while a "legal remedy" is where the injured party seeks his remedy by and through the intervention of the courts. *People ex rel. Stidger v. Horan*, 86 Pac. 263, 34 Colo. 336, 114 Am. St. Rep. 168.

**PERSONAL REPRESENTATIVE**

The term "personal representatives" is often used in statutes and instruments of writing so as to include all persons who stand in place or represent the interests of another, either by his act or by operation of law. In *re Harton's Estate*, 62 Atl. 1058, 1059, 213 Pa. 499, 4 L. R. A. (N. S.) 939.

The term "personal representative," in its commonly accepted sense, means administrator or executor, though this is not the only definition. It may mean heirs, next of kin, or descendants, and sometimes assignees or grantees. The sense in which the

term is to be understood depends somewhat on the intention of the party using it, and is to be gathered, not altogether from its use, but by the surrounding circumstances. *Reed v. American-German Nat. Bank*, 155 Fed. 233, 236 (citing 6 Words and Phrases, p. 5358; *Griswold v. Sawyer*, 26 N. E. 464, 125 N. Y. 411).

Where testator gave property in trust to pay the income to his wife for life, on her death to divide the income into equal parts semiannually, with authority to pay one of such parts to each of testator's five sons or to the "legal representatives" of any who might have died, "per stirpes," in case the trustee should be satisfied that such part of the income was needed for the comfortable support of such son or his "family" and would not be used in payment of any of his debts, the term "personal representatives," used by testator to describe those whom he wished to make the beneficiaries of the income in place of a deceased son, is one of flexible meaning. The sense in which he intended it to be used must be gathered, if possible, from the language of the whole instrument, read in the light of the relevant circumstances existing when it was executed. The uncertainty which often attends the meaning to be given to the term is relieved by the addition of the words "per stirpes," so that it would require strong indications to the contrary to justify the belief that any different body of persons was intended than those who would inherit from the deceased son or be the distributees of his estate, to be determined either as of the time of his death or as at the time of the several payments, or possibly lineal descendants only. *Lepard v. Clapp*, 66 Atl. 780, 782, 80 Conn. 29.

Duluth City Charter, § 276, provides that before payment on a contract for public work the contractor or his "personal representatives" shall make and file an affidavit that all claims for labor have been paid. Held, that the term "personal representatives" includes those persons who may stand in place of or represent the interest of the contractor, including his assignee of the money due on his completed contract. *Lowry v. City of Duluth*, 101 N. W. 1059, 1061, 94 Minn. 95.

**Administrator or executor**

The term "personal representative" ordinarily means only executors and administrators, and therefore it should be so construed, unless there is something in the context that indicates that it was used with a wider meaning. *Casey v. Hoover*, 94 S. W. 982, 983, 197 Mo. 62.

The words "personal representatives" as used in a statute relative to the foreclosure of mortgages by advertisement, which requires notice to be served upon the mort-

gagor or his personal representatives, means executors or administrators, and not heirs or devisees. *Atkinson v. Washington & Jefferson College*, 46 S. E. 253, 260, 54 W. Va. 32.

Under Civ. Code, § 419 (Gen. St. 1909, § 6014), giving a right of action for wrongful death of a nonresident of the state, and providing that the action may be brought by the "personal representative" for the benefit of the widow and children, if any, or next of kin, an action for wrongful death of a nonresident may still be brought by the Kansas administrator of his estate, notwithstanding the passage of Laws 1889, c. 131, supplemental to the former act, authorizing the widow or next of kin to bring the action. *Cox v. Kansas City*, 120 Pac. 553, 555, 86 Kan. 298.

**Same—Special or temporary administrator**

A special administrator is a "personal representative" of the decedent, within Rev. Laws 1905, § 4503, and may sue for wrongful death. *Jones v. Minnesota Transfer Ry. Co.*, 121 N. W. 606, 607, 108 Minn. 129.

**As citizen**

See Citizen.

**Legal representative synonymous**

"Personal representatives" and "legal representatives" are sometimes used interchangeably, as signifying, not only executors or administrators, but also those who legally stand in place of, or represent the interests of, another. *Lowry v. City of Duluth*, 101 N. W. 1059, 1061, 94 Minn. 95.

**As representative**

See Representative.

**Widow and children**

The words "heirs" and "personal representatives," as used in 2 Ballinger's Ann. Codes & St. § 4828, providing that, when the death of a person is caused by any injury received from the wrongful act of another, his heirs or personal representatives may maintain an action, include only the widow and children of the deceased person, and do not authorize an action by the mother for the wrongful death of her unmarried adult son, on whom she was dependent. *Manning v. Tacoma Ry. & Power Co.*, 75 Pac. 994, 34 Wash. 406.

Under the federal employers' liability act making a carrier liable in case of the death of any of its employes to his "personal representative" for the benefit of his widow and children, a widow of an employe killed through the negligence of the employer may sue as administratrix for the use of herself as widow; there being no child. *Gutierrez v. El Paso & N. E. R. Co.*, 117 S. W. 426, 428, 102 Tex. 378.

**PERSONAL SECURITY**

See, also, Right of Privacy.

"Personal security" includes the right to exist and the right to the enjoyment of life while existing, and it is invaded by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual. "The right of 'personal security' is not fully accorded by allowing an individual to go through life in possession of all his members and his body unmarred; nor is his right to 'personal liberty' fully accorded by merely allowing him to remain out of jail, or free from other physical restraints. The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint. The term 'liberty' is not to be so dwarfed, but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. 'Liberty' in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." *Pavesich v. New England Life Ins. Co.*, 50 S. E. 68, 70, 122 Ga. 190, 69 L. R. A. 101, 108 Am. St. Rep. 104, 2 Ann. Cas. 561 (citing *Brannon*, Fourteenth Amendment, 111).

**PERSONAL SERVICE**

See Personally Served.

The expression "personal service" of process, generally speaking, means the actual delivery of the process to defendant in person. *Holiness Church of San Jose v. Metropolitan Church Ass'n*, 107 Pac. 633, 634, 12 Cal. App. 445.

The term "personal service" has a fixed and definite meaning at law. It is service by delivery to defendant personally. Other modes of service may be given the force of such service by legislative enactment; but the use of the words "personal service" unqualifiedly in a statute means actual service by delivering to a person, and not to a proxy. *Thisler v. Little*, 121 Pac. 1123, 86 Kan. 787 (citing 6 Words and Phrases, p. 5363).

"The term 'personal service' has a fixed and definite meaning in law. It is service by delivering the writ, notice, or order to the defendant personally, as contradistinguished from other modes of service, and hence does not include service by leaving a copy at the defendant's last known place of abode, or by mailing a copy to him." *Dalton v. St. Louis, M. & S. Ry. Co.*, 87 S. W. 610, 612, 113 Mo. App. 71.

The term "personal service" of process has a fixed and definite meaning in law. It is service by delivery of the writ to the defendant personally. Other modes of service may be given the force of such service by legislative enactment; but the use of the words "personal service," unqualified in a statute, means actual service by delivering to the person, and not to a proxy. *McKenzie v. Boynton*, 125 N. W. 1059, 1062, 19 N. D. 531.

Unless otherwise provided, a statute providing for the service of notice contemplates "personal service," which means the actual delivery in some way of the notice to the person to whom it is directed, though delivery by an officer or a return is not ordinarily necessary. *Scanlon v. Scanlon*, 135 N. W. 634, 637, 154 Iowa, 748.

Substituted service of summons if properly made by leaving copy at defendant's usual place of abode with some suitable person of at least 14 years of age, as authorized by *Comp. Laws 1907*, § 2948, subd. 8, constitutes "personal service." *Grant v. Lawrence*, 108 Pac. 931, 933, 87 Utah, 450, Ann. Cas. 1912C, 280.

Service of summons on the captain of a boat belonging to a foreign transit company is "personal service," within the statute authorizing entry of judgment by default on personal service. *Phillips v. Portage Transit Co.*, 118 N. W. 539, 540, 137 Wis. 189.

The words "personal service" in *Rev. Laws*, c. 167, § 2, giving municipal courts jurisdiction of a transitory action against a defendant who is not an inhabitant of the state, if "personal service" is had within the state, apply to a service by process on the person who is either the personal defendant or the person representing a foreign corporation as the one on whom a lawfully binding service can be had, and as to a personal defendant the service may be had on him in whatever place he may be found, and the local court of that place has jurisdiction, while service on the commissioner of corporations seems to be personal service within the scope of those words, and has the same effect to give jurisdiction as a service on a personal defendant. *Potter v. La Pointe Mach. Tool Co.*, 88 N. E. 418, 420, 201 Mass. 557.

#### PERSONAL SERVICES RENDERED

The words "personal services rendered," as used in a statute providing that the earnings of a judgment debtor for his personal services rendered at any time within 30 days next preceding the levy of an execution or attachment, shall be exempt, where necessary for the support of his family, does not necessarily contemplate that the services be rendered another. They may in proper cases mean the services which one renders to himself. *Dayton v. Ewart*, 72 Pac. 420, 422, 28 Mont. 153, 96 Am. St. Rep. 549.

#### PERSONAL SERVITUDE

The involuntary servitude prohibited by the federal Constitution is a "personal servitude," and this "consists in the subjection of one person to another. If it consists in the right of property which a person exercises over another, it is slavery. When the subjection of one person to another is not slavery, it consists simply in the right of requiring of another what he is bound to do or not to do. This right arises from all kinds of contracts or quasi contracts." *United States v. McClellan*, 127 Fed. 971, 976 (quoting 2 Bouv. Law Dict. 986).

#### PERSONAL SOLICITATION

The solicitation by mail of orders for intoxicating liquor is "personal solicitation" within *Pen. Code 1895*, § 428, prohibiting the solicitation, personally or by agent, of orders for intoxicating liquor in a prohibition county, where the solicitor in person writes or mails the letter received by the prospective buyer. *Rose v. State*, 62 S. E. 117, 121, 4 Ga. App. 588.

#### PERSONAL STATUTES

Laws regulating the privileges and prescribing the disability of married women are "personal statutes," purely domiciliary in character. *Marks v. Germania Sav. Bank*, 34 South. 725, 727, 110 La. 659.

#### PERSONAL TRANSACTION

The words "personal transactions or communications," within the meaning of section 23, c. 130, Code, include every method whereby one person may derive impressions or information from the conduct, condition, or language of another. *Freeman v. Freeman*, 76 S. E. 657, 659, 71 W. Va. 303.

The word "personally," in *St. 1893*, § 4212, providing that no party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, etc., is not limited to conversations had with a deceased, but includes any transaction or communication had with a deceased person individually. *Conklin v. Yates*, 83 Pac. 910, 912, 16 Okl. 266.

The testimony of one suing an administrator for caring for his intestate that she gave the intestate medicine, prepared his food, and cared for him generally, he being altogether helpless, is testimony of "personal transaction," with the intestate, and is inadmissible, within *Code*, § 590, prohibiting parties in interest from testifying to "communications and transactions" with deceased persons, as against their personal representative. *Davidson v. Bardin*, 51 S. E. 779, 139 N. C. 1.

A statute prohibiting testimony of a party in respect to any transaction or communication "by him personally" with a deceased person does not forbid testimony of

transactions or communications between deceased and third persons in the witness' presence, if the witness did not participate therein and they were not affected by his presence. Unless the transactions or communications are personal, and had with the deceased by the party either literally or in practical effect, as by participating in or influencing them, they do not fall under the prohibition of the statute.—*Wollman v. Ruehle*, 80 N. W. 919, 920, 104 Wis. 603.

In an action by an administrator to recover money lent to defendant by decedent, testimony by defendant that money for payment of the debt was inclosed in an envelope, taken to the post office, and that certain steps were there taken to have the postmaster register the letter and send it to decedent in a distant state, and also that in due time defendant received a writing acknowledging receipt of the money, which writing was identified and introduced in evidence was not incompetent, under Code Civ. Proc. § 320 (Gen. St. 1909, § 5914), providing that no party shall testify in his own behalf in respect to any transaction or communication had personally by him with a decedent, where the adverse party is the administrator of such decedent; witness' acts not constituting a "personal transaction" or communication. *Bryan v. Palmer*, 111 Pac. 443, 444, 83 Kan. 298, 21 Ann. Cas. 1214.

Under Code, § 4604, prohibiting testimony of an interested witness concerning personal transactions or communications with a deceased person in an action against her administrator, evidence by plaintiff, in an action to establish a note signed by his father and stepmother as a claim against the latter estate, that he gave the father an order to obtain the note from the party in whose custody it was, and that he afterwards saw it in his father's possession, and evidence of the father to the same effect, was admissible, since such evidence does not constitute "personal transactions" or "personal communications." *Curd v. Wisser*, 95 N. W. 266, 267, 120 Iowa, 743 (citing *Gable v. Hainer*, 49 N. W. 1024, 83 Iowa, 457; *Dysart v. Furrow*, 57 N. W. 644, 90 Iowa, 59; *McElhenney v. Hendricks*, 48 N. W. 1056, 82 Iowa, 657; *Walkley v. Clarke*, 78 N. W. 70, 107 Iowa, 451).

### PERSONAL USE

The term, as used in a will by which a testator bequeathed to a legatee \$5,000 to be expended by him in accordance with testator's instructions and also \$1,000 for his "personal use," indicated that the \$5,000 was not to go to the legatee individually, but was to be distributed by him for a particular purpose, and, this having failed, the bequest would be adjudged invalid. In *re Keenan*, 94 N. Y. Supp. 1099, 1100, 107 App. Div. 234.

### PERSONAL WARRANTY

A "personal warranty," as defined in Code Prac. art. 379, arises from the obligation which one has contracted to pay the whole or part of a debt due by another to a third person, and does not include a contract of indemnity, so as to permit the calling of an indemnitor in warranty. A contract of indemnity executed by a contractor for the erection of a public schoolhouse with his surety is an original undertaking to make good a future loss or damage, and no action lies on such a contract until after a loss or damage has been sustained, and there is no obligation to pay any part of a debt due to a third person, and therefore no "personal warranty" within Code Prac. art. 379. *Rain v. Arthur*, 55 South. 743, 129 La. 143.

### PERSONALLY

"The word 'personally' often means 'in propria persona'; but that is not its necessary and only meaning." The word "personally," as used in Const. 1902, § 21, art. 2, providing that male citizens who have personally paid toll taxes three years shall be entitled to register, does not require that the voter be physically and bodily present when he pays his tax, but only that his tax be paid by him out of his funds. He may send the amount by check or through an agent. *Tilton v. Herman*, 64 S. E. 351, 353, 109 Va. 503.

### PERSONALLY KNOWN

A certificate of acknowledgment reciting that the grantor was to the officer "personally known" imported merely an acquaintance with the person acknowledging the instrument, and was not the equivalent of a certificate that the individual acknowledging the instrument was "to me known," which was a certificate that the person acknowledging the instrument was known to the officer as the grantor of the deed on which the certificate was indorsed. *Carolan v. Yoran*, 93 N. Y. Supp. 935, 936, 104 App. Div. 488.

### PERSONALLY PAY

Const. 1902, § 20, art. 2, provides that male citizens who have personally paid poll taxes for three years shall be entitled to register, and section 21 (Code 1904, p. ccxiii) gives such person the right to vote if he has personally paid such poll tax at least six months prior to the election. Held, that the phrase, "personally pay," in section 21, does not require that the voter be physically present when he pays his tax, but only that his tax be paid by him out of his own funds. Const. § 20, art. 2 (Code 1904, p. ccxii), requiring all persons to have "personally paid" their poll taxes to be entitled to register, only requires that the voter pay his tax out of his own funds, though the amount be sent by check or through an agent. *Tilton v. Herman*, 64 S. E. 351, 352, 109 Va. 503.

**PERSONALLY PRESENT**

Rev. St. § 4811, providing that the accused must be "personally present at the trial," does not mean that the defendant must all the time be in the actual presence of the jury, but rather that he must be at the trial in court and in its presence. The court is the real thing, fixed and permanent. The jury is but a temporary adjunct for a partial purpose of the trial, and hence defendant need not be personally present while the jury were taking a view. *State v. Mortensen*, 78 Pac. 562, 572, 26 Utah, 312.

**PERSONALLY RESPONSIBLE**

A by-law of a union of musicians, which provides that any leader engaging members to perform for less than the stipulated price shall become "personally responsible" for all fines that may be imposed on such members, means that, if the fines imposed on the members be not paid by them, the leader is responsible therefor; but, before he can be called on to pay, charges must be preferred and an opportunity given to defend, as expressly provided in another by-law. The words "personally responsible" do not mean "primarily liable." *Fuerst v. Musical Mut. Protective Union*, 95 N. Y. Sup. 155, 157.

**PERSONALLY SERVED**

"Personally served," as used in section 4229, Rev. Codes, means service upon the defendant personally, and service by leaving a notice at the last and usual place of abode of the defendant is not personal service, but a substitute for it. Under that part of section 4229, Rev. Codes, which provides that, "when from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action," held, that where the service of summons is made upon the county auditor, and not upon an officer of the company, or its designated agent, such summons has not been "personally served" on the defendant within the meaning of the term "personally served" as used in said section 4229. *Brooks v. Orchard Land Co.*, 121 Pac. 101, 104, 21 Idaho, 212.

**PERSONALLY UNOCCUPIED**

Where the owner of certain farm buildings insured the same, and the house thereon had been occupied by a tenant, and the tenant moved out on the 4th day of April, but he continued to pay rent up to the 19th of April, when the property was destroyed by fire, and continued to work on the farm pleasant days, and during his absence therefrom the stock was cared for by a neighbor, the plaintiff's buildings insured were "personally unoccupied" without the consent of

the company for more than 10 days immediately preceding their destruction within the terms of a policy providing that such nonoccupancy should render the policy void. *Knowlton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 62 Atl. 289, 291, 100 Me. 481, 2 L. R. A. (N. S.) 517.

**PERSONALTY**

See Personal Property.

**PERSONAM**

See In Personam.

**PERSUADE**

An instruction that "preponderance of proof" means that the jury are persuaded of the soundness of the claim more satisfactorily than the contrary was not objectionable in not employing the word "weigh," nor as implying that the jury might be persuaded by argument rather than proof, as the jury could understand the term "persuaded" only to mean that the proof must be more persuasive and convincing. *Toledo, St. L. & W. R. Co. v. Kountz*, 168 Fed. 832, 839, 94 O. C. A. 244.

**PERSUASION**

"Persuasion" is not coercion. *Van Valkenburgh v. Oldham*, 108 Pac. 42, 44, 12 Cal. App. 572.

"Picketing" has been condemned by every court having the matter under consideration. It is a pretense for "persuasion," but is intended for "intimidation." Gentlemen never seek to compel and force another to listen to the art of persuasion. To stop another on the street, get in his road, follow him from one side of the street to another, pursue him wherever he goes, stand in front of his residence, is not persuasion. "Intimidation" cannot be defined. Neither can "fraud" be defined. But every person knows whether his acts are fraudulent, and he knows whether his acts are intimidating. *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 119, 121.

**PERTAIN**

The word "pertain" means to belong, or to pertain, whether by nature, by appointment, or custom; to relate, as "things pertaining to life." *Chicago Theological Seminary v. Illinois ex rel. Raymond*, 23 Sup. Ct. 386, 388, 188 U. S. 662, 47 L. Ed. 641.

**PERTAINING TO PROBATE COURTS**

The jurisdiction "pertaining to probate courts," granted to county courts by the Constitution, included the right to determine heirship as an incident to the distribution of intestates' estates. The statute relating to escheat proceedings, in so far as it attempted to oust the county court of jurisdiction to determine heirship for the distribution of



personal estate of a decedent in process of administration therein, was in violation of the Constitution. *State v. McDonald*, 104 Pac. 967, 971, 55 Or. 419.

#### PERTAINING TO PUBLIC IMPROVEMENTS

A provision of a city charter, requiring matters "pertaining to public improvements" to be referred to the board of public works before final approval by the council, and providing that the board shall examine and pass upon all plans and specifications relating to improvements and on bids for the work embraced therein, applies only to contracts, plans, and specifications for the erection of public improvements and the work and material therefor, and not to a subsidiary contract for the supervision of the construction of an improvement. *City of Houston v. Potter*, 91 S. W. 389, 392, 41 Tex. Civ. App. 381.

#### PERTICULER

The word "perticuler," as used in the title "First Perticuler Baptist Church in Harris and Bridgeton," is supposed to mean regular or straight, in the same sense as the adjective is sometimes applied to one wing of a political party in distinction from those who have seceded from the regular organization. *Hamlin v. Perticuler Baptist Meeting House*, 69 Atl. 315, 317, 103 Me. 343.

#### PERVERSE VERDICT

"A verdict which is the result of anything ulterior to a reasonably fair application of the judgment of the jury to the evidence and the law as given by the court is 'perverse.' Where a verdict is contrary to all the evidence, it does not fall within the ordinary idea of perversity, as regards when a verdict should be set aside and a new trial granted, because in such cases there really is no jury question. Perversity as to a verdict, correctly speaking, relates to some ulterior influence upon the jury in deciding a case involving a jury question and in relation thereto." *Godfrey v. Godfrey*, 106 N. W. 814, 819, 127 Wis. 47, 7 Ann. Cas. 176.

#### PERVERSION

Fraudulent voting at an election, whether consisting of voting disqualified persons, repeating, or voting under the names of other voters, is a "perversion or obstruction of the due administration of law," which by Crimes Act (P. L. 1898, p. 805) § 37, as amended by Act March 22, 1899 (P. L. 1899, p. 214), is made the subject of a criminal conspiracy. *State v. Nugent*, 71 Atl. 485, 487, 77 N. J. Law, 84.

#### PERVERSTY

"'Perversity' does not necessarily signify dishonesty, nor anything of that nature.

It suggests a state of being moved consciously or unconsciously, most generally the former, to look at things from a wrong standpoint." *Godfrey v. Godfrey*, 106 N. W. 814, 819, 127 Wis. 47, 7 Ann. Cas. 176.

#### PETIT

##### PETIT JURY

Petit jury for Monday, see Monday.

##### PETIT LARCENY

By Pen. Code, § 444, any larceny not embraced within the definition of grand larceny is "petit larceny." *Buffehr v. Territory*, 89 Pac. 415, 11 Ariz. 185.

"Petty larceny," under the act of 1874, is the larceny of property of less value than \$100 and is punishable with imprisonment in any parish prison, or in the penitentiary at the discretion of the court for not more than 2 years. *State v. Wall*, 52 South. 556, 559, 126 La. 400.

Cr. Code 1896, § 5049, provides that if any person steals personal property of the value of \$5 or more from or in any dwelling house he is guilty of "grand larceny." Held, that in order to constitute theft of that grade the property stolen must be of the value of \$5 or more, and if less than that value the offense is "petit larceny," defined by Cr. Code 1896, § 5050. *Thomas v. State*, 46 South. 565, 566, 155 Ala. 92.

Act No. 124 of 1874, § 8, divides larceny into grand and petit larceny, and makes the larceny of property or money worth \$100 or more grand larceny, punishable with imprisonment for not more than ten years, and the larceny of property under the value of \$100 "petit larceny," punishable with imprisonment for not more than two years. Act No. 64 of 1910 makes the stealing of cattle a specific offense, punishable with imprisonment for not less than one year. Held that, the two statutes being repugnant and the whole subject of cattle stealing being covered by the later one, the earlier one was repealed thereby by necessary implication in so far as cattle theft is concerned. *State v. Hickman*, 53 South. 680, 127 La. 442.

Under Pen. Code, § 15, providing that a misdemeanor for which no other punishment is specifically prescribed is punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than \$500, or both, and section 532, defining every larceny not grand larceny in the first or second degrees as petit larceny, and section 535, declaring that petit larceny is a misdemeanor, "petit larceny," is, in the absence of any special provision, punishable by imprisonment in the county jail or penitentiary for a term not exceeding one year, or by a fine not exceeding \$500, or by both. *People ex rel. Cosgriff v. Craig*, 114 N. Y. Supp. 833, 835, 129 App. Div. 851.

Where the property taken is articles of wearing apparel of the value of \$3, and the articles are taken from a "box car" placed at the side of a railroad track and "used as a tool and supply house," the offense is "petit larceny." *In re Spaulding*, 88 Pac. 547, 75 Kan. 163.

#### As felony

See Felony.

### PETIT MAL

It appears that a person who has suffered from epilepsy in the major form, or "grand mal," as it is technically termed, in which the expression is usually through convulsions, may later pass into the stage of minor epilepsy, or "petit mal," which is the more dangerous form, because of liability to sudden attacks of maniacal paroxysms or of epileptic furor. The victim of such attacks is unconscious of his conduct, and usually, but not universally, will not remember what has occurred. *People v. Egnor*, 67 N. E. 906, 907, 175 N. Y. 419.

### PETITION

See Cross-Petition.

Filing, as commencement of action, see Commencement of Action.

Presenting petition, see Present—Presented—Presentation.

A "petition" is a formal written request or prayer for a certain thing to be done, the signers of which attach their signatures voluntarily. *Davis v. Henderson*, 104 S. W. 1009, 1010, 127 Ky. 13.

Code Prac. defines a "petition" to be a written document, addressed to a competent judge, containing the name or title of the court to which it is addressed. Hence a petition by a candidate aggrieved by the decision of the election committee must contain the title of the court, and may be filed by the clerk in the absence of the judge. *Vial v. Elfer*, 45 South. 545, 546, 120 La. 673.

A bill in equity is in reality a "petition" by another name; the only difference being that a petition is less formal in its averments and prayers, and defendant is brought in by a citation, instead of by subpoena ad respondendum, and is required to answer in a shorter time. *Fraser v. Fraser*, 75 Atl. 979, 980, 77 N. J. Eq. 205.

As used in Comp. Laws, § 479, as amended by St. 1895, p. 35, c. 37, providing that, when a majority of the resident taxpayers of a road district shall petition the county commissioners, etc., the county clerk shall lay the petition before them at their next meeting, etc., the word "petition," as well as the general framing of the statute, indicates that the legislative intent was not to force compulsory action on the board of county commissioners, but to give it a reason-

able discretion. *State ex rel. Dangberg v. Board of Com'rs of Douglas County*, 77 Pac. 984, 987, 27 Nev. 469 (concurring opinion of Fitzgerald, J.).

The word "petition," as used in a statute relating to the granting of liquor licenses, means a request by eligible citizens to a county court to grant a dramshop license to a designated applicant to keep a dramshop in a designated locality. A blank form of petition, not addressed to any court, and failing to designate the town where the signers are residents, or to ask for the granting of a license to any person, the signers' names being appended to blank books, circulated independent of the blank form, is insufficient. *State ex rel. Marbury v. Tulloch*, 82 S. W. 645, 646, 108 Mo. App. 32.

The purpose of a "petition" for a writ of review is to show prima facie from an inspection thereof that the inferior court or tribunal acted without jurisdiction or has exercised its functions erroneously; and hence it must state every fact, that from an inspection thereof, assuming the facts stated to be true, the court can say there was error upon which to issue the writ. *Raper v. Dunn*, 99 Pac. 889, 890, 53 Or. 203; *Hart v. Richardson*, 101 Pac. 900, 54 Or. 270.

### PETITION FOR REVIEW

The proceeding which is named a "petition for review" by the Legislature is highly remedial, and must necessarily accommodate itself to the needs and practices of every proceeding that comes within its scope. *Marshall v. Hill*, 151 S. W. 131, 137, 246 Mo. 1.

### PETITION IN ERROR

Appeal as including, see Appeal.

A clear distinction exists between a proceeding by "petition in error" and an appeal, as in an appeal the appellate court does not merely review the actions of the trial court, but re-examines the questions presented and in effect affords a retrial of them. *Bishop v. Huff*, 116 N. W. 665, 667, 81 Neb. 729 (citing *Western Cornice & Manufacturing Works v. Leavenworth*, 72 N. W. 594, 52 Neb. 422).

A "petition in error" in the district court to review a judgment or order of an inferior tribunal is an independent proceeding, having for its immediate object a reversal of the judgment or order complained of. Hence a judgment of reversal in such a case may be reviewed in this court, notwithstanding the cause stands for trial on its merits in the district court, under section 601, Code Civ. Proc., after such judgment. *Ribble v. Furmin*, 94 N. W. 967, 969, 69 Neb. 38 (citing *Dane County Bank of Stoughton v. Garrett*, 67 N. W. 894, 48 Neb. 916; *Tootle v. Jones*, 27 N. W. 635, 19 Neb. 588; *Banks v. Uhl*, 5 Neb. 240).

# PETITIONING CREDITOR

When after a petition in involuntary bankruptcy had been filed by certain creditors, an attorney filed a second petition against the debtor in behalf of other creditors, and also demurred to the first and the demurrer was sustained, but on leave given the first petition was amended, and an adjudication made thereon; the second petition being ignored, such attorney did not render services to the "petitioning creditors," within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b (3), 30 Stat. 563, and was not entitled to the allowance of a fee from the estate thereunder. *Frank v. Dickey*, 139 Fed. 744, 745, 71 C. C. A. 562.

# PETITORY ACTION

"The 'petitory action' is a proceeding at law for the recovery of property, and can be maintained in the courts of the United States only where the right of possession can be shown, and, according to the principles and distinctions settled in this court, corresponds in character with the action of ejectment at common law." *Gilmer v. Poindexter*, 10 How. (51 U. S.) 257, 267, 13 L. Ed. 411.

Where plaintiff alleged that he himself was the owner of certain property, and was then and had been in possession of the same for over 10 years under title, and that defendant had "trespassed," and was still "trespassing," upon the same by cutting down and hauling off timber thereon under claim of an absolutely null tax title, which he had spread upon the records, and prays that he be quieted in his own ownership and possession of the property, that he recover damages from the defendant for his trespass, and that the tax title be declared null and void, his action is not a "petitory action." *Gilmore v. Schenck*, 39 South. 40, 43, 115 La. 386 (citing *Wilbert v. Michel*, 8 South. 607, 42 La. Ann. 856).

# PETROLEUM

As mineral, see Mineral.

As personal property, see Personal Property.

As real property, see Real Property.

In construing paragraphs 626, 633, § 2, Free List, Tariff Act July 24, 1897, c. 11, 30 Stat. 199, 200, providing, respectively, for a countervailing duty on "products of crude petroleum" and for the free entry of "paraffin," held that the latter is the more specific, and governs the classification of paraffin, even though it be a product of crude petroleum. *Schoellkopf, Hartford & Hanna Co. v. United States*, 139 Fed. 58.

The provision in paragraph 626, Free List, § 2, Tariff Act July 24, 1897, c. 11, 30 Stat. 199, for "products of crude petroleum," does not include articles not composed in

chief value of petroleum, even though the petroleum predominates in quantity. *United States v. R. F. Downing & Co.*, 146 Fed. 56-60, 76 C. C. A. 376.

# PETTIFOGGERY

"Pettifoggery" is unprofessional practice unworthy of an officer of the law charged with the duty of aiding in the administration of justice, including the offer of evidence with knowledge of its inadmissibility, in order to get it before the jury by arguing for its admissibility, addressing the judge with arguments on a point not properly calling for determination by him, and the introduction into an argument, suitably addressed to the court, of remarks or statements intended to influence the jury or bystanders. *State v. Kaufmann*, 118 N. W. 337, 339, 22 S. D. 433 (quoting 67 Cent. Law J. 46).

# PETTY LARCENY

See Petit Larceny.

# PETTY OFFENSE

Such "petty offenses" as at the common law were triable without a jury by a tribunal legally constituted for that purpose are not "crimes," within the meaning of the jury clause of the federal Constitution. Offenses for which a term of imprisonment for more than one year may be imposed are not "petty offenses," such as may be heard by a tribunal authorized by law to act without a jury. *Low v. United States*, 169 Fed. 86, 89, 90, 94 C. C. A. 1.

If the punishment for the violation of a municipal ordinance is of the same character as that imposed for a petty offense against the state, the infraction of the ordinance cannot be called a "petty offense" for the purpose of summary trial, the result of which is to impose as severe a punishment as would follow a violation of the state law, in which the accused is entitled to a trial by jury; and therefore a provision in a municipal charter which authorizes punishment for offenses against the ordinances of the city by confinement of the offender in the chain gang of the county, where persons convicted of misdemeanors against the state and felons whose punishment have been reduced are confined, is unconstitutional. *Pearson v. Wimbish*, 52 S. E. 751, 756, 124 Ga. 701, 4 Ann. Cas. 501.

# PEW

As personal property, see Personal Property.

# PHALARIS

"The merchandise consisting of the seeds of a grass called 'phalaris' is sold for food

for birds. It is cultivated for the seeds. The straw is very short, and of but little value. It is botanically a grass in the same sense in which wheat, oats, and other seeds are grasses. The principal use, as the board finds, is that of its grain as bird food. It is the well-known canary seed." It is not free of duty under the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 656, 30 Stat. 201, for "grass seeds \* \* \* not specially provided for," but is dutiable under Tariff Act, July 24, 1897, c. 11, § 1, Schedule G, par. 254, 30 Stat. 171, covering "seeds of all kinds not specially enumerated." *Nordlinger v. United States*, 127 Fed. 683, 684, 62 C. C. A. 409.

## PHARMACY

See Practice of Pharmacy.

"Pharmacy" is ordinarily defined as the business of compounding and dealing in drugs and medicines, the definition having been somewhat enlarged by statutory provisions; but the sale of cigars, ice cream, and soda water is not within its intentment. In *re Maulsby*, 113 N. W. 548, 549, 136 Iowa, 66.

## PHARMACEUTICAL PREPARATION

A "pharmaceutical preparation" is primarily a combination of drugs compounded for medicinal uses. *State Board of Pharmacy v. Gasau*, 107 N. Y. Supp. 409, 412, 122 App. Div. 803.

## PHARMACIST

An information charging that accused was a druggist and the proprietor of a drug store and a pharmacist, and that he sold intoxicating liquors without a prescription, charges a violation of Rev. St. 1899, § 3047, making it an offense for a druggist, proprietor of a drug store, or pharmacist to sell intoxicating liquors except on a written prescription, and providing that any druggist who shall violate the act shall be punished as prescribed, and it is not duplicitous or multifarious, since the terms "druggist," "proprietor of a drug store," and "pharmacist" are synonymous, for the business of pharmacist, or apothecary, or druggist, is one. *State v. Clinkenbeard*, 125 S. W. 827, 830, 142 Mo. App. 146.

## PHARMACY COLLEGE

As educational institution, see Education—Institution.

## PHASE

See Differing in Phase.

## PHONE

See Business Phone.

## PHONOGRAPHIC REPORT OF TESTIMONY

Under the provisions of section 4442, the "phonographic report of the testimony" on

file means the stenographic report of the stenographer or the stenographer's notes, and not the transcription of the testimony by such stenographer, and, upon a hearing upon motion for a new trial when made upon the minutes of the court, the sufficiency of the evidence and the questions arising during the trial and the matters contained in the reporter's notes may all be referred to, and the court may determine such questions from his recollection of what took place and from his own minutes kept of the proceedings, and by reference to the stenographer's notes, without waiting for a transcript of the proceedings and evidence as transcribed by the stenographer. *Kelley v. Clark*, 121 Pac. 95, 98, 21 Idaho, 231.

## PHONY ROLLS

"Phony rolls" are packages resembling money, consisting of paper covered with bills on the outside, alleged to be part of the paraphernalia of confidence men. *People v. Smilie*, 103 N. Y. Supp. 348-350, 118 App. Div. 611.

## PHOTOGRAPH

Cinematograph films are "photographs," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189. *United States v. Berst*, 175 Fed. 121.

A series of separate pictures printed on a positive film from a number of negatives taken by a camera, and designed for use in a moving picture machine, and which, taken together, tell a connected story, constitute a "photograph," within the meaning of Rev. St. § 4952, and may be the subject of a copyright, although in taking the negatives the camera was placed in different locations. *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 Fed. 262, 266.

A "photograph" is defined as a "picture or likeness obtained by photography." Where a contract, granting one the privilege within a certain concession at an exposition of taking and selling photographs, provided that the lessor would not grant like or "similar" privileges to any one else, the grant of a privilege to another to cut "silhouettes" with scissors and paste them on cards was not an infringement, though a silhouette made in such manner cannot be distinguished by an ordinary person from a photographic silhouette, which is in the nature of a photographic novelty, and the only means of distinction is by the paper ordinarily used by photographers. *Frankel v. German Tyrolean Alps*, 97 S. W. 961, 962, 121 Mo. App. 51 (citing *Webst. Dict.* and *Cent. Dict.*).

As copy

See Copy.

## PHOTOGRAPHY

"Photography" is defined as "the science which relates to the action of light on sensi-

tive bodies in the production of pictures; the fixation of images and the like." Frankel v. German Tyrolean Alps, 97 S. W. 961, 962, 121 Mo. App. 51 (citing Webst. Dict.).

"A court cannot refuse to take judicial cognizance that 'photography' is the act of producing fac similes, or representations of objects by the action of light on a prepared surface. As such it has been so long recognized; and the mechanical and chemical process employed, and the scientific principles on which it is based, are so generally known that it would be vain for a court to decline cognizance of it." State v. Matheson, 103 N. W. 137, 138, 130 Iowa, 440, 114 Am. St. Rep. 427, 8 Ann. Cas. 430 (quoting and adopting definition in Luke v. Calhoun County, 52 Ala. 115).

## PHRASE

See Trade Phrase.

A "phrase" is defined to be two or more words properly arranged, not constituting an entire proposition, but performing a distinct etymological office. They are of several kinds, but it is necessary to define only that class to which the phrase in the sentence to be construed, the meaning of which is the subject of the present controversy, belongs; i. e., a prepositional phrase, which is one that is introduced by a preposition and has a noun or pronoun (word, phrase, or sentence) or a participle for its object of relation. Bourland v. Hildreth, 26 Cal. 161, 283.

## PHTHALIC ACID

"Phthalic acid, anhydrous," a coal-tar preparation, which though not an acid chemically, is commercially known as and performs the functions of an acid and is free of duty under paragraph 473 Free List, § 2, c. 1244, Tariff Act Oct. 1, 1890, as an acid used for manufacturing purposes. The word "anhydrous," being merely an adjective designation, does not prevent the substance from coming within the commercial designation of an acid. Heller & Mertz Co. v. United States, 124 Fed. 299, 300.

## PHYSICAL

### PHYSICAL DISCOMFORT

See Physical Injury and Discomfort.

### PHYSICAL FACT

In a requested instruction in an action for injuries received by the premature starting of a street car while plaintiff was in the act of boarding it, that if the jury find the "physical facts" conflicting with the oral testimony the verdict should be in accordance with the former, the words "physical facts" must be taken to mean the location and movements of plaintiff and the car from the inception to the close of the occurrence, and the effect of the car's movement on plaintiff.

Schmitt v. St. Louis Transit Co., 90 S. W. 421, 425, 115 Mo. App. 445.

### PHYSICAL IMPOSSIBILITY

"Physical impossibility," when applied to the ability of a party to perform his contract, means "practical impossibility according to the state of knowledge and of the day." One who signed on April 28th a contract to convey land on April 23d of the same year is not bound because of the impossibility of performance of such contract. Le Roy v. Jacobosky, 48 S. E. 796, 801, 136 N. C. 443, 67 L. R. A. 977 (quoting 9 Cyc. p. 326).

### PHYSICAL INABILITY

"Physical inability," within the meaning of an employer's contract for sick benefits, means inability to perform manual labor which would enable the injured member to earn wages equal to what he would have earned in the employment in which he was engaged when injured. Kane v. Chicago, B. & Q. R. Co., 132 N. W. 920, 921, 90 Neb. 112, 36 L. R. A. (N. S.) 1145, Ann. Cas. 1913A, 764.

As used in a contract for benefits between the relief department of a railroad company and its employes in case of disability, providing that the word "disability" shall mean physical inability to work, the words "physical inability to work" mean inability to perform such labor as the insured member was engaged in at the time of his injury, or similar labor which would enable him to earn wages equally remunerative. Keith v. Chicago, B. & Q. Ry., 116 N. W. 957, 959, 82 Neb. 12, 23 L. R. A. (N. S.) 352, 130 Am. St. Rep. 655.

### PHYSICAL INCONVENIENCE

The phrase "physical inconvenience" is too vague to constitute a definite element of damages resulting from a personal injury to a married woman. In an action by a married woman for physical injuries, the petition, in enumerating the items of damages, having alleged that she was permanently crippled and disabled for labor, and had lost her capacity to earn money, she having testified that since her marriage she had done no labor, except to take care of her children and perform household tasks, and the evidence showing a partial paralysis from the injury, interfering with the discharge of such duties, and the instruction on damages being that they should be assessed at such sum as would compensate her for pain and "physical inconvenience" and impairment of health suffered or to be suffered because of the injuries, a requested instruction that she could not recover for her inability to perform her household duties, or for loss of time therefrom, should have been given. Newell v. St. Louis Transit Co., 84 S. W. 195, 108 Mo. App. 530 (citing Root v. Des Moines City Ry. Co., 83 N. W. 904, 113 Iowa, 675; Jensen v. Chi-

cago, St. P. M. & O. Ry. Co., 57 N. W. 359, 86 Wis. 589, 22 L. R. A. 680).

The term "physical inconvenience" resulting from physical disability belongs to the same class as pain and suffering. In an action by a married woman for personal injuries, plaintiff may recover damages for physical or personal inconvenience resulting from the injury. In an action against a street railway for injuries received by plaintiff through stepping on an electrified metal plate on defendant's car, allegations in the petition that as a result of the injuries plaintiff's lower limbs were partially paralyzed, her nervous system injured and diseased, and she suffered severe pains, etc., and that as a result of the injury she was for a considerable period of time confined to her bed, and was unable to perform her household duties, etc., were broad enough to include damages on account of physical inconvenience. *McRae v. Metropolitan St. Ry. Co.*, 102 S. W. 1032, 1035, 125 Mo. App. 562.

#### PHYSICAL INJURY

An instruction that if plaintiff suffered no physical injury, or injuries, in alighting from defendant's train at an improper place, she could not recover damages from fright or mental anguish, if any she suffered, but that bodily suffering from cold, or from being wet, if any, would be a "physical injury" within such instruction, was proper. *Dye v. Chicago & A. R. Co.*, 115 S. W. 497, 500, 135 Mo. App. 254.

#### PHYSICAL INJURY AND DISCOMFORT

The rendering of a passenger on a train nervous almost to sickness, by threatened ejection, constitutes "physical injury and discomfort." *Southern Pac. Co. v. Bailey* (Tex.) 91 S. W. 820, 821.

#### PHYSICAL OCCUPANCY

"Physical occupancy" of property and legal possession of the same are not necessarily identical. A person may be held in law to be in actual possession of property, though at that time he be not physically upon it; and for that same reason another person, who at that time may have been in point of fact physically upon it, was not in legal possession. *State ex rel. Honey Island Land & Timber Co. v. King*, 35 South. 181, 184, 110 La. 961.

#### PHYSICAL OPERATION OF A SWITCH

A railroad employé whose duty was to turn a turntable for all engines coming in or going out of an engine house, and to throw the switch for the tracks in whichever way they were going, was engaged in the "physical operation of a switch" within Const. § 162 (Code 1904, p. cclix), abolishing the fellow-servant rule as to such an employé, and under express provisions thereof and of

Code 1904, § 1294k, may recover for injuries caused by negligence of a coemployé entitled to direct his services. *Washington-Southern Ry. Co. v. Cheshire*, 65 S. E. 27, 29, 109 Va. 741.

#### PHYSICAL VIOLENCE

As cruelty, see Cruelty.

#### PHYSICALLY INCAPABLE

The words "physically incapable," in Code Civ. Proc. § 1743, authorizing the annulment of a marriage on the ground that one of the parties was "physically incapable" of marriage, mean want of potentia copulandi, and not merely incapacity for procreation, and a husband cannot obtain a divorce on the ground of the barrenness of the wife. *Schroter v. Schroter*, 106 N. Y. Supp. 22, 23, 56 Misc. Rep. 69.

#### PHYSICIAN

See Consult or Consultation with Physician; County Physician; Itinerant Physician; Publicly Profess to be Physician; Registered Physician; Traveling Physician; Under the Care of a Physician.

Examination before physician, see Before.

See, also, Doctor; Malpractice; Practice of Medicine.

"A 'physician' is one who is versed in medical science, a branch of which is surgery; and a surgeon is a physician who treats bodily injuries and ills by manual operations and use of surgical instruments and appliances. A 'physician' as defined by our statute and in common parlance, is a person skilled in both medicine and surgery." *Goss v. Goss*, 113 N. W. 690, 692, 102 Minn. 346 (citing Rev. Laws 1905, §§ 2295-2300; 6 Words and Phrases, pp. 5374-5376).

Those who profess to heal the sick by magic, physic, or supernatural agency may be imposters, but are not "physicians" within Pol. Code 1895, §§ 1477-1491, defining and regulating the practice of medicine, and their system is in no sense the practice of medicine. *Bennett v. Ware*, 61 S. E. 546, 550, 4 Ga. App. 293.

"The relation of 'physician' and 'patient' (so far as Code Civ. Proc. § 834, prohibiting the disclosure by a physician of professional information, unless waived by the patient, is concerned) springs from the fact of professional treatment, independent of the causes which led to such treatment." *Meyer v. Supreme Lodge K. P.*, 70 N. E. 111, 112, 178 N. Y. 63, 64 L. R. A. 839.

Code, § 2579, provides that "any person shall be held as 'practicing medicine' or to be a 'physician,' who shall publicly profess to be a physician and assume the duties of that profession, or who shall make a practice of

prescribing, or of prescribing and furnishing medicine, for the sick, or who shall publicly profess to cure or heal." *State v. Yates*, 124 N. W. 174, 175, 145 Iowa, 332.

The definition of the section (Code, § 2579) also includes any one "who shall publicly profess to be a physician \* \* \* and assume the duties." Held, that publishing a card as "doctor of neurology and ophthalmology" was a public profession that he was a "physician," and this, with the assumption of duties as such, came within the meaning of the section. *State v. Wilhite*, 109 N. W. 730, 731, 732, 132 Iowa, 226, 11 Ann. Cas. 180.

The term "physician," as used in Laws 1899, p. 122, c. 87, authorizing registration of reputable resident physicians engaged in actual practice on July 1, 1897, meant any person of whatever school, or whether belonging to any known school, in good faith treating human ills by any remedy, however small, so as to be known among the people as a physician, and was not limited to a person possessed of that technical knowledge of the human system and of drugs and other remedies, and how to administer them, commonly supposed to be possessed by members in good standing of the great schools of medicine, especially in view of Laws 1897, p. 509, c. 264, § 7 (St. 1898, § 1435f), defining the term to include every person who shall for a fee prescribe drugs or other medicines or surgical treatment for the cure or relief of any wound, fracture, bodily injury, infirmity, or disease. *State v. Schmidt*, 119 N. W. 647, 650, 138 Wis. 53.

Under the statute making it a misdemeanor for any person to engage in practicing medicine without having first obtained a license, and providing (Rev. Code 1852, as amended in 1893, p. 58, c. 117) that every person (except apothecaries) whose business it is for fee and reward to prescribe remedies or perform surgical operations shall be deemed a "physician" within the act, it is not necessary that the prescription shall be in writing, and any direction given to the patient for drugs, medicines, or other remedies for the cure of bodily diseases, directing how they are to be applied to or used by the patient, is prescribing remedies within the meaning of the statute, to "prescribe remedies" meaning, in medicine, "to write or to give medical directions, or to indicate remedies"; and it is immaterial whether the direction is given by the defendant himself or by another person, even though such other person be a licensed physician, but engaged by and acting under the direction of defendant in the conduct of his business. *State v. Lawson* (Del.) 69 Atl. 1066, 1067, 6 Pennewill, 395.

Under a statute authorizing insane persons to be removed to a particular hospital on

a certificate of two "physicians" that such person is insane, such certificate may be made by nonresident physicians not officers of an institution for the care of the insane. In re Crosswell's Petition, 66 Atl. 55, 56, 28 R. I. 137, 13 Ann. Cas. 874.

#### **Chiropractic**

One advertising and holding himself out as a chiropractic and offering to treat diseases by the methods dictated by that school is within Code, §§ 2579, 2581, requiring persons practicing as "physicians" to procure a license, and making it an offense for them to practice medicine without such license. *State v. Zechman* (Iowa) 138 N. W. 387, 389.

#### **Masseur**

An indictment alleging that accused practiced on human beings without authority of law, in that he unlawfully treated a physical disease of a person named and charged him indirectly therefor, said treatment being given in the capacity of a "physician," under a system of treatment consisting in the performance of physical manipulations, sufficiently charges a practicing of medicine within Pen. Code, art. 755, declaring that one who shall treat any disease by any system and charge therefor shall be regarded as practicing medicine, and the indictment need not allege that the treatment accused practiced was not within his particular sphere as a masseur, nor negative that he did not publicly represent himself as a masseur. *Milling v. State* (Tex.) 150 S. W. 434, 435.

#### **Osteopath**

Laws 1907, p. 636, c. 344, regulating the practice of medicine, provides for licenses to practice medicine after an examination by the State Board of Medical Examiners, and states the educational requirements of the examination, and prohibits the practice of medicine without a registered license. Section 7, subd. 6, provides that an applicant for license to practice osteopathy shall show that he has studied not less than three years, and subdivision 4 requires all other applicants to have studied not less than four years. Section 14 after stating certain exemptions from the statute, provides that any person engaged in the practice of osteopathy at the passage of the act who presents to the board evidence of graduation from a college of osteopathy with a two years' course, including certain subjects, may be licensed without examination, but such license shall not permit the holder to administer drugs or perform surgery. Section 1, subd. 7, provides that a person practices medicine within the act who holds himself out as able to diagnose any human disease, etc., and who prescribes for any disease, injury, etc.; and, by subdivision 8, "physician" means a practitioner of medicine. The Sanitary Code, § 5, provides that the word "physician" includes every person "practicing about the cure of the sick or injured," or who prescribes for such

person. Section 160 requires every physician to be registered with the department of health, and requires physicians who have attended deceased persons to preserve a registry of their death, stating the cause, with other details, and to state the same in their report. Section 167 prohibits any interment of a dead body without a permit from the board of health, and a regulation of the board of health prohibits such permits except on the certificate and record of death of the physician pursuant to the Sanitary Code. Held, that a duly licensed osteopath was a physician within the Sanitary Code as well as the statute, and was entitled to registration as a physician. *Bandel v. Department of Health of City of New York*, 111 N. Y. Supp. 431, 127 App. Div. 382; *Id.*, 85 N. E. 1067, 1068, 193 N. Y. 133, 21 L. R. A. (N. S.) 49.

#### Orthopedist

Under Burns' Ann. St. 1908, § 520, excluding physicians as witnesses as to matters communicated to them as such by patients, the word "physician" includes those only who are lawfully engaged in the practice of medicine, and hence, in view of sections 8400 and 8410, making it unlawful for one to practice medicine without first obtaining a license and punishing such practicing without a license, an orthopedist who had not received a physician's license was not a physician within said section 520, and information gained by him while giving a course in gymnastic exercises was not privileged. *William Laurie Co. v. McCullough*, 90 N. E. 1014, 1018, 174 Ind. 477, Ann. Cas. 1913A, 49.

#### As employé

See Employé.

#### As member of learned profession

See Learned Profession.

#### As profession

See Profession.

#### As servant

See Servant.

### PIANO

As furniture, see Furniture; Household Furniture.

As household goods, see Household Goods.

### PIAZZA

As building, see Building.

### PICKER

A "picker" is a machine used in cotton mills for the purpose of cleaning notes, which is waste cotton run through the lapper at a cotton mill, to which a small quantity of cotton still attaches. *Washington Mills v. Cox*, 157 Fed. 634, 636, 85 C. C. A. 154.

As the result of the use of a pick to shift the needle in a circular knitting machine, the term "picker" has come to designate the means by which the needles are shifted in an automatic machine, and the machine itself is called the "picker machine." The pickers which raise the needles are known as elevating or lifting pickers, or "lifters," and the pickers which depress the needles as the depressing pickers, or "droppers." Two lifting pickers are used in automatic reciprocating knitting, one operating when the cam cylinder moves in one direction, and the other when the cam cylinder moves in the opposite direction, and the same is true of the depressing pickers. *Mayo Knitting Machine & Needle Co. v. E. Jenckes Mfg. Co.*, 133 Fed. 527, 529, 66 C. C. A. 503.

### PICKET—PICKETING

The word "picket" is defined as "a body of men belonging to a trades union, sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress." Originally the word had no such meaning, and this definition is the result of what has been done under the term and the common application that has been made of it. *Ideal Mfg. Co. v. Ludwig*, 112 N. W. 723, 725, 149 Mich. 183, 119 Am. St. Rep. 656 (quoting *Beck v. Railway Teamsters' Protective Union*, 77 N. W. 13, 118 Mich. 497, 42 L. R. A. 407, 74 Am. St. Rep. 421, Cent. Dict. and Webster's Dict.).

The word "picket" is defined as a body of men belonging to a trades union, sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress. Picketing, if confined strictly and in good faith to gaining information and to peaceful persuasion and argument, is not forbidden by law; but when it is used for the purposes of intimidation it is unlawful. *Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220*, 159 Fed. 500, 523 (quoting *Beck v. Railway Teamsters' Protective Union*, 77 N. W. 13, 14, 118 Mich. 497, 42 L. R. A. 407, 74 Am. St. Rep. 421).

The word "picket," in connection with strikes, is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude against the individual or corporation against whom the labor union has a grievance. It is, however, possible that a picket established at or near a factory where a strike is in progress may act lawfully, and go no farther than to induce others to assist the striking employes by lawful persuasion and inducements, but the slightest evidence of threats, violence, or intimidation of any character should be sufficient to show the unlawful character of the picket, since a picket under the most favorable consideration means an interference between the employer seeking employes and the men seeking employment. *Jones v. Van Winkle Gin & Ma-*



chine Works, 62 S. E. 236, 238, 131 Ga. 336, 17 L. R. A. (N. S.) 848, 127 Am. St. Rep. 235.

"Picketing" of men may simply mean the stationing of men for observation. If in the doing of this act, solely for such purpose, there be no molestation or physical annoyance, or let or hindrance of any person, then it cannot be said that such an act is per se unlawful; but "picketing" may also mean the stationing of a man or men to coerce or to turn aside against their will those who would go to and from the picketed place to do work, or in some other way to hamper or hinder the free dispatch of business by the employer. In that case "picketing" may well be said to be unlawful. An injunction against "picketing," without qualification, is therefore too broad. *Mills v. United States Printing Co.*, 91 N. Y. Supp. 185, 187, 99 App. Div. 605.

"Picketing" by strikers is the detachment of men in suitable places for the purpose of coming into personal relations with the new workmen, in order, if possible, to induce them by peaceful argument to leave the places which they have taken for such natural and proper reasons as may appeal to men in such circumstances. Picketing may be lawfully resorted to, provided the pickets are limited in numbers, so that their presence does not in itself amount to intimidation and the pickets so conduct themselves as to leave persons solicited feeling that they are not being subjected to compulsion, but are at liberty to comply or not as they please. *Pope Motor Car Co. v. Keegan*, 150 Fed. 148, 149.

"Picketing" has been condemned by every court having the matter under consideration. It is a pretense for "persuasion," but is intended for "intimidation." Gentlemen never seek to compel and force another to listen to the art of persuasion. To stop another on the street, get in his road, follow him from one side of the street to another, pursue him wherever he goes, stand in front of his residence, is not persuasion. "Intimidation" cannot be defined. Neither can "fraud" be defined. But every person knows whether his acts are fraudulent, and he knows whether his acts are intimidating. *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 119, 121.

## PICKING

"Picking" at one may mean mere innocent amusement, and it may not tend to show anything criminal. Where, on a prosecution for rape, defendant denied that he was intimate with prosecutrix, and denied that while in the tent of a certain person he had been reproved for his conduct with prosecutrix, it was error subsequently to permit the husband of such person to testify for the state that he and his wife were in their tent, and that defendant was then talking to the girl, and that he kept "picking at her," and that witness' wife then said

that she did not want any such conduct in the tent, and that if there had to be anything of the kind between defendant and prosecutrix she did not want defendant there any more; the phrase "picking at her" being indefinite, and the remarks of witness' wife probably indicating to the jury that the conduct of defendant was indecent. *Denton v. State*, 79 S. W. 560, 561, 46 Tex. Cr. R. 193.

## PICKLES

The provision for "pickles" in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170, covers only vegetables. So pickled walnuts are excluded, and are classifiable as unenumerated manufactures under section 6, 30 Stat. 205. *United States v. Acker, Merrill & Condit Co.*, 171 Fed. 77, 78, 96 C. C. A. 181.

Capers pickled in vinegar, which are used as a condiment and in flavoring sauces, are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170, relating to "pickles and sauces of all kinds." Articles are not to be removed from a provision for pickles and sauces, and placed in a provision for drugs, simply because a medical or therapeutic property may be extracted from them. Articles are not to be excluded from the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 for "vegetables \* \* \* including pickles and sauces of all kinds," on the ground that they are not palatable or desirable as a distinct and separate eatable, or are not known as garden vegetables. The use, rather than strict botanical classification, is the determinative factor; and capers, which are flower buds, but are used as pickles or as a sauce, are included in said provision. *S. S. Pierce Co. v. United States*, 176 Fed. 440-444.

## PICTURE

The word "pictures," as used by a revenue agent in the statement filed by him of property belonging to a person omitted from taxation, includes all of the paintings, drawings, and sketches on the walls of one's residence or office building. *Commonwealth v. Glover*, 116 S. W. 769, 774, 132 Ky. 588.

### As print

See Print—Printing.

## PICTORIAL ILLUSTRATION

Chromolithographs representing actual groups of persons and things, which have been designed from hints or descriptions of the scenes represented, and which are to be used as advertisements for a circus are "pictorial illustrations," within the meaning of Rev. St. § 4952, allowing a copyright to the "author, designer, or proprietor \* \* \* of any engraving, cut, print, \* \* \* or chromo," as affected by the Act 1874, c. 301, §

8, and on complying with all the statutory requirements the proprietors are entitled to the protection of the copyright laws. "These chromolithographs are 'pictorial illustrations'. The word 'illustrations' does not mean that they must illustrate the text of a book, and that the etchings of Rembrandt or Steinla's engraving of the Madonna di San Sisto could not be protected to-day if any man were able to produce them." "The ballet is as legitimate a subject for illustration as any other." *Bliestein v. Donaldson Lithographing Co.*, 23 Sup. Ct. 298, 188 U. S. 239, 251, 47 L. Ed. 460.

## PIECE

See In the Piece.

In a writing limiting the responsibility of a warehouse for any piece or package to \$50, the word "piece" should be construed to mean an individual article with separate identity at the time of storage, and not a concealed portion in a whole, as laces packed in a sideboard. *Rapp v. Washington Storage Warehouse & Van Co.*, 134 N. Y. Supp. 855, 858, 75 Misc. Rep. 16.

"An indictment charging larceny of a certain number of pieces of paper, each of a certain stated value is good. \* \* \* There is no such difference between pieces of paper and railroad tickets in reference to the statutes punishing embezzlement as to make it improper to charge an embezzlement of both kinds of property in the same count." *Commonwealth v. Parker*, 43 N. E. 499, 500, 165 Mass. 526.

The words "lot," "piece," and "parcel" apply peculiarly to the land itself, and are never employed to describe improvements. *Canty v. Staley*, 123 Pac. 252, 254, 162 Cal. 379.

"The terms 'tract or lot' and 'piece or parcel of real property,' or 'piece or parcel of land,' mean any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person, or company." In this connection the word "contiguous" means land which touches on the sides. Hence two quarters of the same section, which only touch at the corner, do not constitute, for the purpose of taxation, one tract or parcel of land. *Griffin v. Denison Land Co.*, 119 N. W. 1041, 1043, 18 N. D. 246 (quoting from Rev. Codes, 1905, § 1480 [Rev. Codes 1899, § 1176]).

Laws 1890, p. 376, c. 132, § 32, provides that the assessor shall actually view when practicable and determine the true and full value of each lot of real property listed for taxation and shall enter the value thereof in one column, etc., and the statutes further provide that the term "tract," or "lot" and "piece" or "parcel" of real property, and "piece" or "parcel" of land, whenever used in the act relating to revenue and taxation,

shall be held to mean any contiguous quantity of land in the possession, owned by, or recorded as the property of, the same claimant, person or company. Held, that under the statutes smaller tracts or subdivisions composing a larger tract could not be assessed as one tract, where the land was owned by different persons under recorded titles or in joint ownership, and assessments in one tract of different ownerships or estates in different tracts seem to be inhibited, where the different titles are of record. *State Finance Co. v. Bowdle*, 112 N. W. 76, 78, 16 N. D. 188.

Laws 1903, p. 376, relating to opening and widening of streets, provides by section 16 that the superintendent of streets upon receiving a diagram shall assess the cost of an improvement upon the land in the district, including the property of any railroad. Held, in view of Civ. Code, § 3541, declaring that an interpretation which gives effect is preferred to one which makes void, that as all railroad land other than rights of way was subject to assessment under the general language used, it was intended to assess its rights of way, whether consisting of an easement or title in fee, and that the use of the street for the purposes specified in its franchise constituted a "piece or parcel of land" within the meaning of the act subject to assessment for resulting benefits. *Los Angeles Pac. Co. v. Hubbard*, 121 Pac. 306, 309, 17 Cal. App. 646.

Under Rev. St. 1908, § 718, which provides that in a proceeding to register title any number of contiguous pieces of land in the same county and owned by the same person and in the same right, or any number of pieces of property in the same county having the same chain of title, and belonging to the same person, may be included, several noncontiguous tracts having the same chain of title may be included in one proceeding: the terms "pieces of property" and "pieces of land" being synonymous. *Held v. Houser*, 127 Pac. 139, 140, 53 Colo. 363.

## PIER

See Lying Between Piers; Public Pier.

A "pier" is a structure extending from the solid land out into the water to afford convenient passage for persons and property to and from vessels alongside of the pier. Its use is thus shown to be essentially the same as that of a way, and it bears to the vessels moored beside it relations similar to those which a way bears to contiguous places. A pier may also be, as a way, either public or private, and when the state granted the right to build piers on this land the right covered public as well as private piers. *Borough of Seabright v. Allgor*, 56 Atl. 257, 288, 69 N. J. Law, 641.

"A 'pier' is defined as a projecting wharf or landing place." In *The Haxby*, 94 Fed.

1016, it was said: "The Century Dictionary defines a pier to be a projecting quay, wharf, or other landing place; and without some qualifying adjective, this is the ordinary meaning of the word. It may be a solid stone structure, or an outer shell of stone or wood, filled in with earth, or it may be a framework formed by fastening a platform of planks upon piles driven into the soil at the bottom of the water. In either event, it is a protection of the land." The limits of a city which is bounded on navigable water may be extended by natural accretion and embrace what is actually made land, wharves, permanently filled in with earth, and the like, unless its charter clearly prohibit such extension, and no distinction should be made between such wharves and piers which rest on piles; a "pier" being a projecting landing place, made either as a solid structure or on piles driven into the soil at the bottom of the water. *Western Maryland Tidewater R. Co. v. City of Baltimore*, 68 Atl. 6, 10, 106 Md. 561.

A covenant in a deed of riparian lands, providing for a line for solid filling and beyond that an exterior line for piers, and stipulating that the land beyond the solid filling line shall not be used for any purpose except the erection of a pier or piers thereon under which the tide may ebb and flow, is not violated by the erection of a boathouse on the piers resting on the land. The word "pier" generically means a support, and in its precise use the absence or presence of water surrounding it is immaterial, though its customary use is with respect to projections into water. *Chelsea Land & Improvement Co. v. Westcott*, 72 Atl. 1007, 75 N. J. Eq. 367.

## PIERCED

A coal mining lease provided for suspension of a minimum royalty clause or exemption therefrom so long as a "fault" in existence in the mine, contact with which occasioned such exemption clause, should be a hindrance to the successful operation of the mine and for resumption of the minimum royalty after the "fault" had been "pierced" and the normal vein "recovered." Held, that the words "pierced" and "recovered" mean more than a mere breach of the fault and discovery of coal on the opposite side, but, if the immediate obstacle has been overcome, the main entry put in condition for successful operation and, together with side entries, carried into the body of the coal for several hundred feet, encountering the same obstacle or others in some of the entries, but none in others, it is for the jury to say whether the fault has been overcome within the meaning of the lease. *Collins v. White Oak Fuel Co.*, 71 S. E. 277, 280, 69 W. Va. 292.

## PIETY

In determining the validity of a charity, there is no distinction between the promotion of "piety" and of "religion"; the two words being synonymous. *Glover v. Baker*, 83 Atl. 916, 931, 76 N. H. 893.

## PIGEON

As poultry, see Poultry.

## PIGMENTS

Hematite iron ore in a form in which it cannot be used as a pigment is not dutiable as "pigments," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 58, 30 Stat. 154, but as "iron ore," under Schedule C, par. 121, 30 Stat. 159. *Hill v. Francklyn & Ferguson*, 162 Fed. 880, 882, 89 C. C. A. 570.

## PILE

### PILE DRIVER

As machine, see Machine.

### PILE DRIVER CAR

A "pile driver car" is a flat car on which is built a pile driver and an engine, which propels the car forward and backward with its own power by means of sprocket chains and wheels. *Johnson v. Great Northern Ry. Co.*, 116 N. W. 936, 104 Minn. 444, 18 L. R. A. (N. S.) 477.

## PILOT ASSOCIATION

See Partnership.

## PIMP

Under Rem. & Bal. Code, § 2440, which makes it an offense to live with a common prostitute, it was error, in an action for calling defendant a "pimp," to refuse to instruct that the charge was justified if plaintiff lived with prostitutes at the hotel where he was employed by defendant, where there was evidence that women, who stayed several days at a time at the hotel, consorted with him, and that he procured patronage for them. *Eddy v. Cunningham*, 125 Pac. 961, 962, 69 Wash. 544.

## PIN

An indictment for the robbery of a diamond pin, which the evidence showed was a stud suspended from the shirt by a corkscrew piece of metal, which describes the property as "one pin, of" a specified value, sufficiently describes the property, within Const. art. 2, § 9, giving accused the right to demand the nature of the accusation; a "pin" being defined as an ornament fastened to the clothing by a pin. *People v. Nolan*, 95 N. E. 140, 250 Ill. 351, 34 L. R. A. (N. S.) 301, Ann. Cas. 1912B, 401.

## PINCH OFF

The term "pinch off," as applied to the culture of trees, consists of the growing of the bud on top much more rapidly than the root or original stock, causing the trunk of the tree or new stock to be larger above the point where it has been joined or grafted than the stem of the original variety. *Brackett v. Martens*, 87 Pac. 410, 412, 4 Cal. App. 249.

## PINCHING

The term "pinching" means to move a railroad car forward with a crowbar, the operation being to thrust the bar between the wheel and the rail and move the load by lifting the other end. *Fassbinder v. Mo. Pac. R. Co.*, 104 S. W. 1154, 126 Mo. App. 563.

"Pinching" a railroad car consists in placing a crowbar on a rail under a wheel and prizing the car along until it has acquired sufficient momentum to take it down-grade. *Street's Adm'r v. Norfolk & W. R. Co.*, 45 S. E. 284, 285, 101 Va. 746.

## PINE TIMBER

All merchantable pine timber, see *All*.

A permit to cut state timber must be construed with reference to Laws 1895, p. 349, c. 163, authorizing the sale of such timber only when it is liable to waste; and a permit to cut "pine timber" will include "dead and down timber." *State v. H. C. Akeley Lumber Co.*, 119 N. W. 387, 390, 107 Minn. 54.

## PINEAPPLES PRESERVED IN THEIR OWN JUICE

Pineapples preserved in cans in their own juice, with 3 per cent. of sugar added for flavoring, and not aiding substantially in the preservation, which is accomplished by the canning process, held dutiable as "pineapples preserved in their own juice," and not as fruit preserved in sugar, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171. *United States v. J. S. Johnson & Co.*, 152 Fed. 164, 165, 81 C. C. A. 416.

Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, provides for fruit preserved in sugar and for "pineapples preserved in their own juice." Held, as to pineapples in hermetically sealed cans, in their own juice, but with 7 to 20 per cent. of sugar added for flavoring only, that they were dutiable under the latter rather than the former provision. *United States v. J. S. Johnson & Co.*, 166 Fed. 1002, 1003.

The addition of from 2.28 to 8.82 per cent. of sugar to pineapples preserved in cans in their own juice does not remove the fruit from the provision for "pineapples preserved in their own juice," in Tariff Act July 24,

1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, to the provision in the same paragraph for "fruits preserved in sugar." *U. H. Dudley & Co. v. United States*, 153 Fed. 881, 82 C. C. A. 627.

## PING PONG BALLS

Not dutiable as toys, see *Toys*.

## PIONEER

The term "pioneer," as applied to a patented invention, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what has gone before. *Singer Mfg. Co. v. Cramer*, 24 Sup. Ct. 291, 296, 192 U. S. 265, 48 L. Ed. 437 (quoting and adopting definition in *Westinghouse v. Boyden Power Brake Co.*, 18 Sup. Ct. 707, 170 U. S. 537, 43 L. Ed. 1136).

"The word 'pioneer,' although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before." *Dey Time Register Co. v. Syracuse Time Recorder Co.*, 152 Fed. 440, 447 (quoting and adopting definition in *Cimlott Unhairing Co. v. American Fur Refining Co.*, 25 Sup. Ct. 607, 198 U. S. 399, 406, 407, 49 L. Ed. 1100).

A "pioneer patent" is one covering a function never before performed, a wholly novel device, or one of such novelty and importance as to make a distinct step in the progress of the art as distinguished from a mere improvement or perfection of what had gone before. *Autopiano Co. v. Amphion Piano Player Co.*, 186 Fed. 159, 163, 106 C. C. A. 291.

A "pioneer patent" is one which first discloses means to accomplish a certain result, and the term does not apply to a patent for new means to accomplish a result already attained in another way, although they may be an improvement on the old way. *National Dump Car Co. v. Ralston Steel Car Co.*, 172 Fed. 393, 397, 97 C. C. A. 91.

A "pioneer invention" is a device of such novelty and importance "as to mark a distinct step in the progress of the art, as distinguished from mere improvement or perfection of what has gone before." A machine for making on a commercial scale and more cheaply an article previously made only by hand is a "pioneer invention," and a patent therefor is entitled to a liberal construction. *Electric Candy Mach. Co. v. Morria*, 156 Fed. 972, 973.

"The term 'pioneer invention,' although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what has gone before. Most conspicuous examples of such patents are the one to Howe of the sewing machine, to Morse of the electric telegraph, and to Bell of the telephone." *Cimlotti Unhairing Co. v. American Fur Refining Co.*, 25 Sup. Ct. 697, 700, 198 U. S. 399, 49 L. Ed. 1100.

## PIOUS GIFT

A charitable or "pious gift" is one given for the love of God or for the love of your neighbor, in the catholic or universal sense, given from these motives and to these ends, free from stain or taint of any consideration that is personal, private, or selfish. More precisely, it is a gift to the general public use, extending to the poor as well as the rich. A charity, in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from diseases, suffering, or constraint, by assisting them to establish themselves in life, or erecting and maintaining public buildings, or works, or otherwise lessening the burdens of government. In order that there may be a good trust for a charitable use, there must be some public benefit open to an indefinite and vague number, the persons to be benefited to be uncertain and indefinite and to be selected or appointed to be the particular beneficiaries of the trust for the time being. A charity is any gift, not inconsistent with existing laws, which is promotive of science, or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge, or for the public convenience. *Crow ex rel. Jones v. Clay County*, 95 S. W. 369, 375, 196 Mo. 234 (citing *Coggeshall v. Pelton* [N. Y.] 7 Johns. Ch. 294, 11 Am. Dec. 471; *Mitford v. Reynolds* [Pa.] 1 Phil. Ch. 191, 192; *Perin v. Carey*, 24 How. [63 U. S.] 506, 18 L. Ed. 701; *In re Hinkley's Estate*, 58 Cal. 457; *Missouri Historical Society v. Academy of Science*, 8 S. W. 346, 94 Mo. 459; *Chambers v. City of St. Louis*, 29 Mo. 543).

## PIPE

See Service Pipe; Stovepipe.  
All pipes, see All.

In a complaint charging that one of the "pipes" connected with furnaces and boilers and filled with hot steam under high pressure was "insecure, defective," etc., the word

"pipe" is used as generally descriptive of a conduit for steam, and the word fairly includes the flanges which connect sections of pipe. *Berwind-White Coal Min. Co. v. Firmment*, 170 Fed. 151, 153, 95 C. C. A. 1.

## PIPE LINE

As real estate, see Real Property.

## PIPING

Under ground piping as personal property, see Personal Property.

## PISTOL

As deadly weapon, see Deadly Weapon.  
Gun as including, see Gun.  
See, also, Revolver.

An object, once a "pistol," does not cease to be one by becoming temporarily inefficient. *Mitchell v. State*, 55 South. 354, 99 Miss. 579, 34 L. R. A. (N. S.) 1174, Ann. Cas. 1913E, 512.

The furnishing of a Stevens 32-caliber rifle by a father to his minor son was not an offense, within Rev. St. 1898, § 4307, prohibiting any person from giving any "pistol or revolver" to a minor. *Taylor v. Seil*, 97 N. W. 498, 120 Wis. 32.

To call a toy a pistol does not make it a "pistol," or to call a pistol a toy does not make it a "toy," within Pen. Code 1895, § 344, forbidding the sale of a pistol to a minor; nor is its essential character changed by the purpose for which it is sold or used in a particular case. *Mathews v. Caldwell*, 63 S. E. 250, 251, 5 Ga. App. 336.

Such act contemplates a weapon, and not a mere imitation of a weapon, not reasonably capable of being put to the use for which the corresponding weapon is intended; and there is no liability for injuries received from a toy pistol sold. *Mathews v. Caldwell*, 63 S. E. 250, 251, 5 Ga. App. 336.

Where an indictment charged accused with inflicting a mortal wound on deceased "with a revolving pistol," and later charged that the wounds were "gunshot wounds," it was not fatally defective for indefiniteness and uncertainty; the term "gunshot wounds" being broad enough to include wounds made by a "pistol." The word "gun" is a generic term, and includes pistol. According to Webster's Dictionary a "gun" is "any firearm for throwing projectiles by the explosion of gunpowder." In common usage the words "pistol" and "gun" are used interchangeably, and as the averment was "after the giving and inflicting the said gunshot wounds in the manner and form aforesaid and at the time and place aforesaid," etc., it is not open to the objection that it was vague, indefinite, uncertain, and argumentative. *State v. Barrington*, 95 S. W. 235, 263, 198 Mo. 23.

**PIT**

See Borrow Pits; Cinder Pit.

The "pit" of a locomotive tender is the part of the tender next to the engine, in which the coal for use in the locomotive is stored. *Missouri, K. & T. Ry. Co. of Texas v. Hanson (Tex.)* 90 S. W. 1122.

**Quarry synonymous**

"Pit" is synonymous with "quarry," signifying a large opening in the earth from which rock or ores are taken. *J. M. Guffey Petroleum Co. v. Murrell*, 53 South. 705, 711, 127 La. 466.

**PIVOT**

The general meaning of the term "pivot" is such as to imply a fixed shaft or hub, and no one would understand a pivotal support to be other than a rigid, nonrotating shaft support. *United States Light & Heating Co. v. Safety Car Heating & Lighting Co.*, 191 Fed. 850, 851.

**PLACE**

See Conspicuous Places; Foreign Port or Place; From Place to Place; Home Place; In Place; Landing Place; New Place; One Place; Polling Place; Public Place; Reasonable Place; Remaining in a Place; Starting Place; Suspicious Place; Traveled Place; Voting Places; Working Place.

Any other place, see Any Other.

Any place, see Any.

Every place, see Every.

Other place, see Other.

Reasonably safe place, see Reasonably Safe.

Such place, see Such.

"Place" is a comprehensive term, and may consist of one or more rooms in a building, or it may be an entire building, or more than one building within the same place used together for the convenient conduct of a prohibited purpose. A place kept as a nuisance, in violation of section 7605, Rev. Codes, 1899, may consist of one or more buildings, where they are both used for the unlawful purpose as parts of the same premises. *State v. Brown*, 104 N. W. 1112, 14 N. D. 529.

The word "place" has a broad signification, and applies, not only to a building, but also to any inclosure, whether covered or not. Under St. 1890, c. 230, providing that the officers of a city may license persons to keep more than four horses in certain specified buildings or places therein, and whoever, not being licensed, uses "any building or place for a stable for more than four horses" may be enjoined, one cannot, unlicensed, keep four horses in each of several buildings on the same lot. *Brookline v. Hatch*, 45 N. E. 756, 757, 167 Mass. 380, 381, 86 L. R. A. 495.

The words "time and place," in a statute requiring a description in the notice of the time and place of the occurrence of the injury, means a statement of the day and hour when, and a description of the locality where, the person injured received the direct injury to his person or property from the defendant's negligent act, as nearly as these facts can be given. *Peck v. Fair Haven & W. R. Co.*, 58 Atl. 757, 758, 77 Conn. 161; *Wright v. City of Omaha*, 110 N. W. 754, 755, 78 Neb. 124.

"Place," as used in the road and bridge act, requiring highway commissioners to give notice of the time when and "place" where they will meet to examine the route of a proposed road, and hear reasons against its establishment, means some definite point or locality, and the site of a proposed road one mile long is not such "place" or locality. *Town of Audubon v. Hand*, 83 N. E. 196, 197, 198, 231 Ill. 384.

Employers' Liability Act (Laws 1902, p. 1749, c. 600) § 2, provides that no recovery for injuries shall be maintained unless notice of the "time, place, and cause of injury" be given the employer. A notice stated that the claimant was injured on or about a certain day in defendant's yard, through the negligence of the defendant in not providing competent servants to unload its coal from cars, and in not stationing guards to warn claimant of danger, and in failing to protect its employes. There were five different "places" in the yards where cars were unloaded, and the claimant was one of a gang of 20 or 30 men. Held, that the notice was insufficient. *Miller v. Solvay Process Co.*, 95 N. Y. Supp. 1020, 1022, 109 App. Div. 135.

Where a note is made payable at a designated branch office of a trust company, presentation at the principal office of the trust company on the due date of the note and at the designated branch after banking hours on the day following is not sufficient as against an indorser, under Negotiable Instrument Law, § 133, providing for presentment for payment at the "place" of payment specified; a "place" not meaning an individual, corporation, or institution. *Ironclad Mfg. Co. v. Sackin*, 114 N. Y. Supp. 42, 43, 129 App. Div. 555.

The word "place," as used in a law relating to licenses for vehicles, providing that a license number obtained in another "place" or state shall be removed from said vehicle while the vehicle is being used within this commonwealth, could not properly be regarded as applying to a municipality within the commonwealth; but what was intended was that the foreign license number should be removed from any vehicle which comes from another territorial division outside the state into the limits of the state, and only in such case. *Brazier v. City of Philadelphia*, 64 Atl. 508, 510, 215 Pa. 297, 7 Ann. Cas. 548.

A federal postoffice building, in which it is charged that defendant committed forgery, is a "place," within the meaning of Act July 7, 1898, c. 576, § 2, 30 Stat. 717, providing that, when any offense is committed in any place, jurisdiction over which has been retained by or ceded to the United States, the punishment for which is not provided by any law of the United States, the offender shall receive the same punishment as the laws of the state provide for the like offense; so that a federal court has jurisdiction to prosecute and punish for forgery, denounced by the state law, committed in a postoffice building owned and occupied by the United States within a state, over which legislative jurisdiction has been ceded by the state. *United States v. Andem*, 158 Fed. 996, 1000 (citing and adopting *Ft. Leavenworth R. Co. v. Lowe*, 5 Sup. Ct. 995, 114 U. S. 525, 29 L. Ed. 264).

Code, § 283, provides that all judicial proceedings must be public, unless otherwise specifically provided by statute or agreed on by the parties; and section 286 declares that courts must be held at the "place" provided by law, except for the determination of actions, special proceedings, or other matters not requiring a jury, when, by the consent of the parties, they may be held at some other place. Held, that where, after the regular term of the district court at which defendant was indicted had convened, in its regular room in the courthouse, the presiding judge announced that the session would be adjourned to the office of the county superintendent, on the first floor of the courthouse, for the purpose of having another defendant, who was in a weak physical condition, present when the grand jury was impaneled—the room being sufficiently large to accommodate the court, its officers, the jurors, attorneys, and a number of the general public—the holding of court in such room was not error. *State v. Richards*, 102 N. W. 439, 440, 126 Iowa, 497.

Under Act Cong. May 19, 1828, c. 68, § 3, providing that an execution on a judgment of a federal court and proceedings thereon shall be the same in each state as are now used in courts of such state, Act Cong. Feb. 16, 1839, c. 27, § 4, providing that the marshal may, at the written request of defendant, change the sale of property to the "place" where the federal court for the district is held, and Act Miss. June 22, 1822 (*How. & H. Dig.* p. 633) § 17, providing that sales of land shall be at the courthouse of the county, an execution sale by a marshal, on a judgment of a federal court, outside the county in which the land was situated, was void, unless it was at the place of holding the federal court of the district, and the return showed that it was on the "written request" of defendant. Neither the return on an execution that the execution sale by a

marshal, on a judgment of a federal court, outside the county where the land was situated, was "in J.," nor the bill in a suit to remove clouds from title, alleging that it was at the "front door of the statehouse in J.," shows that the sale was at the place authorized by Act Cong. Feb. 16, 1839, c. 27, § 4, 5 Stat. 317; the "place" where the United States court for the district is holden being the special house in which the federal court held its sittings. *Jones v. Rogers*, 88 South. 742, 746, 85 Miss. 802.

#### As city or town

The word "place," as used in defining the seat of justice as the place where the courthouse, jail, and county offices are located, means town. *Babcock v. Hahn*, 75 S. W. 93, 94, 175 Mo. 136.

Under a statute requiring a lien claim for materials furnished, etc., for a vessel to state the "place" where the vessel was built, etc., a claim stating that work was done and materials were furnished in "Baltimore city" was sufficient. *Lucas v. Taylor*, 66 Atl. 26, 27, 105 Md. 90.

#### As county or parish

Civ. Code, art. 1591, provides that males who have not attained the age of 16 years complete are incapable of being witnesses to testaments. Article 1578 requires three witnesses residing in the "place" where the will is executed in case of nuncupative testaments by public act. Article 1594 provides that by residence of the witness, in the place where the testament is executed is understood his residence in the parish. Held, that a boy over 16 years of age is capable of being a witness to a will, and, where he actually resides in the parish where the will is executed, he is a competent witness to a nuncupative will by public act, though his parents reside in another parish. *Oglesby v. Turner*, 54 South. 400, 402, 127 La. 1093.

#### As park

The word "place," as used in a plat showing a pond with trees, which had not been planted about it, should be construed as meaning "park"; it being perfectly clear that the donors intended that the space should be used for a pleasure ground for the public. *Fessler v. Town of Union*, 56 Atl. 272, 276, 67 N. J. Eq. 14.

#### Gaming

To maintain a "place" of any character where persons are allowed to bet, offer to bet, place an order for a bet, or telegraph or telephone bets on races of any sort, is an act prohibited by Pen. Code 1895, § 393, and such an act cannot, in the absence of express legislative authority, properly be made penal by a municipal ordinance. *Thrower v. City of Atlanta*, 52 S. E. 76, 124 Ga. 1, 1 L. R. A. (N. S.) 382, 110 Am. St. Rep. 147, 4 Ann. Cas. 1 (citing *Thrower v. State*, 45 S. E. 126, 117 Ga. 756).

**Liquor laws**

The word "place," as used in Rev. Codes 1899, § 7605, declaring a place where liquors are kept for illegal sale to be a nuisance, means the particular building or apartment where the unlawful sale is made or the intoxicating beverages are kept for sale. *State v. Poull*, 105 N. W. 717, 718, 14 N. D. 557.

The word "place," in Rev. St. c. 29, § 49, authorizing search and seizure for the unlawful keeping of intoxicating liquors, cannot be construed as broad enough to cover the search for liquors in a valise in the possession of a person charged with unlawfully keeping or depositing liquors but not alleged to be in any definite or fixed locality. *State v. Fezzette*, 69 Atl. 1073, 1075, 103 Me. 487.

The proprietor of a restaurant is a "person," and his restaurant is a "place," within the city of Denver, within the purview of Denver Ordinance 1902, No. 102, § 1, providing that no person shall, within the limits of the city, sell or give away intoxicating liquors to be drunk upon the premises where sold or at any place. *Scanlon v. City of Denver*, 88 Pac. 156, 157, 38 Colo. 401.

As used in Dispensary Act Feb. 16, 1907, § 27, making it a misdemeanor to carry intoxicants for unlawful use to any place or county where the manufacture and sale of intoxicants is prohibited, the word "place" means any spot within the county at which it would be unlawful to manufacture or sell liquors. *State v. Arnold*, 61 S. E. 891, 892, 80 S. C. 383.

"The popular idea associated with the word 'saloon' is that it is a room, rather than a building with several rooms. Webster also defines 'dramshop' as 'a shop or barroom where spirits are sold by the dram,' and therefore authority to keep a saloon at a certain street and number does not authorize the use of the whole building, but the room where licensees had his bar and ran his saloon was the place where he sold liquor, within the meaning of 'place' as used in the statute and city ordinances." *Malkin v. City of Chicago*, 75 N. E. 548, 551, 217 Ill. 471, 2 L. R. A. (N. S.) 488, 3 Ann. Cas. 1104.

In an action under Gen. St. 1909, § 4387, authorizing an injunction against the keeping of a place where intoxicants are illegally sold, a finding that defendant was guilty of keeping a place where intoxicants were sold is supported by evidence that he sold beer, which he kept for that purpose in a barrel in an alley, the want of other paraphernalia not preventing the spot occupied being a "place" within the statute, nor did its location prevent his being its "keeper," so long as he used it for his own ends. *State v. Dykes*, 111 Pac. 179, 180, 83 Kan. 250.

The word "place," as used in Rev. Codes 1899, § 7605, providing that all places where

intoxicating liquors are sold in violation of law shall be common nuisances, means the particular place, room, or apartment where in the liquor was kept for sale or sold in violation of law. Where a boarder at a hotel kept intoxicating liquor in his bedroom, and on three or four occasions sold liquor to persons in the hotel, but without the knowledge or consent of the owner of the building, or of the proprietor thereof, the hotel could not be adjudged a common nuisance, and the particular place or room where the liquor was kept or sold could only be adjudged a nuisance and abated, on its being particularly identified in the proofs. *State ex rel. Kelly v. Nelson*, 99 N. W. 1077, 1078, 13 N. D. 122.

Under Rev. St. 1909, §§ 7239, 7240, relating to local option elections and to the order and notice of election and providing that, on proper petition, an election shall be ordered held and a notice thereof given by publication in a newspaper, etc., without expressly requiring the designation of polling places, the jurisdictional notice of an election is a notice giving the date and place on which it is to be held, and the naming of the place is satisfied by naming the city or territory in which it is to be held, as the term "place" has many meanings and is synonymous with "town" or "city" or a "certain territory," the term "polling places" not being synonymous with, "place of election." *State ex rel. Fahrman v. Ross*, 143 S. W. 502, 506, 160 Mo. App. 682.

A statute making it unlawful to sell by wholesale intoxicating liquors, except manufacturers selling liquors of their own make at the place of manufacture, must be construed to give it a reasonable effect. Within the meaning of the statute, "place of manufacture" is not the distillery survey, but the premises of the defendant, where the whisky is made. The word "place" is not in ordinary speech so restricted in meaning. Thus a homestead is the family's place of residence; but it includes not only the house in which the family resides, but the land about it, and the words are used in a like sense when one speaks of the place of a man's domicile, or when we speak of a man's place of business or place of employment and the like. The word "place" in the statute must be taken in its common acceptation, and not in its restricted sense. It is not used as equivalent to the town or district where the manufactory is situated, but to indicate the premises on which the manufacturing is done. It includes, not only the government survey, but the property about it, which is used in connection with it, and is fairly a part of the plant. *Commonwealth v. Oldham*, 100 S. W. 1184, 1185, 125 Ky. 262.

**Master and servant—Place for work**

The word "place," used in referring to the place where a servant is required to work, usually means the premises where the



work is to be done. *Cleveland, C. C. & St. L. Ry. Co. v. Foland (Ind.)* 88 N. E. 787, 791.

The word "place" in negligence cases usually means the premises where the work is to be done, and does not comprehend the negligent acts of fellow servants by reason of which the place is rendered unsafe or dangerous. *Haskell & Barker Car Co. v. Prezdziankowski*, 83 N. E. 626, 630, 170 Ind. 1.

The word "place," within the rule requiring a master to furnish a safe place of work, means the premises where the work is being done, and does not comprehend negligent acts of fellow servants rendering the place unsafe. *Southern Indiana Ry. Co. v. Harrell*, 68 N. E. 262, 265, 161 Ind. 689, 63 L. R. A. 460 (citing *Hermann v. Port Blakely Mill Co.*, 71 Fed. 853).

A wall in course of construction is not a bricklayer's "place of work," within the rule requiring an employer to provide a safe place of work; the place furnished being the scaffold. *Ripp v. Fuchs*, 118 N. Y. Supp. 361, 364, 129 App. Div. 321.

"A staging or scaffolding for workmen is not a 'place' in which work is to be done, within the rule requiring the master to furnish his servants a suitable and safe place in which to work, but it is an 'appliance' or instrumentality by the means of which the work is to be done." *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175, 180, 65 C. C. A. 481 (quoting and adopting definition in *Thomas, Neg.* p. 790).

A tunnel in course of construction is not a "place of work," within the rule requiring an employer to provide a safe place of work; the work creating the place itself. *Toppl v. McDonald*, 112 N. Y. Supp. 821, 824, 128 App. Div. 443.

A vat containing a hot liquor and covered by loose slats is not a "place" within the rule that a master must furnish a safe place, when the same is used by a servant standing on the slats while painting, but the same is in the nature of a temporary platform. *Marsen v. Nichols Copper Co.*, 118 N. Y. Supp. 867, 869, 134 App. Div. 294.

A bridge used as a part of the scenery in a play was not a "place" within the rule which requires the master to furnish his employes with a safe place to work, but was rather an appliance, such as scaffolding used in the conduct of the work has been held to be. *Hahn v. Conried Metropolitan Opera Co.*, 111 N. Y. Supp. 161, 162, 126 App. Div. 815.

Where defendant provided a ladder by which its servant was expected to reach one of the manhead doors in the rear of the boilers of defendant's plant, such ladder constituted a "place," within the rule requiring a master to furnish his servant with a reasonably safe place in which to work. *Missouri, K. & T. Ry. Co. of Texas v. Steele*, 110 S. W. 171, 175, 50 Tex. Civ. App. 634.

Where one end of an iron skid or running board was placed on a railroad freight house floor against a cleat to prevent it from slipping, and the other end in a car door, for loading and unloading cars, the skid and cleats being moved about from car to car, and being a part of the tools and appliances furnished the freight handlers, the skid and the cleat in such case were not a "place of work" under the common-law rule relative to furnishing a safe place to work. *Nappa v. Erie R. Co.*, 88 N. E. 80, 81, 195 N. Y. 176, 21 L. R. A. (N. S.) 96.

#### National banking law

The word "place," as used in an act of Congress providing that the shares of national banks shall be assessed in the place where the bank is located, refers to the location of the bank, and not to the state authority under which the tax is to be assessed. *Packard v. Lewiston*, 55 Me. 456, 457.

#### Selection of county seat

The word "place," as used in section 6, art. 17, para. 324, *William's Ann. Const. Okl.*, means a definite locality, competent to be voted upon for the county seat of a county. *Delaware County ex rel. Carver v. Hogan*, 127 Pac. 492, 494, 33 Okl. 791.

A tract of land or locality which, prior to the Governor's proclamation calling a county seat election, had been by its owners platted, and which was thereafter, and before the election, the scene of a public picnic, attended by a large number of voters of the county, and at which a public auction of the lots was held, and public notice given of its metes and bounds, and the location of which was well known to the voters of the county, is a "place" within *Const. art. 17, § 6*, providing that the Governor shall cause to be placed upon the tickets to be voted at such election the names of such towns as may, more than 20 days prior thereto, file with him verified petitions therefor, and that the word "town" shall be construed to mean town, city, or place. *Town of Grove v. Haskell*, 104 Pac. 56, 64, 24 Okl. 707.

#### PLACE (Verb)

"To 'adjust' is to 'place an order.'" *Anderson v. Seropian*, 81 Pac. 521, 527, 147 Cal. 201.

A declaration charging that an employer neglected and omitted to properly and securely "place" the arm of a derrick means that he neglected to properly put the derrick in position in a safe manner, secure against the strain to which it might be subjected. *George B. Swift Co. v. Gaylord*, 82 N. E. 299, 301, 229 Ill. 330.

Machinery is "placed" in a plant by the owner within the meaning of *Porto Rico Code, § 335*, defining the conditions under which property, movable in its nature, becomes immobilized, where it is installed by a tenant under a stipulation in the lease

that, it shall become a part of the plant belonging to the owner, without compensation to the lessee. *Valdes v. Central Altagracia*, 32 Sup. Ct. 664; 665, 225 U. S. 58, 56 L. Ed. 980.

Act May 29, 1901, § 26 (P. L. 302), provides as follows: "That from and after the passage of this act it shall be unlawful to fish in any waters in this commonwealth with dynamite, nitroglycerine, torpedoes, electricity, quicklime, or with any kind of explosive or poisonous substances; or to place such substances in any waters whatever, except for engineering purposes, when written permission has been given therefor by the proper national, state, city or county official or officials." Held (1), that the act applied in its prohibition to the deposit in streams of nonexplosive substances of a poisonous kind; (2) that the placing of explosive or poisonous substances in a stream need not be directly connected with the catching of fish; (3) that the word "place" did not mean that the poisonous substances must directly pass from the hand into the stream, but contemplated an intentional act proximately connected with the introduction of the poisonous substances into the stream; (4) that in proving the commission of the prohibited act it is not necessary to prove that the accused was impelled thereto by an evil motive to destroy the fish, but he may be convicted by showing that, although engaged in a lawful business, he intentionally discharged poisonous substances employed in his business so that such substances flowed into the stream. *Commonwealth v. Immel*, 33 Pa. Super. Ct. 388, 394.

#### PLACE OF ABODE

See Last Place of Abode; Present Place of Abode; Usual Place of Abode.

#### PLACE OF ACCOMMODATION

See Place of Public Accommodation.

#### PLACE OF AMUSEMENT

See Place of Public Amusement.

Any such place of public amusement, see Any.

Other places of public accommodation or amusement, see Other.

Where a coffee merchant rented space from a grocers' association in a food show, where he maintained a booth from which he advertised coffee by serving cups of coffee, gratis, to prospective patrons, and he had no interest in the operation of the show as a whole, which was under the control of the association, which charged an entrance fee, the merchant was not conducting a "place of amusement," within the civil rights act (Act Cong. March 1, 1875, c. 114, 18 Stat. 335, and Code, § 5008. *Brown v. J. H. Bell Co.*, 123 N. W. 231, 237, 146 Iowa, 89, 27 L. R. A. (N. S.) 407, Ann. Cas. 1912B, 852.

#### PLACE OF ATTENDANCE

See Going to Place of Attendance.

#### PLACE OF BUSINESS

See At His Place of Business; Established Place of Business; Principal Place of Business.

Defendant's agent maintained an office in New York, paying his own rent and stenographer, from which defendant's wares were advertised without protest. Defendants used such office as their own, when they wished to press slow debtors. They permitted the agent to advertise and represent that he was their Eastern agent, and from this office many sales were made, though most of the sales were concluded at the corporation's home office at Chicago. Held, that the corporation had a "place of business" in New York, and was therefore subject to suit there. *Chadeloid Chemical Co. v. Chicago Wood Finishing Co.*, 180 Fed. 770, 771.

#### Agency synonymous

Civ. Code 1895, § 1900, provides that service of writs on a corporation may be affected by leaving a copy of the writ with the agent of the defendant, or, if there be no agent in the county, then at the "agency" or "place of business." Held, that the "agency" or "place of business" refers to the same place; that is, the "agency" and "place of business" are synonymous. *Tuggle v. Enterprise Lumber Co.*, 51 S. E. 433, 434, 123 Ga. 480.

#### Burglary

The words "place of business," as used in the statute defining burglary, mean any house, other than a "dwelling, mansion, or storehouse," occupied as a place of business, in which valuable goods are contained. The allegations of the indictment were sufficient to show that the "place of business" alleged to have been broken into and entered with intent to commit a larceny was a house, and that valuable goods were contained therein. If the words "place of business," with the context, were insufficient to show that "the place of business" was a house, it was a formal defect, to be reached by special demurrer, and was cured by the verdict. *Keenan v. State*, 74 S. E. 297, 10 Ga. App. 792.

#### Cropper

The dwelling house of a landlord is not the place of business of a cropper within Acts 1910, p. 134, prohibiting one from "carrying around" a pistol without a license outside of his own house or place of business, especially where it affirmatively appears that the cropper did not live in the house with his landlord, but in a different dwelling. *Boyd v. State*, 73 S. E. 551, 10 Ga. App. 451.

#### Liquor laws

A "place of business," within the prohibition law of 1907 (Acts 1907, p. 81, § 1), means a place devoted by the proprietor to the car-

rying on of some form of trade or commerce. *Jenkins v. State*, 62 S. E. 574, 575, 576, 4 Ga. App. 859.

A nearby room, which a person uses in connection with the business conducted in his regular place of business, is a part of his "place of business," within the general prohibition statute (Acts 1907, p. 81). *Bashinski v. State*, 62 S. E. 577, 578, 5 Ga. App. 3.

If a person should make a common practice of selling liquor at a fixed place, that place would become his "place of business"; but a single sale of liquor, or even sporadic sales, will not ipso facto convert the place where the sale occurs into the seller's place of business, within the prohibition act of 1907 (Acts 1907, p. 81). *Bashinski v. State*, 62 S. E. 577, 578, 5 Ga. App. 3.

If one kept a public restaurant consisting of two main eating rooms and a kitchen, and kept intoxicants on hand in the kitchen, he was guilty of violating the law prohibiting the keeping of intoxicants at a "place of business." *Hall v. State*, 70 S. E. 211, 213, 8 Ga. App. 747.

A "place of business" as used in the prohibition act (Pen. Code 1910, § 426), is a place where a calling for the purpose of gain or profit is conducted. *Union & Mechanics' Club v. City of Atlanta*, 71 S. E. 1060, 1062, 136 Ga. 721.

A man's "place of business" continues to be his place of business on Sunday, within the statute prohibiting the keeping of liquor at a place of business, though the law prohibits him from transacting his business there on that day. *Landreth v. State*, 73 S. E. 349, 350, 10 Ga. App. 399.

A "place of business," within prohibition statute (Acts 1907, p. 81), making it unlawful to keep on hand at one's place of business intoxicating liquor, is a public place of business in contradistinction to a place of private business. The word "business" is used in the sense of trade, commerce, or traffic, and not as synonymous with occupation, vocation, or employment. *Roberts v. State*, 60 S. E. 1082, 1085, 4 Ga. App. 207.

As used in Acts Ga. 1907, p. 81, making it criminal for any person to give away to induce trade at any place of business or keep or furnish at any other public place any of the prohibited liquors, the term "place of business" does not refer to a public place, in the sense of being devoted to governmental use, but refers to any place at which, though privately owned or controlled, a number of persons have assembled through common usages or by general invitation, express or implied. *Tooke v. State*, 61 S. E. 917, 922, 4 Ga. App. 495.

If a person should make a common practice of selling liquor illegally at a fixed place, that place would thereby become his "place of

business"; but a single sale of liquor, or even sporadic sales, will not ipso facto convert the place where the sale occurs into the seller's "place of business," in accordance with the meaning of that phrase as found in the Georgia prohibition act of 1907. *Lyons v. Atlanta*, 64 S. E. 713, 6 Ga. App. 248 (quoting *Bashinski v. State*, 62 S. E. 577, 5 Ga. App. 3).

If one lives at or near his place of business, and keeps on hand liquors in his dwelling house, and his dwelling house is used in connection with his place of business as part of the place of business, and the purpose of keeping the liquors in the dwelling is to have them conveniently located to the immediate place of business, the dwelling house would be in law a part of the place of business, and such keeping on hand would be a keeping of liquors at one's "place of business." All parts of one's place of business, including rooms, closets, stairs, yards, and courts used in connection with the business itself, are a part and parcel of the place of business, within the liquor law relating to the keeping of liquors on hand at one's place of business. *Flahive v. State*, 73 S. E. 536, 10 Ga. App. 401.

In a prosecution for keeping intoxicating liquors on hand at defendant's place of business, an instruction that any nearby room or place used by the proprietor in connection with the business, and in such relation to the actual place of business as to indicate a nearby room or compartment, is also a part of his "place of business," was proper. *Holland v. State*, 72 S. E. 290, 292, 9 Ga. App. 831.

The private operating room of a practicing dentist prima facie is not a public place of business, within the general prohibition law (Laws 1907, p. 81), making it unlawful to sell, etc., at any place of business, or keep at any other public place, intoxicants; the term "place of business" meaning a place where the public generally are expressly or impliedly invited for the purpose of transacting business with the owner, and the term "public place" including a place which for the time being is made public by the attending of people who go there with or without invitation and without restraint. *Cantrell v. State*, 70 S. E. 96, 97, 8 Ga. App. 725.

Where intoxicating liquor is kept in a room apparently used solely as a bedroom and adjoining the owner's place of business, he cannot be convicted of keeping such liquor on hand at his place of business, unless it appears that the room was used not in good faith, solely as a place of abode, but as a convenient cover or subterfuge for keeping the liquor for use in connection with his business. Where in such a case the evidence as to the real purpose for which the room is being used is in conflict, and a finding that it was being used as a part of the "place of business" and for an illegal purpose is dependent upon in-

ference, it is error to charge: "If one elects to make his place of abode at his place of business, then the keeping on hand of spirituous, malt, or intoxicating liquors is a violation of the law." *Frazier v. State*, 74 S. E. 851, 11 Ga. App. 154.

This court reaffirms the ruling in *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574, that "the phrase 'at their place of business,' appearing in the general prohibition statute of 1907 (Acts 1907, p. 81, § 1), includes in its meaning the immediate room or place in which the business in question is conducted, also any nearby room or place used by the proprietor in connection with the business or in such a relation to the actual 'place of business' as to indicate that the nearby room, compartment, etc., is a convenient place which the proprietor would probably use for keeping therein such liquors as he might desire to furnish to others for the purpose of inducing trade, or for keeping therein liquors intended for unlawful sale under cover of the business carried on in the main place." It was not error to instruct the jury in the language above quoted. *Smith v. State*, 74 S. E. 711, 712, 11 Ga. App. 89.

Acts 1908, c. 27, entitled "An act to enable the voters of W. county to determine whether or not intoxicating liquors shall be 'sold' in the county," and providing penalties for its violation, provides, by section 2, that, if local option is adopted in W. county, it shall be unlawful for any person "under any pretense whatever, directly or indirectly, to barter, sell, give away, or otherwise dispose of it, at a place of business, or keep at any place whatsoever for the purpose of bartering or selling any . . . intoxicating liquors within the limits of W. county," and further makes it unlawful to take orders for intoxicants or to operate as a distributing agent therefor. Held, that an indictment thereunder for illegally "selling" intoxicants need not allege that the sale was at a place of business conducted by accused, that not being necessary to constitute an offense under the statute; the words "place of business" merely enlarging the prohibition by making it unlawful to give away or otherwise dispose of intoxicants under any other circumstances at a place of business than those previously mentioned. *Mitchell v. State*, 80 Atl. 1020, 1021, 115 Md. 360.

#### Rural mail carrier

A rural mail carrier is not, while engaged in carrying and distributing mail as such in the vehicle used by him, on his own premises and place of business within Pen. Code 1911, art. 476, permitting the carrying of weapons on one's own premises or "place of business." *Lattimore v. State* (Tex.) 145 S. W. 588, 590.

#### PLACE OF CONTRACT

The expression "place of contract," in the rule that the validity of a contract is

governed by the law of the place of contract, means the place where the contract is entered into. *Mayer v. Roche*, 75 Atl. 235, 236, 77 N. J. Law, 681, 26 L. R. A. (N. S.) 763.

Where a person residing in one place makes a proposal to purchase property by letter to a person residing in another place, and such proposal is there accepted, the place of acceptance is the "place of the contract" and the place where a cause of action to enforce it accrues, under Gen. St. 1906, § 1383, providing that suits shall be begun only in the county where defendant resides or where the cause of action accrued or where the property in litigation is. *Morgan v. Eaton*, 52 South. 305, 306, 59 Fla. 562, 138 Am. St. Rep. 167.

The intention of the parties to a personal contract as to the place of the contract is generally determinable by the presumption of fact that the place was intended to be where the contract was actually made, unless the place of performance was elsewhere, when the presumption is that the latter place was intended; but such presumptions are rebuttable, "place of contract" meaning the place mutually intended for reference as to validity and interpretation. *International Harvester Co. of America v. McAdam*, 124 N. W. 1042, 1044, 142 Wis. 114, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614.

#### PLACE OF DESTINATION

See Destination.

#### PLACE OF ELECTION

Under Rev. St. 1909, §§ 7239, 7240, relating to local option elections and to the order and notice of election and providing that, on proper petition, an election shall be ordered held and a notice thereof given by publication in a newspaper, etc., without expressly requiring the designation of polling places, the jurisdictional notice of an election is a notice giving the date and place on which it is to be held, and the naming of the place is satisfied by naming the city or territory in which it is to be held, as the term "place" has many meanings and is synonymous with "town" or "city" or a "certain territory," the term "polling places" not being synonymous with "place of election." *State ex rel. Fahrman v. Ross*, 143 S. W. 502, 506, 160 Mo. App. 682.

#### PLACE OF INJURY

A notice stating that plaintiff, while riding along A. street "near" B. street, was thrown from his wagon because defendant negligently allowed a large stone to be in the highway at that point, but failing to specify the date when the accident happened, and not referring to any house or other monument upon A. street, by which the specific location of the stone could be fixed, was insufficient, under a statute requiring claims against the city for injuries, to be presented to the council describing the "place of injury." *Forseyth*

v. City of Oswego, 95 N. Y. Supp. 33, 35, 107 App. Div. 187.

#### PLACE OF MANUFACTURE

A "place of manufacture" is, generally speaking, one where articles of trade are created out of raw material in its simple or some improved form. *Sharpe v. Hasey*, 114 N. W. 1118, 1119, 134 Wis. 618.

#### PLACE OF PUBLIC ACCOMMODATION

A statute, requiring barbers to procure a license from a state board before plying their trade, did not make a barber shop a "place of public accommodation," within another statute, authorizing recovery of double damages for discrimination against a person of color by proprietors of such places. *Faulkner v. Solazzi*, 65 Atl. 947, 949, 79 Conn. 541, 9 L. R. A. (N. S.) 601, 9 Ann. Cas. 67.

Laws 1895, p. 974, c. 1042, entitled "An act to protect all citizens in their civil and legal rights," and providing that all persons within the state shall be entitled to equal accommodation in hotels, etc., "and all other 'places of public accommodation,'" does not include a boot-blackening stand; and a refusal to shine the shoes of a colored man because of his color does not subject its proprietor to the penalty of the act. *Burks v. Bosso*, 73 N. E. 58, 59, 180 N. Y. 341, 105 Am. St. Rep. 762.

#### PLACE OF PUBLIC AMUSEMENT

A roller skating rink to which the public are invited on the sole condition of paying a fixed charge is a public place of amusement within St. 1898, § 4398c, providing that any person denying to another the equal enjoyment of the accommodations of "inns, restaurants, saloons, barber shops, eating houses, public conveyances, \* \* \* or any other place of public accommodation or amusement," shall be liable to the person aggrieved. *Jones v. Broadway Roller Rink Co.*, 118 N. W. 170, 171, 138 Wis. 595, 19 L. R. A. (N. S.) 907.

Under an ordinance providing that before issuing a license to operate a theater, dancing hall, or other place of public amusement, the mayor shall make an examination of the place for which the license is desired, to see that all the provisions of the building ordinances of the city have been complied with, and defining the word "place" as used in the ordinance as "the theater, opera house, auditorium, hall, park, grounds, garden, tent, or other inclosure within which it is intended to produce, offer, or present any such entertainments," it is not contemplated that a license shall issue until the building in which the entertainment is to be given is completed. *People v. Busse*, 93 N. E. 327, 329, 248 Ill. 11.

Pen. Code 1895, art. 199, provides that the term "place of public amusement" shall be construed to mean circuses, theaters, va-

riety theaters, and such other amusements as are exhibited, and for which an admission fee is charged. *Ex parte Jacobson*, 115 S. W. 1193, 1194, 55 Tex. Cr. R. 237.

According to Pen. Code 1895, art. 199, a "place of public amusement," at which the sale of liquors on Sunday is prohibited, is construed to mean circuses, theaters, variety theaters, and such other amusements as are exhibited and for which an admission fee is charged. *Muckenfuss v. State*, 116 S. W. 51, 52, 55 Tex. Cr. App. 229, 20 L. R. A. (N. S.) 783, 131 Am. St. Rep. 818, 16 Ann. Cas. 768.

Under Pen. Code Tex. art. 199, forbidding the keeping open of "places of public amusement" on Sunday, and defining such places to mean theaters, etc., and such other amusements as are exhibited and for which an admission fee is charged, a contract providing for the appearance and exhibition of persons as performers in places of public amusement on Sunday in theaters, for admission to which a fee is charged, cannot be enforced in the courts of that state, in so far as it includes Sunday exhibitions. *La Crandall v. Ledbetter*, 159 Fed. 702, 708, 86 C. C. A. 570.

Pen. Code 1895, art. 199, provides that the proprietor of any place of public amusement, or the agent or employé of any such person who shall permit it to be open for the purpose of public amusement on Sunday shall be fined, and defines the term "place of public amusement" to include circuses, theaters, variety theaters, and such other amusements as are exhibited, and for which an admission fee is charged. Defendant, in a prosecution under such section as the agent and employé of an amusement company, was shown to have been the ticket agent and in the ticket office of the building in which the performance was given, and to have sold admission tickets thereto, but urged that under the statute only the proprietor could "permit" the place to be open; and hence that no mere subordinate could be convicted thereunder. Held, that the intent of the section was to make it an offense for any agent or employé of the proprietor to do any act toward keeping the theater open and running on Sunday, whether he had control of it, or could permit it to be opened, or not; and hence that defendant was guilty of the offense. *Oliver v. State (Tex.)* 144 S. W. 604, 609.

#### PLACE OF PUBLIC RESORT

See Public Resort.

#### PLACE OF PUBLIC WORSHIP

See, also, Place of Worship.

An indictment under Pen. Code, § 342, is sufficient which alleges the carrying of a pistol to "a place of worship," and locates that place by name, though it fails to charge that any public gathering was being held at the time; the term "a place of public wor-

ship" importing such a gathering. *Amorous v. State*, 57 S. E. 999, 1001, 1 Ga. App. 313.

### PLACE OF RESIDENCE

See Principal Place of Residence; Usual Place of Residence.

See, also, Residence.

Under a statute relating to elections, providing that, on petition to strike the name of any person deceased, etc., from the list of voters, summons shall be served at his "place of residence" given in the registry, where the house in which a voter resided had been destroyed, and there was no building, service by laying the summons on the lot and putting a brick on it is sufficient. *Applegarth v. Carter*, 62 Atl. 712, 713, 102 Md. 341.

The place of a steamboat corporation's residence, within Pub. St. 1901, c. 56, § 12, and Laws 1905, p. 414, c. 25, § 1, providing for the taxation of vessels, etc., at the owner's "place of residence," is the place where its business is principally conducted, and not the place where it merely maintains an office and holds stockholders' meetings, and the situs of the corporation's business is not changed by a declaration in its articles of incorporation that the place of business shall be a place other than where it actually conducts its business. *Woodsum Steamboat Co. v. Town of Sunapee*, 69 Atl. 577, 74 N. H. 495.

The intent of the Legislature in enacting Rev. St. 1899, § 4160, relating to the construction of statutes, and providing that the construction of all statutes shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the Legislature or of the context of the same statute, and the place where any person having no family shall generally lodge, shall be deemed the "place of his residence," was simply to furnish additional rules of construction which the court might or might not use as the case might require, and the intent was not to construe all statutes itself by defining the word "residence," and the revenue statute (Rev. St. 1899, c. 149 [Ann. St. 1906, pp. 4198-4322]) providing that all personal property shall be assessed in the county and district in which the owners reside, and making no distinction as to the place where property of persons who have families and those who have none shall be assessed, the rule of construction under section 4160 is not applicable, being repugnant to the intention of the Legislature. Where a person worked a farm, keeping a furnished room in the house thereon, which he occupied when there, and claimed his residence there, but generally and continuously lodged with his parents in another school district because they were old and helpless, and he considered it his duty to stay with them at night, returning to his

farm every morning, the district where his farm was situated was the district of his residence, within chapter 149, providing that all personal property shall be assessed in the county and district where the owners reside. *State ex rel. Kelly v. Shepperd*, 117 S. W. 1169, 1172, 218 Mo. 656, 131 Am. St. Rep. 568.

### PLACE OF SOJOURN

"Place of his sojourn," under Code Civ. Proc. § 435, providing for substituted service on a resident where the "place of his sojourn" cannot be ascertained, etc., means a definite locality, and not an entire country. *Hess v. Felt*, 112 N. Y. Supp. 470, 471, 60 Misc. Rep. 541.

### PLACE OF STARTING

As used in Rev. St. Tex. 1895, art. 4494, requiring railroads to furnish reasonable accommodations for the transportation of passengers and property as shall be presented within a reasonable time at the place of starting, as applied to a Texas railroad company whose line ended at the boundary of the state, did not require the railroad company to maintain a station at the place where the railroad stopped, without reference to whether such place would be in an unbroken forest, a wild and unsettled prairie, a river, swamp, or the middle of a stream forming the state boundary, but should be construed to mean the "place" or the "town" from which the railroad started. *Atchison, T. & S. F. Ry. Co. v. State*, 112 Pac. 1010, 1016, 27 Okl. 565 (quoting Railroad Commission of Texas v. Chicago, R. I. & G. R. Co., 117 S. W. 794, 102 Tex. 393).

### PLACE OF STORAGE

In a prosecution for a violation of Hurd's Rev. St. 1905, c. 38, § 125, it does not avail defendant that corn exceeding the amount of the receipt was in cars standing on railroad tracks in a yard which was a part of the elevator property and operated in conjunction with it; the "place of storage," within that section, being the elevator, and not the yard. *McReynolds v. People*, 82 N. E. 945, 949, 230 Ill. 623.

Hurd's Rev. St. 1905, c. 38, § 124, provides that whoever fraudulently utters any receipt or other written evidence of the delivery of any grain, flour, pork, etc., when the quantity specified therein has not in fact been delivered, and is not at the time of issuing the same still in store and the property of the person to whom the receipt is issued, shall be imprisoned as therein prescribed. Section 125 provides that whoever, having given any such receipt, shall sell or in any manner remove from the "place of storage" any such property without the consent of the holder of the receipt shall be imprisoned as therein prescribed. Held, that the words "wharf or 'place of storage' or in

any warehouse, mill, store or other building," describing the place in which the property is situated, did not limit the operation of sections 124 and 125 to buildings alone in which goods were received in store for hire, but that the same extended to all buildings in which goods were stored, whether for hire or otherwise, and hence one who, being the owner of an elevator, and having issued a receipt for grain therein also owned by him, thereafter removed the same without the consent of the holder violated section 125. *McReynolds v. People*, 82 N. E. 945, 949, 230 Ill. 623.

#### PLACE OF TRADE

A "place of trade" is a place devoted to the business of buying and selling, or of plying some mechanical form. *Sharpe v. Husey*, 114 N. W. 1118, 1119, 134 Wis. 618.

#### PLACE OF TRIAL

The "place of trial," in the Code provisions relating to actions involving title to land, is the place where the action is brought and where the record is preserved for the guidance of those who may be interested in land titles. In title 4 of the Code the words "place of trial" are synonymous with "venue." *Weathersbee v. Weathersbee*, 62 S. E. 838, 839, 82 S. C. 4.

#### PLACE OF TRUST OR PROFIT

As used in Const. art. 14, § 7, providing that no person, who shall hold any office or place of trust or profit, under the United States, or any department thereof, or under the state, etc., shall hold or exercise any other office or place of trust or profit under the authority of the state, provided, etc., the terms "office" and "place of trust" are synonymous, and have reference to a public position, involving a delegation to the individual of some part of the sovereign functions of the government, to be exercised for the public benefit. *State v. Smith*, 59 S. E. 649, 650, 145 N. C. 476.

#### PLACE OF WORSHIP

See, also, Place of Public Worship.

A public school opened with prayer and the reading without comment of passages from King James' translation of the Bible, during which pupils are not required to attend, is not a "place of worship," nor are its teachers "ministers of religion," within the meaning of Const. § 5, providing that no person shall be compelled to attend any place of worship or contribute to the support of a minister of religion. *Hackett v. Brooksville Graded School Dist.*, 87 S. W. 792, 793, 120 Ky. 608, 69 L. R. A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 136.

The holding of morning exercises in the public schools, consisting of the reading by the teacher without comment, of nonsectarian extracts from the Bible, King James' version,

and repeating the Lord's Prayer, and the singing of appropriate songs, in which the pupils are invited, but not required, to join, does not convert the schools into a place of worship in violation of Const. art. 1, § 6, providing that no one shall be compelled to support "any place of worship," the phrase "any place of worship" meaning a place where a number of persons meet together for the purpose of worshipping God. *Church v. Bullock*, 109 S. W. 115, 118, 104 Tex. 1, 16 L. R. A. (N. S.) 860.

#### PLACE TO WORK

See Safe Place to Work.

#### PLACE WHERE REFRESHMENTS ARE SERVED

Other places where refreshments are served, see Other.

### PLACER

"Placers" are merely superficial deposits, occupying the beds of ancient rivers or valleys, washed down from some vein or lode." *Northern Pac. R. Co. v. Soderberg*, 23 Sup. Ct. 365, 367, 188 U. S. 532, 47 L. Ed. 575.

The term "placer," as used in Act July 9, 1870, permitting the entry of placer claims, contemplates merely superficial deposits occupying the beds of ancient rivers or valleys washed down from some vein or lode. *Northern Pacific R. Co. v. Soderberg*, 23 Sup. Ct. 365, 367, 188 U. S. 526, 47 L. Ed. 575.

#### Lode distinguished

A "placer" is earth, sand, or gravel containing valuable mineral in particles, as distinguished from a lode which is a solid vein of metal. They are two distinct things and not two different states of the same thing, and hence a reservation from sale of one of these things leaves nothing to the determination of the state's sales agent. *McCarter v. Sooy Oyster Co.*, 75 Atl. 211, 215, 78 N. J. Law, 394.

#### PLACER GOLD

As merchandise, see Merchandise.

#### PLACER LOCATION

A "placer location" is the location in accordance with the acts of Congress of a tract of land for the mineral-bearing or other valuable deposits upon or within it that are not found in lodes or veins in rock in place. *Webb v. American Asphaltum Min. Co.*, 157 Fed. 203, 204, 84 C. C. A. 651.

"A 'placer location' is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface. A lode or vein may be known to exist at the time of the placer location or not known until long after the patent therefor has been issued.

There being no necessary connection between the placer and the vein, Congress \* \* \* has provided that in an application for a placer patent the applicant shall include any vein or lode of which he has possession, and that if he does not make such inclusion the omission is to be taken as a conclusive declaration that he has no right of possession of such vein or lode. If, however, no vein or lode within the placer claim is known to exist at the time the patent is issued, then the patentee takes title to any which may be subsequently discovered." *Clipper Min. Co. v. Eli Mining & Land Co.*, 24 Sup. Ct. 632, 635, 194 U. S. 220, 48 L. Ed. 944.

## PLAIN

### PLAIN GLASS BOTTLES

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, 30 Stat. 158, for "plain" glass bottles, held not to include fancy bottles with metal mountings. *Mark Cross Co. v. United States*, 150 Fed. 610, 611.

### PLAIN IMPLICATION

The phrases "plain implication" and "necessary implication" have exactly the same meaning when used in reference to the construction of deeds. By these is not meant a physical necessity, but a logical necessity. Where a clause is enlarged in its effect beyond the import of the words used on the theory of an intent established by an implication, it must be necessary to so enlarge it in order to give effect to the plain and express provisions of other clauses, or the probability of intent must be so strong that the contrary thereof cannot be supposed. *Griffin v. Fairmont Coal Co.*, 53 S. E. 24, 65, 59 W. Va. 480, 2 L. R. A. (N. S.) 1115.

### PLAIN MEANING

The "plain meaning" of language used in correspondence or other contract writing is simply the meaning of the people who did not write the document, and to insist that the language used in the writing must be given this "plain meaning" involves the fallacy of assuming that there is or ever can be some one, real, or absolute meaning. There can be only some person's meaning, and that person's meaning the law is seeking is the writer of the document. *New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co.*, 154 Fed. 296, 303, 83 C. C. A. 1 (citing 4 Wig. § 2462).

### PLAIN PAPER ENVELOPES

See Paper Envelopes.

### PLAIN SIGHT

The words "plain sight" in an instruction in a railroad crossing accident case, that it was plaintiff's duty when he arrived at a point from which a train could be seen to take reasonable precautions, by looking in the direction from which a train might

come, to ascertain if a train, which might endanger him, was coming, and if the train which injured him was in plain sight from the point where it was his duty to look, and the circumstances suggested a reasonable probability of danger, an attempt to cross was negligence, mean nothing more than that the train was within the range of plaintiff's sight, had he been looking in that direction, and so are unobjectionable. *Case v. Chicago Great Western Ry. Co.*, 126 N. W. 1037, 1040, 147 Iowa, 747.

### PLAIN, SPEEDY, AND ADEQUATE REMEDY

*Riverside City Charter* (St. 1907, p. 1330) § 193, creates a police court, and gives it jurisdiction, concurrent with the justice's court, of all civil actions and proceedings arising within the city limits. Defendant in an action in that court to recover on a note, after his demurrer for want of jurisdiction had been overruled, applied for a writ of prohibition against the police court and the judge thereof. Code Civ. Proc. § 1102, defines the writ of prohibition and its effect. Section 1103 provides that the writ may be issued to an inferior tribunal in all cases where there is not a "plain, speedy, and adequate remedy" in the ordinary course of law, and section 974 gives an appeal from the judgment of a justice's or police court. Held, that the prohibition was properly denied, because under section 974 the applicant had a plain and adequate remedy at law by appeal. *Simpson v. Police Court of City of Riverside*, 117 Pac. 553, 554, 160 Cal. 530.

### PLAIN VIEW

Where a saloon was conducted in the basement of a building, and the bar was so arranged that it commenced 35 feet from the nearest part of the sidewalk, and the tops of the windows were but 4 feet above the walk, it did not comply with the mulek law, requiring that the bar should be established "in plain view of the street," unobstructed by screens, blinds, or other devices. "Plain view" of the bar means plain view from the street or sidewalk used by pedestrians in the usual and ordinary way. *McColl v. Raily & Fisher*, 103 N. W. 972, 973, 127 Iowa, 633.

### PLAINLY

A warranty, indorsed on a policy and referred to in the body thereof as indorsed thereon, is plainly expressed in the policy, within Code 1907, § 4379, forbidding warranties or other stipulations of the application to be made a part of the policy by reference, but must be "plainly expressed therein." *Hunt v. Preferred Accident Ins. Co. of New York*, 55 South. 201, 202, 172 Ala. 442.

The requirement that notice that a dictionary, on which the copyright has run out, is not published by the original publisher should be "plainly printed" means that it



should be printed with the intention to be read and understood. *G. & C. Merriam Co. v. Saalfeld*, 198 Fed. 369, 376, 117 C. C. A. 245.

## PLAINTIFF

See *Equitable Plaintiff*; *Legal Plaintiff*.

The "plaintiff" is a constituent part of every court, and is the one who complains of injury done. *Accousi v. G. A. Stowers Furniture Co. (Tex.)* 83 S. W. 1104, 1105.

In actions at law, the complaining party is usually known as "plaintiff." *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389, 393.

A "plaintiff" is the person who in a personal action seeks a remedy in a court of justice for an injury to, or a withholding of, his rights. *Burrell v. United States*, 147 Fed. 44, 46, 77 C. C. A. 308.

The "plaintiff" in a case is the actor; the one who invokes the aid of the law and puts its machinery in motion to establish a right or redress a grievance. On him necessarily rests the burden of prosecuting the suit without unnecessary or unreasonable delay. *Latta v. Wiley (Tex.)* 92 S. W. 433, 437.

"In condemnation proceedings, the words 'plaintiff' and 'defendant' can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors; one to acquire title, the other to get as large pay as he can." *Metropolitan Water Co. v. Kansas City*, 164 Fed. 738, 745 (citing *Mason City & Ft. D. R. Co. v. Boynton*, 27 Sup. Ct. 321, 204 U. S. 576, 51 L. Ed. 629).

In a complaint for personal injuries, and resulting in the death of plaintiff's intestate, the inadvertent use of the word "plaintiff" in one instance in a paragraph, in which in all other instances the words "plaintiff's intestate" were used, did not render the complaint meaningless and fatally defective. *King v. Mail & Express Co.*, 98 N. Y. Supp. 891, 892, 113 App. Div. 90.

### Defendant demanding set-off or counterclaim

Though, by a state statute, the word "plaintiff" embraces a defendant who demands a set-off or counterclaim, "plaintiff," in a suit in a court of such state, is not to become theoretically or constructively a defendant, entitled to the removal of the cause under the federal statute. *Illinois Central R. Co. v. A. Waller & Co.*, 164 Fed. 358, 361.

### As plaintiff in execution

The "plaintiff" referred to in Rev. St. 1892, § 1200, providing that in claim proceedings, if the verdict is for the "plaintiff," the court shall enter judgment awarding a recovery by the "plaintiff" from the defend-

ant and his sureties, means the "plaintiff" in execution. *Strobhar v. Jesse French Piano & Organ Co.*, 37 South. 177, 178, 48 Fla. 158.

### As plaintiff's agent

Under Civ. Code 1893, § 4130, permitting the verification of an account by the plaintiff, the term "plaintiff" includes, by necessary implication, plaintiff's agent. *Coffee v. McGaskey Register Co.*, 66 S. E. 1062, 1034, 7 Ga. App. 425.

### Construed in plural

The word "plaintiff," in an instruction in an action in which there are two plaintiffs, is not necessarily misleading, but the jury must understand the word to mean the parties bringing the action. *Citizens' Gas & Oil Min. Co. v. Whipple*, 69 N. E. 557, 560, 32 Ind. App. 203.

Code Civ. Proc. § 417, requires a summons to be subscribed by "plaintiff's attorney," who must add to his signature his office address; and section 418 prescribes, as part of the form of a summons, the words, "You are hereby summoned \* \* \* to serve a copy of your answer on the plaintiff's 'attorney.'" Held, that the use of the singular form of the word "attorney" does not indicate that there can be no more than one "attorney" on the plaintiff's side of the case; the use of the word being no more significant than the use of the singular form of the word "plaintiff's." In either case the singular is used as the simple and natural mode of the expression without any intent to exclude the plural but to embrace it. *Jones v. Conlon*, 95 N. Y. Supp. 255, 256, 48 Misc. Rep. 172.

## PLAITS

See *Straw Braids or Plaits*.

## PLAN

See *European Plan*; *Gross Premium Plan*; *Installment Premium Plan*.

"The word 'plan,' in speaking of a public work, is ordinarily used to describe the general plan or system of work." *Bowden v. Kansas City*, 77 Pac. 573, 575, 69 Kan. 587, 66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955 (citing *Johnston v. District of Columbia*, 6 Sup. Ct. 923, 118 U. S. 19, 30 L. Ed. 75).

A "plan," when applied to a building, is an architectural drawing representing the horizontal sections of the various floors or stories of the building, the disposition of apartments and walls, with the situation of the doors, windows—in fact, represents the different stories as they are to be built, and the whole as it will appear when completed. *Nave v. McGrane*, 113 Pac. 82, 85, 19 Idaho, 111.

**Specifications distinguished**

"Plans" may be important, or even necessary, to indicate the methods to be followed and the results to be accomplished in carrying out a building contract. But there is a distinction between them and specifications that provide for the kinds, quality, and quantity of materials to be used and the work to be done, and the time and manner of doing it, without which the contract would be incomplete and ineffective. They are not in the same sense nor to the same extent an integral part of the contract. Their office is rather to illustrate and explain what is to be done. In order to sustain a mechanic's lien, specifications which are expressly made a part of the contract, or are referred to as a part thereof, must be filed with the contract; but the plans of the work, not being, like the specifications, an integral part of the contract, need not be filed. *Knelly v. Horwath*, 57 Atl. 957, 958, 208 Pa. 487.

The word "plans," as used in Rev. St. 1899, § 5859, as amended, requiring contracts for street improvements to be let to the lowest bidder on plans and specifications filed with the city clerk, means a profile, drawing, or picture showing, in a general way, the character of the work, while "specifications" means a detailed statement of the character of the improvements, the purpose of the provision being that by filing plans and specifications information would be furnished to enable bidders to intelligently figure the cost; and, where there was nothing complicated or difficult to understand about grading or paving the street to be improved, and all the details of the work were fully stated, both in the ordinance authorizing it and in the specifications filed, the omission to file plans did not invalidate the contract. *McCoy v. Randall*, 121 S. W. 31, 34, 222 Mo. 24.

**PLANS AND SPECIFICATIONS**

Where a county board empowered a committee to investigate and report regarding "the best manner of raising funds" for the construction of a new courthouse, and to make recommendations, and a report in writing, together with plans and specifications, on or before a specified date, such committee had no authority to decide to build the courthouse, nor to employ architects to prepare "working plans and specifications," but only preliminary plans and specifications for the information of the board. *Kinney v. Manitowoc County*, Wis., 135 Fed. 491, 494, 68 C. C. A. 203.

"Plans and specifications" are "in no sense to be confused with a 'preliminary survey and estimate of cost.' They are entirely distinct and dissimilar things. The one is only a measurement and survey of the territory to be covered by the contemplated plant and an approximate estimate of cost. The other is an accurate, detailed working plan,

showing materials to be used and manner of construction." Hence an engineer, who prepared plans and specifications for the erection of a waterworks system under an agreement to be paid a percentage of the cost of the plant, may, when the project is abandoned, recover for the services actually performed in preparing such plans and specifications. *Jenks v. Town of Terry*, 40 South. 641, 88 Miss. 364.

**PLANING MILL****PLANING MILL BUILDING**

In a policy covering a planing mill and additions, where a shaft from an engine room furnished the motive power to the mill, and where the shavings from the mill were carried by machinery to the engine house, and the buildings and machinery were not only connected, but inseparable, the words "planing mill building" would seem to be broad enough to include the engine room. *Guthrie Laundry Co. v. Northern Assur. Co. of London*, 87 Pac. 649, 651, 17 Okl. 571, 10 Ann. Cas. 936 (quoting *Home Mut. Ins. Co. v. Roe*, 36 N. W. 594, 71 Wis. 33).

**PLANK**

As weapon, see *Weapon*.

**PLANK LINOLEUM**

"Plank linoleum," made by running upon the burlap foundation paste of two colors in stripes of equal width, a process differing from that employed in making inlaid linoleum, is, under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 337, 30 Stat. 180, dutiable as "linoleum \* \* \* figured or plain," rather than as "inlaid linoleum." "Plank linoleum" is made by running upon the burlap paste of two colors in stripes of equal width. The paste is prevented by machinery from mixing, and establishes between the stripes a fairly definite line. Pressure follows immediately upon the application of the paste to the burlap. The effect produced somewhat resembles a floor laid in alternate planks of different woods. *United States v. Scott & West*, 164 Fed. 285-287.

**PLANT (VERB)**

"Planting" means, in 'oysterman's phraseology,' as counsel say, 'depositing with the intent that the oysters shall remain until they are fattened.'" *McCready v. Virginia*, 94 U. S. 391, 397, 24 L. Ed. 248.

**PLANT**

See *Deciduous Plant*; *Manufacturing Plant*; *Pottery Plant*; *Waterworks and Electric Light Plant*; *Ways, Works, Machinery, or Plant*.

The tools, machinery, and articles employed by subcontractors in the work of constructing a subway is known as a "plant." *McCabe v. Hunt*, 82 N. Y. Supp. 664, 666, 40 Misc. Rep. 466.

Substances used in dressing a pulley belt in a manufacturing plant to keep the belt from slipping are a part of the "plant," within the employer's liability act. *Riddle v. Bessemer Soil Pipe Co.*, 54 South. 525, 526, 170 Ala. 559.

Under Employer's Liability Act, subd. 1, making a master liable for a defect in the ways, works, machinery, and plant, a ladder used in doing the master's work is a part of the "plant," and the master is liable for injuries caused by a defect in it. *Grasselli Chemical Co. v. Davis*, 52 South. 35, 37, 166 Ala. 471.

A ladder used by a master in pursuit of his business as a contractor, engaged in the construction of a building, is a part of his "plant," within the liability act, providing that, when a servant is injured in the business of the master, the master is liable, as if the servant were a stranger, when the injury is caused by a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master. *Huyck v. McNerney*, 50 South. 926-929, 163 Ala. 244.

A servant injured by a defect in chain tongs used on a pipe machine may recover under Labor Law, § 202, as amended, providing that if an employé while exercising ordinary care is injured by reason of any defect in the condition of the ways, works, machinery or plant of his employer he may recover; chain tongs being a part of the master's plant, the term "plant" in its ordinary sense including whatever apparatus other than stock in trade an employer uses to carry on his business. *McKeon v. Proctor & Gamble Mfg. Co.*, 135 N. Y. Supp. 291, 294, 76 Misc. Rep. 599.

The word "plant" in Code 1896, § 1749, declaring that a master is liable for any injury to his servant caused by any defect in the ways, works, machinery, or plant, comprises whatever apparatus, fixtures, or tools a master uses in his business. Any injury resulting to an employé from the negligence of the employer, or of another employé intrusted by the common master with the duty of seeing that his plant is in proper condition, in not providing suitable tools, implements, or appliances, or in allowing such tools, implements, or appliances to be in a defective condition is within such provision. *Sloss-Sheffield Steel & Iron Co. v. Mobley*, 36 South. 181, 184, 139 Ala. 425.

The word "plant," as used in the mechanic's lien act, means property owned or used in carrying on some trade or business, and cannot be applied to a row of buildings,

where the only business carried on is house-keeping. *Todd v. Gernert*, 72 Atl. 249, 223 Pa. 103.

Mechanic's Lien Law June 4, 1901 (P. L. 432) § 2, provides that every improvement and the curtilage pertinent thereto shall be subject to a lien for debts due the contractor or subcontractor in the erection or removal thereof. Section 8 declares that the curtilage shall include other structures, whether newly erected or altered, and forming part of a single business or residential plant. Section 12 provides that a single claim may be filed against more than one structure if they are all intended to form part of one plant. Held, that where a contractor with two distinct contracts for building a house and garage on adjoining lots belonging to the same owner, submitted two separate lots of materials to a subcontractor at different times, who furnished the materials, the subcontractor cannot file one lien against both structures. The word "plant," in section 12, Act June 4, 1901 (P. L. 437), is used in its commercial sense, as property owned or used in carrying on some trade or business. *Schively v. Radell*, 76 Atl. 209, 211, 227 Pa. 434.

Where an agreement indemnifying a contractor's surety provided that, in the event of the contractor's being unable to complete the contract, the contractor thereby assigned such "plant" as the contractor then owned or had upon the work to the surety, the term "plant" was sufficient to include lumber and other materials intended for use in the building in process of erection, together with horses, carts, and harnesses used in connection with the work. *Wood v. United States Fidelity & Guaranty Co.*, 143 Fed. 424, 425.

"Plant," as applied to a factory, is defined by the Century Dictionary to consist of "the fixtures, machinery, tools, apparatus, appliances, etc., necessary to carry on any trade or mechanical business or any mechanical operation or process." The Standard Dictionary defines it as "a set of machines, tools, etc., necessary to conduct a mechanical business, often including the buildings and grounds or, in case of a railroad, the rolling stock, but not including material or product; hence the permanent appliances needed for any institution, as a post office." The Imperial Dictionary defines the word to mean: "The fixtures, machinery, tools, apparatus, etc., necessary to carry on any trade or mechanical business. The locomotives, carriages, vans, trucks, etc., constitute the plant of a railway." In the Encyclopedic Dictionary, the word is defined: "The tools, machinery, apparatus, and fixtures used in a particular business; that which is necessary to the conduct of any trade or mechanical business or undertaking." Webster's International Dictionary defines it: "The whole machinery and apparatus employed in carrying on a trade or mechanical business;

also sometimes including real estate and whatever represents investment of capital in the means of carrying on a business, but not including material worked upon or finished products; as the plant of a foundry, mill, or railroad." "It will be noticed that the only definition including real estate is found in Webster's International Dictionary, and there it is qualified by the word 'sometimes.' That there may be instances in which courts will hold real estate to be a part of a plant cannot be doubted. The ground occupied by the factory or mill, or even that part adjoining the factory used for offices or warehouses, may be treated as a part of the plant, but a large tract of land, miles from the plant proper, to be used for the purpose of raising the raw material for use in the factory, has never been held to be a part of the plant." *Old Colony Trust Co. v. Standard Beet Sugar Co.*, 150 Fed. 677, 680.

A corporation was empowered to manufacture, sell, and distribute electricity for lighting, heating, and manufacturing purposes in two towns, and to maintain a dam on a river, and take as for public use any water rights or land, and to flow any lands to construct its dam and the establishment of its plant, but not to flow any mill privilege. It was empowered to transmit electric power in said town in such manner as might be expedient, and to erect poles and wires. The town and the corporation were authorized to contract for public lighting. Held, that the word "plant" in defendant's charter included its poles and wires. *Brown v. Gerald*, 61 Atl. 785, 786, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526.

"Plant" is "the fixtures, machinery, tools, apparatus, appliances, etc., necessary to carry on any trade or mechanical business, or any mechanical operation or process." In its ordinary sense it "includes whatever apparatus is used by a business man in carrying on his business, \* \* \* all goods and chattels fixed or movable, alive or dead, which he keeps for permanent employment in his business." Where plaintiff's agent, when taking an order from defendant for an engine with connections, was present at defendant's well, wherein was installed a pump, invented by defendant, and knew that defendant desired to obtain power to utilize the pump in raising water to irrigate his crop, the word "plant," in the provision of the order that payment shall be as soon as "plant" is running in good order, will be held to cover and include the pump as well as the engine; its operation being essential to accomplish the purpose desired. *Scott Supply & Tool Co. v. Roberts*, 93 Pac. 1123, 1124, 42 Colo. 280 (quoting and adopting the definitions in Cent. Dict.).

#### Of railroad

Rev. St. Ind. § 7083, provides that every railroad or other corporation, except munic-

ipal, operating in the state, shall be liable in damages for personal injury suffered by any employé while in its service, where such injury is suffered by reason of any defect in the condition of "ways, works, plant, tools, and machinery connected with or in use in the business of such corporation," if the employé so injured is in the exercise of due care and diligence, and the defect is the result of negligence on the part of the corporation or some person intrusted by it with the duties of keeping such part of its plant in proper condition. Held, that a temporary scaffold constitutes a part of the plant of a railroad corporation, within the meaning of such act. *Cleveland, C. & St. L. Ry. Co. v. Austin*, 127 Ill. App. 281, 284.

## PLANTATION

Where a reservation in a timber deed provided that the vendors should have the right to use such timber from the land as might be necessary for ordinary plantation purposes connected with the land, not including the right to clear any of the land, the grantors or those claiming under them were entitled to use the timber for every other ordinary plantation purpose, than clearing any part of the land, etc., construing the word "ordinary" in its usual acceptation as "common," "usual," "common occurrence," "usual practice," and the word "plantation" as a cultivated estate, a large farm for raising the different products of agriculture. *Midland Timber Co. v. Pegues*, 76 S. E. 32, 34, 93 S. C. 82.

## PLANTER

A "planter" is one who is engaged in the business of producing crops from the soil, and it is immaterial whether he sows and reaps with his own hand, with the hand of a tenant, the hand of a cropper, or the hand of a hired laborer. *Butler, Stevens & Co. v. Georgia & A. Ry. Co.*, 47 S. E. 320, 322, 119 Ga. 959.

## PLANTS

In construing the provision in Tariff Act Aug. 27, 1894, c. 349, § 1, Schedule G, par. 234½, 28 Stat. 525, for "lily of the valley \* \* \* plants used for forcing," held that lily of the valley roots, sprouted, which are imported for forcing, are dutiable thereunder, being included within the term "plants," in a popular sense, though not technically. *McAllister v. United States*, 147 Fed. 773.

## PLASTERER

As machinist, see Machinist.

## PLASTIC

Where a term is defined in a patent, that is the construction to be given it, rather

than the definition found in the dictionaries; and held, therefore, in a patent for the interior fire-finishing of the glass article which provides that it is to be subject to the fire blast when in a "plastic" condition, by this term according to the patent is meant before the imperfections imparted to the inner surface of the mold by the plunger have become permanent by the formation of a glaze. *Blair v. Jeannette-McKee Glass Works*, 161 Fed. 355, 358.

## PLAT

A "plat" is a representation of land on paper, appealing to the eye by means of lines and memoranda rather than by words. *Thompson v. Hill*, 73 S. E. 640, 644, 137 Ga. 308.

## PLATTED

The term "platted," as used in *Burns' Ann. St. 1901*, § 8658, giving the council of a city jurisdiction of a proceeding to annex platted territory, means legal plats executed for town purposes as provided by sections 4411, 4413. *Ernsperger v. City of Mishawaka*, 80 N. E. 543, 544, 168 Ind. 253.

## PLATTED LOT

Lot as including, see Lot.

## PLATE

See Saw Plates; Steel Plates.

## PLATE IRON

In construing the provisions for "plate iron or steel sheared," and for "sheared \* \* \* shapes," found respectively in paragraphs 126, 135, Schedule C, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 159, 161, held, that the former was intended to cover stock plates of a general commercial shape and for ordinary use, and the latter something not in general stock, but sheared to a particular or given shape, and that certain sheets of steel, cut, according to a sketch, and for a special purpose, to a specific shape, varying very slightly from a rectangle, are within the latter provision. In re *F. B. Vandegrift & Co.*, 139 Fed. 790, 792; *United States v. Vandegrift*, 142 Fed. 448, 73 C. C. A. 564.

## PLATEN

In printing, a "platen" is the flat part of a press which comes down upon the form and by which the impression is made. A platen press is any form of printing press which gives impression from a platen, in distinction from rotary or cylinder press, which gives the impression from a cylinder or a curved surface. The *Century Dictionary* defines the term as: "(a) The part of a printing press which presses the paper against the type and by which the impression is made; (b) hence an analogous part of a typewriter on which the paper rests to receive an im-

pression; (c) the movable table of a machine tool, as a planer, on which the work is fastened and presented to the action of the tool." *Dey Time Register Co. v. Syracuse Time Recorder Co.*, 152 Fed. 440, 448.

## PLATES

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, for "plates" of steel, does not include an engraved piece of steel, 15 feet long, 4 feet 2 inches wide, 6.5 inches thick, and weighing over six tons, which is a completed article ready for use in glass manufacture, because it is not a "plate," and because said paragraph is limited to articles in an incomplete condition. *Theodore W. Morris & Co. v. United States*, 169 Fed. 666; *Id.*, 174 Fed. 656, 657, 98 C. C. A. 410.

Misnomer alone cannot make a tariff provision applicable; and the appellation of "drawplates" cannot bring articles within the enumeration of "plates," which are not plates in form, nor commercially known as plates, and to which such name has clung inappropriately because plates were formerly used for the same purpose. *Newman v. United States*, 159 Fed. 123, 124, 86 C. C. A. 511.

The provision for steel plates in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, while not covering all steel articles that are known as plates, includes so-called monogram dies and plates used in engraving, which, besides being called plates, are within the dictionary definitions of "plates." *United States v. Sellers*, 160 Fed. 518, 519.

Thin, checkered, steel plates about 12 by 5 feet, specially adapted for use in the construction of floors for boiler rooms, are dutiable as steel "plates," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, rather than as "plate \* \* \* steel," under paragraph 126, 30 Stat. 159. *Hill v. R. D. Wood & Co.*, 163 Fed. 51, 89 C. C. A. 635.

## PLATES AND STEEL IN ALL FORMS AND SHAPES

A so-called steel table, engraved, weighing nearly six tons, measuring 12 feet by 4 feet by 6 inches, and mounted like a table top on a frame, held to be within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, for "plates and steel in all forms and shapes." *Morris v. United States*, 140 Fed. 774.

Drawplates and wortles, which are practically completed articles manufactured from steel bars or plates and having a purpose distinct from that of the original product, are not within the provision for plates in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, relating to "plates and steel in all forms and shapes." This provision was not intended to include plates manufactured into some other completed article.

United States v. C. Newman Wire Co., 152 Fed. 488.

### PLATES NOT MANUFACTURED

Plates that have been ground, polished, and planished are not copper in "plates \* \* \* not manufactured," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 532, 30 Stat. 197. United States v. B. F. Drakenfeld & Co., 178 Fed. 258, 259, 101 C. O. A. 618.

### PLATFORM

See Ride on Platform.

As house, see House.

As scaffold, see Scaffold.

Railroad platform as highway, see Highway.

### PLAY

Under Ballinger's Ann. Codes & St. Wash. § 7260, providing that any person who shall deal, "play," or carry on, or open or cause to be opened, or who shall conduct, either as owner, proprietor, employé, whether for hire or not, any game of poker shall be guilty of a misdemeanor, one who merely plays at a game of poker, not having any interest in the place, is within the statute. State v. Smith, 108 Pac. 618, 619, 58 Wash. 235.

Pen. Code 1895, art. 379, as amended by Acts 27th Leg. p. 26, c. 22, makes it an offense for any person to "play" at any game of cards at any house or other public, or at any place except a private residence occupied by a family. Held, that it is an offense to play cards, even without betting, at any place, except at a private residence occupied by a family. Lamar v. State, 95 S. W. 509, 511, 49 Tex. Cr. R. 563 citing Hodges v. State, 72 S. W. 179, 44 Tex. Cr. R. 444; Weaver v. State, 31 S. W. 400, 34 Tex. Cr. R. 554).

The word "shooting," as applied to the game of craps, is synonymous with the word "playing." Indeed, the word "playing," as used in the statute relating to gaming, is simply a generic term. To shoot craps is to play craps. To roll tenpins is to play tenpins. Sims v. State, 57 S. E. 1029, 1 Ga. App. 776.

#### Bet synonymous

Under Pen. Code, § 388, as amended March 28, 1907 (Acts 30th Leg. c. 49), which makes it an offense to bet or wager at any gaming table or any game of any character whatsoever that can be played with cards, there is no distinction between playing and betting, and, when it is charged that an accused "played" at cards, it means that he was betting, or, if it was a banking game, that he exhibited it for the purpose of obtaining bets, and generally the word has such meaning in statutes with reference to gam-

ing. Purvis v. State, 137 S. W. 701, 702, 62 Tex. Cr. R. 302, Ann. Cas. 1913C, 536.

### PLAY (Noun)

A "play" is a dramatic composition for scenic representation by speaking or acting, as a tragedy, comedy, farce, melodrama, or pantomime. People v. Klaw, 106 N. Y. Supp. 341, 351, 55 Misc. Rep. 72 (quoting and adopting the definition in Stand. Dict.).

### PLAY GROUND

As public use, see Public Use (In Eminent Domain).

### PLEA

See Compound Plea; Dilatory Plea; Saving Benefit of Plea.

The office of a "plea" is to set up facts which otherwise would not be apparent to the court, and to pray the benefit of certain legal conclusions from them. Where the grounds of objections to the jurisdiction of the court on appeal appear on the face of the record, a plea to the jurisdiction is unnecessary, and a motion to erase the appeal from the docket is the proper mode of taking advantage of the objections. In re O'Brien's Petition, 63 Atl. 777, 781, 79 Conn. 46 (diting in support of definition Gould, Plead. c. 1, §§ 3, 20; Id. c. 3, § 12; Id. c. 5, § 25; Tweedy v. Jarvis, 27 Conn. 42, 47).

"A 'plea' goes to the bill, not to the service or to the appearance." A defendant in a case incorrectly employs a "plea" to obtain the striking of his name from a motion to transfer the case to another court and from a demurrer which had been filed for the reason that the attorney who made the motion and filed the demurrer had no authority to represent him. Sanderson v. Bishop, 171 Fed. 769, 771.

The word "pleas," as used in 33 Edw. I. St. 2, declaring those to be conspirators who conferred "falsely to move or maintain pleas," is equivalent to "actions." State v. Bacon, 61 Atl. 653, 655, 27 R. I. 252.

#### As answer

See Answer.

#### In equity

A "plea" in equity is in effect an answer which reduces the issue between the parties to a single point. Gilson v. Appleby, 78 Atl. 668, 78 N. J. Eq. 96.

A "plea in equity" is different from an answer in equity and from an answer under our code pleading, being not directly responsive to the bill of complaint in equity, or to the petition under the Code, nor is it the same as a demurrer, but it is more in the nature of a demurrer than of an answer, for as a demurrer admits the facts well pleaded, but only for the purposes of the demurrer, and as the demurrer, if overruled, cannot be read in evidence, so also the plea

in equity is not effective as an admission in courts adhering to the chancery procedure. *Meissner v. Standard Ry. Equipment Co.*, 109 S. W. 730, 731, 736, 211 Mo. 112.

It is the office of a "plea in equity" to present some one single and well-defined ground of defense, which if sustained, will dispose of the case and avoid the expense and delay of a hearing; and in a suit for infringement of a patent the defense of noninfringement cannot properly be presented by a plea, at least where it involves a consideration of evidence extrinsic to the patent itself. *American Sulphite Pulp Co. v. Bayless Pulp & Paper Co.*, 163 Fed. 843, 844.

#### Demurrer

A demurrer to a declaration is not a "plea," within a court rule requiring defendant to elect whether he will demand a jury trial at or before the time of first filing a plea, but in no event after the time allowed by law to plead, and hence an election made within an extended time granted for pleading after overruling a demurrer is made in time. *City of Baltimore v. Thomas*, 80 Atl. 726, 728, 115 Md. 212.

#### PLEA IN ABATEMENT

A "plea in abatement" goes to the writ. *Whiton v. Balch*, 89 N. E. 1045, 1046, 203 Mass. 576.

A "plea in abatement" is essentially a dilatory plea, and must be filed at the first term. *Quillian v. Johnson*, 49 S. E. 801, 803, 122 Ga. 49 (citing Civ. Code 1895, § 5058).

A "plea in abatement" to an indictment may be made when there is a defect in the record which is shown by facts extraneous thereto. *Lindsey v. State*, 69 N. E. 126, 128, 69 Ohio St. 215.

A "plea in abatement" is one in which is set up matter tending to defeat or suspend the suit or proceeding in which it is interposed, but which does not debar the plaintiff from recommencing another action at some other time or in some other way. *Chicago & Bloomington Stone Co. v. Nelson*, 69 N. E. 705, 706, 32 Ind. App. 355.

"Pleas in abatement" do not deny the merits of plaintiff's claim, but simply tend to delay the remedy, and to support such a plea it must appear that the two suits are for the same cause or causes of action, or the identity of the matters involved must be such that a judgment in the first could be pleaded in bar as a former adjudication. *Botto's Ex'r v. Botto* (Ky.) 80 S. W. 174.

A motion to quash an indictment, supported by affidavits, is substantially a "plea in abatement," which is the proper and regular method of attacking the same on the ground that the grand jury had been improperly constituted. *State v. Paramore*, 60 S. E. 502, 503, 146 N. C. 604.

A plea to an indictment, which alleged substantially that the respective counts violated specified provisions of the Constitution and should be quashed and the prosecution abated, was not a "plea in abatement" as contemplated by Rev. St. 1899, § 2562, declaring that no plea of abatement or other dilatory plea to an indictment should be received unless the party offering it should prove the truth thereof by affidavit or other evidence. *State v. Martin*, 129 S. W. 931, 932, 230 Mo. 1, 139 Am. St. Rep. 628.

A plea of the statutory right or privilege to have an action brought against a natural person begun in the county where he resides is a "plea in abatement." *E. O. Painter Fertilizer Co. v. Du Pont*, 45 South. 507, 508, 54 Fla. 288.

"A 'plea in abatement' is a defense to a pending action, and is properly so termed." *Bliss*, Code Pl. § 845; *Bergkofski v. Ruzofski*, 74 Conn. 204, 50 Atl. 585. "What was known under the old practice as a plea in abatement went to some defect or error which merely defeated the present proceeding, but did not show that the plaintiff was forever concluded from maintaining the action." *Baylies*, Code Pleading and Prac. (2d Ed.) 385. And he further says (page 386): "All this has been changed by the Code. That act contemplates but one answer, which shall embrace matter in abatement as well as matter in bar; and the defendant may now unite matter in abatement and matter in bar, and have both tried and determined at the same time." *Groton Bridge & Mfg. Co. v. American Bridge Co.*, 137 Fed. 284, 295 (citing 6 Words and Phrases, pp. 5406-5409).

A "plea in abatement" is a dilatory plea, and, being such, is construed with much greater strictness than an ordinary plea in bar, and no intendment can be taken in its favor. Such a plea must contain the utmost fullness and particularity in statement in every respect, as well as the highest attainable accuracy and precision, leaving on the one hand nothing to be supplied by intendment and on the other no supposable answer unobviated. *O. Callahan Co. v. Wall Rice Milling Co.*, 89 N. E. 418, 419, 44 Ind. App. 372.

A "plea in abatement" is one which goes, not to the merits of the action, but merely postpones it until some requisite disclosed by the plea is complied with. Where, in a proceeding to compel the granting of a liquor license, the objectors pleaded the adoption of local option in the county, in accordance with the local option act of 1908 (Acts Sp. Sess. 1908, c. 2), by a majority vote, the plea was in bar, and not in abatement, and therefore was not required to state any facts beyond those necessary to defeat the right of action, nor was it required to state the facts with the definiteness and certainty

of a plea in abatement. *Kunkle v. Coleman*, 92 N. E. 61, 63, 174 Ind. 315.

A "plea in abatement" must allege fully, not only what is necessary to be answered, but must anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat the plea. *Price v. Wakeham*, 107 S. W. 132, 133, 48 Tex. Civ. App. 339.

"Pleas in abatement" are founded on some defect apparent on the face of the indictment, or on some matter outside the record going to its insufficiency. That the indictment was not returned in open court, but to the trial judge, after all persons had been excluded from the courtroom excepting the prosecuting attorney and another, and that persons not authorized by law were permitted in the grand jury room, was properly raised by plea in abatement. *State v. Firey*, 122 S. W. 1007, 1008, 223 Mo. 194.

**Plea to the jurisdiction distinguished**  
See *Plea to the Jurisdiction*.

#### PLEA IN AVOIDANCE

See *Avoidance*.

#### PLEA IN BAR

A "plea in bar" goes to the merits of the action. *Whiton v. Balch*, 89 N. E. 1045, 1046, 203 Mass. 576.

A "plea in bar" is one which alleges matter in avoidance of a cause of action. Where, in a proceeding to compel the granting of a liquor license, the objectors pleaded the adoption of local option in the county, in accordance with the local option act of 1908 (Acts Sp. Sess. 1908, c. 2), by a majority vote, the plea was in bar, and not in abatement, and therefore was not required to state any facts beyond those necessary to defeat the right of action, nor was it required to state the facts with the definiteness and certainty of a plea in abatement. *Kunkle v. Coleman*, 92 N. E. 61, 63, 174 Ind. 315.

A "plea in bar," as indicated by the word "bar," means a special plea constituting a sufficient answer to an action at law, so-called because it barred (i. e., prevented) the plaintiff from further prosecuting it with effect, and, if established by proof, defeated and destroyed the action altogether. A statute providing that a county warrant, having been delivered that shall not be presented for payment within 5 years from its date, or, having been presented and not paid for want of funds, shall not be again presented for five years after the funds are set apart for payment, shall be "barred" is a limitation of actions on warrants as well as a direction to the county officers. *Wilson v. Knox County*, 34 S. W. 45, 46, 132 Mo. 337 (quoting 1 Burrill, Law Dict. 185).

#### PLEA NON INFREGIT CONVENTIONEM

A "plea non infregit conventionem" is not a proper one, since it pleads a negative to a negative, and two negatives do not make a good issue. But, although the plea is informal, it is not an immaterial one, and will sustain a verdict. It is bad on demurrer, but good on motion in arrest of judgment. To the declaration for breach of the covenant of a lease to surrender the premises in as good condition as when taken, ordinary wear and damage by fire or providential causes alone excepted, alleging that defendant did not surrender in good condition, but with a window broken, and that it was not injured by ordinary wear or fire or providential causes, defendant answered, admitting the leaving of the broken window, but pleading that this did not constitute a breach, but was within the exception, having been caused by the settlement of the building due to the action of the frost and heat. Held, that this was a "plea of non infregit conventionem," which, though not proper, it pleading a negative to a negative, was good in the absence of a demurrer. *Drouin v. Wilson*, 67 Atl. 825, 826, 80 Vt. 335, 13 Ann. Cas. 93.

#### PLEA OF AUTREFOIS ACQUIT

See *Autrefois Acquit*.

#### PLEA OF CONFESSION AND AVOIDANCE

Plea of contributory negligence *as, see* *Contributory Negligence*.

#### PLEA OF CONTRIBUTORY NEGLIGENCE

See *Contributory Negligence*.

#### PLEA OF THE CROWN

In English law, a phrase now employed to signify criminal causes in which the King is a party. *State v. Bacon*, 61 Atl. 653, 656, 27 R. I. 252 (citing *Bouv. Law Dict.* [Rawle's Revision]).

#### PLEA OF GUILTY

"A 'plea of guilty' in a court is a confession of the crime charged in the complaint or indictment." *State v. Call*, 61 Atl. 833, 100 Me. 403.

A "plea of guilty" is a record admission of whatever is well alleged in the indictment. *People v. Earing*, 130 N. Y. Supp. 1099, 1102, 71 Misc. Rep. 615.

A "plea of guilty" differs from a full and voluntary confession, in that, while the latter is merely evidence of guilt, the former is a formal confession before the court on which judgment may be rendered. *State v. Branner*, 63 S. E. 160, 170, 149 N. C. 559.

A "plea of guilty" is a confession of guilt, and is equivalent to a conviction, and the court must pronounce judgment and sentence as on a verdict of guilty. *Lowe v.*



State, 73 Atl. 637, 638, 111 Md. 1, 24 L. R. A. (N. S.) 439, 18 Ann. Cas. 744.

Under a provision of the Penal Code, providing that if a jury shall find any person guilty of murder they shall also find the degree, and if any person shall plead guilty to murder a jury shall be summoned to find the degree, etc., a trial of a prosecution for murder is precisely the same under the plea of guilty as under the plea of not guilty, and in such a case a plea of guilty is not tantamount to a confession of murder in the first degree. *Murray v. State*, 78 S. W. 927, 46 Tex. Cr. R. 400.

#### PLEA OF NOLO CONTENDERE

See Nolo Contendere

#### PLEA OF NON EST FACTUM

See Non Est Factum

#### PLEA OF NONTENANT

See Nontenant.

#### PLEA OF NOT GUILTY

See Not Guilty.

#### PLEA OF RECOUPMENT

See Recoupment.

#### PLEA OF SET-OFF

See Set-Off.

#### PLEA OF TITLE

Code Civ. Proc. § 2951, provides that, in a suit before a justice of the peace, defendant may allege in his answer facts showing that title to real property will come in question. Held, in an action before a justice for breach of contract for the cutting of hoop poles, that a special plea that plaintiff was not the owner of the land, nor the trees cut therefrom, was insufficient as a "plea of title," which means some affirmative, unequivocal assertion on the part of defendant of title to the locus in quo, or some part thereof. *Rose v. Purcell*, 120 N. Y. Supp. 860, 862, 64 Misc. Rep. 674.

#### PLEA SON ASSAULT

See Son Assault.

#### PLEA TO THE JURISDICTION

A "plea to the jurisdiction" is an affirmative plea, for it is only by asserting an affirmative position that the plea can prevail. On the trial of an issue of fact raised by a plea to the jurisdiction the burden is on defendant to establish the averments of his plea. *Pyron v. Ruoha*, 48 S. E. 434, 435, 120 Ga. 1060.

"The distinction between 'pleas to the jurisdiction' and 'pleas in abatement,' which prevailed at the common law, has not been recognized by this court. It follows, therefore, that 'pleas to the jurisdiction,' like ordinary pleas in abatement, may be put in by attorney without admitting jurisdiction of the person. The same result follows from

the provisions of circuit court rule 6. Having provided that a plea of the general issue may be filed with a plea in abatement, which could certainly be signed by attorney without waiving the plea in abatement, it would seem illogical to hold that the dilatory plea must be signed by the party in person." *Fell v. Gorman*, 108 N. W. 282, 283, 144 Mich. 521 (citing 1 Chit. Plead. [16th Ed.] pp. 569, 588; *National Fraternity v. Circuit Judge*, 86 N. W. 540, 127 Mich. 186).

"In equity, 'pleas to the jurisdiction' simply assert that the court of chancery is not the proper court to take cognizance of the rights sought to be enforced by the complainant." A defendant may take advantage of insufficient service of process in a suit in chancery by a plea to the jurisdiction reciting a special appearance. Upon a hearing upon bill and plea raising a question of jurisdiction, the merits may not be gone into further than is necessary to determine the question of jurisdiction. *Groel v. United Electric Co. of New Jersey*, 60 Atl. 822, 825, 69 N. J. Eq. 397 (citing 1 Daniell, Chan. Pl. & Pr. [6th Am. Ed.] p. 621, star page 627).

#### PLEA TO THE PERSON

In equity, "pleas to the person" assert that the complainant is incapacitated to sue, or that the defendant is not the person who ought to be sued. *Groel v. United Electric Co. of New Jersey*, 60 Atl. 822, 825, 69 N. J. Eq. 397 (citing 1 Daniell, Chan. Pl. & Pr. [6th Am. Ed.] p. 621, star page 627).

### PLEADING

See Argumentative Pleading; Frivolous Pleading; Good Pleading; Proper Pleading; Sham Pleading; Subsequent Pleading.

Bill of particular as part of pleading, see Bill of Particulars.

Color in pleading, see Color.

Felo de se in pleading, see Felo De Se. Insufficiency of pleading, see Insufficiency.

New matter in pleading, see New Matter.

"Pleadings" are the juridical means of investing the court with jurisdiction of a subject-matter to adjudicate thereon. *State v. Topham* (Utah) 123 Pac. 888, 894.

"The very object and design of all 'pleading' is that the adverse party may be informed of the real cause of action or defense relied upon by the pleader, and may thus have an opportunity of meeting and defeating it, if possible, at the trial. Unless the complaint fairly accomplishes this purpose, pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands orally before the court at the time of the trial, as is done in courts of justices of the peace." *Soden v. Murphy*, 94 Pac. 353, 354, 42 Colo. 352 (quoting Pom. Rem. & Rem.

Rights, § 554; *Saxonia, N. & R. Co. v. Cook*, 4 Pac. 1111, 7 Colo. 574; *Seymour v. Fisher*, 27 Pac. 240, 16 Colo. 189; *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 21 Pac. 1028, 13 Colo. 117, 4 L. R. A. 767).

"A 'pleading' is primarily and essentially a statement of facts. Where the facts are stated in a pleading, the pleader may and often should state that conclusion from such facts upon which he based his right; but, when the facts upon which the pleader's conclusion is based are not stated, his conclusion from such undisclosed facts goes for nothing, and, not being in itself a relevant fact, is not admitted by a demurrer." *Millville Gas Light Co. v. Sweeten*, 64 Atl. 959, 960, 74 N. J. Law, 39.

A "pleading" is a judicial admission, and is a waiver of all controversy so far as the adverse party may desire to take advantage of it. *Holbrook v. J. J. Quinlan & Co.*, 80 Atl. 339, 346, 84 Vt. 411.

"The principal purpose of written 'pleadings' is to frame and present the issues to be tried." *Tate v. Rose*, 99 Pac. 1003, 1005, 35 Utah, 229.

"Pleadings" are the precise statements of the cause for the relief asked by plaintiff on the one side and the like denial, negative or affirmative, of such cause by the other side, and they must be sufficient, in the absence of such denial, to entitle the plaintiff to the relief asked without evidence in their support. Ind. T. Ann. St. 1899, §§ 3225, 3231, provide that "pleadings" are the written statements by the parties of the facts constituting their respective claims and defenses, and declare that the complaint must contain a statement in ordinary, concise language of the facts constituting the plaintiff's cause of action, and, where the complaint contains more than one cause of action, each shall be distinctly stated in separate paragraphs and numbered. *Bolen-Darnall Coal Co. v. Williams*, 104 S. W. 867, 868, 7 Ind. T. 648.

The words "avers," "says," and "pleas," as used in a "pleading," are equivalent terms, and the use of the word "pleads" means no more than the preceding words, and signifies no more than they would, to characterize the language as a plea, than if it had not been used. *Mylin v. King*, 35 South. 998, 1000, 139 Ala. 319.

Rev. St. 1898, § 4096, authorizing examination of an adverse party otherwise than as a witness on the trial in any action or proceeding, and declaring that such examination may be taken before issue joined to enable the party to "plead," is not limited to a complaint, answer, or reply but extends to a "claim" urged in defense of a proceeding instituted by either party in aid of an action or defense which may be put in issue and tried, including an examination of plaintiff who has brought a proceeding for the examination of

defendant's books and papers before the filing of a complaint, as authorized by section 4183. *Ellinger v. Equitable Life Assur. Soc.*, 104 N. W. 811, 812, 125 Wis. 643.

#### **Affidavit**

The section of the Code relating to verification of "pleadings" has no application to an application and affidavit under Code, § 3901, providing for the examination of an attachment defendant on oath respecting his property when it appears by the affidavit of plaintiff that not enough property is known on which attachment can be executed to satisfy the plaintiff's claim. *Carpenter v. Clements*, 98 N. W. 129, 131, 122 Iowa, 294.

An affidavit required for the institution of contempt proceedings is not a "pleading," within the ordinary sense of the term, so as to fall within the ordinary rules governing the construction of formal allegations of the parties of their respective claims and defenses. *State v. Sieber*, 88 Pac. 313, 314, 49 Or. 1.

#### **Application for bankrupt's discharge**

An application for a bankrupt's discharge should be considered a pleading within Bankr. Act July 1, 1898, c. 541, § 18c, 30 Stat. 551, providing that all pleadings setting up matters of fact shall be verified under oath. In re Taylor, 188 Fed. 479, 482.

#### **As distinguished from proceedings**

A prayer to take a case from the jury which makes no reference to the pleadings presents only the question whether the facts that might properly be found from the evidence constitute a good cause of action, and, if the prayer refers to the "proceedings," it does not by that term include "pleadings," as the "proceedings" consist of successive acts done and steps taken as parts of the suit during its progress, while the "pleadings" consist of statements of the litigants, in legal form, of facts constituting a cause of action and grounds of defense. *Monumental Brewing Co. v. Larrimore*, 72 Atl. 596, 599, 109 Md. 682 (citing 6 Words and Phrases, pp. 5410, 5632, 5633).

#### **Brief**

A brief on rehearing is not a "pleading," but an argument addressed to the court and to its individual members, so that to incorporate therein scandalous or insulting matter is to commit a contempt in open court. In re Dunn, 124 N. W. 120, 85 Neb. 606.

#### **Defense or counterclaim**

A counterclaim is not a "pleading" in the action within the rule that a demurrer searches all the pleadings prior to itself for the first fault, so that on the trial of the issues created by the demurrer judgment must be given against the party who committed the first fault, and the court on demurrer to a counterclaim will not pass on the sufficiency of the complaint. *Fulton County Gas & Electric Co. v. Hudson River Telephone Co.*, 93 N. E. 1052, 1053, 200 N. Y. 287.

The word "pleading," in Code Civ. Proc. § 545, authorizing the striking out on motion of irrelevant or scandalous matter "in a pleading," embraces a defense or counterclaim which are distinct and independent pleadings, and which must be complete in themselves. *Stroock Plush Co. v. Talcott*, 113 N. Y. Supp. 214, 218, 129 App. Div. 14.

#### **Documents to sustain application to set aside judgment**

Documents filed by defendants on their application to set aside a default judgment against them upon service by publication were not "pleadings" within the rule that a plea of venue must precede a plea on the merits, so that their plea of privilege to be sued in another county was not waived by filing such documents. *Wolf v. Sahm*, 120 S. W. 1114, 1117, 55 Tex. Civ. App. 564.

#### **Exceptions**

Neither circuit court rule 2, § E, nor rule 26, § E, requires that exceptions to the reasons of the court for denying a new trial shall be filed within 15 days, and exceptions filed in time to be incorporated in the bill of exceptions are sufficient, as, until the bill of exceptions is signed, the court may file supplemental reasons which may be excepted to, all of which may be incorporated in the bill of exceptions when settled; exceptions to the reasons not being in any sense a "pleading." *United States Graphite Co. v. Saginaw Circuit Judge*, 123 N. W. 27, 28, 158 Mich. 598.

#### **Mandamus, writ, return, and demurrer**

Under Code Civ. Proc. § 2082, providing that the proceedings, after joinder of issue on law or facts on an alternative writ of mandamus, are the same as in an action, the Code relating to the proceedings in an action applies to mandamus, and for the purpose of the application the writ and the return, or the writ and the demurrer, are deemed "pleadings in an action." *People ex rel. Ajas v. Department of Health of City of New York*, 123 N. Y. Supp. 294, 296, 138 App. Div. 559.

#### **Motion to make complaint definite and certain**

A motion to make the complaint definite and certain is not a "pleading." The object of the motion is to enable the opposite party to demur, answer, or reply intelligently, and should be made before the time to answer or demur. Code Civ. Proc. 1902, § 164, provides that the only "pleading" on the part of the defendant is either a demurrer or an answer. *Lawrence v. Lawrence*, 62 S. E. 9, 10, 81 S. C. 126.

#### **Notice of claim by materialman**

The notice required by Mechanics' Lien Law, § 3, P. L. 1898, p. 538, giving materialmen a lien by stop notice on the funds in

the hands of the owner and requiring the stop notice to state the amount due from the contractor, and that a demand has been made to him and payment refused, is not a "pleading," but its object is to put the party on whom it is served on inquiry and to inform him that a claim is made against him which he must investigate for the benefit of the party giving the notice, and a notice which states that material was sold to a contractor for a building, but does not expressly allege that it was actually used in the building, is sufficient. *McNab & Harlin Mfg. Co. v. Patterson Bldg. Co.* (N. J.) 63 Atl. 709, 715.

#### **Opening statement**

Statements of the case, or of the defense and of the evidence expected to be produced at the commencement of the trial, are not "pleadings," within the purview of article 8 of the Code, and are not vulnerable to attack by demurrer. *Glenn v. Missouri Pac. Ry. Co.*, 124 Pac. 420, 421, 87 Kan. 391.

#### **Remonstrance in drain proceeding**

A two-thirds remonstrance in a proceeding for a drain is not strictly a "pleading" or answer. *Thorn v. Silver*, 89 N. E. 943, 945, 174 Ind. 504.

#### **PLEADING A CONTRACT**

In "pleading a contract" it is not sufficient to state that a contract was executed, since to "plead a contract" means to plead its provisions, undertakings, or engagements. *McNealey v. Chicago, B. & Q. Ry. Co.*, 95 S. W. 312, 313, 119 Mo. App. 200 (citing *Dawson v. St. Louis, K. C. & N. Ry. Co.*, 76 Mo. 514; *Brown v. Wabash, St. L. & P. Ry. Co.*, 18 Mo. App. 568; *Crow v. Chicago & A. Ry. Co.*, 57 Mo. App. 135; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337).

#### **PLEASURE**

See At Pleasure.

Remove at pleasure, see Remove—Removal.

#### **PLEDGE**

By a "pledge" the pledgee takes only a special property; the general property remaining in the pledgor. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 59 Atl. 197, 198, 77 Vt. 123, 107 Am. St. Rep. 754.

A "pledge" is trust property, and the character of a pledgee is that of a trustee. The law does not permit a pledgee to purchase the pledge at his own sale except upon an agreement with the pledgor, because he has a duty to perform in relation to the property inconsistent with the character of a purchaser, and such a sale is voidable at the option of the pledgor. *Wetherell v. Johnson*, 70 N. E. 229, 231, 208 Ill. 247 (citing *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Cook, Stock & Stockholders*, § 479).

"A 'pledge' is a bailment of personal property to secure an indebtedness. A pledge cannot be created by delivery of title deeds." A third person paying the purchase money at the instance of the vendee, and taking the title to the land direct to the vendor, holds neither the land nor title as pledgee. Such a transaction is the equivalent of the vendor's conveyance to the vendee, and a conveyance by the vendee to the person paying the purchase money as security for the debt. *Fleming v. Georgia R. Bank*, 48 S. E. 420, 422, 120 Ga. 1023 (citing Civ. Code 1895, § 2956; *Davis v. Davis*, 14 S. E. 194, 88 Ga. 191).

To constitute a "pledge" of personal property, there must be a contract whereby the property is held as security, but it is not essential that such a contract shall be express, as it may be implied from the circumstances of the case, if it appears that the minds of the parties met with respect to the same subject-matter, and consented to the same thing for a sufficient consideration. *Wilkinson v. Misner*, 138 S. W. 931, 934, 158 Mo. App. 551.

A "contract of pledge" is a legal obligation, made by the deposit with the pledgee of personalty as security for a debt or other engagement, with an implied power of sale on default; the pledgor retaining the general ownership, subject to the lien of the pledgee. *Tennent v. Union Cent. Life Ins. Co.*, 112 S. W. 754, 759, 133 Mo. App. 345.

By Civ. Code, §§ 2986, 2987, a "pledge" is a deposit of personal property by way of security for the performance of another act, and every contract by which the possession of personal property is transferred as security only is to be deemed a "pledge." *Rohrbacher v. Superior Court*, 78 Pac. 22, 23, 144 Cal. 631.

A "pledge" is more than a simple lien, being a deposit or delivery of possession and control of property as security for a debt, vesting a right to the property in the pledgee to the full extent necessary to protect and collect the debt. *Austin v. Hayden*, 137 N. W. 317, 322, 171 Mich. 38.

A "pledge" is a bailment to secure the payment of a debt or the performance of some other act, in which the pledgee only acquires a special property in the thing pledged. *Trenholm v. Miles*, 59 South. 930, 931, 102 Miss. 835.

An instrument, purporting to sell certain movables on a plantation for a certain price paid in cash, cannot be construed as against third persons as a contract of pledge securing the contingent liability of a surety on a release bond. *Millot v. Conrad*, 38 South. 139, 114 La. 193.

One is no less a pawnbroker because he requires pawnors to execute notes or chattel mortgages in connection with the transaction,

whether or not he relies exclusively on the goods received, as, under Civ. Code, §§ 2924, 2987, 2988, every contract by which possession of personal property is transferred as security, only, is a "pledge." *Levison v. Boas*, 88 Pac. 825, 827, 150 Cal. 185, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661.

Where a customer leaves stock in the hands of a broker as collateral security for a balance due on its purchase price, a qualified relation of pledgor and pledgee exists, so that the broker, while he is not compelled to retain in his possession the identical stock purchased on his customer's order, must have in his possession or under his control an amount of the stock in question equal to that purchased, which he can deliver to the customer when the account is closed. *Strickland v. Magoun*, 104 N. Y. Supp. 425, 427, 119 App. Div. 113.

#### Chattel mortgage distinguished

A "chattel mortgage" is a present transfer of title to mortgaged property, with a defeasance, so that, upon payment of the debt or performance of the obligation secured, the title to the property reverts to the mortgagor; while a "pledge" is a transfer of the possession of personalty, not the title, as security for the performance of some act by the pledgor, with provisions for sale of the property or other disposition thereof by the pledgee upon the pledgor's default. *Palmer v. Mutual Life Ins. Co. of New York*, 130 N. W. 250, 252, 114 Minn. 1, Ann. Cas. 1912B, 957.

A transaction whereby neither an absolute nor a defeasible title to personalty is transferred by the owner, but only possession with the power to sell if default is made in the payment of the note secured, is not a sale or a mortgage, but a "pledge." *Grand Ave. Bank v. St. Louis Union Trust Co.*, 115 S. W. 1071, 1074, 135 Mo. App. 366.

#### Delivery required

"To constitute a 'pledge' there must be an actual delivery of possession to the pledgee, and to preserve his pledge he must retain possession." *Gray v. Doty*, 94 Pac. 1008, 1009, 77 Kan. 446 (citing *Raper v. Harrison*, 15 Pac. 219, 37 Kan. 243).

A "pledge" is a delivery of goods by one to his creditor to be kept until the discharge of the debt. *People v. German Bank*, 110 N. Y. Supp. 291, 293, 126 App. Div. 231.

A "pledge" is a lien created by the owner of personal property by the mere delivery of it to another, upon an express or implied understanding that it shall be retained as security on an existing or future debt. *Farson v. Gilbert*, 114 Ill. App. 17, 19.

To make a valid "pledge" as against other creditors, there must be an actual or constructive delivery of the possession of the goods, and the delivery must be clear, unequivocal, complete, and effective at all times.

so as to give notice to third persons of the pledgee's rights. Incorporeal property, incapable of manual delivery, cannot be pledged without a written transfer of title performing the office of delivery of possession, on a pledge of corporeal property, and hence a book account is not pledged by a delivery of the copy of the account without an assignment thereof in writing. *American Exchange Nat. Bank of New York v. Federal Nat. Bank of Pittsburgh*, 75 Atl. 683, 685, 226 Pa. 483, 27 L. R. A. (N. S.) 666, 184 Am. St. Rep. 1071, 18 Ann. Cas. 444.

The word "pledge," as used in Kirby's Dig. Ark. § 5720, is used in its colloquial, rather than technical, sense, since there can be no pledge without delivery and there could be no delivery of "uncollected assessments." *Street Grading Dist. No. 60 of Little Rock, Ark., v. Hagadorn*, 186 Fed. 451, 455, 108 C. C. A. 429; *Connor v. Kimball*, 186 Fed. 458, 108 C. C. A. 436.

"A 'pledge' is a disposition of personal property as security (Civ. Code, § 2986), and is dependent on possession, and is not valid until the property is delivered to the pledgee. Civ. Code, § 2988. The delivery must be as complete as is required in the case of sales of personal property by section 3440 of the Civil Code, and change of possession must be continuous and open." Defendant, having possession under an oral contract for purchase of land on which he had commenced making brick, executed two written instruments, one of which purported to transfer all his interest in the contract for the purchase of the land and in and to the brick made and to be made thereon to plaintiff; the other instrument, after reciting the transfer, providing that it was made as security for all moneys to become due from defendant to plaintiff, who agreed to advance money for the making of the brick. The agreement further provided that the plaintiff was to be and remain the owner of all the brick made and entitled to its possession until payment of all sums due him. The writings as to the brick constituted a contract for the creation of a "pledge." *Sequeira v. Collins*, 95 Pac. 876, 877, 153 Cal. 426.

#### **As a lien**

See Lien.

#### **Ownership of stock distinguished**

Where defendant's son-in-law, promoting a consolidation of corporations, was financially embarrassed, and procured a loan on the note of the new corporation, secured by bonds underwritten or guaranteed by defendant under an agreement providing that a block of stock in the new corporation should be placed in his hands as security for the son-in-law's performance of his agreement to procure other parties to underwrite the loan so as to take up defendant's obligation, but the stock was in fact issued directly to

defendant as a stockholder, and resignations of the officers of the corporation were placed in his hands, but he refused to act as a stockholder, and did not act upon the resignations, defendant was a "pledgee," and not a "shareholder," and was not subject to a stockholder's liability. *Colonial Trust Co. v. McMillan*, 87 S. W. 933, 940, 188 Mo. 547, 107 Am. St. Rep. 335.

#### **As preference**

See Preference.

#### **Sale distinguished**

See Sale.

#### **Transfer of note as collateral**

Rev. St. 1899, § 3710, provides that in an action to enforce a lien on personal property pledged or mortgaged, or involving the validity of such lien, proof that the party holding the lien has exacted usurious interest for the debt shall render any mortgage or pledge of personal property, or any lien thereon, invalid. Held, that the delivery of a promissory note as collateral security for a principal note given for the same amount as the balance due on the first note, and executed to plaintiff the day that a payment was made on the first note, was a "pledge" within the meaning of the statute, though it was signed by an additional maker. The authorities have defined "collateral security" as a pledge of incorporeal property as distinguished from chattels. The words necessarily indicate something additional to the principal obligation, and running along with it as security therefor. *Winfrey v. Strother*, 128 S. W. 849, 850, 145 Mo. App. 115.

#### **PLEDGE FAITH OF STATE**

Act 1909, authorizing the State Treasurer to deliver to certain persons bonds issued under Act March 4, 1879 (Laws 1879, p. 183, c. 98), in discharge of an indebtedness, does not "pledge the faith of the state," within Const. art. 2, § 16, declaring that no such law shall be passed, unless the bill be read three times in each house. For the General Assembly to order the State Treasurer to pay a debt with money is not "pledging the faith of the state," within Const. art. 2, § 16, relating to the reading of bills. *Battle v. Lacy*, 64 S. E. 505, 506, 150 N. C. 573.

#### **PLEDGEE**

As owner, see Owner.

#### **PLEDGE OF STOCK**

As stockholder, see Stockholder.

#### **PLEDGOR**

As creditor, see Creditor.

As real party in interest, see Real Party in Interest.

#### **PLENARY PROCEEDINGS OR SUIT**

A proceeding in a circuit court by parties injuriously affected by orders of the in-

terstate commerce commission, though not parties to the proceedings before the commission on which they are based, to suspend or annul such orders, is not an "appeal," but a plenary suit in equity." *F. H. Peavey & Co. v. Union Pac. R. Co.*, 176 Fed. 409, 417.

Whenever a bill or petition is filed in the orphans' court, whether or not the parties are cited to appear, if they do appear and answer the proceedings, are "plenary." *Stonesifer v. Shriver*, 59 Atl. 139, 140, 100 Md. 24 (citing *Pegg v. Warford*, 4 Md. 385).

## PLENTY OF CHANGE

To say that a street car conductor had "plenty of change" at the time he was asked to change a bill in order to collect a passenger's fare does not mean plenty for the single transaction, but plenty for the reasonable requirements of the trip. *Funderburg v. Augusta & A. R. Co.*, 61 S. E. 1075, 1076, 81 S. C. 141, 21 L. R. A. (N. S.) 868.

## PLOTTAGE

"Plottage" is a percentage added to the aggregate value of two or more contiguous lots when held in one ownership as representing an increased value by reason of the fact that they admit of more advantageous disposition and improvement than a single lot. *People ex rel. Pennsylvania N. Y. & L. I. R. Co. v. O'Donnell*, 115 N. Y. Supp. 509, 511, 130 App. Div. 734.

"Plottage" covers an enhancement of value by reason of the fact that parcels of land sought to be condemned are held in single ownership. The question whether or not plottage is an element of value depends necessarily on the particular circumstances surrounding the use of the property and its situation; there being no rule of law that "plottage," taken alone, must have a value in any particular case. In *re City of New York*, 107 N. Y. Supp. 567, 569, 56 Misc. Rep. 306.

## PLOWBOTE

"Plowbote" is the right to a sufficient supply of wood for making and repairing instruments of husbandry. *Anderson v. Cowan*, 101 N. W. 92, 93, 125 Iowa, 259, 68 L. R. A. 641, 106 Am. St. Rep. 303.

## PLOWING

A railway construction contract provided that "loose rock," as distinguished from "earth," for the purpose of computing compensation for excavation, should include hard shale or soapstone, coarse boulders in gravel, cemented gravel, hardpan or any other material, requiring, in the company's engineer's judgment, the use of pick and bar, or which could not be plowed with a specified plow.

It was further provided that the plowing test should apply to all the materials, and that only such material should be loose rock as in the engineer's judgment could not be plowed with such plow. Held, that the provision for a plowing test did not apply to the particular material specified as hardpan, etc., and that the clause relating to "other material which could not be plowed," etc., meant such as could not be plowed with reasonable facility; a mere "rooting-up" of material, or a cutting of a very shallow furrow, or such plowing as would require men to ride on the plow beam, etc., not being "plowing" within the contract. *Indianapolis Northern Traction Co. v. Brennan*, 87 N. E. 215, 228, 174 Ind. 1, 30 L. R. A. (N. S.) 851.

## PLUMB

See Out of Plumb.

The Century Dictionary defines "plumb" as not only "vertical" but also "true," "accurate." While in its primary sense "plumb," in mechanics, means "vertical," etc., an object when said to be out of plumb may be understood to be defective in some other sense. The meaning that should be attached to the term in pleading is to be extended to that sense in which it is capable of being understood. In an action by a servant for personal injuries received by reason of defective machinery, there was no variance between an allegation that a wheel driving the belting was "out of plumb and wobbly," causing the belting to alternately tighten and loosen, in such manner as to tear out the rivets holding sections of the belt together, and proof that the surface of the wheel over which the belting worked was not true to the axle, that the axle had gotten out of the true center by the wheel having worn on one side, and that its operation was thereby rendered irregular and unsteady. *Receivers of Kirby Lumber Co. v. Poindexter (Tex.)* 103 S. W. 439, 440.

## PLUMBER

See Employing Plumber; Master Plumber.

Machinist, see Machinist.

Journeyman plumber, see Journeyman.

## PLUMBING BUSINESS

Code 1906, § 8354, imposing a privilege tax on one "doing a plumbing business," applies only to a person, firm, or corporation taking contracts and completing them by employing other plumbers to do the work, and does not apply to an individual plumber working by the day or taking contracts for himself alone. *Wilby v. State*, 47 South. 465, 93 Miss. 767, 23 L. R. A. (N. S.) 877.

## PLURAL

In statutory construction "words used in the singular number include the plural"

and the plural the singular, except where a contrary intention plainly appears." Hence the words of a statute requiring the filing of a lien statement should be read in the plural, if the circumstances justify, and where grain, upon which a thresher's lien, under chapter 83 of the Civil Code (Rev. Codes 1899, §§ 4823-4825), is claimed, was grown on land situated in two counties, the lien statement should be executed in duplicate and filed in both counties. *Gorthy v. Jarvis*, 108 N. W. 39, 40, 15 N. D. 509 (quoting Rev. Codes 1899, § 5134).

### PLURAL MARRIAGE

Under the doctrines of the Church of Jesus Christ of Latter Day Saints, commonly known as the Mormon Church, marriages celebrated and solemnized by mere civil authority and with only the sanction of the law are regarded as marriages for time only, while a marriage solemnized by a duly constituted person, authority, or "by the holy and eternal priesthood of the Saints" is designated a "celestial or patriarchal marriage," binding not only during this life, but throughout the life to come. As used in Const. Idaho, art. 6, § 3, disqualifying as voters, jurors, or officers, among others, one who is a bigamist, polygamist, or living in what is known as patriarchal or celestial marriage, the words "bigamous," "polygamous," "plural," "celestial," and "patriarchal" marriages were meant and intended to prohibit and forbid any man having more than one wife at one time under whatever name or designation he might choose to style his marriage; and the use of each of these words was directed against bigamous and polygamous marriages. The "celestial" or "patriarchal" marriage, in order to come within the prohibition of the Constitution, must be "bigamous" or "polygamous." One who teaches or practices having more than one wife at any one time, or belonging to an organization teaching such doctrine, is disqualified for the duties of an elector, and consequently for holding any civil office, within the laws of the state, but it is not intended by the Constitution to interfere with the religious beliefs and opinions of any one. *Toncray v. Budge*, 95 Pac. 26, 38, 14 Idaho, 621.

### PLURALITY OF COUNTS

A "plurality of counts," in an indictment, may consist in the charging of the same criminal transaction as having been committed in a number of different ways or in the charging of a number of distinct transactions of the same general nature. It is permissible to join one or more counts charging violations of the general prohibition law, which went into effect January 1, 1908, with counts charging violations of such laws regulating or prohibiting the sale, etc., of intoxicating liquors as may have been in force in the particular venue of the trial prior to that date

and within the period prescribed by the statute of limitations. *Tooke v. State*, 61 S. E. 917, 920, 4 Ga. App. 495 (citing *Bish. New Cr. Proc.* § 1015 [a] 4).

### PLUSH

So-called "panne velvet" is dutiable as "plush," and not as "velvets," under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 386, 30 Stat. 186. *United States v. Passavant & Co.*, 164 Fed. 912.

No rule exists in trade or commercial usage declaring that fabrics having a pile of 3.5 millimeters or less in length should be regarded as velvets, and of over 3.5 millimeters as plush. *United States v. Silberstein, Castell & Co.*, 158 Fed. 965, 966.

### PNEUMONIA

See Traumatic Pneumonia.

The fact that an animal, apparently sound when delivered to a carrier for shipment, arrives at its destination sick with a disorder, such as "pneumonia," does not raise the presumption that the carrier has been guilty of negligence; "pneumonia" being a well-known and malignant disease attacking both man and beast at times when least expected, and frequently under conditions which shroud its cause and beginning in mystery. Medical science has not yet reached a stage when it can with any degree of certainty protect or prevent its development in animated beings. *St. Louis & S. F. R. Co. v. Brosius & Le Compte*, 105 S. W. 1131, 1136, 47 Tex. Civ. App. 647.

### POCK

It is always permissible to amend the pleadings to make them conform to the proof, so that in slander for charging that plaintiff had syphilis, gonorrhoea, and clap, there was no error in permitting an amendment of the petition so as to include a charge that plaintiff had the "pock," on the ground that defendant's counsel had no opportunity to learn the nature of that disease, or whether plaintiff was afflicted therewith, so as to prepare for trial on that issue; the word "pock" being commonly known to be but another name for syphilis, or French or Spanish pox. *Mills v. Flynn* (Iowa) 137 N. W. 1082, 1084.

### POCKET PICKING

As larceny, see Larceny from the Person.

### POINT

See Between Two Points; Division Point; Intermediate Point; Meeting Point; Signal Point; Terminal Point.

#### Aim distinguished

"The word 'aim' is more specific than the word 'point.' Intention is one of the

connotations of the word 'aim,' but not of the word 'point.' To aim is to point intentionally with a deliberate purpose." We aim at a bird; we point a cannon against a wall; we level a cannon at a wall. Pointing is, of course, used with most propriety with reference to instruments that have points. It is likewise a less decisive action than either aiming or leveling. A stick or finger may be pointed at a person merely out of derision; but a blow is leveled or aimed with an expressed intent of committing an act of violence. *Livingston v. State*, 65 S. E. 812, 6 Ga. App. 805 (citing and adopting *Herrington v. State*, 48 S. E. 908, 121 Ga. 141, and quoting *Crabbe's English Synonyms*).

#### **Aim synonymous**

Code 1906, § 1045, makes it an offense to "point or aim" a gun, etc. Defendant was indicted, for that he did "point and aim" a pistol at and toward prosecutor, etc., and was found guilty as charged. Held, that the words "point" and "aim," as used in such section, were synonymous, and defendant was therefore charged and convicted of but a single offense. *Coleman v. State*, 48 South. 181, 182, 94 Miss. 860.

#### **In boundary**

A "point" in a boundary is the extremity of a line. *Tiffany v. Town of Oyster Bay*, 126 N. Y. Supp. 910, 912, 141 App. Div. 720.

#### **Railroad station**

Under a contract providing that a carrier would return the outfit of a railroad contractor to point of shipment from any point on the carrier's line, the word "point" would be construed to mean a station or point where the carrier was doing its regular business as a common carrier. *Santa Fé, P. & P. Ry. Co. v. Grant Bros. Const. Co.*, 108 Pac. 467, 469, 13 Ariz. 186.

#### **Signal points**

The employers' liability act (Code 1896, § 1749, subd. 5), making railway companies liable for injury to an employé caused by the negligence of any person in charge of any "signal, points," etc., is a literal copy of the English statute using the words "signal points," designating an apparatus for giving signals, called "points." In the original Alabama statute (Acts 1884-85, p. 116) the word "signal" was used, without "points." Held, that the present statute covers cases of negligence of persons having charge of signals generally; "points" referring to apparatus used in giving signals; and not merely localities. *Coghill v. Louis & N. R. Co.*, 44 South. 683, 685, 152 Ala. 154.

#### **POINT OF DESTINATION**

The "point of destination" of goods shipped by express is ordinarily not a mere common terminal point, like a depot in the case of a railroad, or a wharf in the case of a steamboat, but is the place of business or

residence of the consignee. *Saunders v. Adams Express Co.*, 74 Atl. 670, 671, 78 N. J. Law, 441.

#### **POINT OF NAVIGABILITY**

The doctrine that a riparian owner has the right to maintain landings, etc., to the "point of navigability," of a navigable stream is not to be understood in the narrow sense of being limited to that point where the stream may be navigable for some purposes at certain stages of water. It must be understood as giving the riparian owner the right to construct landings, etc., to the extent necessary to make his property reasonably available at any ordinary stage of water for any navigation for which the stream is adapted and used, provided it does not obstruct the paramount rights of the public. It must have reference, not only to an ordinary low stage of water, but also to the size and kind of vessels which navigate the stream and the kind of business done upon it. *Hobart v. Hall*, 174 Fed. 433, 445, 446, 467 (quoting *Union Depot St. Ry. & Transfer Co. v. Brunswick*, 17 N. W. 626, 628, 31 Minn. 297, 47 Am. Rep. 789).

#### **POINTED OUT**

Where appellee admits that, if the verdict is excessive, the trial court committed error in denying the motion for a new trial, it follows that the error is "pointed out" when appellant, in his opening brief, assigns as error the only ruling which the trial court made upon the question of excessive verdict, its denial of the motion for a new trial. An error is not "presented" or "pointed out" simply because appellant does not argue the matter in his opening brief, since failure to argue an assignment of error does not prevent a review of the same. There is no statute or rule of court requiring an argument of an assignment of error. *Williams v. Spokane Falls & N. Ry.*, 87 Pac. 491, 492, 44 Wash. 363.

#### **POISON**

See Added Poisonous Ingredient; Contact with Poison; Voluntary Taking of Poison.

Administer poison, see Administer.  
Poison taken, see Taken.

While, under a provision of an accident insurance policy exempting the insurer from liability for injuries resulting from poison or anything accidentally or otherwise taken, the word "poison" may be construed to mean liquids commonly known as poisons, the words following "or anything" clearly indicate an intention to include everything of a poisonous nature. *Maryland Casualty Co. v. Hudgins* (Tex.) 72 S. W. 1047, 1049 (quoting *Kasten v. Interstate Casualty Co. of New York*, 74 N. W. 534, 99 Wis. 73, 40 L. R. A. 651).



The words "poisonous or injurious to the health," as used in Pa. Act June 26, 1895 (P. L. 317) § 3, subcl. 7, were held in *Com. v. Kevin*, 51 Atl. 594, 202 Pa. 23, 90 Am. St. Rep. 613, to refer to the ingredients used in adulteration. *Com. v. Kebort*, 61 Atl. 895, 896, 212 Pa. 289.

#### Sting of insect

A death from blood poisoning caused by the sting of an insect is not the result of "poison in any form or manner," or of "contact with poisonous substances," within the meaning of those terms in an accident policy. *Omberg v. United States Mut. Acc. Ass'n*, 40 S. W. 909, 911, 101 Ky. 303, 72 Am. St. Rep. 413.

#### Wood alcohol

See Wood Alcohol.

### POISONOUS GERM

An infinitesimal poisonous germ, or that which it generates, is not "poison," as the word is ordinarily understood. Death caused by a poisonous germ received into the body through the bite of a dog is not a case of contact with "poisonous or infectious substances" without the accident benefits of an insurance policy. Such bite is an accident and should be classed under the "accident provisions" of the policy. *Farner v. Massachusetts Mut. Acc. Ass'n*, 67 Atl. 927, 928, 219 Pa. 71, 123 Am. St. Rep. 621.

### POISONOUS LIQUID

A liquid sold by a druggist as hand lotion was a "poisonous liquid," if it blistered and burned the plaintiff's hands and lips, and rendered her helpless through the liquid becoming scattered through her body. *Kelley v. Ross*, 148 S. W. 1000, 1002, 165 Mo. App. 476.

### POKER

As gambling, see Gambling—Gaming.

As gambling device, see Gambling Device.

"Poker" is defined to be a "game with cards," and evidence that defendant and others engaged in a game of poker was sufficient to support an information charging him with playing a game of cards. *Inman v. State*, 85 S. W. 796, 47 Tex. Cr. R. 609; *Mapes v. State (Tex.)* 85 S. W. 797.

"Poker" is a well-known American game, always played with cards, and generally considered as a gentleman's game, played for diversion or gain. But, even when played for diversion, chips, representative of value, are generally used. *Sims v. State*, 57 S. E. 1029, 1 Ga. App. 776.

### POLARISCOPE

The "polariscope" is an instrument of science used in the laboratory, composed of many parts, apparently varying in details of

structure, and requiring special knowledge and experience to operate it. It is so adjusted that, when a ray of polarized light passes through a tube filled with a certain solution of sugar, the scale indicates the percentage of pure sugar. *United States v. Bartram Bros.*, 131 Fed. 833, 834, 835, 65 C. C. A. 557.

### POLE

See Boom Pole.

### POLICE

See Chief of Police.

Police ordinances, see Ordinance.

### POLICE COMMISSIONER

As city officer, see City Officer.

Board of police commissioner as court, see Court (Of Justice).

### POLICE COURT

The terms "police court" and "recorder's court," as used in Cal. St. 1905, p. 944, e. 15, are synonymous. *Ex parte Baxter*, 86 Pac. 998, 999, 3 Cal. App. 716.

"The term 'police court' ordinarily refers to an inferior municipal court, with a limited jurisdiction in criminal cases only. A court with the power to try certain misdemeanors, arising from a violation of state law, or municipal ordinance, and with the power to conduct preliminary examinations in cases of felony, and certain misdemeanors, and to hold defendants to answer for trial for the same, and it does not include the justice courts established by our law. The term should probably be construed also to include such inferior courts as may properly be held to be purely municipal, though given by the state certain jurisdiction in state, as distinguished from municipal matters. Courts coming within the class specified in the Constitution as 'such inferior courts as the Legislature may establish in any incorporated city or town or state and county,' such as a city recorder's court or mayor's court." The amendment to Const. art. 11, § 6, adopted November 3, 1896, inserting "except in municipal affairs," in the provisions that cities and towns and all charters thereof adopted by authority of the Constitution shall be subject to and controlled by the general laws and Constitution, and Const. art. 11, § 8½, being an amendment adopted November 3, 1896, providing that it shall be competent for all charters formed under the authority given by Const. art. 11, § 8, to provide for the Constitution, jurisdiction, etc., of police courts, the manner, time, and terms for which the judges thereof shall be elected or appointed, and for the compensation of the judges, etc., do not affect the power of the Legislature to provide for justices' courts in cities and towns as part of the state system of justices' courts.

*Graham v. Mayor, etc., of City of Fresno*, 91 Pac. 147, 148, 151 Cal. 465.

### POLICE FORCE

Member of police force, see Member.

The "police force" of a city are a body of men appointed to preserve its peace and good order. *State ex rel. Bailey v. Edwards*, 106 Pac. 703, 704, 40 Mont. 313.

### POLICE JUDGE

"A 'police judge' is an officer of a city of the first class, whose powers and duties are provided by general statute, applicable alike to all cities of that class." *Ft. Scott v. Slater*, 72 Pac. 550, 551, 67 Kan. 133.

### POLICE OFFICER

As executive officer, see Executive Officer.

Depot police, see Depot Police.

The chief of police of a city is a "police officer," within the rule of the board of police examiners, created by the charter of the city, providing that no member of the police force should be permitted to be a delegate to any caucus or take part in any political canvass. *Brownell v. Russell*, 57 Atl. 103, 104, 76 Vt. 326.

A "police officer" is one of the staff employed to enforce the laws and ordinances of a city and preserve the peace of the community, and the term "policemen" includes every member of the police force, whatever his rank, so that a police captain is a "police-man" notwithstanding his superior rank, and hence is not a purely municipal officer; *Sess. Laws 1907, c. 136, § 5 (Rev. Codes, § 3308)*, relating to the examination of applicants for positions on the police force and providing for their appointment and removal, making no distinction between the officers and members of different rank as to their duties or the manner of their appointment. *State ex rel. Bailey v. Edwards*, 106 Pac. 703, 704, 40 Mont. 313.

Under *Rev. Codes, § 3254*, clothing the chief of police of cities with powers of a peace officer and of a constable, etc., the chief of police of a city is a mere police officer, and, though he has the additional duty of supervision of the entire police force, he is an ordinary "police officer," notwithstanding sections 3216 and 3250, providing for the appointment of a chief of police by the mayor with the consent of the council, etc. The chief of police of a city is within *Laws 1907, c. 136 (Rev. Codes, §§ 3304-3317)*, establishing a police commission for cities, providing for an examination and trial board to examine and certify to the qualifications of applicants to act as members of the police force or police department, etc., and a chief of police appointed to serve during good behavior or until he becomes incapacitated may not be removed under sections 3216 and 3250, pro-

viding for the appointment and removal of chief of police. *State ex rel. Wynne v. Quinn*, 107 Pac. 506, 508, 40 Mont. 472.

### POLICE PENSION BOARD

Members as trustees, see Trustee.

### POLICE POWER

Exercise of as taking property, see Taking (In Eminent Domain).

The "police power" of a state is that power which is necessary for its preservation, and without which it cannot serve the purpose for which it was formed. *Ex parte Rowe*, 59 South. 69, 70, 4 Ala. App. 254.

The "police power" is the power to restrain common rights of liberty or property. When it is sought to exercise rights which are not common or fundamental, still more when special privileges are asked, the state may grant the required permit or license upon such conditions as it pleases, without observing the limitations which otherwise hedge about the exercise of the police power. The restrictions upon the exercise of corporate rights afford the most conspicuous illustration of this; others are found in fish and game laws, and others in cases of qualified property. *State v. Hume*, 95 Pac. 806, 810, 52 Or. 1 (citing Freund, *Police Power*, § 24).

The "police powers" inherent in the state are akin to the right of self-defense in the individual, and authorize the state to protect itself against those things which threaten its existence which can only be maintained by protecting the life, health, and happiness of its citizens, and promoting that which will upbuild its educational and industrial interests. *Ex parte Flake (Tex.)* 149 S. W. 146, 154.

"There is a power beneath the Constitution, but not superior to it, unwritten, not fully defined, necessary, resting on the sovereignty of the state, which exists because the state cannot exist without it, and which must be considered in connection with the Constitution. That power, known as the 'police power,' aims to promote the public welfare by compulsion and restraint, and it is under the exclusive control of the Legislature. The executive department can exert it only as authorized by the Legislature. The courts can neither exercise it nor prevent its exercise, but they can determine whether a statute is a constitutional use of the power." *Wright v. Hart*, 75 N. E. 404, 412, 182 N. Y. 330, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263 (dissenting opinion of Judge Vann).

The term "police power" means the general power of governing its people and dominions belonging to every sovereignty. *Appeal of Allyn*, 71 Atl. 794, 796, 81 Conn. 534, 23 L. R. A. (N. S.) 630, 129 Am. St. Rep. 225.

The "police power" is the power to impose those restraints upon private rights

which are necessary for the general welfare. It is a power inherent in all governments, needing neither grant nor recognition by the Constitution. *State of South Carolina v. United States*, 39 Ct. Cl. 257, 285.

The "police power" of a city is the power to govern, exercised by restriction or compulsion in promoting the general good, and while a city may not surrender the portion of the police power, the exercise of which is essential to the promotion of the general welfare in protecting personal or property rights, it may make concessions by which the general welfare is promoted in securing the services of some public utility not involving the surrender of necessary governmental functions. *Texarkana Gas & Electric Co. v. City of Texarkana (Tex.)* 123 S. W. 213, 216.

"Police power" includes the public convenience, as well as the public safety, health, and morals. That power is to organized government what the atmosphere is to man; "its vital breath, its native air." It penetrates, permeates, pervades all, in its omnifically healing reach, "broad and general as the casing air." It is the oil in which the machinery of government efficiently moves. *Yazoo & M. V. R. Co. v. Harrington*, 37 So. 1016, 1018, 85 Miss. 366, 3 Ann. Cas. 181.

The "police powers" comprise that indefinite mass of powers reserved to the state, and which inhere in all civil societies for the protection of the lives, health, morals, and public interests of their members. They have their origin in the law of necessity. There is no equivalency between them and the power to regulate commerce, which does not pertain to the other granted powers. These powers reserved to the state must always remain indefinite in character and incapable of classification or definition, from the very variety and multiplicity of the matters with which they are concerned. As subjects of legislation, they are, from their very nature, of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision. *United States v. Delaware & H. Co.*, 164 Fed. 215, 233 (citing License Cases, 5 How. [46 U. S.] 632, 12 L. Ed. 256).

Defendants were charged with the violation of *Mills' Ann. St. § 1376*, which makes it an offense for any person to throw or discharge into any stream of running water, or ditch or flume, any obnoxious substance or sewage. The trial court sustained their motion to dismiss on the ground that their action in emptying sewage from their hotel into a running stream was not within the spirit of the statute. Held, that as the statute was based on a legislative exercise of the "police

power," which is an attribute of sovereignty and exists without any reservation in the Constitution, being founded upon the duty of the state to protect its citizens, the act of dismissal by the court was improper; the determination of what measures are appropriate for the protection of the public being within the province of the Legislature. *People v. Hupp*, 123 Pac. 651, 653, 53 Colo. 80, 41 L. R. A. (N. S.) 792; *State ex rel. Yapple v. Creamer*, 97 N. E. 602, 604, 85 Ohio St. 349, 39 L. R. A. (N. S.) 694.

#### Attribute of sovereignty

The "police power" is an inherent attribute of sovereignty, and may be exercised to conserve and promote the safety, health, morals, and welfare of the public. *Inland Steel Co. v. Yedinak*, 87 N. E. 229, 234, 172 Ind. 423, 139 Am. St. Rep. 389.

The power to prescribe regulations demanded by the general welfare for the common protection of all is known as the "police power," and is inherent in every sovereignty. *Cochran v. Preston*, 70 Atl. 113, 114, 108 Md. 220, 23 L. R. A. (N. S.) 1103, 129 Am. St. Rep. 432, 15 Ann. Cas. 1018.

The "police power" is inherent in every government, and does not depend upon legislative grants or limitations. *State v. Central Lumber Co.*, 123 N. W. 504, 510, 24 S. D. 136, 42 L. R. A. (N. S.) 804.

"What is called 'police power' appertains to the sovereignty of the state, but is exercised by that sovereignty through the agency of municipalities, as well as through direct statutory enactments operative throughout the commonwealth. That is to say, the power to enact regulations for the welfare, health, and good morals of a community within the limits of a city or town is largely delegated by the state to its municipal governments. But in every case of municipal legislation under the guise of the police power, express or implied authority for the ordinance must be found in the charter of the city or in some other statute." *Carpenter v. Reliance Realty Co.*, 77 S. W. 1004, 1008, 103 Mo. App. 480.

The test of the validity of a law which creates liability without fault, and under which the property of one is taken, without compensation, to pay the obligations of another, is not whether it does objectionable things, but whether there is any reasonable ground to believe that the public safety, health, or general welfare is promoted thereby; the "police power" under which such reasonable regulations may be made being a power inherent in every sovereignty, the power to govern men and things, the power to which the possession and enjoyment of all rights are subject, and under which the Legislature exercises a supervision over matters affecting the common weal and enforces the observance by each member of society of his

duties to others and the community at large, and prescribes regulations promoting the health, peace, morals, education, and good order of the people, and legislates so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity. *State ex rel. Davis-Smith Co. v. Clausen*, 117 Pac. 1101, 1106, 65 Wash. 156, 37 L. R. A. (N. S.) 466.

"Police power" is an attribute of a sovereign power to enact laws for the exercise of such restraint and control over the citizen and his occupation as may be necessary to promote the health, safety, and welfare of society. In its exercise, the Legislature may provide that any occupation, which is the proper subject of the power, may not be pursued by the citizen except when authorized by license issued by public authority, and such enactment may require the payment of a fee and the execution of a bond with security conditioned in view of the object and purpose of the act as a prerequisite to the issuance of such license. *Spiegler v. City of Chicago*, 74 N. E. 718, 721, 216 Ill. 114 (quoting *Price v. People*, 61 N. E. 844, 846, 193 Ill. 114, 117, 55 L. R. A. 588, 86 Am. St. Rep. 306).

"Police power" is nothing more nor less than the power of government inherent in every sovereignty. While generally speaking the police power of the state is said to extend to the protection of the public health, the public morals, and the public safety, the law does not recognize these as the extent of the power, but it embraces regulations designed to promote public convenience and general prosperity as well, and the rights of a sovereign state to regulate public service corporations rests on the police power of the state. In *re Arkansas Rate Cases*, 187 Fed. 290, 292, 297; *State v. Kofines*, 80 Atl. 432, 33 R. I. 211, Ann. Cas. 1913C, 1120 (citing *License Cases*, 5 How. 583, 12 L. Ed. 256; *Chicago, B. & Q. Ry. Co. v. Drainage Commissioners*, 26 Sup. Ct. 341, 200 U. S. 561, 592, 50 L. Ed. 596, 4 Ann. Cas. 1175).

#### **Belongs to the states**

The "police power" is one which belongs to state sovereignty, reserved and protected by the Constitution of the United States. *El Paso & S. W. R. Co. v. Foth*, 100 S. W. 171, 175, 45 Tex. Civ. App. 275 (citing *Cooley*, Const. Lim. [7th Ed.] p. 831).

"Police power," which is the power to establish the ordinary regulations of police, is reserved to the individual states, as there is in the Constitution no grant thereof to Congress. *Keller v. United States*, 29 Sup. Ct. 470, 471, 213 U. S. 138, 146, 53 L. Ed. 737, 16 Ann. Cas. 1066 (citing *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. Ed. 1115, 1116; *Cooley*, Const. Lim. 574; *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 1, 6 L. Ed. 23; *License Cases*, 5 How. [46 U. S.] 504, 12 L. Ed. 256; *Gilman v.*

*Philadelphia*, 3 Wall. [70 U. S.] 718, 18 L. Ed. 96; *Henderson v. New York* [*Henderson v. Wickham*] 92 U. S. 259, 23 L. Ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989).

The "police power" is, in its fullest and broadest sense, reserved to the states; that the mode of exercising the power is left to their discretion, and is not subject to national supervision. *South Carolina v. United States*, 26 Sup. Ct. 110, 113, 199 U. S. 437, 50 L. Ed. 261, 4 Ann. Cas. 737.

"Police power" is another name for that portion of the sovereignty of the state not surrendered by the terms of the national compact. The police power, as that term is commonly employed, may be paraphrased as society's natural right of self-defense, and its definition and limitation vary with the circumstance calling for its exercise. To enshrine it in any fixed or rigid formula would be to destroy its value, for it would then be deprived of its indispensable quality of adaptation to changing conditions, and thus defeat the ends it was intended to promote. *McGuire v. Chicago, B. & Q. R. Co.*, 108 N. W. 902, 907, 131 Iowa, 340, 33 L. R. A. (N. S.) 706 (citing 6 Words and Phrases, p. 5424).

"Police power" is one of the inherent powers of all sovereign states. The states composing the United States were vested with this power when they entered into the federal compact, and, not being among the enumerated powers granted to the federal government, they were reserved by the states to be exercised and administered within their respective jurisdictions. The amendments to the federal Constitution, and especially the fourteenth amendment, do not in any way interfere with the states in the exercise of this power. The power is comprehensive and its limits are difficult to define. As stated in *Cooley's Const. Lim.* (6th Ed.) 704: "The police power of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought, not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to secure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others." As stated in 8 Cyc. pp. 863, 871: "Police power is the name given to that inherent sovereignty which is the right and duty of the government or its agents to exercise, whenever public policy, in a broad sense, demands for the benefit of society at large regulations to guard its morals, safety, health, order, or to secure in every respect such economic conditions as an advancing civilization of a higher complex character requires. \* \* \* It is the duty of the police

power to adopt all measures necessary for the preservation of the rights of person and property from unlawful violence and disorder, and for the maintenance of peace and quiet." This power extends over a large range of subjects: The public health, the public morals, the public safety, the public welfare. The courts have wisely refrained from prescribing the limits to the exercise of the police power, and it has been held to embrace all legislation which prohibits things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons, and use and management of all property, as may be conducive to the public interest. *Morrison v. State*, 95 S. W. 494, 496, 116 Tenn. 534 (citing *Martin v. Hunter*, 1 Wheat. [14 U. S.] 304, 4 L. Ed. 97; *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 1, 6 L. Ed. 23; *License Cases*, 5 How. [46 U. S.] 504, 12 L. Ed. 256; *Prigg v. Pennsylvania*, 16 Pet. [41 U. S.] 539, 10 L. Ed. 1060; *Barbier v. Connolly*, 5 Sup. Ct. 357, 113 U. S. 27, 28 L. Ed. 923; *Mugler v. Kansas*, 8 Sup. Ct. 273, 123 U. S. 623, 31 L. Ed. 205; *Webster v. State*, 82 S. W. 179, 110 Tenn. 304; *Thellian v. Porter*, 14 Lea [82 Tenn.] 626, 52 Am. Rep. 173).

Broadly speaking, the "police power" is all the power of the state which has not been delegated to the general government and which is not restricted by the Constitution. Though there are many definitions of "police power" and differentiations of the power of the state, it is immaterial what the power may be called, so long as it is known to exist. The General Assembly has all power for general legislation which is not delegated to the general government and which is not inhibited by the Constitution. *Hendricks v. Block*, 97 S. W. 63, 64, 80 Ark. 333.

"Police power" is a general term used to express the particular right of a government which is inherent in every sovereignty. It is nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. This power must, however, be exercised in subordination to the provisions of the federal Constitution. If, in the assumed exercise of its police power, the Legislature of a state should directly and plainly violate a provision of the Constitution of the United States, such legislation would be void. *McCully v. Chicago, B. & Q. R. Co.*, 110 S. W. 711, 717, 212 Mo. 1 (dissenting opinion of Woodson, J., quoting and adopting definition in *License Cases*, 5 How. [46 U. S.] 504, 533, 12 L. Ed. 256).

"The 'police power' is inherent in the several states and is left with them under the federal system of government, and may always be exercised by the state Legislatures." *Barrett v. Rickard*, 124 N. W. 153, 156, 85 Neb. 769.

#### Delegation of power

While the Legislature may delegate all or a part of its powers to municipalities, such as the taxing power, the "police power," and the power of eminent domain, the mere delegation of such powers does not divest the state of its sovereign right to exercise them for itself or to take them away from municipalities at its pleasure. *City of Chicago v. M. & M. Hotel Co.*, 93 N. E. 753, 755, 248 Ill. 264.

The enactment of an ordinance directing and regulating the construction of buildings in cities, and requiring a permit from the city therefor, is an exercise of that great power called "police power." That power is vital and indispensable. Without it cities and towns could not exist. That power is vested in the state; but, it being utterly impracticable that the state Legislature and executive could regulate by their constant presence all the doings in cities and towns, it became indispensable that the state should delegate the exercise of such power to those petit states, the cities and towns. Municipal corporations have exercised the police power eo nomine for time out of mind by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities; and this power of local legislation may be conferred upon the smallest village that the Legislature sees fit to incorporate, as well as upon the largest city in the state. The extent of their police powers depends upon the limitations of their charters. The power to be exercised is frequently restricted to the one phrase "police powers," and the ordinances must then be reasonable regulations upon subjects which are recognized as falling within the scope of such powers. *Fellows v. Charleston*, 59 S. E. 623, 624, 62 W. Va. 665, 13 L. R. A. (N. S.) 737, 125 Am. St. Rep. 990, 13 Ann. Cas. 1185.

"Court and law writers have found it difficult to define the extent and boundaries of the 'police power.' It certainly extends to the protection of the lives, health, and property of the citizens and to the preservation of good order and public morals. Every citizen has the constitutional guaranty of life, liberty, and the enjoyment of his property, and they cannot be taken from him except by due process of law. Social and conventional rights, however, are subject to such reasonable limitations in their enjoyment as will prevent them from being dangerous and hurtful to the body politic, and the law-making department of the government, under the power vested in it by the

Constitution, can enact laws providing for such reasonable restraints and regulations as may be necessary and expedient to secure social order and public morals." A city council has a large discretion in the enactment of ordinances, and an ordinance enacted under the police power will not be declared void unless it is clearly oppressive or unreasonable. *Commonwealth, for Use of City of Madisonville, v. Price*, 94 S. W. 32, 33, 123 Ky. 163, 13 Ann. Cas. 489 (quoting and adopting definition in *Dunn v. Commonwealth*, 105 Ky. 834, 49 S. W. 813, 43 L. R. A. 701, 88 Am. St. Rep. 344).

"The 'police powers' of the states may, in the absence of any constitutional restrictions upon the subject, be delegated to the various municipalities throughout the state, to be exercised by them within the corporate limits. And indeed such delegation is necessary, for it is a well-recognized principle in government that the police requirements of a city are different from those of the state at large, and that stricter regulations are essential to the good order and peace of a crowded metropolis than are required in the sparsely peopled portions of the country." "The police power of the state, being an expression of the instinct of self-preservation and protection characteristic of every living creature, is an inherent faculty and function of life, attributed to all self-governing bodies as indispensable to their healthy existence and to the public welfare. It embraces all rules and regulations for the protection of the lives, limbs, health, comfort, and quiet of persons, and the preservation and security of property. \* \* \* After repeated challenge of municipal authority to exercise the police power, on the ground that it is a sovereign power and therefore nondelegable, the doctrine is firmly established and now well recognized that the Legislature may expressly or by implication delegate to municipal corporations the lawful exercise of police power within their boundaries. The measure of power thus conferred is subject to the legislative discretion." *Barrett v. Rickard*, 124 N. W. 153, 156, 85 Neb. 769 (quoting 28 Cyc. p. 692).

"The governmental power under which the care and control of prisons fall is the great one commonly called the 'police power.'" And in caring for prisons a county exercises part of this great power by virtue of its delegation by the Legislature to it. *Pritchett v. Board of Commissioners of Knox County*, 85 N. E. 32, 34, 42 Ind. App. 3 (quoting and adopting definitions in *Board of Com'rs of Jasper County v. Allman*, 42 N. E. 206, 142 Ind. 573, 39 L. R. A. 58).

The "police power," so called, rests at common law, and in this state also, by reservation in the Constitution. In the absence of constitutional restrictions, this power may be delegated by a state to municipal corpo-

rations, to be exercised within their corporate limits; but, whether the power be so delegated or otherwise, it is a governmental function, founded upon the duty of the state to protect the public safety, the public health, and the public morals. A municipality, constructing and maintaining a jail, as expressly authorized by V. S. 5302-5304, is exercising a governmental power, and is not liable at common law for negligence to one committed to the jail to await an examination, as expressly authorized by section 5305. *Carty's Adm'r v. Village of Winoski*, 62 Atl. 45, 46, 78 Vt. 104, 2 L. R. A. (N. S.) 95, 6 Ann. Cas. 436 (citing *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Lake Shore & M. S. R. Co. v. Smith*, 19 Sup. Ct. 565, 173 U. S. 684, 43 L. Ed. 858; *License Cases*, 5 How. 504, 12 L. Ed. 256).

"The exercise of the 'police power' for the protection of safety, order, and morals constitutes the 'police power' in the narrower or primary sense of the term. It is a power so vital to the community that it is often conceded to local authorities of limited powers. It is the 'police power' in this narrower sense of the term which the Supreme Court of the United States concedes on principle to states even where its exercise affects interstate and foreign commerce." *Peace v. McAdoo*, 96 N. Y. Supp. 1039, 110 App. Div. 13 (quoting *Freund, Police Powers*, § 10).

"The 'police power' is included in the legislative power, but there are in the Constitution express limitations upon some of the powers comprised in the police power, and the term 'police power' is used to designate that power from others, and is helpful in ascertaining its scope and the limitations upon it." "The police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." The state may, in the exercise of the police power, delegate authority to municipal corporations to license and regulate chattel mortgage and salary loan brokers. *Sanning v. City of Cincinnati*, 90 N. E. 125, 127, 81 Ohio, 142, 25 L. R. A. (N. S.) 686 (quoting *Chicago, B. & Q. Ry. Co. v. Drainage Com'rs*, 200 U. S. 561-592, 26 Sup. Ct. 341, 349, 50 L. Ed. 596, 4 Ann. Cas. 1175).

The "police power" extends to the making of laws which are necessary for the preservation of the state itself, to secure the uninterrupted discharge of its legitimate functions, for the prevention and punishment of crime, for the preservation of the public peace and order, and for the protection of all members of the state in the enjoyment of their just rights against fraud and oppression. Under the American system of government, plenary authority to make police

regulations is vested in the Legislatures of the different states, restricted only by the paramount authority of positive constitutional prohibitions. It is vested in a subordinate and delegated manner in the authorities of municipal corporations. It must be observed that there is not a distinct police power inherent in municipal corporations, other than that of the state to which they owe their existence. Of course, the police power delegated to a municipal corporation is not exclusive of that retained by the state. That is, municipal police regulations must yield to the general laws of the state whenever there is a conflict between them. *Ex parte Corliss*, 114 N. W. 962, 980, 16 N. D. 470 (dissenting opinion of Spalding, J., citing *Cooley*, Const. Lim. §§ 109, 110).

#### **Eminent domain distinguished**

"The 'police power' is to be clearly distinguished from the right of 'eminent domain,' and the distinction lies in this: That, in the exercise of the latter right, private property is taken for public use, and the owner is invariably entitled to compensation therefor, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may sustain in consequence thereof, for the law considers that either the injury is *damnum absque injuria*, or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power." *Chicago, B. & Q. R. Co. v. People*, 72 N. E. 219, 224, 212 Ill. 103 (citing *Frazer v. City of Chicago*, 57 N. E. 1055, 186 Ill. 480, 51 L. R. A. 306, 78 Am. St. Rep. 290).

It is a well-recognized principle in the decisions of the state and federal courts that the citizen holds his property subject, not only to the exercise of the right of "eminent domain" by the state, but also subject to the lawful exercise of the "police power" by the Legislature. In the one case, property is taken by condemnation and due compensation; in the other, the necessary and reasonable expenses and loss of property in making reasonable changes in existing structures, or in erecting additions thereto, are *damnum absque injuria*. *Laws 1901*, p. 912, c. 334, § 100, as amended by *Laws 1902*, p. 937, c. 332, § 47, generally known as the "Tenement House Act," requiring all school sinks in the existing tenement houses in cities of the first class to be removed and replaced by water-closets, is a proper and constitutional exercise of the police power of the state for the protection of the public health. *Tenement House Dept. of City of New York v. Moesch*, 72 N. E. 231, 232,

179 N. Y. 325, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439.

An ordinance requiring railroad companies at their own expense to reduce their tracks at crossings to grade is the exercise of the "police power" over crossings and not the power of "eminent domain." The limitation, in the power of eminent domain, that property shall not be taken or damaged for public use without adequate compensation does not of itself impose any restrictions on the proper employment of the police power on any subject lying within its sphere in a proper and lawful manner. *Houston & T. C. R. Co. v. Dallas*, 84 S. W. 648, 651, 98 Tex. 396, 70 L. R. A. 850.

#### **Extent of power**

The "police power" of the state is the power which enables it to promote the health, comfort, safety, and welfare of society. In *re Boyce*, 75 Pac. 1, 8, 27 Nev. 299, 65 L. R. A. 47, 1 Ann. Cas. 66 (quoting *People v. Lochner*, 76 N. Y. Supp. 399, 73 App. Div. 120).

The "police power" of a state is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society. *Oldknow v. City of Atlanta*, 71 S. E. 1015, 9 Ga. App. 594.

"The 'police power' of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." *Chicago, B. & Q. Ry. Co. v. Illinois*, 26 Sup. Ct. 341, 349, 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175 (citing *Lake Shore & M. S. R. Co. v. Ohio*, 19 Sup. Ct. 465, 173 U. S. 285, 292, 43 L. Ed. 702, 704; *Gilman v. Philadelphia*, 3 Wall. [70 U. S.] 713, 729, 18 L. Ed. 525, 527; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470, 24 L. Ed. 529).

The subjects for the exercise of the "police power" are, first, preservation of the public health; second, preservation of the public morals; third, regulation of business enterprises; fourth, regulation of civil rights of individuals; and, fifth, the general welfare and safety of the citizens. *Commonwealth v. Reinecke Coal Min. Co.*, 79 S. W. 287, 290, 117 Ky. 885.

The "police power" of the state is that power vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. In *re Arkansas Rate Cases*, 187 Fed. 290, 299 (quoting with approval from *Commonwealth v. Alger*, 7 Cush. [Mass.] 53, 85).

The "police powers" of a state or municipality do not extend to the passage of laws or ordinances which violate fundamental rights secured by the federal Constitution. *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500, 511.

The exercise of the "police power" is not limited to regulations to promote the public health, morals, or safety, and it may be extended to such regulations as will promote public convenience and general prosperity. *Williams v. State*, 108 S. W. 838, 839, 85 Ark. 464, 26 L. R. A. (N. S.) 482, 122 Am. St. Rep. 47.

"The 'police power,' in its broadest acceptance, means the general power of a government to preserve the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest." *Caven v. Coleman* (Tex.) 96 S. W. 774, 778.

The "police power" of the state not only embraces laws intended to promote the public health, morals, or safety, or to suppress that which is disorderly or unsanitary but it also embraces laws which conduce to the general welfare of the public or state. *Morris v. City of Indianapolis*, 94 N. E. 705, 714, 177 Ind. 369.

The "police power" is the inherent and plenary power residing within constitutional limitations in the Legislature to pass wholesome and reasonable laws for the good and welfare of the people of the state. *Carr v. State*, 93 N. E. 1071, 1078, 175 Ind. 241, 82 L. R. A. (N. S.) 1190.

"Police power" is: " \* \* \* The power vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and services of this power than to mark its boundaries or prescribe limits to its exercise." *State v. Robb*, 60 Atl. 874, 876, 100 Me. 180, 4 Ann. Cas. 275 (quoting and adopting the definition in *Commonwealth v. Alger*, 7 Cush. [61 Mass.] 85).

The "police power" is the power vested in the Legislature by the Constitution to make all manner of wholesome and reasonable laws, either with penalties or without, not repugnant to the Constitution, as they may judge to be for the good and welfare of the public. *State v. Central Lumber Co.*, 123 N. W. 504, 510, 24 S. D. 136, 42 L. R. A. (N. S.) 804.

The "police power" is a term which has relation to a power to enact a system of reg-

ulations tending to the health, order, convenience, and comfort of a state's inhabitants and to the prevention and punishment of public injuries and offenses. *State v. Penny*, 111 Pac. 727, 730, 42 Mont. 118, 31 L. R. A. (N. S.) 1155.

The absolute freedom from restraint which an individual has as a natural right yields to the necessities of the public welfare when the public welfare demands that this right be temporarily impaired. These temporary invasions of natural right are what is known as the "exercise of police power," and the act of declaring what temporary invasion of the natural rights of liberty and personal immunity are necessary in the exercise of the police power for the common welfare is solely a legislative act, and hence, where no statutory authority is shown for photographing and measuring, under the Bertillon system, persons accused of an offense, after arraignment and admission to bail, the police department of a city has no authority to exercise such power. *People ex rel. Gow v. Bingham*, 107 N. Y. Supp. 1011, 1014, 57 Misc. Rep. 66.

In general "police power" extends to all the great public needs that may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare. *Cunningham v. Northwestern Improvement Co.*, 119 Pac. 554, 560, 44 Mont. 180.

The "police power" of a state is the right to prescribe regulations for the good order, peace, protection, comfort, convenience, and morals of the community, and its essential quality as a governmental agency is that it imposes on persons and property burdens designed to promote the health and safety of the public at large. *Commonwealth v. Plymouth Coal Co.*, 81 Atl. 148, 150, 232 Pa. 141.

The "police power" is the general power of the state to preserve and promote the public health, peace, comfort, and morals, and statutes which but indirectly affect the common good are sustainable as an exercise of the police power, provided they are reasonable. *State ex rel. Webster v. Superior Court for King County*, 120 Pac. 861, 862, 67 Wash. 37, Ann. Cas. 1913D, 78.

"Police power," in its most comprehensive sense, embraces the whole system by which the state seeks to preserve the public order, to prevent offenses against the law, to insure to citizens in their intercourse with each other the enjoyment of their own, so far as is reasonably consistent with the like enjoyment of rights by others, but is completely subject to the Constitution, and does not exist, except with reference to matters clearly within the conservation of the public health, safety, and welfare. *Ives v. South Buffalo Ry. Co.*, 94 N. E. 431, 442, 201 N. Y.



271, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

The "police power" of a state is the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Ex parte Hollman*, 60 S. E. 19, 30, 79 S. C. 9, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105 (quoting and adopting the definition in *Barbier v. Connelly*, 5 Sup. Ct. 357, 113 U. S. 27, 28 L. Ed. 923).

The "police power" is an exercise of the sovereign right of government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. The obligations of an agreement to remove an existing dam from a navigable stream, and to allow the stream to remain open and unobstructed, are not unconstitutionally impaired by a state statute subsequently enacted in the exercise of the police power to subserve the drainage of lowlands, authorizing the construction of a dam across the stream by the very persons making such agreement. *Manigault v. Springs*, 26 Sup. Ct. 127, 130, 199 U. S. 473, 50 L. Ed. 274.

"Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description'; indeed, all laws that relate to matters completely within its territory, and which do not by their necessary operation affect the people of other states. According to settled principles, the "police power" of a state must be held to embrace at least such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Jacobson v. Massachusetts*, 25 Sup. Ct. 358, 360, 197 U. S. 11, 49 L. Ed. 643, 3 Ann. Cas. 765 (citing *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 1, 203, 6 L. Ed. 23, 71; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527, 530; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 6 Sup. Ct. 252, 115 U. S. 650, 661, 29 L. Ed. 516, 520; *Lawton v. Steele*, 14 Sup. Ct. 499, 152 U. S. 133, 38 L. Ed. 385).

The "police power" is the inherent and plenary power in the state enabling it to prohibit all things hurtful to the comfort, safety, and welfare of society, and to adopt such regulations as will promote the same. *People v. Steele*, 83 N. E. 236, 237, 231 Ill. 340, 14 L. R. A. (N. S.) 361, 121 Am. St. R&P. 321; *City of Chicago v. Powers*, 83 N. E. 240, 231 Ill. 560.

The "police power" springs from the fundamental principle that every property

owner must so use his own as not to endanger the safety, health, and general welfare of the community. It operates on an existing evil that injuriously affects the health, morals, safety, or general welfare of the community, and is a power to which every person and corporation must yield obedience, and from which the state itself cannot grant exemption. *Cincinnati, I. & W. Ry. Co. v. City of Connersville*, 83 N. E. 508, 509, 170 Ind. 316.

The "police power" is limited to the prevention and punishment of such acts as may menace the welfare, happiness, morals or peace of the state and of the people, and as these cannot be imperiled by the exercise of a right to resort to a federal court, given by the law of the land, no court can recognize the bringing of such suit as any legal cause for the forfeiture of any vested right of property. *Seaboard Air Line Ry. Co. v. Railroad Commission of Alabama*, 155 Fed. 792, 804.

Under its "police power" a state has the right to determine what is dangerous and injurious to the public health, morals, and safety. *Massie v. Cessna*, 88 N. E. 152, 154, 239 Ill. 352; *McCord v. State*, 101 Pac. 280, 282, 2 Okl. Cr. 214.

A state's "police power" involves the right to make regulations for the protection of public health, safety, morals, peace, education, good order, convenience, and general prosperity. *State v. Sherman*, 105 Pac. 290, 300, 18 Wyo. 169, 27 L. R. A. (N. S.) 898, Ann. Cas. 1912C, 819.

The "police power" embraces the whole system of internal regulation by which the state seeks to preserve public order, and to establish, for the intercourse of citizens with citizens, those rules of good manners which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others; and restraints on human action, necessary to the uniform and reasonable enjoyment of private rights, are an exercise of the police power. *Nash Hardware Co. v. Morris*, 146 S. W. 874, 876, 105 Tex. 217.

The "police power" of a state includes the power to prescribe such regulations in the use of inherently dangerous property as will render the consequent danger as small as possible. *Texas Cent. R. Co. v. Pruitt*, 110 S. W. 966, 968, 49 Tex. Civ. App. 370 (quoting and adopting 3 Elliott, R. R. [2d Ed.] § 1182).

The "police power" of the state extends to the protection of the lives, health, comfort, and quiet of all persons and the protection of all property within the state; and persons and property are subjected to such restrictions and burdens as are reasonably necessary to secure the general comfort, health, and prosperity. *Town of Canaan v. Enfield Village Fire Dist.*, 70 Atl. 250, 261, 74

N. H. 517 (concurring opinion, quoting and adopting definition in *State v. White*, 5 Atl. 828, 830, 64 N. H. 48, 50, and citing *State v. United States & C. Express Co.*, 60 N. H. 219).

The "police power" of the state is the power to make laws to secure the comfort, peace, convenience, and health of the community. It derives its existence from the rule that the safety of the people is the supreme law, justifying legislation upon matters pertaining to public welfare, the public health, or the public morals. *Ex parte Elam*, 91 Pac. 811, 812, 6 Cal. App. 233 (citing *Ex parte Whitwell*, 32 Pac. 870, 98 Cal. 78, 19 L. R. A. 727, 35 Am. St. Rep. 152; *Ex parte Drexel*, 82 Pac. 429, 147 Cal. 766, 2 L. R. A. [N. S.] 588, 3 Ann. Cas. 878).

"The 'police power' of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others. The 'police power' is the power vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise. 'This police power of the state' says an eminent judge, 'extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, "Sic utere tuo ut alienum non lædas," which being of universal application, it must, of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' And again: (By this) 'general police power of the state, persons and property are subjected to all kinds of restraint and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right in the Legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.' And neither the power itself, nor the discretion to exercise it as need may require, can be bargained away by the state. In the American constitutional system the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken from them, either wholly or

in part, and exercised under legislation of Congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the states. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal Constitution." "There is also a common assent that the Legislature has the right of control in all matters affecting public safety, health, and welfare on the ground that these are within the indefinable but unquestioned purview of what is known as the police power. It is indefinable because none can foresee the everchanging conditions which may call for its exercise; and it is unquestioned because it is a necessary function of government to provide for the safety and welfare of the people. Private rights are often involved in its exercise, but a law is not on that account rendered invalid or unconstitutional. The first inquiry is whether the subject of the law is within the power, for, if it is, the Legislature has jurisdiction to enact it, and its terms are subject to a reasonable legislative discretion." *State v. Kofnes*, 80 Atl. 432, 436, 437, 33 R. I. 211, Ann. Cas. 1913C, 1120 (quoting and adopting definitions from *Cooley Const. Lim.* [7th Ed.] p. 829 et seq; *Opinion to the Governor*, 54 Atl. 602, 603, 24 R. I. 603, 605).

"The 'police power' extends to all regulations affecting the health, good order, morals, peace, and safety of society, and under it all sorts of restrictions and burdens are imposed; and, when they are not in conflict with any constitutional principles, they cannot be successfully assailed in a judicial tribunal." *Commonwealth v. Andrews*, 60 Atl. 554, 555, 211 Pa. 110 (quoting and adopting *Bartemeyer v. Iowa*, 85 U. S. [18 Wall.] 129, 21 L. Ed. 929).

"Police power" is that broad and comprehensive authority which resides in the lawmaking branch of the state government, and which it is permitted by the Constitution to exercise to provide for the comfort, the safety, and welfare of society by regulating and controlling the conduct of the citizen in respect to himself and his property. *Wright v. Hart*, 93 N. Y. Supp. 60, 62, 67, 103 App. Div. 218.

"Police powers" embrace the powers of government to preserve and promote public welfare, the safety, health, good order, and happiness of the people, and authorize the establishment of such rules and regulations for the conduct of all persons and for the use and management of all property as may be conducive to the public interest and welfare. *Nobel v. Bragaw*, 85 Pac. 903, 12 Idaho, 265.

**Same—Abatement of nuisances**

The "police power" of the state extends to everything necessary to the due protection of public morals and the maintenance of the peace and quiet of the state as well as the protection of life and property, and in the exercise of that power the state may authorize its officers to summarily abate and destroy nuisances and those things specifically designed for the commission of crime. *J. B. Mullen & Co. v. Mosley*, 90 Pac. 986, 989, 13 Idaho, 457.

"Police power" includes everything essential to the public safety, health, and morals, and justifies the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. *Bland v. People*, 76 Pac. 359, 362, 32 Colo. 319, 65 L. R. A. 424, 105 Am. St. Rep. 80 (citing *Lawton v. Steele*, 14 Sup. Ct. 499, 152 U. S. 133, 38 L. Ed. 385); *State v. Tower*, 84 S. W. 10, 12, 185 Mo. 79, 68 L. R. A. 402 (citing *Lawton v. Steele*, 14 Sup. Ct. 499, 152 U. S. 133, 38 L. Ed. 385).

**Same—Primary elections**

The "police power" is that attribute of government by which the Legislature is authorized to pass laws to constrain the conduct of citizens for the benefit of the public good. Limitations of strictly natural rights and regulation of constitutional rights are not incompatible with the valid exercise of the "police power." Primary elections are so far matters of public concern that they are, at the discretion of the Legislature, proper objects of reasonable statutory regulation under its police power. *Hopper v. Stack*, 56 Atl. 1, 3, 69 N. J. Law, 562.

**Same—Running, registration, and license of motor vehicles**

The provisions of a statute requiring every owner to file a declaration that he is competent to drive a motor vehicle and a statement of the name and address of the owner, of the maker, and number of the machine, and its rated horse power, and requiring the registration and license of the machine, are within the exercise of the police power of the state. *Unwen v. State*, 64 Atl. 163, 164, 73 N. J. Law, 529.

**Same—Separation of races**

A city ordinance for the separation of the races on the street cars is within the incidental "police powers" of the city. *Patterson v. Taylor*, 40 South. 493, 495, 51 Fla. 275.

No jurist has dared to attempt to state the limit in law of that quality in government which is exercised through what is termed the "police power." All agree that, very broadly and indefinitely speaking, it is the power and obligation of government to secure and promote the general welfare, comfort, and convenience of the citizens as well as the public peace, public health, public

morals, and the public safety. Act March 22, 1904 (Acts 1904, p. 181, c. 85), in so far as it prohibits and imposes a punishment for maintaining and operating an institution of learning in which white and colored persons may be taught at the same time and in the same place, is within the police power, and valid. Act March 22, 1904 (Acts 1904, p. 181, c. 85), in so far as it prohibits maintenance by an institution of learning of separate and distinct branches for white and colored persons, less than 25 miles distant from each other, is unreasonable, and not within the police power. *Berea College v. Commonwealth*, 94 S. W. 623, 624, 123 Ky. 209, 124 Am. St. Rep. 344, 13 Ann. Cas. 337 (citing *Cooley*, Const. Lim. 704; *Tied. Lim. Police Power*, 212; 1 *Hare*, American Const. Law, 766).

The "police powers of the states" means the "power to enact laws to promote the order and to secure the comfort, happiness, and the health of the people." Though Acts 1904, p. 186, c. 109, requiring carriers to provide separate coaches for the transportation of white and colored passengers, and making it an offense for a passenger to refuse to occupy the car to which he is assigned by the conductor, is valid in so far as it affects commerce wholly within the state, it is invalid as to interstate passengers, under the commerce clause of the federal Constitution. *Hart v. State*, 60 Atl. 457, 459, 100 Md. 595 (quoting and adopting the definition in *Hennington v. Georgia*, 16 Sup. Ct. 1086, 163 U. S. 299, 41 L. Ed. 166).

**Grounds of power**

The "police power" extends to the enactment of all laws which, in contemplation of the Constitution, promote the public welfare. "It has been not inaptly termed 'the law of necessity.'" The doctrine that the "police power" is a law of necessity may well be said to furnish the key to what is within and what is without the boundaries of such power; not that a police regulation to be legitimate must be an absolute essential to the public welfare, but that the exigency to be met must so concern such welfare as to suggest, reasonably, necessity for a legislative remedy, the Legislature to be the primary judge and the supreme judge as well as to interferences so unreasonable as to be excessive beyond reasonable controversy. *State v. Redmon*, 114 N. W. 137, 140, 134 Wis. 89.

"Police power" of the state is a power resorted to only of necessity in the protection and promotion of the life, comfort, safety, and welfare of society. *Larabee v. Dolley*, 175 Fed. 365, 389.

The "police power" of the state, is that inherent or plenary power which enables the state to prohibit all things hurtful to the comfort, safety, and welfare of society, and may be termed the "law of overruling necessity." Anything which is hurtful to the

public interest is subject to the police power and may be restrained or prohibited in the exercise of that power. All rights, whether tenable or untenable, are held subject to this power. *City of Chicago v. Gunning System*, 73 N. E. 1035, 1038, 214 Ill. 628, 70 L. R. A. 230, 2 Ann. Cas. 892.

#### Public health

Under the "police power" there is a general legislative authority to pass such laws as is believed will promote the common good, or will protect and preserve the public health. The power to determine what laws are necessary to promote or secure these objects rests primarily with the General Assembly, subject to the power of the courts to decide whether a particular enactment is to that end. Vaccination, while made compulsory in a few of the states, is countenanced and promoted by legislation in nearly all of them, and statutes authorizing boards of education, or the local school authorities, to require vaccination as a prerequisite to attendance upon the public schools have been almost uniformly upheld and sustained by the courts as a reasonable and proper exercise of the "police power." The enactment of Rev. St. § 3986, authorizing boards of education "to make and enforce such rules and regulations to secure the vaccination of, and to prevent the spread of smallpox among, the pupils attending, or likely to attend, schools of the district, as in its opinion the safety and interest of the public require," is a reasonable exercise of the "police power" of the state. *State ex rel. Milhoof v. Board of Education of Village of Barberton*, 81 N. E. 568, 569, 76 Ohio St. 717 (citing *Abeel v. Clark*, 24 Pac. 883, 84 Cal. 226; *Commonwealth v. Pear*, 66 N. E. 719, 183 Mass. 242, 67 L. R. A. 935; *Hutchins v. School Committee of Town of Durham*, 49 S. E. 46, 137 N. C. 68, 2 Ann. Cas. 840; *Blue v. Beach*, 56 N. E. 89, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195; *In re August Rebenack*, 62 Mo. App. 8; *Duffield v. Williamsport School District*, 29 Atl. 742, 162 Pa. 476, 25 L. R. A. 152; *Ffield v. Robinson*, 48 Atl. 873, 198 Pa. 638; *Tiedeman, State & Federal Control of Persons & Property*, vol. 1, § 17; *Parker & Worthington's Public Health & Safety*, § 123).

The Legislature is entitled in the exercise of its "police power" to prohibit the sale of cigarettes. *People ex rel. Berlitzheimer v. Busse*, 83 N. E. 175, 231 Ill. 251.

"Police power" is "the general power of the government to protect and promote the public welfare, even at the expense of private rights" (citing definition in *Booth v. People*, 186 Ill. 43, 57 N. E. 798, 50 L. R. A. 762, 78 Am. St. Rep. 229). "The police power was not surrendered by the states to the federal government, and is an inherent right of every sovereignty. \* \* \* It is clearly within the 'police power' to protect the lives and health of the people by the seizure, con-

demnation, and destruction of impure and dangerous articles of food." *North American Cold Storage Co. v. City of Chicago*, 151 Fed. 120, 123.

A statute providing for the exclusion of unvaccinated children from the public schools does not involve, in its application, trespass on the reserved rights of the individual beyond the reach of the "police power" from the fact that vaccination is the infliction of a disease on the subject. *Stull v. Reber*, 64 Atl. 419, 421, 215 Pa. 156, 7 Ann. Cas. 415.

Every law for the restraint and punishment of a crime, for the preservation of public peace, health, and morals, comes within the "police power." That power embraces all those matters which affect the lives, limbs, health, comfort, and welfare of all in their persons and their property, and subjects both persons and property to those restraints and burdens which are necessary in order that the general comfort and welfare may be secured. A law requiring vaccination of children as a condition of their attendance on public schools is a valid exercise of the "police power." *Viemelster v. White*, 84 N. Y. Supp. 712, 716, 88 App. Div. 44.

#### Public morals

It cannot be doubted that the regulation of the sale of liquor comes within the scope of the "police power." *South Carolina v. United States*, 26 Sup. Ct. 110, 113, 199 U. S. 437, 50 L. Ed. 261, 4 Ann. Cas. 737.

The right to regulate the sale of intoxicating liquors by retail by the Legislature, or by municipal or other authority, under legislative power given, is within the "police power" of the state and is practically limitless. It may extend to the prohibition of the sale altogether. *Meehan v. Board of Excise Com'rs of Jersey City*, 64 Atl. 689, 690, 73 N. J. Law, 382.

Much has been said in respect to the limits of "police power," but no text-writer or court of last resort has definitely established its confines. Its boundary must therefore be coextensive with and measured only by the necessity which calls for its exercise. To this extent the state may employ such power, or it may delegate the whole or a part thereof to a municipal corporation as its subordinate agent; an ordinance interdicting sale of intoxicating liquors in any side room, back room, upper room, alcove, booth, or box connected with a saloon is a valid exercise of police power. *Sandys v. Williams*, 80 Pac. 642, 646, 46 Or. 327 (citing *Stone v. Mississippi*, 100 U. S. 814, 25 L. Ed. 1079).

While a city or municipality may not, under the guise of a police regulation, exact a tax, and it is true that laws enacted under the police power must have reference to the supervision, control, and regulation of some act or thing which may in some way injuriously affect the peace, good order, health,

morality, or safety of society, an ordinance requiring all dealers in liquors to procure a license from the city is a valid exercise of the "police power," and is not invalid in its application to a nonresident manufacturer of liquors. *Duluth Brewing & Malting Co. v. Superior*, 128 Fed. 353, 359, 59 C. C. A. 481.

The "police power" embraces the whole system of internal regulation by which the state seeks, not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment by others. Blackstone says that "police power" is the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. The retail traffic in intoxicating liquors is a business in which a person has no inherent right to engage, and the state, in the exercise of its police power, may prohibit or regulate it by the imposition of such conditions and restrictions as it sees fit, provided the restrictions do not interfere with interstate commerce. *Reed v. Collins*, 90 Pac. 973, 976, 5 Cal. App. 494.

The "police powers" of a state form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which may be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for the regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. A license tax imposed under municipal ordinance upon those engaged in selling beer in the city by the barrel, half barrel, or quarter barrel must be regarded, even when applied to interstate transactions in the original packages, as an exercise of the police power permitted by the Wilson Act of August 8, 1890 (26 Stat. 313, c. 728), subjecting intoxicating liquors arriving in a state to the laws of such state enacted in the exercise of its police powers, although the city may derive more or less revenue from the ordinance in question. *Phillips v. City of Mobile*, 28 Sup. Ct. 370, 372, 208 U. S. 472, 52 L. Ed. 578.

Without attempting to define what are peculiar subjects or limits of the "police power," it may be safely affirmed that every law for the restraint or punishment of crime for the preservation of public peace, health, and

morals must come within this category. The provision of Rev. St. § 2139, as amended by Act Jan. 30, 1897, c. 109, 29 Stat. 506, which makes it a criminal offense to introduce liquor into the Indian Territory, is a police regulation and can be enforced only as to land within the exclusive territorial jurisdiction of the United States. *United States v. Sutton*, 165 Fed. 253, 255 (quoting and adopting definition in *License Cases*, 5 How. [46 U. S.] 504, 12 L. Ed. 256, and citing *Slaughterhouse Cases*, 16 Wall. [83 U. S.] 36, 21 L. Ed. 394, *Ex parte Dick*, 141 Fed. 5, 72 C. C. A. 667, and *United States v. Boss*, 160 Fed. 132).

The "police power" is vested in the state government. It is exercised primarily by the Legislature, which may adopt any measure within the extent of the power, appropriate and needful, for the protection of the public morals, the public health, or the public safety. The Legislature, in the exercise of the police power, by appropriate enactments, may regulate and, if they deem it conducive to the public health, morals, peace, or safety, entirely prohibit the manufacture and sale of intoxicating liquors, and for the purpose of making effective such legislation may make it criminal for any person to have such liquors in his possession, within the territory where the sale or gift is prohibited, with intent to sell or give away, and may prescribe or change the rules of evidence by making such possession prima facie evidence of a guilty intent. *State v. Williams*, 61 S. E. 61, 64, 146 N. C. 618, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562.

The "police power of the United States" can only be exercised where the legislative authority of Congress excludes territorially all state legislation; and where the United States has conveyed under its land laws lands within a state ceded to it by an Indian tribe, and such lands have passed into the ownership of individuals and a municipality of the state which has been formed thereon, they are no longer subject to the provisions of Rev. St. § 2139, as amended by Act Jan. 30, 1897, c. 109, 29 Stat. 506, making it an offense to introduce liquor into the Indian country; nor can that law be retained in force over such lands by agreement with the Indians in the contract or treaty of cession, the police power of the state to regulate the sale of liquor thereon being exclusive. *Ex parte Dick*, 141 Fed. 5, 7, 72 C. C. A. 667 (citing *United States v. De Witt*, 9 Wall. [76 U. S.] 41, 45, 19 L. Ed. 593; *Slaughterhouse Cases*, 16 Wall. [83 U. S.] 36, 64, 21 L. Ed. 394).

#### Public welfare

An act imposing a per capita tax on dogs is valid as an exercise of the "police power" of the state. *State v. Sharp*, 81 N. E. 1150, 1152, 169 Ind. 123.

A statute prohibiting the having of oysters in possession containing more than 5 per cent. of shells or the taking of oysters less than 2½ inches from hinge to mouth is a proper exercise of the state's "police power." *Windsor v. State*, 64 Atl. 288, 292, 103 Md. 611, 12 L. R. A. (N. S.) 869.

A statute making it an offense to permit a female under the age of 21 years to remain in or about a saloon is within the "police power." *State v. Baker*, 92 Pac. 1076, 1078, 50 Or. 381, 13 L. R. A. (N. S.) 1040.

In the exercise of its "police power," a state may prohibit the conduct of business on Sunday. *State v. Dolan*, 92 Pac. 995, 998, 13 Idaho, 693, 14 L. R. A. (N. S.) 1259.

In the exercise of the "police power," the Legislature may enact laws for the prevention of cruelty to animals, and designate officers charged with the execution thereof. *Jenks v. Stump*, 93 Pac. 17, 18, 41 Colo. 281, 124 Am. St. Rep. 137, 14 Ann. Cas. 914.

It is competent for the Legislature, in the exercise of its "police power," to take steps for the protection of the lives and limbs of employes who may be exposed to dangerous agencies in the control of others. Laws 1906, c. 657, relating to actions for personal injury or death of railroad employes, and defining fellow servants, is not invalid. *Schradin v. New York Cent. & H. R. R. Co.*, 103 N. Y. Supp. 73, 75 (citing *Indianapolis Union R. R. v. Houlihan*, 60 N. E. 943, 157 Ind. 494, 54 L. R. A. 787).

The "police power" was well known to the common law, and was defined by Blackstone prior to the adoption of the Constitution of the United States (4 Blackstone Comm. 162). Municipal corporations have exercised this power from the beginning of our government, and it is necessary to the tranquillity, safety, and protection of every well-ordered community; and Constitutions and statutes, in the absence of provisions to the contrary, are to be construed with reference to that fact. The power is very broad and comprehensive and is exercised to promote the health, comfort, safety, and welfare of society. An ordinance requiring occupants of premises to keep abutting sidewalks free from ice and snow, under penalty, is a valid exercise of municipal police power. *City of Helena v. Kent*, 80 Pac. 258, 259, 32 Mont. 279, 4 Ann. Cas. 235 (quoting *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, and citing *Village of Carthage v. Frederick*, 25 N. E. 480, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490).

#### **Regulation of business and occupations**

The term "police power" has generally been defined to be that power which a state or municipality has to enact laws or ordinances which pertain to the public safety, the public health, or the public morals. A

statute, therefore, prohibiting, regulating, or interfering with private business, can be upheld only under the police power, and that police power can be rightfully exercised only when the statute in question is for the protection of the public safety, the public health, or the public morals. *Ex parte Drexel*, 82 Pac. 429, 430, 147 Cal. 763, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878 (citing *Young v. Commonwealth*, 45 S. E. 327, 101 Va. 853).

The "police power" of a state is recognized by the courts to be one of wide sweep. It is exercised by the state in order to promote the health, safety, comfort, morals, and welfare of the public. The right to exercise this power is said to be inherent in the people in every free government. It is not a grant, derived from or under any written Constitution. It is not, however, without limitation, and it cannot be invoked so as to invade the fundamental rights of a citizen. As a general proposition, it may be asserted that it is the province of the Legislature to decide when the exigency exists for the exercise of this power, but as to what are the subjects which come within it is evidently a judicial question. Under *Burns' Rev. St. § 3794* (*Indianapolis City Charter, § 23*), the city has no power to pass an ordinance requiring roads operating within the corporate limits to construct elevated tracks over all crossings within a prescribed district without regard to the conditions or circumstances of any particular crossing. *State ex rel. City of Indianapolis v. Indianapolis Union Ry. Co.*, 66 N. E. 163, 167, 160 Ind. 45, 60 L. R. A. 831 (quoting and adopting definition in *State v. Gerhardt*, 44 N. E. 469, 145 Ind. 439, 33 L. R. A. 313).

The "police power" granted by the Constitution is not restricted to the suppression of nuisances. It includes the regulation of the conduct of business, or the use of property, to the end that the public health or morals may not be impaired or endangered. *Laurel Hill Cemetery v. City and County of San Francisco*, 93 Pac. 70, 73, 152 Cal. 464, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080.

"To justify the state in thus interposing its authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its 'police power' is not final or conclusive, but is subject to the supervision of the courts." *Act Feb. 28, 1899* (*Weekly Wage Law; Laws 1899, p. 193, c.*

124), providing that every person, company, or corporation employing any person to labor shall make weekly payments for the full amount due for such labor, and that the chief inspector, or any person interested, may bring suit in the name of the state against any person, company, or corporation that neglects or refuses to comply within 10 days after such payment is due and left unpaid, is not sustainable as a proper exercise of the state's "police power." *Republic Iron & Steel Co. v. State*, 66 N. E. 1005, 1007, 160 Ind. 379, 62 L. R. A. 136 (quoting and adopting definition in *Lawton v. Steele*, 14 Sup. Ct. 499, 152 U. S. 133, 137, 38 L. Ed. 385).

A state statute imposing an inspection fee upon beer or other malt liquors shipped from other states into that state, and held there for sale and consumption therein, must, although producing a revenue, and not providing for an adequate inspection, be deemed enacted by the state "in the exercise of its police powers," within the meaning of *Wilson Act* Aug. 8, 1890, c. 728, 26 Stat. 313, subjecting to laws so enacted all intoxicating liquors arriving in the state, where the highest state court has upheld as a valid police regulation so much of the statute as imposes the same fee on beer of domestic manufacture over the objection that it is a revenue measure, and not an inspection law. *Pabst Brewing Co. v. Crenshaw*, 25 Sup. Ct. 552-556, 198 U. S. 17, 49 L. Ed. 925.

The "police power" includes the right to regulate or prohibit occupations which endanger the health, morals, or safety of the people. *Ex parte Townsend*, 144 S. W. 628, 631, 64 Tex. Cr. R. 350 (citing 6 Words and Phrases, p. 5424 et seq.).

The "police power" of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, morals, or safety, and, in a sense, the police power is but another name for the power of government. Making invalid against the employer assignments of or orders for wages to be earned in the future, unless recorded, accepted in writing by the employer, and accompanied by the written consent of the wife of the employé, as is done by *Laws Mass. 1908, c. 605, §§ 7, 8*, is a valid exercise of the "police power." *Mutual Loan Co. v. Martell*, 32 Sup. Ct. 74, 222 U. S. 225, 56 L. Ed. 175, Ann. Cas. 1913B, 521.

Courts generally refuse to attempt a definition of "police power" leaving each case to be decided as it arises. It may be said, however, that the police power is that attribute of sovereignty in a state by which it clothes the Legislature with power to regulate persons, natural and artificial, and property in accordance with the provisions of the state Constitution in all matters relating to the public health, morals, and safety.

Whatever may be its limitation, there seems to be no doubt that it does extend to the protection of the health and property of the citizens and to the preservation of good order and public morals. In 22 Am. & Eng. Enc. Law, p. 938, it is said that, in order for a statute or ordinance to be sustained as an exercise of the police power, the courts must be able to see: (1) That the enactment has for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals, or general welfare; and (2) that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend towards the accomplishment of the object for which the power is exercised. The police power cannot be used as a cloak for the invasion of personal rights or private property, neither can it be exercised for private purposes, or for the exclusive benefit of particular individuals or classes, but its exercise must have in view the good of the citizens of the sovereignty as a whole. An act requiring fire insurance companies to pay annually a specified sum on premiums to create a pension fund for disabled firemen cannot be sustained on the ground that it is a police regulation. *Ætna Fire Ins. Co. v. Jones*, 59 S. E. 148, 150, 78 S. C. 445, 13 L. R. A. (N. S.) 1147, 125 Am. St. Rep. 818.

Professions or trades operating directly on the person and thereby directly affecting the health, comfort, and safety of the public may be regulated by the Legislature under the "police power," while other professions or trades cannot be so regulated without depriving the citizen of his natural rights guaranteed by the Constitution. A statute for the licensing of barbers, which provides, as a prerequisite to obtaining a license, that the applicant has studied the trade for two years as an apprentice under or as a qualified and practicing barber, is invalid because unreasonable and arbitrary; the manner of acquiring the necessary skill or knowledge being immaterial. *State v. Walker*, 92 Pac. 775, 776, 48 Wash. 8, 15 Ann. Cas. 257.

An ordinance forbidding any gift enterprise, defined to include the giving of any trading stamp, or other device, which shall entitle the purchaser of property to receive from any person or corporation, other than the vendor, any property other than that actually sold, is not justifiable as an exercise of the "police power." *Denver v. Frueauff*, 88 Pac. 389, 393, 39 Colo. 20, 12 Ann. Cas. 521.

"The 'police power' of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state." The clause of the United States Constitution, which forbids the passage of laws impairing

the obligation of contracts, is frequently invoked by private corporations to prevent the Legislatures of the states from regulating and controlling them, but it is uniformly held by federal and state courts that they are subject to such regulations from time to time as may be deemed necessary to guard the rights of individuals and other corporations, shield the public health, and protect the safety of life and limb. There is no limit to this police power except that it must be exercised for the comfort, safety, or welfare of society; that it must not destroy any charter privilege, nor interfere with any vested right. Gen. Laws 1905, p. 386, c. 163, provides that, in a suit against a railroad for injuries to a servant the plea of assumed risk, where the ground thereof is knowledge or a means of knowledge of the defect, shall not be available where the servant had an opportunity to inform the master and did so within a reasonable time, or where a person of ordinary care would have continued in the service with knowledge of the defect, in which case it shall not be necessary for the servant to give notice of the defect. This statute is a measure passed, undoubtedly, to better protect the lives and limbs of those who are in the employment of railroads or street railways. It is an exercise of the police power of the state over the creatures that it has by its legislative fiat brought into existence. *El Paso & S. W. R. Co. v. Foth*, 100 S. W. 171, 175, 101 Tex. 133 (citing *Cooley*, Const. Lim. [7th Ed.] p. 831).

No exact definition of the extent of "police power" has or perhaps can be given. *Cooley*, in his work on Constitutional Limitations, has approved that given by Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush. (61 Mass.) 53, which is as follows: "All property in this commonwealth is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other usual and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. \* \* \* The power is vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and source of this power than to mark its boundaries and limit its exercise." Ky. St. 1899, § 1274, prohibiting the sale of milk from cows fed on "still slop," being a regulation within the police power of the state, is not in conflict

with the fourteenth amendment to the federal Constitution, declaring that no state shall deprive any person of life, liberty, or property, though there is no evidence contradictory of the claim that still slop is a wholesome food for dairy cows. *Sanders v. Commonwealth*, 77 S. W. 358, 359, 117 Ky. 1, 1 L. R. A. (N. S.) 932, 111 Am. St. Rep. 219.

The transportation of deer raised on a private preserve is subordinate to the "police power" of the state. *Dieterich v. Fargo*, 102 N. Y. Supp. 720, 721, 52 Misc. Rep. 200.

The "police power" extends to the protection of persons and of property within the state. To secure that protection, they may be subjected to restraint and burdens by legislative acts. If the act is a valid and reasonable exercise of the power of the state, then it must be submitted to, as a measure designed for the protection of the public, and to secure against such danger, real or anticipated from a state of things which modifications in our social or commercial life have brought about. Under the police power, the Legislature may prescribe how animals may be killed by their owner in order that they may be used for food. They may fix by statute the times, places, and manner of such killing. *State v. Davis*, 61 Atl. 2, 4, 72 N. J. Law, 345 (citing *People ex rel. Nechamcus v. Warden*, 39 N. E. 688, 144 N. Y. 535, 27 L. R. A. 718).

"Police power" is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application, and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation, and it is therefore not a legitimate exercise of police power. *Act Cal. March 18, 1905* (St. 1905, p. 140, c. 140), prohibiting any person from selling tickets to theaters or other public places of amusement for a price higher than the price originally charged by the management of such amusement places, is not a valid exercise of the police power of the state, as it prohibits an act which is innocent in character, and which has no tendency to affect, injure, or endanger the public health, morals, or safety. *Ex parte Quarg*, 84 Pac. 768, 767, 149 Cal. 79, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747.

The power to regulate and control the rates of carriers is within the "police power" of the state. *State ex rel. Webster v. Superior Court for King County*, 120 Pac. 861, 863, 67 Wash. 37, Ann. Cas. 1913D, 78.



**Same—Licensing or taxing occupations**

Courts and text-book writers have found it difficult to accurately define "police power." In the case of *State v. Carey*, 30 Pac. 729, 4 Wash. 424, the court quotes approvingly from the case of *Lake View v. Rose Hill Cemetery*, 70 Ill. 192, 22 Am. Rep. 71, where the court referred to this subject as "that inherent and plenary power in the state which enables it to prohibit all things heretofore to the comfort, safety, and welfare of society." Speaking of it in the *Slaughter House Cases*, 16 Wall. (83 U. S.) 36, 87, 21 L. Ed. 394, Mr. Justice Field said: "That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society." From these and the many adjudicated cases touching the subject, the proposition is deducible that the police power may curtail the rights of the individual in so far as, and no farther than, the free exercise thereof is calculated to infringe upon the rights of others. Act March 18, 1891 (Laws 1891, p. 314), in so far as it requires examination by and a license from a dental board before one may "own, run, or manage" a dental office, as distinguished from the actual practice of dentistry, is not a proper exercise of the police power, but is unconstitutional. *State v. Brown*, 79 Pac. 635, 636, 37 Wash. 97, 68 L. R. A. 889, 107 Am. St. Rep. 798.

"The 'police power' must also be distinguished from the 'taxing power,' and the distinction is this: That the taxing power is exercised for the raising of revenue and is subject to certain limitations, while the police power is exercised only for the purpose of promoting the public welfare, and, though this end may be attained by taxing or licensing occupations, yet the object must always be regulation and not the raising of revenue, and hence the restrictions upon the taxing power do not apply." *Robinson v. City of Norfolk*, 60 S. E. 762, 764, 108 Va. 14, 15 L. R. A. (N. S.) 294, 128 Am. St. Rep. 934.

The words "police power," when used with reference to a statute prohibiting any one engaging in the temporary selling of provisions within a mile of a fair ground without consent, means the power which, among other things, in given circumstances, compels obedience to the maxim, "Sic utere tuo ut alienum non laedas." It has been said, and correctly enough, that: "The police power of a state extends beyond the protection of health, peace, morals, education, and good order. It is the power to govern men and things within the limits of its dominions. It comprehends all those general laws of internal regulation necessary to secure the peace, good order, the health and comfort of society, and the regulation and protection of all property in the state." *State v. Reynolds*, 58 Atl. 755, 756, 77 Conn. 131.

The distinction between the "police power" and the "taxing power" is that, while the "taxing power" is exercised for the raising of revenue and is subject to certain limitations, the "police power" is exercised only for the purpose of promoting the public welfare, and, though this end may be attained by taxing or licensing occupations, the object must always be regulation and not the raising of revenue. *Robinson v. City of Norfolk*, 60 S. E. 762, 764, 108 Va. 14, 15 L. R. A. (N. S.) 294, 128 Am. St. Rep. 934.

"The 'police power' is included in the legislative power, but there are, in the Constitution, express limitations upon some of the powers comprised in the police power, and the term 'police power' is used to designate that power from others, and is helpful in ascertaining its scope and the limitations upon it." "The police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." The state may, in the exercise of the police power, license and regulate chattel mortgage and salary loan brokers. *Sanning v. City of Cincinnati*, 90 N. E. 125, 127, 81 Ohio, 142, 25 L. R. A. (N. S.) 686 (quoting *Chicago, B. & Q. Ry. Co. v. Drainage Com'rs*, 28 Sup. Ct. 341, 349, 200 U. S. 561-592, 50 L. Ed. 596, 4 Ann. Cas. 1175).

**Same—Limiting hours of labor**

A statute imposing a penalty on any one working more than eight hours a day in any mine, smelter, or mill for the reduction of ores is sustainable as a valid health regulation, under the "police power." *Ex parte Kair*, 80 Pac. 463, 464, 28 Nev. 127, 113 Am. St. Rep. 817, 6 Ann. Cas. 893.

The "police power" of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but is not without its limitations. Act March 23, 1901 (Laws 1901, p. 211), making it unlawful for persons engaged in mining or making excavations beneath the surface of the earth, while searching for minerals or other valuable substances, to work their employes at such labor more than eight hours a day, is a proper exercise of the police power of the Legislature to enact a reasonable regulation to secure the health and safety of the employes. *State v. Cantwell*, 78 S. W. 569, 573, 179 Mo. 245.

"The police power," \* \* \* when broadly stated, is the power of the state which relates to the conservation of the health, morals, and general welfare of the public, and the property rights of the citizen are always held and enjoyed subject to the reasonable exercise of the police power by the state." *Laws 1909*, p. 212, limiting the time a woman may work in a mechanical establishment or factory or laundry to ten

hours in a day, is a legitimate exercise of the police power. *W. C. Ritchie & Co. v. Wayman*, 91 N. E. 695, 697, 244 Ill. 509, 27 L. R. A. (N. S.) 994.

"In the exercise of that vast and (purposely) undefined power, known as the 'police power,' a power which lies at the root of, and gives vitality and validity to, any legislative enactment self-defensive of the general welfare of the people in their moral and physical health, it is settled doctrine that, if a state law, referable to the exercise of the police power, only incidentally or indirectly affects interstate commerce, it is good under the provisions of the federal Constitution heretofore quoted, unless Congress has occupied the exact ground by a federal law, in which event state legislation must give way, at least where the two acts involve irreconcilable differences of detail of regulation or antagonistic theories. \* \* \*

"The line of distinction between that which constitutes an interference with commerce and that which is a mere police regulation is sometimes exceedingly dim and shadowy, and it is not to be wondered that learned jurists differ when endeavoring to classify the cases which arise. \* \* \*. Congress may establish police regulations, as well as the states, confining their operation to the subject over which it is given control by the Constitution." *Laws 1907*, p. 332, regulating the hours for service of telegraph operators and train dispatchers, which does not discriminate between operators employed in the operation of interstate trains and traffic and those employed in operating local traffic, cannot stand and be operative as to intrastate traffic; Congress having passed an act (*Act Cong. March 4, 1907*, c. 2937, 34 Stat. 1415) covering the same subject-matter, though the Missouri act took effect June 14, 1907, and the act of Congress did not take effect until March 4, 1908. *State v. Missouri Pac. R. Co.*, 111 S. W. 500, 505, 212 Mo. 658 (quoting and adopting *Cooley*, *Const. Lim.* [7th Ed.] p. 856, and citing and adopting *Sherlock v. Ailing*, 93 U. S. 99, 23 L. Ed. 819; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Smith v. Alabama*, 8 Sup. Ct. 564, 124 U. S. 465, 31 L. Ed. 508; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 9 Sup. Ct. 28, 128 U. S. 96, 32 L. Ed. 352; *State v. Addington*, 77 Mo. loc. cit. 116).

#### Same—Prevention of fraud

The "police power" of the state is not limited to regulations necessary for the preservation of good order or the public health and safety, but the prevention of fraud and deceit, cheating, and imposition are equally within the power. *People v. Freeman*, 90 N. E. 366, 368, 242 Ill. 373, 17 Ann. Cas. 1098.

#### Limitations on power

There is an exception to the commerce clause of the Constitution in favor of the

"police power" of the states. That power is sufficient to enable the states to provide for the security of the lives, health, and comfort of its citizens, and as a part of that power the states may regulate or restrict the sale of articles deemed injurious to the health or morals of the community. But in exercising this power the states cannot impose taxes on persons passing through the state, nor upon property imported, so long as it is in the original package, and no regulation can be made directly affecting interstate commerce. *Moog v. State*, 41 South. 166, 168, 145 Ala. 75 (citing *Robbins v. Taxing Dist. Shelby County*, 7 Sup. Ct. 592, 120 U. S. 489, 30 L. Ed. 694).

"The 'police power' is an inaccurate but convenient phrase used to designate that power inherent in every sovereignty to make laws essential to the public welfare, to promote the public health, safety, and morals, and to prevent and punish the commission of public offenses. It is incapable of exact definition or precise limitation, because of the infinite variety of circumstances affecting the relations and affairs of mankind in civilized society, where, from necessity, individual persons and property are subject to burdens and restraints in order to secure, in a well-ordered government, the general comfort, health, and prosperity of the state. Like every other power, the 'police power' is subject to the Constitution, and cannot be used as a cloak for legislation which impairs rights or unduly restricts liberties guaranteed by it. Vast and comprehensive as is the field for the legislative exercise of the 'police power,' it is not arbitrary or unlimited, but is fettered by the express and peremptory prohibitions of the Constitution, which is the supreme law of the land, and, wherever rights arising under that Constitution are claimed to be impaired, it is the duty of the courts to scrutinize such legislation and determine whether it really relates to the public welfare, whether it is enacted in the interest of the public generally, as distinguished from those of a class, and whether the means are reasonably necessary for the accomplishment of the public object, and not unduly oppressive on individuals, for a Legislature cannot, under the guise of protecting the public interest, impose unusual and unnecessary restrictions upon individual liberty or lawful occupations." *Ex parte Drayton*, 153 Fed. 986, 989.

The exercise by the state of its "police power" must have relation to the promotion of the health, comfort, safety, and welfare of society, and, when a regulation does not fairly relate to some one of such objects, it is not within the police power, and common business, callings, and trades which are innocent in themselves, and have been followed in all communities from time immemorial, must be free, to all alike, on the same terms.

People v. Ringe, 110 N. Y. Supp. 74, 76, 125 App. Div. 592.

The "police power" is the inherent primary power of the state to prohibit all things hurtful to the comfort, welfare, and safety of society, but the power is not without restrictions, for it must not conflict with the Constitution, and must have some relation to and be adapted to the ends sought to be accomplished, and rights of property will not be permitted to be invaded under the guise of police regulation. *City of Belleville v. St. Clair County Turnpike Co.*, 84 N. E. 1049, 1052, 234 IH. 428, 17 L. R. A. (N. S.) 1071.

The "police power" of a municipality is confined to such reasonable restrictions as are necessary to public health, morals, and safety, and to public peace, order, and the general welfare, and ordinances under such power may be enforced, although they interfere with the use of private property. *People ex rel. Wineburgh Advertising Co. v. Murphy*, 88 N. E. 17, 19, 195 N. Y. 126, 21 L. R. A. (N. S.) 735; *Id.*, 113 N. Y. Supp. 855, 129 App. Div. 260.

The "police power" extends to and permits legislation regulating reasonably all matters appertaining to the life, limbs, health, comfort, good morals, peace, and safety of society, or, in short, to all which promotes the public welfare. The significant word "reasonable," as used in such definition, although not often found in definitions of the police power, should never be omitted in defining its constitutional scope. The police power is not a power to pass unconstitutional laws, but such power, like any other exercise of the law-making power, is subject to express and implied constitutional limitations. *State ex rel. Milwaukee Medical College v. Chittenden*, 107 N. W. 500, 517, 127 Wis. 468.

The "police power" is somewhat shrouded in mystery as to its limits, which are not easy to prescribe with precision, the power, however broad and comprehensive, is not paramount to the Constitution, but is always bounded by its provisions. If, therefore, an act of the Legislature is repugnant to the Constitution, it cannot be held valid as a proper exercise of the police power. Likewise, if a right of property or of person be protected by the Constitution, it cannot be destroyed by any exercise of the police power, either by the Legislature or the executive power of the state. The police power may be exercised to promote the safety, health, comfort, and welfare of society, and, to sustain legislation as a proper exercise of the police power, it must have reference to some end. *Block v. Schwartz*, 76 Pac. 22, 27, 27 Utah, 387, 65 L. R. A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550.

The "police power" of a state is the power to make laws to secure the comfort,

convenience, peace, and health of the community, and is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for the purpose is necessarily committed to the legislative body in which the power is vested. *Plumas County v. Wheeler*, 87 Pac. 909, 911, 149 Cal. 758 (citing *Ex parte Whitwell*, 32 Pac. 870, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152; *In re Lawrence*, 11 Pac. 217, 69 Cal. 608).

## POLICE REGULATIONS

A "police regulation" necessarily involves selection, involves the power to permit some and refuse others, to suffer the act at one time and place, or under certain conditions, and to deny it under all others; and it presumes a condition, which unless restricted, regulated, or controlled, will operate to the public disadvantage. *State Racing Commission v. Latonia Agricultural Ass'n*, 123 S. W. 681, 685, 136 Ky. 173, 25 L. R. A. (N. S.) 905.

Since Act No. 171 of 1898, the general license law, is purely a taxing law, and not a "police regulation," it is not applicable to impose a license on sales of beer which constitute interstate commerce. The Gay-Shattuck act is not a revenue act, but a police regulation, within Act Cong. Aug. 8, 1890, c. 728, known as the "Wilson Law," providing that all intoxicating liquors transported into any state for sale, etc., shall be subject to the operation of laws enacted in the exercise of the police powers, though imported in the original packages, so that a license could be imposed thereunder upon the sale of malt liquor brought into the state in original packages by a brewery. *State v. Pabst Brewing Co.*, 55 South. 349, 352, 128 La. 770.

In the absence of constitutional limitation, the Legislature may authorize cities or towns to impose a license tax upon any industry or business which falls within the scope of "police regulations," which includes the practice of medicine, dentistry, osteopathy, optometry, pharmacy, the engineer's trade, and other trades and professions. *Johnson v. City of Great Falls*, 99 Pac. 1059, 1061, 38 Mont. 369, 16 Ann. Cas. 974.

"Police regulations" of a city are made and enforced in the public interest, and the city is not liable for the acts of its officers in attempting to enforce them. The establishment and maintenance of a city calaboose is within the proper exercise of the city's police power, and the city is not liable for the wrongful or negligent acts of its police officers or board of health in managing a calaboose or detaining therein persons inflicted with smallpox, resulting in persons residing or working nearby contracting the disease. *Evans v. City of Kankakee*, 83 N. E. 223, 231 Ill. 223, 13 L. R. A. (N. S.) 1190.

The term "police regulation" is used to define a power which resides in the state,

and an act to prevent the perpetration of possible frauds on the public by the unauthorized sale of railway tickets is within the scope of the term. In re O'Neill, 83 Pac. 104, 106, 41 Wash. 174, 3 L. R. A. (N. S.) 588, 6 Ann. Cas. 869.

"A 'police regulation' or restraint is for the purpose of preventing damage to the public or to third persons. There are certain lines of business and certain occupations which require police regulation because of their peculiar character, in order that harm may not come to the public, or that the threatened danger may be averted. Where the profession or business is not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever which does not fall within the power of taxation for revenue. It appears, therefore, that the due exercise of the police power is limited to the preservation of the public health, safety, and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation." A statute limiting the compensation which an employment agent may receive to 10 per cent. of a month's wages in the employment furnished is not within the police power, but contravenes the constitutional guaranty of protection in the possession of property. *Ex parte Dickey*, 77 Pac. 924, 925, 144 Cal. 234, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428 (citing *Sonora v. Curtin*, 70 Pac. 674, 137 Cal. 583).

"Laws and ordinances, relating to the comfort, health, and good government of the inhabitants of a city, are ordinarily described as 'police regulations,' and, though they may disturb the full enjoyment of a personal right, are constitutional, notwithstanding they do not provide compensation therefor, for they do not appropriate private property for public use, but merely regulate its enjoyment by the owner, who is supposed to be compensated by sharing in the benefits which such regulations are intended to secure." Under a municipal charter authorizing ordinances necessary and proper for the protection of persons and property and the preservation of the public health, an ordinance directed to the suppression of the emission, from smokestacks, of dense smoke, containing soot in sufficient quantities to fall upon the surface of the city, is limited in its application to smoke of such character as invades the rights of persons and property. *Atlantic City v. France*, 70 Atl. 163, 164, 75 N. J. Law, 910, 18 L. R. A. (N. S.) 156.

Enactments to prevent fraudulent transfers by retail dealers are clearly within that class of legislation generally denominated "police regulations." *Young v. Lemieux*, 85 Atl. 436, 439, 79 Conn. 434, 20 L. R. A. (N. S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452.

## POLICEMAN

As city officer, see City Officer.

As ministerial officer, see Ministerial Office—Officer.

As municipal officer, see Municipal Officer.

As officer, see Officer.

As passenger, see Passenger.

As peace officer, see Peace Officer.

As position, see Position.

See, also, Patrolman.

It appears that a "policeman" occupies a sort of dual position. He is, strictly speaking, neither a state officer, as such, nor an officer acting in a purely local capacity. He may be said to be *sui generis*, occupying a unique place of his own. *State ex rel. Quintin v. Edwards*, 99 Pac. 941, 944, 946, 38 Mont. 250.

The term "policeman," with respect to the power to arrest without warrant, is the legal equivalent of the term "watchman" at common law. *Porter v. State*, 52 S. E. 283, 285, 124 Ga. 297, 2 L. R. A. (N. S.) 730 (citing *State v. Evans*, 61 S. W. 590, 161 Mo. 85, 84 Am. St. Rep. 669).

*Sess. Laws 1907, c. 136*, providing for the organizing of the police departments of cities upon a civil service basis, refers to persons serving on the police force as "members" or "officers" of the police force or department. An ordinance enacted thereunder creating the police department of a city mentioned certain officers by a special title, and classified all other members as "policemen" or "patrolmen," and provided that the number of "policemen or patrolmen" should be reduced, etc. Held, that as a "patrolman" is defined as a member of the police force of a town or city who patrols a certain beat, and a "policeman" as one of the ordinary police force, whose duty it is to patrol a certain beat for the protection of property, lives, etc., and also, in its generic sense, was applicable to any member of the police force whatever his rank, the terms as used in the ordinance were synonymous, so that one appointed under the ordinance under the designation of "patrolman" was a policeman, and hence not a purely municipal officer. *State ex rel. Quintin v. Edwards*, 106 Pac. 695, 698, 40 Mont. 287, 20 Ann. Cas. 239.

The term "policemen" includes every member of the police force, whatever his rank, so that a police captain is a "policeman" notwithstanding his superior rank, and hence is not a purely municipal officer; *Sess. Laws 1907, c. 136, § 5* (Rev. Codes, § 3308), relating to the examination of applicants for positions on the police force and providing for their appointment and removal, making no distinction between the officers and members of different rank as to their duties or the manner of their appointment. *State ex rel. Bailey v. Edwards*, 106 Pac. 703, 704, 40 Mont. 313.

**POLICY**

See Public Policy.

As a game

See Policy Playing.

As insurance policy

See Policy of Insurance.

**POLICY OF INSURANCE**

See Assessment Policy; Blanket Policy; Floating Policy; Flyer Policy; Life Insurance; Old Line Policy; Open Policy; Participating Policy; Running Policy; Unlimited Policy; Unvalued Policy; Valued Policy; Wager Policy.

Issue of, see Issuance—Issue.

Paid-up policy, see Paid Up.

"The 'policy of insurance' is the final contract between the parties, and the effect of its acceptance is to supersede all preliminary agreements in respect to insurance." So that the final consummation of the contract of insurance includes both the delivery of the policy and its acceptance by the insured. The applicant has a right to reject the policy if it does not conform to the agreement of the parties for its execution, and until delivery and acceptance, either expressly or by inference or implication, the contract is not finally executed, although it may be so far assented to as to give a right of action thereon. *Stringham v. Mutual Life Ins. Co.*, 75 Pac. 822, 824, 44 Or. 447.

The essentials of a "policy of insurance" are the payment of the premium by the insured and the agreement by the insurer to indemnify the insured against loss on a certain subject against certain perils. *German-American Ins. Co. v. Yeagley*, 71 N. E. 897, 899, 163 Ind. 651, 2 Ann. Cas. 275.

The word "policy," in the insurance law, may well be taken to mean a formal document delivered by an insurance company and containing evidence of an obligation to pay. *Mutual Reserve Fund Life Ass'n v. Austin*, 142 Fed. 398, 401, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064.

A "policy" is a contract of insurance. *Floars v. Aetna L. Ins. Co.*, 56 S. E. 915, 916, 144 N. C. 232.

The word "policy," in a life policy provision for payment to a beneficiary of a stated sum on insured's death during continuance of the policy, refers to the insurance contract. *In re Schaefer*, 189 Fed. 187, 190.

The inclusion in a policy of an accident clause does not prevent its being a "policy of insurance on life," within Rev. St. 1899, § 7897, providing for extended insurance. *Moore v. Northwestern Nat. Life Ins. Co.*, 87 S. W. 988, 989, 112 Mo. App. 696.

A "policy of life insurance" is a chose in action; a promise to pay money upon a given contingency. *Doty v. Dickey* (Ky.) 96 S. W. 544, 547.

A "policy of life insurance" is a chose in action, even before the death of the insured. *Perry v. Tweedy*, 57 S. E. 782, 783, 128 Ga. 402, 119 Am. St. Rep. 393, 11 Ann. Cas. 46 (citing *Steele v. Gatlin*, 42 S. E. 253, 115 Ga. 929, 931, 59 L. R. A. 129).

As property

See Personal Property; Property.

**POLICY PLAYING**

As lottery, see Lottery.

"Policy," which is forbidden by Rev. St. 1899, § 2219, is understood to be "a form of gambling in which bets are made on numbers to be drawn by lottery." *State v. Cronin*, 88 S. W. 604, 605, 189 Mo. 663 (quoting and adopting definition in Cent. Dict.).

A scheme, whereby an association sells for five cents, or any other specific sum of money, certificates or tickets which entitle the purchaser to a lead pencil of trifling value, and also permits such purchaser to select certain numbers, say 3—9—13, which, if all drawn by a blindfolded boy from a revolving wheel in which several numbers are placed, entitle the person purchasing the certificate or ticket to a prize of money much larger in amount than he has paid for his certificate or ticket, is generally known as "playing policy." *State ex rel. Kellogg v. Kansas Mercantile Ass'n*, 25 Pac. 984, 985, 45 Kan. 351, 11 L. R. A. 430, 23 Am. St. Rep. 727.

**POLING**

The "poling" of a car is done by adjusting a heavy piece of timber, called a "pole," with one end on and against the front of the engine and the other against the car to be moved, then starting the engine forward, thereby pushing the car by the pole to a point that will allow it to be passed by the engine. Poling is resorted to for moving a car that is on a different track from that occupied by the engine, but is so in the way of the movements of the engine as to prevent its passing such car. *Howard v. Chesapeake & O. Ry. Co.* (Ky.) 90 S. W. 950, 951.

**POLISHING**

In relation to the manufacture of steel strips, "polishing" is a process of improving the surface by the use of emery and buffing wheels, and planishing or glancing is apparently the same process carried out a little more elaborately. *United States v. Crucible Steel Co. of America*, 137 Fed. 384, 386, 69 C. C. A. 576.

**POLITIC**

See Body Politic or Corporate.

**POLITICAL****POLITICAL COMMITTEE**

As public agency, see Public Agency.

**POLITICAL CONVENTION**

See Assemblage.

The words "political convention," as used in Comp. Laws 1897, § 1633, relating to designation of political party, and the words "adopt or use" designating device for election purposes, refers solely to the political management used in originating and furnishing ballots, and not those persons whose sole connection therewith is voting the same. *Esquibel v. Chaves*, 78 Pac. 505, 511, 12 N. M. 482.

**POLITICAL CORPORATION**

As municipal corporation, see Municipal Corporation.

When applied to corporations, the words "political," "municipal," and "public" are used interchangeably. *Smith v. Board of Trustees of Robersonville Graded School*, 53 S. E. 524, 527, 141 N. C. 149, 150, 8 Ann. Cas. 529 (quoting and adopting *Curry v. District Tp., of Sioux City*, 17 N. W. 191, 62 Iowa, 102).

A state bar association is a mere voluntary association of lawyers, and is not a "political corporation," as defined by Rev. Civ. Code, art. 429, declaring that political corporations are those which have principally for their object the administration of a portion of the state, and to whom a part of the powers of government is delegated to that effect. *State ex rel. Cotonio v. Louisiana Bar Ass'n (La.)* 36 South. 241.

Public corporations are synonymous with "political corporations." *Phillips v. Mayor, etc., of Baltimore*, 72 Atl. 902, 905, 110 Md. 431, 25 L. R. A. (N. S.) 711 (citing 6 Words and Phrases, p. 5781).

**POLITICAL PARTY**

Section of political party, see Section.  
See, also, Minority Party.

"Political parties" result from the voluntary association of electors, and do not exist by operation of law, and they possess plenary powers as to their own affairs in the absence of legislative regulation. *Morrow v. Wipf*, 115 N. W. 1121, 1127, 22 S. D. 146.

Any combination or aggregation of electors with sufficient coherence and organization to have acted together for a common purpose, and sufficient strength and certainty to have polled 2 per cent. of the highest vote at the next preceding election, is a "political party," within Act June 10, 1893, § 2 (P. L. 419), relating to the putting of nominations on the ballot by certificate by any political party which at the election next preceding polled at least 2 per cent. of the largest entire vote for any office cast in the state or in the electoral district or division. *Independence Party Nomination*, 57 Atl. 344, 346, 206 Pa. 108.

Code 1906, c. 3, § 7, as modified by section 85, requires the city council to appoint three qualified voters as commissioners of election for each precinct, of good standing and character, to be selected from the two political parties casting the highest number of votes at the last preceding election, not more than two to belong to the same political party, and that, if the executive committee of either such party shall request in writing the appointment of a qualified voter of their political party, council shall appoint such person, impliedly gives the right of representation to the two leading political parties in every election, and prescribes a mode of determining a right of preference by giving it to those whose candidates received the highest number of votes at the last preceding election, when there are such parties, but the two leading parties, though not participating as an organization in the last preceding election, are entitled to representation by persons designated by them. A political party for national, state, county, and magisterial district elections is not one for the purpose of a municipal election, unless the members thereof participate as such an organization in the municipal election by nominating and supporting candidates under the party named. *Hasson v. City of Chester*, 67 S. E. 731, 732, 67 W. Va. 278.

"Political parties" are organizations of electors entertaining the same political opinions, attempting through an organization to elect officers of their own party faith and make their political doctrines the policy of the government. The rights of political parties can be no greater than the rights of electors under the Constitution. *Riter v. Douglass*, 109 Pac. 444, 450, 32 Nev. 400.

"A 'political party' is an organization of electors believing in certain principles concerning governmental affairs, and urging the adoption and execution of those principles through the election of their respective candidates at the polls." In Const. Amend. 1908, art. 2, § 2½, which provides that the Legislature may enact laws as to the election of delegates to conventions of political parties, and shall enact laws, providing for the direct nomination of candidates for public office by electors, political parties, or organizations of electors without conventions at elections to be known as "primary elections," and also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election, the term "political parties" is intended to embrace those which had participated in a struggle at the polls for political ascendancy, and political "organizations of electors" is intended to include new parties which had not participated in prior elections, organized to advance some principle or measure of public policy. This constitutional provision was sufficiently com-

pled with, in so far as nomination by electors and organizations of electors was concerned, by the enactment of Act March 24, 1909 (St. 1909, p. 691, c. 405), providing, in addition to direct primaries, for political parties for nominations by electors or bodies of electors by petition, as authorized by Pol. Code, § 1188. This constitutional provision does not require the Legislature to adopt a universal mode whereby all the classes of electors mentioned therein may participate in primary elections, but authorizes the Legislature to provide reasonable and different tests and conditions for participation by the different classes. Neither the whole of Primary Election Law March 12, 1909 (St. 1909, p. 691, c. 405), nor the part thereof requiring the payment of certain fees by candidates on the filing of nomination papers and affidavits of candidacy, was invalid as a violation of Const. art. 1, § 24, declaring that no property qualification to vote or hold office shall ever be required of any person. The Legislature could also provide, by Primary Election Law March 24, 1909 (St. 1909, p. 691, c. 405), that, when nomination papers of a candidate were filed, they should be accompanied by an affidavit of affiliation, such provision not being in violation of Const. art. 22, § 3, prescribing the form of oath to be taken by one before entering on the duties of an office, and which declares that no other authority, declaration, or test shall be required as a qualification for any office or public trust; such provision being applicable only to persons appointed or elected to office, and not to candidates for election. *Socialist Party v. Uhl*, 103 Pac. 181, 182, 183, 185, 188, 155 Cal. 776.

The term "political parties," as used in Gen. St. Kan. 1901, §§ 2696, 2697, providing for nominations by such parties, includes local and city parties. Where a certificate of nomination, regular in form, is filed with the city clerk purporting to show the nomination of a full set of city officers by a mass convention of a party designated as the "City Party," and no objection thereto is filed within three days, and the names so certified appear on the official ballot under the title "City Ticket," over which a circle is printed, with directions to place a cross mark therein to vote a straight ticket, ballots cast at the ensuing election, which are marked only in such circle, cannot be rejected upon the grounds that the ticket was not nominated by a political party, and that there was in fact no political party in the city known as the "City Party." *Ogg v. Glover*, 83 Pac. 1039, 1040, 72 Kan. 247 (citing and adopting *Independence Party Nomination*, 57 Atl. 844, 208 Pa. 108; *Davidson v. Hanson*, 92 N. W. 93, 87 Minn. 211; *Baker v. Scott*, 43 Pac. 76, 4 Idaho, 596; *Roller v. Truesdale*, 26 Ohio St. 586; citing and disapproving *McKinley-Citizens Party*, 6 Pa. Dist. R. 109; *Nomination of Jeffries*, 9 Pa. Dist. R. 663).

New York Primary Election Law (Laws 1899, p. 993, c. 473) provides that the term "party" shall apply to any political organization which, at the last preceding election of the Governor, polled at least 10,000 votes for Governor. *People ex rel. McCarren v. Dooling*, 112 N. Y. Supp. 67, 70, 60 Misc. Rep. 132.

Primary Election Law (Act No. 49, p. 67, of 1906) § 2, defining a "political party" to be one that shall cast at least 10 per cent. of the votes cast for Governor at the last preceding election, does not violate Const. 1898, art. 48, forbidding the passage of local or special laws granting special privileges. *State ex rel. Labauve v. Michel*, 46 South. 430, 435, 121 La. 374.

Pub. Laws 1902, c. 1078, p. 35, § 1, defines a "political party" to be one which, at the next preceding annual election of state officers, cast for its candidate for Governor at least 2 per cent. of all the votes cast for that officer. *Ney v. Whiteley*, 59 Atl. 400, 401, 26 R. I. 464.

"Where the word 'party' occurs in the statute relating to nominations (for public office), it should be construed to mean a number of persons united in the manner usual to the then existing political parties." A party—that is, an organized political party—cannot have at the same time more than one candidate for the same county office. *State ex rel. Howells v. Metcalf*, 100 N. W. 923, 924, 18 S. D. 393, 67 L. R. A. 331.

Under the provisions of section 1 of the direct primary election law of this state (Sess. Laws 1909, p. 196), a "political party" is an affiliation of electors representing a political organization under a given name, which at the last preceding general election cast for any candidate on their ticket for office within the state at least 10 per cent. of the total vote cast for all candidates for the same office within the state, and all political parties coming within this definition are required to make nominations at the direct primary election held on the last Tuesday in July of election years. *State ex rel. Spofford v. Gifford*, 126 Pac. 1060, 1063, 22 Idaho, 613; *Ex parte Wilson*, 125 Pac. 739, 744, 7 Okl. Cr. 610.

While election Act 1910 (Laws Ex. Sess. p. 16) § 2, defines a "political party" as any political organization which was represented by candidates at the last regular election, and whose candidate for Governor received 10 per cent. of the total vote cast, and section 26, providing for nomination by a petition, declares that any set of petitioners may adopt any name they desire, not heretofore used by any political party as defined in the act, the name adopted by a new political party, which placed its candidates on the ballot by petition, is not subject to appropriation by other petitioners. *McBroom v. Brown*, 127 Pac. 957, 958, 53 Colo. 412.

**POLITICAL POWER**

See, also, Public Power.

**POLITICAL QUESTION**

Whether a Constitution shall be amended is a "political question," but whether it has been legally amended is a judicial question. *McConaughy v. Secretary of State*, 119 N. W. 408, 413, 106 Minn. 392.

Whether a statute redistricting the state into representative districts makes a division so unequal as to be a violation of Const. § 33, requiring such division to be in proportion to population, is not so purely a "political question" as to be beyond the jurisdiction of the courts. *Ragland v. Anderson*, 100 S. W. 865, 866, 125 Ky. 141, 128 Am. St. Rep. 242.

**POLITICAL RIGHT**

"A 'political right' is a right exercisable in the administration of government." *State ex rel. Attorney General v. Huston*, 113 Pac. 190, 198, 27 Okl. 606, 34 L. R. A. (N. S.) 380; *People ex rel. Attorney General v. Tool*, 86 Pac. 224, 228, 35 Colo. 225, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198 (quoting *And. Law Dict.* 905).

"Political rights" consist in the power to participate directly or indirectly in the establishment or administration of government such as the right of citizenship, suffrage, etc. *Friendly v. Olcott*, 123 Pac. 53, 56, 61 Or. 580.

"'Political rights' consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers and of being elected. These are the political rights which the humblest citizen possesses." *Winnett v. Adams*, 99 N. W. 681, 684, 71 Neb. 817 (quoting 2 *Bouv. Law Dict.*).

The right to become the nominee of a political party for public office, whether national or state, and as such nominee to receive the votes of the qualified electors voting to fill such office, is a purely "political right," as contradistinguished from a civil or property right. "'Political rights' consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers, and of being elected. These are the political rights which the humblest citizen possesses." A court of equity has no jurisdiction to enjoin officers of a state, acting under a state statute, from issuing a certificate of nomination to a candidate for representative in Congress; the right involved being purely political, as distinguished from a civil or property right, to which alone the jurisdiction of equity extends. *Anthony v. Burrow*, 129 Fed. 783, 784, 789 (quoting and adopting defi-

nition in *Re Sawyer*, 8 Sup. Ct. 482, 124 U. S. 200, 31 L. Ed. 402).

Under Const. art. 6, § 3, which provides that persons convicted of infamous crime, unless restored to their civil rights, shall be excluded from the elective franchise, an information charging that accused, in registering to vote, falsely swore that he had not lost his civil rights by being convicted of an infamous crime, whereas he had been convicted in another state of the infamous crime of breaking jail before conviction; does not state an offense; the right to vote being "political" and not "civil." *State v. Collins*, 124 Pac. 903, 904, 69 Wash. 268.

**POLITICAL SUBDIVISION**

As county in general, see *County*.

As municipal corporation in general, see *Municipal Corporation*.

As town in general, see *Town*.

As township in general, see *Township*.

A school district is not a "political subdivision of the state," within the meaning of that term as used in a constitutional provision giving the Supreme Court jurisdiction of appeals in cases where a county or other political subdivision of the state is a party. *School Dist. No. 1, Tp. 24, Range 4, v. Boyle*, 81 S. W. 409, 410, 182 Mo. 347.

A school district is not a "political subdivision" of the state within Const. art. 6, § 12, authorizing appeals to the Supreme Court where a political subdivision of the state is a party, and an appeal from a judgment in quo warranto by a school district against another district, to determine the legality of proceedings to attach territory to the latter district, lies to the Court of Appeals, and not to the Supreme Court. *State ex rel. School Dist. No. 4 v. School Dist. No. 3*, 141 S. W. 1111, 238 Mo. 407.

A drainage district is not a "political subdivision," within Const. art. 6, § 12, giving the Supreme Court jurisdiction in cases where a county or "other political subdivision" is a party; the quoted words meaning subdivisions created with powers similar to those of a county, and not referring to townships, school districts, levee districts, drainage districts, and like minor political subdivisions. *Wilson v. King's Lake Drainage & Levee Dist.*, 139 S. W. 136, 140, 237 Mo. 39.

School districts are "political subdivisions" of the state, and can be sued only by permission of the state. *Goldtree v. City of San Diego*, 97 Pac. 216, 218, 8 Cal. App. 505 (quoting and adopting *Skelly v. Westminster School Dist.*, of Orange County, 37 Pac. 643, 103 Cal. 652).

Under Const. art. 6, § 12, giving the Supreme Court jurisdiction "in cases where a county or other political subdivision of the state is a party," the court has jurisdiction, in a case in which the city of St. Louis is a



party, that city being, by virtue of Const. art. 9, §§ 20, 22, 23, providing for its charter, a political subdivision of the state, and not merely a city within a county. *Gracey v. City of St. Louis*, 111 S. W. 1159, 1160, 213 Mo. 384.

A city not being a "political subdivision of the state," within the meaning of Const. art. 6, § 12, and the amendment thereof adopted in November, 1884 (page 243), extending the jurisdiction of the St. Louis Court of Appeals and establishing the Kansas City Court of Appeals, that the city is a party to a suit for an injunction does not give the Supreme Court jurisdiction on appeal from the judgment in such suit. *Smith v. City of Sedalia*, 128 S. W. 785, 228 Mo. 505.

Const. art. 5, § 18, provides for the dividing of each county into four commissioners' precincts, and the election of one commissioner from each precinct, and Rev. St. 1895, arts. 1532, 1533, makes similar provisions. Const. art. 16, § 20, as amended in 1891, directs the Legislature to enact a law whereby the qualified voters of any county, justice's precinct, town, etc., or such subdivision of a county as may be designated by the commissioners' court, may by a majority vote determine from time to time whether the sale of intoxicants shall be prohibited within the prescribed limits. *Sayles' Ann. Civ. St. 1897*, art. 3384, provides that the commissioners' court of each county may order an election by the voters of the county, or of any commissioners' or justice's precinct in such district, or two or more of such political subdivisions of a county, as may be designated by the commissioners. Held, that a commissioners' precinct was a "political subdivision of the county" within the Constitution, so as to authorize the commissioners' court to order an election therein. *Coffield v. Britton*, 109 S. W. 493, 496, 50 Tex. Civ. App. 208.

## POLL

See Closing of Polls.

Under Rev. St. 1895, art. 3390, requiring the commissioners' court to hold a special session after a local option election, "for the purpose of opening the polls and counting the votes," the commissioners' court must open the ballot boxes and count the votes, instead of merely canvassing the returns made by the officers of the election; the word "polls" referring to the ballot boxes. *Clarey v. Hurst (Tex.)* 136 S. W. 840, 843.

Under Rev. St. 1895, art. 3389, as amended by Laws 1909, c. 29, providing that officers holding a local option election shall conform to the general election laws in force, except as otherwise specified, and that after the polls are closed they shall proceed to count the votes and make a report of the election to the commissioners' court, and ar-

ticle 3390, requiring the commissioners' court to hold a special session "for the purpose of opening the polls and counting the votes," the commissioners' court has authority to canvass the returns made by the officers of the election, and they may not open the ballot boxes and count the votes; the word "polls" in article 3390 meaning the returns of the election officers, though the word "poll" means the number or aggregate of heads; a list or register of heads or individuals voting at an election. *Clary v. Hurst*, 138 S. W. 566, 569, 104 Tex. 423 (citing 6 Words and Phrases, p. 5446).

## POLL TAX

*Wilson's Rev. & Ann. St. 1903*, § 6090, requiring all male persons between 21 and 50 years of age to perform 4 days' work on the public roads or furnish a substitute or pay \$1 a day, does not impose a "poll tax" so as to be repugnant to Const. Bunn's Ed. § 284, authorizing the collection of a poll tax on all electors under 60 not exceeding \$2 a year. *State v. Rayburn*, 101 Pac. 1029, 1031, 2 Okl. Cr. 413, 22 L. R. A. (N. S.) 1067, Ann. Cas. 1912A, 733.

The underlying nature and purpose of a "poll tax" are disassociated from any consideration of property. The state accords to every inhabitant, regardless of his property, the protection and advantages of its laws and public institutions, and, by reason of these guaranties and benefits, it asks a tribute toward the support of the government from those beneficiaries who are physically qualified to contribute. In the absence of constitutional inhibition, the Legislature may provide for the levy and enforcement of a poll tax on any or all of the citizens of the state, regardless of the question of uniformity. Acts 1903, c. 119, as amended by Laws 1905, c. 156, imposing a poll tax on every male inhabitant between the ages of 21 and 50 years outside the limits of an incorporated city or town, is not violative of Const. art. 1, §§ 3, 12, providing that no person shall be deprived of property without due process of law, and that no law shall be passed granting to any city privilege or immunities which, upon the same terms, shall not legally belong to all citizens. *Thurston County v. Tenino Stone Quarries*, 87 Pac. 635, 636, 44 Wash. 351, 9 L. R. A. (N. S.) 306, 12 Ann. Cas. 314.

## POLLING JURY

To "poll a jury" is to call the names of the persons who compose a jury and require each juror to declare what his verdict is, before it is recorded. *State Life Ins. Co. v. Postal*, 84 N. E. 156, 1093, 43 Ind. App. 144.

"Polling the jury" consists of asking the jurors individually whether they assented and still assent to the verdict. The clerk or the judge may propound the questions, and it is not erroneous for another to do so, but it must be done under the direction of the

court. It was proper for the court to refuse to permit accused or his counsel to poll the jury and to require such duty to be performed by the clerk. *Jackson v. State*, 41 South. 178, 179, 147 Ala. 699.

### POLLING PLACE

Under Rev. St. 1909, §§ 7239, 7240, relating to local option elections and to the order and notice of election and providing that, on proper petition, an election shall be ordered held and a notice thereof given by publication in a newspaper, etc., without expressly requiring the designation of polling places, the jurisdictional notice of an election is a notice giving the date and place on which it is to be held, and the naming of the place is satisfied by naming the city or territory in which it is to be held, as the term "place" has many meanings and is synonymous with "town" or "city" or a "certain territory," the term "polling places" not being synonymous with "place of election." *State ex rel. Fahrman v. Ross*, 143 S. W. 502, 506, 160 Mo. App. 682.

### POLLUTE

A harmful pollution of a water course is quite a different thing from "pollution" which consists merely in the presence even in considerable quantities of minerals held in suspension, or of minerals produced by chemical reactions, whose specific gravity causes them to sink quickly to the bottom. *Doremus v. City of Paterson*, 69 Atl. 225, 232, 73 N. J. Eq. 474.

In an action for the pollution of a stream, an instruction that the word "pollute" was not used by counsel to mean the mere rolling up of the water, if no sediment were deposited, and that any discoloration of the water, where it is used solely for motive power, would be of no importance to the case, is correct. *Neely v. Detroit Sugar Co.*, 101 N. W. 664, 667, 138 Mich. 469.

Plaintiff, the proprietor of a gristmill and owner of water rights including a millpond, contracted, with a sugar company located on the stream above, which had turned refuse into the stream, polluting the water and filling the millpond, which plaintiff utilized for ice and power. The contract provided that the sugar company should pay plaintiff \$1,250 in full for all losses sustained by plaintiff in the past due to the pollution of the water in the pond from the refuse discharged, and for rental of a certain icehouse belonging to plaintiff, and provided that the company might continue the agreement on payment of \$400 annually, and that the agreement should not abrogate any water rights which plaintiff then possessed. Held, that the term "pollution" was used in a restricted sense, and was understood by the parties to refer only to such damage as resulted directly from contamination by im-

purities, and that water power rights and all rights flowing therefrom were excluded, so that plaintiff was not precluded thereby from recovering for past and future damage caused by the sugar company in filling up the millpond by turning refuse into the stream so as to cause it expense in buying fuel to replace power lost by filling up the pond. *Lepper v. Wisconsin Sugar Co.*, 128 N. W. 54, 57, 146 Wis. 494.

### POLYGAMOUS MARRIAGE

Under the doctrines of the Church of Jesus Christ of Latter Day Saints, commonly known as the Mormon Church, marriages celebrated and solemnized by mere civil authority and with only the sanction of the law are regarded as marriages for time only, while a marriage solemnized by a duly constituted person, authority, or "by the holy and eternal priesthood of the Saints" is designated a "celestial or patriarchal marriage," binding not only during this life but throughout the life to come. As used in Const. art. 6, § 3, disqualifying as voters, jurors, or officers, among others, one who is a bigamist, polygamist, or living in what is known as patriarchal or celestial marriage, the words "bigamous," "polygamous," "plural," "celestial," and "patriarchal" marriages were meant and intended to prohibit and forbid any man having more than one wife at one time, under whatever name or designation he might choose to style his marriage, and the use of each of these words was directed against bigamous and polygamous marriages. The "celestial" or "patriarchal" marriage, in order to come within the prohibition of the Constitution, must be "bigamous" or "polygamous." One who teaches or practices having more than one wife at any one time or belonging to an organization teaching such doctrine is disqualified for the duties of an elector, and consequently for holding any civil office, within the laws of the state, but it is not intended by the Constitution to interfere with the religious beliefs and opinions of any one. *Toncray v. Budge*, 95 Pac. 26, 38, 14 Idaho, 621.

### POND

See Great Ponds; Private Pond.

A complaint alleging that plaintiff was the owner of land upon which was a "pond" which had flowed through a culvert erected by defendant railroad company, but that such culvert had been taken out by the company and replaced by a pipe too small to carry off the water, thereby overflowing plaintiff's land, is not demurrable because not alleging that the waters obstructed are the waters of a natural water course, and that the cutting off of the flow of surface water is not actionable, for a pond may be created not only by the accumulation of surface wa-

ter, but by springs or streams emptying into it which have a continuous flow, but the proper remedy is a motion to make the complaint more definite and certain as to the nature of the pond and the character of the water accustomed to flow therefrom. *Rentz v. Southern Ry. Co.*, 63 S. E. 743, 744, 82 S. C. 170.

## PONTON

"A 'pontoon' is nautically described by the Century Dictionary as 'a lighter,' a 'low flat vessel resembling a barge,'" etc. A pontoon floating upon the water of a navigable stream, between high and low water mark, rising and falling with the tide, and used as a landing in connection with a ferry, although fastened to the shore by a cable, is not land, and an action for an injury to a person thereon by a moving vessel is for a maritime tort and within the admiralty jurisdiction. *The Mackinaw*, 165 Fed. 351, 352 (citing and adopting *The Blackheath*, 25 Sup. Ct. 46, 195 U. S. 361, 49 L. Ed. 236, and citing and distinguishing *The Plymouth*, 8 Wall. [70 U. S.] 20, 18 L. Ed. 125).

## PONTON BRIDGE

As bridge, see Bridge.

## PONY

### PONY HOMESTEAD

The Georgia exemption act of 1822, including in its protected articles a trooper's horse, has been popularly termed a "pony homestead." In re *Hargraves*, 160 Fed. 758, 759.

## POOL

The term "pool" means a surrender of certain individual rights and powers to the common holder for the benefit of all, on the theory that the accruing benefits gained by the joint venture outweigh the individual rights surrendered. *Burley Tobacco Soc. v. Monroe*, 146 S. W. 725, 730, 148 Ky. 289.

Under the Commerce Act of Feb. 4, 1887, § 5, making it unlawful for common carriers to enter into any contract, agreement, or combination for the pooling of freights of different and competing railroads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof, railroads may "pool" their freights either by distributing commodities between themselves for carriage or by dividing among themselves their aggregate earnings on the commodities carried. A "pool" is a combination of the interests of several otherwise competing parties, such as rival transportation lines, in which all take common ground as regards the public and distribute the profits of the business among themselves equally or according to special agreement. Within this definition, an agreement between competing railroads and their

connecting lines, by which a through rate on a certain class of traffic is conditioned on a reservation to the initial carrier of the absolute and unqualified power to route the shipments beyond its own line for the declared purpose of enabling such initial carriers to control and maintain the rates so fixed by preventing competition either direct or indirect between their connecting carriers, created a traffic pool. A joint tariff of through rates between noncompeting railroads forming a continuous line, although constituting an earnings pool under the general definition of the word "pool" as a combination intended by concert of action to make or control market rates, is not within the prohibition of that section. *Interstate Commerce Commission v. Southern Pac. Co.*, 132 Fed. 829, 839 (quoting and adopting definition given in *Cent. Dict.*).

### As a body of water

"Where a collection of water has acquired a specific name, he (Lord Coke) says that the land may be included under that name, as: 'Stagnum, a poole, doth consist of water and land, and therefore by the name of stagnum, or poole, the water and land shall pass also.' So of a gorse or gulf, for which a præcipe will lie with the esplees in taking of fish therefrom." *Co. Litt. 5b*. This shows that still water, as well as rivers and streams, was the subject of private ownership by the old English law. *Hardin v. Jordan*, 11 Sup. Ct. 808, 140 U. S. 871, 889, 35 L. Ed. 428.

### As a game played on a billiard table

"Pool" is a game played by two or more persons on a billiard table containing six pockets. In the United States the game is played with 15 numbered balls, counting from 1 to 15; the object of the game being to pocket the balls, the number of each ball being placed to the credit of the player pocketing it. An indictment charging in the alternative that defendant bet at a certain "gaming table or bank" is bad, though the words, "to wit, a pool table," follow. *Taylor v. State*, 95 S. W. 119, 120, 50 Tex. Cr. R. 183 (citing *Cent. Dict.*).

"Pool" is defined by Century Dictionary as a "game played on a billiard table with six pockets by two or more persons." The table upon which the game is played is one included within the term "billiard table," as used in a statute empowering cities to suppress "billiard tables" enacted while that term was applied to tables substantially the same as pool tables of the present time, so that such statute was a sufficient authority for an ordinance forbidding the use of pool tables. *City of Clearwater v. Bowman*, 82 Pac. 526, 527, 72 Kan. 92.

## POOLROOM

As gambling house, see Gambling House.  
As useful enterprise, see Useful Enterprise.

Running poolroom as labor, see Labor.

A "poolroom" is a place maintained for carrying on or facilitating betting on horse races, or any other sport or game or contest or other event upon which wagers are laid, and the maintenance of a poolroom is a crime. *State v. Vaughan*, 98 S. W. 685, 690, 81 Ark. 117, 7 L. R. A. (N. S.) 899, 118 Am. St. Rep. 29, 11 Ann. Cas. 277.

"Conceding that the term 'pool' or 'poolroom' has, according to lexicographers, several meanings, we are of opinion that the legislation on the subject, the direct result of the decisions of this court, show that the term 'poolroom' was used to designate a room in which betting on races is carried on." *State v. Maloney*, 39 South. 539, 544. 115 La. 498.

### POOL SELLING

As gambling, see Gambling—Gaming.  
As game, see Game.  
As lottery, see Lottery.

"Pool selling" is a term used by writers of authority to describe a form of gambling. In re Opinion of the Justices, 63 Atl. 505, 507, 73 N. H. 625, 6 Ann. Cas. 689 (citing N. Y. Const. art. 1, § 9; *People ex rel. Sturgis v. Fallon*, 46 N. E. 302, 152 N. Y. 1, 5, 37 L. R. A. 419; and 9 Messages of the President, 94).

"Pool selling," as used with "bookmaking" in Act March 21, 1905, prohibiting bookmaking and poolselling, is germane to bookmaking; both terms having been always understood to refer to horse racing of some character. *State ex inf. Hadley v. Delmar Jockey Club*, 92 S. W. 185, 190, 200 Mo. 34.

The words "pool selling" includes bets or wagers on the result of any trial of skill, speed, or endurance. One furnishing, for use in and to maintain a poolroom, an apparatus known as a "ticker," together with telegraph service, automatically printing on a tape connected therewith, giving the names of horses and the results of trials and contests, which telegraph service is convenient for and is used in the place for the purpose of maintaining the same, with knowledge of the purposes for which the ticker and the telegraph service is used, violates Gen. St. 1902, § 1359, prohibiting "pool selling," whether he furnished the ticker and telegraph service gratuitously or for a compensation measured by daily rental, or a percentage of profits, or whether he furnished the device and services for this poolroom alone, or furnished similar devices and services to others for legitimate purposes. *State v. Scott*, 68 Atl. 258, 259, 80 Conn. 317.

### POOL TABLE

As billiard table, see Billiard Table.  
As gambling device, see Gambling Device.

### POOR

Code, § 2252, provides that the word "poor," as used in the chapter relating to

the relief of such persons by the township, shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public. *Brock v. Jones County*, 124 N. W. 209, 210, 145 Iowa, 397.

"It must be borne in mind, however, that the term 'poor' is used in two senses. We use it in one sense simply as opposed to the term 'rich.' Thus we speak of the ordinary laborers, mechanics, and artisans as poor people, without a thought of describing persons who are other than self-supporting. Indeed, the large majority of our people are poor people, and yet they would feel insulted to be told that they were objects of public charity. We use the term also to describe that class who are entirely destitute and helpless, and therefore dependent upon public charity. The dictionaries recognize this twofold sense. Thus Webster gives these definitions: '1. Destitute of property; wanting in material riches, or goods; needy; indigent. It is often synonymous with indigent, and with necessitous, denoting extreme want. It is also applied to persons who are not entirely destitute of property, but who are not rich; as a poor man or woman; poor people. 2. (Law.) So completely destitute of property as to be entitled to maintenance from the public.' Now, when we speak of the relief of the poor as a public duty, and one which may justify taxation, we use the term only in the latter sense. \* \* \* Something more than poverty, in that sense of the term, is essential to charge the state with the duty of support. It is, strictly speaking, the pauper, and not the poor man, who has claims on public charity. It is not one who is in want merely, but one who, being in want, is unable to prevent or remove such want. There is the idea of helplessness as well as of destitution." Code 1876, c. 42, authorizing townships to issue bonds for relief purposes, and by section 5 authorizing the furnishing of the destitute with provisions and with grain for feed and seed, is unconstitutional as not being a public purpose. *State ex rel. Griffith v. Osawkee Tp.* 14 Kan. 418, 421, 19 Am. Rep. 99 (citing *Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *Citizen's Savings & Loan Ass'n v. City of Topeka*, 20 Wall. [87 U. S.] 655, 22 L. Ed. 455; *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185; *Lowell v. City of Boston*, 111 Mass. 454, 15 Am. Rep. 39).

V. S. 3171 (P. S. 3667), provides that, if a person is "poor and in need of assistance," the overseer of the poor of any town shall, on application relieve the person, and if he has not resided in the town for three years,

supporting himself and family, and is not of sufficient ability to provide such assistance, the town furnishing the same may recover the expense from the town where he last resided for three years and supported himself and family. Section 3174 (3670) declares that if a transient person is suddenly taken sick or lame, or is otherwise disabled and confined at any house, or is in need of relief, or is committed to jail, the person at whose house he is, or the jailer, shall be at the expense of relieving and supporting the person until he reports his situation to the overseer of the poor of the town, after which the officer shall provide for his support. Held, that whether a person is "poor and in need of assistance" does not depend alone on the amount and value of his property, but on the exigencies of his present situation. *Town of Ripton v. Town of Brandon*, 67 Atl. 541, 544, 80 Vt. 234.

#### POOR CHILDREN

The words "poor children," as used in a will making a bequest of a certain sum in trust "to pay the tuition or education of orphan or poor children under the age of sixteen years at or within two miles of the county seat of Clay county," embrace all those whom the testator included in the beneficiaries of his charity. *Crow ex rel. Jones v. Clay County*, 95 S. W. 369, 379, 196 Mo. 234.

#### POOR HOUSE

The words "poor house or other asylum," as used in Const. art. 8, § 8, providing that "no person while kept at any 'poor house or other asylum' at public expense, nor while confined in any public prison, shall be entitled to vote at an election under the laws of this state," will not be held to include soldiers' homes, and therefore Rev. St. 1899, § 6994, providing that no person, while kept in any "poor house or other asylum" at public expense, "except at soldiers' homes," shall be entitled to vote, will not be held unconstitutional as excepting soldiers' homes from its operation. *Hale v. Stimson*, 95 S. W. 885, 890, 198 Mo. 134.

#### POOR PERSON

Code, § 2252, provides that the words "poor person," as used in the chapter relating to the relief of such persons by the township, shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public. *Brock v. Jones County*, 124 N. W. 209, 210, 145 Iowa, 397.

The statute relative to the relief of poor persons, fairly construed, means that a per-

son must be without property which can aid in his support or out of which funds may be realized for his maintenance, to be a "poor person." A husband and wife unable to care for themselves, who are without property, except the right to the use of a small house and two lots in a town, are poor persons. *Hamilton County v. Hollis*, 119 N. W. 978, 980, 141 Iowa, 477.

The term "poor person," as used in Comp. St. Neb. 1903, c. 67, is the equivalent of "pauper," and includes all persons, without means, who are unable, on account of some bodily or mental infirmity or other unavoidable cause, to provide for themselves, and who either have no kindred in the state liable under the statute for their support, or, if they have such kindred, they are of insufficient ability, or fail or refuse to maintain such paupers. *Oteo County v. Lancaster County*, 111 N. W. 182, 183, 78 Neb. 517 (quoting and adopting the definition in Comp. St. 1903, c. 67, § 3 [Cobbey's Ann. St. 1903, c. 48]).

The poor law (Laws 1896, p. 136, c. 225) defines a "poor person" as one unable to maintain himself. Section 40 provides that every person of full age, who is a resident of a town for one year, and the members of his family, who have not gained a separate settlement, are deemed settled in such town, and shall so remain until he shall have gained a like settlement in some other town, or shall remove from the state and remain therefrom a year. A wife, with her children, went to S., February 13, 1907, from A., where she had resided for more than five years. Her husband, also a resident of A. for five years preceding September 11, 1906, left his family there on that date and went to another state. February 5, 1907, he met his wife at S., and she returned to A., and got her children and belongings, and went to S. as stated, where she resided with her husband until May 23d, when he left her without support and she applied to S., two days later, for assistance, which was given her. When her husband left her at A., she was unable to maintain herself and children, and applied for public assistance, which she received on November 3 and December 5, 1906, and January 4, 1907; the orders received by her being for necessities and paid by A. Held, that the wife had a "settlement" in A., and was a "poor person" there when she went to S., and that the city of A. remained and was liable for the support furnished by the city of S. *Onondaga County v. City of Amsterdam*, 117 N. Y. Supp. 1121, 1122, 64 Misc. Rep. 181.

Code, § 2216, provides that the father of any "poor person" who is unable to maintain himself or herself by labor shall relieve such person in such manner as, on application to the township trustees where such person has a residence or may be, they may direct; and section 2252 defines a poor person as one

who has no property, and is unable, because of physical or mental disabilities, to earn a living by labor, etc. Held, that evidence of a divorced wife that she worked around for neighbors at washing, sewing, and cleaning house, but that she had not been able to make a living for herself and the children, and that she had been receiving assistance from the county, was insufficient to establish either mental or physical disability to earn support for herself and the children, so as to render her father liable therefor. *Monroe County v. Abegglen*, 105 N. W. 350, 351, 129 Iowa, 53.

Under Hurd's Rev. St. 1905, c. 33, § 5, providing that, if the court, before or after the commencement of a suit, be satisfied that the plaintiff is a "poor person" and unable to prosecute his suit and pay the costs and expenses thereof, the court may, in its discretion, permit him to commence to prosecute his action as a "poor person," and thereupon such person shall have all the necessary writs, process, and proceedings without fees or charge, it is not necessary that either the applicant's attorney or the court should be satisfied that the applicant is a pauper. *People v. Chytraus*, 81 N. E. 844, 846, 228 Ill. 194.

Laws 1896, p. 137, c. 225, § 2, defines a "poor person" as one unable to maintain himself, and provides that such person shall be maintained by the town, city, county, or state according to the provisions of the chapter. Held that, where a person becomes a "poor person" after he has left the town or county in which he had gained a settlement, he is not a "poor person" there but must be supported by the county in which he becomes a "poor person," without right on the part thereof to reimbursement from the town or county from which he came, though his settlement still remains there. *Delaware County v. Delaware*, 93 N. Y. Supp. 954, 956, 105 App. Div. 129.

## POP HOLES

Where, in quarrying, irregular fragments of rock, which are too large to be loaded into cars and transported to the crusher, are blown to pieces by dynamite, the holes drilled for the purpose are called "pop holes." *Harper v. Iola Portland Cement Co.*, 93 Pac. 179, 76 Kan. 612.

## POP SHOTS

Where, in quarrying irregular fragments of rock, which are too large to be loaded into cars and transported to the crusher, are blown to pieces by dynamite, the explosions are called "pop shots." *Harper v. Iola Portland Cement Co.*, 93 Pac. 179, 76 Kan. 612.

## POPULAR ACTION

A "popular action" is one which can be brought by anybody who is willing to inform against the defendant and who is therefore denominated a common informer or prosecutor. Blackstone defines it as an action for a statutory penalty or forfeiture given to any such person or persons as will sue for it; an action given in England to any of the King's subjects (3 Bl. Comm. 161), and in this country to the people in general. The recovery may go to the informer, or, if the action be *qui tam* (that is, one in which the plaintiff sues for the state as well as for himself, it is divided as the law may direct. *Turner v. McKee*, 49 S. E. 330, 333, 137 N. C. 251.

## POPULATION

The term "population," as used in General City Classification Act of New Jersey (1 Gen. St. p. 458), means the enumeration of the inhabitants, and refers to such enumeration as the law provides to be made. *Dickinson v. Board of Chosen Freeholders of Hudson County*, 60 Atl. 220, 221, 71 N. J. Law, 589 (citing *In re Sewer Assessment for City of Passaic*, 23 Atl. 517, 54 N. J. Law, 156).

The meaning of the words "population of one hundred thousand inhabitants," as used in Laws 1901, p. 73, making the emission of dense smoke within the limits of cities, which now have or may hereafter have a "population of one hundred thousand inhabitants," a public nuisance, means 100,000 inhabitants or more than that number, and such statute is not limited in its operations to cities having exactly 100,000 inhabitants. *State v. Tower*, 84 S. W. 10, 11, 185 Mo. 79, 68 L. R. A. 402.

The phrase, "population of the entire state," as used in Const. § 123, providing that in making apportionment of judicial districts the number shall not exceed one district for each 60,000 of the population of the entire state, means all of the state's inhabitants. *Brown v. Moss*, 105 S. W. 139, 142, 126 Ky. 833.

A provision of the state Constitution that no county judge or surrogate in a county having a "population" exceeding 120,000 shall practice as an attorney or counsel in any court of record in the state or act as referee, the term "population" must be construed as meaning citizen population. Judge Goodrich dissents from this opinion, holding that the term includes all individuals resident in a county. *In re Silkman*, 84 N. Y. Supp. 1023, 1038, 1042, 83 App. Div. 102.

## POR CASAS CONSIISOORIALES

The early translation of the Spanish words "por casas consisooriales," used in reference to the purpose for which a portion of the sites of towns selected by colonists was

to be set apart, was for "public buildings of the municipality." *City of Victoria v. Victoria County (Tex.)* 94 S. W. 368, 371.

## PORCH

As dwelling, see Dwelling—Dwelling House.

As house, see House.

## PORCION

While "porcion," as applied to land, is not a technical term (see word in *Escrache*, Dict.), and means no more than portion or parcel in English, the usual application of the word in the old Spanish grants along the Rio Grande was to the parcels, ordinarily set aside to the settlers of new towns. *State v. Ortiz*, 90 S. W. 1084, 1086, 99 Tex. 475.

## PORPRESTURE

See Purpresture.

## PORT

See Custom of the Port; Foreign Port or Place; From Port of the United States; Home Port.

Other ports, see Other.

What constitutes a "port" for purposes of the revenue act is of necessity a matter of proof in each case. The term is broader than the word "harbor" and may mean more in one connection than in another. "Port" is often used as synonymous with "district," where the limits of the port and district are the same. The word "port" is defined in Rev. St. U. S. § 2787, as including any place from which merchandise can be shipped for importation or at which merchandise can be imported. The word as used in the revenue act rests somewhat in theory, and involves intention and perhaps certain acts to make its operation effectual. The language of the statute is that it may include places where cargoes are received and discharged, thus indicating a distinction between a commercial and a fiscal port. It cannot be the intention of the law that a vessel must report at the barge office before it can be considered in port, since there are several piers or docks between that office and the mouth of the river. The statutes of Illinois provide that the city of Chicago shall have jurisdiction over Lake Michigan for a distance of three miles beyond the city limits, and the ordinances of that city give the city harbor master control over lake water outwardly for the same distance between the north and south lines of the city. Held, as to certain barges in tow which had reached a place within these limits within the outer harbor works, where it was usual for such a tow to be broken up so that the barges might be taken to their separate docks, that they should be considered as in the port of Chicago for the purpose of fixing the time their car-

goes became dutiable, though the arrival had not been reported at the barge office. *Hartwell Lumber Co. v. United States*, 128 Fed. 306, 307 (quoting and adopting *Ayers v. Thatcher*, 3 Mason 153, 2 Fed. Cas. 269).

The settled rule that the domicile of the owner or the actual situs of the vessel, and not the place of enrollment of a vessel plying between ports of different states, engaged in the coastwise trade, and the consequent marking of the stern of the vessel with the name of the place of enrollment, as provided for in Rev. St. U. S. §§ 4178, 4334, was the criterion by which to determine the situs of the vessel for taxation, was not changed by the declaration of the act of June 26, 1884, § 21, that the word "port," as used in those sections, shall be construed to mean either the port where the vessel is enrolled, or the place where it was built, or where one of the owners resides, which simply enables the owner to select a place other than the port of enrollment to be marked upon the vessel. *Ayer & Lord Tie Co. v. Commonwealth of Kentucky*, 26 Sup. Ct. 679, 684, 202 U. S. 409, 50 L. Ed. 1082, 6 Ann. Cas. 205.

Act Feb. 12, 1909, is entitled "An act to provide for incorporation under general law of ports in counties bordering on bays or rivers navigable from the sea," etc. Laws 1909, p. 78. Held that, in view of legislation and decisions on the subject, the term "port" has a recognized status, and is used in its larger acceptance as comprising under one name a district of many places classed together for the purpose of revenue; and hence the title of the act is sufficient under Const. art. 4, § 20, providing that the subject of every act shall be expressed in its title. *Straw v. Harris*, 103 Pac. 777, 779, 54 Or. 424.

Under a policy prohibiting a vessel "from the river and gulf of St. Lawrence, ports in Newfoundland, Northumberland Strait, Cape Breton," etc., and from loading grain, except at certain "ports" named, the prohibition applied to the waters about Cape Breton, and not to the "ports" only, of that island. *Lovitt v. China Mut. Ins. Co.*, 54 N. E. 338, 174 Mass. 108 (citing and adopting *Odiorne v. New England Mut. Marine Insurance Co.*, 101 Mass. 551, 3 Am. Rep. 401; *Whitton v. Albany City Insurance Co.*, 109 Mass. 24).

## PORT DISTRICT

As municipal corporation, see Municipal Corporation.

## PORT OF DISCHARGE

See Final Port of Discharge.

Where the "port of discharge" designated in a charter party is one at which there is a customhouse, the word "port" is to be construed in its ordinary and commercial sense, as meaning the particular place named, and not any place within the boundaries of

the revenue port or the district for which such place is the port of entry. Under a charter for the carriage of a cargo of manure salt used in the manufacture of fertilizers from a German port to Wilmington, N. C., at and near which city there were large fertilizer works having landing docks, the vessel was not authorized to demand discharge at a point 30 miles below Wilmington where there were no such works, merely because the term "port of Wilmington" was used elsewhere in the charter and in the bill of lading. *Manchester Liners v. Virginia-Carolina Chemical Co.*, 194 Fed. 463, 469.

### PORT OF SHIPMENT

Where slate was quarried at one place and carried thence to another to a shop one-half mile from a railroad station, and there cut and finished for mantels and boxed and placed in a storehouse near by, the shop or the storehouse from whence the mantels were sold and delivered is the "port of shipment," within the statute giving laborers a lien for 30 days after slate has arrived at its port of shipment. *Union Slate Co. v. Tilton*, 73 Me. 207, 211.

### PORTER

As employé, see *Employé*.

As intoxicating liquor, see *Intoxicating Liquor*.

### PORTION

See *Body Portion*; *Business Portion*; *Disposable Portion*; *Greater Portion*; *Lowermost Portion*; *Material Portion of Will*.

Other portions of street, see *Other*.

Where testator directed that a remainder of his estate be equally apportioned among his children, not to be turned over to them, but to be invested for their behalf, and the annual income of each child to be subject to her sole control, etc., and, in case of any child dying without a will, then her "portion of said inheritance" should be equally divided between her children who might survive her, or, if not, to testator's surviving children, etc., the quoted phrase did not contradict the idea of a life estate in the beneficiaries; the clause being used in the popular sense as meaning, not the part of the estate to which the beneficiary took an absolute interest, but that portion from which, as the beneficiary, she received her annual income, and the part over which she was given a power of disposition by will. *Robbins v. Smith*, 78 N. E. 1051, 1054, 72 Ohio St. 1.

### POSITION

See *Confidential Position*; *Congressional Position*; *Lap Position*; *Present Positions*.

Change of position, see *Change*.

A position is analogous to an office, in that the duties that pertain to it are permanent and certain, and it differs from an office in that its duties may be nongovernmental, and not assigned to it by public law. *Fredricks v. Board of Health of Town of West Hoboken*, 82 Atl. 528, 529, 82 N. J. Law, 200.

An exempt fireman holding the position of assistant building inspector did not hold an office, but a "position," so that certiorari and not quo warranto was the proper remedy to test the legality of his removal. *McGrath v. Mayor of City of Bayonne*, 83 Atl. 780, 781, 83 N. J. Law, 224.

A "public office" is a place created, or at least recognized, by the law of the state, and to which certain permanent duties are assigned either by the law itself or by regulations adopted under authority of law. A "position," within the purview of the veteran act of 1895 (3 Gen. St. 1895, p. 3702), is a place, the duties of which are continuous and permanent, analogous to those of an office, and which pertain to the position as such. *Hart v. City of Newark*, 77 Atl. 1086, 1087, 80 N. J. Law, 600.

A special verdict, in an action for the death of the engineer of a traveling crane, that decedent was in a better position than any one else to determine when any particular hog chain should be slackened or tightened, was not a finding that decedent had an equal opportunity with the master to know that the chains were not properly adjusted, for the word "position" merely meant that the station of the engineer was a more favorable place from that of any one else from which to determine when any particular hog chain should be slackened or tightened, and the finding did not show assumption of risk by decedent so as to defeat a general verdict. *Ittenbach v. Thomas*, 96 N. E. 21, 27, 48 Ind. App. 420.

### Clerk

The words "regular clerk," as used in New York City Charter, Laws 1901, p. 636, c. 466, § 1543, providing that no "regular clerk" or person holding a "position" in the classified municipal civil service, subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation, etc., are used in their popular sense, and include only such positions as did not require any other qualification than the ability to perform purely clerical work. A regular clerkship is a "position" in the classified municipal civil service subject to competitive examination." *People ex rel. Corkill v. McAdoo*, 99 N. Y. Supp. 324, 325, 113 App. Div. 770 (citing *People v. Board of Fire Com'rs*, 73 N. Y. 437; *People v. Board of Fire Com'rs of City of New York*, 86 N. Y. 149; *Chittenden v. Warster*, 46 N. E. 857, 152 N. Y. 345, 37 L. R. A. 809).



**Janitor of courthouse**

An honorably discharged Union soldier, who has been appointed by the board of chosen freeholders janitor of the county courthouse, for a term indefinite in its extent, does not hold a public office, but holds a "position" within Veteran Act March 14, 1895 (3 Gen. St. p. 3702), from which he cannot be removed except for cause. "A 'position,' within the purview of the statute, is defined to be a place the duties of which are continuous and permanent, and which pertain to the position as such." State v. Board of Chosen Freeholders of Salem County, 42 Atl. 844, 845, 63 N. J. Law, 57 (citing Stewart v. Board of Chosen Freeholders of Hudson County, 38 Atl. 842, 61 N. J. Law, 118).

Under Laws 1904, p. 8, c. 9, § 1, providing that in every public department and upon all public works, etc., honorably discharged veterans of the Civil War who are citizens and residents of the state shall be entitled to preference in appointment and employment, etc., a position as janitor of a courthouse is one by appointment or employment. Kitterman v. Board of Suprs. of Wapello County, 115 N. W. 13, 14, 137 Iowa, 275.

**Policeman**

Under a rule of the municipal civil service commission providing that, in the relative weights of subjects of rating on any promotion examination, seniority of service in the "position or grade," from which promotion is sought shall count 20, the words "position or grade," refer to a position or grade as constituted by law, and a policeman is not entitled in his rating in promotion examinations for seniority of service as roundsman while patrolmen were detailed to such service, but only from the time the Greater New York charter took effect, under which an appointment as roundsman was first recognized as a position or grade. Moran v. Baker, 99 N. Y. Supp. 197, 49 Misc. Rep. 327 (citing People ex rel. Buckley v. Roosevelt, 39 N. Y. Supp. 78, 5 App. Div. 168; People ex rel. Colbert v. Knox, 68 N. Y. Supp. 267, 57 App. Div. 155).

**Tax appraiser**

The provisions of the "veteran acts" relating to the employment of honorably discharged soldiers and sailors in the public service, giving them a preference in appointment and promotion to positions, and protecting them against removal from such positions or employment, applied solely to subordinate positions or offices, and under Civil Service Law, Laws 1899, pp. 808, 809, c. 370, § 2021, which are practically a re-enactment thereof, a tax appraiser who is required to file a bond in not less than \$1,000, and whose powers and duties are of a quasi judicial character, and whose qualifications are different from those requisite from those in a clerical or subordinate position, does not hold

a "position" in the sense in which that word is used in the Civil Service Law. People ex rel. McKim v. Glynn, 106 N. Y. Supp. 956, 959, 56 Misc. Rep. 35.

**POSITIVE****POSITIVE DUTY**

In an action for injuries to a servant, a charge that "the master owes the positive duty to an employé to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe," is a correct statement of the law, and is not objectionable as requiring the master to insure the safety of the place; the word "positive" being used rather as the antithesis of the word "delegable" than as a measure of the diligence required of a master. Harris v. Brown's Bay Logging Co., 106 Pac. 152, 154, 57 Wash. 8.

**POSITIVE EVIDENCE**

In weighing contradictory evidence, other things being equal, "positive evidence" preponderates over "negative evidence"; but the jury must take into consideration the circumstances, such as opportunity and attention of the witnesses. Anderson v. Horlick's Malted Milk Co., 119 N. W. 342, 346, 137 Wis. 569 (citing Farmers' & Mechanics' Bank v. Champlain Transportation Co., 23 Vt. 186, 56 Am. Dec. 68).

**POSITIVE FRAUD**

Fraud in the procurement of a contract avoids it; and where a party intentionally or by design misrepresents a material fact or produces a false impression in order to mislead another or to entrap or cheat him or to obtain an undue advantage over him, in every such case there is positive fraud in the truest sense of the term—there is an evil act with an evil intent—and the misrepresentation may be as well by deeds and acts as by words, by artifices to mislead as by positive assertions. Tolley v. Poteet, 57 S. E. 811, 819, 62 W. Va. 231.

**POSITIVE TESTIMONY**

"Positive testimony" is that of witnesses who know the facts. Daniel v. State, 62 S. E. 539, 4 Ga. App. 843.

In a prosecution for homicide, the court properly defined and distinguished "positive" and "negative testimony": "The testimony of those witnesses who swore positively that they saw the pistol in the hand of the prisoner, and that he fired the fatal shot while the pistol was in his hand, is what the law terms 'positive testimony.' They swear positively that they saw the existence of a fact. The testimony of the witnesses who said that they saw the prisoner and the deceased in a struggle at the time when the last shot was

fired, but they did not see the pistol, and did not know in whose hand the pistol was, is what the law terms 'negative testimony.' The reason the law gives greater weight to positive testimony than to negative testimony is because the witnesses who swore to positive testimony swore to what is a fact, an existing fact, or else they deliberately swore to a falsehood, while those who swore to negative testimony may be telling the truth, and yet the fact may exist which they did not see. If one witness swears that he saw Sheriff Markham in the courthouse in Durham on a certain date, the sheriff was there, or else the witness told a lie. Another witness might say: 'I was in the courthouse on that occasion, but I did not see Sheriff Markham in there.' That witness may be telling the truth and may be conscientious, and yet it may be a fact, notwithstanding, that Sheriff Markham was in the courthouse. And for that reason the law says you must attach greater weight to positive testimony than to negative testimony." *State v. Murray*, 51 S. E. 775, 139 N. C. 540.

## POSSESS

See Openly Possess; Repossess; Seised and Possessed.

All I may possess, see All.

### Occupy synonymous

"In the primary and most familiar sense of the word, 'occupy' is the equivalent of the word 'possess.'" *Hoysradt v. Delaware, L. & W. R. Co.*, 151 Fed. 321, 330.

### Own synonymous

See Own.

## POSSESSED

### As ownership

The word "possessed," as used in an allegation in an action by an administrator for the conversion of goods claimed to have been owned by intestate that intestate, at the time of his death, was "seised and possessed" of the property, means "owned"; that is, that the intestate was the owner of the goods at the time. *Grant v. Hathaway*, 96 S. W. 417, 118 Mo. App. 604 (citing 6 Words and Phrases, p. 5463).

### As seised

An allegation that a person was "seised and possessed" of land *prima facie* imports seisin in fact, not mere seisin in law. *Bragg v. Wiseman*, 47 S. E. 90, 91, 55 W. Va. 330.

A testator devised land to a nephew. Thereafter he made a parol gift of the land to him, and he entered into possession with the consent of testator, and remained in the undisturbed possession until the death of the testator a few months later. The testator made no change in the will. Held, that testator was not "seised" or "possessed" of the land at the time of his death, within Acts

1893, c. 174, imposing a tax on property passing by will. *Bailey v. Henry* (Tenn.) 143 S. W. 1124, 1128.

## POSSESSIO PEDIS

See Pedis Possessio.

## POSSESSION

See Actual and Continued Change of Possession; Actual Possession; Adverse Possession; Constructive Possession; Continued Change of Possession; Continued Possession; Continuity of Possession; Effective Possession; Estate in Possession; Exclusive Possession; Immediate Possession and Recording; Lawfully Claiming Possession; Lawful Possession; Legal Possession; Mortgagee in Possession; Natural Possession; Notorious Possession; Open and Notorious Possession; Openness, Notoriety and Exclusiveness of Possession; Open, Notorious, and Continuous Change of Possession; Party in Possession; Peaceable Possession; Property in Possession; Real Possession; Store and Keep in Possession; Taking Possession; Title by Possession; Virtual Possession; Writ of Possession.

As element of trespass, see Trespass.

Change of possession, see Change.

Continuous possession, see Continuous.

Keep in possession, see Keep.

Privy of possession, see Privy—Privy.

Recent possession, see Recent.

Resume possession, see Resume—Resumption.

Right of possession, as property, see Property.

Possession is the having or holding or detention of property in one's power or command. Defendant formed a plot to obtain possession of certain indictments for the purpose of destroying them by bribing the assistant district attorney having them in charge to deliver them to him for a certain consideration. A third party, pretending to act for the district attorney, delivered them to him, and he took possession of them, and walked away, whereon he was arrested and the indictments recovered. It was held that defendant was properly convicted under Pen. Code, § 531, of an attempt to commit grand larceny in the second degree. *People v. Mills*, 70 N. E. 786, 790, 178 N. Y. 274, 67 L. R. A. 131 (quoting *Harrison v. People*, 50 N. Y. 518, 10 Am. Rep. 517).

Evidence that a defendant was one of a party engaged in a common unlawful enterprise, that of shooting game in the closed season, is sufficient upon which to base a conviction of such defendant upon the charge of having in his "possession" game protected by the statute, although the game when taken is shown to have been in a buggy not occupied or being driven by the defendant.

McMahon v. State, 97 N. W. 1035, 1036, 70 Neb. 722.

"The character of possession for the statutory period necessary to toll the right of entry by the legal title holder must be such as amounts constantly to a trespass against the true title (that is, it must be an actual physical entry upon or control of the premises, and be continuous); it must be open (that is, it must of itself be such as to afford notice to the rightful owner of its hostile nature); it must be adverse (that is, it must be against and in defiance of the claim of the real title holder, and be such as to exclude his authority); and it must be accompanied by the claim by the occupant that it is his property." *Owsley v. Owsley*, 77 S. W. 397, 401, 117 Ky. 47.

"Possession, to be the foundation of a prescription, must be in the right of the possessor, and not of another; must not have originated in fraud; must be public, continuous, exclusive, uninterrupted, and peaceable, and be accompanied by a claim of right." *Compton v. Newton*, 59 S. E. 270, 271, 129 Ga. 619.

To constitute possession, there must be such appropriation of the land to the individual as will apprise the community in its vicinity that the land is in his exclusive use and enjoyment, and notice of possession to be sufficient must be of the open and visible character, which from its nature will apprise the world that the land is occupied, and who the occupant is. *Towle v. Quante*, 92 N. E. 967, 969, 246 Ill. 568.

"The term 'expectation,' as used in the statute 'in relation to inheritance taxes, 'has reference only to possession. The language is: 'By reason whereof any person \* \* \* shall become beneficially entitled, in possession or expectation, to any property or income thereof.' The term 'expectation' is used, not to denote an expectation of becoming vested both with the title and the possession where neither is now vested, but to denote a condition where the title is vested and the possession is deferred. The term 'in expectation' is used in contradistinction to 'in possession.' Both contemplate a title vested and indefeasible, but in one instance the right of enjoyment is immediate, 'in possession'; in the other, it is postponed, 'in expectation.' As used in this statute, these words last quoted refer to the future possession of an estate now vested and which is subject to the immediate enjoyment of another." *In re Kingman's Estate*, 77 N. E. 135, 136, 220 Ill. 563, 5 Ann. Cas. 234 (quoting and adopting definition in *People v. McCormick*, 70 N. E. 350, 208 Ill. 437, 64 L. R. A. 775).

"Possession" of land cannot be more than the exclusive dominion over it. Neither actual occupation, cultivation, or residence are necessary to constitute actual "possession,"

when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not so claim. *McCaughn v. Young*, 37 South. 839, 842, 85 Miss. 277 (quoting and adopting 2 Wood, Lm. § 267; *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137).

Where the contract of sale of a threshing machine contains a warranty that is limited and conditioned by the following provision, "Continued 'possession' or use of machinery for six days shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the undersigned, who agree thereafter to make no further claim on Russell & Co. under warranty," the "possession" therein mentioned is held to mean a possession coupled with a possibility or opportunity of using or testing the property for the uses and purposes to which it is to be applied. *Harrison v. Russell & Co.*, 87 Pac. 784, 785, 12 Idaho, 624.

The act of the purchaser's assignee in posting "for sale" signs on vacant lots did not constitute possession so as to preclude the vendor from bringing suit to quiet title after service of notice of forfeiture of the sale contract for default in the payments. *Donnelly v. Lyons*, 139 N. W. 246, 248, 173 Mich. 515.

Though one gives a deed of trust on land as security, he still retains the possession within St. 1906, p. 78, c. 59, § 1, limiting the right to bring action to quiet title to one who is by himself or his tenant or other person in the actual and peaceable possession of the property. *Charles A. Warren Co. v. San Francisco Sav. Union*, 96 Pac. 807, 809, 153 Cal. 771.

"Possession" to vest title must be actual, continuing, visible, notorious, distinct, hostile, full, and open. *Jones v. Weaver (Tex.)* 122 S. W. 619, 621.

What constitutes possession of land is a mixed question of law and fact, possession consisting of the exercise of acts of dominion over it, in making the ordinary use of it, and taking the ordinary profits it is capable of yielding in its present state. *New Jersey & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co.*, 178 Fed. 772, 778, 102 C. C. A. 220.

There is a change of "title" as well as of "interest" and "possession" within a fire policy declaring it void in case of any change in the interest, title, or possession of the insured property, where insured, the owner in fee of the insured property, makes a contract of sale of it, declaring that deed shall pass when final payment is made, and that the purchaser shall pay all taxes and assess-

ments levied against the property subsequent to contract, and shall have the right to occupy the property before passing title, as tenant of the seller, without payment, and the purchaser goes into possession and is not in default. The word "interest" is broader and more comprehensive than the word "title," since it embraces both legal and equitable rights, and the words are not synonymous. The true test is whether the vendor has parted with the absolute control and dominion over the property insured. In this case, there was a change in possession within the meaning of that word as used in the policy. While the agreement designates the occupancy of the vendee, as that of a tenant of the vendor without pay or rent, the contract gives and secures to him more than the rights and interests of a tenant. He is charged with the liabilities, and entitled to enforce the rights, of a purchaser in possession and cannot be ejected as a tenant regardless of such rights. The possession of the vendee is absolute and exclusive of the vendor, as long as he performs the contract. *Brighton Beach Racing Ass'n v. Home Ins. Co.*, 99 N. Y. Supp. 219, 221, 118 App. Div. 728 (citing *Lett v. Guardian Fire Ins. Co.*, 25 N. E. 1088, 125 N. Y. 82).

The expression "possession," under Bankr. Act, § 3, subd. 5, providing that where the act of bankruptcy consists of a transfer of property with intent to defraud or to give a preference, the time for filing the petition shall not expire until four months from the date when the beneficiary takes exclusive or continuous possession of the property, means such possession as the property is susceptible of, and it will be deemed notorious under those circumstances, though the creditors have no notice thereof. *Jones v. Coates*, 196 Fed. 860, 864, 116 C. C. A. 422.

#### As actual or constructive possession

The word "possession" means prima facie actual possession. *Bragg v. Wiseman*, 47 S. E. 90, 55 W. Va. 330.

"Possession," as used in Ky. St. 1903, § 11, providing that any person having both the legal title and possession of land may sue in equity any person setting up claim thereto, means actual possession; otherwise the word would be virtually meaningless. *Brown v. Ward*, 105 S. W. 964, 965.

The "possession" required by Code Civ. Proc. § 1532, providing that when two or more persons hold and are in possession of real property as joint tenants or tenants in common, in which either of them has an estate of inheritance, or for life or years, any of them may maintain an action for the partition thereof, is not a strict *pedis possessio*, but merely a present right of possession. *Brown v. Crossman*, 100 N. E. 42, 43, 206 N. Y. 471.

"Possession" means simply the owning or having a thing in one's power; it may be actual or it may be constructive. Actual possession exists when the thing is in the immediate possession of the party; constructive possession is that which exists without actual personal occupation." *Brown v. Volkening*, 64 N. Y. 76, 80.

The "possession" in the 10-year statute of limitations means an actual residence on the land, or such cultivation, use, and enjoyment of the same, by such visible and notorious acts of ownership, as will give notice to the owner and others, and such possession may be by tenant and need not extend to the limits of the entire 160 acres; but possession of some definite part of the land is sufficient to confer title to 160 acres or less. *Carlock v. Willard (Tex.)* 149 S. W. 363, 365.

A mere constructive possession is not "seisin" or "possession," within the meaning of Kirby's Dig. § 5061, providing that no action for the recovery of lands sold for taxes shall be maintained against the purchaser unless plaintiff or his predecessor in interest was seised or possessed of the lands within two years next before the commencement of the action. *Towson v. Denson*, 86 S. W. 661, 665, 74 Ark. 302.

"Actual possession" or "possession in fact," as used in referring to the right to maintain an action to quiet title, exists when the thing is in the immediate occupancy of the party or his agent or tenant and the terms are synonymous with "*pedis possessio*"; while "constructive possession" or "possession in law," as applied to the remedy for the quieting of title to land, is that possession which the law annexes to the legal title or ownership of property when there is a right to the immediate actual possession. When one has a legal estate in fee in land, he has the constructive possession, unless the actual possession is in some one else. Constructive possession is founded on the existence of title in some form, and it is a legal impossibility for a constructive possession under the statute of uses to vest in one under a deed from another having no legal estate to convey. *Southern Ry. Co. v. Hall*, 41 South. 135, 136, 145 Ala. 224 (citing *Smith v. Gordon*, 34 South. 838, 136 Ala. 498).

"Actual possession" is a term with well-understood legal meaning, and is used in opposition to the other term 'constructive possession' or 'possession in law.' \* \* \* In a general way, it may be said that 'constructive possession' is that which exists in contemplation of law without actual personal occupancy of the property, such a possession as in contemplation of law proceeds from the vesting of the paramount title or follows in the wake of the legal title, or, as more exactly defined, 'constructive possession,' or 'possession in law,' as it is sometimes called.

is that possession which the law annexes to the legal title or ownership of property when there is a right to the immediate 'actual possession' of such property, but no 'actual possession.' To constitute actual possession of land, there must be such an appropriation of the land by the claimant as will convey to the community where it is situated visible notice that the land is in his exclusive use and enjoyment, an appropriation manifested by either inclosing, cultivating, improving, or adapting it to such uses as it is capable of. *Ofstad v. Murasky*, 91 Pac. 1008, 1009, 152 al. 64.

"Possession" of land is the holding of an exclusive exercise of dominion over it. It is evident that this is not and cannot be uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of ownership. The owner cannot occupy, literally, the whole tract; he cannot have an actual *pedis possessio* of all, nor hold in the grasp of his hand. His possession must be indicated by other acts. The usual one is that of inclosure. But this cannot always be done, yet he may hold possession, in fact, of uninclosed land by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable and acquire the profits it yields in its present condition. Such acts, being continued and uninterrupted, will amount to actual possession." *Illinois Steel Co. v. Jeka*, N. W. 399, 402, 123 Wis. 419 (quoting adopting definition in *Booth v. Small*, 25 Ill. 177).

A mere symbolical "delivery of possession" such that the mortgagee acquires the right to control the property, and if it is defeated the loss will fall on him, is not sufficient in case of a mortgage of the articles in a saloon, under St. 1898, § 2313, providing no mortgage of chattels shall be valid except another than the mortgagor, in the absence of a filing thereof, unless possession of the property be delivered to and retained by the mortgagee; but the possession must be actual, open, unequivocal, and exclusive, accompanied by the ordinary indicia of ownership and control, such that those familiar with the situation would naturally draw the inference of a change of ownership where the property remains in the hands of the mortgagor, which is conducted in the usual and, on his absconding, his wife continues exactly the same relations to the property as the officers of the mortgagee merely ensconced in the saloon, and tell the wife and bartender they take possession, and tell the mortgagor to look after the place and incur no responsibility, and then leave the property as if considering that the wife will continue the business as before for herself, if she does, there is no delivery of possession to the mortgagee, much less any release thereof by it. *George Walter Brew-*

*ing Co. v. Lockery*, 114 N. W. 120, 121, 134 Wis. 81.

#### Care ~~synonymous~~

There is no distinction between the words "care" and "possession," as used in Code 1906, § 1136, making it a crime for any agent, clerk, officer, etc., to embezzle money which shall have come to his "care or possession," so that an indictment charging that defendant had the money under his "care" is sufficient, as is also one charging that he had the same in his "possession." *Richberger v. State*, 44 South. 772, 774, 90 Miss. 806.

#### As control

"Possession is the having, holding, or detention of property in one's power or command; actual seizure or occupancy." The mere fact that one who works elsewhere lodges and boards on premises the legal title to which is in him with whom he boards, and who claims and exercises full power, control, and dominion over the property by virtue of such legal title, does not constitute possession such as would be notice, in and of itself, of any equitable interest that such lodger or boarder would have in and to the premises or any part thereof. *Derrett v. Britton*, 80 S. W. 562, 563, 35 Tex. Civ. App. 485.

The paymaster of a railroad company, intending to pay the foreman of a gang and the members thereof, counted out the wages due the foreman and placed the money on the counter, and, while the foreman signed the pay roll, the money was stolen by accused, who a few moments later was found by the foreman and the money taken from him and returned to the paymaster, who again counted it and paid it to the foreman. Held, that an indictment for the larceny of the money properly alleged that it was the property of the foreman, since "possession" means the owning or having a thing in one's power, and may be actual or constructive. *Campbell v. State*, 57 South. 412, 3 Ala. App. 76.

#### As disseisin

See *Disseisin*.

#### As evidence of title

"Possession" is evidence of title against all persons except the owner. It is prima facie evidence of title against all persons not having a better right. It constitutes or rather answers for a right of property. *Llewellyn v. Cauffiel*, 64 Atl. 388, 392, 215 Pa. 23 (dissenting opinion of Elkin, J.).

#### As legal possession

The word "possession," unaccompanied by a qualifying word to indicate the kind of possession, does not necessarily mean a possession manifested by outward signs, but may mean mere legal or fictive possession. *Succession of Zebriaka*, 44 South. 893, 895, 119 La. 1076.

The word "possession," as used in Const. art. 6, §§ 4, 5, conferring original jurisdiction

upon the superior court in all cases at law which involve the possession of real property, in Code Civ. Proc. § 964, providing for a taking of appeal from a superior court judgment in all cases involving the possession of real property, and in Code Civ. Proc. § 838, providing that in actions in justice court no evidence should be given upon any question which involves possession of real property, means such a possession as has relation to title, or is necessary to the enforcement or defeat of the cause of action asserted. *O'Meara v. Hables*, 124 Pac. 1003, 163 Cal. 240.

The word "possession," as used in Mont. Code Civ. Proc. § 1340, giving the remedy of partition to cotenants "who hold and are in possession of" realty, means the possession which the law imputes to the holder of the legal title. *Heinze v. Butte & B. Consol. Min. Co.*, 126 Fed. 1, 3, 61 C. C. A. 63.

Where a policy of fire insurance provides that the policy shall be void if any change takes place in interest, title, or possession, except change of occupants without increase of hazard, a leasing of the insured premises by the legal owner, with the consent of the insured, the equitable owner, and placing the lessee in actual possession of the premises, without any increase of hazard, does not avoid the policy, as the word "possession" means legal possession or possessory right. *McGinnis v. St. Paul Fire & Marine Ins. Co.*, 38 Pa. Super. Ct. 390, 394.

#### Occupancy synonymous

As commonly used and understood, the word "occupation" is synonymous with "possession." *Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594, 599.

"Possession" does not imply occupation." *U. S. v. Arredondo*, 6 Pet. [31 U. S.] 691, 743, 8 L. Ed. 547.

"Possession" means actual control of property by physical occupation, while "title" is the means whereby one holds possession of his land. *Collar v. Ulster & D. R. Co.*, 131 N. Y. Supp. 56, 60, 72 Misc. Rep. 274.

The ordinary meaning of the word "possession" is the same as "occupancy." It is defined as "the act of possessing; a having and holding or retaining of property in one's power or control." *Iler v. Miller*, 111 N. W. 580, 590, 78 Neb. 675, 14 L. R. A. (N. S.) 289 (citing Cent. Dict.).

The word "possession," in Wilson's Rev. & Ann. St. 1903, § 4787, providing that an action may be brought by any person in "possession," by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest, is not equivalent to the word "occupancy," and one who temporarily vacates a homestead owned in fee simple, for the purpose of giving educational advan-

tages to minor children, does not so abandon the possession as to forfeit his right to maintain an action to remove a cloud from the title. *Womble v. Pike*, 87 Pac. 427, 429, 17 Okl. 122.

The ordinary meaning of the word "possession" is the same as "occupancy." It is defined as the act of possessing; a having and holding or retaining of property in one's power or control. A question asked of a witness as to who was in possession of the property in a certain year was not objectionable as calling for the conclusion of the witness on legal possession, in the absence of anything in the form of the question or previous questions indicating that the word was used in its technical sense as synonymous with "seisin." *Nathan v. Dierssen*, 79 Pac. 739, 740, 146 Cal. 63.

Mere occupancy or personal presence of complainant on the ground does not constitute such possession as to sustain an action of forcible entry, and a mere trespasser cannot by the very act of trespass immediately and without excuse give himself what the law understands by possession against the person whom he ejects. *Schwinn v. Perkins*, 78 Atl. 19, 22, 79 N. J. Law, 515, 32 L. R. A. (N. S.) 51, 21 Ann. Cas. 1223.

In common usage, the word "possession" is often used as synonymous with "occupancy," and, when it is so used and understood in a question asked a witness, "Who had possession of the land?" the question is not objectionable as calling for a conclusion of the witness. *Brown v. Spencer*, 126 Pac. 493, 496, 163 Cal. 589.

The words "occupation" and "possession" are frequently used synonymously, especially in leases and like instruments. Where a guaranty for the payment of rent recited that the landlord had exacted from the lessees a guaranty that they would pay the rent that might become due under the lease while they were in the occupation of the premises, and stipulated that the guarantor would on default for such months as the lessees were in occupation of the premises pay the rent, the words "in occupation" will be construed to mean "in possession" to make the instrument effective. *Woods v. Broder*, 113 N. Y. Supp. 335, 336, 129 App. Div. 122.

Where an indictment for burglary charges the entry without consent of the occupant of a house, occupancy is equivalent to "possession," and embraced the entire premises including the chicken house in question. *Moore v. State*, 88 S. W. 230, 48 Tex. Cr. R. 400.

The term "possession," as used in Act June 4, 1901 (P. L. 431) § 8, providing that service of notice of intent to file a lien may be served on the party in possession of the improvement, means occupancy, as actual possession exists where the thing is in the

immediate occupancy of the party. *Merritt & Co. v. Poll*, 84 Atl. 683, 685, 236 Pa. 170.

#### Possession of weapons

Penal Law, § 1897, as amended by Laws 1911, c. 195, making it a misdemeanor to have in one's possession weapons of a size that may be concealed on one's person, means a physical possession, and does not extend to a weapon of the kind described in a cabinet at home. *People ex rel. Darling v. Warden of Tombs Prison*, 134 N. Y. Supp. 835, 336, 74 Misc. Rep. 151.

#### Residence not required

"Possession" does not imply residence." *U. S. v. Arredondo*, 31 U. S. (6 Pet.) 691, 748, 3 L. Ed. 547.

#### As seisin

See Seisin.

#### Sole possession

In forcible entry and detainer, where the bill of exceptions, after the assertion that plaintiff was in possession of the property, admitted that the property was an alleyway and that plaintiff did not claim the exclusive ownership, the word "possession" must be construed in the light of the other elements, and is not used in its technical sense, so as to denote sole possession. *Moye v. Thurber*, 40 South. 822, 823, 146 Ala. 180, 11 Ann. Cas. 1175.

*White's Ann. Pen. Code*, art. 862, declares that it is not necessary to constitute theft, that possession and ownership of the property be in the same person at the time he taking. Article 863 provides that "possession" is constituted by exercise of actual control, care, and management of property. *Cr. Proc.* 1895, art. 445, provides that if one person owns the property, and another has possession, charge, or control of ownership may be alleged in either, and the property is owned in common, or jointly by two or more, ownership may be alleged to be in all or either. Held, that the rule last cited applied to the special owner of property as well as the actual owner thereof, that the state made out its case when it proved the alleged owner to be a special owner with two others, and that, while neither had the care and management of the property, it was unnecessary to prove the consent of the other joint owners, to prove it would not be reversible error nor prejudicial to accused. *Lockett v. State*, 129 S. W. 627, 628, 59 Tex. Cr. R.

employment, which section was further amended and extended in 1874, as shown by 3 Rev. St. (6th Ed.) pt. 4, c. 1, tit. 3, § 73. Pen. Code, § 528, subd. 2, makes any person guilty of larceny, who, having in his possession, custody or control as officer of any corporation, etc., any money, etc., appropriates it to his own use. Defendants were president and vice president, respectively, of a bank. The president was given direct control over all employes, was required to countersign checks, which duty, with the trustees' consent, might be delegated to the vice president, who could perform the president's duties in his absence. The treasurer had custody of all moneys and a committee consisting of all three officers, together with the secretary, was given general supervision of the business between the meetings of the trustees. A company in which defendants were interested made drafts upon them which were satisfied by funds of the bank taken therefrom by the treasurer by defendants' direction, which funds were replaced by defendants' checks, which all the officers knew were worthless. Held, that physical possession was not essential to custody or control, and, in view of the history of the provision, defendants had "possession, custody, or control" of the funds misappropriated so as to make them guilty of larceny under subdivision 2. *People v. Britton*, 118 N. Y. Supp. 989, 992, 993, 134 App. Div. 275.

#### POSSESSION FOR SALE

An ordinance provides that whoever shall have in his possession for sale any adulterated milk as defined by the ordinance, which defines milk falling below a prescribed standard adulterated, or who shall refuse to furnish the sample as provided therein, shall be fined, etc., and provides for the taking of a sample of milk from the can or other vessel from which it is sold to the public. Held, that "possession for sale" within the ordinance means possession for the purpose of sale to consumers in the customary manner of the trade, and the mere receipt by a dairy company at a railroad depot of one or two cans of milk below the legal standard out of a shipment of 26 cans does not amount to such "possession for sale," especially where it appears that the dairy company does not sell to consumers milk below the legal standard, but uses it for manufacturing butter, cheese, and other by-products. *City of New Orleans v. Villere*, 52 South. 682, 683, 126 La. 514.

#### POSSESSION OF BANK

See Money in Hands or Possession of Bank.

#### POSSESSION OF OFFICE

The "possession of an office" as between two rival claimants does not depend on the mere physical possession of the rooms and

**POSSESSION, CUSTODY, OR CONTROL**  
Rev. St. (1st Ed.) pt. 4, c. 1, tit. 3, § 73, prescribes in the manner prescribed for stealing any corporate officer, etc., shall embezzle without his employer's any money, etc., which shall have to his possession by virtue of such

appurtenances ordinarily used in performance of the duties thereof. *Scott v. Sheehan*, 79 Pac. 353, 145 Cal. 691.

### POSSESSION OR CONTROL

The words "possession or control," as used in Code, § 866, providing for the punishment of any one in "possession or control" of premises who knowingly permits a gambling device to be set up thereon, mean some right or power over or in the premises for the time being, and the right to exercise some power relative thereto, and a conviction cannot be had where it appears that the premises were, at the time of the act of the accused, under the control of a representative of the owner, although the accused was present and had set up a gaming table therein. *Nelson v. United States*, 28 App. D. C. 32, 36.

### POSSESSION PURSUANT TO CONVEYANCE

"Possession is given pursuant to the conveyance when it is given by reason of or on account of the conveyance having been made and not by reason of or on account of some other circumstance. If the possession would not have been delivered except for the making of the conveyance, and no adequate reason appears for the possession being delivered except the making of the conveyance, then the possession is to be regarded as having been given pursuant to the conveyance, no matter what length of time or circumstances intervene the execution of the deed and the change in the possession." *Coon v. Wilson*, 78 N. E. 900, 901, 222 Ill. 633, 113 Am. St. Rep. 441.

### POSSESSIONS

That the words "property, possessions, or estates" are sufficient if not qualified to carry real estate, is well settled by many decisions, but it is otherwise if it appears from the context that personal estate only was in contemplation of the parties. Will in which apt words, distinguishing gifts, of real and personal property, were used, providing, "The balance and residue of my estate of every kind I give, bequeath, and devise to my daughter \* \* \* during her lifetime; said estate to be placed in the hands of my trustee. \* \* \* Said trustee is to invest and keep invested said estate, and the interest or income accruing therefrom is to be by him paid to my said daughter \* \* \* for and during her natural life, and at her death said estate to be paid over by said trustee to her issue; provided, however, that my said trustee shall not be chargeable with interest on any money or personal estate lying idle in his hands"—included the real as well as personal property. *Foll v. Newsome*, 50 S. E. 597, 598, 138 N. C. 115, 3 Ann. Cas. 417 (quoting and adopting the definition in *Clark v. Hyman*, 12 N. C. 382; *Harrell v. Hoskins*, 19 N. C. 479; *Pippin v. Ellison*, 34 N. C. 61, 55 Am. Dec. 403; *Page v. Foust*, 89 N. C.

447; *Holt v. Holt*, 18 S. E. 967, 114 N. C. 241; 1 *Underhill*, Wills, 295; *Schouler*, Wills, § 510; *Rich. Wills*, 415).

### POSSESSOR

Rev. St. § 2676, providing that if the owner or possessor of any lot or land in any city or village digs or causes to be dug any cellar, pit, vault, or excavation to a greater depth than nine feet below the curb of the street on which such lot or land abuts, or if there be no curb, below the surface of the adjoining lots, and by such excavation causes any damage to any wall, house, or other buildings on the lot adjoining thereto, such owner or possessor shall be liable in a civil action to the party injured to the full amount of the damages aforesaid, does not apply to boards of education holding titles to the lot or land being excavated for school and school purposes. *Board of Education of Cincinnati v. Volk*, 74 N. E. 646, 649, 72 Ohio St. 469.

### POSSESSOR IN GOOD FAITH

To constitute a person a "possessor of land in good faith," he must not only believe that he is the true owner, but he must be ignorant of the fact that his title is contested by any one claiming a better title. *Fellers v. McFatter*, 101 S. W. 1065, 1067, 46 Tex. Civ. App. 335.

Under the betterment act (*Kirby's Dig.* §§ 2754-2757), providing that any person, believing himself to be owner at law or in equity under color of title, shall be entitled to compensation for improvements placed on land, in order to recover for improvements placed on land of another, one must occupy the land in good faith under color of title, and in ignorance of his title being questioned by another claiming a better title, and though he knows the facts which prove the invalidity of his title, yet, if through mistake of law he believes his title good, he is a "possessor in good faith" within the act. *McDonald v. Rankin*, 122 S. W. 88, 92, 92 Ark. 173.

### POSSESSORY LIEN

The lien of a factor belongs to the class known as a "possessory lien," and it is a well-settled and universal rule that the factor must have either the actual or the constructive possession of the goods in order that his lien may attach thereto. *People's Bank of Pratt, Kan., v. Frick Co.*, 73 Pac. 949, 951, 13 Okl. 179.

Attorney's liens are divided into two classes, "possessory" and "charging." The first exists at common law, and extends to all property in the possession of the attorney with respect to which he renders services to the owner. The lien is divested, as in other cases of similar liens, upon the surrender of possession of the property to the owner. The other class, the "charging" lien, is a statutory creation, and was unknown to the common law. It extends to all money or



property of the client, including judgments, with reference to which the attorney's services were rendered, and is perfected when notice thereof is given the debtor. Prior to the adoption of the Revised Laws of 1905 this lien did not extend to the cause of action, but only to judgments recovered or money paid, or agreed to be paid, as a result of the attorney's services. *Northup v. Hayward*, 113 N. W. 701, 702, 102 Minn. 307, 12 Ann. Cas. 341.

### POSSESSORY WRIT

As writ of assistance, see Writ of Assistance.

### POSSIBILITY

Possibility, see Mere Possibility.

A written contract whereby a son, in consideration of a payment to him by his father, released claim to any part of the father's estate, as against the father and any of his heirs or devisees, is void, as it is the transfer of a mere "possibility." *Elliott v. Leslie*, 99 S. W. 619, 621, 124 Ky. 553, 124 Am. St. Rep. 418.

### POSSIBILITY OF REVERTER

A "determinable fee" is an estate limited to a person and his heirs with a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end, and so long as the estate in fee remains the proprietor has the rights and privileges of a tenant in fee simple, and no right of reversion or possession remains in the grantor, and the only practical distinction between a "right of entry for each of condition subsequent" and a "possibility of reverter" on a determinable fee is that in the former the estate in fee does not terminate until entry by the person having a right, while in the latter the estate reverts at once on the occurrence of the event which it is limited. *Lyford v. City of La Grange*, 72 Atl. 1085, 1086, 1089, 75 N. H. 220, 18 L. R. A. (N. S.) 1062, 139 Am. St. Rep. 16.

Where a deed conveyed lands for church purposes subject to a condition subsequent that the title should revert to the grantor or his heirs if the seats in the church to be erected thereon should at any time be sold or not be free, the interest of the grantor or his heirs was a mere "possibility of reversion," which was only a personal right, not an estate, in the land, so that, if the grantor or his heirs did not elect to assert forfeiture for breach of the condition, the interest remained unimpaired in the grantee. *Wick v. New York Christian Missionary Society*, 135 N. Y. Supp. 392, 395, 151 App. Div. 16.

Where one grants a base or determinable fee, since what is left in him is only a possibility to defeat the estate so granted upon the

happening of a contingency, there is no reversion in him; that is, he has no future vested estate in fee, but only what is called a naked possibility of reverter, which is incapable of alienation or devise, although it descends to his heirs." *Tiedeman, Real Property* (3d Ed.) § 291. In *Challis, Law of Real Property* p. 63, it is stated: "Possibility of reverter denotes no estate, but, as the name implies, only the possibility to have an estate at a future time. Of such possibilities there are several kinds, of which two are usually denoted by the term now under consideration: (1) The possibility that a common-law fee may return to the grantor by breach of a condition subject to which it was granted; and (2) the possibility that a common-law fee, other than a fee simple, may revert to the grantor by the natural determination of the fee." The possibility of reversion to the grantor, under a conveyance providing that the land shall revert whenever it ceases to be used or occupied for a meeting house or church, is left in the person who limits it, but "in the meantime the whole estate is in the grantee or owner, subject only to a possibility of reverter in the grantor." *North v. Graham*, 85 N. E. 267, 268, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189.

A "possibility of reverter" denotes no estate but, as the name implies, only the possibility to have the estate at a future time. Of such possibilities there are several kinds, of which two are usually denominated. One kind of such possibilities is that a common-law fee other than a fee simple may revert to the grantor by the natural termination of the fee. Another kind is that a common-law fee may return to the grantor by a breach of a condition subject to which it was granted. A naked possibility of reverter of title to land does not denote an estate or any present legal interest in it and gives no right of entry into it. *Rev. St. c. 75, § 1*, providing that a person owning real estate and having a right of entry into it, whether seised of it or not, may convey it or all his interest in it by deed, does not include a mere possibility of reverter. *Pond v. Douglass*, 75 Atl. 320, 322, 106 Me. 85 (quoting and adopting definition in *Challis, Law of Real Property*, p. 63).

### POSSIBLE

See As Soon as Possible; Earliest Possible; If Possible.

All possible care, see All.

Results which are only possible cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter

of definite inference. *Douglass v. New York Cent. & H. R. R. Co.*, 58 Atl. 160, 161, 209 Pa. 128 (citing *South Side Passenger Ry. Co. v. Trich*, 11 Atl. 627, 117 Pa. 390, 2 Am. St. Rep. 672).

A contract for the sale of standing timber provided that the timber should be cut during the current winter "if possible," and that which remained should be cut the following winter. Held, that the word "possible" means capable of being done, not contrary to the nature of things; and, as used in such contract, should be construed with reference to the thing to be done, namely, the cutting and removing the trees as timber, and hence did not require further removal after the weather conditions rendered the work impossible as a business proposition. *Brown v. Bishop*, 74 Atl. 724, 729, 105 Me. 272.

## POST

### POST CARDS

As printed matter, see *Printed Matter*.

### POST OFFICE

See *General Post Office*.

Establish post office, see *Establish*.

As contemplated in the statutes of the United States, and in the sense in which the word is ordinarily used, "post office" is the room or building where the local business of the postal department is conducted. A policy insuring articles sent by mail provided that no article should be considered as insured until a letter of advice, with a description of the property, be deposited in the post office at the place of mailing, and that the article should be deposited and registered at the post office. The word "post office" as used in the policy was used in this sense, and a mail box was not included. *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 100 N. W. 532, 534, 124 Iowa, 576, 104 Am. St. Rep. 367.

A post office is a public agency, charged with the duty of transmitting letters that are properly addressed, stamped, and deposited in some regular receptacle for outgoing mail; but in the absence of anything tending to show that a letter in question was addressed to a specified person and properly deposited, postage prepaid, there is no presumption that he received it. *Fountain City Drill Co. v. Lindquist*, 114 N. W. 1098, 1100, 22 S. D. 7.

### POST OFFICE ADDRESS

There is a distinction between residence address as used in the local option law (Rev. St. 1908, § 4096), providing that the petition for a local option election shall contain the residence address of each signer and post office address, a post office address being the place one receives his mail, while a residence address is where one resides, and hence a petition cannot be held defective for lack of post office addresses. *People v. Newell*, 113 Pac. 643, 645, 49 Colo. 349.

## POST ROADS AND ROUTES

"Post routes" are "post roads" within the meaning of Rev. St. U. S. § 5263, granting authority to construct telegraph lines on "post roads." *Cosgriff v. Tri-State Telephone & Telegraph Co.*, 107 N. W. 525, 528, 15 N. D. 210, 5 L. R. A. (N. S.) 142.

Act July 24, 1866, now embodied in Rev. St. §§ 5263-5269, authorizing any telegraph company which accepts its provisions to construct and maintain its lines along any military or post roads of the United States "which have been or may hereafter be declared such by law," supplemented by Act March 1, 1884, c. 9, 23 Stat. 3, which declares that all public roads and highways while kept up and maintained as such are post routes, gives such a telegraph company the right to use any public highway, street, or alley for its lines independent of any action or consent of the state or municipal authorities; but it holds such right subject to the police power of the state and municipality to make and enforce any appropriate and reasonable regulations governing such use. *Western Union Telegraph Co. v. City of Richmond*, 178 Fed. 310, 312.

Under Rev. St. U. S. § 3964, declaring that all letter carrier routes established in any city for the collection and delivery of mail shall be post roads, and Code Civ. Proc. § 1875, subd. 3, requiring the courts to take judicial notice of acts of the executive departments of the United States, the streets of a city kept up and maintained as such are letter carrier routes established in the city for the collection and delivery of mail, and are post roads; and a telegraph company maintaining telegraph lines on the terms imposed by Act Cong. July 24, 1866, c. 230, empowering any telegraph company accepting the obligations of the act to construct, maintain, and operate telegraph lines over any military or post roads of the United States, has such right to the streets of a city, constituting post roads, as are granted by the act, and such rights constitute a federal franchise. *Western Union Telegraph Co. v. Hopkins*, 116 Pac. 557, 559, 160 Cal. 106.

### POSTAL CLERK

As officer, see *Officer*.

As passenger, see *Passenger*.

### POSTAL LAW

As revenue law, see *Revenue Law*.

### POSTAL MONEY ORDER

As negotiable instrument, see *Negotiable Instruments*.

## POSTMASTER'S RECEIPT

Under Rev. St. 1895, art. 2286, providing that, when depositions are returned to the court by mail, the postmaster or his deputy mailing the same shall indorse thereon that he received them from the hands of

the officer before whom they were taken, a receipt reading: "Received this package \* \* \* from the hands of E. T. McD., the officer before whom they were taken. \* \* \* R. H. J., P. M., per S., Postmaster at," etc.—purported on its face to be the "postmaster's receipt" within the meaning of the statute, and sufficiently complied therewith. *Texas & P. R. Co. v. Felker*, 90 S. W. 530, 531, 40 Tex. Civ. App. 604.

## POSTHUMOUS CHILD

A "posthumous child" is in esse from the time of its conception. *State v. Atwood*, 102 Pac. 295, 297, 54 Or. 526, 21 Ann. Cas. 116.

## POSTPONE

Where a clerk's record of a meeting of school trustees recited that, as there was no quorum present, the meeting was "postponed" to meet at a specified later date, the word "postponed" was used in the sense of adjourned, and showed a regular adjournment of the meeting for lack of a quorum. *People v. Nelson*, 96 N. E. 1071, 1072, 252 Ill.

## POSTPONEMENT

See Indefinite Postponement.

P

A "pot" is a bell-shaped rock in the roof of a mine more or less disconnected from it. *Tracy v. West Pratt Coal Co.*, 49 South. 968, 161 Ala. 435.

## POT PLANTER

See tool, see Tools—Tools of Trade.

## POTENTIAL

See Constant Potential.

"Potential" means existing in possibility, anything that may be possible. *Campbell v. E. Grant Co. (Tex.)* 82 S. W. 794,

## POTENTIAL EXISTENCE

"Potential existence" means that the thing may be at some time. Webster. Where a contract provided for the payment of a stipulated price in installments as time progressed, the debt accruing thereon from the owner to the contractor has not potential existence, after the contract is made, to sustain a parol equitable lien of a portion thereof. *Campbell v. Grant Co.*, 82 S. W. 794, 796, 36 Tex. 641.

The doctrine of "potential existence," means a present interest in property in the thing mortgaged is the natural growth, as wool to be upon sheep,

or crops upon land owned by the mortgagor when the mortgage is made, a mortgage on property not in existence, or which the mortgagor does not then own, may be upheld at common law. *Barron v. San Angelo Nat. Bank (Tex.)* 138 S. W. 142, 144.

## POTENTIAL MODE

The "potential mode" denotes possibility, contingency. *Orman v. Van Arsdell*, 12 N. M. 344, 78 Pac. 48, 49, 67 L. R. A. 438.

## POTION

See Noxious Potion or Substance.

## POTTERY PLANT

Buildings supplied with tools, machinery, and appliances for the manufacture of stoneware, brick, and tile constitute what is called a "pottery plant." *Indiana Clay Co. v. Baltimore & O. S. W. R. Co.*, 67 N. E. 704, 705, 31 Ind. App. 258.

## POTT'S FRACTURE

A "Pott's fracture," as usually defined, is the breaking of one bone between the knee and ankle joints, and the dislocation of the other, or, as described in this particular case, as the breaking of the fibula  $1\frac{1}{2}$  to 2 inches above the joint, and of what is known as the malleolus process. *Peterson v. Modern Brotherhood of America*, 101 N. W. 289, 125 Iowa, 562, 67 L. R. A. 631.

## POULTRY

As valuable things, see Valuable Thing.

"Poultry," defined as domestic fowls reared for the table, or for their eggs or feathers, includes pigeons, if reared for the table. *Bartels v. State*, 136 N. W. 717, 718, 91 Neb. 575.

A complaint, alleging that accused stole chickens of a specified value, charges the larceny of "poultry," punishable by Gen. St. 1902, § 1211; the word "chickens" meaning poultry, and the word "poultry" including domestic fowls, generally or collectively, reared for the table or for their eggs or feathers. *Town of Wolcott v. Stickles*, 82 Atl. 572, 573, 85 Conn. 322.

Guinea fowl and turkeys, that are not shown to be in fact wild birds, are more appropriately classified as "poultry," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172, rather than as "birds and land \* \* \* fowls" under section 2, Free List, par. 404, 30 Stat. 196. *Silz v. United States*, 167 Fed. 686; *Id.*, 178 Fed. 273, 101 C. C. A. 537.

## POULTRY DRESSED

Duck meat in tins, some salted and dried, and some packed in oil, is not "poul-

try \* \* \* dressed," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172, but is rather classifiable as "meats of all kinds, prepared or preserved," under par. 275, 30 Stat. 172. *Kwong Yuen Shing v. United States*, 177 Fed. 605, 606.

The cooked meat of poultry and game, in tins, and goose livers prepared as pate de foie gras, are not dutiable, either directly or by similitude, as "poultry \* \* \* dressed," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172. *James P. Smith & Co. v. United States*, 168 Fed. 462, 463.

## POUND

See Per Pound.

### Kilo distinguished

See Kilo.

### As a place for impounding animals

A "pound" is a place where beasts, subject to be impounded, are to be confined, kept, and fed. *Harriman v. Fifield*, 36 Vt. 341, 345; *Farrar v. Bell*, 50 Atl. 1107, 73 Vt. 342.

## POUNDS PRESSURE

The terms "horse power" and "pounds pressure," as applied to steam, are entirely different in meaning and application; "horse power" expressing quantity of steam, and "pounds pressure" the quality of pressure at which the steam is delivered. *Fox v. Coggeshall*, 88 N. Y. Supp. 676, 679, 95 App. Div. 410.

## POUNDAGE

"Poundage," as used in Rev. St. 1906, § 1230, giving the sheriff "poundage" on all moneys actually made and paid to him on execution, decree, or sale of real estate (except on writs for the sale of real estate in partition), is payment made to the sheriff as a compensation for the risk incurred in handling and disbursing money actually received by him in his official capacity. *Major v. International Coal Co.*, 81 N. E. 240, 242, 76 Ohio St. 200.

## POWDER

See Giant Powder; Gunpowder.

### POWDER PUFFS

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 410, 30 Stat. 190, the provision for "brushes" does not include so-called powder puffs, which are composed of flat circular pieces of woollen cloth with a fuzzy surface and are useful in applying toilet powder, and which, though resembling brushes in use, do not resemble them in construction. *United States v. George Borgfeldt & Co.*, 153 Fed. 480, 481.

## POWER

See Appointing Power; Beneficial Power; Business Powers; Chancery Power; Collateral Power; Commercial Power; Corporate Powers and Privileges; Do All in His Power; Exclusive Power; Executive Power; Exercising Any Power; Full Power; Governmental Power; Horse Power; Implied Powers; Incidental Power; Inherent Power; Judicial Power; Legislative Power; Necessary Powers; Police Power; Private Power; Taxing Power; Unit of Power.

"A 'power' exists in law only for some purpose, and, when fully executed by the accomplishment of its purpose, it is exhausted." *City of Philadelphia v. Johnson*, 57 Atl. 1114, 208 Pa. 645.

"Construction," as used in the title of an act; "An act to incorporate the Economic Power & Construction Company," suggests building, erecting, and manufacturing, and "power" is used in connection with it, and the words together do not give any clear indication of a business necessarily requiring a special franchise. *Economic Power & Construction Co. v. City of Buffalo*, 88 N. E. 389, 394, 195 N. Y. 286.

### As authority

Real Property Law, § 111, defines a "power" as "an authority to do an act in relation to real property \* \* \* which the owner, granting \* \* \* the power, might himself lawfully perform." *Murray v. Miller*, 70 N. E. 870, 872, 178 N. Y. 316.

Acts 1894-95, p. 498, is entitled "An act to limit the criminal jurisdiction of justices of the peace and notaries public within certain precincts in J. county and in the wards of a certain city," and provides that justices and notaries in such territory shall not have jurisdiction over any criminal case, except to take affidavits and to issue warrants thereon returnable to the police court of B. in all cases in which that court has jurisdiction. and to take affidavits and issue warrants and examine persons charged with offenses of which such court has not jurisdiction. Held, that the word "jurisdiction," as used in the title, was synonymous with "power" or "authority," as distinguished from "power to hear and determine," and that the act was therefore not objectionable as containing matter not expressed in the title of the act. *Lee v. State*, 39 South. 366, 367, 143 Ala. 91.

A "power" is not property, but a mere authority, and an absolute "power" of disposal is not inconsistent with an estate for life only and does not enlarge such estate, but merely confers an authority in addition thereto. *Melton v. Camp*, 49 S. E. 690, 121 Ga. 693 (citing *Stuart v. Walker*, 72 Ma. 144, 39 Am. Rep. 311).

Under Const. U. S. § 8, conferring on Congress the power of enacting uniform laws on the subject of bankruptcy throughout the United States, Congress has supreme power, untrammelled by state laws, to pass such laws for the division of a bankrupt's property between the bankrupt, his family, and his creditors, as it deems proper. *Hurley v. Devlin*, 151 Fed. 919, 921.

Act May 3, 1909 (P. L. 417), requires exits, fire escapes, fire extinguishers, and fire preventives for buildings of a certain character such as theaters, public halls, and other places where persons assemble or the public resort, "other than buildings situated in the titles of the first and second classes." The provisions of the act are enforceable by state officers, no duty to be performed, nor responsibility to be incurred, being imposed upon any city, county, borough, or school district officer, and the fees of any such officer are not regulated thereby, and it has nothing to do with the revenues of counties, cities, or townships. Held, that the act grants no powers or "privileges" within Const. art. § 7, providing that no law shall be passed conferring powers or privileges in any case, where the granting of such powers or privileges shall have been provided by general law. *A. L. Roumfort Co. v. Delaney*, 79 Atl. 655, 230 Pa. 374.

#### **duty**

Under the law of Maryland, as settled decision, a legislative delegation of "power and authority" to a municipal corporation to be exercised for the public benefit or protection, is not permissive merely, but imperative, and imposes a duty and obligation on the municipality for the nonexercise or negligent exercise of which, resulting in personal injury, it is liable in damages. *State of Maryland v. Miller*, 194 Fed. 775, 781, 114 C. 495.

Under the rule that when a statute confers power on a corporation to be exercised for a public good, the exercise of such power is not merely discretionary, but imperative, and the words "power and authority" are construed "duty and obligation," a verdict in an action against a city for injury through a defective street alleging that the city was charged by law with the duty of keeping its streets in a safe condition for travel and reciting, in averring such duty, the language of the charter conferring the power as defendant, was sufficient. *City of New Grace v. Fletcher*, 77 Atl. 114, 116, 562.

#### **distinction**

The distinction between "power" and "authority" whatever may be its value in ethics, is very shadowy and unsubstantial. It is a legal power to do anything has legal right. *State v. Koch*, 85 Pac. 272, 10 Ont. 490, 8 Ann. Cas. 804 (citing

*Kane v. Commonwealth*, 89 Pa. 522, 33 Am. Rep. 787).

A "power," which is defined by Real Property Law (Consol. Laws, c. 50) § 131, as "an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, which the owner granting or reserving the power might himself lawfully perform," is a right to dispose of the legal estate by virtue of the statute; but it does not confer on the grantee, as such, any estate. *Stanley v. Payne*, 119 N. Y. Supp. 570, 574, 65 Misc. Rep. 77.

The distinction between the powers and the rights of a corporation should not be lost sight of, for corporations, like natural persons, have the power to overleap the legal and moral restraints imposed upon them and do acts which they cannot rightfully do. But one who has executed to a corporation an oil and gas lease, granting the right to explore a tract of land for oil and gas and appropriate either if found, cannot secure a cancellation of that portion relating to oil, because the company's charter gives it the right only to dig or mine for natural gas, and sell the same for heating purposes; the lessor being estopped to deny the power which he impliedly recognized the corporation rightfully possessed. *Harris v. Independence Gas Co.*, 92 Pac. 1122, 1125, 76 Kan. 750, 18 L. R. A. (N. S.) 1171 (citing *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258).

#### **POWER APPENDANT**

"A power is appendant when the estate created by its exercise affects the estate and interest of the donee of the power." Appendant or appurtenant powers are annexed to the estate of the donee, and must be exercised wholly or partly out of the estate, so that a lease by a life tenant who has power to lease must commence during his life. *McFall v. Kirkpatrick*, 86 N. E. 139, 143, 149, 236 Ill. 281 (quoting *Powell, Powers*, 8; and citing 2 *Hilliard, Real Prop.*, 828, 843; *Williams, Real Prop.* [17th Ed.] 130, 446; *Washburn, Real Prop.*, § 1668; 1 *Sugden, Powers* [8th Ed.] 74, 75; and 2 *Chance, Powers*, 31-49).

A power relating to an estate or interest given donee may be either appendant or in gross, being a "power appendant" when its exercise overreaches, affects, or destroys donee's interest, and being a "power in gross" when the estate created thereby is beyond and does not affect the estate of donee. *Columbia Trust Co. v. Christopher*, 117 S. W. 943, 946, 133 Ky. 335.

#### **POWER COUPLED WITH AN INTEREST**

A "power coupled with an interest" is a power which accompanies or is connected with an interest; the power and the interest being united in the same person. *Cooley v. Kelley (Ind.)* 96 N. E. 638, 642.

A power coupled with an interest is an interest in the subject upon which the power is to be exercised, or an interest in that which is produced by the exercise of the power. *Boyer v. Nesbitt*, 76 Atl. 103, 104, 227 Pa. 398, 136 Am. St. Rep. 890.

"A power coupled with an interest is when the power or authority is coupled with an interest in the thing itself actually vested in the agent. It must not be merely an interest in that which is produced by the exercise of the power. The former is irrevocable, while the latter is revocable, though expressed to be irrevocable." *Angle v. Marshall*, 47 S. E. 882, 886, 55 W. Va. 671 (quoting *Walker v. Denison*, 86 Ill. 142).

When a power of attorney is coupled with an interest, by such interest is not meant an interest in that which is produced by the exercise of power, but it must be an interest in the property in which the power is to operate. The authority to sell on commission is not an authority coupled with an interest. *Taylor v. Burns*, 76 Pac. 623, 625, 8 Ariz. 463 (citing *Trickey v. Crowe*, 71 Pac. 968, 8 Ariz. 176); *Id.*, 27 Sup. Ct. Rep. 40, 42, 203 U. S. 120, 51 L. Ed. 116 (citing *Hunt v. Rousmanier*, 8 Wheat. [21 U. S.] 174, 5 L. Ed. 589).

Where one H. made written application for a loan from M., and in such application appointed M.'s agent his attorney in fact to execute a note and mortgage in case H. failed to do so, and thereafter H. died before the loan was advanced or the application accepted by M., such power of attorney was not a "power coupled with an interest," and was terminated by the death of H. *Brown v. Skotland*, 97 N. W. 543, 545, 12 N. D. 445.

A "power coupled with an interest" must be an interest in the thing itself. The power must be ingrafted on an estate in the thing. The power and interest are united in the same person. The interest or title in the thing, being vested in the person who gives the power, remains in him unless it be conveyed with the power and can pass out of him only by regular act in his own name. A power of attorney authorizing another, to assign future earnings from an existing employment which declared that the power was coupled with an interest and was irrevocable could not be revoked while the employment continued until the debt was discharged, but could be revoked as to earnings from a future employment, since the assignor himself then had no interest therein. *Cox v. Hughes*, 102 Pac. 956, 959, 10 Cal. App. 553 (quoting and adopting definition in *Hunt v. Rousmanier's Adm'rs*, 21 U. S. [8 Wheat.] 174, 5 L. Ed. 589, and citing and adopting *Norton v. Whitehead*, 24 Pac. 156, 84 Cal. 270, 18 Am. St. Rep. 172).

A power of attorney given by joint owners of land to another joint owner of the same land to sell and convey it, which con-

veys to the attorney no interest in the land to be sold, is not a "power coupled with an interest." *Gilmer's Heirs v. Veatch*, 121 S. W. 545, 546, 56 Tex. Civ. App. 511 (citing 6 Words and Phrases, pp. 5478-5480; 8 Words and Phrases, p. 7758).

A power appointing an attorney to sell all the property of the estate of a deceased person belonging to the signers of the power, and to receive and distribute the proceeds, containing an express provision that it should be irrevocable and survive them if any of the parties should die, did not constitute a "power coupled with an interest," and was therefore revoked by the death of certain of the grantors prior to the exercise of the power. *Weaver v. Richards*, 108 N. W. 382, 389, 144 Mich. 395, 6 L. R. A. (N. S.) 855.

### POWER DAM

A "power dam" is one in the immediate connection with which water wheels are operated. *Penobscot Log Driving Co. v. West Branch Driving & Reservoir Dam Co.*, 66 Atl. 542, 545, 102 Me. 263.

### POWER IN GROSS

A power relating to an estate or interest given donee may be either appendant or in gross, being a "power appendant" when its exercise overreaches, affects, or destroys donee's interest, and being a "power in gross" when the estate created thereby is beyond and does not affect the estate of donee. *Columbia Trust Co. v. Christopher*, 117 S. W. 943, 946, 133 Ky. 335.

### POWER IN TRUST

See General Power in Trust.

A "general beneficial power" granted, which is one in which no person other than the grantee has by the terms of its creation any interest in its execution, may be released by such grantee, but a "power in trust" may not be so released. *Newton v. Hunt*, 112 N. Y. Supp. 573, 576, 59 Misc. Rep. 633 (quoting and adopting the definition in 1 Rev. St. [1st Ed.] pt. 2, art. 3, c. 1, tit. 2, § 79; citing *Chapl. Express Trusts & Powers*, §§ 545, 696).

### POWER OF ALIENATION

See Suspension of Power of Alienation.

The power or right of alienation within the rule relating to restraint of such power or right, repugnant to a grant of an estate in fee simple, includes the power or right to dispose of property in such manner as the owners see fit, whether by direct gift, by settlement in trust or by will, or by sale at a price to be fixed by owner at private sale, or by sale at public auction, or by lien, mortgage, or other means of conveyance or by subjection to the owner's debts and liabilities, and it is not given where the owner is forbidden to alienate or devise to any one except descendants of the testatrix without

the consent of all the descendants of full age and competent to convey and devise real property. *Manierre v. Welling*, 78 Atl. 507, 522, 32 R. I. 104, Ann. Cas. 1912C, 1311.

#### POWER OF CHARTER AMENDMENT

The limitation on the "power of amendment of charters of corporations" may be exercised to make any alteration or amendment in a charter granted that will not defeat or substantially impair the object of the grant or any rights which are vested under it, which the Legislature may deem necessary to secure either the object of the grant or any other public right, not expressly granted away by the charter (*City of Holyoke Water-Power Co. v. Lyman*, 15 Ill. [82 U. S.] 522, 21 L. Ed. 140). "The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be effected under the guise of amendment or alteration." *Fair Haven & W. R. Co. v. New Haven*, 27 Sup. Ct. 74, 77, 203 U. S. 379, 388, 1 L. Ed. 237 (quoting *Shields v. Ohio*, 95 U. S. 324, 24 L. Ed. 350).

#### POWER OF DIVESTITURE

See Reserved Power of Divestiture.

#### POWER OF SALE

As lien, see Lien.

#### POWER PLANT

As railroad, see Railroad—Railway.

#### POWER TO AUDIT, ADJUST, AND SETTLE

"Power to audit, adjust, and settle" is a power to hear and examine it, and to hold a hearing and examination to allow or reject it as a whole, or to allow it in part or to reject it in part. *State ex rel. Gil-Clausen*, 87 Pac. 498, 501, 44 Wash.

#### POWER TO DEFINE VAGRANCY

"power to define vagrancy" granted by charter is simply the power to decide what shall constitute a vagrant. When a city by ordinance declared that one living idly, or without any set occupation, or without any visible means of lawful occupation and employment, begging or living or frequenting disreputable houses, should be deemed a vagrant, it in effect defined vagrancy and provided for its punishment. *Nichols v. State*, 804, 805, 49 Or. 298.

#### POWER TO LICENSE

License (Government Regulation).

#### POWER TO PARDON

Const. p. 2, c. 2, § 1, art. 8, vesting power to pardon offenses, except after conviction by impeachment, in the Gov-

ernor, by and with the advice of Council, conditional pardons or commutations or respite of sentence can be granted only in conformity to the advice of Council; the words "power of pardoning offenses" including not only absolute pardons, but also lesser exercises of clemency. In *re Opinion of the Justices to the Governor*, 98 N. E. 101, 210 Mass. 609.

#### POWER TO REGULATE COMMERCE

See Regulate Commerce.

#### POWER TO SELL AND CONVEY

See Sell and Convey.

#### POWERS

See Execution of a Power; General Power; Naked Power; Special Power.

#### PRACTICABLE

See As Soon as Practicable; Reasonably Practicable; So Far as Practicable.

See, also, Practical.

A direction to executors to convert the residue of testator's estate into money for distribution, as soon as practicable, is imperative, though it gives some discretion as to the time of sale, as to which the executors' judgment, exercised in good faith, is conclusive. An imperative power in executors to sell the residue of the estate "as soon as practicable \* \* \* having in mind the interest of all concerned," does not warrant its compulsory exercise though three years have elapsed, though the land could be sold "without difficulty," and though the executors have refused to sell to beneficiaries at the "fair and reasonable value" of the property; the will permitting purchase at the market value at testator's death as valued by the executors. *Walbridge v. Brooklyn Trust Co.*, 128 N. Y. Supp. 686, 687, 143 App. Div. 502.

#### As possible

"Practicable" means capable of being performed or effected (citing *Words and Phrases*, vol. 1, p. 529). *Walbridge v. Brooklyn Trust Co.*, 128 N. Y. Supp. 686, 690, 143 App. Div. 502.

"Practicable" and "practical" are defined as that that may be practiced or performed; capable of being put into practice; done or accomplished; feasible. *Joynes v. Pennsylvania R. Co.*, 83 Atl. 318, 320, 234 Pa. 321.

The word "practicable" does not necessarily mean "possible of execution." An act is practicable if conditions or circumstances permit its performance. It is practicable, if, under all the circumstances, it is feasible; if it can be done lawfully with reasonable convenience. *Wilcox v. Supreme Council of Royal Arcanum*, 123 N. Y. Supp. 88, 86, 66 Misc. Rep. 253.

The word "practicable" and the word "possible" may and sometimes do have the

same meaning. If here regarded as synonymous, neither could be construed to require more than the exercise of reasonable diligence in view of all the circumstances which might attend upon the execution of the work. It may be, and often is, possible to do that which is impracticable. Where a written contract for the sale of an engine called for delivery "as soon as possible," parol evidence that the seller's agent was advised by the buyer of the importance to the buyer of the greatest expedition in shipping the engine by reason of the harvesting season designated date was admissible to enable the court to construe the quoted clause, and to enable the jury to determine whether the undertaking was performed within the meaning of the contract. *Berry Bros. v. Fairbanks, Morse & Co.*, 112 S. W. 427, 428, 51 Tex. Civ. App. 558 (quoting *Williams v. Rittenhouse & Embree Co.*, 64 N. E. 995, 198 Ill. 602).

The word "practicable," as used in Acts 1903, p. 125, c. 59, § 5, providing that, if any street railroad company and a railroad company shall fail to agree to a change of any existing grade crossing to a crossing above or below grade, either company may carry the subject to a circuit or superior court, and, if the court shall find it is "practicable" to change the grade crossing to one above or below grade, it shall order that the change shall be made, is not synonymous with "possible." A thing practicable must necessarily be possible, but a thing may be possible that is not practicable. It implies a legal discretion, and the exercise of judgment based upon the whole evidence of all the facts that affect the question of practicability within the usual and ordinary sense of the word. *Pittsburgh, O. C. & St. L. Ry. Co. v. Indianapolis, C. & S. Traction Co.*, 81 N. E. 487, 488, 169 Ind. 634.

"Practicable" is defined as "that which can be put into practice; possible of execution or performance"; and as "that which may be done, practiced, or accomplished; that which is performable, feasible, possible." Chicago Civil Service Act (Laws 1895, p. 87) § 9, requires the commission to provide for promotions on the basis of ascertained merit and seniority in service and examination, and to provide, "in all cases where it is 'practicable,' that vacancies shall be filled by promotion. Held, that the quoted phrase added little to the meaning of the section, and took little or nothing from it; that if this phrase was eliminated entirely from the statute, it would mean substantially the same; that in both cases the vacancies were to be filled by promotion if possible; and that, where there were at least 15 persons ready and willing to take a promotional examination for a higher position to which they were eligible, the commissioners may not determine before such examination that it is im-

practicable to fill the vacancy by promotion. *People v. Errant*, 82 N. E. 271, 274, 229 Ill. 56.

An instruction in an action against a street railroad for personal injuries that, if defendant exercised all the care and prudence that were reasonably practicable, it was not negligent, was erroneous, in that the word "practicable" means "capable of being done or accomplished with available means or resources," and includes the element of reasonableness, what is unreasonable not being practicable, and the qualifying word "reasonably" renders the construction confusing and liable to misconstruction. *Benjamin v. Metropolitan St. R. Co.*, 151 S. W. 91, 96, 245 Mo. 598.

## PRACTICAL

See, also, *Practicable*.

"Practicable" and "practical" are defined as that that may be practiced or performed; capable of being put into practice; done or accomplished; feasible. *Joynes v. Pennsylvania R. Co.*, 83 Atl. 318, 320, 234 Pa. 321.

## PRACTICAL IMPROVEMENT OF NAVIGATION

A canal forming a deep water connection between a navigable stream and the sea was a "practical improvement of the navigation" of the stream, to which a riparian owner's right of the use of the water for irrigation was subservient. *Bigham Bros. v. Port Arthur Canal & Dock Co. (Tex.)* 91 S. W. 848, 858.

## PRACTICAL RAILROAD OPERATIVES

An instruction in an action for injuries to a passenger imposing on the carrier the very high degree of care and foresight of skillful, careful, and "practical railroad operatives" under the same or similar circumstances, is not different in meaning from one imposing on the carrier the obligation to use the highest degree of care practicable among prudent and skillful and experienced men in the same kind of business; there being no difference between "practical railroad operatives" and skillful and experienced men. A practical railroad operative must be one of experience in that line. *Loftus v. Metropolitan St. R. Co.*, 119 S. W. 942, 944, 220 Mo. 470.

## PRACTICALLY

The word "essentially," as used in the description in letters patent, wherein a patented vessel is described as "essentially a bowl with a flange, etc., is used as synonymous with "practically" or substantially," and not in the sense that this precise bowl shape is indispensable. *Electric Candy Machine Co. v. Morris*, 156 Fed. 972, 974.

## PRACTICALLY IMPOSSIBLE

The word "impossible" is defined in the Standard Dictionary as "impracticable in the



nature of the case." The phrase "practically impossible" expresses only that meaning which would be ascribed to the word "impossible" standing alone, and does it with exactness and aptitude. *Clevenger v. Matthews* (Ind.) 75 N. E. 836, 837.

#### PRACTICALLY SETTLES

The phrase "practically settles," as used in the statute providing that, when the judgment of the Court of Civil Appeals reversing a judgment "practically settles the case," the Supreme Court may review the same, etc., is broad enough to embrace all cases in which the practical effect of the reversal is to finally determine the rights of the parties. Thus, where the judgment plaintiff died pending the appeal and before the decision of Court of Civil Appeals, and, because of his death, the reversal of the judgment abated the action, the decision settled the case so as to give the Supreme Court jurisdiction on a writ of error under the statute. *Ellis v. Brooks*, 102 S. W. 94, 95, 101 Tex. 591.

#### PRACTICALLY USELESS

See Useless.

#### PRACTICE

See Malpractice.

#### Habit

A question asked an applicant for fraternal insurance, "What is your daily practice in regard to the use of \* \* \* liquors?" calls for information as to whether applicant has a liquor habit to the extent being a daily habit, and where he has such habit, an answer to that effect is truthful, though at times he drank to excess; the word "practice," when used in connection with the word "daily," suggesting idea of doing a thing regularly, and signifying a habit or regular conduct. *Keatley Grand Fraternity*, 78 Atl. 874, 875, 2 ce (Del.) 267.

#### PRACTICE (In Law)

See, also, Procedure.

All that relates to the manner and time which a case shall be conducted and tried from its inception to final judgment and execution is generally embraced under the title "practice." *Loeb v. Loeb*, 103 Pac. 570, 24 Okl. 384. (Quoting Words and Phrases, vol. 6, p. 5486.)

In a statute entitled, "An act in regard to practice in courts of record," the word "practice" is used as a general term, covering modes of trial and review of judgments and transfers from one court to another. *v. Cosmopolitan Fire Ins. Co.*, 92 N. E. 924, 246 Ill. 442.

In an act regulating the ascertainment of compensation for property condemned for public use, providing that the practice pre-

scribed by the act shall supersede existing practice in condemnation cases except in cases of the taking of land for public improvement where a payment of award and damages is authorized to be set off against benefits, the word "practice" was used as synonymous with "procedure," and hence includes the tribunal as well as the conduct of matters before it. *Morris v. Board of Police Com'rs of City of Newark*, 62 Atl. 1005, 1006, 73 N. J. Law, 268.

A statute providing that no act of the General Assembly shall affect pending suits, but excepting from its provisions acts relating to "practice in courts," is broad enough to include within the exception all matters of judicial procedure. Where a statute provided that in case of the decease of a judge of the Supreme Court any judge could allow or amend exceptions in a case tried by such deceased judge, a party's right to a new trial under the law as it stood at the time of the trial, because of the death of the judge without settling or signing the bill of exceptions, was not a vested right, and the statute applied to causes pending when it took effect. *Johnson v. Smith*, 62 Atl. 9, 10, 78 Vt. 145, 2 L. R. A. (N. S.) 1000.

#### Costs

Rev. St. 1908, § 3226, provides that every person desiring to change the point of diversion of water from any of the streams of the state shall present a petition to the district court from which the original decree issued, and that the "practice and procedure" on all petitions shall be the same as if the petition were for an original statutory decree, etc. Section 3300 provides for the payment by counties of the costs of reference, in a general adjudication of the priorities of rights to the use of water for irrigation, out of the treasury of the county in which the water district lies. Held, that the terms "practice" and "procedure," as used in section 3226, related to the legal rules directing the manner of bringing parties into court, and the method of the court after they are brought in, in hearing, dealing with, and disposing of, matters in dispute between them, and had no reference to costs, so that such sections did not authorize imposition of costs on a county of proceedings by petitioner to change the point of his diversion, which involved a mere private dispute, in which the county was not interested. *Board of Com'rs of Jefferson County v. Reno*, 124 Pac. 582, 583, 53 Colo. 217 (citing 6 Words and Phrases, p. 5486).

#### Change of venue

Proceedings to secure a change of venue are within the words "practice and procedure" in a statute providing that civil actions and proceedings in municipal courts shall be commenced and conducted as prescribed by the statute regulating the practice

and procedure in district courts. *Clark v. Baxter*, 108 N. W. 838, 839, 98 Minn. 256.

### Evidence

The word "practice," as applied to procedure, including pleading, evidence, and practice, means those legal rules which direct the course of proceeding to bring parties into the court, and the course of the court after they are brought in. A law which alters the legal rules of evidence or receives less or different testimony than the law requires at the time of the commission of the offense, or applies different rules for the conduct of the trial of the case, is an *ex post facto* law because changing the procedure. *State ex rel. Sims v. Caruthers*, 98 Pac. 474, 478, 1 Okl. Cr. 428.

### PRACTICE A CALLING

To practice a calling does not mean the exercise of a calling on the isolated occasion, but its frequent or habitual exercise. *State v. Cotner*, 127 Pac. 14, 87 Kan. 864, 42 L. R. A. (N. S.) 768.

### PRACTICE OF DENTISTRY

"Practice of dentistry," as used in Act Wash. March 18, 1891 (Laws 1891, p. 314, c. 152), providing that any person or persons seeking to practice dentistry in the state or to own, operate, or cause to be operated or to run or manage a dental office or place for the practice of dentistry in the state, etc., is clearly distinguished from the expression to "own, operate, or cause to be operated," or to "run or manage a dental office or place for the practice of dentistry," as used in such act. Such act, in so far as it requires examination by and a license from a dental board before one may own, run, or manage a dental office as distinguished from the actual practice of dentistry, is not a proper exercise of the police power. *State v. Brown*, 79 Pac. 635, 636, 37 Wash. 97, 68 L. R. A. 889, 107 Am. St. Rep. 798.

Where it was shown that defendant, while maintaining a dental office, agreed to make a new mouth plate for a certain price, and that, in order to fit the plate, he extracted a tooth and took an impression for the plate, and collected a sum on account, this constituted the practice of dentistry within Ballinger's Ann. Codes & St. § 3032 (Pierce's Code, § 4475), prohibiting such practice without a license, and it was immaterial that defendant stated that he made no independent charge for extracting the tooth. *State v. Thompson*, 94 Pac. 667, 668, 48 Wash. 683.

Evidence that one who had no license to practice dentistry cleaned teeth, examined them to give an estimate of the cost of repairs, and sounded and picked them, was sufficient to justify a conviction for "practicing dentistry" without a license. *State v. Sexton*, 79 Pac. 634, 635, 37 Wash. 110.

Pub. Acts 1907, c. 249, provides that no person shall engage in the practice of dentis-

try unless such person shall have first obtained a license from the dental commissioners, and that the unlawful practice of dentistry for each week shall be a separate offense. Held, that performing a dental operation did not constitute engaging in the practice of dentistry within such act, and hence the fact that an employé in the office of a licensed dentist, who was not himself a licensed dentist filled a tooth for a patron and thereafter collected a fee which he paid over to his employer, did not constitute practicing dentistry without a license. *State v. Faatz*, 76 Atl. 295, 296, 83 Conn. 800.

Sess. Laws Wash. 1893, c. 55, p. 90, § 4, provides that any person who desires to practice dentistry shall file his application and take an examination before the board of dental examiners, provided that persons might be admitted to examination who were not graduates of dental colleges, on satisfactory evidence of having been engaged in the practice of dentistry for 10 years prior to the application for examination. By Laws 1901, p. 314, c. 152, § 1, section 4 of the act of 1893 was amended by omitting the proviso therein, and inserting, "provided this section shall not apply to persons engaged in the practice of dentistry at the time of the passage of this act who are bona fide citizens of the state." Held that where relator, who was not a graduate of a dental college, and who had never attended lectures therein, and did not hold a diploma, had been engaged for five years prior to the amendment of 1901 in the practice of dentistry, without legal authority, he was not entitled to registration as a bona fide citizen engaged in the practice of dentistry under the section as amended. *State ex rel. Smith v. Board of Dental Examiners*, 72 Pac. 110, 111, 31 Wash. 492.

### PRACTICE OF LAW

As business, see *Business*.

As lawful business, see *Lawful Business*.

The "practice of law" is not limited to conduct of cases in court, but includes persons acting professionally in legal formalities, negotiations, or proceedings by authority of their client, and one prohibited from acting as attorney by a judgment of disbarment practiced in violation thereof by contracting for a fee, to obtain release of one sentenced to the workhouse and serving sentence, and endeavoring to induce the magistrate to discharge the prisoner on payment of a fine, though the same services might have been rendered by one not a lawyer. In *re Duncan*, 65 S. E. 210, 211, 83 S. C. 186, 24 L. R. A. (N. S.) 750, 18 Ann. Cas. 657.

A justice of the peace who practices law in any of the courts of the county wherein he holds his office is guilty of a misdemeanor under Code, § 27. To constitute a "practicing of law," within the prohibition of the statute, it is necessary that the person charged with

its violation shall have customarily or habitually held himself out to the public as a lawyer, or that he demanded compensation for his services as such; and the fact that on one occasion he acted as an attorney may be considered in determining whether he practiced, but it is not conclusive. *State v. Bryan*, 4 S. E. 522, 98 N. C. 644, 647.

### PRACTICE OF MEDICINE

As business, see Business.

Code Iowa, § 2579, provides that any person shall be held as "practicing medicine" or to be a "physician," who shall publicly profess to be a physician and assume the duties of that profession, or who shall make a practice of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal. Section 2580 provides that any person who shall practice medicine in the state without having first obtained and filed for record the required certificate shall be punished, etc. An indictment was in two counts, in the first of which defendant was charged with publicly professing to cure and heal persons without having filed for record a certificate from the State Board of Medical Examiners conferring on him the right to practice medicine, and as a physician, publicly professing to cure or heal, and in the second count was charged with publicly professing to be a physician and unlawfully assuming the duties of the profession, without having filed for record such certificate. Held, that the indictment was not subject to the objection of duplicity; the acts charged not being stated as separate offenses, but as contemporaneous acts, which, when construed together, constituted the practice of medicine. *State v. Yates*, 124 N. W. 174, 175, 145 Iowa, 332.

One may "practice medicine" without prescribing drugs or other substances to be used as medicines, and one may do it in other ways than those practiced as a part of their respective systems, by either osteopaths, pharmacists, clairvoyants, or persons practicing hypnotism, magnetic healing, mind cure, etc.; and on a trial for violating Rev. Laws, c. 76, § 8, by practicing medicine without being lawfully authorized to do so, the court properly refused to charge the jury to find that one may practice medicine without necessarily prescribing a substance to be used as a medicine. *Commonwealth v. Jewelle*, 85 N. E. 853, 859, 199 Mass. 553.

The use of the expression "practicing medicine" to mean the art of healing is by no means new, but is rather a return to the original meaning of the word "medical." The phrase may be properly used by the Legislature as one under which to group healing methods of all kinds, and is broad enough to include a person who claims to be a practitioner of a system of drugless healing. *Territory v. Newman*, 79 Pac. 706, 707, 13 N. M. 98, 68 L. R. A. 783.

A person publicly professes to heal, in announcing to the public generally his skill in the art of healing, and is guilty, under Code, § 2580, if without a certificate and not within the statutory exceptions, and this is done for the purpose of treating those who may engage his attention, without proof that he has actually undertaken to do so. *State v. Heath*, 101 N. W. 429, 430, 125 Iowa, 585.

The prescribing of a remedy, in a single instance, for another, is not "practicing medicine" within a statute providing that any person shall be regarded as practicing medicine who shall repeatedly prescribe for the use of any person or persons any medicine for the cure or relief of any bodily disease. *Foo Lun v. State*, 106 S. W. 946, 84 Ark. 475.

Under Laws 1903, p. 61, c. 40, regulating the practice of medicine, such practice consists either in opening an office for practice, or announcing a general willingness to treat the sick or suggesting, prescribing, or directing for the use of any specified person drugs, medicines, or other agencies for the cure of mind or body, ~~having received, or with intent~~ to receive compensation therefor. *Territory v. Lotspeich*, 94 Pac. 1025, 1026, 14 N. M. 412.

"The 'practice of medicine' as ordinarily and popularly understood has relation to the art of preventing, curing, or alleviating disease or pain. It rests largely on a knowledge of anatomy, physiology, and hygiene. It requires a knowledge of disease, its anatomical and physiological features, and its causative relations. Popularly, it consists in the discovery of the cause and nature of disease, and the administration, or the prescribing of treatment therefor." One who diagnosed his patient's diseases by a microscopic examination of a drop of blood, and treated them by placing them under the rays of electric arc lights, and also incidentally prescribed certain medicines for which prescriptions he made no charge "practiced medicine," within Acts 1901, p. 115, c. 78, prohibiting the practice of medicine without a license, and providing that any person shall be regarded as practicing medicine who shall treat, or profess to treat, operate on, or prescribe for, any physical ailment of another. *O'Neil v. State*, 90 S. W. 627, 631, 115 Tenn. 427, 3 L. R. A. (N. S.) 762.

The words "practice of medicine," as used in Gen. Laws 1896, c. 165, requiring authority to practice medicine, must be construed to relate to the practice of medicine as ordinarily and popularly understood. In a prosecution for practicing medicine without authority, it appeared that defendant had advertised that "Dr. H. (defendant) has opened offices at 88 W. street, for the practice of dermatology and physical education, in the cure of every and all manner of disease on the inside or outside of the human body"; that he was also authorized by law to teach this science of healing; that he had cured certain

diseases; "consultation and advice free; the only charge is for Electro-Magnetic Nerve Food and work done." Witnesses testified that they or their friends had consulted said H., been examined by him, had been given treatments by being rubbed with the nerve food, and had purchased quantities of it and had paid him for the treatments and medicine. Defendant admitted that he had no certificate or medical education, but showed a certificate of incorporation to himself and certain persons for the purpose of promoting and teaching dermatology and physical education, aiding and caring for sick, etc., and admitted that he had sold a so-called nerve food, and had applied it to patients. Held, that the evidence showed that defendant had "practiced medicine" in violation of Gen. Laws 1896, c. 185, as amended by Pub. Laws 1901, p. 336, c. 926. *State v. Heffernan*, 65 Atl. 284, 287, 28 R. I. 20.

Any person who shall prescribe or recommend for a fee, for like use, any drug or medicine or perform any surgical operation for the cure of any bodily infirmity, shall be regarded as "practicing medicine." *State v. Cotner*, 127 Pac. 1, 87 Kan. 864, 42 L. R. A. (N. S.) 768 (citing Laws 1908, c. 63, § 1).

An agreement "to nurse" an adult implies that the object of the care is sick, and means much more than mere watchfulness, and contemplates such care and attention of the person as will conduce to the comfort and hasten the recovery of the patient; but the practice of medicine, within the statute regulating its practice, implies not only the knowledge of the professional nurse, but implies much more, and includes the application of medical knowledge of disease, and the loss of health, and hence an agreement to nurse a person during his lifetime in consideration of the devise of the patient's property is not an agreement to practice medicine without a license prohibited by the statute, so as to prevent specific performance of the contract. *Oswald v. Nehls*, 84 N. E. 619, 622, 233 Ill. 438.

The act regulating the practice of medicine (Sess. Laws 1889-90, p. 119, § 8, as amended by Laws 1901, p. 50, c. 42) forbids the practice of medicine or surgery within the state without the license required by the act, and provides that any person shall be deemed as practicing within the act who shall have and maintain an office or place of business with his or her name and the words "Physician" or "Surgeon," "Dr.," "M. D.," or "M. B." in public view, or shall assume or advertise the title of "Dr." or any title which shall tend to show that the person assuming or advertising the same is a lawful practitioner of any of the branches of medicine or surgery under the laws of this state. Defendant maintained an office in front of and on the doors of which he caused his name to be lettered with the words "Physician" and "Dr.," and published an advertisement in a

daily newspaper in which he used the title "Dr." before his name. Held, that defendant had violated the act relating to the practice of medicine, although in his use of the word "physician" he prefixed the words "osteopathic and magnetic," or the word "drugless." *State v. Pollman*, 98 Pac. 88, 91, 51 Wash. 110.

Medical Law, Laws 1907, p. 636, c. 344, § 1, subd. 7, provides that a person practices medicine within the meaning of that act who holds himself out as being able to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or physical condition, and section 2 (page 637) provides that no person shall practice medicine unless registered or licensed, as therein provided. Section 15 (page 646) makes any person, not a registered physician, who shall advertise to practice medicine, guilty of a misdemeanor. Statutory Construction Law, Laws 1892, p. 1486, c. 677, § 1, provides that that chapter is applicable to every statute, unless its general object or the context or other provision at law indicates that a different meaning or application is intended than that required to be given by that chapter, and section 5 (page 1487) provides that the word "person" includes a corporation. Held, that the medical law applies to all persons, natural or artificial, and, since under it a corporation never could become legally authorized to practice medicine, having advertised to practice the corporation is guilty of a violation of section 15. *People v. John H. Woodbury Dermatological Institute*, 109 N. Y. Supp. 578, 853, 124 App. Div. 877.

The term "practicing," as applied to medicine, indicates the pursuit of such business, and the fact that one is pursuing such business may be proven by a single act, or by a series of acts. An indictment for unlawfully practicing medicine without a license covers all special instances occurring prior to the indictment in the particular venue, going to sustain the main charge; and hence the state cannot be compelled to elect to stand on any special instance testified to by witnesses for the prosecution. *Payne v. State*, 79 S. W. 1025, 1027, 112 Tenn. 587.

One who claimed the power to discover and remove the cause of disease so as to give nature a chance, to do which he professed to stop the leaks in the nervous system, and repair the damages done, by rest and dietetics, announcing himself as a graduate of a unique medical school and as master mechanic of the human body who would remove the organ if not working well or if there was pressure on a nerve causing pain, claiming his system gave a permanent cure in difficult diseases, and that he proved his system by getting good results among those who had tried other systems, was "practicing medicine" within Code, § 2579, prohibiting any person to practice medicine without a certificate. *State v.*

Wilhite, 109 N. W. 730, 732, 132 Iowa, 226, 11 Ann. Cas. 180.

Under the provision of Code, § 2579, that one shall be held as "practicing medicine" who shall make a practice of prescribing or prescribing and furnishing medicine for the sick, where it appeared, in a prosecution under Code, § 2580, prohibiting practicing medicine without a certificate of the board of medical examiners, that accused was catering to the patronage of the sick who were asking relief from their ills, and assured them of her ability to help them, and supplied them with her alleged appropriate remedies, giving instructions for their application or use, though she was careful to call the article she supplied "tissue food," instead of medicine, a charge that if accused, after diagnosing a case, undertook to determine for a sick person applying to her the character of the medicine best suited for the ailment, such act would be prescribing medicine within the meaning of the statute, was correct so far as went, and was not prejudicial to accused. *State v. Bresee*, 114 N. W. 45, 47, 137 Iowa, 73, 24 L. R. A. (N. S.) 103.

In a prosecution for practicing as a physician without a license, an instruction defining "practicing medicine" as "Any person shall be regarded as 'practicing' within the meaning of the act who shall append the letters 'M. D.' or 'M. B.' to his or her name, for a fee prescribe, direct or recommend the use of any person any drug or medicine or other agency for the treatment, cure relief of any wound, fracture or bodily injury, infirmity or disease," was approved on appeal. *State v. Oredson*, 105 N. W. 188, 189, Minn. 509.

Where licensed physicians form a corporation, the making of contracts and furnishing services of licensed physicians thereunto is not a violation of Comp. St. 1901, c. 7, forbidding the practice of medicine without a license. *State Electro-Medical Institute v. State*, 103 N. W. 1078, 1079, 74 Neb. 2 Ann. Cas. 673.

In a prosecution for "practicing medicine" without a license, it was held that one who visited the sick, diagnosed their ailments, furnished medicine for their cure, and claims against the estates of some of his patients for medical services rendered, and

the county to recompense him for levying a "county charge," was a "practicing" within the definition of Code, § 2579, holding that "any person shall be held as practicing medicine, \* \* \* or be held as practicing within the meaning of this chapter, shall publicly profess to be a physician \* \* \* and assume the duties or shall practice of prescribing and furnishing medicine for the sick, or who shall profess to cure or heal," etc. *State v. [unintelligible]*, 110 N. W. 463, 464, 465, 133 Iowa,

In a prosecution for practicing medicine without a license, evidence that accused had a sign on his door, "Dr. H. M. Blumenthal," was admissible. *State v. Blumenthal*, 125 S. W. 1188, 141 Mo. App. 502.

One practicing medicine in violation of Pub. Acts 1899, p. 370, No. 237, providing that all persons practicing medicine and all who shall wish to begin the same shall make application for a certificate, is required to apply for a certificate under the amendatory act (Pub. Acts 1903, p. 270, No. 191), providing that all persons "who wish to begin the practice of medicine" shall apply to the board of registration for a certificate of registration. *Hooper v. Batdorff*, 104 N. W. 667, 141 Mich. 353.

The phrase "physicians practicing," in a requested instruction in a malpractice case that, if defendants possessed such skill as is ordinarily possessed by "physicians practicing" in the same line in similar localities, and that in treating plaintiff's case they used ordinary care in exercising such skill, the verdict must be for them, means only such physicians as are ordinarily recognized as reputable physicians, and the refusal to give it cannot be justified on the ground that the phrase is too indefinite, and may include quacks. *McBride v. Huckins*, 81 Atl. 528, 531, 76 N. H. 206.

#### Chiropractic

One advertising himself as a chiropractic and undertaking to heal persons according to that system by manipulating the spine of the patient practices as a physician within Code, § 2579, defining who shall be deemed practicing as a physician. *State v. Corwin*, 131 N. W. 659, 660, 151 Iowa, 420.

One who practices as a chiropractic and who requires a patient to remove her street clothing for the treatment and to put on a kimono, and who diagnosed the patient's ailments with aid of a vibrator, and who manipulates the supposedly diseased parts, and who prescribes a diet for the patient, and who collects a fee, and who advises the patient to return for further manipulation, "practices a system of treatment of the sick," within Rem. & Bal. Code, § 8400, prohibiting the practicing of medicine without a license. *State v. Greiner*, 114 Pac. 897, 899, 63 Wash. 46.

Under Kirby's Dig. § 5241, which provides that the practice of medicine without a license shall be a misdemeanor, and section 5243, defining the practice of medicine as prescribing or directing the use of any "drug or medicine or other agency" for the treatment of injury or disease, the general term "agency" must be construed with reference to the terms of the statute which precede it, under the doctrine of statutory construction of ejusdem generis, and will be limited to agency of like nature and quality, to drugs or medicine, as designated by particular words,

so that an indictment for prescribing and directing an agency, commonly known as "chiropractics," being a system of hand manipulation, and not a drug or medicine, or similar agency, does not charge an offense within the definition of the "practice of medicine," and hence is insufficient as not charging a public offense. *State v. Gallagher*, 143 S. W. 98-106, 101 Ark. 593, 38 L. R. A. (N. S.) 328.

#### Christian Science

The act regulating the practice of medicine in the state of Ohio provides that any person shall be regarded as practicing medicine or surgery within the meaning of this act who shall append the letters "M. D." or "M. B." to his name, or, for a fee prescribed, direct or recommend for the use of any person, any drug or medicine or other agency for the treatment, cure, or relief of any wound, fracture, or bodily injury, infirmity, or disease, or who shall use the words or letters "Dr.," "Doctor," "Professor," "M. D.," "M. B.," or any other title in connection with his name, which in any way represents him as engaged in the practice of medicine, or surgery, or midwifery in any of its branches, or who shall prescribe, or who shall recommend for a fee for like use any drug or medicine, appliance, application, operation or treatment, of whatever nature, for the cure or relief of any wound, fracture, or bodily injury, infirmity, or disease, and that the use of any of the above-mentioned words or letters, or titles in such connection, and under such circumstances as to induce the belief that the person who uses them is engaged in the practice of medicine or surgery or midwifery in any of its branches, shall be deemed and accepted as a prima facie proof of an intent on the part of such person to represent himself as engaged in the practice of medicine or surgery or midwifery. Held, that the giving of Christian Science treatment for a fee, for the cure of disease, was "practicing medicine" within the meaning of the statutes regulating such practice. *State v. Marble*, 73 N. E. 1083, 1064, 72 Ohio St. 21, 70 L. R. A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898.

#### Divine healing

In a prosecution for practicing medicine without a license in which accused claimed to practice as a divine healer, evidence of the tenets of his church was not admissible; the nature of the business done by him only being relevant. Rev. St. 1908, § 6069, defines the "practice of medicine" to be the holding of one's self out to the public as engaged in the diagnosis and treatment of human diseases, or the prescription of any treatment for the relief or cure of any physical or mental ailment with intent to receive any compensation, or the maintenance of any office for the reception, examination, or treatment of any one suffering from any disease, or attaching any word or abbreviation to one's name indicating that he is engaged in the

treatment or diagnosis of diseases, and further makes it an offense to practice medicine in violation of the act, but provides that nothing therein shall prohibit the practice of religious tenets or the general belief of any church, not prescribing medicine. Accused kept a furnished office for healing the sick: his sign on the window reading, "Prof. S., Healer." Accused claimed that his treatment was a gift from God, enabling him to cure any disease a physician could and many others, including spinal and nervous diseases, and testified that he was a preacher in a church called "The Divine Scientific Healing Mission," and treated the sick in his living rooms without drugs or surgery, charging some and treating others gratuitously, but that he had no knowledge of the nature of diseases. Held, that accused was "practicing medicine" within the statute. *Smith v. People*, 117 Pac. 612, 614, 51 Colo. 270, 36 L. R. A. (N. S.) 158.

In St. 1907, c. 212, Gen. Laws 1910, p. 609, Act 2163, "for the regulation of the practice of medicine," etc., the proviso "that nothing herein shall be held to apply or to regulate any kind of treatment by prayer," even if prayer can be regarded as practicing medicine and as a privilege or immunity, extends such privilege to all, and is not an exemption from the general law, which would make the whole act unconstitutional. *Ex parte Bohannon*, 111 Pac. 1039, 14 Cal. App. 321.

One who professes to "heal the sick without the use of medicine" and "by placing his hands upon that portion of the body that is affected by the pain," the healing resulting from "magic power given direct from the Lord," is not a medical practitioner, and such treatment is not the "practice of medicine," as defined and regulated by the statutes of the state. Pol. Code, 1895, §§ 1477-1491. *Bennett v. Ware*, 61 S. E. 546, 548, 4 Ga. App. 293.

#### Massage

While Acts 30th Leg. c. 123, which makes it an offense to "practice medicine" without a license, and declares in section 13 that any person shall be regarded as "practicing medicine" who shall publicly profess to be a physician or surgeon, treat, or offer to treat, any disease or disorder by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation, does not apply to masseurs in their particular sphere of labor who publicly represent themselves as such, yet a masseur who treats, or offers to treat, diseases or disorders, mental or physical, and attempts to effect a cure thereof, and charges compensation therefor, without having registered and filed a certificate authorizing him to practice medicine, is guilty of a violation of the act. *Dankworth v. State*, 136 S. W. 788, 789, 61 Tex. Cr. R. 157.

A masseur who publicly represents himself as a masseur, and who limits his practice to that of a masseur, is exempt from the law requiring a certificate for the practice of medicine; but where he represents himself as a masseur, but undertakes to cure diseases for pay and represents himself as able to cure diseases, he must obtain the proper certificate. *Milling v. State (Tex.)* 150 S. W. 434, 435.

Acts 30th Leg. c. 123, providing that it shall be unlawful for any one to practice medicine without a certificate from the state medical board, and that to obtain a certificate one must be examined as to his knowledge of various medical subjects, and section 13, providing that a person who shall publicly profess to be a physician or surgeon, and offer to treat any disease by any system, or who shall offer to treat any disease by any method for compensation, shall be regarded as practicing medicine is not unconstitutional in discriminating against the practice of the masseur treatment, in failing to provide any board or authority to whom one can apply for license to practice such treatment, for a license to practice that treatment can be obtained from the state medical board, and the condition that an applicant have certain medical knowledge is not a discrimination against the practice of the masseur treatment, but a valid exercise of police power. *Germany v. State*, 137 S. W. 130-132, 62 Tex. Cr. R. 276, Ann. Cas. 1913C, 477.

A party who advertised in a local newspaper that he was a masseur doctor located at a certain place, and that he could heal all diseases, and who treated many persons who came to him afflicted with various ailments, for which he received compensation, was "practicing medicine," within the meaning of Acts 30th Leg. 1907, pp. 224-228, c. 123, forbidding the practicing of medicine without a license, and declaring, by section 13, that any person shall be regarded as "practicing medicine" who shall publicly profess to be a physician or surgeon, and treat or offers to treat any disease or disorder, mental, or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof, and receive compensation therefor, and hence was required to have a license, although he prescribed and used no drugs, but only massage treatment. *Newman v. State*, 124 S. W. 956, 957, 58 Tex. Cr. R. 223.

Laws 1893, p. 1547, c. 661, § 153, provides that any person who, not being then lawfully authorized to practice medicine within the state, and so registered according to law, shall practice medicine within the state without lawful registration, shall be guilty of a misdemeanor. Defendant, who was not registered, held himself out by a sign and card as a doctor, with office hours. He prescribed no drugs, but consulted with his patients, di-

agnosed their ailments, prescribed diet, conduct, and remedies, and gave treatment by manipulation with the fingers, professing to cure without drugs all diseases that physicians could cure with drugs and others that they could not cure, taking payment for his services. Held, that defendant was practicing medicine in violation of the statute. *People v. Allcutt*, 102 N. Y. Supp. 678, 680, 117 App. Div. 546.

#### **Mechano-Neural Therapy**

The science of "mechano-neural therapy" means mechanical nerve treatment, a gentle pressure on all parts of the body. The theory of this science is that the disease comes from the lack of blood circulation, and the treatment proceeds upon the theory of assisting the circulation back into the normal condition. A practitioner of this science, who holds himself out by sign and card as a doctor with office hours, who consults with his patients and gives treatments, who makes a diagnosis and prescribes diet and conduct and remedies, and who asserts the power to cure all diseases that any physician can cure without drugs and also diseases that they cannot cure with drugs, and who takes payment for consultation and diagnosis as well as payment for subsequent treatment, is within the statute prohibiting the "practice of medicine" without being lawfully authorized and registered. *People v. Allcutt*, 102 N. Y. Supp. 678, 680, 681, 117 App. Div. 546.

#### **Obstetrics**

When, in addition to ordinary assistance in the normal cases of childbirth, there is the occasional use of obstetrical instruments, and a habit of prescribing for conditions described in printed formulas which the defendant carried, such a course of conduct constitutes a "practice of medicine" in one of its branches. Although childbirth is not a disease, but a normal function of women, yet the "practice of medicine" does not appertain exclusively to disease, and obstetrics as matter of common knowledge has long been treated as a highly important branch of the science. *Commonwealth v. Porn*, 82 N. E. 31, 196 Mass. 326, 17 L. R. A. (N. S.) 94, 13 Ann. Cas. 569.

#### **Ophthalmology**

An ophthalmologist is a "medical practitioner" within Laws 1907, p. 358, § 5, prohibiting any person from practicing medicine or treating the bodily infirmities of the sick without a license. Defendant maintained an office in a hotel with a sign "Dr. H. M. Blumenthal" on the door. Prosecutrix went to his office and engaged him to treat her eyes. He diagnosed her trouble, prescribed certain ointments and eye-washes, for which he charged her \$10, and fitted her with glasses, for which he charged \$15. Held sufficient to show that defendant was "practicing medicine" within Laws 1907, p. 358, § 5, prohibit-

ing any person from practicing medicine without a license. *State v. Blumenthal*, 125 S. W. 1188, 1189, 141 Mo. App. 502.

A person engaged in fitting glasses to the eye prefixed to his name the title "Dr." on his sign, and on a notice explaining the science of ophthalmology, stating that by its assistance certain ailments would be cured without drugs or operations. The evidence tended to prove that ophthalmology is the science treating of diseases of the eye, and that the fitting of glasses for the relief of defective eyesight is a branch of the practice of medicine. Held, that he practiced medicine within Laws 1903, p. 202, c. 176, regulating the practice of medicine, and declaring every person prefixing the title "Dr." to his name, or professing to be a physician, or prescribing any drug, "medicine, apparatus, or other agency" for the cure of any ailment, shall be regarded as practicing within the meaning of the act. *State v. Yegge*, 103 N. W. 17, 18, 19 S. D. 234, 69 L. R. A. 504, 9 Ann. Cas. 202.

### Osteopathy

The ruling of the state court that osteopaths are persons "practicing medicine," within the meaning of Laws Tex. 1907, c. 123, providing for licensing and registering medical practitioners, will be followed by the federal Supreme Court in determining the constitutionality of such statute on writ of error to the state court. *Collins v. State of Texas*, 32 Sup. Ct. 286, 288, 223 U. S. 288, 56 L. Ed. 439.

The word "medicine," as used in Const. art. 16, § 31, providing that the Legislature may pass laws prescribing the qualifications of practitioners of medicine and punish persons for malpractice, but that no preference shall ever be given by law to any school of medicine, embraces the art of healing, by whatever scientific or supposedly scientific method; the art of preventing, curing, or alleviating diseases, and remedying as far as possible results of violence and accident, some thing or method supposed to possess curative power. Hence the Constitution authorized the passage of Acts 30th Leg. 1907, p. 224, c. 123, requiring physicians and surgeons, including osteopaths, to obtain a license before engaging in the public practice of their profession. *Ex parte Collins*, 121 S. W. 501, 508, 57 Tex. Cr. R. 2.

Laws 1907, p. 636, c. 344, regulating the practice of medicine, provides for licenses to practice medicine after an examination by the State Board of Medical Examiners, and states the educational requirements of the examination, and prohibits the practice of medicine without a registered license. Section 7, subd. 6, provides that an applicant for license to practice osteopathy shall show that he has studied not less than three years, and subdivision 4 requires all other applicants to

have studied not less than four years. Section 14 after stating certain exemptions from the statute, provides that any person engaged in the practice of osteopathy at the passage of the act who presents to the board evidence of graduation from a college of osteopathy with a two years' course, including certain subjects, may be licensed without examination, but such license shall not permit the holder to administer drugs or perform surgery. Section 1, subd. 7, provides that a person practices medicine within the act who holds himself out as able to diagnose any human disease, etc., and who prescribes for any disease, injury, etc.; and, by subdivision 8, "physician" means a practitioner of medicine. The Sanitary Code, § 5, provides that the word "physician" includes every person "practicing about the cure of the sick or injured," or who prescribes for such person. Section 160 requires every physician to be registered with the department of health, and requires physicians who have attended deceased persons to preserve a registry of their death, stating the cause, with other details, and to state the same in their report. Section 167 prohibits any interment of a dead body without a permit from the board of health, and a regulation of the board of health prohibits such permits except on the certificate and record of death of the physician pursuant to the Sanitary Code. Held, that a duly licensed osteopath was a physician within the Sanitary Code as well as the statute, and was entitled to registration as a physician. *Bandel v. Department of Health of City of New York*, 111 N. Y. Supp. 431, 432, 127 App. Div. 382; *Id.*, 85 N. E. 1067-1069, 193 N. Y. 133, 21 L. R. A. (N. S.) 49.

### PRACTICE OF MEDICINE AND SURGERY

Where it was shown that an applicant for a license to practice medicine and surgery was a resident of the state, engaged in the practice of his profession under the provisions of the law of 1887, and had complied with all the provisions of Sess. Laws 1899, p. 345, relating to the practice of medicine, if the board of medical examiners refuse to issue him a license, it was not criminal in him to pursue his profession. *State v. Cooper*, 81 Pac. 374, 376, 11 Idaho, 219.

Acts 1901, p. 207, making it a misdemeanor for any person to practice medicine or surgery or to attempt to treat the sick without first obtaining a license from the State Board of Health, is not limited to attempts to treat by medicine or surgery, but includes those who practice neither medicine nor surgery in any of its departments, but who profess to cure, and who treat or attempt to treat the sick by means other than medicine or surgery. *State v. Smith*, 135 S. W. 465, 468, 233 Mo. 242, 33 L. R. A. (N. S.) 179.

"The term 'practice of medicine and surgery' embraces probably the larger, and



certainly by far the most profitable, part of the treatment of diseases, but is not coextensive with the latter term, and cannot be made so, unless surgery and medicine are adopted as the state system of treatment, and all other methods are made indictable." A statute designating who are eligible to practice medicine and surgery, and defining the expression "practice of medicine and surgery" as meaning "the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operations, surgical or mechanical appliances, or by any other method whatsoever," attempts to create a monopoly, and is void. *State v. Biggs*, 46 S. E. 401, 405, 133 N. C. 729, 64 L. R. A. 139, 98 Am. St. Rep. 731.

#### **Chiropractic**

In a prosecution for violation of Act March 14, 1907 (St. 1907, p. 252, c. 212), providing that any person who shall practice \* \* \* medicine or surgery, etc., or any other system of treating the sick, without having a certificate, etc., shall be guilty of a misdemeanor, it must appear that defendant practiced, or attempted to practice, medicine, etc., as a business or calling, or advertised or held himself out as so doing, the term "practicing medicine or surgery," etc., meaning that one is engaged in that line of work as a business; and a complaint, charging that defendant did unlawfully "treat the sick" by practicing the system or mode known as "chiropractic," without having a certificate, etc., was insufficient, the words "by practicing the system or mode," etc., being simply descriptive of the method by which defendant treated the sick. *Ex parte Greenall*, 96 Pac. 804, 805, 153 Cal. 767.

#### **Right to practice dentistry**

A person licensed to practice medicine and surgery under the statute cannot by virtue thereof practice dentistry without securing a license as a dentist, as required by Gen. Laws 1907, p. 127, c. 117. *State v. Taylor*, 118 N. W. 1012, 1013, 106 Minn. 218, 19 L. R. A. (N. S.) 877, 16 Ann. Cas. 487.

#### **PRACTICE OF MEDICINE, SURGERY, AND OSTEOPATHY**

Laws 1901, c. 254, as amended by Sp. Sess. Laws 1908, c. 63, creating a state board of medical registration and examination and regulating the practice of medicine, surgery, and osteopathy, embraces within its terms one who without registration, examination, or license from such board, and for pay, practices or attempts to practice chiropractic by pretending to adjust the spine of one afflicted with bodily infirmities, or who advertises to treat, for pay, by chiropractic spinal adjustment, persons thus afflicted. *State v. Johnson*, 114 Pac. 390, 392, 84 Kan. 411, 41 L. R. A. (N. S.) 539.

#### **PRACTICE OF PHARMACY**

The sale at retail of drugs, medicines, and poisons is included in the "practice of pharmacy" within V. S. 4662, making it unlawful for an unlicensed person to practice pharmacy. *State v. Abraham*, 61 Atl. 766, 78 Vt. 53.

#### **PRACTICING DENTISTRY**

See Practice of Dentistry.

#### **PRACTICING MEDICINE**

See Practice of Medicine.

#### **PRACTITIONER OF MEDICINE**

See Practice of Medicine.

#### **PRÆCIPE**

Filing, as commencement of action, see Commencement of Action.

#### **PRAIRIE**

A "prairie" is a level or rolling tract of treeless land, covered with coarse grass and generally of rich soil. *Gardner v. Mann*, 76 N. E. 417, 418, 36 Ind. App. 694 (citing Standard Dict.; Cent. Dict.; Webster's Dict.).

#### **PRAIRIE LAND**

Raw prairie land, see Raw.

#### **PRAISE**

"Praise" is defined as "especially the joyful tribute of gratitude or homage rendered to the Divine Being; the act of glorifying or extolling the Creator; worship, often in song, in distinction from petition or confession." *People v. Board of Education of Dist. 24*, 92 N. E. 251, 252, 245 Ill. 334, 29 L. R. A. (N. S.) 442, 19 Ann. Cas. 220.

#### **PREACHER**

As laborer, see Laborer.

As profession, see Profession.

#### **PREACHING**

As labor, see Labor.

#### **PREAMBLE**

A "preamble" is a history or recitation of the necessity for the legislation in question. Bouvier defines it as follows: It is no more than a recital of some inconvenience, which does not exclude any others for which a remedy is given by the enacting part of the statute. A provision of an ordinance which is nothing more or less than a second or more extended title containing the purposes of the proposed ordinance cannot be considered a "preamble." *Silva v. City of Newport*, 84 S. W. 741, 742, 119 Ky. 587.

The "preamble" in a statute is a prefatory statement or explanation or a finding of

facts by the Legislature leading up to the passage of the act, purporting to state the purpose, reason, or occasion for making the law to which it is prefixed. *Hanly v. Sims*, 94 N. E. 401, 403, 175 Ind. 345.

## PRECATORY TRUST

The rule concerning "precatory trusts" requires: "(1) That the words used must be such that it shall appear from them that they were intended in an imperative sense. (2) The subject of the recommendation or wish must be certain. (3) The object thereof must be certain." A will giving testator's residuary estate to his wife "absolutely" with the request that, at her death, or before, if she should think best, to give to his son a certain sum, or any sum she might think best, providing, "and further request that she, my said wife, shall assist any of my brothers and sisters, if they should be in need, and at her decease, she shall divide her property among them as she may think best," gave the wife an absolute estate and did not create a precatory trust in favor of the testator's brothers and sisters. *McDuffie v. Montgomery*, 128 Fed. 105, 108, 109 (citing *Warner v. Bates*, 98 Mass. 274; *Mills v. Newberry*, 112 Ill. 123, 1 N. E. 156, 54 Am. Rep. 213).

The doctrine of implied or "precatory trusts" was carried to great length by early English and American cases, and thus where a testator made an absolute gift to one person in his will and accompanied the gift with words expressing a desire, will, request, wish, hope, or recommendation, they have been held sufficient to raise a trust where the subject and object are sufficiently certain; but the later cases have departed from the doctrine of the early cases and have inclined toward the doctrine of giving precatory words and expressions only their natural force. Where testator devised certain land to his son, absolutely, a subsequent provision by which testator requested all of his children, if any should die without issue, at their death to will the property received from his estate to testator's surviving children, or the issue of those dead, the devise was insufficient to raise a "precatory trust" and limit the fee previously devised. *Igo v. Irvine* (Ky.) 70 S. W. 836, 837.

Where a will stated that after the death of testator's wife one-half of the principal of the trust fund should be paid to the wife's appointee, but that it was testator's wish and desire that she should appoint the share to testator's daughter and her children, the words "wish and desire" did not create what is commonly called a "precatory trust," but was merely an expression of the hope and belief of the testator. *Holmes v. Dalley*, 78 N. E. 513, 514, 192 Mass. 451.

A will recited the affection and watchfulness of testator's wife; devised certain land to a son; recited that since a prior will

certain real estate had been deeded to the daughters as their share of the real estate, "leaving them to inherit such shares of my personal estate \* \* \* which in the judgment of my executors they may be entitled to"; bequeathed "all the balance of my estate \* \* \* to my beloved wife, \* \* \* to be hers and to be disposed of as she may think best. I have full confidence in my said wife, and have abiding faith that she will deal justly with our children"—and appointed the wife and son executors. Held, that the will made independent provision for the wife, without the creation of a "precatory trust." *Rector v. Alcorn*, 41 South. 370, 372, 88 Miss. 788.

Where a husband conveyed his land to his attorney under an agreement whereby the attorney conveyed to the husband and wife, so as to create an estate by entirety, and subsequently the husband made a will in which he gave all his property to his wife in case she survived him, otherwise to certain legatees, the will providing that in case the wife should survive it was testator's request that, either before her death by gift, or after her death by will, she should provide for testator's legatees as indicated in the will, and where at the time such will was made the wife had made a will in which no provision was made for some of the legatees in the husband's will, and the wife survived the husband, the husband's will did not create a "precatory trust." *Hillsdale College v. Wood*, 108 N. W. 675, 677, 145 Mich. 257.

## PRECAUTION

See Due Precaution; Signal and Precautions.

## PRECEDENT

See Condition Precedent; Unprecedented. See, also, *Stare Decisis*.

"More is needful to constitute a 'precedent' than merely that a principle or doctrine is announced within the appropriate limits of a cause. It is a fundamental law that a precedent must be a conclusion, a decision in a cause; and not a process of reasoning, an illustration, or analogy." *Rodwell v. Rowland*, 50 S. E. 319, 327, 137 N. C. 617.

The doctrine of "stare decisis," commonly called the "doctrine of precedents," means that we should adhere to decided cases and settled principles and not disturb matters which have been established by judicial determination. *Johnson v. Western Union Tel. Co.*, 57 S. E. 122, 124, 144 N. C. 410, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961 (citing *Hill v. Atlantic & N. C. R. Co.*, 55 S. E. 854, 143 N. C. 539, 9 L. R. A. [N. S.] 606).

The doctrine of *stare decisis*, commonly called the "doctrine of precedents," means that we should adhere to decided cases and settled principles, and not disturb matters

which have been established by judicial determination. The precedent should serve as a rule for future guidance in deciding analogous cases, especially where persons in their business relations and in making contracts have acted on the faith of its correctness and in reliance on its continuance as a rule of law, so that rights have become vested which will be seriously impaired if the precedent is reversed. *Hill v. Atlantic & N. C. R. Co.*, 55 S. E. 854, 866, 143 N. C. 539, 9 L. R. A. (N. S.) 606.

## PRECEDING

See Last Preceding; Next Preceding.

Revenue Act (Hurd's Rev. St. 1909, c. 120) § 276, declares that, if any property shall have been omitted in the assessment of any year or number of years, the same, when discovered, shall be listed and assessed by the assessors. Section 277 provides that, if the tax on property liable to taxation has been prevented from being collected for any year, it shall be added to the tax for any subsequent year. Section 278 declares that no such charge for tax and interest for previous years as provided for in the "preceding" section shall be made against any property prior to the date of ownership of the person owning such property at the time the liability for such omitted tax was first ascertained, provided that the owner of the property, if known, assessed under "this" and the "preceding" section shall be notified by the assessor or clerk as the case may require. Held, that the word "this" in section 278 did not refer to an assessment under that section, which contained no provision for assessment, but referred to section 277, and the word "preceding" to section 276, and, since the assessment which before the revenue act would have been made under section 276 by the assessor is now made by the board of review, the notice required by the provision of section 278 must be given prior to the assessment of omitted property by the board of review, so that the statute is not unconstitutional as failing to provide for due process of law in the assessment of such omitted property. *People v. National Box Co.*, 93 N. E. 778, 779, 248 Ill. 141.

Rev. Laws, c. 81, § 11, authorizes the superior court to assess a pauper's kinsman for his support. Section 38 requires overseers of the poor to prosecute or defend actions founded on the "preceding sections," etc. Under St. 1793, p. 479, c. 59, § 14, under Rev. St. 1836, c. 46, § 26, and under Gen. St. 1860, c. 70, § 22, successively, overseers of the poor were authorized to prosecute actions under the preceding provisions of the respective chapters, including actions to compel one to contribute to a pauper kinsman's support. The language of the provision now constituting such section 38 was changed by Pub. St. 1882, c. 84, § 33, by omitting the

words "of this chapter" after "preceding section." Held, that the Legislature did not, by changing the phraseology of the statute, intend to restrict the overseers' authority to actions brought under Rev. Laws, c. 81, §§ 35-37, and that such overseers can sue in the name of their town under section 11 to compel one to contribute to his pauper kinsman's support. *Inhabitants of Great Barrington v. Gibbons*, 85 N. E. 737, 199 Mass. 527.

## PRECEPT

A "precept" is a command or mandate in writing of equal importance with a writ or process. *Ackermann v. Berriman*, 114 N. Y. Supp. 937, 939, 61 Misc. Rep. 165.

## PRECINCT

See Proper Precinct; Road Precinct; Within Any County or Precinct.

Parish precinct as municipal corporation, see Municipal Corporation.

Parish precinct as parish, see Parish.

A "precinct" is a certain, definite, particular subdivision of a county. *Candle v. Court of Com'rs of Talladega County*, 39 South. 307, 308, 144 Ala. 502.

"A 'precinct' is a mere territorial division created for certain political and administrative purposes. It can neither plead nor be impleaded, nor is it capable of imposing upon itself any obligation or liability, except in pursuance of express legislative authority." *Union Pac. R. Co. v. Howard County*, 97 N. W. 280, 281, 66 Neb. 663. For administrative purposes counties are divided into precincts, and the precinct is the political unit of such county, as a township is the political unit of counties under township organization. A "precinct" lacks the corporate character of a township, but elects certain officers, and has the power to issue bonds for certain purposes, and in other ways bears a relation to the county not under township organization analogous to that which the township bears to its county. *Union Pac. R. Co. v. Howard County*, 92 N. W. 579, 580, 66 Neb. 663.

### As district

The words "precinct" and "district" in the election law are frequently used interchangeably, and the meaning must be gathered very largely from the connection in which they are used. *Welch v. Shumway*, 83 N. E. 549, 555, 232 Ill. 54.

The words "district" and "precinct," as used in the election law since the present Constitution was adopted, have not always been used with the same meaning. Sometimes they have been so used that the word "precinct" meant a larger territory than the word "district"; a district being a subdivision of a precinct. This is usually, but not

always, the case in the general election law. Sometimes they have been used so that the word "precinct" covered a smaller territory than the word "district." This is the case with reference to the election act passed in 1885, now in force in the city of Chicago, when taken in connection with certain primary laws, although generally in primary laws the term "primary district" is used. Sometimes "district" and "precinct" are used interchangeably, as will be shown from a careful reading of the present general election law. They will be found to be so used in paragraph 30 of chapter 46 (Hurd's Rev. St. 1905, p. 860). Hence the meaning of these words must be gathered very largely from the connection in which they are used in each instance. For the purpose of town elections only, polling places and election districts in a town having been established by the county board, under the law, solely for the convenience of the voters, for that election the entire town, as to the qualifications of the electors, is considered one voting district. *People ex rel. Delaney v. Markiewicz*, 80 N. E. 256, 258, 225 Ill. 563.

#### As religious society

"The term 'religious society' had in the English ecclesiastical law and has in our law a well-defined meaning, and, as commonly used in our law, it is synonymous with 'parish,' 'precinct,' and designates an incorporated society created and maintained for the support of public worship." *Riffe v. Proctor*, 74 S. W. 409, 410, 99 Mo. App. 601.

#### As village

The word "precinct" does not include "village." *Dooley v. Jackson*, 78 S. W. 330, 333, 104 Mo. App. 21 (citing *State v. Chichester*, 47 N. W. 984, 31 Neb. 825, 11 L. R. A. 104).

#### As voting place or territory

In a statute providing for the punishment of one who votes in more than one election precinct, the word "precinct" means no more nor less than a place of voting, and therefore the statute is aimed to punish the same offense that was punishable under a prior statute providing for the punishment of one who votes more than once at the same or different "place." *State v. Anslinger*, 71 S. W. 1041, 1044, 171 Mo. 600.

The word "precinct," in Const. § 61, providing that the General Assembly shall by general law provide a means whereby the sense of the people of any county, city, town, district, or precinct may be taken as to whether or not intoxicating liquors shall be sold therein, means only a voting territory as a part of a district, town, city, or county. Precincts are created in the county by the county and for the convenience of the people of the county. It has not the machinery for government. It has not a single official, or may not have, who performs any act of gov-

ernment whatever. *Board of Trustees of Town of New Castle v. Scott*, 101 S. W. 944, 947, 125 Ky. 545.

#### PRECINCT OFFICER

By Sess. Laws 1901, p. 109, c. 107, providing that precinct officers are one justice of the peace and one constable, and that cities of the first class shall not be divided, but shall be deemed one precinct for the purpose of electing a justice and constable, justices of the peace in cities of the first class are "precinct officers," and not merely city officers, and the fact that the territorial boundaries of their precinct are coextensive with the city does not render them city officers, and, as a class by themselves, subject to special legislation. *Love v. Liddle*, 72 Pac. 185, 187, 26 Utah, 62, 62 L. R. A. 482.

#### PRECIOUS STONES

See Imitation Precious Stones.

As set, see Set.

Articles, such as bowls, vases, trays, wine pitchers, teacups, altar sets, flower stands, and other completed articles, manufactured from jade by cutting, carving, or other means, are not "precious stones," within paragraph 435, Schedule N, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 192, but are dutiable under paragraph 97, Schedule B, 30 Stat. 156, covering "articles and wares composed wholly and in chief value of mineral substances." *C. L. Tiffany & Co. v. United States*, 126 Fed. 255, 256.

In construing the provisions in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, pars. 408, 435, 30 Stat. 189, 192, for "beads of all kinds," and "precious stones," respectively, held, that pierced opal balls about one-fourth of an inch in diameter and pierced rock-crystal rondelles, or small, flat, faceted disks, are dutiable under the latter provision rather than the former; these articles not being commercially known as beads. Held, also, as to the rock-crystal articles, that they are dutiable under said latter provision rather than as manufactures of rock crystal under paragraph 115, Schedule B, § 1, of said act (30 Stat. 159). *United States v. American Gem & Pearl Co.*, 142 Fed. 283, 284.

Sapphires intended for bearings for electrical instruments are dutiable as precious stones, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192, rather than as articles composed of mineral substances under Schedule B, par. 97, 30 Stat. 156. *United States v. American Express Co.*, 147 Fed. 894.

In the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, for "diamonds and other precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, and not set," the word "set" has a

well-known and well-defined trade meaning in connection with "precious stones," as to frame or mount in gold, silver, or other metal, and does not include the insertion of an agate bearing in a scale. So that the paragraph was intended to cover only precious stones intended for jewelry purposes, and not such as are fitted for use as bearings. Small pieces of agate, fitted for use as scale bearings by being cut, polished, and grooved, are dutiable as manufactures of agate, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 115, and not as "precious stones," under paragraph 435, Schedule N, 30 Stat. 192. *Smith v. Computing Scale Co.*, 147 Fed. 890, 891.

Where Congress, having provided in general terms for a group of articles, which includes many different species, as "precious stones," selects by name one of those species and prescribes that manufactures of that particular species shall be dutiable at a different rate, as "manufactures of agate, not specially provided for," it has so clearly indicated its intention to withdraw the article from the general group as soon as it becomes a completed manufacture that the absence of the limiting clause, "not specially provided for," from the group provision, is not particularly significant. *United States v. Albert Lorsch & Co.*, 158 Fed. 398, 399, 86 C. C. A. 34.

Rock-crystal intaglios, produced in an expensive manner by engraving, and then painted, are dutiable under the Tariff Act as "precious stones advanced in condition or value \* \* \* by \* \* \* cutting or other process," regardless of their advancement in value by painting. *Benedict & Warner v. United States*, 135 Fed. 242; *United States v. Benedict & Warner*, 145 Fed. 914, 915, 76 C. C. A. 446.

## PRECIPITATE

See Artificially Precipitated.

## PRECIPITATION

That a town did nothing to prevent surface water from following the law of gravitation in crossing over a road onto adjoining land does not show a "precipitation" of water thereon. *Beals v. Brookline*, 54 N. E. 339, 341, 174 Mass. 1.

## PRE-EMPTION

The essence of a right of "pre-emption" is the privilege of purchasing, and when settlers occupy public lands, and the government places the same in the market, the settlers have a preference right to purchase at the price stated, and the state, which has acquired the pre-emption in lands occupied by Indians, has the first right to purchase when the lands are put up for sale or to extinguish the Indian title. *Seneca Nation of*

*Indians v. Appleby*, 112 N. Y. Supp. 177, 182, 127 App. Div. 770.

The word "pre-emption" has a varied meaning. At common law it expressed the king's right to buy provisions and other necessities for his household in preference to others. In international law, it expresses the right of a nation to detain goods of a stranger in transit so as to afford its subjects a preference. Webster gives, among other definitions, the right of purchase before another, but the word "pre-emption" in Act March 3, 1891, c. 561, § 7, 26 Stat. 1098, relating to homestead entries, has another well-defined technical meaning, familiar to all. *United States v. Yankee Fuel Co.*, 195 Fed. 850, 852.

## PRE-EMPTION CLAIM

"A 'pre-emption claim,' until perfected, is not a title defeasible upon the nonperformance of conditions subsequent, but is a mere inchoate right which may ripen into a perfect title upon the performance of certain conditions precedent. Neither is it an already existing and certain demand for land issued by the government upon an executed consideration, but is a mere privilege or right of possession, sufficient under the statute, as against all but those holding under a superior right, or title, to maintain trespass to try title, but not sufficient to defeat this superior right or title by limitation. *Creamer v. Briscoe (Tex.)* 107 S. W. 635, 637.

A "homestead filing" is a "homestead claim," and a "pre-emption filing" is a "pre-emption claim" within the meaning of acts granting rights in public lands. Hence, a grant of public lands to aid in the construction of a railroad, which excepts therefrom such lands within the place limits as shall be found to have been "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of," did not attach to lands which were within the primary limits of the grant as fixed by the definite location of the line of road, but upon which, at the time the map of definite location became effective, there were homestead and pre-emption claims filed in the proper land office, and remaining of record and uncanceled. *Oregon & C. R. Co. v. United States*, 148 Fed. 603, 605, 606, 78 C. C. A. 375 (citing *Northern Pacific Railway Co. v. DeLacey*, 19 Sup. Ct. 791, 174 U. S. 634, 43 L. Ed. 1111; *Northern Pacific Railroad Company v. Sanders*, 17 Sup. Ct. 671, 166 U. S. 620, 41 L. Ed. 1139; *Whitney v. Taylor*, 15 Sup. Ct. 796, 155 U. S. 85, 39 L. Ed. 906; *Kansas Pacific Railroad Co. v. Dunmeyer*, 5 Sup. Ct. 566, 113 U. S. 629, 28 L. Ed. 1122; *Doolan v. Carr*, 8 Sup. Ct. 1228, 125 U. S. 618, 31 L. Ed. 844; *Monroe Cattle Co. v. Becker*, 13 Sup. Ct. 217, 147 U. S. 57, 37 L. Ed. 72; *Leavenworth, L. & G. R. R. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Bardon v. Northern Pacific Rail-*

road, 12 Sup. Ct. 856, 145 U. S. 535, 36 L. Ed. 806; *United States v. Southern Pacific Railroad Co.*, 13 Sup. Ct. 152, 146 U. S. 570, 36 L. Ed. 1091).

### PRE-EMPTION ENTRY

The proviso to section 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1098, giving the right to patent where no contest or protest has been filed within two years after receiver's receipt "upon the final entry of any tract of land under the homestead, timber culture, desert land, or pre-emption laws," does not include coal land entries. *United States v. Yankee Fuel Co.*, 195 Fed. 850, 851.

### PRE-EMPTION FILING

See Pre-emption Claim.

### PRE-EMPTION INTEREST

A "pre-emption interest" is a right to purchase at a fixed price, within a limited time, in preference to others. *Davenport v. Farrar*, 2 Ill. (1 Scam.) 314, 316.

### PRE-EMPTION RIGHT

As inchoate equity, see Inchoate Equity. Attached to land, see Attach.

### PRE-EXISTING DEBT

As value, see Value.

"The words 'pre-existing debt' in their natural meaning include all debts previously contracted, whether they have become payable or not." *Beall v. Hudson County Water Co.*, 185 Fed. 179, 183 (citing *In re Fletcher*, 186 Mass. 340).

### PREFERENCE

See Creditor Seeking Preference; Fraudulent Preference; Undue Preference; Unlawful Preference.

As privilege, see Privilege.

As voidable, see Voidable.

Surrender of preference, see Surrender. Void preference construed as voidable, see Void.

A carrier which transports large quantities of coal is entitled to make regulations with respect to the manner of receiving and transporting it so that it may be handled expeditiously, safely, and economically, without unnecessary interference with the carrier's other business; and regulations which are well designed to promote such object cannot be complained of on the ground that they operate to give a preference to one who complies with them, or as a discrimination against one who does not. Where defendant railroad company, which had previously permitted the loading of cars with coal on its side track at a station, made a regulation by which it withdrew such permission, and it thereafter refused to furnish cars to be so loaded to plaintiff or to any other shipper;

but during such time, however, certain mine-owners, who through agreements with the company had constructed private spur tracks to their mines, were furnished cars, some of which they loaded from wagons while standing on such spur tracks before the development of the mines and the construction of tipples for loading, it was held that the furnishing of cars for such purpose, while refusing to furnish cars for loading on the station track to plaintiff, who had constructed no spur track, did not constitute the giving of an undue "preference," either under the common law or the statute of Arkansas, prohibiting the giving of any preference in the furnishing of cars. The idea conveyed by the "preference" is that, as between two persons occupying the same situation or relation to the carrier, one has been preferred over the other or granted certain privileges or facilities that were not extended to the other. *Harp v. Choctaw, O. & G. R. Co.*, 125 Fed. 445, 446, 452, 61 C. O. A. 405.

Under Rev. Corp. Act 1896 (P. L. 1896, pp. 280, 283, 304, c. 185) §§ 8, 18, 36, requiring the certificate of incorporation to describe the different classes of stock, authorizing corporations to create different kinds of stock with preferences, and declaring that in the distribution of the assets of a corporation the surplus funds after payment of the creditors and the preferred stockholders may be divided among the general stockholders, when considered in connection with the history of legislation on the subject as embodied in Rev. Corp. Act 1875 (Revision 1877, pp. 181, 191) §§ 25, 30, and the judicial interpretation of such act, a certificate of incorporation which gives to the holders of preferred stock a yearly dividend before any dividend shall be set apart on common stock, creates a "preference" in favor of the preferred stock in the assets on a dissolution of the corporation. *Hellman v. Pennsylvania Elec. Vehicle Co.*, 67 Atl. 834, 836, 73 N. J. Eq. 269.

The idea conveyed by the word "preference" as used to indicate a discrimination by a carrier is that, as between two persons occupying the same situation or relation to the carrier, one has been preferred over the other, or granted certain privileges or facilities that were not extended to the other. *Choctaw, O. & G. R. Co. v. State*, 84 S. W. 502, 503, 73 Ark. 373.

The right given by Laws 1905, c. 103, § 8, to cause unsurveyed land to be surveyed and to purchase the same within 60 days after approval of survey, is not abrogated by Laws 1907, c. 20, § 6e, declaring that no person shall have any preference to purchase unsurveyed land, except as provided in that act; the right conferred by the former act not being a "preference," but a right to purchase initiated by application for survey. *Pence v. Robison*, 119 S. W. 1145, 102 Tex. 489.

**In bankruptcy and insolvency laws**

In order to constitute a "preference," within the meaning of the bankruptcy act, the debtor must do some act to facilitate the proceedings. Submissive inactivity is not enough. *Johnson v. Anderson*, 97 N. W. 339, 342, 70 Neb. 233.

Bankr. Act July 1, 1898, c. 541, § 60a, provides that a person shall be deemed to have given a "preference" if, being insolvent, he has procured or suffered a judgment to be entered against him in favor of any person or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *West v. Bank of Lahoma*, 85 Pac. 469, 470, 16 Okl. 328; *Coder v. Arts*, 29 Sup. Ct. 436, 442, 213 U. S. 223, 229, 53 L. Ed. 772, 16 Ann. Cas. 1008 (quoting and adopting the definition in Bankr. Act, § 60a, as amended by section 13, 32 Stat. 799, c. 487); *In re White*, 177 Fed. 194, 196, 101 C. C. A. 364 (quoting and applying Bankr. Act, § 60a); *Galveston Dry Goods Co. v. Frenkel*, 86 S. W. 949, 950, 39 Tex. Civ. App. 19.

A suit by the trustee of a bankrupt corporation to compel a stockholder to pay corporate debts because of her alleged participation in a fraudulent overvaluation of the corporation's assets in payment for stock was not a case of a preferential or fraudulent transfer within Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act Cong. Feb. 5, 1903, c. 487, 32 Stat. 797, giving courts of bankruptcy jurisdiction in suits for the recovery of property under sections 60b, 67e, and 70e (30 Stat. 562, 564, 565, 32 Stat. 799, 800), relating to fraudulent and preferential transfers but was a suit of a plenary nature, of which the bankruptcy court had no jurisdiction except by defendant's consent. *In re Haley*, 158 Fed. 74, 78, 85 C. C. A. 404.

Under Bankr. Act July 1, 1898, c. 541, § 60a, a bankrupt is deemed to have given a preference if within four months before the filing of the petition he procures or suffers a judgment against him or makes a transfer of any of his property, and the effect of which will be to give a creditor a greater percentage of his debt than any other creditor of the same class. Section 60b provides that, if a person receiving a preference has reasonable cause to believe a preference was intended, it shall be voidable by the trustee. An insolvent made an assignment for the benefit of creditors with a preference in favor of defendant and after paying the preferred debts the residue was not sufficient to pay other creditors. The assignment was made and registered within four months before the filing of the petition. Defendant knew that she was protected in the assignment, and asked that the money be paid to her, which was

done. Held, that there was a preference entitling the trustee in bankruptcy to recover the amount paid defendant, although there was no fraudulent intent, and the payment was made by the assignee, and not directly by the bankrupt. *Wilson v. Taylor*, 70 S. E. 286, 288, 154 N. C. 211.

A guarantor is a "creditor" within the meaning of section 60b of the bankruptcy act (30 Stat. 562), relating to the giving of "preferences" to creditors. *Stern v. Paper*, 183 Fed. 228, 231.

Under Bankr. Act 1898, § 60, as amended by 32 Stat. c. 487, § 13, providing that a person shall be deemed to have given a "preference" who has within four months before the filing of the petition in bankruptcy, or after the filing of the petition and before adjudication, procured a judgment to be entered against himself in favor of any person, or made a transfer of any of his property which will enable one of his creditors to obtain a greater percentage of his debt than other creditors of the same class, a "preference" is not necessarily a fraudulent conveyance; a bankrupt having the right to prefer one creditor if giving the preference more than four months before filing of the petition. *Coder v. Arts*, 29 Sup. Ct. 436, 442, 213 U. S. 223, 53 L. Ed. 772, 16 Ann. Cas. 1008.

One who had a contract with a railroad to furnish board to a track gang entered into an arrangement with a supply firm whereby it was to extend him credit, and he in turn gave it an order on the railroad, directing it to pay to the firm any sums due from the railroad to him. It was agreed between the contractor and the firm that the latter was not to present the order unless the former did not keep up his payments. In pursuance of this agreement, the order was not presented for over a year, and then just one day before the contractor, being insolvent, filed a voluntary petition in bankruptcy. Held, that the order did not operate as an equitable assignment as of the date when it was given, but was effective as a transfer only when presented to the railroad, and therefore constituted a "preference," within section 60, Bankr. Act. *Johnston v. Huff, Andrews & Moyler Co.*, 133 Fed. 704, 707, 86 C. C. A. 534.

A "preference" is defined in section 60, Bankr. Act (Act July 21, 1898, c. 541, 30 Stat. 562), as follows: "(a) A person shall be deemed to have given a 'preference' if, being solvent, he has, within four months before the filing of the petition, or after the filing of the petition, and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such

creditors of the same class. (Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.) (b) If a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by trustee, and he may recover the property or its value from such person." Held, that the words which were inclosed in parentheses, and which were not in the original act, but added by the amendment of February 5, 1903 (Act Feb. 3, 1905, c. 487, § 13, 32 Stat. 799), did not change the meaning of a voidable "preference" as defined by the original act, the essential elements of which are that the debtor at the time of the transaction must have been insolvent: that there must have been a pre-existing debt paid or secured by the transaction within four months before the filing of the petition in bankruptcy, and the creditor must have had reasonable cause to believe that a preference was thereby intended. *Seager v. Lamm*, 104 N. W. 1, 95 Minn. 325.

The return of excessive margins by an insolvent stockbroker to a customer does not constitute a preference, forbidden by Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, where the customer had demanded settlement, and, on the following day, the sum paid over was taken into account in the settlement before turning over to the customer stock belonging to him, according to the understanding of the parties. *Richardson v. Shaw*, 147 Fed. 659, 77 C. C. A. 643; *Id.*, 28 Sup. Ct. 512, 517, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981.

That a bankrupt who was insolvent paid \$2,600 of his money to creditors of his wife did not constitute a "preference" under Bankruptcy Act, § 60a, 30 Stat. 562, though the effect of such payment was to reduce the percentage which would otherwise be paid to the petitioning creditor. *In re Kayser*, 177 Fed. 383, 385, 100 C. C. A. 615.

A "preference" within the bankruptcy act is not the same as a "fraudulent transfer" of a bankrupt's assets. In a preferential transfer, the fraud is technical and infringes the rule of equal distribution among all creditors which it is the policy of the court to enforce when all cannot be fully paid; while in a "fraudulent transfer" the fraud is actual, in that the bankrupt has secured an advantage for himself out of what should belong to his creditors. Where a bankrupt with knowledge of insolvency assigns certain accounts to secure advances from a banker and at once uses the money so obtained to pay favored creditors, the

transaction, while constituting a "preference," shows no intent to defraud except inferentially by a preferential payment, and therefore is not a "fraudulent transfer" prohibited by Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564. *Van Iderstine v. National Discount Co.*, 174 Fed. 518, 519, 521, 98 C. C. A. 300 (syllabus pars. 4, 5).

"A 'preference,' in its legal as well as in its ordinary sense, implies a party who prefers; but a bankrupt, after the appointment of a receiver, cannot, by doing or omitting anything, prefer anybody. He has no longer any title to any property with which he can prefer any creditor." *Ryttenberg v. Schefer*, 181 Fed. 313, 317.

#### **Same—Conditional sale to bankrupt**

Where stoves sold to a bankrupt for installation in his buildings under a conditional contract of sale were actually delivered, accepted, and used therein, such conditional sale contract, if otherwise valid, was not objectionable as a "preference," though made within four months prior to the bankruptcy. *In re Cohen*, 163 Fed. 444, 445.

#### **Same—Conveyance to bankrupt's wife**

A bankrupt within four months of adjudication of bankruptcy conveyed his interest in mill property to his wife, who paid full value. He owned no other property at the time, and the wife knew his financial condition, and that the conveyance was made to enable him to pay a creditor, and thereby relieve an indorser from liability. She had no use for the property conveyed. Held, that the conveyance was a "preference" within the bankruptcy act, and must be set aside at the suit of the trustee in bankruptcy. *McKay v. Weager*, 134 N. Y. S. 66, 67.

#### **Same—Deposit in bank**

Transfers of property amounting to preferences, within the bankruptcy act of 1898, contemplate the parting with the bankrupt's property for the benefit of the creditors and the consequent diminution of the bankrupt's estate. It is such transactions operating, to defeat the purposes of the act, which under its terms are preferences. Insolvents, by depositing money in a bank on an open account, subject to checks, do not thereby make a transfer of property amounting to a preference. *New York County Nat. Bank v. Massey*, 24 Sup. Ct. 199, 201, 192 U. S. 133, 48 L. Ed. 380.

Money deposited in a bank in the ordinary course of business by an insolvent within four months of the time he is adjudged a bankrupt is not a transfer of property amounting to a preference within the meaning of the Bankruptcy Act, and the bank may apply such deposit on a debt due from the bankrupt. *Habegger v. First Nat. Bank of St. Paul*, 103 N. W. 216, 217, 94 Minn. 445, 110 Am. St. Rep. 379.



**Same—Exchange of property**

A transfer which does not diminish the estate of a bankrupt, but which constitutes only a fair exchange of property, is not a "preference." *McDonald v. Clearwater Short-line Ry. Co.*, 164 Fed. 1007, 1011 (citing *Cook v. Tullis*, 85 U. S. [18 Wall.] 332, 21 L. Ed. 933).

**Same—Intent of debtor and knowledge or belief of creditor**

A "preference," such as offends the bankruptcy act, must be one likely in its results to defeat the collection by other creditors of their claims. Essential to such a preference, therefore, is insolvency. Knowledge or a reasonable cause to believe that a preference is intended involves knowledge of a reasonable cause to believe that insolvency exists as a matter of fact. *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 99 N. W. 121, 123, 123 Iowa, 432.

Bankr. Act, § 60b, which makes a preference voidable if the creditor "or his agent acting therein shall have had reasonable cause to believe" that a preference was intended, states the whole law on that subject, and it is immaterial how or when the agent obtained his knowledge, or that he had confidential relations with the bankrupt, or personal interests which prevented him from disclosing his knowledge to his principal. *Campbell v. Balcomb*, 183 Fed. 766, 767, 106 C. C. A. 474.

To constitute a "preference" within Bankr. Act, § 60a, a mere intent to prefer is not sufficient, but the test is whether it was given when the debtor was insolvent and within four months of the filing of the petition in bankruptcy, and whether the enforcement thereof gives any creditor a greater percentage of his debt than any other creditor of the same class. *Blyth & Fargo Co. v. Kastor*, 97 Pac. 921, 924, 17 Wyo. 180.

The test of a "preference" within section 60a is whether the person while insolvent performed the act therein described within the prescribed time, and with the effect stated; the intention of the debtor being material only in ascertaining whether the preference is voidable. *Lynch v. Bronson*, 69 Atl. 538, 540, 80 Conn. 566.

Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562, declares a recoverable "preference" to consist of a transfer of property within four months of the filing of the petition by a person who is insolvent, when the person to whom the transfer is made shall then have reasonable cause to believe that the enforcement of the transfer will effect a preference. Held, that where, at the time the bankrupts transferred certain choses in action to the receiver of a bank to secure an overdraft, the receiver did not have reasonable cause to believe that the bankrupts were insolvent, as distinguished from mere ground

for suspicion that they might be, and their financial condition was such at the time of the transfer that the bankrupts themselves might reasonably have thought that they were not insolvent, the transfer was not voidable. *In re F. M. & S. Q. Carille*, 199 Fed. 612, 617.

The bankrupts being largely interested in a stock pool, in accordance with the custom of brokers dealing on the New York Stock Exchange, obtained a clearance loan of \$400,000 from defendant bank on January 19, 1910. The pool having collapsed, and the bank ascertaining that the brokers were in difficulties, the cashier demanded additional securities, which were thereupon deposited, which, with a deposit of \$54,048.08, was received just prior to the brokers' suspension. The clearance loan was charged to the brokers' deposit account, which was credited with the amount of the deposit received, whereupon the account was closed, and a loan put through for the debit balance. Held that, though the deposit might have reached the bank before the brokers were absolutely insolvent, yet the bank knew of the firm's possible insolvency, and that not only the deposit, but the transfer of the securities, constituted a "preference," recoverable by the bankrupt's trustee. *Ernst v. Mechanics' & Metals Nat. Bank of New York*, 200 Fed. 295, 298.

**Same—Judgment**

In order to allege a voidable preference under Bankr. Act, §§ 60a, 60b, and amendment thereto, approved February 5, 1903, where the act complained of is the procuring of or suffering a judgment to be entered against the bankrupt in favor of any person, it is necessary, among other averments, to allege that at the time of the rendition of the judgment the judgment debtor was insolvent, and that by suffering said judgment to be entered against him he intended thereby to give a preference, and that the judgment creditor had reasonable cause to believe that the judgment debtor so intended, and that the judgment creditors benefiting thereby would receive a greater percentage of their debt than other creditors of the same class. *Rodolf v. First Nat. Bank of Tulsa*, 121 Pac. 629, 630, 30 Okl. 631, 41 L. R. A. (N. S.) 204.

Under Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562, defining a "preference," and section 1, subd. 25 (30 Stat. 545), defining a "transfer," and section 3, subd. 8 (30 Stat. 5406), declaring what shall constitute an act of bankruptcy, the act of a debtor, while insolvent, in permitting certain creditors to recover and docket a judgment against her so as to acquire a lien on real estate, and in permitting such judgment to remain a lien until one day before the expiration of four months from the date it was so docketed, constituted a "preference" and an available

act of bankruptcy. In re Tupper, 163 Fed. 766, 772.

Where an insolvent debtor within four months of the filing of the petition in bankruptcy voluntarily confessed judgment in favor of a creditor holding past-due notes and knowing of the insolvency, and the creditor purchased the debtor's property at execution sale, subject to prior judgments which he paid, and the debtor had reasonable cause to believe that the transaction would effect a preference, there was a "preference" within Bankruptcy Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562, as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842, defining a preference and authorizing the trustee in bankruptcy to avoid preferences. Grant v. National Bank of Auburn, 197 Fed. 581, 588.

#### Same—Mortgage

Under the law of Texas, by which the failure to record a chattel mortgage as provided by Rev. St. Tex. 1895, art. 3328, does not affect its validity as between the parties, or as against general creditors of the mortgagor, having no lien, such a mortgage is not one which is required to be recorded, within the meaning of Bankr. Act, § 60a, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799; and, a chattel mortgage given in good faith more than four months before the bankruptcy of the mortgagor does not constitute a preferential transfer, under said section, although it was not recorded until within such time. Meyer Bros. Drug Co. v. Pipkin Drug Co., 186 Fed. 396, 397, 398, 69 C. C. A. 240.

A Missouri state bank lent to a corporation, the president of which was also president and a director of the bank, sums in excess of the limit allowed by the law of the state, and held the corporation's notes therefor. The bank examiner required the indebtedness to be reduced, whereupon it was divided and notes of other parties connected with the officers, some of whom were irresponsible, were substituted for a portion of it; all being secured by a mortgage on the corporation's property which was not recorded. Later, on the insistence of the bank examiner, others, including the cashier of the bank, indorsed such notes. The cashier, who made the examinations, afterward assumed all of the notes, taking a note and mortgage from the corporation to himself therefor, and surrendering the bank's mortgage. The corporation was insolvent when both mortgages were given, as all parties had reasonable cause to believe, and became a bankrupt within four months after making the mortgage to the cashier. Held that, notwithstanding the substitution of the individual notes for those of the corporation, it remained the real debtor, and that by indorsing such notes the cashier became its creditor; that the mortgage to him was void as a preference under Bankr. Act, § 60b, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799.

McAtee v. Shade, 185 Fed. 442, 450, 107 C. C. A. 512.

Bankr. Act, § 60 (b), making void preferences given within four months before filing of a petition in bankruptcy, refers to existing debts, and not to a mortgage given bona fide for a present consideration, not in contemplation of bankruptcy, and duly recorded. Neill v. Barbaree, 70 S. E. 638, 135 Ga. 771.

A mercantile dealer had sold a bankrupt goods for only a few months prior to his bankruptcy. He was slow in making payments, and, learning that he had placed a mortgage on his stock, the creditor sent an attorney to look after the claim. The bankrupt stated to him that he did not have sufficient capital to meet his bills promptly, but was doing a profitable business and was entirely solvent; that he had an offer for his stock in cash and land amounting in value to a sum largely in excess of his indebtedness, which he could accept at once. The attorney advised its acceptance and meantime took a chattel mortgage on the stock for the amount of his claim. The debtor was, in fact, insolvent, and became within four months thereafter bankrupt. Held, that such facts supported a finding of the District Court that the creditor did not have a reasonable cause to believe, when the mortgage was taken, that a "preference" was intended, and that it was not "voidable" under Bankr. Act, § 60b, 30 Stat. 562. Hussey v. Richardson-Roberts Dry Goods Co., 148 Fed. 598, 599, 78 C. C. A. 870.

Where a mortgage given by a corporation includes after-acquired property, and is valid between the parties, and the mortgagor makes default, and under the terms of the mortgage the property is turned over to the transferee of the mortgage, the delivery of the property gives effect to the mortgage as to after-acquired property, and no "preference" is obtained under the mortgage within the meaning of a statute forbidding preferences by insolvent corporations. Little v. National Bank of Mena, 133 S. W. 166, 167, 97 Ark. 57.

In order to make a "preference" by mortgage unlawful, it is necessary that the preference shall have been made with the intention on the part of the bankrupt to prefer the person to whom the mortgage is given, and that the mortgagee at the time he receives the mortgage shall have reasonable cause to believe that a preference to him was intended, and that the debtor is insolvent. Summerville v. Stockton Milling Co., 76 Pac. 243, 244, 248, 142 Cal. 529.

A bank, which took a chattel mortgage from a debtor to secure a past indebtedness and withheld the same from record for nearly a year, and until a few days prior to the bankruptcy of the mortgagor, held to have had reasonable cause to believe that he was in failing circumstances when it was taken.

and insolvent when it was recorded, which rendered it a voidable "preference," under Bankr. Act, § 60, cls. "a," "b," 30 Stat. 562, as amended in 1903 (82 Stat. 799). In re Hickerson, 162 Fed. 345, 347.

In the absence of proof or findings of insolvency of bankrupt when he gave a mortgage, or when it was recorded, or of the mortgagee having reasonable cause to believe that a preference was intended, which facts are by Bankr. Act §§ 60a, 60b, 30 Stat. 562, made conditions of a transfer being a voidable preference, the mortgage cannot be held to be a preference. In re Clifford, 136 Fed. 475-477.

#### **Same—Payment of indebtedness in general**

Where a creditor of a bankrupt during the period of insolvency held one or more claims against the bankrupt and received payment of one or more in whole or in part, such payment constitutes a "preference," and such preference must be returned, or the particular claim upon which the payment was made cannot be allowed, nor can other independent or distinct claims be allowed upon which no payment whatever was made. In re Delling, 124 Fed. 852, 854.

Where the jury found that a partial payment made by the debtor to a creditor within four months preceding the time the debtor was adjudged a bankrupt did not enable that creditor to obtain any greater percentage of its debt than the bankrupt was able to pay to his other creditors, there was no illegal "preference" within the meaning of the Bankruptcy Act. John S. Brittain Dry Goods Co., v. Bertenshaw, 75 Pac. 1027, 68 Kan. 734.

A partnership did not commit an act of bankruptcy by giving a "preference," within Bankr. Act July 1, 1898, c. 541, § 3a(2), 30 Stat. 546, by paying certain creditors in full, although at the time its liabilities exceeded its assets, where its members, who all resided within the jurisdiction, were amply solvent and worth many times the amount of the partnership debts. Washington Cotton Co. v. Morgan & Williams, 192 Fed. 310, 311, 112 C. C. A. 568.

A payment of a debt by an insolvent New York corporation on the day before a petition in bankruptcy was filed against it with intent to prefer the creditor is a "preference," voidable by its trustee under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 565, and the stock corporation law of New York (Laws 1892, p. 1838, c. 688, § 48), which makes void any payment made by a corporation when insolvent, or when its insolvency is imminent, with intent to prefer a creditor. Wright v. William Skinner Mfg. Co., 162 Fed. 315, 317, 89 C. C. A. 23.

Payment by an insolvent debtor of a percentage on claims of a part of his creditors, which does not lessen the percentage

which the other creditors will receive, is not a "preference," for under Bankr. Act July 1, 1898, c. 541, § 60b, providing that if a bankrupt shall have given a preference, and the person receiving it or to be benefited thereby, or his agent, shall have reasonable cause to believe that it was intended to give a preference, it shall be voidable by the trustee, the party receiving the payment must have had reasonable ground to believe that he was being given a preference before he can be compelled to refund. Wilson v. Welgle, 62 Atl. 458, 461, 69 N. J. Eq. 561 (citing Hackney v. Raymond Bros. Clarke Co., 94 N. W. 822, 99 N. W. 675, 68 Neb. 624, 10 Am. Bankr. Rep. 213).

A payment by a debtor, subsequently adjudged a bankrupt, is not a preferential payment within the bankruptcy act, unless the creditor had reasonable cause to believe that the debtor was insolvent. Stuart v. Farmers' Bank of Cuba City, 117 N. W. 820, 822, 137 Wis. 66, 16 Ann. Cas. 821.

Payments of money by a bankrupt to creditors, enabling them to obtain a greater percentage of their debts than other creditors of the same class, made within four months prior to the filing of the bankruptcy petition, constitute illegal and voidable preferences under the federal bankruptcy act, if the creditors receiving the payments have reasonable cause to believe that preferences are thereby intended. Maxwell v. Davis Trust Co., 71 S. E. 270, 271, 69 W. Va. 276.

If a creditor accepts only that part of his debt to which he would be entitled if all the property liable to the debtor's debts should be apportioned among the creditors, there is no preference in violation of Bankr. Act, § 60 (a, b), though the debtor be hopelessly insolvent. Herzberg v. Riddle, 54 South. 635, 637, 171 Ala. 368.

Section 60a, Bankr. Act, 30 Stat. 562, as amended, provides as follows: "A person shall be deemed to have given a 'preference' if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property; and the effect of the enforcement of such a judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt, than any other of such creditors of the same class." The payment by an insolvent saloonkeeper, at various times within four months prior to the filing of a petition in involuntary bankruptcy against him, of considerable sums of money to two creditors, in part on account of current expenses of his business and in part on account of antecedent debts, while another large creditor was paid nothing during such time, held to constitute a transfer of property with intent to prefer the

creditors paid, and to be an act of bankruptcy, under Bankr. Act July 1, 1898, § 3a(2), 30 Stat. 546. In re Foley, 140 Fed. 300, 301.

A payment to a creditor having an inchoate lien is not a "preference." In re Lynn Camp Coal Co., 168 Fed. 998, 1000.

Where a loan was procured long before a bank's insolvency, it could not be regarded as having been obtained by the depositor in contemplation of the insolvency, and, where the amount due from the bank on the deposit of the borrower was greater than the amount due on the note at the time of the receiver's appointment, the depositor is entitled to the difference, and such allowance is not a "preference" within the meaning of the insolvency act. Steelman v. Atchley, 135 S. W. 902, 904, 98 Ark. 294, 32 L. R. A. (N. S.) 1060 (citing Kirby's Dig. § 951).

It is only where new sales succeed payments, and the net result is to increase the value of the estate, that payments made by an insolvent debtor on a running account are not to be considered as preferential transfers, under Bankr. Act, § 60a, 30 Stat. 562, which must be surrendered, under section 57g, before the creditor can prove the remainder of his claim. Joseph Wild & Co. v. Provident Life & Trust Co., 153 Fed. 562, 564, 82 C. C. A. 516.

#### **Same—Payment of note or mortgage**

The payment of a bank by an insolvent, within four months prior to bankruptcy, of notes given to third persons, but which have been indorsed to and are owned by the bank, constitutes a preferential payment, within Bankr. Act, § 60a, 30 Stat. 562. In re George M. Hill Co., 130 Fed. 315, 318, 64 C. C. A. 561, 66 L. R. A. 68.

Where a bankrupt corporation made a note to another corporation which indorsed and discounted the same with defendant bank, and within four months prior to the bankruptcy, and when both corporations were insolvent and known to be so by defendant, the indorser paid the note which was not then due and charged the amount to the bankrupt which had goods or a credit for goods with the indorser of greater value than the amount of the note, and the bankrupt was a party to the arrangement, and the officers of the two corporations were practically the same, the transaction was in effect a "preference" by the bankrupt to defendant which was recoverable in equity by the trustee. Mason v. National Herkimer County Bank of Little Falls, 163 Fed. 920, 922.

A preferential payment of notes by bankrupts cannot be recovered from an accommodation indorser of such notes under the Bankruptcy Act, where there is no evidence to show that such indorser advised, or procured the payment, or even that he had knowledge of it until after it had been made. Reber v. Shulman, 183 Fed. 564, 565, 106 C. C. A. 110.

Where a mortgagee purchased a restaurant from the mortgagor, the consideration being the satisfaction of the mortgage and the payment of another debt, and the restaurant was of greater value than the consideration, and the transaction occurred within four months of the mortgagor's voluntary petition in bankruptcy, it was a "preference" under the national Bankruptcy Act, § 60, providing that, if an insolvent within four months of bankruptcy transfers his property so as to enable one creditor to obtain greater percentage of the debt than the others, it is a preference, and section 70 having reference to the title of the trustee in bankruptcy. Where the only mortgagee of an insolvent's property receives property in excess of the value of the mortgage, the transaction to the extent of the excess is a preference, for, while the mortgagee as the only one of his class has a right under the mortgage to payment prior to unsecured creditors, that right does not entitle him to receive property in excess of the mortgage, to the exclusion of unsecured creditors; and hence the excess may be recovered from him for the benefit of the others. Kerr v. Melum, 130 N. W. 83, 85, 27 S. D. 208.

The payment to a bank by an insolvent corporation within four months prior to its bankruptcy, and at a time when the bank had reasonable cause to believe it to be insolvent, of notes in favor of the corporation which it had discounted at the bank and indorsed, or of notes given by it to third parties and discounted by the bank constituted voidable preferences given to the bank which it was required to return under Bankr. Act, § 57g, 30 Stat. 560, as amended in 1903, by Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799, before it could prove a claim against the bankrupt estate. In re W. W. Mills Co., 162 Fed. 42.

Where a bank on the maturity of a bankrupt's note in good faith, and not merely for the purpose of appropriating the bankrupt's deposit to the benefit of another, set off such deposit against a note due the bank from the bankrupt, such set-off was not a "preference," within Bankr. Act, § 60a. Booth v. Prete, 71 Atl. 938, 939, 81 Conn. 636, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306.

Setting off a deposit against an insolvent depositor's note to a bank secured by a mortgage is not a preferential transfer under the bankruptcy act. Hooks v. Gila Valley Bank & Trust Co., 100 Pac. 806, 807, 12 Ariz. 315.

A "preference," within Stock Corporation Law (Laws 1901, p. 970, c. 354, § 45), providing that no payment by a corporation, when insolvent, with intent to give a "preference," shall be valid, is dependent, not on the position of the favored creditor alone, but upon his position as compared with that of other creditors. The test is, not whether

the favored creditor has received any advantage, but whether the general creditors have been put at a disadvantage by a payment which reduces or exhausts a fund to which they must look for their payment. The assets of a corporation are a trust fund for the payment of its debts and obligations, upon which its creditors have an equitable lien, both as against the stockholders and all transferees, except those purchasing in good faith and for value. When funds of an insolvent corporation are so distributed as to violate this principle, a "preference" is effected. The demand notes of a corporation held by a bank were fully protected by collateral of the president of the corporation and his wife. On the day before a petition in bankruptcy was filed against the corporation, and while it was insolvent, the notes were paid. Such payment amounted to a "preference" within the statute. *Wright v. Gansevoort Bank*, 103 N. Y. Supp. 47, 48, 52 Misc. Rep. 214.

Under Stock Corporation Law, Laws 1892, c. 688, § 48, providing that no conveyance, assignment of any property of such corporation, nor any payment made when the corporation is insolvent or its insolvency is imminent, with intent of giving a "preference" to any particular creditor over other creditors, shall be valid, a payment by an insolvent corporation representing the value of mortgages then held by the creditor as security is not preferential, but the payment by an insolvent corporation of notes secured by indorsement is preferential where the effect of such payment is to exhaust practically all the assets of the corporation, leaving nothing for other creditors. The statute applies whenever a corporation is insolvent or its insolvency is imminent if the payment therefor is made with intent on the part of the debtor to give a "preference" without regard to the creditor's intent or even his knowledge as to actual or imminent insolvency of the debtor. *Wright v. Gansevoort Bank*, 103 N. Y. Supp. 548, 550, 118 App. Div. 281.

#### **Same—Payment to attorney**

Payment by a bankrupt to his attorney immediately prior to the bankruptcy for services rendered, so far as the payment is beyond the amount of a reasonable allowance, is a "preference." In *re Shiebler*, 163 Fed. 545, 546.

To undertake to bring within the definition of a "preference," contained in Bankr. Act, § 60a, requiring a plenary action for its recovery, the protection given a bankrupt's estate because of a transfer of property or money to an attorney or counselor for services to be rendered in contemplation of filing a petition in bankruptcy, is to add to the clearly defined preferences contemplated by the act, and is to include entirely different transactions, not embraced in the statutory

definition of a "preference" as Congress has defined that term. *Re Wood*, 28 Sup. Ct. 621, 624, 210 U. S. 246, 52 L. Ed. 1046.

#### **Same—Pledge**

A pledge to secure an old obligation, enabling the creditor to obtain a greater percentage of his debt than any other, when made less than four months before the bankruptcy, constitutes a "preference" within Bankr. Act 1898, § 60, providing that a person shall be deemed to have given a "preference" if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Stewart v. Hoffman*, 77 Pac. 689, 691, 31 Mont. 184.

#### **Same—Transfer of property**

In order to constitute a "preference," the transfer must be made by the debtor while insolvent. In *re Sayed*, 185 Fed. 962, 964.

A "preference," within Bankr. Act, § 60b, 30 Stat. 562, providing that if a bankrupt shall have given a preference, etc., it shall be avoidable by the trustee, and he may recover the property or its value from such person, is a transfer by an insolvent person made within four months before the filing of a petition in bankruptcy, which enables any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Manning v. Evans*, 156 Fed. 106, 109.

A "preference" in bankruptcy is a transfer which will enable one of the insolvent's creditors to obtain a greater percentage of his debt than other creditors of the same class. It contemplates a class of existing creditors, one of whom is singled out for a preference. It does not include security given for a debt created at the time; the word "preference" in its ordinary significance meaning that one person is favored above others who before stood on an equal footing. *Claridge v. Evans*, 118 N. W. 198, 200, 137 Wis. 218, 25 L. R. A. (N. S.) 144.

To constitute a "preference," it must appear that the bankrupts have made a transfer of their property, the effect of which was to enable one of their creditors to obtain a greater percentage of his debt than others of such creditors of the same class. *Engel v. Union Square Bank*, 87 N. Y. Supp. 1070, 1074, 94 App. Div. 244.

Where an insolvent transfers any of his property, thereby enabling the creditor to whom the same is transferred to obtain a greater percentage of his debt than any other creditor of the same class, such transfer is a "preference" within the Bankruptcy Act. *Kahn & Bro. v. Bledsoe*, 98 Pac. 921, 922, 22

Okl. 666, 182 Am. St. Rep. 665 (citing *Gans v. Ellison*, 114 Fed. 737, 52 C. C. A. 366; *Wilson Bros. v. Nelson*, 22 Sup. Ct. 74, 183 U. S. 191, 46 L. Ed. 147; *Pirie v. Chicago, Title & Trust Co.*, 21 Sup. Ct. 906, 182 U. S. 438, 45 L. Ed. 1171).

Though the fact that an alleged bankrupt parted with the possession of property levied on under an attachment to the attaching officer conditionally and as security be held to constitute a "transfer" of the property attached, as defined by Bankr. Act, § 1a (25), 30 Stat. 545, it was essential, in order that such transfer should constitute an act of bankruptcy, that it so operate as to constitute a "preference," as defined by section 60a, to wit, that the enforcement of the transfer will enable one of the bankrupt's creditors to obtain a greater percentage of his debt than any other creditor of the same class. In *re Crafts-Riordon Shoe Co.*, 185 Fed. 931, 933.

It is a necessary condition precedent to a preference that there shall have been a transfer of property by the bankrupt whereby a creditor is enabled to obtain a greater percentage of his debt than other creditors of the same class, as provided by Bankr. Act, § 60a, so that, if a conveyance attacked as a preference was originally and remained a nullity as against creditors and the bankrupt's trustee, there was no "transfer" within such definition. *Rosenbluth v. De Forest & Hotchkiss Co.*, 81 Atl. 955, 957, 85 Conn. 40.

Where a debtor, at the time it delivered a part of its stock in trade to a creditor, within four months of the filing of a petition in bankruptcy against it, had left stock in trade worth about \$2,500, and owned notes and open accounts worth about \$1,300, and owed about \$40,000, it was insolvent, and the transfer operated to give the creditor a voidable "preference," within Bankr. Act, § 60, cls. "a," "b," 30 Stat. 562. *Coleman v. Decatur Egg Case Co.*, 186 Fed. 136, 137, 108 C. C. A. 248.

A bankrupt was testamentary trustee of a number of estates from all of which he had embezzled funds. While insolvent, at the instance of the surety on one of his bonds, he deposited the remaining securities in his hands belonging to the estate with others to make up his shortage, and the same passed into the hands of his successor in the trust after his bankruptcy. Held, that in equity the trustee occupies always a double capacity, so that as an individual he might theoretically be a debtor to himself as a trustee, and prefer himself as such; that, while there is no contract liability so long as there is no default, a contract liability arises on the default; and that consequently the transfer of such substituted securities constituted a preference, and they were recoverable by his trustee under Bankr. Act, § 60b, 30 Stat. 562. *Clarke v. Rogers*, 183 Fed. 518, 525, 106 C. C. A. 64.

A bankrupt borrowed money prior to the filing of his petition in bankruptcy, to secure which he executed a deed of trust to certain personal property, which he claimed belonged to his wife. Thereafter he executed a bill of sale to the lender for a stock of goods and appurtenances, the purchase price being credited on the debt secured by the deed of trust, and omitted to list the property conveyed by the deed in his schedules in bankruptcy. He also claimed that the goods were sold for cash in good faith, while he believed himself perfectly solvent, and that the sale was not made to secure a pre-existing debt. Held, that such transfer did not constitute a "preference" which would bar his application for discharge. In *re Battle*, 154 Fed. 741, 742.

Where a bank executed its notes to a clearing house association in return for clearing house certificates and deposited collateral to secure payment, no such preference was created as is inhibited by Civ. Code 1895, § 1979, making any transfer in contemplation of insolvency, except for benefit of creditors, fraudulent and void, unless made to an innocent purchaser for value without notice of the condition of the bank. *Booth v. Atlanta Clearing House Ass'n*, 63 S. E. 907, 908, 132 Ga. 100.

In order to constitute a preference, the transfer must be made by the debtor with the intent on his part to give a preference, to wit, to pay one creditor, leaving others in danger of not being paid to the same extent, and a receiver must also believe that the debtor has such intent. Under the rule that one who receives security in exchange for a present loan is not of the same class as an existing creditor of the borrower, security given for a present loan is not a preference, though the borrower is insolvent. Where a bankrupt while solvent transferred a land contract to a bank to secure a present loan and future advances to a specified amount, each advancement, in effect, constituted a loan in exchange for a present security, and was not therefore a preference. In *re Sayed*, 185 Fed. 962, 964.

A transfer of property by a corporation as security for a past indebtedness, within four months prior to its bankruptcy when it was insolvent and the creditor had reason to believe it to be insolvent, is voidable as a preference under Bankr. Act, § 60b, 30 Stat. 562, even though such transfer was made in ratification of an unauthorized transfer made by an officer of the corporation before the four months period. In *re W. W. Mills Co.*, 162 Fed. 42, 47.

To constitute a voidable preference by transfer under Bankr. Act, § 60b, the transfer must have been such as to create a "preference," as defined in section 60a, and have been made with an actual, and not an attributed, intent on the part of the debtor to give a preference, and the creditor must have had reasonable cause to believe such preference

was intended. It is not sufficient to establish such actual intent on the part of the debtor that he was insolvent when the transfer was made or that a preference in fact resulted. *Debus v. Yates*, 193 Fed. 427, 430.

The amendment of Bankr. Act, §§ 60a, 60b, by Act Feb. 5, 1903, c. 487, § 13, by adding the provision that, "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required," has the effect of making recordable transfers, which were in fact preferential and so intended by both parties, voidable under subdivision "b," although they were made more than four months before the bankruptcy, where they were not recorded until within that time; but the transfer is still to be judged, in determining the question whether or not it constituted a voidable preference, as of the time when it was made, and not as though it first came into being at the time it was recorded, and unless when it was made the debtor was insolvent and actually intended a preference, and the creditor then had reasonable cause to believe it was so intended, it is not voidable. *Debus v. Yates*, 193 Fed. 427, 440.

Bankrupt was a man of large business affairs, both on his own account and through three corporations, of which he was principal stockholder and an officer; their aggregate business in one of the years just prior to the bankruptcy amounting to \$300,000. At about that time he contracted to sell a lot for \$1,500, accepting as part payment a note given to the purchaser by one of his corporations and indorsed by him. For legitimate reasons the deed was not made until more than a year after the contract, and within four months prior to the bankruptcy. The sale was made at the instance of the purchaser who desired the lot and expected to pay cash for it; the application of the note toward the purchase price being at the suggestion of the bankrupt. At the time of the transfer the bankrupt and the corporations were all in fact insolvent; but such condition had existed for some years, and during that time the bankrupt had kept the business of all going and had substantially reduced their indebtedness. He testified that until 10 days before he filed his petition, when certain creditors began to crowd him, he expected to pay out in full, and circumstantial evidence tended to support the statement. No claim was made of any other transfer which was either fraudulent or preferential, and no reason existed why he should prefer the purchaser of the lot, who was not pressing for payment. Held that, conceding that the bankrupt knew of the insolvency, the evidence was not sufficient to show that he intended a preference, or that the purchaser had reasonable cause to believe such preference was intended, so as to render the trans-

fer voidable. *Debus v. Yates*, 193 Fed. 427, 453-463.

A railroad contractor for the purpose of securing money to perform his contracts assigned to a bank all moneys which would become due from a railroad under a railroad construction contract, which money was to be paid directly to the bank to secure money then due the bank, and money thereafter to be advanced by the bank in reference to the contract until the indebtedness to the bank was satisfied. The assignment was made eight months before bankruptcy of the contractor and at the time of the assignment \$6,000 was owing the bank, and thereafter over \$15,000 was paid the bank by the railroad; the last payment of \$4,747.36 being made four days before bankruptcy. Held that, so far as the consideration was advances to be thereafter made, it was in the nature of a conditional sale, conditional because the bank was not compelled to advance the money if the credit failed, and the transfer became operative as soon as the advances were made, and hence such payments, including the payment of \$4,747.36, were not "preferential" within Bankr. Act, § 60a, as amended by Act Feb. 5, 1903, c. 487, § 13, though made within four months, since the transfer was a sale of credit in due course of business and not a preferential payment of a debt. Held, also, that since the transfer or sale of the credit was not to cover all advances which might be made by the bank to the debtor, but only those in reference to the particular railroad construction contract so far as the entire amount paid over by the railroad company to the bank exceeded the \$6,000 originally due and advances made by the bank for the particular railroad contract, the payment of \$4,747.36 was a preference, under Bankr. Act, § 60a. *Cox v. First Nat. Bank*, 52 South. 227, 231, 126 La. 88.

To constitute a preferential transfer, it is immaterial, under the bankruptcy act, to whom the transfer is made, if it be made for the purpose of paying the claims of one creditor in preference to those of others. A creditor of a bankrupt cannot escape the consequences of the bankrupt act regarding unlawful preferences by assigning his account to a purchaser of the property of the bankrupt, under an arrangement whereby such purchaser offers to assume the liability and satisfy such account, contingent upon the purchase of the bankrupt's property, and where, in the sale of such bankrupt's property, as a part of the consideration, such purchaser agrees to and assumes such liability, and reserves from the purchase price an amount sufficient to satisfy the same. *Hackney v. Hargreaves Bros.*, 99 N. W. 675, 677, 68 Neb. 624 (citing 5 Cyc. p. 294; *Goldman v. Smith*, 93 Fed. 132).

To constitute a "preference" voidable under Bankr. Act, § 60, as amended by Act Feb. 5, 1903, it is not necessary that the

transfer of the insolvent's property be made directly to the creditor. It may be made to another, for his benefit. *National Bank of Newport v. National Herkimer County Bank of Little Falls*, 32 Sup. Ct. 633, 635, 225 U. S. 178, 58 L. Ed. 1042.

In view of Bankr. Act, § 60a, defining a "preference" within contemplation of the bankrupt law as being a transfer the effect of which will be to enable any creditor to obtain a greater percentage of his debt than other creditors of the same class, and section 3, providing that a transfer, while insolvent, of any portion of his property with intent to prefer a creditor over other creditors, shall be an act of bankruptcy, it was held that a mere preference does not amount to an act of bankruptcy, but that there must be also an intent to prefer. *Thompson v. First Nat. Bank*, 36 South. 65, 67, 84 Miss. 54.

Where an insolvent transferred property, and within four months thereafter was adjudicated a bankrupt, such transfer was not voidable, as a "preference" under the bankrupt act, unless at the time of the transfer the transferee had reasonable cause to believe that it was intended thereby to give him a preference over other creditors. *Cummings v. Kansas City Wholesale Grocery Co.*, 99 S. W. 470, 471, 123 Mo. App. 9.

Under Bankr. Act, § 60, para. "a" and "b," defining a preference as a transfer of property by an insolvent, the effect of which is to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class, and declaring preferences made within four months of bankruptcy proceedings voidable by the trustee if the person receiving the same shall have had reasonable cause to believe that a preference was intended, it is not enough, to constitute a voidable preference, that the creditor suspected, or had cause to suspect, that a preference was intended; but he must have had reasonable cause to so believe. *Johnston v. George D. Witt Shoe Co.*, 50 S. E. 153, 156, 103 Va. 611.

Under Bankr. Act, § 60, defining a "preference" (a) to consist in the payment by a debtor to one creditor of a greater percentage of his debt than he is able to pay to all other creditors of the same class; and (b) denouncing the penalty imposed on the giving of a preference to be that if such preference has been made and the person receiving it or his agent, acting in the matter for him, had reasonable cause to believe that a preference was intended, then the same is voidable and made recoverable by the trustee, the penalty is wholly independent of any idea of fraud. To make a transfer voidable within the provisions of the act, it is necessary to establish four acts: (1) The insolvency of the transferor; (2) the obtaining by the creditor of a larger percentage of his debt

than any other creditor of the same class; (3) the giving of a preference within four months before the filing of a petition in bankruptcy; (4) reasonable cause upon the part of the creditor to believe that a preference was intended. The creditor must have reasonable cause to believe the debtor insolvent in fact as a foundation for reasonable cause to believe that an unlawful preference was intended. *Wright v. Cotten*, 52 S. E. 141, 142, 140 N. C. 1 (citing *Pirle v. Chicago Title & Trust Co.*, 21 Sup. Ct. 903, 182 U. S. 438, 45 L. Ed. 1171; *In re Fixen*, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605; *Sherman v. Luckhart*, 70 S. W. 388, 96 Mo. App. 320; *Sebring v. Wellington*, 71 N. Y. Supp. 788, 63 App. Div. 498; *In re Eggert*, 98 Fed. 843, 3 Am. Bankr. Rep. 541; *Grant v. First Nat. Bank*, 97 U. S. 80, 24 L. Ed. 971).

Under Bankr. Act, § 60, 30 Stat. 562, providing that a transfer by an insolvent within four months preceding bankruptcy shall be a preference if it enables a creditor to obtain a greater percentage than others of his class, intent of insolvent to give a preference is immaterial; it being sufficient that the transferee have reasonable cause to believe that a preference was intended. *Alexander v. Redmond*, 180 Fed. 92, 95, 103 C. C. A. 446.

Where a corporation, to secure past indebtedness and a present loan, assigned notes and security held by it, and later, with the consent of the assignee, took the same back and gave in their place its own notes and trade-marks as security, the fact that the corporation was insolvent at the time of the assignments does not show that they were for the purpose of giving the "preference" prohibited by section 48, Stock Corporation Law (Laws 1892, p. 1838, c. 688), where there was no evidence that the assignee knew of the insolvency at the time. *Van Slyck v. Warner*, 103 N. Y. Supp. 1, 4, 118 App. Div. 40.

A "preference" and a "fraudulent transfer" of a bankrupt's assets, within the bankruptcy act, are not the same; the fraud in a preferential transfer being technical and consisting in the infraction of the rule of equal distribution among all creditors, while in a fraudulent transfer, the fraud is actual in that the bankrupt has secured an advantage for himself out of what in law should belong to his creditors. Where a creditor attempted to take possession of the property of his debtor, over which he had previously attempted to obtain a lien by a bill of sale and a conditional sale, and must, from the circumstances, have known that such debtor was insolvent, it was a "preference" within the meaning of the bankrupt act and is not permissible. *Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co.*, 138 S. W. 412, 415, 152 Mo. App. 401.



A transfer of assets by a bankrupt to a creditor within four months prior to bankruptcy, though with intent on the bankrupt's part to prefer the creditor, is not a voidable preference, unless the creditor had reasonable cause to believe that a preference was intended, or unless the proof shows that the creditor knew or ought to have known the substantial truth concerning the bankrupt's financial condition. In *re Houghton Web Co.*, 185 Fed. 213, 214.

While a bankrupt's trustee, in order to set aside a transfer as a "preference," is not required to show that the transferee had actual knowledge that a preference was intended by the transfer, or that the transferor was insolvent, it must be shown that the transferee was in possession of some fact or facts which would have led a reasonably prudent man to inquire, and that the result of such inquiry would have disclosed the transferor's insolvency. *Andrews v. Kellogg*, 92 Pac. 222, 223, 41 Colo. 35.

#### PREFERENCE IN DESIGNATION

The words "preference in designation," as used in Rev. St. 1898, § 35, providing that, when two or more conventions or caucuses shall be held and the nominees thereof certified, each claiming to be the regular convention or caucus of the same political party, "preference in designation" shall be given to the nominations of the ones certified by the committee which has been officially certified to be authorized to represent the party, suggests at once and unmistakably two or more designations, one for the party ticket which is regular, and one for each of those which are irregular. *State ex rel. Cook v. Houser*, 100 N. W. 964, 974, 122 Wis. 534.

#### PREFERENCE SHAREHOLDER

As shareholder, see Shareholder.

"The expression 'preference shareholder' is equivocal. It by no means clearly indicates what are the rights of those to whom it applies. \* \* \* All which the language fairly imports is that some preference is given to the person to whom the language applies. How far the preference is to extend must be ascertained by other media than the mere expression itself." *Hackett v. Northern Pac. Ry. Co.*, 140 Fed. 717.

#### PREFERENTIAL ASSIGNMENT

A testamentary trustee who is also a beneficiary executed a conveyance of his interest in the trust estate to a third person, and the grantee reconveyed the same interest to the trustee, with power to manage and sell the same for the benefit of the legatees; any balance to be for the benefit of the trustee. Held, that the transaction was not a "preferential assignment," within Act April 17, 1843 (P. L. 273), providing that assignments in trust by debtors on account of their inability to pay their debts, with in-

tent to prefer one or more creditors, shall be construed to inure to the benefit of the creditors. In *re Hart's Estate*, 60 Atl. 728, 729, 211 Pa. 219.

#### PREFERENTIAL RIGHT

In an action against a street railroad for personal injuries, error in instructing that the street railroad had no prior right to that part of the street occupied by its track, as against pedestrians and vehicles, is not cured by an instruction that it had a superior and preferential right, since there is no distinction between a "prior" right and a "superior" or "preferential" right, and hence the two instructions were clearly inconsistent and left the jury to accept either and disregard the other. *Denver City Tramway Co. v. Gustafson*, 121 Pac. 1015, 1019, 21 Colo. App. 478.

While street cars and drivers of vehicles, equestrians, and pedestrians, as a general rule, have concurrent rights to occupy the public street crossings in a city, the right of the railroad at such point is superior, in the sense that it is preferential, as to the right of way. *Denver City Tramway Co. v. Norton*, 141 Fed. 599, 604, 73 C. C. A. 1.

#### PREFERRED CLAIMS

Laws 1887, p. 308, as amended by Act June 21, 1895 (Laws 1895, p. 242; *Starr & C. Ann. St. p. 2596, c. 82, par. 56*), provides that when the business of any person is suspended by the action of creditors, or is put in the hands of a receiver or trustee, the debts owing to laborers or servants shall be "preferred claims," and the laborers or employes shall be preferred creditors, and shall be first paid in full. Held, that such act merely gave a preference to claims for labor or services over claims of other simple contract creditors, and did not create a preferred "lien" in favor of labor claims so as to give them priority over a claim secured by a valid chattel mortgage on the insolvent's property. *Seymour v. Berg*, 81 N. E. 339, 342, 227 Ill. 411, 10 Ann. Cas. 840.

To establish a preference under *Burns' Ann. St. 1901, §§ 7051, 7058*, making debts of insolvents, owing to laborers or employes, "preferred debts" against the insolvent estate, it is essential that it be alleged and proved that the labor was performed in connection with the business in which the insolvent debtor was engaged. *McDaniel v. Osborn (Ind.)* 72 N. E. 601, 603.

#### PREFERRED CREDITORS

A creditor is not a "preferred creditor" disqualified from filing a petition in bankruptcy against the debtor because of the receipt of the payment more than four months previously, which, if made within that time, would have been preferential, but is not so

under the Bankruptcy Act of 1898. In re Girard Glazed Kid Co., 129 Fed. 841, 842.

Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562, defines "preferred creditors" as follows: A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Coder v. Arts*, 152 Fed. 943, 948, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372.

#### PREFERRED DIVIDEND

Preferred stock in a corporation is that entitling the holder to dividends from earnings before the common stock can receive a dividend therefrom. The relation of debtor and creditor, however, does not exist between the preferred stockholders and the corporation, as to any right to a preferred or guaranteed dividend until the dividend is declared; the preferred dividend being nothing more than money paid out of profits by a corporation to one class of shareholders in priority to that to be paid to another class. *Kain v. Angle*, 69 S. E. 355, 357, 111 Va. 415.

#### PREFERRED LIEN

The provision in a certificate of preferred stock that it "shall be a preferred lien on the assets of the company," where the entire language of the certificate shows no intention to place the stockholder in a position of a creditor, only gives a preferred lien on the assets of the corporation, when in liquidation, over the common stockholders. *Weaver Power Co. v. Elk Mountain Mill Co.*, 69 S. E. 747, 748, 154 N. C. 76.

#### PREFERRED STOCK

Merely denominating shares as "preferred stock" in a legislative act does not per se define the rights and character of the holder of such shares, which depend on the essential qualities of the transaction authorized by the statute. As a general rule holders of "preferred stock" are not entitled to dividends unless the earnings justify paying them, and the principal privileges such stockholders enjoy is priority of claim to dividend over the holders of common shares, and the holder of "preferred stock" was not entitled to recover semiannual dividends on a stock not declared by the corporation. *Kidd v. Puritana Cereal Food Co.*, 122 S. W. 784, 788, 145 Mo. App. 502.

A loose expression is used when it is said that "preferred stock" is only a form of a mortgage. Whatever the extent of the preference may be, speaking generally, stock, whether it be common or preferred, does not

represent indebtedness. Its possession means ownership of the company. *Sternbergh v. Brock*, 74 Atl. 166, 168, 225 Pa. 279, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877.

A "preferred stockholder" of a corporation is not a creditor of the corporation, and must be confined to his rights as a stockholder. The provision in a certificate of preferred stock that it "shall be a preferred lien on the assets of the company," where the entire language of the certificate shows no intention to place the stockholder in a position of a creditor, only gives a preferred lien on the assets of the corporation, when in liquidation over the common stockholders. *Weaver Power Co. v. Elk Mountain Mill Co.*, 69 S. E. 747, 748, 154 N. C. 76.

Securities issued by a corporation, which were denominated "bonds," contained a promise to pay a certain sum at a fixed time with a stated interest, and further provided that, after the payment of specified dividends on the stock, the holders of the bonds were entitled to a proportionate share in the surplus income, if any. Held, that the securities were in effect a species of preferred stock, as "stock" confers upon the holder a part ownership of the assets with the right to share in the profits of the corporation, and on dissolution in the assets after payment of debts, but without a lien on the property, while a "bond" is an obligation to pay a fixed debt with interest, which debt, if secured, is not wiped out if the security proves insufficient. *Cass v. Realty Securities Co.*, 132 N. Y. Supp. 1074, 1077, 148 App. Div. 96.

Where defendant agreed to pay plaintiff for services a portion of the preferred stock of a corporation to be organized, the use of the term "preferred stock" in such contract, in connection with defendant's guaranty of interest, may fairly be taken to indicate stock whose par value is to be based upon the actual value of the property it represents, and not upon any fictitious or speculative value. *Critchfield v. Julia*, 147 Fed. 65, 71, 77 C. C. A. 297.

"Preferred stock" in a corporation is that entitling the holder to dividends from earnings before the common stock can receive a dividend therefrom. The relation of debtor and creditor, however, does not exist between the preferred stockholders and the corporation, as to any right to a preferred or guaranteed dividend until the dividend is declared; the preferred dividend being nothing more than money paid out of profits by a corporation to one class of shareholders in priority to that to be paid to another class. *Kain v. Angle*, 69 S. E. 355, 357, 111 Va. 415.

Stock Corporation Law (Laws 1890, p. 1066, c. 564) § 47, provides that "every domestic stock corporation may issue 'preferred stock' and 'common stock' and different

classes of preferred stock, if the certificate of incorporation so provides, or by the consent of the holders of record of two-thirds of the capital stock, given at a meeting called for that purpose, upon notice such as is required for the annual meeting of the corporation. \* \* \* And the corporation may, upon the written request of the holders of any 'preferred stock,' by a two-thirds vote of its directors, exchange the same for 'common stock,' and issue certificates for common stock therefor, upon such valuation as may have been agreed upon in the certificate of organization of such corporation, or the issue of such 'preferred stock,' or share for share, but the total amount of such capital stock shall not be increased thereby." Held, that the "preferred stock" represented a contribution of capital precisely the same as "common stock," differing only as to the preferred right of the holders to share in dividends or interest. *People ex rel. S. Cohn & Co. v. Miller*, 72 N. E. 525, 526, 180 N. Y. 16.

"'Preferred stock' entitles the holder to a priority in the dividends or earnings over common stock. \* \* \* In the absence of anything to the contrary, preferred stock shares equally with common stock upon a dissolution of the corporation; otherwise, if provided by the charter, a statute, or by the contract." *People v. New York Building-Loan Banking Co.*, 100 N. Y. Supp. 459, 462, 50 Misc. Rep. 23 (quoting *Bouv. Law Dict.* [2 Rawle's Revision], pp. 1041, 1042).

"Shares conferring on their holders preferential or additional rights not enjoyed by the holders of other shares are called 'preference shares' or 'preferred shares.' They can only be created when the authority to create them is given by statute or charter, or by agreement between all parties interested. Unless there be some law authorizing it, the power to issue preferred stock rests upon universal consent on the part of all stockholders; but this universal consent may be contained in the articles of association providing for the issuance of such shares adopted when the association was formed." Where preferential stock is issued in a building and loan association organized under the General Statutes of 1889, authorized by the agreement of the members expressed in the by-laws, and recited in the certificates issued therefor, the preference so agreed upon will be observed in the distribution of funds among the different classes of stockholders when not immoral or contrary to public policy. *Hogsett v. Aetna Bldg. & Loan Ass'n*, 96 Pac. 52, 53, 56, 78 Kan. 71 (quoting and adopting definition in *Thornt. & Bl., Bldg. & Loan Ass'ns*, § 149).

## PREGNANCY—PREGNANT

See Negative Pregnant.

As disease, see Disease.

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## PREGNANT WOMAN

As person, see Person.

## PREJUDGMENT

"Every court is bound to follow its own decisions, if it deems them sound, until overruled by higher authority. Otherwise, there would be no certainty in the law. If a subsequent case arises involving the principle applied in the prior case, the judgment in the prior case must necessarily control the subsequent case. This, as every one knows, is not 'prejudgment' in any sense, either moral or legal, but merely the application to the case of the law as pronounced in the prior case. When a court has solemnly adjudged a principle of law, especially, as here, in other stages of the very case, it is not required by the subtlest obligation of even the most delicate rule of ethics to refrain from expressing adherence to its former decisions, in discussing further interlocutory orders it is called to make, because a party insists that the principle of the former decision was wrong, and insists on silence on the part of the court, when the question is again brought forward by way of rehearing, until reargument can be had." *Louisville & N. R. Co. v. Railroad Commission of Alabama*, 157 Fed. 944, 950, 951.

## PREJUDICE

See Passion and Prejudice; Undue Prejudice; Without Prejudice.

Prejudice is a leaning toward one side of a question from other considerations than those belonging to it; in law, a bias on the part of judge, jury, or witness which interferes with fairness of judgment. It applies as well to prejudice in favor of the adverse party as to prejudice against a party making an application for transfer of a cause on the ground of prejudice of the judge. *Keen v. Brown*, 35 South. 401, 402, 46 Fla. 487.

The "prejudice" within the rule that prejudice by a judgment to one not a party to the record, shown by the record, will authorize him to prosecute error therefrom, must be such that he takes or loses something directly by the judgment. On a judgment against a corporation, a stockholder does not fall within the rule because the value of his shares may be affected by the judgment. *White Brass Castings Co. v. Union Metal Mfg. Co.*, 83 N. E. 540, 541, 232 Ill. 165, 122 Am. St. Rep. 63.

### Of judge

The "prejudice" of the judge, contemplated by Const. art. 1, § 18, is a prejudice directed against the party litigant and of such a character as would render it improbable that he would give the litigant an impartial trial. *Bell v. Bell*, 111 Pac. 1074, 1075, 1076, 18 Idaho, 636.

"Prejudice" of the judge as a statutory ground for change of venue in a criminal case refers to his prejudice against a party and not to an opinion that he has formed, or is believed to entertain, upon a legal question arising in the case. *State v. Parmenter*, 79 Pac. 123, 124, 70 Kan. 513.

The prejudice of a judge against a case, as distinguished from prejudice against a litigant, is not a basis for a change of venue or a motion of the judge. In *re Dolbeer's Estate*, 96 Pac. 266, 268, 153 Cal. 652, 15 Ann. Cas. 207.

The "prejudice" of a judge, within Laws 1911, c. 121, authorizing any party or attorney in the action to establish the prejudice of the judge by motion supported by affidavit, is a personal prejudice against the litigant or his attorney; and where the litigant or his attorney believes that the prejudice exists the cause must be transferred, on motion supported by affidavit, which must be deemed to be true, and cannot be disputed. *State ex rel. Lefebore v. Clifford*, 118 Pac. 40, 41, 65 Wash. 313.

The constitutional provision guaranteeing to every person charged with crime a trial without prejudice, so far as it relates to the judge, does not include the opinion of the judge as to the guilt or innocence of the defendant, but it must be shown, to disqualify him, that he is biased. *State ex rel. Nowakowski v. Lockridge*, 118 Pac. 152, 154, 6 Okl. Cr. 216, 45 L. R. A. (N. S.) 525, Ann. Cas. 1913C, 251.

The mere fact that a judge may be witness in case, or that he has conducted a preliminary examination resulting in a prosecution of defendant, in the absence of any showing of bias or prejudice on his part, does not disqualify him. *State ex rel. Nowakowski v. Lockridge*, 118 Pac. 152, 155, 6 Okl. Cr. 216, 45 L. R. A. (N. S.) 525, Ann. Cas. 1913C, 251.

#### Of juror

A juror who, on his voir dire, stated that he had a feeling or "prejudice" against one charged with a crime, but that it would not hinder him from rendering a verdict according to the law and the evidence, and that he could go into the case unbiased, though his prejudice against one charged with the offense was, to a certain extent, a fixed one, was not disqualified to act as a juror. A "prejudice" being something that is not founded on information or reason, the juror evidently meant to say that he had a feeling against crime, and, when he said that he would try the case upon the evidence wholly, and under the instructions of the court, if he is to be believed, he would be a fair juror. *State v. Croney*, 71 Pac. 783, 785, 31 Wash. 122.

The word "prejudice," as applied to a jury's action, means anger, resentment, heat,

absence of reflection, disregard of the rights of others, and kindred motives. *Murphy v. Southern Pac. Co.*, 101 Pac. 822, 827, 81 Nev. 120, 21 Ann. Cas. 502.

#### PREJUDICIAL

The word "adverse" is defined as "opposite," "hurtful," "unfavorable"; and as synonyms of "prejudicial" are given "hurtful," "injurious," "disadvantageous." *Prunty v. Consolidated Fuel & Light Co.*, 108 Pac. 802, 803, 82 Kan. 541.

"Prejudicial error" is such error as in all probability must have produced some effect upon the final result. *State v. Pirkey*, 124 N. W. 713, 715, 24 S. D. 533.

In mining parlance an interference exists where within the boundaries of the lands sold, or partially within those boundaries, there are other lands owned by other parties; and it is a prejudicial interference, when the intervening lands are so situated as to interfere with the operation and use of the lands sold, and thereby affect their value. *Hotchkiss v. Bon Air Coal & Iron Co.*, 78 Atl. 1108, 1110, 108 Me. 34.

#### PRELIMINARY

##### PRELIMINARY EXAMINATION

As proceeding, see Proceeding.

A "preliminary examination" is not a trial but the commencement of criminal prosecution. The object of the examination is to secure the appearance of defendant before the district court for further investigation. *State v. Wisnewski*, 102 N. W. 883, 13 N. D. 649, 3 Ann. Cas. 907.

Laws 1905, p. 133, § 2476a, provides that no prosecuting attorney shall file any information charging any person with any capital offense until such person shall have first been accorded the right to a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed. Rev. St. 1899, §§ 2457, 2460, 2461, provide that if a justice shall be satisfied that a felony has been committed, and that there is probable cause to believe the prisoner guilty, he shall commit the prisoner to jail, or admit him to bail for trial upon the charge. Held, that the law of 1905, in using the term "preliminary examination," has reference to the examination referred to in Rev. St. 1899, §§ 2457, 2460, 2461, which neither charged nor empowered the justice with the determination of accused's guilt, and was but an expedient to prevent a suspected person from escaping, and to preserve the evidence and keep the witnesses within the control of the state, and hence a preliminary examination of an accused was not defective under the law of 1905, because all the witnesses the state intended to produce at the trial did not testify at the examination, where the justice took some evidence upon which he found the

commission of a murder and probable cause to believe that accused was guilty of the offense. *State v. Jeffries*, 109 S. W. 614, 619, 210 Mo. 302, 14 Ann. Cas. 524.

### PRELIMINARY INJUNCTION

Restraining order distinguished, see Restraining Order.

A preliminary injunction is a mere process of the court, issued to hold in statu quo the subject-matter on which the decree is to operate until the court can adjudicate the rights of the parties. *Tebo v. Hazel* (Del.) 74 Atl. 841, 846.

The function of a "preliminary injunction," whether prohibitory or mandatory, is to preserve the status quo until the court can grant full relief on final hearing. *Powhatan Coal & Coke Co. v. Ritz*, 56 S. E. 257, 260, 60 W. Va. 395, 9 L. R. A. (N. S.) 1225.

A preliminary injunction runs until the defendant "shall have duly answered the bill of complaint and our said court shall make other order to the contrary," but an ad interim restraining order always commands the defendant to show cause why an injunction should not issue, and he is thereby brought in court for the purpose of that motion only. *Allman v. United Brotherhood of Carpenters & Joiners of America*, 81 Atl. 116, 118, 79 N. J. Eq. 150.

"A 'preliminary injunction' is granted before a hearing on the merits has been had, and its purpose and sole object is to preserve the subject in controversy in its then existing condition, and, without determining any question of right, merely to prevent a further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered until a full and deliberate investigation of the case is afforded to the party." *Knight v. Cohen*, 90 Pac. 145, 146, 5 Cal. App. 296.

"'Preliminary' or interlocutory injunctions are those granted prior to the final hearing and determination of the trial, and continue until answer, or until the final hearing, or until the further order of the court. \* \* \* Their object is to maintain the status quo, to maintain property in its existing condition, to prevent further or impending injury—not to determine the right itself." *Ex parte Sharp*, 124 Pac. 532, 534, 87 Kan. 504, Ann. Cas. 1913E, 460 (quoting definition in 22 Cyc. p. 740).

"The office of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equi-

ty issue mandatory writs before the case is heard on its merits." *Bachman v. Harrington*, 77 N. E. 657, 659, 184 N. Y. 458 (quoting and adopting definition in *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387).

"A 'preliminary injunction,' or, as it is sometimes called, 'injunction pendente lite,' is a provisional remedy granted before the hearing on the merits for the purpose of preventing the perpetration of wrong, or the doing of any act whereby the rights in controversy may be materially injured or endangered before final decree, and its purpose is to preserve the subject of the controversy until an opportunity is afforded for a full and deliberate investigation." Hence a preliminary injunction is properly granted in a suit for a perpetual injunction to restrain defendant from refusing plaintiff the use of track scales; it appearing that a temporary refusal will ruin plaintiff's business. *Darlington Oil Co. v. Pee Dee Oil & Ice Co.*, 40 S. E. 169, 177, 62 S. C. 196.

"The whole theory of a 'preliminary injunction' is that it is to preserve the rights of the party until the truth of the charges can be regularly investigated" (quoting and approving *Lambert v. Haskell*, 22 Pac. 827, 80 Cal. 621), and a temporary injunction cannot be dissolved until after the trial of the cause upon its merits. *Humphry v. Buena Vista Water Co.*, 84 Pac. 296, 297, 2 Cal. App. 540.

### PRELIMINARY SURVEY

"The 'plans and specifications' is in no sense to be confused with a 'preliminary survey and estimate of cost.' They are entirely distinct and dissimilar things. The one is only a measurement and survey of the territory to be covered by the contemplated plant and an approximate estimate of cost. The other is an accurate, detailed working plan, showing materials to be used and manner of construction." Hence an engineer who prepared plans and specifications for the erection of a waterworks system under an agreement to be paid a percentage of the cost of the plant may, when the project is abandoned, recover for the services actually performed in preparing such plans and specifications. *Jenks v. Town of Terry*, 40 South. 641, 88 Miss. 364.

### PREMEDITATE—PREMEDITATION

"Premeditation," as an element of murder, means entertainment by the mind of a design to kill. *State v. Mangano*, 72 Atl. 366, 367, 77 N. J. Law, 544.

#### Deliberation

The words "deliberate" and "premeditate" may be used interchangeably, in an instruction defining heat of passion. *Dillon v. State*, 119 N. W. 352, 356, 137 Wis. 655, 16 Ann. Cas. 918.

The meaning of the words "premeditated design," as used in the statutory definition of the crime of murder in the first degree, "not being technical words of the common law, is to be found in their meaning as used in the best dictionaries and standard authorities. 'Premeditation' is composed of 'pre' and 'meditation,' and means the act of premeditating; previous deliberation; forethought. Deliberation and premeditation are synonymous. Century Dict. 'And Isaac went out to meditate in the field at eventide.' Gen. xxiv, 63. 'This book of the law shall not depart out of thy mouth, but thou shalt meditate thereon day and night.' Josh. i, 8. 'Meditate upon these things; give thyself wholly to them.' 1 Tim. iv, 15. 'Let the words of my mouth and the meditations of my heart be acceptable,' etc. Psalm xix, 14. The word 'meditate,' as thus used in the Bible, implies all the thoughts which can be generated in the mind by the exercise of the discursive or regulative faculties. It certainly implies everything that is implied in the word 'deliberate' and more." In a prosecution for murder, an instruction to the effect that no specific time is required to constitute premeditation, but if the mind of the accused was in a condition to form a purpose, there was sufficient time for the forming of that purpose, and for the mind to be conscious of that purpose to kill, it is sufficient time to constitute premeditation, and if the jury believe beyond a reasonable doubt that defendant had fully formed a purpose to shoot and kill, and that he was conscious of that purpose when he fired the shot, they would find him guilty of murder in the first degree, does not afford a clear and correct interpretation of the meaning and design of the Legislature in the use of the phrase "premeditated design" in a statute providing that the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed, or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, etc., shall be murder in the first degree. *Cook v. State*, 35 South. 665, 671, 678, 46 Fla. 20.

A design to effect death is premeditated, within the meaning of the law relating to murder, if the intention to take life is deliberately formed in the mind before the act is done which results in death, no matter for how short a time. *Fooshee v. State*, 108 Pac. 554, 560, 3 Okl. Cr. 666.

"Premeditated design" as an element of first degree murder does not necessarily require existence of a design for any definite or considerable period of time before its formation and the homicide. It is sufficient if accused had when he inflicted the fatal wound a design to take human life and inflicted such wound to accomplish such design. *Cupps v. State*, 97 N. W. 210, 220, 120 Wis. 504, 102 Am. St. Rep. 996.

"Intent to kill means just what the ordinary signification of the words suggest, whether it be described by the words 'actual intent,' 'design,' or 'premeditated design' makes no difference. When we leave entirely out of view those subtleties, often indulged in, in discoursing on the meaning of 'premeditated design,' and give to words the meaning ordinarily attributed to them, the person who effects the death of another by design does so intentionally, and the design or intent is understood to necessarily precede the act by which the purpose is accomplished. In other words, the intent is understood to be premeditated, or thought of, because, without mental action, the purpose could not be formed. So, when it is said that the slayer intentionally caused the death of his victim, it is at the same time said that he caused it by design, or premeditated design. That the word 'premeditated,' as used in the statutes on the subject of felonious homicide, has no other significance than that the design must precede the homicidal act, is indicated from the evident purpose of the statute makers to give the same meaning to the term 'premeditated design,' where used inclusively in murder in the first degree, as to 'design,' where that word alone is used exclusively in murder in the third degree and manslaughter in the first, second, and third degrees." *Cupps v. State*, 98 N. W. 546, 549, 120 Wis. 504, 102 Am. St. Rep. 996.

Design means intent, and so "premeditated design" must mean premeditated intent; but a premeditated design to kill means more than a mere intent to kill, and hence. In a prosecution for murder, an instruction that "premeditated design to kill means an intent to kill, design means intent, and both words imply premeditation," was misleading and erroneous. *Stokes v. State*, 44 South. 759, 760, 54 Fla. 109.

Where an information for first degree murder charged that the killing was with a premeditated design to effect death, the words "premeditated design" should be construed as equivalent to malice aforethought. *State v. Seifert*, 118 Pac. 746, 748, 65 Wash. 596.

In a prosecution for statutory murder in the first degree, the state claimed that accused killed deceased with premeditated design. The court charged that premeditated design was simply an intent to kill, that "design" meant "intent," and that both words implied premeditation, that premeditation did not exclude sudden intent, and that whether it be described by the words "actual intent," "design," or "premeditated design" was immaterial; that the intent was understood to be premeditated because without mental action the purpose could not be formed; that, when there were no circumstances to prevent the presumption, the law would presume that the unlawful act was intentional and malicious; that, in the absence of evi-

dence to the contrary, he who takes the life of another by some act naturally calculated to produce death would be presumed to have intended that result and to be guilty of murder in the first degree, it being presumed that such person intended the result that followed, and must be guilty of murder in the absence of evidence that the homicide was justifiable or excusable or such as to raise a reasonable doubt on the question; thus that where accused fired a shot, the weapon being aimed at a vital part of the body, and death ensued as a natural result, the presumption of fact as to the intention to take life, in the absence of any explanatory circumstances, makes a prima facie case for the prosecution, the state not being required to negative any probability that there were circumstances reducing the homicide below that of murder in the first degree, or excusing or justifying it. Held, that such charge was correct in so far as it related to statutory murder in the first degree under the facts proved. *Hedger v. State*, 128 N. W. 80, 90, 144 Wis. 279.

An instruction that, to constitute "murder in the first degree," there must be proof of malice and premeditation, and that if either of these elements is absent there can be no conviction for that grade of homicide, that a "premeditated design or purpose" is one resulting from thought and reflection, a design conceived and afterwards so deliberately considered as to become resolved and fixed, that when the design to take human life is formed after deliberation, and there is adequate time and opportunity for deliberate thought, then, no matter how soon the felonious killing follows the formation of the settled purpose, it is murder in the first degree, that there need be no appreciable space of time between the formation of the intention to kill and the killing, is correct. *Welty v. State* (Ind.) 100 N. E. 73, 75.

An instruction that, if the facts and circumstances in the case furnish satisfactory evidence of a deliberate mind on the part of the person killing, to do the killing at the time he does the act that results in the killing and show a formed design on the part of the person killing to take the life of the person slain or some other person, then the killing will be by "premeditated design," is correct. *Kent v. State*, 126 Pac. 1040, 1042, 8 Okl. Cr. 188.

The phrase "premeditated design to effect death," as used in *Wilson's Rev. & Ann. St. 1903*, § 2167, defining murder as "homicide when perpetrated without authority of law and with a 'premeditated design to effect death' of the person killed," means a purpose or intention to take life, previously formed or thought upon before it is executed. There is no substantial difference between an act performed under these conditions and one

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A charge that premeditated malice exists where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given, and that there need be no particular length of time between the formation of the intention to kill and the killing amply stated the necessity for deliberation and time therefor, but that no definite standard as to lapse of time was necessary; the words "no particular" being used in the explanatory sense that no fixed or definite time was necessary, it being only necessary that there be actual time for deliberation. *State v. Bridgham*, 97 Pac. 1006, 1008, 51 Wash. 18.

"Maliciously" and "malice aforethought" do not mean the same thing. Malice comprehends ill will, a wickedness of disposition, cruelty, recklessness, a mind regardless of social duty, etc.; while "malice aforethought" or "premeditated" design has a more intense meaning. They comprehend, not only what is included within the term "malice," but in addition thereto mean "premeditated malice." *Brett v. State*, 47 South. 781, 783, 94 Misc. 609 (citing 5 Words and Phrases, p. 4304; 1 Bish. Cr. Law [8th Ed.] p. 261; *Patterson v. State*, 66 Ind. 185; *Tutt v. Commonwealth*, 46 S. W. 675, 104 Ky. 299; *State v. Green*, 7 South. 793, 42 La. Ann. 644; *State v. Curtis*, 70 Mo. 594; *Cravey v. State*, 35 S. W. 658, 36 Tex. Cr. R. 90, 61 Am. St. Rep. 833).

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## PREMISES

See Inclosed Premises; On or About the Premises; On the Premises; Property On or Near Premises; These Conveyed Premises.

Engaged or employed about the premises, see Engaged.

Keep on premises, see Keep.

In common parlance the term "premises" is broader than the term "room." As applied to the occupancy of real property it embraces any definite portion of land and the building and appurtenant structures, over which the owner or occupant has the right and does exercise authority and control. *Kunkel v. Abell*, 84 N. E. 503, 504, 170 Ind. 305.

### Coal mine

In ejectment for a coal mine, the judgment was not objectionable for adjudging that plaintiff recover possession of the "following described premises, to wit: two-fifths of one-half of the coal situated under the surface," etc.; the word "premises" only referring to the mineral estate. *Gordon v. Park*, 117 S. W. 1163, 1167, 219 Mo. 600.

In an action for injuries to the surface of land over a mine belonging to defendant, plaintiff's prayers were not prejudicial to defendant in the use of the word "premises" to indicate plaintiff's surface ownership, instead of instructing the jury in terms that defendant owned the mineral rights. *Piedmont & George's Creek Coal Co. v. Kearney*, 79 Atl. 1013, 1018, 114 Md. 496.

### Fee

The word "premises" has different meanings, dependent on its connection and the object to which it is applied, and it oftentimes describes the fee of land; but it may signify something less extensive where the context requires it, and to determine the meaning of the word used in an instrument the court must bear in mind the subject about which the parties were contracting and their general purpose. *Old South Ass'n v. Codman*, 97 N. E. 766, 767, 211 Mass. 211.

### House or building

In a lease granting to plaintiff the use of park land on which stand the premises owned by her, where there was undisputed evidence that there were buildings on the park lands owned by plaintiff, the word "premises" may be construed as meaning buildings. *Nichols v. Eustis*, 131 N. Y. Supp. 265, 266, 146 App. Div. 475.

An owner contracted to sell land on which the purchaser, as lessee, had erected buildings, with a right to remove the same.

The contract provided that the owner should advance the purchaser a specified sum, and that the purchaser should keep "said premises insured for the benefit of the owner." The purchaser gave to the owner a bill of sale of the buildings and improvements, which recited that it was supplemental to the contract for the purchase of the real estate and security only for the payments called for, and that it should be void when all the payments were made. At the time of the sale there were other buildings on the land than those which belonged to the purchaser. The word "premises," as used in the contract, which the purchaser was to keep insured for the benefit of the owner, referred to buildings other than those belonging to the purchaser as lessee. *Dankwardt v. Prussian Nat. Ins. Co.*, 98 N. W. 603, 604, 123 Iowa, 70.

Though a complaint and warrant merely to search the premises of a person would not authorize the search of a dwelling house, where complaint alleges that intoxicating liquors were and still are kept and deposited by a certain person in a dwelling house occupied by him, and the location of which was particularly described, and the warrant in setting forth the complaint designates the locus in the exact language of the description therein contained, and then alleges that complainant prayed that due process be issued to search the premises hereinbefore mentioned, the description of the place to be searched is sufficiently definite and certain. *State v. Comolli*, 63 Atl. 326, 101 Me. 47.

### In conveyancing

The term "premises" may or may not include land, but may be held to mean only the right, title, or interest conveyed; and its exact meaning, when found in contracts and conveyances, must be determined according to the intention of the parties as ascertained from the contract and the facts and circumstances attending its making. *Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co.*, 71 N. E. 22, 27, 210 Ill. 26, 102 Am. St. Rep. 145.

In a covenant in a lease prohibiting the sale of intoxicating liquors on the premises, the word "premises" should be construed as including not only the land actually described in the deeds, but all rights and property of the nature of land which belonged to the grantees named therein by virtue of their title to the upland. In includes the valuable property rights to land below high-water mark which followed as an incident to the lease. *Silberman v. Mayer*, 96 N. Y. Supp. 928, 931, 48 Misc. Rep. 468.

Where the parties to a lease interpreted it to mean that the lessee was entitled to hold thereunder only the ground floor of the building, and he in fact held only that part of the building, and a sublessee, before making his contract, was apprised of such interpretation, the language, "the premises

which he holds under lease," used to describe the property subleased, means the property actually held by the lessee, rather than that which he might have held had the lease been otherwise interpreted. *Hirsh v. Valloft*, 48 South. 103, 105, 121 La. 66.

#### In liquor laws

The word "premises," as used in Rev. St. c. 29, § 49, commanding an officer to enter the place or premises before named and therein to search for intoxicating liquors, signifies it as a distinct and definite locality. It may mean a room or a shop or a building or a definite area, but in either case the locality is fixed; otherwise the use of the word would be misapplied. *State v. Fezzette*, 69 Atl. 1073, 1075, 103 Me. 467.

The word "premises," in Gen. Laws 1909, c. 123, § 52, imposing a penalty for the sale or keeping for sale by retail druggists without first obtaining a license of enumerated liquors, and declaring that the finding of any liquors enumerated on the premises of any retail druggist in quantities exceeding one-half gallon shall be evidence of a violation of the law, when considered in section 53-55 and chapter 178, punishing sales by druggists without prescription and not to be drunk on the premises, etc., and prohibiting a person, unless a registered or registered assistant pharmacist, from disposing of medicines, etc., means the store or shop of any retail druggist, as distinguished from his residence. *State v. Almy*, 79 Atl. 962, 964, 32 R. I. 415.

Under Code, § 2460, providing that any person operating a brewery permitting any drinking of such products or selling the same at retail "upon the premises of any such manufacturing establishment" shall forfeit, etc., the word "premises" is limited to the buildings occupied by and the ground used in connection with such establishment; hence, where a brewery had an entrance into the office of its general manager and an entrance from his office into a saloon in the same building, the brewery paying the malt taxes for the sale of the liquor by retail therein, the operation of the saloon is not a violation of the statute, where the entrance from the brewery was used by no one to obtain liquor, and the employes of the brewery who obtained their liquor there entered only from the outside. *Orke v. McManus* (Iowa) 115 N. W. 580, 581.

Liquor Tax Law, § 11, subd. 1 (Laws 1896, p. 51, c. 112), provides for the issuance of liquor tax certificates authorizing the sale of liquor in buildings occupied as hotels. A bond executed by an applicant for a liquor tax certificate was conditioned that the obligor should not permit the "premises" to become disorderly, etc. Held, that the "premises" referred to in the bond included the rooms of the hotel in which the liquor business was carried on, and hence permit-

ting such rooms to become disorderly was a breach of the bond. *Cullinan v. Fidelity & Casualty Co. of New York*, 82 N. Y. Supp. 695, 697, 84 App. Div. 292.

Liquor Tax Law (Laws 1897, p. 225, c. 312, § 24, subd. 1), prior to the amendment made by Laws 1905, p. 145, c. 104, made it unlawful to traffic in liquor within one-half mile of the building and "premises" of any state hospital, and the amendment added the words "or lands" after the word "premises." On a petition for the cancellation of a liquor tax certificate, it was stipulated that defendant, prior to the amendment, had been legally selling liquor at the place in question. Held, that "lands" was synonymous with "premises," and in view of the stipulation there could be no cancellation of the certificate, whether defendant was carrying on his business within one-half mile of lands owned and used by a state hospital and contiguous to it, or within one-half mile of the buildings, or not. The terms "premises" and "lands" are synonymous, and, if there is any distinction between the words, it is that the word "premises" is more inclusive. According to *Bouvier and Worcester's Dict.*, the word "premises" is defined as "lands and tenements." According to the *Century Dict.*, it is defined as "lands and houses or tenements." According to the *Standard Dict.*, it is defined as "land or lands; land with its appurtenances." In *re Cullinan*, 99 N. Y. Supp. 374, 375, 113 App. Div. 485.

#### Insured building

The words "building" and "premises" are sometimes used interchangeably in prohibitive clauses of insurance policies. These words were so used in the clause of a policy prohibiting the keeping of explosives. *Kenefick v. Norwich Union Fire Ins. Soc.*, 103 S. W. 957, 959, 205 Mo. 294.

A fire policy stipulated that if the "premises" described should become vacant the policy should be void. The property insured was a barn on a farm referred to in the policy as being owned by the assured. The contract was made on a form containing blanks adapted to many kinds of property, such as "farm implements \* \* \* on the premises," "grain \* \* \* on the premises," etc. The policy provided that it should not be construed to cover property located elsewhere than on the "premises" or in the buildings described. Held, that the provision that the policy should be void if the premises should become vacant had reference to the occupancy of the farm, the word "premises" meaning the farm, and the fact that the barn had never had anything in it did not defeat a recovery for its loss. *Home Ins. Co. v. Gagen*, 76 N. E. 927, 928, 38 Ind. App. 680.

#### Land

The word "premises" often means land, but it is equally well adapted to designate

the interest or estate. *Smith v. Pollard*, 19 Vt. 272.

The phrase "property sold," in the statutory definition of a redemptioner as being one holding a lien by judgment or mortgage on the property sold, applies to "land" or "premises," as those words are commonly used. *North Dakota Horse & Cattle Co. v. Serungard*, 117 N. W. 454, 463, 17 N. D. 466, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717.

An affidavit, charging that accused entered on "the premises" of a person named, in charge of another person named, charges an entry on land within Revisal 1905, § 3688, for the word "premises" and the word "land" are synonymous. An affidavit, alleging that accused unlawfully and willfully entered on the premises of a person named, in charge of another person, who was acting as her agent, charges that the person named was by her agent in actual possession of the land. *State v. Yellowday*, 67 S. E. 480, 482, 152 N. C. 793.

#### As property

See Property.

#### Right of way

City Charter of Buffalo, § 288, provides that it is the duty of the owner or occupant of any premises in the city to lay sidewalks in front of them whenever ordered by the common council, and that, if the same is not done, they shall be laid by the city, and the expense assessed upon such premises. A railroad company used the lowered tracks through part of the street, which street was intersected by others. Held that, as to the right of way in the street, the railroad company was the occupant of premises which are lands and tenements, the subject of grant, and so it was liable to assessment for the laying of walks on the intersecting streets which abutted on its premises. *New York Cent. & H. R. R. Co. v. City of Buffalo*, 135 N. Y. Supp. 196, 198, 76 Misc. Rep. 655.

While in common parlance the word "premises" is used to signify land with its appurtenances, yet the usual meaning of the word in conveyances is the thing granted by the deed, and the term refers to the interest conveyed and not to the land itself, and the word "premises" as used in a grant of a right of way under the East River for a railroad tunnel refers to the right of way granted, and not to the soil in the bed of the river. *People ex rel. Bryan v. State Board of Tax Com'rs*, 124 N. Y. Supp. 711, 713, 67 Misc. Rep. 508.

#### Vehicle

A rural mail carrier is not, while engaged in carrying and distributing mail as such in the vehicle used by him, on his own premises and place of business within Pen. Code 1911, art. 476, permitting the carrying of weapons on one's own premises or place of business. *Lattimore v. State* (Tex.) 145 S. W. 588, 590.

## PREMIUM

See Gross Premium Plan; Gross Premiums; Installment Premium Plan; Level Rate Premium; Natural Premium; Renewal Premium.

#### Bet distinguished

See Bet.

#### Building and loan associations

The law which permits building and loan associations to take a premium from its members for "priority of loan" means the privilege of obtaining a loan out of the funds of the society in advance of other members seeking a similar benefit. *Citizens' Mut. Banking & Building Soc. v. Wyatt* (N. J.) 59 Atl. 553, 554.

Generally speaking, the word "premium," as used in relation to building and loan associations, is the bonus which the borrowing member agrees to pay for the privilege of obtaining the money. Defendants were borrowing members of a building and loan association, and executed bonds which required them to make stipulated monthly payments: a stated part being for stock dues, another for interest, and a further sum as premium on the loans. The bond also contained a provision: "Upon final settlement with the association, it to retain as installments on said stock and interests no greater sum than the sum actually advanced with interest thereon at the rate of 8 per cent. per annum." The association became insolvent; defendants having made the required payments to that time. On settlement between them and its receiver under such provision of the contract, the rule of partial payments applied, and defendants were entitled to credit for the full amount of each monthly payment, whether made for dues, interest, or premium. *Filim v. Interstate Bldg. & Loan Ass'n of Atlanta, Ga.*, 141 Fed. 672, 677.

Rev. St. 1909, § 3389, which directs, after providing for the making of loans by building and loan companies by competitive bidding for premiums, that the by-laws of the company may dispense with bids and provide for the making of loans to members at such a rate of interest and premium as may be provided in the by-law, "such premium to be paid in gross installments." Section 3390 provides that premiums shall consist of a percentage of the amount loaned. Held that, as "installment" means a part of a greater amount and is a word only fitly used in connection with an ascertained amount, especially when qualified by "gross," and as "interest" is a certain rate per cent. of the sum loaned for the time the money is detained by the borrower, while a "bonus" or "premium" is a definite sum agreed upon which is paid in addition to interest, either in advance or by installments, the statute means that the premium referred to should be in gross, payable in installments, and it does not therefore authorize the charging of a rate per cent. for

the uncertain period for which the money may be kept, so that, though such a charge be called a "bonus" in by-law authorizing it, it is without statutory authority. *Holmes v. Royal Loan Ass'n*, 150 S. W. 1111, 1113, 166 Mo. App. 719.

#### In insurance

The sum which the insured is required to pay is called the "premium." If 1,000 men, aged 20, enter into an agreement to pay each one as he dies \$1, and to provide in advance a fund therefor, which will be sufficient, and no more than sufficient, to meet the undertaking, they find that from the tables of mortality so many will die the first year, so many the second year, and so on, so that enough will have to be paid in advance that out of it there can be paid the death claims of the per cent. who will die each year, and leave enough which, placed at compound interest, will accumulate a fund sufficient to pay all the others as they die the agreed sum of \$1. The first important step in formulating the scheme is to determine that amount of money which will, when increased by interest at a given rate per annum, compounded annually, become \$1 in a given number of years—the expectancy of the duration of life of the whole class. This amount will constitute the premium. Only a certain per cent. of 1,000 insured will die the first year. Hence the whole sum that would be required to be put at interest to pay them all the full amount will not be called for. The life tables will show how many will probably die. The fraction produced by the mortality number divided by the number of insured, when multiplied by the sum to be put at interest at  $4\frac{1}{2}$  per cent. for one year to produce \$1, will then represent what each will have to pay in advance in order to have in the common fund enough to pay the death claims maturing that year. This effects the insurance for one year only. Only those dying get anything. The survivors get nothing. They have been insured—have been protected against the chance of being included in the number who died. This would be called the net cost of insuring \$1 for one year. The cost of insuring \$1 for a whole life is made up by adding together the net cost of each year beginning with the age of the insured when the insurance is effected, and continuing to the end of his expectancy, which would be the net single premium for whole life. Life insurance premiums are generally paid annually, or annually for a limited number of years, instead of one premium for the whole life. This annual net premium is divided into two parts: One, to help pay death claims occurring that year, being the proportion that policy is required to contribute to pay death claims arising that year in its class; and the other is placed by the insurer at interest to the credit of a fund which shall at all times be kept equal to the net single premium that will at the age the policy holder has at-

tained be sufficient to then effect his insurance. This fund is commonly known as the "reserve." The sum added to the net premiums to meet expenses, contingencies, and losses is called "loading" the premium, and the total sum collected is called the "gross premium." The words "dividend additions," as used in the New York statute, refer to that part or the premiums charged which was "loaded" onto the premium in excess of its share of expenses and losses sustained. Such additions, and the earnings thereon, which constitute the "surplus," must be valued and applied in buying extended insurance for lapsed policies in force three years or longer, in the same way that the "reserve" of the policy is required to be valued and applied in purchasing such extended insurance. *United States Life Ins. Co. in City of New York v. Spinks (Ky.)* 96 S. W. 889, 890, 892, 893, 13 L. R. A. (N. S.) 1053.

#### As interest

See Interest (On Money).

#### Prize synonymous

"Premiums" and "prizes" are equivalent words within the meaning of the federal statute forbidding the carriage from one state to another of any paper, etc., purporting to be or represent a chance in a lottery. *U. S. v. Jefferson*, 134 Fed. 299, 300.

#### PREMIUM SALE

Though there was but one bid for a lot at a sale under Comp. St. 1907, §§ 5197-5244, that bid being less than the decree, the sale was a premium sale within section 5223, declaring that no redemption from a premium sale shall be allowed for less than the amount of the decree, interest, and costs and subsequent taxes paid. *State v. Several Parcels of Land*, 121 N. W. 977, 979, 84 Neb. 719.

Laws 1903, p. 502, c. 75, § 28, is as follows: "Any person desiring to purchase any certificate of tax sale owned by the state or by any county or city, either at public or private sale, may secure an assignment thereof by paying to the county treasurer the amount due thereon, as well as all subsequent taxes and assessments on the property then delinquent: Provided, a premium sale may be purchased at public sale for less than the amount of the decree and such sale shall be subject to the provisions of section twenty-three. Such assignment shall be made by indorsement of the county treasurer in his official capacity, countersigned by the county clerk. A record shall be kept of such assignments by the county treasurer and the county clerk. The effect of such assignment shall be to vest in the assignee the same rights which would have been secured to such assignee had he been the original purchaser at the sale." Held, that the term "premium sale" as used in this act applied to such sales as are made for less than the amount of the decree. *State ex rel. Saunders v. Fink*, 104 N. W. 1059, 1060; 74 Neb. 641.

## PREPAID

Where a person claimed a shipment as purchaser of the bill of lading issued by the initial carrier, he was not entitled to recover it in replevin from the connecting carrier in the absence of any showing except the bill of lading which did not recite the class of freight shipped, the amount of charges prepaid, or the amount of charges prepaid on account, but merely in a space headed "If charges are to be prepaid, write or stamp here 'To be prepaid,'" contained the word "Prepaid"; such instrument not being prima facie proof that the freight had been fully paid. *Bramley v. Ulster & D. R. Co.*, 126 N. Y. Supp. 854, 856, 142 App. Div. 176.

## PREPARATION

See Medicinal Preparation; Pharmaceutical Preparation.

### For commission of crime

Acts of "preparation" may have such proximity to the place where the intended crime is to be committed, and such connection with a purpose of present accomplishment, that they will amount to an attempt. Some acts toward the commission of the crime are too remote for the law to notice. The act need not be the one next preceding that needed to complete the crime. Preparations made at a distance from the place where the offense is to be committed are ordinarily too remote to satisfy the requirement. The preparation must be such as would be likely to end, if not extraneously interrupted, in the consummation of the crime intended. The act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent. It must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. The mere fact that a prisoner procured tools adapted to jail breaking did not constitute an attempt to break jail. *State v. Hurley*, 64 Atl. 78, 79 Vt. 28, 6 L. R. A. (N. S.) 804, 118 Am. St. Rep. 934.

### Under Tariff Act

The process of hermetically sealing fruit in tin cans, thus preserving it from decay until the cans are opened, constitutes "preservation," rather than "preparation"; and fruit pulp that has been cooked and subjected to such sealing process is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, as fruit "preserved \* \* \* in its own juices," rather than under paragraph 262, 30 Stat. 171, as fruit "prepared in any manner." *Habicht, Braun & Co. v. United States*, 175 Fed. 1009, 1012.

Bone-size substitute, consisting of chemical starch, dextrin, magnesium chloride, and silica, which is used for stiffening the backs of fabrics, is not a "preparation fit for use

as starch" under paragraph 265, Schedule G, § 1, Tariff Act July 24, 1897, 30 Stat. 173, c. 11, but is a chemical compound under paragraph 3, Schedule A, 30 Stat. 151. *United States v. B. P. Ducas & Co.*, 149 Fed. 253, 254.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 265, 30 Stat. 173, for "preparations \* \* \* fit for use as starch," held to include arrowroot in its starchy form. *Middleton & Co. v. United States*, 151 Fed. 16, 80 C. C. A. 512.

The article known as "carbolineum," or "Carbolineum Avenarius," which consists of dead oil modified by the action of chlorine gas, is dutiable under the provision in paragraph 15, Schedule A, § 1, c. 11, Tariff Act of July 24, 1897, 30 Stat. 152, for "preparations of coal tar, not colors or dyes and not medicinal, not specially provided for," and is not dutiable under the provision for "chemical compounds" in paragraph 3 of said act, or free of duty as "dead or creosote oil," under paragraph 524 of said act (Free List, § 2, c. 11). *Downing v. United States*, 123 Fed. 1000, 1001.

Immersing olives in salt and water does not constitute a "preparation." *United States v. Zucca & Co.*, 175 Fed. 578, 580.

## PREPARATION OF CASE

See Efficient Preparation of Case.

## PREPARE

In the absence of explanatory evidence, the item "preparing roadway" in a tax bill cannot be assumed to include the making or repairing of the concrete foundation, especially where the city for whom the contract for the work was made and whose street commissioner supervised it paid for repairing the concrete foundation. *Perkinson v. Schnake*, 83 S. W. 301, 302, 108 Mo. App. 255.

## PREPARED

The provision in paragraph 241, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 170, for mushrooms "prepared or preserved," does not include mushrooms dried merely by evaporation, which are dutiable under paragraph 257 of said act, c. 11, § 1, Schedule G, 30 Stat. 171, as "vegetables in their natural state." *Kraut v. United States*, 139 Fed. 94, 95.

Hanks and balls of dried and salted cabbage, the salting and manipulation of which were done as a preparation, fitting the cabbage for cooking purposes, and intended to be permanent, are dutiable as vegetables "prepared or preserved," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170, and not as vegetables in their "natural state," under paragraph 257, 30 Stat. 171. *Sun Kwong On v. United States*, 177 Fed. 595, 596.

While, in the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 13, 30 Stat. 152, for chalk "prepared for toilet purposes," the preparation referred to is not, perhaps, such as is necessary to make a completed toilet article, there must be advancement toward use for toilet purposes, by the admixture of flavoring or other ingredients, or otherwise; and chalk that has been merely precipitated artificially, bolted, and packed in bags is not within that provision. *United States v. P. E. Anderson & Co.*, 175 Fed. 961, 962, 99 C. C. A. 451.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 262, 30 Stat. 171, relating to fruits "dried, desiccated, evaporated or prepared in any manner," the scope of the expression "prepared in any manner" is not upon the rule of *noscitur a sociis* to be so limited as to embrace only fruits prepared by a drying process. *Causse Mfg. Co. v. United States*, 151 Fed. 4, 6, 80 C. C. A. 461.

A provision in a tariff act laying duty on meats of all kinds "prepared or preserved" is broad enough to include not only cooked meat, all poultry and game in tins, but also goose livers prepared *pate de foie gras*. *James P. Smith & Co. v. United States*, 168 Fed. 462, 464.

Olives which have been immersed in salt and water for the purpose of preserving them from decay in shipment, and which had been subjected to no preparation to fit them for eating, are not "olives prepared," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 264, 30 Stat. 171. *United States v. Zucca & Co.*, 175 Fed. 578, 579.

The process of hermetically sealing fruit in tin cans, thus preserving it from decay until the cans are opened, constitutes "preservation," rather than "preparation"; and fruit pulp that has been cooked and subjected to such sealing process is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, as fruit "preserved \* \* \* in its own juices," rather than under paragraph 262, 30 Stat. 171, as fruit "prepared in any manner." *Habicht, Braun & Co. v. United States*, 175 Fed. 1009, 1012.

Mushrooms, dried in order to preserve them and placed in hermetically sealed tins holding from 30 to 45 pounds, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, relating to "mushrooms prepared or preserved, in tins, jars, bottles or similar packages," rather than paragraph 257, relating to "vegetables in their natural state." *Choy Chong Woh & Co. v. United States*, 153 Fed. 879, 82 C. C. A. 608.

The slicing of vegetables solely to facilitate the natural drying operation is not sufficient to remove them from their natural state; and mushrooms cleaned, sliced, and dried in the sun are dutiable as "vegetables in their natural state," under Tariff Act July

24, 1897, c. 11, § 1, Schedule G, par. 257, rather than as "vegetables prepared or preserved," under paragraph 241. *A. Zanmati & Co. v. United States*, 153 Fed. 880, 82 C. C. A. 626.

Cauliflowers that have been trimmed, washed, and packed in brine for preservation during transportation, and to keep them in their natural state, and that when taken out of it and washed are still in their natural state, are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, as "vegetables in their natural state," rather than under paragraph 241, as "vegetables prepared or preserved." *United States v. Strohmeier & Arpe Co.*, 167 Fed. 533, 534, 93 C. C. A. 65.

## PREPENSE

The words "premeditated," "aforethought," and "prepenae" possess etymologically the same meaning. They are in truth the Latin and Saxon synonyms, expressing a single idea and possess in law precisely the same force. "Malice prepenae" has attained a broader meaning than belongs to the term "premeditated design." *Cook v. State*, 35 South. 665, 671, 46 Fla. 20 (quoting *People v. Clark*, 7 N. Y. 885).

## PREPONDERANCE

See Clear Preponderance; Fair Preponderance.

"Preponderance of evidence" means that evidence which is most consistent with the truth as measured by the experience and judgment of the jury; that which accords best with reason and probability. The best test of the preponderance is where the jury believe, from all the evidence and the circumstances in the case, the truth lies. *United States v. McCaskill*, 200 Fed. 332, 336.

To create a "preponderance" of evidence, the evidence must overcome opposing presumptions as well as opposing evidence. Presumptions, like probabilities, are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weak one. To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations. *Troeder v. Lorsch*, 150 Fed. 710, 715, 80 C. C. A. 376 (quoting and adopting definition in *Decker v. Somerset Mut. Fire Ins. Co.*, 66 Me. 406, 408, 409, citing *The Metamora*, 144 Fed. 926, 941, 75 C. C. A. 576).

An instruction that the jury must be "satisfied" of the existence of a fact is erroneous, where such fact is only required to be established by a "preponderance of the evidence." *Houston & T. C. R. Co. v. Buchanan*, 84 S. W. 1073, 1076, 38 Tex. Civ. App. 165.

An instruction that the burden of proof was on plaintiff, and that she could not recover until she showed the facts by a preponderance or a material part of the evidence, was error because not the equivalent of a "preponderance." *St. Louis, I. M. & S. R. Co. v. Woodruff*, 115 S. W. 953, 956, 89 Ark. 9.

An instruction that by mentioning the burden of proof and the preponderance of evidence the court means merely to briefly express the rule of law, which is that unless the evidence before you in regard to the facts necessary to a verdict in favor of plaintiff appears in your judgment more credible than the contrary evidence regarding said facts, or than the evidence of the facts mentioned in these instructions as constituting a defense to plaintiff's said claim, then your verdict should be for the defendant, is not erroneous. *Stephan v. Metzger*, 69 S. W. 625, 627, 95 Mo. App. 609.

"Preponderance of evidence" is the excess over the amount of testimony necessary to balance the scales; and to say that the burden of proof is upon the party simply means that he must furnish that excess before he is entitled to a verdict. *Palmer v. Huston*, 121 Pac. 452, 67 Wash. 210.

A juror was disqualified to sit in a murder case in which the sole defense was insanity, who stated on his voir dire that he would require overwhelming proof of insanity before acquitting on that ground; the law only requiring proof of insanity by a "preponderance" of the evidence, which may leave the mind in doubt, while "overwhelming" proof is such as is sufficient to remove every doubt from the mind. *Jones v. State*, 131 S. W. 572, 577, 60 Tex. Cr. R. 139.

An instruction defined the burden of proof as the duty of proving a fact by the preponderance of evidence. Preponderance of evidence was then defined to mean the greater convincing power of evidence, and was illustrated by saying that that side has furnished the preponderance of evidence which has produced evidence of greater convincing power in the minds of the jury than that produced by the other side. The instruction then stated that the party having the burden of proof might meet such burden by producing a preponderance of the evidence, and yet not lift the burden, because, although such evidence might be of slightly greater convincing power than that produced by his opponent, still his evidence might be weak, and that, to entitle him to a finding, his evidence must be such as to satisfy the minds of the jury of the truth of his contention. Held, that the instruction was not objectionable as self-contradictory, illogical, or misleading. *Logeman Bros. Co. v. R. J. Preuss Co.*, 111 N. W. 64, 68, 181 Wis. 122.

An instruction defining "preponderance of evidence" as the "greater convincing power of evidence, that is, in the trial of a law-

suit that side had furnished the preponderance of evidence which has produced evidence of greater convincing power in the minds of the jury than that produced by the other side," was substantially correct. *Anderson v. Chicago Brass Co.*, 106 N. W. 1077, 1079, 127 Wis. 273.

An instruction that the "preponderance" of evidence means the "best" evidence was not inappropriate nor objectionable as tending to mislead the jury; the term "best evidence" obviously not having been used in the technical sense. *Johnstone v. Seattle, R. & S. Ry. Co.*, 87 Pac. 1125, 1126, 45 Wash. 154.

"Proof by a preponderance of evidence" is that state of mind in which there is felt to be a preponderance of evidence in favor of the demandant's proposition, though the application of the phrase 'preponderance of evidence' is apt to lead the judicial discussion close to the danger line of the fallacious quantitative or numerical theory of testimony." It is in the jury, who tries an issue, that the state of mind in which there is felt to be a preponderance of evidence in favor of a proposition must exist; and it must necessarily be the result of the consideration and weight given by the jury to the testimony. *San Antonio Traction Co. v. Higdon (Tex.)* 123 S. W. 732, 736 (quoting 4 Wig. Ev. § 2498).

#### Direct or circumstantial

Whether a fact is established by a "preponderance of the evidence" is not determined alone by the fact that the affirmative evidence may be direct, while the negative evidence may be circumstantial. *Fountain v. Connecticut Fire Ins. Co. of Hartford*, 117 Pac. 630, 634.

#### Number of witnesses

"Preponderance of the evidence" is not necessarily determined by the number of witnesses. *Culbert v. Wilmington & P. Traction Co. (Del.)* 82 Atl. 1081, 1083; *Fountain v. Connecticut Fire Ins. Co. of Hartford (Cal.)* 117 P. 630, 634; *Indianapolis St. Ry. Co. v. Johnson*, 72 N. E. 571, 573, 574, 163 Ind. 518; *Marcotte v. Sheridan*, 91 N. Y. Supp. 744; *Atoka Coal & Mining Co. v. Miller*, 104 S. W. 555, 564, 7 Ind. T. 104; *Houston & T. C. R. Co. v. Johnson (Tex.)* 103 S. W. 239, 242 (citing *Alcorn v. Powell [Ky.]* 60 S. W. 520).

An instruction defining "preponderance of evidence" as that most satisfactory to the minds of the jurors which should not be determined by the number of witnesses on each side, but solely from what the jurors think the evidence shows to be the truth, although a departure from the general definition, is not misleading or erroneous. *Thurman v. Miller*, 98 N. E. 879, 380, 50 Ind. App. 372.

The "preponderance of evidence" may not be determined by the number of witnesses, but by the greater weight of all the evi-



dence, and the greater weight does not necessarily mean a greater number of witnesses, but the opportunity for knowledge, the information possessed, and the manner of testifying must be considered to determine the "weight" of testimony. *Garver v. Garver*, 121 Pac. 165, 166, 52 Colo. 227, Ann. Cas. 1913D, 874.

Saying, in defining "a fair preponderance of the evidence," that it is such evidence as "produces conviction in your mind," is not so prejudicial as to warrant reversal; the court further saying that it means "not the number of witnesses, but the most credible evidence; that which satisfied the minds, the minds as jurors." *Shaw v. Woodland Shingle Co.*, 111 Pac. 1070, 1072, 61 Wash. 56.

"Preponderance of evidence" is not necessarily determined by the number of witnesses for or against a proposition, although, other things being equal, it may be so determined. *Wilkinson v. Anderson-Taylor Co.*, 79 Pac. 46, 47, 28 Utah, 346.

Proof by a "preponderance of evidence" means proof inducing that state of mind in which there is felt to be a preponderance of the evidence in favor of the proposition, and the number of witnesses or quantity of the evidence is not the test in determining where lies the preponderance; the personal element behind the testimony which induces the state of mind in the trier of facts being the controlling consideration. *San Antonio Traction Co. v. Higdon (Tex.)* 123 S. W. 732, 786.

"Preponderance of the evidence" means the greater weight of the evidence. In determining this, the jury are bound to consider the number of witnesses as well as the quality of the evidence for the purpose of determining where the truth lies. *Dupuis v. Saginaw Valley Traction Co.*, 109 N. W. 413, 415, 146 Mich. 151.

The "preponderance of the evidence" does not depend upon the number of witnesses. It does depend upon the weight and credibility that should be given to the respective witnesses. Any number of witnesses may be of equal credibility and possess equal information, and still differ greatly in the amount or weight of their evidence. The authorities generally affirm that the number of witnesses are not to be counted by the jury or court trying the case in order to determine upon which side is the preponderance; but the evidence given by them is to be weighed, and the preponderance thereof does not depend on the greater number of the witnesses in the particular case. This rule is specially applicable to the case of *ex parte* affidavits, where there is a direct conflict as to time, facts, and circumstances material and relevant to the issues presented, and especially is it true in a case when more or less of the alleged facts are stated on both sides upon hearsay, informa-

tion, or belief. *Ford v. Taylor*, 140 Fed. 356, 360 (citing *Indianapolis St. Ry. Co. v. Johnson*, 72 N. E. 571, 574, 163 Ind. 518).

"Preponderance of testimony" does not mean necessarily any class of testimony or any kind of evidence, or the number of witnesses, but it means that testimony which satisfies the jury of the very right of the case. *Hogan v. Detroit United Ry.*, 103 N. W. 543, 544, 140 Mich. 101.

An instruction that by a "preponderance of the evidence" is meant the greater weight or value of the same, "and necessarily the greater number of witnesses," was erroneous. *Heald v. Western Union Tel. Co.*, 105 N. W. 588, 129 Iowa, 326.

#### **Reasonable doubt distinguished**

See Reasonable Doubt.

#### **Weight of evidence**

"Preponderance of evidence" means the greater weight of evidence. *Western Union Tel. Co. v. James*, 73 S. W. 79, 82, 31 Tex. Civ. App. 503; *Ewen v. Wilbor*, 70 N. E. 575, 578, 208 Ill. 492; *Wilkinson v. Anderson-Taylor Co.*, 79 Pac. 46, 47, 28 Utah, 346; *Nickey v. Steuder*, 73 N. E. 117, 119, 164 Ind. 189; *Woods v. Latta*, 88 Pac. 402, 404, 35 Mont. 9; *Roberge v. Bonner*, 77 N. E. 1023, 1024, 185 N. Y. 265; *John Ainsfield Co. v. Rasmussen*, 85 Pac. 1002, 1003, 30 Utah, 453; *State v. Paulsgrove*, 101 S. W. 27, 30, 203 Mo. 193; *Hickey v. Rio Grande Western R. Co.*, 82 Pac. 29, 35, 29 Utah, 392; *Gansey v. Orr*, 73 S. W. 477, 480, 173 Mo. 532; *Mutual Reserve Life Ins. Co. v. Jay*, 109 S. W. 1116, 1120, 50 Tex. Civ. App. 165 (citing *Western Union Tel. Co. v. James*, 73 S. W. 79, 31 Tex. Civ. App. 503).

The term "preponderance of the evidence" means the greater weight of the credible testimony. *Archambault v. Blanchard*, 95 S. W. 834, 846, 198 Mo. 384; *Rutledge & Kilpatrick Realty Co. v. Gartside*, 106 S. W. 1126, 1130, 128 Mo. App. 580.

By a "preponderance of the evidence" is meant the weight of the testimony, when properly considered. *Culbert v. Wilmington & P. Traction Co. (Del.)* 82 Atl. 1081, 1083.

By "preponderance of evidence" is meant that evidence which, after a consideration of all the evidence, is in the judgment of the jurors entitled to the greatest weight; that the testimony which points to a certain conclusion appears to the jury to be more credible and probable than the testimony to the contrary. It means such evidence as, when weighed with that which opposes it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests. *United States v. Southern Pac. Co.*, 157 Fed. 459, 462.

The "preponderance of evidence" depends on the weight of evidence and means

the greater weight of evidence. "Preponderance of evidence" is defined in *Bouv. Law Dict.* vol. 2, p. 730, to be "the greater weight of evidence or evidence which is more credible and convincing to the mind." *Indianapolis St. Ry. Co. v. Johnson*, 72 N. E. 571, 573, 574, 163 Ind. 518.

A charge that "by 'preponderance of evidence' is meant that superior weight of evidence, upon the issues involved, which, while it may not be sufficient to convince the mind beyond a reasonable doubt, is yet sufficient to incline a fair and impartial mind to one side of the issue rather than to the other" is a substantial definition of the term "preponderance of evidence," as defined in *Civ. Code* 1895, § 5145. *Scott v. Brown*, 56 S. E. 130, 127 Ga. 88.

An instruction that by the word "preponderance" is meant a greater weight of evidence, or evidence which is more credible and convincing to the mind, is correct. *Krup v. Corley*, 69 S. W. 609, 610, 95 Mo. App. 640.

"Preponderance of evidence" and "burden of proof" are not the same thing, although they run into each other. By "preponderance of evidence" is meant the evidence which possesses greater weight or convincing power; by "burden of proof" is meant the duty resting on the party having the affirmative of the issue to satisfy or convince the minds of the jury, by the preponderance of the evidence, of the truth of his contention. It is not enough that his evidence is of slightly greater weight or convincing power; it must go further and satisfy the minds of the jury before the "burden of proof" is discharged. *Eichmann v. Buchheit*, 107 N. W. 325, 326, 128 Wis. 385 (citing *Anderson v. Chicago Brass Co.*, 106 N. W. 1077, 127 Wis. 273).

An instruction: "By preponderance of the evidence is not necessarily meant a greater number of witnesses, but only such weight of evidence as satisfies the jury of the truth of the allegation to be established"—is sufficient, though *Code Civ. Proc.* § 1835, provides that only evidence which satisfies the "unprejudiced" mind will justify a verdict. *McVay v. Central California Inv. Co.*, 91 Pac. 745, 747, 6 Cal. App. 184.

The term "preponderance of evidence" suggests the quality of outweighing in convincing power. It means preponderance in the convincing power of the evidence. In the orderly way of determining the truth from evidence, the jury first consider the same and determine on which side of the dispute there is a greater weight thereof; the more convincing indications as to where the truth lies. They next determine whether such greater indications are sufficiently convincing to satisfy them of the truth of the matter, not beyond a reasonable doubt, for no such degree of certainty in civil cases

is required, nor merely as to what the "preponderance of the evidence" tends to prove, for that degree of certainty leaves the truth of the matter possibly not more than suggested; the mind being far from satisfied as to the real truth, but satisfied of the truth to a reasonable certainty. *Grotjan v. Rice*, 102 N. W. 551, 553, 124 Wis. 253.

The slightest difference in the weight of the evidence is a "preponderance," and justifies the jury in returning a verdict in favor of the party in whose favor such preponderance exists. *Hammond, W. & E. C. Electric Ry. Co. v. Antonia*, 83 N. E. 766, 769, 41 Ind. App. 335.

An instruction that "by a 'preponderance of the evidence' is meant greater weight of the evidence as viewed by you after a careful consideration of all of the evidence introduced in the case" is correct so far as it goes. *Parkins v. Missouri Pac. Ry. Co.*, 93 N. W. 197, 199, 4 Neb. (Unof.) 1.

An instruction that the burden was on plaintiff to establish each and every particular fact necessary to prove his cause of action by a "preponderance of the evidence," that by the "preponderance of the evidence" was meant that greater and superior weight of the testimony which reasonably satisfied the jurors' minds, that it was not to be determined alone by the number of witnesses, but that it might occur that the statement or superior knowledge of the subject-matter testified to, of one or a few witnesses, might be of more importance and be relied upon with a greater degree of assurance than that of a greater number, and that the testimony of witnesses was strengthened or weakened by other facts or considerations disclosed by the evidence, was not erroneous. The use of the expression "reasonably satisfies," while not to be commended, must have been understood by the jury as meaning that a preponderance was established if the result of the evidence was to reasonably satisfy their minds that the greater weight was with the plaintiff, and not as meaning that they must be reasonably satisfied of the truth of the matters alleged. *Ball v. Marquis*, 98 N. W. 496, 497, 122 Iowa, 665.

The phrase "preponderance of the evidence," in the statement that a plaintiff must establish his case by a "preponderance of the evidence," means that he must have more evidence, weightier evidence, than defendant, but does not mean that his case shall be established beyond a reasonable doubt. *Atoka Coal & Mining Co. v. Miller*, 104 S. W. 553, 564, 7 Ind. T. 104.

By a "preponderance of the evidence" is meant that the testimony adduced by one side is more credible and conclusive than that of the other, and that it sufficiently outweighs the opposing evidence to satisfy the jury that a certain fact is true rather

than the reverse. *Cartlich v. Metropolitan St. R. Co.*, 108 S. W. 584, 587, 129 Mo. App. 721.

As expressly defined by Civ. Code, §§ 5144, 5145, a "preponderance of the evidence" is that superior weight of evidence which, while not enough to wholly free the mind from a reasonable doubt, is sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other. *Jones v. McElroy*, 68 S. E. 729, 730, 134 Ga. 857, 137 Am. St. Rep. 276.

The term "preponderance of the evidence," in the rule that the findings of a referee must be affirmed by the trial court unless they are against the clear preponderance of the evidence, requires the overbalancing weight of the evidence to be so apparent as to manifestly outweigh any probable legitimate inference resulting from advantages of the referee for discovering the truth, which the reviewing tribunal cannot have. *Wojahn v. National Union Bank of Oshkosh*, 129 N. W. 1068, 1074, 144 Wis. 646.

An instruction that "preponderance of proof" means that the jury are persuaded of the soundness of the claim more satisfactorily than the contrary was not objectionable in not employing the word "weigh," nor as implying that the jury might be persuaded by argument rather than proof, as the jury could understand the term "persuaded" only to mean that the proof must be more persuasive and convincing. *Toledo, St. L. & W. R. Co. v. Kountz*, 168 Fed. 832, 839, 94 C. C. A. 244.

In civil cases the burden of proof may be carried by means of a preponderance of the evidence, which is that superior weight of evidence upon the issues involved which is sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other. It is not required to be sufficient to wholly free the mind from a reasonable doubt. Accordingly it is not proper in a civil case to instruct the jury that the party on whom rests the burden of proof must establish his contention to a reasonable and moral certainty. *Central of Georgia Ry. Co. v. Stiles*, 76 S. E. 570, 571, 139 Ga. 49.

The judge charged: "By a 'preponderance of the testimony' is meant that superior weight of the evidence upon the issues in the case, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline the reasonable and impartial minds of the jury to one side of the issue rather than to the other. The burden is upon the defendant in this case to make out his case under the rule of law just given you, and in the cross-bill filed by the defendant the burden is upon him, the defendant, to make out against the plaintiff under the same rule of law the contentions set out therein." Held: (a) It clearly ap-

pears from the context that the use of the word "defendant" was a mere slip of the tongue, and that the word "plaintiff" was intended to be used. (b) The judge elsewhere charged: "A parol contract for land should be so clearly, strongly, and satisfactorily shown and proven as to leave no reasonable doubt as to the agreement or contract." In the light of the entire charge, that portion of it copied above, on which error was assigned, affords no cause for a new trial. *Becker v. Donaldson*, 75 S. E. 1122, 1126, 138 Ga. 634.

## PREROGATIVE

See Royal Prerogative.

The constitutional "prerogative" of the President to grant reprieves and pardons includes the power to commute punishments. *Ex parte Harlan*, 180 Fed. 119, 127; *Harlan v. McGourin*, 81 Sup. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849.

## PREROGATIVE WRITS

See *Maudamus*; *Prohibition* (Writ of).

## PRES.

The abbreviation "Pres." for president is in such common use that the courts will take judicial notice of its meaning. *Griffin v. Erskine*, 109 N. W. 13, 15, 131 Iowa, 444, 9 Ann. Cas. 1193.

## PRESBYTERIANS

### PRESBYTERIANISM

The name "Presbyterianism" indicates primarily a system of church government through chosen representatives, consisting of the church session as the governing body in each congregation, and a presbytery consisting of all the ministers, in number not less than five, and one ruling elder from each congregation, within a certain district, and a synod embracing at least three presbyteries, and consisting of ministers and ruling elders from the local churches, and the General Assembly, which is a representative body composed of ministers and ruling elders selected by each of the presbyteries, and the name also indicates a doctrine commonly known as "Calvinism." *Ramsey v. Hicks*, 91 N. E. 344, 346, 174 Ind. 428, 30 L. R. A. (N. S.) 665.

## PRESBYTERY

The constitution of the Cumberland Presbyterian Church and its Confession of faith, § 29, provides that a "presbytery" consists of all the ordained ministers and one ruling elder from each church within a certain district. *Clark v. Brown* (Tex.) 108 S. W. 1186.

The constitution of the Presbyterian Church creates certain church courts. It

declares that the government of the church is to be exercised in some certain and definite form, and by various courts, in regular gradation. These courts are denominated "church sessions," "presbyteries," "synods," and the "general assembly." The jurisdiction of each of these courts is defined in the constitution. The church session has jurisdiction of a single church; the presbytery has jurisdiction over the church session and jurisdiction within a prescribed district; the synod has jurisdiction over three or more presbyteries; and the general assembly has jurisdiction over such matters as concern the whole church. Every court is declared to have the right to resolve questions of doctrine and discipline seriously and reasonably proposed; and, although each court exercises exclusive and original jurisdiction over all matters especially belonging to it, the lower courts are subject to the review and control of the higher courts, in regular gradation. The general assembly has jurisdiction to review and decide all references and complaints regularly brought before it from the inferior courts, and to decide all questions respecting doctrine and discipline, and "to receive, under its jurisdiction, other ecclesiastical bodies whose organization is conformed to the doctrine and order of the church." So far as any controversies in reference to doctrine are concerned, by the very terms of the constitution the general assembly is made the highest court, and, of course, its judgment on the matter is final and conclusive. The general assembly of the Cumberland Presbyterian Church, hence, has jurisdiction to determine whether the matter in controversy is within its jurisdiction, and also to determine the controversy itself. *Mack v. Kime*, 58 S. E. 184, 195, 129 Ga. 1, 24 L. R. A. (N. S.) 675.

## PREScribe

See As Prescribed.

The word "prescribed" has a well-defined legal meaning, denoting to lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; to dictate; to point; to direct; to give as a guide, direction, or rule of action; to give law. *Loewy v. Gordon*, 114 N. Y. Supp. 211, 122, 129 App. Div. 459; *People ex rel. McDermott v. Board of Estimate & Apportionment of City of New York*, 131 N. Y. Supp. 604, 605, 146 App. Div. 515; *Heiferman v. Scholder*, 119 N. Y. Supp. 520, 523, 134 App. Div. 579.

Acts Sp. Sess. 1909, p. 316, § 25, provides that for a court "established for and held" in a territorial division of a county only the names of jurors residing in that territory shall be placed in the jury box and drawn. Act Feb. 23, 1907 (Loc. Acts 1907, p. 61) divides St. Clair county into two judicial divisions, and provides for the holding of terms

of court in each division, with a branch clerk's office and sheriff's office in the division established by the act, and with process returnable to it, and that all criminal cases in the county shall be tried in the judicial division where the offenses were committed. Held, that the word "established" is not limited to the meaning of "to found" or "set up," but often means putting in a settled or efficient state an existing legal organization or institution, and is often synonymous with "prescribed"; that the act of 1907 "established" a court to be held in a territorial subdivision of the county, within the meaning of section 25, though the two courts exercised exclusive jurisdiction within their respective divisions and together constituted the circuit court of the county, and hence that the jury for the new division should be drawn under the provisions of section 25. *Shell v. State*, 56 South. 39, 42, 2 Ala. App. 207.

"Legislative power," within Const. art. 4, § 1, providing that the legislative power shall be vested in the General Assembly, is the power to make laws; a "law" is a rule of civil conduct prescribed by the supreme power of a state; a "rule" is distinguished from whim, caprice, compact, agreement, or discretion, and "prescribed" means that the rule shall be manifested and published, so as to be known as a rule of civil conduct. *Merchants' Exchange of St. Louis v. Knott*, 111 S. W. 565, 571, 212 Mo. 616.

### As direct as a remedy

Under Rev. St. 1898, § 4075, giving the privilege of secrecy to all information acquired by a physician from a patient in attending the patient professionally, necessary to enable the physician to prescribe for such patient, the words "necessary" and "prescribe" are not to receive any technical or unduly restricted meaning, and, in a proceeding contesting the probate of an alleged will of decedent, the testimony and opinion of decedent's attending physician as to her mental capacity, based entirely on information derived from her statements or the physician's observation while treating her professionally and for the purpose of such treatment, are properly excluded. In re *Hunt's Will*, 100 N. W. 874, 876, 122 Wis. 460.

In medicine to "prescribe" remedies is defined to be "to write or to give medical directions; to indicate remedies." It is not necessary that such prescription should be in writing. It may be given or indicated verbally. Any direction given to the patient for drugs, medicines, or other remedies, for the cure of bodily diseases, directing how they are to be applied to, or used by, the patient, is a prescription, within Rev. Code 1852, amended in 1893, p. 58, c. 7. It would make no difference whether the direction was given by the person in charge of the patient

himself or by another person, even though he be a licensed physician engaged by and under the control and direction of the person in charge in that particular. *State v. Paul*, 76 N. W. 861, 56 Neb. 369; *State v. Lawson* (Del.) 69 Atl. 1066, 1067, 6 Pennewill, 395.

A person treating patients by hypnotism and massage does not engage in the business of prescribing remedies for the cure of bodily disease, within Rev. Code 1852, amended in 1893, p. 58, c. 7, requiring every person, whose business it is to "prescribe" remedies for the cure of bodily disease, to obtain a license, unless the treatment is accompanied by directions as to the use by the patients of drugs, medicines, or other remedies. *State v. Lawson* (Del.) 65 Atl. 593.

Under the statute making it a misdemeanor for any person to engage in practicing medicine without having first obtained a license, and providing (Rev. Code 1852, as amended in 1893, p. 58, c. 117) that every person (except apothecaries) whose business it is for fee and reward to prescribe remedies or perform surgical operations shall be deemed a physician within the act, it is not necessary that the prescription shall be in writing, and any direction given to the patient for drugs, medicines, or other remedies for the cure of bodily diseases, directing how they are to be applied to or used by the patient, is prescribing remedies within the meaning of the statute, to "prescribe remedies" meaning, in medicine, "to write or to give medical directions, or to indicate remedies"; and it is immaterial whether the direction is given by the defendant himself or by another person, even though such other person be a licensed physician, but engaged by and acting under the direction of defendant in the conduct of his business. *State v. Lawson* (Del.) 69 Atl. 1066, 1067, 6 Pennewill, 395.

Where, in a prosecution for administering or "prescribing" medicine to a pregnant woman to produce an abortion, it was proved that defendant furnished medicine to her, and gave her directions with reference to taking it, he was properly convicted of "administering or prescribing" medicine or drugs to prosecutrix, etc., prohibited by Sand. & H. Dig. § 1459, though he was not present when the medicine was delivered to prosecutrix or taken. According to the Century Dictionary, "prescribe" means "to advise, appoint, or designate as a remedy for disease; to give medical directions; designate the remedies to be used; as to prescribe for a patient in a fever"—and according to Webster's Dictionary the term, as applied to medicine, means "to write or give medical directions; to indicate remedies; as to prescribe for a patient in a fever." *Burris v. State*, 84 S. W. 723, 724, 73 Ark. 453 (citing *McCaughy v. State*, 59 N. E. 169, 156 Ind. 41).

One who caters to the patronage of the sick, who ask relief from their ills and assures them of her ability to help them, and supplies them with her alleged appropriate remedies, giving instructions for their application or use, would seem to come within the ordinary and usual signification attached to the words "prescribing and furnishing medicines." *State v. Breese*, 114 N. W. 45, 47, 137 Iowa, 673, 24 L. R. A. (N. S.) 103.

## PRESCRIBED BY LAW OR ORDINANCE

See Specially Prescribed by Law.

The term "prescribed by law," as used in Const. 1846, art. 5, § 6, describing the duties of the officers mentioned, which provision has been re-enacted in each Constitution since 1846, means prescribed by some statute of the state, and does not include matters required by common law. *People v. Santa Clara Lumber Co.*, 106 N. Y. Supp. 624, 626, 55 Misc. Rep. 507.

Rev. Code, City of Chicago, § 1477, relating to the police department of cities, declares that the department shall embrace as many patrolmen "as has been or may be prescribed by ordinance." Held, that the word "prescribed" as there used is equivalent to "established." *Bullis v. City of Chicago*, 85 N. E. 614, 617, 235 Ill. 472.

## PRESCRIPTION

Prescribe as direct as a remedy, see Prescribe.

A physician's "prescription" which does not state that intoxicating liquor prescribed is a necessary remedy is not a prescription within a statute prohibiting the sale of liquors by pharmacists, except on a prescription stating that such liquor is "prescribed as a necessary remedy," although it contains the letters "P. N. R." *State v. Manning*, 81 S. W. 223, 225, 107 Mo. App. 51.

Rev. St. 1890, § 3050, makes any physician who shall issue a "prescription" for intoxicating liquor to be used otherwise than for medicinal purposes guilty of a misdemeanor. Section 3047 forbids a druggist to sell intoxicating liquor in any quantity of less than four gallons, except on a written prescription from some physician, stating the name of the person for whom prescribed, and that such intoxicating liquor is prescribed as a necessary remedy. Held, that a prescription issued by a physician "for one quart of whisky" dated and signed by him, was not a prescription within section 3047, and was not even good as a written order for intoxicating liquor, and hence, furnishing no authority to a druggist to sell intoxicating liquor, the issuance thereof was not a violation of section 3050. *State v. Davis*, 108 S. W. 127, 128, 129 Mo. App. 129.

# **PREScription (In Law)**

See Presumptive Grant; Title by Limitation or Prescription.

"So far, therefore, as the title to property is concerned, or, at all events, so far as the title to real property is concerned, 'prescription' and 'limitation' are convertible terms, and a plea of the proper statute of limitations is a good plea of prescriptive right." *Wutchumna Water Co. v. Ragle*, 84 Pac. 162, 164, 148 Cal. 759.

The term "limitations," as used in statutes of this country relating to adverse possession, is merely synonymous with the word "prescription," used in the Roman law, and means the time prescribed by statute within which a title to property may be acquired by adverse possession. *Brock v. Kirkpatrick*, 48 S. E. 72, 79, 69 S. C. 231 (citing *Tyler, Eject. p. 88*).

## **Adverse possession distinguished**

See Adverse Possession.

## **As applicable to private right of way**

"Granting that the act of 1872 changed the common law in making more liberal provisions for the acquisition of a private way 'prescription,' we fail utterly to see how it can be said to follow that the prescriptive right, when once acquired as provided by the statute, is any less complete than it would have been if obtained under the more rigid requirements of the common law. Prescription is prescription, whether it be acquired at common law or by statute." *Nugent v. Watkins*, 52 S. E. 158, 159, 124 Ga. 150.

## **Elements of prescription**

Long user is the essential element of "prescription." *Davis v. Town of Bonaparte*, 114 N. W. 896, 898, 137 Iowa, 196.

One claiming title by "prescription" must show uninterrupted, open possession, under a claim of ownership, for 30 years. *Brewer v. Yazoo & M. V. R. Co.*, 54 South. 987, 992, 128 La. 544.

The foundation of "prescription" rests upon an adverse, continuous, uninterrupted use, of such nature as to impart notice to the owner for such a period of time as would raise a presumption of grant. *International & G. N. R. Co. v. Cuneo*, 108 S. W. 714, 715, 717, 47 Tex. Civ. App. 622.

"Adverse possession" and "prescription" are closely related. The one is regulated by statute and the other by common law which has adopted 20 years as the prescriptive period from analogy to the statute of limitations. "Adverse possession" is the open and hostile possession of land under claim of title to the exclusion of the true owner, which, if continued for 20 years, ripens into an actual title. "Prescription" is measured by user, and the adverse use must commence the same way, continue for the same period, and be of the same character as the adverse pos-

session required to give to the real estate. The close connection between the two methods of acquiring property makes it reasonable and natural to extend the analogy to the subject of disability. *Muller v. Manhattan Ry. Co.*, 102 N. Y. Supp. 454, 456, 53 Misc. Rep. 133 (quoting *Scallan v. Manhattan Ry. Co.*, 78 N. E. 284, 285, 185 N. Y. 359, 363, 7 Ann. Cas. 168).

"To acquire a right by 'prescription' there must be an actual enjoyment. Prescription acquires for the party precisely what he has possessed, and nothing more, and in proving a prescription the user of the right is the only evidence of the extent to which it has been acquired. The use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate, in, over, or out of which the easement prescribed for is claimed, and while such owner was able in law to assert and enforce his rights, and to resist such adverse claim, if not well founded." *McCaslin v. State*, 75 N. E. 844, 845, 38 Ind. App. 184 (quoting and adopting definition in *Peterson v. McCullough*, 50 Ind. 35).

A fee-simple title to real estate by "prescription" may be acquired by open, notorious, adverse, and continuous possession, upon claim of title for the length of time provided by Mansf. Dig. Ark. § 4471 (*Ind. T. Ann. St. 1899, § 2938*). *Choctaw, O. & G. R. Co. v. Rice*, 104 S. W. 819, 821, 7 Ind. T. 514.

"Prescription" is a title acquired by use and time and allowed by law, three things being necessary to establish the right, viz. use and occupation or enjoyment, identity of the thing enjoyed and that it should be by claim adverse to the rights of some other person. *Rice v. Wade*, 111 S. W. 594, 596, 131 Mo. App. 338.

"Dedication" and "prescription" are distinguishable in that "dedication" is established by proof of an act of dedication, and an intent to dedicate without reference to the period of public use while long user is an essential element of "prescription." *Davis v. Town of Bonaparte*, 114 N. W. 896, 898, 137 Iowa, 196.

"Prescription" \* \* \* is measured by user, and the adverse use must commence in the same way, continue for the same period, and be of the same character as the adverse possession required to give title to real estate." *Scallan v. Manhattan Ry. Co.*, 78 N. E. 284, 285, 185 N. Y. 359, 7 Ann. Cas. 168.

In order to obtain a right by "prescription," it is necessary that during the prescriptive period an action could have been maintained by the party against whom the claim was made, and a right of prescription is limited by the character and extent of the user during the period requisite to acquire

the right. *Chessman v. Hale*, 79 Pac. 254, 256, 31 Mont. 577, 68 L. R. A. 410, 3 Ann. Cas. 1038.

The elements essential to a "prescriptive right" or "prescription" to the use of an irrigating ditch are that the user by claimant during the irrigation season be actual, open, and notorious; that it be hostile; that it be under claim of title; that it be continuous and uninterrupted for five years; and that the right must have been asserted with the knowledge and acquiescence of the owner and permitted to the commencement of the action. *Silva v. Hawn*, 102 Pac. 952, 955, 10 Cal. App. 544 (citing and adopting *De Frieze v. Quint*, 30 Pac. 1, 94 Cal. 653, 28 Am. St. Rep. 151; *Strong v. Baldwin*, 70 Pac. 288, 137 Cal. 438; *Hesperia Land & Water Co. v. Rogers*, 23 Pac. 196, 83 Cal. 10, 17 Am. St. Rep. 209; *Franz v. Mendonca*, 63 Pac. 361, 131 Cal. 205; *Id.*, 80 Pac. 1078, 146 Cal. 640).

"The acts by which it is sought to establish the 'prescriptive right' must be such as to operate as an invasion of the right of the person against whom the prescriptive right is asserted, and will give cause of action in his favor. No adverse user can be initiated until the owners of the superior right are deprived of the benefit of its use in such a substantial manner as to notify them that their rights are being invaded." *Watts v. Spencer*, 94 Pac. 39, 43, 51 Or. 262 (citing *Long, Irr.* § 90; *Wimer v. Simmons*, 39 Pac. 6, 27 Or. 1, 50 Am. St. Rep. 685; *North Powder Co. v. Coughanour*, 54 Pac. 546, 34 Or. 9; *Bowman v. Bowman*, 57 Pac. 546, 35 Or. 279; *Boyce v. Cupper*, 61 Pac. 642, 37 Or. 256).

A "prescriptive right" to an easement in another man's land is the adverse and uninterrupted enjoyment of it for 20 years under a claim of right without payment of damages and without the consent of the owner; but the overflowing of another's land by the owner of a mill to work it by means of a dam, the mill and dam standing on his own land, being secured by the mill act (Rev. St. c. 94) his common-law remedy for damages is taken away, and the landowner can recover against the owner of the mill only as provided in the mill act. *Foster v. Sebago Imp. Co.*, 60 Atl. 894-896, 100 Me. 196.

"To establish a highway by 'prescription' there must be a continuous user by the public, under a claim of right distinctly manifest by some appropriate act on the part of the public authorities, for a period equal to that required to bar an action for recovery of title land. To establish the existence of a legal public road over the premises of a private person by user alone, it must appear that the user was with the knowledge of the owner." *Kansas City & O. R. Co. v. State*, 105 N. W. 713, 714, 74 Neb. 868 (citing *Lewis v. City of Lincoln*, 75 N. W. 154, 55

Neb. 1; *Graham v. Hartnett*, 7 N. W. 280, 10 Neb. 517).

In order that a way may be established by "prescription," the use and enjoyment thereof must have been adverse, under a claim of right, exclusive, uninterrupted, and with the knowledge and acquiescence of the owner of the land in or over which the easement is claimed for the period of 20 years. A mere permissive use never ripens into a prescriptive right. It must appear the use was enjoyed under such circumstances as to indicate that it was claimed as a right, and was not regarded by the parties as a mere privilege or license, revocable at the pleasure of the owner. Where a railroad company constructed a bridge over a sluiceway, and an adjoining property owner, whose farm was divided by the railroad right of way, used the sluice as a passage for cattle under the railroad track for a period equal to the statutory period of limitation, but there was nothing to show that such use was adverse to the rights of the railroad company, and not permissive, the landowner acquired no prescriptive easement in the use of the way. *Chicago, B. & Q. R. Co. v. Ives*, 66 N. E. 940, 202 Ill. 69 (citing *Rose v. City of Farmington*, 63 N. E. 681, 196 Ill. 226; *Dexter v. Tree*, 6 N. E. 506, 117 Ill. 532).

To establish a street by "prescription," the use and enjoyment of the land claimed as a street must have been adverse under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner. *City of Princeton v. Gustavson*, 89 N. E. 653, 655, 241 Ill. 566.

"The four essential facts for the plaintiffs to prove in order to sustain their claim to an 'easement by prescription' are: First, user for the prescribed period; second, that the user was adverse; third, that it was under a claim of right; fourth, notice to the owner of the user, and of its character and of the claims of right." *Anthony v. Kennard Bldg. Co.*, 87 S. W. 921, 924, 188 Mo. 704.

In order to acquire an "easement by prescription," the adverse user must not only be continuous in point of time but also substantially identical during the whole statutory period with respect to manner and extent. One seeking to acquire an easement of maintaining a ditch over land by adverse user must maintain it without material change of location for the full statutory period. *Dunn v. Thomas*, 96 N. W. 142, 143, 69 Neb. 683.

To acquire an "easement" in the land of another under the common law, the use must have been continued from a time when the memory of man ran not to the contrary. *Wasmund v. Harm*, 78 Pac. 777, 778, 86 Wash. 170.

#### Grant presumed

"'Prescription' rests on the presumption of a grant, which has been lost by process of

County, 166 Ind. 162, 76 N. E. 986, 994 (citing Crabbe).

## PRESENT

See For the Present; Personally Present.

At the first meeting of creditors, the majority creditors were represented by an attorney who had represented the bankrupt in the preparation of his consent to an adjudication, and voted for one person for trustee, and the minority creditors voted for another. Held, that a ruling that the majority creditors were not "present," for the purpose of voting, because their attorney was disqualified to represent them, but were present for the purpose of being counted in determining whether the person voted for by the minority creditors had received the votes of a majority in number and value of the creditors present, was erroneous, since creditors are not to be counted as present merely because their claims have been allowed, but must attend in person or by duly authorized agent or attorney, and those creditors who do so attend constitute the meeting. In re Kaufman, 179 Fed. 552, 554.

## PRESENT CONSIDERATION

Where a corporation executed a mortgage to claimants to secure their indorsement of its notes, such mortgage was based on a present consideration within Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564, 565, protecting liens given or accepted in good faith for a "present consideration" which have been recorded according to law, if record thereof is necessary, etc. In re Farmers' Supply Co., 170 Fed. 502, 507.

A Missouri state bank lent to a corporation, the president of which was also president and a director of the bank, sums in excess of the limit allowed by the law of the state, and held the corporation's notes therefor. The bank examiner required the indebtedness to be reduced, whereupon it was divided and notes of other parties connected with the officers, some of whom were irresponsible, were substituted for a portion of it; all being secured by a mortgage on the corporation's property which was not recorded. Later, on the insistence of the bank examiner, others, including the cashier of the bank, indorsed such notes. The cashier, who made the examinations, afterward assumed all of the notes, taking a note and mortgage from the corporation to himself therefor, and surrendering the bank's mortgage. The corporation was insolvent when both mortgages were given, as all parties had reasonable cause to believe, and became a bankrupt within four months after making the mortgage to the cashier. Held that, notwithstanding the substitution of the individual notes for those of the corporation, it remained the real debtor, and by indorsing

such notes the cashier became its creditor; that the mortgage to him, which was not recorded until suits against the corporation were threatened, was not given or accepted in good faith and for a "present consideration," within Bankruptcy Act July 1, 1898, c. 541, § 67d, 30 Stat. 564, but as a fraud upon such act, void under subdivision "e" of said section. *McAtee v. Shade*, 185 Fed. 442, 449, 107 C. O. A. 512.

The words "present fair consideration" must be determined from all the facts and conditions surrounding the purchase, and if the price paid was in cash, and an amount equal to the fair value of the goods, under all the circumstances, the consideration would be present and fair. *Schilling v. Curran*, 76 Pac. 998, 1002, 30 Mont. 370.

Under Bankr. Act July 1, 1898, c. 541, § 573, 30 Stat. 564, which requires a "present fair consideration" to support a mortgage given within four months prior to bankruptcy, a mortgage securing notes for \$1,500, bearing 6 per cent. interest, for which the consideration was a loan of \$1,310, the remainder being for additional interest and bonus, will be sustained, where taken in good faith, but only to the extent of the money actually advanced, with interest. Where the security is taken for a loan of money, the present fair consideration cannot ordinarily be greater than the sum of money lent. In re Sawyer, 130 Fed. 384.

## PRESENT IN COURT

The judge presiding at a criminal trial was "present in court" when an act constituting contempt was committed, though he was in his retiring room during a short recess while waiting for the arrival of an interpreter for a witness who had already been called to the stand. *McCarthy v. Hugo*, 73 Atl. 778, 780, 82 Conn. 262, 135 Am. St. Rep. 270, 17 Ann. Cas. 219.

## PRESENT INCUMBRANCE

A mortgage on a vessel to secure a debt of the mortgagor is a "present incumbrance" by a chattel mortgage, within the meaning of a provision of a policy of insurance on such vessel making it void, in case of such "incumbrance," so long as the debt secured is outstanding, although it is not in default. *Gilchrist Transp. Co. v. Phenix Ins. Co.*, 170 Fed. 279, 282, 283, 95 C. O. A. 475.

## PRESENT INDEBTEDNESS

Where a city, through its mayor and city council, enters into a contract with an accountant for the auditing of the city's books and the installation of a new auditing system at a stipulated price per diem, including hotel fare and traveling expenses, the work to begin at once and continue until completed, where there is no provision in the contract as to when or how the services are to be paid for, such contract should be construed



as an entirety, the rate per diem being a mere means of estimating the entire debt; and the indebtedness incurred thereunder is a "present indebtedness," chargeable against the city's funds for the year in which the contract is made. *Haskins & Sells v. Oklahoma City*, 126 Pac. 204, 206, 36 Okl. 57.

### PRESENT INTEREST

One having a mere interest by assignment in a part of the rents is not the owner of a "present or vested interest," within Gen. St. c. 63, art. 6, § 1, providing that remainder and contingent interests may be sold upon petition of any person having a vested or present interest, if the court is satisfied that all interests would be subserved by such sale. *Kalfus v. Davle (Ky.)* 110 S. W. 871, 873.

### PRESENT PLACE OF ABODE

Ordinarily "usual place of abode," as applied to the service of process, is a much more restricted term than "residence" and means the place where the defendant is actually living when service is made. Service at the dwellinghouse of defendant, which is not described as his usual place of abode, is not sufficient. The purpose of the use of the term in the act relating to service of process has primary reference to the place where defendant is usually to be found. Therefore "usual place of abode" means "present place of abode." Accordingly, if defendant be confined in a jail, it is his usual place of abode, within the statute, although his residence was compulsory. As defined in this state, the term means the customary or settled place of residence. In the case of a married man the "house of his usual abode" is *prima facie* the house wherein his wife and family reside. In this case summons served on the daughter of the defendant, at the house of her mother, who for some months had lived separate and apart from her husband, on premises upon which he had never been, and after he had become a resident of Montana, was not properly served. *Berryhill v. Sepp*, 119 N. W. 404, 405, 106 Minn. 458, 21 L. R. A. (N. S.) 344 (citing and adopting *State v. Toland*, 15 S. E. 599, 600, 36 S. C. 515; *Du Val v. Johnson*, 39 Ark. 182, 192; *Walker v. Stevens*, 72 N. W. 1038, 52 Neb. 653; *Mygatt v. Coe*, 44 Atl. 198, 199, 63 N. J. Law, 510; *Ser v. Bobst*, 8 Mo. 506, 507; *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398; *Madison County Bank v. Suman's Adm'r*, 79 Mo. 527, 530; *Missouri, K. & T. Trust Co. v. Norris*, 63 N. W. 634, 61 Minn. 256).

### PRESENT POSITIONS

Plaintiff was employed as foreman machinist for a corporation for five years at a stated weekly wage and in addition \$1,000 par value of the common stock of the corporation at the end of each year of service. Plaintiff worked until the corporation became

insolvent. Its assets and business were purchased at foreclosure sale by defendant, which was organized as part of a reorganization plan. The business was conducted without interruption, and the same man was president of both corporations. Defendant thereafter posted a bulletin reciting that the former employes were invited to continue in their "present positions." Held that the term "present positions" had reference only to the general character of the work performed by plaintiff and the other employes, and did not constitute an assumption by defendant of the terms of plaintiff's contract with the original corporations. *Aldridge v. Fore River Shipbuilding Co.*, 87 N. E. 485, 486, 201 Mass. 131.

### PRESENT PRICES

The expression "present prices," in an agreement to renew an existing contract to purchase glass at "present prices," means the standard uniform list of prices prevailing at the time of the making of the agreement. *Flash v. Rossiter*, 102 N. Y. Supp. 449, 453, 116 App. Div. 880.

### PRESENT PROVISION

Testator executed a will devising more than half of his property in trust to a charitable use, and thereafter executed a codicil revoking the legacies and trusts, and assigning as a reason therefor that "present provisions" had been made for the legatees by the declaration of trust. Held, that the words "present provision" should be construed as meaning that testator had made a "present provision" for those for whom he had previously made a testamentary provision; he having in the first preamble stated that he desired to irrevocably appropriate and settle certain securities on a college, subject to the payment of certain sums thereafter designated. *Robb v. Washington & Jefferson College*, 93 N. Y. Supp. 92, 105, 103 App. Div. 327.

### PRESENT SERVICE

A grand jury, recalled under Cr. Code, div. 11, § 3 (*Hurd's Rev. St. 1911*, c. 38, § 405), after being dismissed, to discharge some additional duties during the same term at which it had been impaneled and sworn, need not be resworn; the oath prescribed by *Hurd's Rev. St. 1911*, c. 78, § 18, to "diligently inquire into and true presentment make of all such matters and things as shall be given you in charge, or shall otherwise come to your knowledge, touching the present service," being broad enough to cover all service such jury may render during the term—"present service" meaning all the services that may be lawfully required of such jury during its existence as an organized body. *People v. McCauley*, 100 N. E. 182, 185, 256 Ill. 504.

**PRESENTLY**

A contract the legal import of which is that it shall be performed "presently" means, not that it may be performed "within a reasonable time," but that it must be performed "immediately; now; at once." *Hawkins v. Studdard*, 71 S. E. 1112, 1113, 136 Ga. 727.

**PRESENTMENT****In commercial law**

"Presentment for payment" and 'presentment for acceptance' are two different acts, well known to the law of negotiable instruments. Presentment for payment cannot be made until the instrument presented for payment is due. Presentment for acceptance must be made before the instrument presented for acceptance is due." *First Nat. Bank of Omaha v. Whitmore*, 177 Fed. 397, 399, 101 C. C. A. 401.

**In criminal law**

A "presentment" is an accusation made by grand jurors upon personal knowledge or observation of the facts instead of upon the testimony of witnesses. *McKinney v. United States*, 199 Fed. 25, 28, 117 C. C. A. 403.

A "presentment" is a notice taken by the grand jury of any offense from the knowledge or observation of the grand jurors without any bill of indictment laid before them at the suit of the government, and is an informal accusation generally regarded in the light of an instruction on which an indictment can be framed, and is also defined as an accusation without any bill before the grand jury and afterwards reduced to a formal indictment. *In re Osborne*, 125 N. Y. Supp. 313, 315, 68 Misc. Rep. 597.

"A 'presentment,' properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the King, as the 'presentment' of a nuisance, a libel, and the like, upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it." *Hale v. Henkel*, 26 Sup. Ct. 370, 373, 201 U. S. 43, 50 L. Ed. 652 (quoting and approving definition in 4 Bl. Comm. p. 301).

"The term 'presentment,' in its stricter meaning, is an accusation of the grand jury sua sponte, or, as Judge Story puts it, 'an accusation made ex mero motu,' as distinguished from an 'indictment' which was a written accusation preferred to the grand jury and presented upon oath at the instance of the government." A "presentment" was regarded as the basis of an "indictment." The distinction does not now often practically appear, inasmuch as the grand jury is rarely the origin of accusation, as was its prototype. A "presentment" is a report made by a grand jury of their own motion either on their own knowledge or on evidence before

them concerning some wrongdoing and presented to the court, usually as a basis for an "indictment," or the finding and setting forth of charges in an "indictment." "Presentment," in a larger sense of the term, includes every proceeding of a grand jury. Code Cr. Proc. § 260, provides that the grand jury must inquire into the case of every person imprisoned in the jail on a criminal charge, and not indicted; (2) into the condition and management of the public prisons in the county; and (3) into the willful and corrupt misconduct in office of public officers. Section 261 gives them free access to public prisons and the examination of public records. While there is no specific provision for a report as the result of an inquiry, section 250, in referring to the preservation of the minutes of the proceedings of the grand jury, uses the term "presentment" in contradistinction to "indictment." Held, that the grand jury may, in the exercise of its inquisitorial powers, make a presentment in the nature of a report, although an indictment cannot or does not follow it, and such report need not be stricken out because it incidentally designates some public official as responsible for omissions or commissions. *In re Jones*, 92 N. Y. Supp. 275, 276, 101 App. Div. 609 (quoting and adopting definitions in *Stand. Dict.*; *Bish. Cr. Proc.* § 137; *Hochheimer on the Law of Crime and Criminal Proceedings*; and citing *Thayer's Preliminary Treatise on Evidence in Common Law*; *Green's Short History of the English People*, 111; *Ency. Brit.* "Jury," quoting *Stubbs*; *Bl. Comm.* c. 21).

**PRESERVATION—PRESERVE**

See Self-Preservation; Sweetmeats and Preserved Fruits.

The process of hermetically sealing fruit in tin cans, thus preserving it from decay until the cans are opened, constitutes "preservation," rather than "preparation": and fruit pulp that has been cooked and subjected to such sealing process is dutiable under *Tariff Act* July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, as fruit "preserved \* \* \* in its own juices," rather than under paragraph 262, 30 Stat. 171, as fruit "prepared in any manner." *Habicht, Braun & Co. v. United States*, 175 Fed. 1009, 1012.

As used in the tariff act, the term "preserved in spirits" means simply put in spirits for the purpose of preservation or to restrict fermentation and decay. Orange and lemon peel immersed in brine for the purpose of protecting it from decay during transit, without affecting its properties or quality, is not "preserved," within the meaning of *Tariff Act* July 24, 1897, c. 11, § 1, Schedule G, par. 267, 30 Stat. 172, but is free of duty as "not preserved, candied, or dried," under section 2 *Free List*, par. 627, 30 Stat. 200. *Cause*

*Mfg. Co. v. United States*, 150 Fed. 419, 420, 423.

The provision in paragraph 241, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 170, for mushrooms "prepared or preserved," does not include mushrooms dried merely by evaporation, which are dutiable under paragraph 257 of said act, c. 11, § 1, Schedule G, 30 Stat. 171, as "vegetables in their natural state." *Kraut v. United States*, 139 Fed. 94, 95.

Fish roe, or caviar, which was necessarily put into brine before importation, because otherwise it would not be suitable for food after importation, is "preserved for food purposes," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 549, 30 stat. 197, which excludes from that paragraph fish roe thus preserved. *Hansen & Dieckmann v. United States*, 175 Fed. 892.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, for "comfits, sweetmeats, and fruits preserved in sugar, molasses, spirits, or in their own juices," refers to a class of goods commercially known as preserved fruits, and is intended to apply to fruits treated so as to become a preserve or comfit, and not to such as merely remain temporarily in their natural juice. *Causse Mfg. Co. v. United States*, 151 Fed. 4, 5, 80 C. C. A. 461.

Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, provides for fruit "preserved in sugar" and for pineapples "preserved in their own juice." Held, as to pineapples in hermetically sealed cans, in their own juice, but with 7 to 20 per cent. of sugar added for flavoring only, that they were dutiable under the latter rather than the former provision. *United States v. J. S. Johnson & Co.*, 166 Fed. 1002, 1003.

Mushrooms dried in order to preserve them, and placed in hermetically sealed tins holding from 30 to 45 pounds, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, relating to "mushrooms prepared or preserved, in tins, jars, bottles, or similar packages," rather than paragraph 257, relating to "vegetables in their natural state." *Choy Chong Woh & Co. v. United States*, 153 Fed. 879, 82 C. C. A. 608.

The slicing of vegetables solely to facilitate the natural drying operation is not sufficient to remove them from their natural state; and mushrooms cleaned, sliced, and dried in the sun are dutiable as "vegetables in their natural state," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, 30 Stat. 171, rather than as "vegetables prepared or preserved," under paragraph 241, 30 Stat. 170. *A. Zannati & Co. v. United States*, 153 Fed. 880, 82 C. C. A. 626.

Cauliflowers that have been trimmed, washed, and packed in brine for preservation

during transportation, and to keep them in their natural state, and that when taken out of it and washed are still in their natural state, are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, 30 Stat. 171, as "vegetables in their natural state," rather than under paragraph 241, 30 Stat. 170, as "vegetables prepared or preserved." *United States v. Strohmeyer & Arpe Co.*, 167 Fed. 533, 534, 93 C. C. A. 65.

## PRESERVATION OF PRINCIPAL

Where a will authorized executors to sell stock whenever necessary "for the preservation of the principal sum invested," their authority to sell was for such preservation only, and not for profits which might be realized on the sale thereof. *In re Stevens*, 95 N. Y. Supp. 297, 305, 46 Misc. Rep. 623.

## PRESIDE

### PRESIDENT

See, also, Pres.; Pt.

Where a corporation owning realty sells it through A., its president, to B., and notes for the purchase money are signed "B., Trustee," which are payable to "A., President," and the latter, in the name and behalf of the corporation, makes a deed to the property to "B., Trustee," who, without the knowledge of the corporation, makes the purchase for himself and others, and the possession, use, and benefit of the property goes to those for whom he thus purchases, the word "president" and the word "trustee" are merely descriptive personae. *Coaling Coal & Gas Co. v. Howard*, 61 S. E. 987, 988, 130 Ga. 807, 21 L. R. A. (N. S.) 1051.

Under Rev. St. 1899, § 995, as amended by act of March 23, 1903 (Laws 1903, p. 115), providing that service of process on the president or other chief officer of a corporation, or, in his absence, by leaving a copy at any business office of the company with the person having charge thereof, shall be deemed sufficient, and that if the corporation have no business office in the county where suit is brought, or if no person be found in charge thereof, and the president or chief officer cannot be found in the county, a summons shall be issued, directed to the sheriff of any county in the state, or any other state where the president or chief officer may reside or be found, and the service thereof shall be the same as above, the phrases "president or other chief officer" and "president or chief officer" are used synonymously; and hence a sheriff's return of summons in an action against a railroad company that he executed the writ on the defendant's local agent within his county, "the president or chief officer" of the railroad company not being found therein, is sufficient. *Brassfield v. Quincy, O. & K. C. R. Co.*, 83 S. W. 1032, 1033, 109 Mo. App. 710.

**PRESIDENT OF SENATE**

See De Facto President of Senate.

**PRESIDENTIAL ELECTOR**

As state officer, see State Officer.

**PRESIDING JUDGE**

In Laws 1909, c. 112, providing for an additional division of the district court in certain counties, and that upon the taking effect of the act the duly elected and presiding judge of the district court of each such county shall be the judge of the first division of the district court for the remainder of his regular term of office, "presiding" is used as the equivalent of "officialing" or "acting," and referred to the incumbent of the office when the act took effect. *State ex rel. Dawson v. Meek*, 120 Pac. 555, 557, 86 Kan. 576.

The statute requiring that the special venire in criminal cases shall be drawn by the "presiding judge" means the venire drawn while the judge is presiding, and does not contemplate that it shall be drawn by the judge who presides at the trial. *Laws v. State*, 42 South. 40, 41, 144 Ala. 118.

Neither under Act 1885 (Acts 1884-85, p. 475, § 30), providing that affidavits in criminal prosecutions in the city court of Macon shall be made before the judge of such court, nor under constitutional provision (Civ. Code 1895, § 5851), authorizing the judge of the city court and the superior court to "preside" in the courts of each other, respectively, where either is disqualified, did the judge of the superior court of Macon circuit have authority to administer an oath and attest an affidavit made as a basis for an accusation in the city court of Macon, on the ground that the judge of the latter court was disqualified to act; such act not being presiding in a case in a city court, within the meaning of the Constitution. *Edmondson v. State*, 51 S. E. 301, 302, 123 Ga. 194.

**PRESS**

Liberty of the press, see Liberty of Speech and the Press.

**In tariff act**

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, relating to "pressed or stamped shapes," includes steel stampings which have been pressed or stamped into an openwork or raised pattern and are used in manufacturing ornaments, etc. *United States v. A. & H. Veith*, 169 Fed. 665.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, 30 Stat. 156, the term "molded," as applied to glassware, is synonymous with "pressed." *United States v. Hell Chemical Co.*, 178 Fed. 537, 540, 102 C. C. A. 47.

**PRESS FEEDER**

The "helper" of an operator or pressman of a printing press is sometimes called a

"press feeder." *Doerr v. Daily News Pub. Co.*, 106 N. W. 1044, 97 Minn. 248.

**PRESSURE**

See Pound's Pressure; Unit of Pressure.

**PRESSURE ENGINE**

Constant Pressure Engine.

**PRESUME**

To "presume" is defined by Webster as "to assume" to be true, or entitled to belief without examination or proof. *Ferrari v. Interurban St. Ry. Co.*, 103 N. Y. Supp. 134, 136, 118 App. Div. 155.

The word "presume" is defined as meaning, "to venture, go, or act by an assumption of leave or authority not granted; to go beyond what is warranted by the circumstances of the case." *Pearce v. State*, 132 S. W. 986, 987, 97 Ark. 5.

In a holding that, as against a party making a plea, the law presumes its allegations to be true because they are against his interests, the word "presume" is not to be taken as meaning that the party was concluded by the admission, nor that the allegations are not subject to contradiction. *Hesston State Bank v. Luthy*, 137 S. W. 66, 155 Mo. App. 363.

In an action for wrongful discharge from employment, where the court charges that the law presumes, when a man hires to do a certain thing, that he is competent to do it, and, if he is not competent, the person who hires him has a right to displace him, the term "the law presumes," in this context, does not indicate a legal presumption, such as could not be rebutted by proof, and the jury could not have been misled by it. *Bagwell v. Milam*, 71 S. E. 684, 685, 9 Ga. App. 315.

A sale in violation of the bulk sales law (Laws 1908, c. 100), declaring that a sale of a stock of merchandise in bulk shall be presumed to be fraudulent as against the seller's creditors, unless specified conditions are complied with, is prima facie fraudulent, and, unless the purchaser shows a compliance with the conditions as to inventory and notice to creditors, the sale is absolutely void; the word "presumed" having no fixed meaning, and in one instance the presumption declared may be only prima facie, while in another conclusive. *Wm. R. Moore Dry Goods Co. v. Rowe & Carithers*, 54 So. 659, 660, 99 Miss. 30, Ann. Cas. 1913C, 1213.

**Assume synonyms**

The word "assume," in Rev. Laws, c. 102, § 1, providing that whoever assumes to be a common victualer, without being licensed as such, shall forfeit a specified sum, is synonymous with the word "presume," as used in Gen. St. 1860, c. 88, § 1, and Pub. St. 1882, c. 102, § 1, which are the same as Rev. Laws,

c. 102, § 1, with the exception that the word "presume" is used instead of "assume." *Commonwealth v. Lavery*, 73 N. E. 884, 188 Mass. 13.

### PRESUMPTION

See Disputable Presumption; Dry Presumptions; Legal Presumption; Rebuttable Presumption.

"Presumptions" may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." *Mackowik v. Kansas City, St. J. & C. B. R. Co.*, 94 S. W. 256, 262, 196 Mo. 550.

"The French Civil Code calls all 'presumptions' consequences that the law or the judge draws from a known fact to an unknown fact, and a legal presumption one that a special law applies to certain facts. *Cachard's Translation*, arts. 1349, 1350." In *re Cowdry's Will*, 60 Atl. 141, 142, 77 Vt. 359, 3 Ann. Cas. 70.

A "presumption" may be called an "instrument of proof" in the sense that it determines from whom evidence shall come, and it may be called something in the nature of evidence for the same reason. "Presumptions" are not in themselves either argument or evidence, although for the time being they accomplish the result of both. \* \* \* Presumptions, assumption, taking for granted are simply so many names for an act or process which aids and shortens inquiry and argument." *Overcash v. Charlotte Electric Ry., Light & Power Co.*, 57 S. E. 377, 380, 144 N. C. 572, 12 Ann. Cas. 1040 (quoting and adopting the definition of Thayer, *Ev.* 315).

A "presumption" is generally only a rule of law as to which party shall first proceed and go forward with the evidence to prove an issue. *Rock Island Plow Co. v. Balderson*, 128 N. W. 482, 483, 26 S. D. 399.

A "presumption" is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining the matter in issue. A "presumption" will serve as and in the place of evidence in favor of one party or the other until prima facie evidence has been adduced by the opposite party, but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when the opposite party has produced prima facie evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponent's prima facie evidence with evidence and not presumptions. A "presumption" is not evidence of a fact, but purely a conclusion. *Peters v. Lohr*, 124 N. W. 853, 855, 24 S. D. 605 (citing *Elliott, Ev.* §§ 91, 92, 93; *Wig. Ev.* §§ 2490, 2491).

"Presumptions" are a sort of proof, and a substitute in certain stages of a case for affirmative testimony. A disputable presumption may operate as a prima facie case

upon a particular point. A presumption acting as a prima facie case stands as proved until the prima facie is destroyed by controverting evidence." The casting of the burden of proof on one party or the other in a given case does not destroy the presumptions in favor of a party which exist under the general law of evidence. *The Wildcroft*, 130 Fed. 521, 528, 65 C. C. A. 145.

The law does not attach the "presumption" of guilt to any given circumstance, nor does it require the accused to overcome the presumption thereby raised in order to be entitled to an acquittal. What the law does say is that the fact of possession is evidence of guilt, upon which a conviction may properly be returned, unless the other facts or circumstances developed be such that, notwithstanding the recent possession, the jury still entertains a reasonable doubt of the defendant's participation in the crime. It is in this sense that the words "presumption" and "prima facie evidence" must be understood, when employed in this connection. *State v. Brady*, 97 N. W. 62, 64, 121 Iowa, 561, 12 L. R. A. (N. S.) 199.

A "presumption" is neither more nor less than that which is accepted as a fact without proof by reason of its probability born of human experience; thus where, on the death of an attorney, his will was found among his private papers in a strong box, with certain erasures and interlineations in lead pencil, it would be presumed that the same were made with a view of executing a new will, but they would not be given effect as a revocation of the existing will prior to the execution of a new one. In *re Ralsbeck's Will*, 102 N. Y. Supp. 967, 969, 52 Misc. Rep. 279.

Under B. & C. Comp. § 784, defining a "presumption" as a deduction from particular facts, it will be presumed that, when an assault with intent to commit robbery is made by placing the muzzle of a pistol at or near the body of a person from whom money or property is expected to be taken by force, the weapon so employed is loaded with powder and ball, and is a dangerous weapon, and imposes upon the person accused, if he admit the use of the pistol, the burden of proving it was not so charged. *State v. Parr*, 103 Pac. 434, 437, 54 Or. 316.

"Presumptions" are rules of convenience, based upon experience or public policy, and established to facilitate the trial of causes. Except in a few instances of conclusive presumptions, where there are conflicting presumptions, one is not as a matter of law stronger or weaker than the other; but the whole case is then thrown open, to be decided as a fact on all the evidence. *Turner v. Williams*, 89 N. E. 110, 112, 202 Mass. 500, 24 L. R. A. (N. S.) 1199, 132 Am. St. Rep. 511.

While the statement in the instruction in defining the word "presumption," within St.

1898, § 2310, relative to presumption of fraud against a seller's creditors, where there is not an immediate delivery and actual and continued change of possession, to the effect that such presumption was not conclusive, but subject to explanation, that "it is only to be considered fraudulent in the absence of any explanation on the part of the purchaser," was incorrect by itself, as the presumption from continued possession by the seller is only to be overcome by a satisfactory explanation, not merely by "any" explanation, yet the next sentence having been that the jury were to be controlled by such explanation only in case it satisfied them that the purchase was made in good faith, the correct idea will be considered to have been conveyed to the jury. *Seivert v. Galvin*, 113 N. W. 680, 682, 133 Wis. 391.

A "presumption" is the act of presuming. The act of a party in attempting to bribe a witness of the adverse party affords no presumption against the party's evidence on the question testified to by the witness, and does not have the effect of gaining a more ready admission to the evidence of the adverse party on that question, but is to be considered in weighing the evidence, and the failure of a party to produce a witness within his reach raises no unfavorable presumption against him, but the jury may consider that, if called, the testimony of the absent witness would not sustain the party's contention. *Ferrari v. Interurban St. Ry. Co.*, 103 N. Y. Supp. 134, 136, 118 App. Div. 155.

#### As distinguished from inference

The fundamental characteristic of a "presumption," as distinguished from an "inference," is that the former affects the duty of producing further testimony, not merely the weight of that already produced. *Bower v. Bower*, 74 Atl. 522, 525, 78 N. J. Law, 387.

An "inference" is nothing more than a permissible deduction from the evidence, while a "presumption" is compulsory, and cannot be disregarded by the jury. *Territory v. Lucero*, 120 Pac. 304, 306, 16 N. M. 652, 89 L. R. A. (N. S.) 58.

#### As inference

A "presumption" is a deduction which the law expressly directs to be made from particular facts. *Lake County v. Nellon*, 74 Pac. 212, 214, 44 Or. 14; *Alferitz v. Arrivillaga*, 77 Pac. 657, 658, 143 Cal. 646; *People v. Wong Sang Lung*, 84 Pac. 843, 845, 3 Cal. App. 221 (citing Code Civ. Proc. § 1959).

A "presumption" is a rule of law that a particular inference shall be drawn from particular facts or evidence until the truth of the inference is disproved. *Leask v. Hoagland*, 98 N. E. 395, 398, 205 N. Y. 171, Ann. Cas. 1913D, 1199; *Brandt v. Morning Journal Ass'n*, 80 N. Y. Supp. 1002, 1004, 81 App. Div. 183 (citing Bouv. Law Dict.); *State v. Dodds*, 46 S. E. 228, 231, 54 W. Va. 289

(quoting *Lawson, Presump. Ev.* 639, 640); *First Nat. Bank v. Adams*, 118 N. W. 1055, 82 Neb. 801.

"Presumptions" are inferences which common sense draws from the known course of events or from circumstances usually occurring in such cases. *Sears v. Vaughan*, 82 N. E. 881, 887, 230 Ill. 572.

"Presumptions" and inferences are logically the same. Thus, from one fact proven, another may be inferred or presumed, if the inference or presumption is a logical result, but a fact so inferred or presumed cannot become an established fact for the purpose of serving as a base for a further inference or presumption. *Miller v. Northern Pac. Ry. Co.*, 118 N. W. 344, 346, 18 N. D. 19, 19 Ann. Cas. 1215 (quoting *Diel v. Mo. Pac. Ry. Co.*, 37 Mo. App. 454).

A "presumption" is defined as an inference, affirmative or disaffirmative, of the truth or falsity of any proposition of fact, drawn by a process of probable reasoning, in the absence of actual certainty of its truth or falsity, or until such certainty can be ascertained. In *re Dailey's Estate*, 89 N. Y. Supp. 538, 540, 43 Misc. Rep. 552.

"A 'presumption' is simply an inference or conclusion logically deduced from known data." It follows that, when contradictory conclusions are asserted as resulting from the same premises, one or the other or possibly both must be erroneous. *Western Maryland R. Co. v. Shivers*, 61 Atl. 618, 620, 101 Md. 391.

"Presumption" is a principle of law by which, for the furtherance and support of right, facts not established by positive evidence are inferred from circumstances. Where the thing itself is unseen and unknown, in a close sense, it may yet be deemed seen and known in the light of the knowledge of mankind based on frequent occurrence and found from experience to be generally accordant with truth. A presumption, therefore, of a rebuttable character, such as here, only remains in force until repelled by contrary evidence. It follows that, when the evidence is contrary to the presumption invoked, the presumption itself cannot be laid hold of for use in administering justice in a particular case. Take a familiar illustration: A presumption of death arises under certain circumstances, on the lapse of a given period of time; yet that presumption could not be invoked by plaintiff in a case where plaintiff's evidence showed the man alive. The basic principle upon which presumptions are built is philosophically related to the doctrine of faith. "Now faith is the substance of things hoped for, the evidence of things not seen." *Rodan v. St. Louis Transit Co.*, 105 S. W. 1061, 1066, 207 Mo. 892 (quoting 1 Mat. Presum. Ev., Heb. XI, 1, q. v.).

An instruction that where two witnesses directly contradict each other, and the verac-

ity of neither is impeached, "the presumption of truth is in favor of the witness who swears affirmatively," and that the positive testimony of a single witness is entitled to more weight than that of two witnesses, equally credible, who testify negatively, is not misleading in using the words "presumption of truth"; the word "presumption" meaning the act of believing, on probable evidence and meaning, the inference which a reasonable person will, as a rule, draw from given circumstances. *Anderson v. Horlick's Malted Milk Co.*, 119 N. W. 342, 345, 137 Wis. 569.

"Presumption" is a principle of law by which, for the furtherance and support of right, facts not established by positive evidence are inferred from circumstances. *Schmidt v. Missouri Pac. Ry. Co.*, 90 S. W. 136, 139, 191 Mo. 215, 3 L. R. A. (N. S.) 196 (quoting and adopting definition in *Lynch v. Metropolitan St. Ry. Co.*, 20 S. W. 642, 112 Mo. 433).

"Presumptions" are aids to reasoning and argumentation which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience or probability of any kind, or merely on policy and convention. On whatever basis they rest, they operate in advance of argument or evidence, or, irrespective of it, by taking something for granted—by assuming its existence. \* \* \* A presumption is in its characteristic features a rule of law laid down by the judge, and attaching to an evidentiary fact certain consequences as to the production of evidence by the opponent. They are based on their policy upon the probative strength as a matter of reasoning and inference of the evidentiary fact, but the presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it." *Vincent v. Mutual Reserve Fund Life Ass'n*, 58 Atl. 963, 966, 77 Conn. 281 (quoting *Thayer*, Ev. 314; *Lisbon v. Lyman*, 49 N. H. 553; *Wigmore*, *Greenleaf*, Ev. § 147).

#### Presumption on presumption

One "presumption" cannot rest upon another. *Miller v. Northern Pac. Ry. Co.*, 118 N. W. 344, 346, 18 N. D. 19, 19 Ann. Cas. 1215.

#### PRESUMPTION OF FACT

The term "presumption of fact" is a misnomer, and amounts to no more than an inference drawn by the jury. *Modern Woodmen of America v. Kincheloe* (Ind.) 93 N. E. 452, 454.

"Presumptions of fact" are exclusively for the jury, to be decided by the ordinary test of human experience. *Dyer v. State*, 65 S. E. 42, 43, 6 Ga. App. 390 (quoting and approving *Kinnebrew v. State*, 5 S. E. 59, 80 Ga. 239).

"A 'presumption of fact' is a rule of law that a fact otherwise doubtful may be in-

ferred from a fact which is proved. A presumption is an inference as to the existence of a fact, not actually known, arising from its usual or necessary connections with others, which are known. Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon common principles of induction. Presumptions of fact are at best but mere arguments, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments." *State v. Dodds*, 46 S. E. 228, 231, 54 W. Va. 289 (quoting *Lawson*, *Presump. Ev.* 639, 640).

"Presumptions of fact" are but conclusions drawn from particular circumstances; the connection between them and the sought for fact having received such sanction in experience as to have become recognized as justifying the assumption. *Chicago, I. & L. Ry. Co. v. Pritchard*, 79 N. E. 508, 512, 168 Ind. 398, 9 L. R. A. (N. S.) 857 (citing 1 *Starkie*, Ev. p. 78; *Sutphen v. Cushman*, 35 Ill. 186, 201).

"Presumptions of fact" are inferences which enlightened common sense and experience may draw from the connection, relation, and coincidence of facts and circumstances with each other. If the fact in question necessarily accompanies, or is usually associated with, certain other facts and circumstances, such associated facts and circumstances are admissible in evidence as tending to prove or affording the basis for an inference of the existence of the disputed fact. The so-called "presumption of fact" must always be drawn by the trial court or jury from the evidence, and the only "presumptions of fact" which the law recognizes are such immediate inferences as the court or jury trying the cause may reasonably draw from facts proved. *City of Indianapolis v. Keeley*, 79 N. E. 499, 503, 167 Ind. 516.

"Presumptions of fact" are derived wholly and directly from the circumstances of the particular case by means of the common experience of mankind, without the aid or control of any rules of law whatever. *Pittsburgh, C. & St. L. Ry. Co. v. Bennett*, 35 N. E. 1033, 1039, 9 Ind. App. 92.

"Presumptions of fact" are but inferences drawn from other facts and circumstances in a case and should be made upon the common principles of induction. Cohabitation, having begun meretriciously, will be presumed to have so continued, in the absence of clear proof of a subsequent marriage. *Dietrich v. Dietrich*, 112 N. Y. Supp. 968, 972, 128 App. Div. 564 (citing *O'Gara v. Eisenlohr*, 88 N. Y. 296).

The "presumption of death" is a rule of evidence which determines the sufficiency of certain facts to discharge the burden of proof from the party on whom it is placed by the pleadings. When those facts appear,

the burden is discharged until something else is disclosed. A presumption of death from a long absence is not an imperative rule of law, where the circumstances of disappearance permit any different inference. Plaintiff sued upon a benefit certificate. Her testimony showed that the insured disappeared more than seven years before, and that he had not been heard from since. It appeared also that there was a deficit in his accounts as an officer of the lodge, which would have become known on the day following his disappearance. Held, error to instruct the jury that, if they found that he disappeared and had not been heard of for seven years, "then, in the absence of any rebutting circumstances, he is presumed to be dead." *Winter v. Supreme Lodge K. of P.*, 69 S. W. 662, 666, 96 Mo. App. 1.

#### **Presumption of law distinguished**

A "presumption of law" is a rule of law which the court draws from the requisite facts before it, and it must charge the jury to find in accordance therewith, while a presumption of fact is an inference of fact which cannot at common law be made without the intervention of the jury. *Mitchell v. Stanton (Tex.)* 139 S. W. 1033, 1036.

It was argued that prior decisions of the court sharply discriminated between "presumptions of law" and presumptions of fact, and that, whenever a "presumption of fact" was given by the court as a "presumption of law," it was error necessitating reversal, and that the presumption of the truth of an admission against interest was a "presumption of fact" and not of law, but the majority of the court were averse to modifying the rule announced in the former cases as against the objection that the attempted distinction between a "presumption of law" and the so-called "presumption of fact" is often so metaphysical, subtle, and shadowy as to elude analysis. *Ausmus v. People*, 107 Pac. 204, 215, 216, 47 Colo. 167, 19 Ann. Cas. 491.

#### **PRESUMPTION OF INNOCENCE**

"Presumption of innocence" is an instrument of proof created by law in favor of one accused, whereby his innocence is established until sufficient proof is introduced to overcome the proof which the law has created. *Bowman v. Little*, 61 Atl. 1084, 1088, 101 Md. 273 (citing *Coffin v. United States*, 156 U. S. 482, 15 Sup. Ct. 394, 39 L. Ed. 481).

"Presumption of innocence" in a civil case, where an officer, acting under process, is charged with an assault, means that it is presumed that the defendant did not commit the act charged. *McKinstry v. Collins*, 56 Atl. 985, 988; 76 Vt. 221 (citing *Bradish v. Bliss*, 35 Vt. 328; *Currier v. Richardson*, 22 Atl. 625, 63 Vt. 620).

The "presumption of innocence" is a legal inference based on the fact that the ma-

jority of men are not criminals, and is without evidence to support it. *State v. Reilly*, 116 Pac. 481, 482, 85 Kan. 175.

The "presumption of innocence" fixes the burden of proof in the first instance, and it is not evidence, and does not partake of the nature of evidence. The presumption of innocence remains with defendant only until it is overcome, and does not necessarily remain with him throughout the whole of the trial. *Culpepper v. State*, 111 Pac. 679, 680, 4 Okl. Cr. 103, 31 L. R. A. (N. S.) 1166, 140 Am. St. Rep. 668.

An instruction that if, after examining and weighing all the evidence carefully, there is left in the minds of the jury a "presumption of innocence" in favor of accused, they should acquit was properly refused, as a presumption of innocence is a conclusion of law, having no relation to a condition of mind produced by proof. *Gordon v. State*, 41 South. 847, 849, 147 Ala. 42.

The law presumes that one accused of crime is innocent of the crime charged in the indictment and of every material act and element of the crime, and this "presumption of innocence," obtains in his favor until his guilt has been established by evidence beyond a reasonable doubt. *Flohr v. Territory*, 78 Pac. 565, 573, 14 Okl. 477.

#### **PRESUMPTION OF LAW**

See **Conclusive Presumption of Law**.

A "presumption of law" is a rule of law that a particular inference shall be drawn by a court or jury from a particular circumstance. *State v. Dodds*, 46 S. E. 228, 231, 54 W. Va. 289 (citing *Lawson, Presump. Ev.* 639, 640).

"Presumptions of law" are conclusions and inferences which the law draws from given facts. *Dyer v. State*, 65 S. E. 42, 43, 6 Ga. App. 390 (quoting and adopting *Kinnebrew v. State*, 5 S. E. 59, 80 Ga. 239).

"Presumed as a matter of law" is synonymous with conclusively presumed. *Vaughn v. Glens Falls Portland Cement Co.*, 93 N. Y. Supp. 979, 981, 105 App. Div. 136.

A "presumption of law" establishes a certainty. The presumption arising from possession of recently stolen property is one of fact and not of law. Guilt may or may not be inferred from such possession, and whether, under the circumstances, the inference is sufficient to establish guilt is a question of fact for the jury. And it is error to instruct the jury that possession of stolen property, under the circumstances, was prima facie evidence of guilt, unless accounted for by a reasonable explanation. *State v. Hoshaw*, 94 N. W. 873, 874, 89 Minn. 307.

"Presumptions of law" are such inferences as are warranted by the legal experience of courts in administering justice, and are usually founded upon reasons of public



policy and social convenience and safety. Some of these presumptions have become so well established as to be conclusive as rules of law, while others are only prima facie evidence, and may be rebutted. *City of Indianapolis v. Keeley*, 79 N. E. 499, 503, 187 Ind. 518.

"Presumptions of law" consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry." In a prosecution for assault with intent to kill, an instruction that if the jury believed beyond a reasonable doubt that defendant shot his wife, and cut her throat, as charged, the natural consequence of such acts would be the wife's death, and that defendant was of sound mind at the time, then the presumption of law was that defendant committed such assault, with intent to kill his wife, and if the assault, under such circumstances, was committed with a premeditated design to effect the wife's death, the defendant, being sane at the time, was guilty, was not erroneous, as charging that defendant's intent arose as a presumption of law, since the instruction required, in order to convict, that the jury "find" that the acts mentioned were done with premeditated design to effect the wife's death, and that the natural and probable consequence of such act was the death of the wife. *Lowe v. State*, 96 N. W. 417, 418, 423, 118 Wis. 641.

The phrase "presumed to be fraudulent and void," in Laws 1903, p. 249, c. 30, regulating the sale of stocks of merchandise in bulk, and declaring that sales in bulk, made without a compliance with the act, shall be "presumed to be fraudulent and void," only raises a legal presumption of fraud, which may be destroyed by rebutting evidence. *Williams v. Fourth Nat. Bank of Wichita, Kan.*, 82 Pac. 496, 498, 15 Okl. 477, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970.

#### Classes

Presumptions are divided into two classes: Irrebuttable presumptions, or "presumptions of law," and rebuttable presumptions, or "presumptions of fact." Some presumptions are irrebuttable, and proceed as an arbitrary rule of law, to the effect that a particular inference of fact shall necessarily be drawn from certain established facts. There are other presumptions of law, however, which are rebuttable. All presumptions of fact proceed from other facts in proof, and supply an omitted fact in accord with the dictates of human experience on like questions, and are therefore rebuttable or disputable. It is the well-established law that a presumption of fact will not be permitted to contradict or overcome facts actually proved. *Sowders v. St. Louis & S. F. R. Co.*, 104 S. W. 1122, 1123, 127 Mo. App. 119 (quoting and adopting *Lawson*, Presump. Ev.; 16 Cyc. p. 1073).

"Presumptions of law" are of two kinds, conclusive and disputable, and the former

are rules determining the quantity of evidence requisite to the support of any particular averment which is not permitted to be overcome by proof, while disputable presumptions are those that may be overcome by proof; but, in the absence of opposing evidence, the law will infer the existence of one fact from the proved existence of another. *Modern Woodmen of America v. Kincheloe* (Ind.) 93 N. E. 452, 453.

#### PRESUMPTION OF LEGAL KNOWLEDGE

The maxim, "Every one is presumed to know the law," does not obtain literally and generally; it is limited by the reason for the rule, viz.: To prevent violators of the Criminal Code from escaping punishment on the ground of ignorance of the law and violators of private rights escaping liability for actual loss thereby inflicted on such ground. *Topolewski v. Plankinton Packing Co.*, 126 N. W. 554, 561, 143 Wis. 52.

#### PRESUMPTIVE EVIDENCE

"Presumptive evidence" authorizes but does not require conviction. *People v. Deluce*, 86 N. E. 1080, 1082, 237 Ill. 541, 547.

Although the term "presumptive evidence of guilt," as applied to a certain state of facts, may perhaps sometimes indicate no more than that the facts referred to may be considered by the jury as evidence from which guilt may be inferred as a matter of fact, and not as a matter of law, yet it is always unwise, in giving the jury instructions as to the evidence, to say that from any particular fact a presumption of guilt arises. The question of guilt is one to be determined by the jury on all the facts. *State v. Poe*, 98 N. W. 587, 591, 123 Iowa, 118, 101 Am. St. Rep. 307.

#### PRESUMPTIVE GRANT

A "presumptive grant" is a grant of a highway implied by law because of public user, and it cannot be broader than the user. *Meade v. City of Topeka*, 88 Pac. 574, 575, 75 Kan. 61.

#### PRETEND

##### PRETENDED DEED

A "pretended deed" is a deed apparently and prima facie valid. *Jones v. Hubbard*, 90 S. W. 1137, 1141, 193 Mo. 147.

##### PRETENSE

See False Pretense.

#### PRETERMITTED

The word "pretermitted," according to Webster, means "to pass by," "to omit," "to disregard." Where testator provided that after-born children should share in such personal property as was not bequeathed to his wife, such after-born children were not pre-

terminated, within Ky. St. 1903, § 4848, entitling "pretermitted" children to such a share as they would have taken had testator died intestate, and this though testator left little or no personal property. *Porter v. Porter's Ex'r*, 86 S. W. 546, 547, 120 Ky. 302.

### PRETERMITTED DEFENSE

Where a defendant, in an action to recover the penalty for the maintenance of an existing fence encroaching on a highway, fails to avail himself of the defense of title to land where the fence is located, such defense has become what is called a "pretermitted defense," to which equity will not listen as a ground for affirmative relief, and he is not entitled to maintain a suit in equity to restrain the supervisors from removing a contemplated fence, to be located on substantially the same ground. *Swenness v. Sprain*, 97 N. W. 511, 512, 120 Wis. 68.

### PRETEXT

The word "pretext," in *Wilson's Rev. & Ann. St. 1903*, § 3407, punishing any person who shall give away on any pretext intoxicating liquors without having obtained a license therefor, means any subterfuge or colorable transaction by which liquor may be disposed of, and it is not the intent of the statute to make a simple act of giving away intoxicating liquors a crime without reference to the circumstances, necessities, or conditions attending the giving, and the giving of liquors, unaccompanied by any intention to evade the law, is not necessarily a crime, and an information charging the offense must state the pretext under which the gift was made, so that accused may know what offense he is required to defend against. *Weston v. Territory*, 98 Pac. 360, 361, 1 Okl. Cr. 407.

### PRETTY

The adverb "pretty" means "in some degree, moderately, considerably, rather, less emphatic than very; as, I am pretty sure of the fact." *Nelms v. State*, 51 S. E. 588, 123 Ga. 575 (quoting and adopting definition in *Webst. Dict.*).

### PREVAILING

A resolution adopted by a city council pending a dispute with a street railroad company as to its franchise rights with respect to fares, etc., on certain streets, which permitted the company to continue operations from time to time "upon the same terms and conditions now prevailing in the city, whether due to contract agreement or not," though made when the city knew that the company was collecting extra fares on certain lines which were without the city limits when the franchises for such lines, which authorized extra fares, were granted, did not recognize

the company's right to charge extra fares on such lines; the word "prevailing" having no technical meaning and as used signifying that which is common, in operation, or prevalent, while the words "terms" and "conditions" mean the propositions and limitations which comprise the agreement and govern the parties, defining their obligations, and, as applied to an ordinance giving a franchise, signifying the boundary, limit or extent of the grant. *City of Detroit v. Detroit United Ry.*, 139 N. W. 56, 59, 173 Mich. 314.

### PREVAILING PARTY

Where, in an action to establish a lien on a chattel in favor of plaintiff, to the total exclusion of a warehouseman's lien in favor of defendant, defendant's lien for a portion of his charges was sustained, plaintiff was not entitled to costs, as being the "prevailing party," within *Municipal Court Act, Laws 1902*, p. 1584, § 330, awarding costs to the prevailing party in the *Municipal Court*. *Singer Mfg. Co. v. Becket*, 85 N. Y. Supp. 391, 392.

A person appearing and filing with permission of the court a motion to dismiss the action becomes thereby a party, and if his motion is sustained, and action dismissed, he is the "prevailing party," and is entitled to costs, under *Rev. St. 1883*, c. 82, § 130. *Thomas v. Thomas*, 56 Atl. 651, 653, 98 Me. 184.

Plaintiff was the "prevailing party," within *Acts 1821*, c. 59, giving costs to the prevailing party, where he recovered judgment in the court of common pleas for nearly \$200, though on appeal he got only \$37. *Polleys v. Smith*, 10 Me. 69, 71.

Where, in an action on a note, defendant sought to defeat any recovery on the ground that the payee had sold collaterals for more than enough to pay the note, and the court allowed plaintiff a recovery, defendant was not the "prevailing party" in whose favor costs are taxable. *Swofford Bros. Dry Goods Co. v. Randolph*, 132 S. W. 255, 256, 261, 151 Mo. App. 385.

Under *Rev. Laws*, c. 203, § 1, providing that in civil actions the "prevailing party" shall recover costs, the prevailing party is the one in whose favor the judgment is entered, although, in the course of the proceedings, he made certain claims upon which he was held not entitled to recover, and as to which, though not otherwise, the other party prevailed. *Smith v. Wenz*, 73 N. E. 651, 653, 187 Mass. 421.

There can be but one prevailing party in an action at law to recover a money judgment, and though each party wins as to some issues, and as to such issues prevails, the one in whose favor the verdict compels a judgment, or who in the end secures the most points, is the "prevailing party" or winner, who, under *Rev. St. 1899*, § 1547 (*Ann. St.*

1906, p. 1174), in all civil actions is entitled to recover his costs, "except in those cases in which a different provision is made by law." *Ozias v. Haley*, 125 S. W. 556, 141 Mo. App. 637.

A judgment abating an appeal rendered on a plea in abatement is a determination of an issue in favor of the pleader, and disposes of a pending cause, and makes the pleader the "prevailing party" and entitled to costs under Gen. St. 1902, § 4840, authorizing costs to the prevailing party. An order erasing on motion an appeal to the Supreme Court of Errors for want of jurisdiction apparent on the record does not carry costs under Gen. St. 1902, § 4840, authorizing costs to the prevailing party. *Slak v. Meagher*, 74 Atl. 880, 82 Conn. 483.

A stipulation that an action in which defendant prayed affirmative relief shall be submitted upon an agreed statement of facts, and that if the defendant "prevails" a certain judgment shall be rendered, does not prevent the plaintiff from having a dismissal without prejudice, in which case the defendant, though obtaining judgment, will not have prevailed within the meaning of the stipulation. *Steele v. Dye*, 105 Pac. 700, 702, 81 Kan. 286.

Under Rem. & Bal. Code, § 476, the prevailing party is entitled to costs, the "prevailing party" being regarded as that party only who has an affirmative judgment rendered in his favor on the entire case; hence where suit was brought on three money demands, and defendant showed a balance due him on one cause of action, but the plaintiff showed a greater balance due him on the other two, the plaintiff was entitled to costs. *Empire State Surety Co. of New York v. Moran Bros. Co.*, 127 Pac. 1104, 1107, 71 Wash. 171.

Where defendant in a proceeding to foreclose a mechanic's lien offered judgment against him for a certain amount and accrued costs, plaintiff who succeeded in reversing a judgment for defendant, but who obtained no more favorable judgment than such offer, accomplished nothing subsequent thereto, and was not the "prevailing party," and, as it was his wrongful act in refusing the offer that made the judgment from which he appealed necessary, he was not entitled to costs on appeal. *Burnett & Johnson v. Senn*, 76 S. E. 820, 821, 93 S. C. 316.

Where, on foreclosure of a mechanic's lien, plaintiffs claimed \$891, and rejected an offer for \$500, and finally recovered \$585, they are the "prevailing party," within Lien Law (Consol. Laws 1909, c. 33) § 53, entitled to costs, in the discretion of the court. *Salerno v. Vogt*, 138 N. Y. S. 664, 665, 78 Misc. Rep. 64.

### PREVAILING RATE OF WAGES

The expression "prevailing rate of wages," in Laws N. Y. 1897, c. 415, as amended

by Laws 1899, cc. 192, 567, requiring municipal corporations to pay employes the "prevailing rate of wages," does not mean the wages paid by the municipality itself, but the market rate, or the rate generally prevailing in the locality for similar services to those performed by the classes of employes enumerated in the statute. *Ryan v. City of New York*, 79 N. Y. Supp. 599, 603, 78 App. Div. 184 (dissenting opinion of Laughlin, J.).

### PREVENT

See Not to Be Prevented; Unavoidably Prevented.

The word "prevent," in a complaint alleging that defendant, operating a railroad, negligently failed to use safe and sufficient spark arresters or other proper appliances on its engine to "prevent" the emission of sparks, is used in the sense of hinder, check, or retard. *Lake Erie & W. R. Co. v. McFall*, 76 N. E. 400, 402, 165 Ind. 574.

By the word "prevented," as used in Bankr. Act, § 67b, providing that whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate, is meant prevented by the supervening of bankruptcy proceedings. In re *Doran*, 154 Fed. 467, 471, 83 C. C. A. 265.

### PREVENTIVE DEATH

The word "preventive," as used in Civ. Code 1895, § 2118, declaring that death by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract, refers to a killing by an authorized officer, or a private person standing for the time being in the attitude of a public officer. Even though the killing by the husband of the paramour of the wife be under such circumstances that the law would class the act as justifiable homicide, such killing is not, at the hands of justice, either punitive or "preventive." *Supreme Lodge K. P. v. Crenshaw*, 58 S. E. 628-629, 129 Ga. 195, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307.

### PREVENTIVE INJUNCTION

"A mandatory injunction compels affirmative performance, while a 'preventive injunction' restrains the commission of an act." *Carver v. San Pedro, L. A. & S. L. R. Co.*, 151 Fed. 334, 338.

"'Preventive injunctions' necessarily operate upon unperformed and unexecuted acts." *Bates v. Hastings*, 108 N. W. 1005, 1007, 145 Mich. 574.

## PREVIOUS

### PREVIOUS CHASTE CHARACTER

"It is held that, under charges of seduction, the words 'of previous chaste character' mean what a woman really is, not what she is reputed to be." They mean "actual personal virtue, in distinction from good reputation, and therefore a single act of illicit connection may be shown." "The subsequent sexual intercourse between the parties, brought about by the repetition of the same promise, cannot be deemed seduction, where, under the statutory definition of that crime, it is necessary that the female shall be of previous chaste character." *Hatton v. State*, 46 South. 708, 709, 92 Miss. 651 (citing 60 Am. St. Rep. 597, notes; *Lyons v. State*, 52 Ind. 427; *People v. Nelson*, 46 N. E. 1040, 153 N. Y. 80, 60 Am. St. Rep. 592).

Under a statute providing that any unmarried man seducing any unmarried female of "previous chaste character" shall be guilty of a misdemeanor, a woman was not necessarily not "chaste" because she had previously had illicit intercourse with defendant because of her affection for him and her trust in his faith. If she had previously had illicit intercourse with other men, and had made a reformation on principle, the law will even then protect her and punish her seducer. *State v. Timmens*, 4 Minn. 325, 334 (Gil. 241, 250).

In a prosecution for having sexual intercourse with a female under 18 years of age not accused's wife and of previous chaste character, accused cannot attack the character of the female for chastity by proof of her general reputation, but he may prove any specific act indicating a want of chastity on her part; the real issue being, not her reputation, but her actual virtuous character prior to the intercourse. *Hast v. Territory*, 114 Pac. 261, 265, 5 Okl. Cr. 162.

Under Rem. & Bal. Code, § 2436, punishing one who has sexual intercourse with any female child over 15 and under 18 years of age, and of previously chaste "character," the words "previously chaste character" mean only an actual physical condition, as distinguished from a chaste state of mind; and lack of chastity in prosecutrix cannot be proved, except by specific acts of unchastity; evidence of general reputation for lack of chastity being inadmissible. *State v. Workman*, 119 Pac. 751, 66 Wash. 292.

The word "previous," within a statute making it an offense to seduce a female of "previously chaste character," refers "to a period terminating immediately previous to the commencement of accused's guilty conduct." *State v. Dacke*, 109 Pac. 1050, 1052, 59 Wash. 238, 30 L. R. A. (N. S.) 173 (quoting and adopting a definition in *Carpenter v. People* [N. Y.] 8 Barb. 603).

"Chaste character," in connection with seduction, does not mean reputation, but actual personal chastity. A woman who has been at some time in her life unchaste, but who has reformed and acquired the virtue of chastity, is then a female of "previous chaste character," within Rev. Laws 1905, § 4931. *State v. Preuss*, 127 N. W. 438, 439, 112 Minn. 108.

### PREVIOUS DECEASE

Testatrix devised a residuary estate in trust to pay the income to her brothers for life and survivor, with remainder to the issue of one of them, and provided that, on the death of the brothers leaving no issue "then living," the "then remaining" property should be divided into three parts, one part to be divided equally between three cousins, the children of an uncle, one part to be divided equally between two cousins, the children of an aunt, and one part to an uncle, and, in case of the "previous decease" of either of the cousins or of the uncle leaving issue, the share of the deceased should be paid to such issue by right of representation, and, if there were no issue "then living," the share should be divided equally among the survivors of the cousins and the uncle, or the whole to the survivor of them. The last surviving brother, both of whom died without issue, survived a cousin, a child of the aunt, who died leaving no issue, and the uncle leaving two daughters. Held, that the words "then living," "then remaining," and "previous decease" referred to the period of distribution, and testatrix intended that the survivors should be ascertained at the period of distribution, and the share of the deceased cousin must be divided equally between the four surviving cousins, to the exclusion of the children of the deceased uncle. *Hall v. Hall*, 95 N. E. 788, 789, 209 Mass. 350.

### PREVIOUS INDEBTEDNESS

Under a policy of credit insurance making the experience of the insured in dealing with its customers a basis of credit, and providing that the highest "previous indebtedness" shall be taken as an experience which will justify the indemnified in again extending credit to an old customer, an indebtedness which has not been paid could not be called a "previous indebtedness," but would be a present indebtedness, and an experience which would justify a creditor in again extending credit to a debtor must be a satisfactory experience, and no experience could be said to be satisfactory unless the goods sold were paid for. *Philadelphia Casualty Co. v. Cannon & Byers Millinery Co.*, 118 S. W. 1004, 1006, 133 Ky. 745.

### PREVIOUS INDORSEMENTS GUARANTEED

An indorsement on a note "previous indorsements guaranteed" was only a guaranty

of the genuineness of a previous indorsement, and did not render the indorser liable on the note. *Johnston v. Schnabaum*, 109 S. W. 1163, 1164, 86 Ark. 82, 17 L. R. A. (N. S.) 838, 15 Ann. Cas. 876.

### PREVIOUS YEAR

The statutory limitation on the power of the county board to contract for bridge building to cost a sum not greater than the amount of money on hand in the county bridge fund derived from a levy of "previous years" and two-thirds of the levy of the "current year" gives no authority to the board to take into account the levy of the "current calendar year" prior to the making of such levy. Until it is made, there is no "levy of the current year." Ordinarily the terms "this year," "the current year," or "the previous year" mean in each instance the calendar year in which the event under discussion took place and the one before it, but the Legislature did not have this meaning in putting the words into this statute. *Clark v. Lancaster County*, 96 N. W. 593, 599, 69 Neb. 717.

### PREVIOUSLY ASCERTAINED BY LAW

Where, after the commission of an alleged crime in a federal district, the division of the district in which it was committed is changed by the creation of a new division therefrom, the district as "previously ascertained by law," within the meaning of the sixth constitutional amendment, which constitutes the vicinage from which the jury must be drawn for the trial of the accused, comprises the division as it stood before the change. *United States v. Greene*, 146 Fed. 776.

### PREVIOUSLY DIED

Where testator gave the remainder to the issue of his two daughters, naming each, and to his three sons, naming each, "or to the issue of either of said sons, if they shall have previously died leaving issue," he evidently meant by the word "previously" a death during the continuance of the trust, and not during his own life. Until the trust ended he did not intend that his residuary estate should vest so that it could be sold and squandered. *People's Trust Co. v. Flynn*, 80 N. E. 1098, 1101, 188 N. Y. 385.

## PRICE

See Billed Prices; Contract Price; Cost Price; Current Market Price; Fair and Reasonable Price; Fair Price; Inadequate Price; Long Price; Market Price; Present Prices; Purchase Price; Quotation of Prices; Reasonable Price; Satisfactory Price; Short Price; Wholesale Price.

"Price" primarily signifies the sum which the seller will receive in exchange, and implies a mental operation requiring the exer-

cise of memory and calculation, and the term "price scale" would not be free from objection if appropriated as a trade-mark. *Computing Scale Co. v. Standard Computing Scale Co.*, 118 Fed. 965, 969, 55 C. C. A. 459.

The word "price," in the rule that a court of equity will not extend its aid except on equitable terms imposed as the "price" of the decree, means the thing exacted of one party and given to the other in order to do equity. *State ex rel. Heddens v. Rusk*, 139 S. W. 199, 203, 236 Mo. 201.

The balance of account between a debtor and creditor is not the "price" of the property accepted in settlement thereof, as that word is used in an ordinary purchase and sale. It is more nearly correct to say that the property is the price of the settlement, and if, for any reason, the party making the delivery has good ground for repudiating the settlement so made, the utmost of his recovery will be the property itself or its fair market value. *Johnson v. Saum*, 114 N. W. 618, 619, 137 Iowa, 138.

Where plaintiff agreed to sell defendant his interest in certain railroad land for \$250 and a further sum of \$48.30, and to lend defendant and another \$100, and defendant promised to pay \$250, and that, if he left before paying that amount, the property should go to plaintiff when he paid the "price of the land" that defendant bought from the railroad for \$51.50, the price of the land referred to, if not uncertain, may be considered as including not only the \$51.50 paid to the railroad company but also the \$48.30 paid to plaintiff, together with defendant's written promise to pay the \$250, so that plaintiff, on a tender of \$51.50, was not entitled to a reconveyance. *Raymond v. Laboudigue*, 84 Pac. 189, 190, 148 Cal. 691.

#### As rent

See Rent.

#### As value

The word "price" is not synonymous with "value," the primary meaning of the latter word being "worth," but "market value" and "market price" are frequently used alike. *Chicago, K. & W. R. Co. v. Parsons*, 32 Pac. 1083, 1084, 51 Kan. 408.

Though, strictly, "price" tokens agreement on a value by parties in interest, while "value" is, as a rule, the general estimate of the pecuniary equivalent of the subject of inquiry, the terms "worth," "price," and "value" may be treated as synonymous in determining the damages for breach by the buyer of a contract of sale. *Scruggs & Echols v. Riddle*, 54 South. 641, 645, 171 Ala. 350.

Under defendant's contract to pay plaintiff, on sale of a mine, a part of the net price received, plaintiff is entitled to such proportion of the stock of a company for which it is sold, as "price" does not necessarily mean

value in money. *Kinard v. Jordan*, 101 Pac. 696, 698, 10 Cal. App. 219 (citing 6 Words and Phrases, p. 5547).

### PRICES CURRENT AND COMMERCIAL LISTS

Circular letters sent out at different times by the secretary of a cotton seed association, containing the prices of cotton seed oil, are not "prices current and commercial lists," within Code 1896, § 1810, providing that "prices current or commercial lists" printed at any commercial mart are presumptive evidence of the value of any merchandise specified therein, and a witness should not be permitted to examine them and testify from them as to the prices of cotton seed oil. *Kentucky Refining Co. v. Conner*, 39 South. 728, 729, 145 Ala. 664 (citing *Tyson v. Chestnut*, 24 South. 73, 118 Ala. 387).

### PRICES F. O. B.

The language "prices f. o. b." is not synonymous with "delivery f. o. b." nor with "f. o. b." standing by itself. A contract whereby a coal company agreed to furnish to defendant all the coal that might be required by the latter for the use of an illuminating company "of Detroit," for certain purposes at "the following 'prices f. o. b.' Michigan Central Railroad," to wit, etc., required the delivery of the coal on the track of such railroad company at Detroit. *Detroit Southern R. Co. v. Malcolmson*, 107 N. W. 915, 916, 144 Mich. 172, 115 Am. St. Rep. 390.

### PRIMA FACIE

"Prima facie" means at first view, and so the statement that flight is a circumstance which prima facie is an indication of guilt means nothing more than that at first view flight suggests guilt. *State v. Richards*, 102 N. W. 439, 441, 126 Iowa, 497.

"Prima facie" just, reasonable, and correct in section 22, art. 9 (section 235, Bunn's Ed.; Snyder's Ed. p. 259), of the Constitution, is a presumption arising upon the finding of the Corporation Commission that the order based upon such facts is presumed on appeal in this court to be just, reasonable, and correct, subject to be overcome or rebutted by the facts in the record as weighed and found by this court in reviewing the same. *Atchison, T. & S. F. Ry. Co. v. State*, 100 Pac. 11, 15, 16, 23 Okl. 210, 21 L. R. A. (N. S.) 908.

The term "prima facie," in relation to assignments of salary, is equivalent to the word apparent. *State ex rel. State Bank v. Hastings*, 15 Wis. 75, 84.

### PRIMA FACIE CASE

"A 'prima facie case' is that which is received or continues until the contrary is shown." *Gilpin v. Missouri, K. & T. Ry. Co.*, 94 S. W. 869, 871, 197 Mo. 319; *McCombs v. State*, 99 S. W. 1017, 1018, 50 Tex. Cr. R.

490, 9 L. R. A. (N. S.) 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72.

"A 'prima facie case' is one which is established by evidence and can be overthrown only by rebutting evidence adduced on the other side." *Gilpin v. Missouri, K. & T. Ry. Co.*, 94 S. W. 869, 871, 197 Mo. 319 (quoting 2 Abb. Law Dict. 312).

A "prima facie case" is only evidence, stronger than ordinary proof, which the party against whom it is raised is not bound to overthrow by the greater weight of evidence, but which, if he fails to introduce proof to overcome it, will be sufficient to sustain an adverse verdict, though not conclusive. *Brock v. Metropolitan Life Ins. Co.*, 72 S. E. 213, 215, 156 N. C. 112.

The filing of an affidavit of forgery against a document casts on the party claiming thereunder the burden of proving its execution as at common law, so that, when the party claiming under it has "prima facie" established the instrument, the attacking party may proceed to sustain the plea of non est factum by any lawful testimony. *Crosby v. Ardoin (Tex.)* 145 S. W. 709, 713 (citing 6 Words and Phrases, p. 5549).

### PRIMA FACIE EVIDENCE

"'Prima facie evidence' of a fact is such evidence as in the judgment of the law is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose." *Gilpin v. Missouri, K. & T. Ry. Co.*, 94 S. W. 869, 871, 197 Mo. 319 (quoting and adopting the definition in *Smith v. Burrus*, 16 S. W. 881, 106 Mo. 100, 13 L. R. A. 59, 27 Am. St. Rep. 329); *Meador v. Johnson*, 112 Pac. 1121, 27 Okl. 544.

"Prima facie evidence" means evidence which is sufficient to establish the fact unless rebutted; evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. *La Fitte v. City of Ft. Collins*, 93 Pac. 1098, 1099, 42 Colo. 293; *McCombs v. State*, 99 S. W. 1017, 1018, 50 Tex. Cr. R. 490, 9 L. R. A. (N. S.) 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72.

By "prima facie" is meant that, if nothing more appeared, the evidence offered would, without contradiction, be taken as sufficient. *Foss v. McRae*, 73 Atl. 827, 828, 105 Me. 140.

"Prima facie proof" or evidence is that which, standing alone, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed, and if not rebutted remains sufficient for that purpose. *People ex rel. Sanders v. Cairo, V. & C. Ry. Co.*, 94 N. E. 11, 12, 249 Ill. 97.

"'Prima facie evidence,' once in a case, stands there all through the trial, and must be given its full probative force, unless stricken out, but may be overcome by evi-

dence given in explanation or contradiction. It is never overcome by the mere silence of the party who has offered it, for he has no occasion to speak further, or by the failure to produce further supporting evidence, for that is not necessary, or by the mere weakness of additional or further evidence introduced in support of such prima facie case. If a prima facie case is made by the proof of certain facts, and other facts are also proved which tend to support that case, but which facts, standing alone, would not make it out, the prima facie case is not weakened. Nor is a prima facie case weakened by evidence intended to support or strengthen it, but which does not, provided such evidence does not contradict or impeach the prima facie case." *United States v. Green*, 136 Fed. 618, 631, 632.

"Prima facie evidence" is that degree of proof which, unexplained or uncontradicted, is alone sufficient to establish the truth of a legal principle asserted by a party. *State v. Kline*, 93 Pac. 237, 240, 50 Or. 426 (citing 1 Jones, Ev. § 7).

"Prima facie evidence" means sufficient evidence upon which a party would be entitled to recover if his opponent produced no evidence. *Peters v. Lohr*, 124 N. W. 853, 855, 24 S. D. 605.

"Prima facie evidence" means simply that evidence which is sufficient, in the absence of evidence to the contrary, to warrant a judgment or the direction of the court for recovery in favor of a person having possession. *Amos-Richia v. Northwestern Mut. Life Ins. Co.*, 152 Fed. 192, 193.

"Prima facie evidence" is that degree of proof which, if unchallenged, is sufficient in law to establish a relevant fact." *State v. Martin*, 83 Pac. 849, 852, 47 Or. 282; 8 Ann. Cas. 769.

The law does not attach the presumption of guilt to any given circumstance, nor does it require the accused to overcome the presumption thereby raised in order to be entitled to an acquittal. What the law does say is that the fact of possession is evidence of guilt, upon which a conviction may properly be returned, unless the other facts or circumstances developed be such that, notwithstanding the recent possession, the jury still entertains a reasonable doubt of the defendant's participation in the crime. It is in this sense that the words "presumption" and "prima facie evidence" must be understood, when employed in this connection. *State v. Brady*, 97 N. W. 62, 64, 121 Iowa, 561, 12 L. R. A. (N. S.) 199.

"Prima facie evidence" may be said to be such as in law is regarded as sufficient to entitle a party to a recovery until it is fairly overcome by rebutting proof." 1 *Greenleaf on Evidence* (14th Ed.) p. 104, note, states that "in civil cases, when the plain-

tiff has introduced sufficient evidence to make out a prima facie case, he may rest on his proof, and it becomes the duty of the defendant to introduce evidence to rebut the case made by the plaintiff." *Porter v. Valentine*, 41 N. Y. Supp. 507, 510, 18 Misc. Rep. 213.

"Prima facie evidence," in legal intentment, means evidence which, if un rebutted or unexplained, is sufficient to maintain the proposition and warrant the conclusion to support which it has been introduced; but a prima facie case, when made out, does not, either necessarily or usually, change the burden of proof. *Carroll v. Boston Elevated R. Co.*, 86 N. E. 793, 797, 200 Mass. 527.

"Prima facie evidence" is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be accredited by the jury, unless it be rebutted or the contrary be proved. When a plaintiff has fulfilled the burden of proof laid upon him, and no facts in evidence show that the plaintiff's testimony cannot be true, the court is warranted in directing a verdict in his favor. *Pohemus v. Prudential Realty Corp.*, 67 Atl. 303, 308, 74 N. J. Law, 570 (citing *Starkie*, Ev. [9th Am. Ed.; 4th Eng. Ed.] 819; *Delaware, L. & W. R. Co. v. Toffey*, 38 N. J. Law, 525, 529; *Fifth Ward Sav. Bank v. First Nat. Bank*, 7 Atl. 318, 321, 48 N. J. Law, 513, 518; *Baumann v. Hamb. Amer. Packet Co.*, 51 Atl. 461, 462, 67 N. J. Law, 250, 252, 253, and quoting and adopting definition given in *Kelly v. Jackson ex dem. Morris*, 31 U. S. [6 Pet.] 622, 632, 8 L. Ed. 523).

By the term "prima facie evidence or presumption" is meant such evidence as answers the legal requirements of proof, authorizing a submission of the question to the jury, and it does not follow that, in case counter-vailing proof is put in evidence, the court is warranted in withdrawing the case from the jury. *State v. Forbes*, 73 Atl. 929, 930, 75 N. H. 306, Ann. Cas. 1912A, 302 (citing *King v. Hopkins*, 57 N. H. 334, 359; 4 Wig. Ev. §§ 2494, 2513).

Where a statute, such as section 8, c. 15, of the 1911 Session Laws (Sess. Laws 1911, p. 32), provides that, when the possession of intoxicating liquors is shown, such fact is "prima facie evidence that such intoxicating liquors are kept for sale," the statute means that such prima facie presumption or prima facie evidence is sufficient to go to the jury to prove such facts, and that such possession will be sufficient to support a verdict on that particular fact; but it does not mean that such evidence is conclusive and binding upon the jury, and that it is their duty to bring in a verdict against the defendant, where such a prima facie case only is made, and it is error to instruct a jury that under such circumstances they should

bring in a verdict of guilty. *State v. Adams*, 126 Pac. 401, 402, 22 Idaho, 485.

In an instruction that if accused unlawfully and intentionally hit deceased in the head with a pistol and killed him, though he did not intend to kill, yet he is prima facie guilty of murder in the second degree, the words "prima facie" "import that the evidence produces for the time being a certain result; but that the result may be repelled. They import that there is a presumption of guilt arising from the facts supposed in the instruction, but they do not import that the result is conclusive beyond any showing to the contrary." *State v. Stover*, 63 S. E. 315, 64 W. Va. 668.

Under the rule that the Legislature may prescribe that a fact shall be prima facie evidence of a certain other fact, where it has a tendency to prove the other fact, the provision of Laws 1907, p. 297, providing for the creation by popular vote of antisaloon territory, that proof of the issuance of an internal revenue stamp shall be prima facie evidence of the sale of intoxicating liquor by the person to whom it is issued, etc., is not invalid as overturning the doctrine of reasonable doubt in criminal cases; the term "prima facie evidence" implying evidence which may be rebutted and overcome, and the provision merely establishing a rule of evidence. *People v. McBride*, 84 N. E. 866, 870, 234 Ill. 146, 123 Am. St. Rep. 82, 14 Ann. Cas. 994.

The statute, in declaring that the possession of the United States revenue receipt or license for the sale of liquors shall be "prima facie evidence" that the holder is selling and keeping liquor for sale, "means that such evidence is competent and sufficient to justify a jury in finding a defendant guilty, provided it does in fact satisfy them of his guilt beyond reasonable doubt, and not otherwise." *State v. Momberg*, 108 N. W. 566, 567, 14 N. D. 291.

A diagram is not "prima facie evidence" of any fact or object represented by it. *Carman v. Montana Cent. R. Co.*, 79 Pac. 690, 692, 32 Mont. 137 (quoting *People v. Cochran*, 61 Cal. 548).

Recent possession of stolen property, the proceeds of a robbery or burglary, is "prima facie evidence" of the possessor's guilt. *People v. Deluce*, 86 N. E. 1080, 1081, 237 Ill. 541.

The commissioner's deed of land forfeited for taxes is "prima facie evidence" of title which is sufficient to establish the title in the grantee therein in the absence of evidence to the contrary. *Morris v. Breedlove*, 116 S. W. 223, 89 Ark. 296 (citing 6 Words and Phrases, pp. 5549, 5550).

"Prima facie evidence" is such as in the judgment of the law is sufficient to establish the fact, and, if unrebutted, remains sufficient for that purpose. The statutes

having made the probate of wills conclusive as to personality and "prima facie evidence" of the validity of wills as to real property, the manner of execution and of attestation of a will admitted to probate cannot be attacked in a collateral proceeding. *Thomas v. Williams*, 40 South. 831, 833, 51 Fla. 332 (quoting and adopting definition in 6 Words and Phrases, p. 5549).

The term "prima facie evidence," within Comp. Laws 1907, § 4355, which provides that possession of property recently stolen, when the possessor fails to make satisfactory explanation, shall be deemed prima facie evidence of guilt, means "presumptive" evidence, the term not meaning that, unless rebutted by other evidence or discredited by circumstances, the proof becomes conclusive as to guilt. *State v. Potello* (Utah) 119 Pac. 1023, 1027.

### PRIMA FACIE LIABILITY

We therefore adopt what is known as the "rule of prima facie liability." All losses of property incurred by guests at a public hotel or inn by fire are prima facie due to the negligence of the proprietor, but he may discharge and relieve himself from liability by showing that the loss happened by an irresistible force or unavoidable accident, such as a fire originating upon premises over which he had no control, without fault or negligence on his part. This doctrine does not infringe upon the common-law rule, which makes him responsible for all thefts from within his house, or unexplained, whether committed by guests, servants, or strangers, upon the general principle that an innkeeper guarantees the good behavior of all who may be under his roof, particularly his servants. *Johnson v. Chadbourn Finance Co.*, 94 N. W. 874, 876, 89 Minn. 310, 99 Am. St. Rep. 571.

### PRIMA FACIE VALID

An entry on public land is "prima facie valid" when it is valid on the face of the record. *Holt v. Classen*, 91 Pac. 866, 868, 19 Okl. 131 (adopting definition in *McMichael v. Murphy*, 25 Sup. Ct. 460, 197 U. S. 304, 49 L. Ed. 766).

### PRIMA FACIE VALUE

Face or prima facie value, see Face Value.

### PRIMARY—PRIMARILY

See Closed Primary.

Suffrage at primary, see Suffrage.

The words "primary and direct," as contrasted with "secondary," when spoken of an obligation, refer to the remedy provided by law for enforcing the same rather than to the character and limits of the obligation. *Rouse v. Wooten*, 53 S. E. 430, 432, 140 N. C. 557, 111 Am. St. Rep. 875, 6 Ann.



Cas. 280 (quoting *Kilton v. Tool Co.*, 48 Atl. 1039, 22 R. I. 611).

**PRIMARYLY LIABLE**

Neg. Inst. Act (Pub. Laws 1896-1900, p. 84, c. 674) art. 1, § 3, provides that the person "primarily" liable on an instrument is the person who, by the terms thereof, is absolutely required to pay the same, and that all other parties are "secondarily" liable. Article 6, § 71, provides that a person placing his signature on an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates his intention to be bound in some other capacity. Article 8, § 97, provides that where a negotiable instrument has been dishonored, if notice of dishonor is not given to an indorser, he shall be discharged. Held, that persons who placed their signatures on the back of a note before delivery for the accommodation of the maker were indorsers, and could not be held as joint makers on the ground that the holder would not have taken the note without their signatures. *Deahy v. Choquet*, 67 Atl. 421, 422, 28 R. I. 333, 14 L. R. A. (N. S.) 847.

The word "primarily," in Laws 1896, p. 220, c. 272, § 22, providing that a married woman may cause the life of her husband to be insured and be entitled to receive insurance money as her separate property, free from any claim of creditors of her husband except that, where the premium actually paid annually out of the husband's property exceeds \$500, that portion of the insurance purchased by the excess of the premium over \$500 is "primarily" liable for the husband's debts, means first in order of payment, and the liability created is wholly statutory, and under Code Civ. Proc. §§ 2472, 2481, 2596, 2712, 2731, describing the general jurisdiction and powers of the surrogate's court, providing for the issuance of letters, specifically declaring what shall be deemed assets of an estate, etc., a surrogate has no jurisdiction of a proceeding by a creditor of a deceased husband to compel the wife, as executrix, to account for the excess of life insurance purchased by the portion of annual premiums in excess of \$500. In re *Thompson*, 76 N. E. 870, 872, 184 N. Y. 36.

The liability of a guarantor is based on the terms of his contract, which is distinct from the terms of the instrument on which it is indorsed, and he does not agree to make the debt his own, but only to answer on his principal's default, and his contract, while it may require him to pay the note, is secondary within Rev. Codes 1905, § 6494, providing the terms for the release of a person secondarily liable. The terms "primarily liable" and "secondarily liable," as used in Rev. Codes 1905, § 6494, have reference to the remedy provided for enforcing the obligation of one signing a negotiable instrument, rather than to the character of the obligation, and

the remedy against a guarantor is not primary and direct, but collateral and secondary. *Northern State Bank of Grand Forks v. Bellamy*, 125 N. W. 888, 889, 19 N. D. 509, 31 L. R. A. (N. S.) 149.

Under the negotiable instruments law (Laws 1899, pp. 127, 180, 181, 187, 188, 147, c. 83, §§ 29, 60, 63, 119, 120, 192), defining an accommodation maker, making him liable to a holder for value, providing that a negotiable instrument is discharged by payment, etc., and that a person secondarily liable on the instrument is discharged by any act which will discharge a simple contract for the payment of money, etc., and defining a person "primarily liable" as one who by the terms of the instrument is absolutely required to pay the same, etc., an accommodation maker of a note is not relieved from liability by an extension of time of payment without his knowledge or consent. *Wolstenholme v. Smith*, 97 Pac. 329, 331, 84 Utah, 300.

Under L. O. L. § 5862, defining an "accommodation maker" as one who has signed a negotiable instrument without receiving value, but providing that such person is liable to a holder for value, notwithstanding the holder knew him to be only an accommodation party, and section 6023, defining a person "primarily liable" as one who is absolutely required to pay a negotiable instrument, and sections 5952, 5953, providing for the discharge of a negotiable instrument by payment, and that a person secondarily liable shall be discharged by indulgence of the maker, an accommodation maker is primarily liable, and is not discharged, notwithstanding an indulgence to parties secondarily liable. *Murphy v. Panter*, 125 Pac. 292, 294, 62 Or. 522.

**PRIMARY AND GRAMMAR SCHOOLS**

Const. art. 9, § 5, requires the Legislature to provide for a system of "common schools" by which a free school shall be supported in each district. Section 6 provides that the "public school system" shall include "primary and grammar schools," and such high schools, evening schools, etc., as may be established by legislative or local authority, and further provides that the entire revenue derived from the state school fund shall be applied exclusively to the support of the "primary and grammar schools." Pol. Code, §§ 1622, 1861, reiterate the requirement that the revenue of the state school fund shall be applied solely to primary and grammar schools. Section 1532 requires the superintendent of public instruction to apportion the balance of the state school fund which remains after providing for teachers to the several counties according to their "average daily attendance," as shown by reports of the county superintendents for the preceding year. Sections 1617, 1662, and 1663 recognize and make certain provisions relative to the adoption of kindergartens as part of

the burden is discharged until something else is disclosed. A presumption of death from a long absence is not an imperative rule of law, where the circumstances of disappearance permit any different inference. Plaintiff sued upon a benefit certificate. Her testimony showed that the insured disappeared more than seven years before, and that he had not been heard from since. It appeared also that there was a deficit in his accounts as an officer of the lodge, which would have become known on the day following his disappearance. Held, error to instruct the jury that, if they found that he disappeared and had not been heard of for seven years, "then, in the absence of any rebutting circumstances, he is presumed to be dead." *Winter v. Supreme Lodge K. of P.*, 69 S. W. 662, 666, 96 Mo. App. 1.

#### **Presumption of law distinguished**

A "presumption of law" is a rule of law which the court draws from the requisite facts before it, and it must charge the jury to find in accordance therewith, while a presumption of fact is an inference of fact which cannot at common law be made without the intervention of the jury. *Mitchell v. Stanton (Tex.)* 139 S. W. 1033, 1036.

It was argued that prior decisions of the court sharply discriminated between "presumptions of law" and presumptions of fact, and that, whenever a "presumption of fact" was given by the court as a "presumption of law," it was error necessitating reversal, and that the presumption of the truth of an admission against interest was a "presumption of fact" and not of law, but the majority of the court were averse to modifying the rule announced in the former cases as against the objection that the attempted distinction between a "presumption of law" and the so-called "presumption of fact" is often so metaphysical, subtle, and shadowy as to elude analysis. *Ausmus v. People*, 107 Pac. 204, 215, 216, 47 Colo. 167, 19 Ann. Cas. 491.

#### **PRESUMPTION OF INNOCENCE**

"Presumption of innocence" is an instrument of proof created by law in favor of one accused, whereby his innocence is established until sufficient proof is introduced to overcome the proof which the law has created. *Bowman v. Little*, 61 Atl. 1084, 1088, 101 Md. 273 (citing *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481).

"Presumption of innocence" in a civil case, where an officer, acting under process, is charged with an assault, means that it is presumed that the defendant did not commit the act charged. *McKinstry v. Collins*, 56 Atl. 985, 988; 76 Vt. 221 (citing *Bradish v. Bliss*, 35 Vt. 328; *Currier v. Richardson*, 22 Atl. 625, 63 Vt. 620).

The "presumption of innocence" is a legal inference based on the fact that the ma-

jority of men are not criminals, and is without evidence to support it. *State v. Reilly*, 116 Pac. 481, 482, 85 Kan. 175.

The "presumption of innocence" fixes the burden of proof in the first instance, and it is not evidence, and does not partake of the nature of evidence. The presumption of innocence remains with defendant only until it is overcome, and does not necessarily remain with him throughout the whole of the trial. *Culpepper v. State*, 111 Pac. 679, 680, 4 Okl. Cr. 103, 31 L. R. A. (N. S.) 1166, 140 Am. St. Rep. 668.

An instruction that if, after examining and weighing all the evidence carefully, there is left in the minds of the jury a "presumption of innocence" in favor of accused, they should acquit was properly refused, as a presumption of innocence is a conclusion of law, having no relation to a condition of mind produced by proof. *Gordon v. State*, 41 South. 847, 849, 147 Ala. 42.

The law presumes that one accused of crime is innocent of the crime charged in the indictment and of every material act and element of the crime, and this "presumption of innocence," obtains in his favor until his guilt has been established by evidence beyond a reasonable doubt. *Flohr v. Territory*, 73 Pac. 565, 573, 14 Okl. 477.

#### **PRESUMPTION OF LAW**

##### **See Conclusive Presumption of Law.**

A "presumption of law" is a rule of law that a particular inference shall be drawn by a court or jury from a particular circumstance. *State v. Dodds*, 46 S. E. 228, 231, 54 W. Va. 289 (citing *Lawson, Presump. Ev.* 639, 640).

"Presumptions of law" are conclusions and inferences which the law draws from given facts. *Dyer v. State*, 65 S. E. 42, 43, 6 Ga. App. 390 (quoting and adopting *Klinnebrew v. State*, 5 S. E. 59, 80 Ga. 239).

"Presumed as a matter of law" is synonymous with conclusively presumed. *Vaughn v. Glens Falls Portland Cement Co.*, 93 N. Y. Supp. 979, 981, 105 App. Div. 136.

A "presumption of law" establishes a certainty. The presumption arising from possession of recently stolen property is one of fact and not of law. Guilt may or may not be inferred from such possession, and whether, under the circumstances, the inference is sufficient to establish guilt is a question of fact for the jury. And it is error to instruct the jury that possession of stolen property, under the circumstances, was prima facie evidence of guilt, unless accounted for by a reasonable explanation. *State v. Hoshaw*, 94 N. W. 873, 874, 89 Minn. 307.

"Presumptions of law" are such inferences as are warranted by the legal experience of courts in administering justice, and are usually founded upon reasons of public

policy and social convenience and safety. Some of these presumptions have become so well established as to be conclusive as rules of law, while others are only prima facie evidence, and may be rebutted. *City of Indianapolis v. Keeley*, 79 N. E. 499, 508, 187 Ind. 516.

"Presumptions of law" consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry." In a prosecution for assault with intent to kill, an instruction that if the jury believed beyond a reasonable doubt that defendant shot his wife, and cut her throat, as charged, the natural consequence of such acts would be the wife's death, and that defendant was of sound mind at the time, then the presumption of law was that defendant committed such assault, with intent to kill his wife, and if the assault, under such circumstances, was committed with a premeditated design to effect the wife's death, the defendant, being sane at the time, was guilty, was not erroneous, as charging that defendant's intent arose as a presumption of law, since the instruction required, in order to convict, that the jury "find" that the acts mentioned were done with premeditated design to effect the wife's death, and that the natural and probable consequence of such act was the death of the wife. *Lowe v. State*, 96 N. W. 417, 418, 423, 118 Wis. 641.

The phrase "presumed to be fraudulent and void," in *Laws 1903*, p. 249, c. 30, regulating the sale of stocks of merchandise in bulk, and declaring that sales in bulk, made without a compliance with the act, shall be "presumed to be fraudulent and void," only raises a legal presumption of fraud, which may be destroyed by rebutting evidence. *Williams v. Fourth Nat. Bank of Wichita, Kan.*, 82 Pac. 496, 498, 15 Okl. 477, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970.

#### Classes

Presumptions are divided into two classes: Irrebuttable presumptions, or "presumptions of law," and rebuttable presumptions, or "presumptions of fact." Some presumptions are irrebuttable, and proceed as an arbitrary rule of law, to the effect that a particular inference of fact shall necessarily be drawn from certain established facts. There are other presumptions of law, however, which are rebuttable. All presumptions of fact proceed from other facts in proof, and supply an omitted fact in accord with the dictates of human experience on like questions, and are therefore rebuttable or disputable. It is the well-established law that a presumption of fact will not be permitted to contradict or overcome facts actually proved. *Sowers v. St. Louis & S. F. R. Co.*, 104 S. W. 1122, 1123, 127 Mo. App. 119 (quoting and adopting *Lawson, Presump. Ev.*; 16 Cyc. p. 1073).

"Presumptions of law" are of two kinds, conclusive and disputable, and the former

are rules determining the quantity of evidence requisite to the support of any particular averment which is not permitted to be overcome by proof, while disputable presumptions are those that may be overcome by proof; but, in the absence of opposing evidence, the law will infer the existence of one fact from the proved existence of another. *Modern Woodmen of America v. Kincheloe (Ind.)* 98 N. E. 452, 453.

#### PRESUMPTION OF LEGAL KNOWLEDGE

The maxim, "Every one is presumed to know the law," does not obtain literally and generally; it is limited by the reason for the rule, viz.: To prevent violators of the Criminal Code from escaping punishment on the ground of ignorance of the law and violators of private rights escaping liability for actual loss thereby inflicted on such ground. *Topolewski v. Plankinton Packing Co.*, 128 N. W. 554, 561, 143 Wis. 52.

#### PRESUMPTIVE EVIDENCE

"Presumptive evidence" authorizes but does not require conviction. *People v. Deluce*, 86 N. E. 1080, 1082, 237 Ill. 541, 547.

Although the term "presumptive evidence of guilt," as applied to a certain state of facts, may perhaps sometimes indicate no more than that the facts referred to may be considered by the jury as evidence from which guilt may be inferred as a matter of fact, and not as a matter of law, yet it is always unwise, in giving the jury instructions as to the evidence, to say that from any particular fact a presumption of guilt arises. The question of guilt is one to be determined by the jury on all the facts. *State v. Poe*, 98 N. W. 587, 591, 123 Iowa, 118, 101 Am. St. Rep. 307.

#### PRESUMPTIVE GRANT

A "presumptive grant" is a grant of a highway implied by law because of public user, and it cannot be broader than the user. *Meade v. City of Topeka*, 88 Pac. 574, 575, 75 Kan. 61.

#### PRETEND

##### PRETENDED DEED

A "pretended deed" is a deed apparently and prima facie valid. *Jones v. Hubbard*, 90 S. W. 1137, 1141, 193 Mo. 147.

##### PRETENSE

See False Pretense.

#### PRETERMITTED

The word "pretermitted," according to Webster, means "to pass by," "to omit," "to disregard." Where testator provided that after-born children should share in such personal property as was not bequeathed to his wife, such after-born children were not pre-

of making use of the purchased privilege, which the books denominate the "franchise to do," is entirely distinct and separate from the franchise to be or to exist here as a corporation. *American Smelting & Refining Co. v. People ex rel. Lindsley*, 82 Pac. 531, 534, 84 Colo. 240.

### PRIMARY INVENTIONS AND PATENTS

"A 'primary invention' is one which performs a function never performed by any earlier invention, while a 'secondary invention' is one which performs a function previously performed by some earlier invention, but in a substantially different way from any that preceded it." The Supreme Court of the United States has defined the legal distinctions flowing from this diversity as follows: "Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines, which employ substantially the same means to accomplish the same result, are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine." Secondary patents should receive a construction narrower than that given to primary patents. *Von Eberstein v. Chambliss*, 166 Fed. 463, 468, 469 (quoting and adopting definitions in *Walker, Patents*, 313, and *Morley Sewing Machine Co. v. Lancaster*, 9 Sup. Ct. 299, 302, 129 U. S. 273, 32 L. Ed. 715).

The distinction between "primary and secondary patents" is now given less force than formerly by the courts, for every patent may be regarded as primary within its field; and it follows, then, that every patent should have as broad an interpretation as the courts may fairly give it and as full and fair a use of the doctrine of equivalents as the courts may fairly allow it. *Kip-Armstrong Co. v. King Philip Mills*, 130 Fed. 28, 31.

### PRIMARY RIGHT

The term "primary right," used as a designation of that which, when violated, will constitute a ground for judicial redress, may in an equitable action include other rights which are also primary in the sense that they might constitute separate grounds of complaint, but which, by reason of their relation to the dominant purpose of the suit, are deemed to be embodied therein. *Emerson v. Nash*, 102 N. W. 921, 927, 124 Wis. 369, 70 L. R. A. 326, 109 Am. St. Rep. 944.

### PRIME

In an action for a broker's commission, where the court had given instructions covering every phase of the case, it was error to instruct that, before plaintiff could recover, he must show by the greater weight of the

evidence that he was the "prime cause" of the purchase, as the jury might infer from the use of the word "prime" that the cause must be first in order of time, original, and that something more definite was meant than was included in the other instruction as to "procuring" cause. *S. J. Cox Real Estate Co. v. French*, 142 S. W. 449, 450, 160 Mo. App. 678.

### PRINCES

See Restraints of Kings or Princes.

### PRINCIPAL

See Vice Principal.

The word "principal" means main, chief, leading, highest in value, character or importance, most considerable or important. *Kelty v. Burgess*, 115 Pac. 583, 584, 84 Kan. 678.

The word "principal," as used in Code Civ. Proc. N. Y. § 3320, as amended by Laws 1904, p. 1921, c. 755, declaring that two or more trustees of an express trust are entitled to certain commissions to be apportioned among them, and, where the value of the principal of the trust estate or fund equals or exceeds \$100,000, each trustee is entitled to full commissions on "principal" and on income of each year to which a sole trustee is entitled, unless the trustees are more than three, means the fund which is to be paid over, either in cash or its equivalent in securities, and hence did not include real property. *Chisolm v. Hamersley*, 100 N. Y. Supp. 38, 41, 114 App. Div. 565.

#### In criminal law

All participants in the commission of a misdemeanor are "principals." *Richardson v. United States*, 181 Fed. 1, 5, 104 C. C. A. 69.

Those who are present aiding, commanding, or abetting are deemed "principals." *United States v. Young & Holland Co.*, 170 Fed. 110, 113 (citing *United States v. Gooding*, 12 Wheat. [25 U. S.] 460, 472, 6 L. Ed. 693).

All who are present aiding and abetting in the commission of a misdemeanor are "principals." *State v. Hunter*, 60 S. E. 240, 79 S. C. 73; *Southern Express Co. v. State*, 64 S. E. 341, 342, 6 Ga. App. 31; *State v. Rowland Lumber Co.*, 69 S. E. 58, 59, 153 N. C. 616.

There are no accessories in misdemeanors, but all who participate in any way in the unlawful act are "principal" offenders. *Burrow v. City of Hot Springs*, 108 S. W. 823, 827, 85 Ark. 396; *People v. Acritelli*, 110 N. Y. Supp. 430, 440, 57 Misc. Rep. 574; *Loeb v. State*, 64 S. E. 338, 340, 6 Ga. App. 23.

Every person concerned in the commission of a crime, whether directly committing

the acts constituting the offense or aiding or abetting or advising or encouraging its commission, is a "principal." *People v. Bunkers*, 84 Pac. 864, 367, 2 Cal. App. 197.

Under the express provisions of Pen. Code, § 29, a person concerned in the commission of a crime, whether he directly commits the criminal act or aids and abets in its commission, is a "principal." *People v. Kellogg*, 94 N. Y. Supp. 617, 621, 105 App. Div. 506.

All persons who are concerned in the commission of an offense are guilty as "principals," and should be prosecuted and convicted as such. *Bowes v. State*, 127 Pac. 883, 888, 8 Okl. Cr. 277.

All persons are "principals" in the commission of a crime who are guilty of acting together therein, and any person who advises or agrees to the commission of an offense and is present at its commission is a principal thereto, whether he aids or not in the commission of the illegal act. *Sheppard v. State*, 140 S. W. 1090, 1091, 63 Tex. Cr. R. 569.

Each person present, consenting to the commission of an offense, and doing any act which is an ingredient or immediately connected with it, or leading to its commission, is a "principal" to the same extent as if he committed the whole crime. *McCoy v. State*, 44 South. 814, 817, 91 Miss. 257.

Code Ala. 1895, § 4308, abolishes the common-law distinction between accessories before the fact and the "principals" in a felony, and makes guilty as principals all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet in its commission, though not present. *Ferguson v. State*, 37 South. 448, 450, 141 Ala. 20.

An instruction to the effect that all persons guilty of acting together in the commission of an offense are "principals," and that if one actually commits an offense, and another is present, and knowing the unlawful purpose, aids the commission of the offense by acts, or encourages it by words or gestures, he is a principal offender, is correct. *Parks v. State* (Tex.) 79 S. W. 537.

Pen. Code 1895, art. 74, makes all persons "principals" who are guilty of acting together in the commission of an offense. Article 75 provides that when an offense is actually committed by one or more, but others are present, and knowing the unlawful intent, aid by acts, or encourage by words or gestures, those actually engaged in the commission of the unlawful act, or who, not being actually present, keep watch so as to prevent the interruption of those committing the offense, the persons aiding, encouraging or keeping watch, are "principals." Held, that two or more who act together with an unlawful intent and common design in committing an offense are each guilty as prin-

cipals. *White v. State*, 132 S. W. 790, 791, 60 Tex. Cr. R. 559.

All persons who participate in an offense are guilty as "principals," and it is immaterial whether they have any interest in any financial gain from the commission of the crime. *Buchanan v. State*, 112 Pac. 32, 34, 4 Okl. Cr. 645, 36 L. R. A. (N. S.) 88.

All persons are "principals" who are concerned in the commission of a criminal offense, whether they profit by the commission of such offense or not. *Morris v. State*, 111 Pac. 1096, 4 Okl. Cr. 233.

Comp. Laws 1909, § 2045, provides that all persons concerned in the commission of a crime, whether a felony or a misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, are "principals." Held that, to constitute one a party to a crime under the statutes, it is necessary that he be concerned in the commission of the offense, either committing it himself or procuring it to be done by aiding or abetting its commission, and it is not sufficient that he merely acquiesced therein. *Moore v. State*, 111 Pac. 822, 823, 4 Okl. Cr. 212.

Where several persons threw stones at a train at the same time and place, they were each liable without proof of a conspiracy, though some of them threw stones at one car and some at another, for proof of conspiracy is necessary only to fix liability on members of a mob who are present, but not shown to have committed the illegal act complained of. *State v. Holder*, 69 S. E. 66, 67, 153 N. C. 606.

All persons concerned in the commission of a crime, whether they directly commit the act or aid and abet, though not present, are "principals," under Snyder's Comp. Laws 1909, § 2045. *Greenwood v. State*, 105 Pac. 371, 372, 3 Okl. Cr. 247.

Under Kirby's Dig. § 1560, defining an "accessory" as one who stands by, aids, abets, or assists, or one who, not being present, has advised and encouraged a crime, and section 1561, making such a person a principal, and at common law, all persons concerned in a crime, less than a felony, are "principals." *Strong v. State*, 114 S. W. 239, 240, 88 Ark. 240, 22 L. R. A. (N. S.) 560.

Where defendant proposed a scheme by which he was to obtain possession of certain indictments, for the purpose of destroying them, and under such scheme the indictments were actually removed from the files of the court and delivered to him, he was a "principal" throughout the transaction; and if he took them from the person actually removing them, either with or without his consent, he was guilty of a theft of public records. *People v. Mills*, 70 N. E. 786, 791, 178 N. Y. 274, 67 L. R. A. 131 (citing Pen. Code, § 29; *People v. Bliven*, 19 N. E. 638, 112 N. Y.

79, 8 Am. St. Rep. 701; *People v. Peckens*, 47 N. E. 883, 153 N. Y. 576).

Where the idea of guilt, on the part of an unmarried participant, of the offense of living in adultery is excluded by the terms of the statute defining the offense (Pen. Code, § 269a, as amended March 21, 1911 [St. 1911, p. 426]), it follows that such participant cannot be held punishable as being an aider and abettor in the offense, even though she be held to be an accomplice under Pen. Code, § 31, defining "principals" as all persons concerned in the commission of a crime, or who aid or abet its commission. *Ex parte Cooper*, 121 Pac. 318, 320, 162 Cal. 81.

Evidence held insufficient to sustain a conviction for larceny, under Pen. Code, § 29 (now Penal Law [Consol. Laws, c. 40] § 2), making a person who counsels or induces another to commit a crime a "principal." *People v. Gerst*, 121 N. Y. Supp. 934, 935, 137 App. Div. 272.

Rev. 1905, § 3534, provides that any person who shall unlawfully procure and deliver intoxicating liquor to another shall be the agent of the seller, and makes it a misdemeanor. Held, that one who procured liquor from an illicit dealer in the state by purchase and delivered it to another, both the purchase and the delivery being made at a place where the sale of liquor is prohibited, is deemed a principal, and liable criminally as the seller of the liquor is liable, since in misdemeanors all who participate in the offense are "principals." *State v. Burchfield*, 63 S. E. 89, 90, 149 N. C. 537.

One who conspired with another to commit a robbery, and gave a signal to announce that the proposed victim had left a certain point, and arrived near the scene when his co-conspirator killed the victim, and then helped him to carry the murdered man into his cabin, was a "principal" and not an accessory, and his guilt was not dependent upon the guilt or innocence, the conviction or acquittal, of his coconspirator or any other participant in the crime. *Dean v. State*, 37 South. 501, 502, 85 Miss. 40.

Under Pen. Code 1895, arts. 75-78, defining principals in felonies, all persons who are present and participate by acts, or encouragement by words or gestures in the commission of the offense, are "principals," though the act directly accomplishing the offense is the act of another. Where cattle stolen in F. county were placed in a pasture of accused in that county, with knowledge that they were stolen, and he employed an innocent third person to drive them to T. county, and there conceal them by shipping them, accused was a principal in the concealment in T. county, within Pen. Code 1895, art. 77, providing that one who employs another who cannot be punished to commit an offense shall be a principal, and T. county could

prosecute him. *Davis v. State*, 136 S. W. 45, 46, 61 Tex. Cr. B. 611.

The mere presence of accused at the time of a homicide committed by a third person is not sufficient to make him a "principal"; but he must say or do something to encourage the third person to do the killing, or the killing must have occurred because of a previous agreement, and, if the third person acted in self-defense, accused could act with him, without becoming guilty as a principal. *Patton v. State*, 136 S. W. 459, 62 Tex. Cr. R. 71.

An indictment, under Rev. St. 1909, § 4772, declaring that whoever, as principal, or as agent of a corporation or person, shall set up and carry on a bucket shop, or any employé of a person or corporation engaged in carrying on a bucket shop, who under his employment shall assist in carrying on the bucket shop, shall be guilty of a felony, which charges that defendant "as principal" set up and carried on a bucket shop is not sustained by evidence that the bucket shop was being carried on by a corporation, and that defendant was its president. *State v. Miner*, 135 S. W. 483, 496, 233 Mo. 312.

Under Rev. St. § 1620, one who knowingly rents premises to be occupied for the purpose of prostitution, and which with his knowledge are conducted as a bawdyhouse, aids, abets, and assists in keeping such a house, and may be punished as a "principal" for a violation of section 1776. *Griffin v. People*, 99 Pac. 321, 322, 44 Colo. 533.

An owner of property, or an agent of such owner, who knowingly rents the same to another to be used as a bawdyhouse, the keeping of which is a misdemeanor, aids and abets the commission of the offense, and under Pen. Code Alaska, § 188, which provides that in misdemeanors there are no accessories, is punishable as a "principal." *Rosenrath v. United States*, 155 Fed. 38, 43, 83 C. C. A. 634.

In a prosecution for violation of the local option law, it is not essential to charge on the subject of "principals," since in misdemeanor cases the distinction between principals and accomplices does not apply. A charge that all persons are "principals" who are guilty of acting together in the commission of an offense, and that the criterion is did the parties act together, was the act done in pursuance of a common intent and previously formed design in which the minds of all united; if so, they are alike guilty, providing the offense was actually committed during the existence and in the execution of the common design and intent, whether all were actually bodily present when the offense was actually committed or not—sufficiently submitted the law on the subject of principals. *Lott v. State*, 127 S. W. 191, 192, 53 Tex. Cr. B. 604.

An instruction, on a prosecution for an illegal sale of intoxicating liquors, that defendant would be guilty if he aided or assisted B. in effecting the sale in violation of law, is not error; B. & C. Comp. § 2153, declaring one who aids and abets in the commission of a crime to be a "principal." *State v. Carmody*, 91 Pac. 446, 448, 50 Or. 1, 12 L. R. A. (N. S.) 828.

One present aiding and abetting a burglary is a "principal," under Comp. Laws, § 11,930, abolishing the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, and declaring that all persons concerned in the commission of a felony may be tried and punished as principals. *People v. Wycoff*, 114 N. W. 242, 243, 150 Mich. 449.

Accused was present at a homicide, and the testimony of the state tended to show that he was directly aiding and encouraging the one who did the killing. The court instructed that all persons are "principals" who are guilty of acting together in the commission of an offense, and that where an offense is actually committed by one or more persons, and others are present and, knowing the unlawful intent, aid by acts or encourage by words or gestures those engaged in the commission of the unlawful act, the persons so acting or encouraging are principals. Held, that the instruction did not assume that others were present and knew the unlawful intent of those engaged in the difficulty in question, nor any other fact, but correctly defined "principal," that the jury might intelligently determine and fairly declare, in the light of subsequent portions of the charge, whether accused was or was not a principal. *Barton v. State*, 111 S. W. 1042, 1044, 53 Tex. Cr. R. 443.

Under Pen. Code 1895, art. 78, making one who advises or agrees to the commission of an offense, and who is present when it is committed, a "principal," mere presence when an offense is committed, does not make one a principal unless he advises or agrees thereto, so that if accused took a girl to a certain place where she was afterwards assaulted by others who met them there, according to agreement without any purpose of having her assaulted, but, as accused understood, for the purpose of seeing her about a letter, he would not be guilty as a principal, and it was error to refuse an instruction to that effect. *Nowlin v. State*, 132 S. W. 800, 60 Tex. Cr. R. 356.

In a murder case, a charge that all persons are principals who act together in committing an offense; and that, when an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in committing the unlawful act, such

persons so aiding are "principals," as are all who endeavor at the time of the offense to secure the safety or concealment of the offenders, and one who is present when the offense is committed is a principal whether he aids or not in the illegal act; and that, if decedent was killed on the date charged, and accused was present, and, knowing the unlawful intent, aided by acts or encouraged by words or gestures those actually engaged in killing decedent, or advised or agreed to the killing, and was present when it was done, whether she aided or not in the killing, or endeavored to secure the safety or concealment of the ones doing the act, she would be a principal, and subject to the same punishment as those actually engaged in the killing—was a sufficient charge on the law of principals as declared by Pen. Code 1895, arts. 74-76. *Goode v. State* (Tex.) 123 S. W. 597, 603, 604.

Where, in a prosecution for murder, there was no question as to defendant's presence at the time of the killing, a charge on "principals" that all persons who are acting together in the commission of an offense are principal offenders, etc., and that deceased was killed by some other person, but the jury had a reasonable doubt as to whether defendant was a party as a principal to such murder, or that another party killed deceased without any aid rendered by defendant, or, if they had a reasonable doubt on the subject, to acquit defendant, was sufficient, without further stating that to be a principal one must be present at the commission of an offense, and do something to aid the party committing the offense, knowing that an offense was being committed. *Cecil v. State* (Tex.) 100 S. W. 390, 392.

#### **Same—Actual presence**

In order to constitute one a "principal" in a crime, he must be actually and bodily present when the offense is committed. *McDonald v. State*, 79 S. W. 542, 543, 46 Tex. Cr. R. 4.

All persons concerned in the commission of an offense are "principals," whether present when the offense is actually committed or not. *Cox v. State*, 104 Pac. 1074, 1078, 8 Okl. Cr. 129.

In order that a "principal" shall be answerable for a felony he must have been actually or constructively present where another equally guilty committed the offense. *Richardson v. United States*, 181 Fed. 1, 5, 104 C. C. A. 69.

Bodily presence on the ground when a robbery by assault is committed is essential to make a participant a "principal." *Bollen v. State*, 86 S. W. 1025, 1026, 48 Tex. Cr. R. 70.

To render one a "principal" to a murder, his presence need not be strictly actual, immediate presence, such as would make him

an eye or ear witness of what passes, but may be a constructive presence; and, where it appears that a person at the time of the homicide was within a few feet of the house in which the homicide was committed, his juxtaposition clearly brought him in legal contemplation as a principal to the homicide, if the facts showed him acting with actual participants. *Smith v. State*, 105 S. W. 182, 183, 52 Tex. Cr. R. 27.

"Since there must always be a 'principal,' one is such who does the criminal act through an innocent agent, while personally absent. For example, when a dose of poison, or an animate object like a human being, with or without general accountability, but not criminal in the particular instance, inflicts death or other injury in the absence of him whose will set the force in motion, there being no one but the latter whom the law can punish, it of necessity fixes upon him as the doer." Since Burns' Rev. St. 1901, provides a penalty for a woman soliciting and taking medicine for the purpose of procuring a miscarriage, and section 1996 prescribes a penalty for this person administering or prescribing such medicine or any other substance, thereby procuring a miscarriage, or causing the death of the woman, in a prosecution under the latter section, the person administering or prescribing the medicine, and not the woman, is the "principal," and may be punished as such, although absent at the time the medicine was taken or instrument used. *Seifert v. State*, 67 N. E. 100, 160 Ind. 464, 98 Am. St. Rep. 340 (quoting and adopting definition in 1 Bish. New Cr. Law, § 651).

"A man is a 'principal,' whatever agencies he employs, if the crime is committed by his will alone. His presence is immaterial. This doctrine extends to the case of the innocent agent, who, acting under mistake of fact, becomes the instrument in the hands of the principal for the commission of the unlawful act." One who knowingly presented, through an innocent agent, a false claim against a city for allowance would be as guilty of the offense of presenting such claim as if he presented it in person. *Brunaugh v. State*, 90 N. E. 1019, 1029, 173 Ind. 483 (quoting *Gillette*, Cr. Law [2d Ed.] § 13).

An instruction that, to constitute a person a "principal" in the commission of larceny, the person must have been actually present at its commission is erroneous; the language being entirely too broad and forbidding the idea that constructive presence recognized by all of the authorities. *Baldwin v. State*, 35 South. 220, 222, 46 Fla. 115.

To constitute a "principal," the offender must either be present where the crime is committed, or he must do some act during the time when the offense is being committed which connects him with the commission in

some way, and where the acts committed occurred prior to the commission of the principal offense, or subsequent thereto, and are independent of and disconnected with the actual commission, and no act is done during the commission in aid thereof, one is not a principal offender, but an accomplice, or an accessory, according to the facts. *Davis v. State*, 117 S. W. 159, 160, 162, 55 Tex. Cr. R. 495.

One who advises others to commit larceny, but who is at several miles distance at the time of the commission of the offense, and who takes no part therein, but assists in the disposal of proceeds, after the theft has been fully committed, is not a "principal," but an "accessory." *Skidmore v. State*, 115 N. W. 288, 80 Neb. 698.

One using an innocent party to consummate a crime would be a "principal," whether present or absent, under Pen. Code 1895, art. 77, making one a principal who employs another who cannot be punished to commit an offense. *Farris v. State*, 117 S. W. 798, 799, 55 Tex. Cr. R. 481, 131 Am. St. Rep. 824.

To constitute one a "principal" in hog theft, he must have been present and assisted in taking the hogs, or he must have aided in the commission of the theft, as by keeping watch or by securing the safety of the principal. That he entered into a conspiracy to commit theft with others is not sufficient. If he advised them in advance to steal the hogs, and encouraged them, and furnished means, he is but an "accomplice." *O'Quinn v. State*, 115 S. W. 39, 44, 55 Tex. Cr. R. 18.

Where defendant was not present when an offense was committed, he could not be charged as a "principal," unless he was doing some act at the time in furtherance thereof. *Eddens v. State*, 84 S. W. 828, 47 Tex. Cr. R. 539.

One not present when a theft was committed is not a "principal" in the crime. *Holmes v. State*, 91 S. W. 588, 49 Tex. Cr. R. 348.

One who, though not actually present at the commission of an offense, is engaged in or is doing something in the chain of causation which leads up to the offense and is a necessary part of its accomplishment, is a "principal." *Bass v. State*, 127 S. W. 1020, 1025, 59 Tex. Cr. R. 186.

If accused's son and grandson took possession of another's cow from the range, and drove her away, with the intention of appropriating her to their own use, and accused was not present, he would not be guilty of the theft as a "principal," though he may have agreed that the animal should be stolen and subsequently butchered, and that he would participate in the butchering and would conceal the meat. *Jones v. State*, 122 S. W. 81, 83, 57 Tex. Cr. R. 144.



All persons concerned in the commission of felony, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, are "principals," and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against a principal. Rev. St. § 7697. State v. Bland, 76 Pac. 780, 783, 9 Idaho, 796.

#### Same—Degrees

Persons present assisting in doing a criminal act are principals in the second degree, not accessories. State v. Rowland Lumber Co., 69 S. E. 58, 59, 153 N. C. 610.

"To constitute one a principal in the second degree, he must not only be present when the crime is committed, but must aid and abet the actual perpetrator of the crime. One who is present when the crime is committed, but neither assists in its commission nor shares in the criminal intent of its perpetrator," is not a principal in the second degree. Thornton v. State, 46 S. E. 640, 641, 119 Ga. 437.

Where the actor, the person who performs the manual act incident to the crime, had felonious intent in the performance thereof, or knew the act was criminal, he is a principal in the first degree, and the person at whose instigation he acted is either a co-principal in the first degree or a principal in the second degree, if actually or constructively present, but, if not so present he is an accessory before the fact. State v. Bailey, 60 S. E. 785, 788, 68 W. Va. 668.

A "principal in the second degree" is one who is present aiding and abetting the principal actor in the commission of the crime, and actual physical presence is not necessary. A constructive presence is sufficient, as in the instance of a person keeping watch or guard at a convenient distance while the murder is being committed by the principal actor. State v. Cremeans, 57 S. E. 405, 406, 62 W. Va. 134.

"A 'principal in the second degree' is he who is present 'aiding and abetting' the act to be done. Actual presence is not necessary. It is sufficient to be so situated as to come readily to the assistance of his fellows." People ex rel. Perkins v. Moss, 99 N. Y. Supp. 138, 144, 113 App. Div. 329 (citing People v. Peckins, 47 N. E. 883, 153 N. Y. 585).

To constitute one a "principal in the second degree," it is essential that he be present, actually or constructively, at the commission of the crime, and participate in it, sharing the criminal intent of the principal in the first degree. Landrum v. Commonwealth, 96 S. W. 587, 589, 123 Ky. 472.

#### In wills

Where a will provided "that none of the principal shall be used unless it shall be absolutely necessary" until the devisee becomes

21 years of age, when it shall be paid or turned over to her, by the word "principal" was meant the total proceeds of both the real and personal property. Betty v. Petrie, 128 S. W. 320, 323, 138 Ky. 426.

The words "put on interest," "the interest of my property shall be paid annually," and "the principal shall go," etc., as used in a will, all relate, in their ordinary sense, to dealing with money, the value of the use of money, measured by interest and securities, dischargeable by the payment of money, and not the rents and profits of real estate. Benner v. Mauer, 113 N. W. 663, 664, 133 Wis. 325.

#### Of trust

The "principal of the trust" consists of the securities in which the trust is vested. Robertson v. De Brulatour, 98 N. Y. Supp. 15, 27, 111 App. Div. 882.

#### Proximate synonyms

A requested charge in an action for injury to a passenger respecting the "proximate or principal cause" was bad for using the word "principal," which is not a synonym of "proximate." Woolsey v. Brooklyn Heights R. Co., 108 N. Y. Supp. 16, 18, 123 App. Div. 631.

#### Stock dividend

Stock issued by a corporation as a stock dividend is "principal," and not income, within a testamentary trust giving the income of a trust fund invested in stocks to life beneficiaries. Bishop v. Bishop, 71 Atl. 583, 591, 81 Conn. 509.

As between the life tenant, entitled to the net income, and the remainderman, entitled to the "principal," of a trust estate invested in corporate stock, a stock dividend is a part of the principal of the trust estate, and goes to the remainderman. Billings v. Warren, 74 N. E. 1050, 1055, 216 Ill. 281.

A dividend in stocks of a corporation declared by its directors out of its surplus net earnings is income, and not "principal," within a deed conveying property, including the stocks on which the dividend is declared, to trustees to pay the income to certain persons for life, the principal on their death to become the property of others. Safe Deposit & Trust Co. of Baltimore v. White, 61 Atl. 295, 296, 102 Md. 73; Same v. Long, 61 Atl. 297, 102 Md. 73.

#### Subscription rights in additional stock

Defendants, as administrators with the will annexed, came into possession of a fund of which one of them was a beneficiary. A new trustee was appointed on the application of the remaindermen, and the administrators ordered to account for such fund and "all accretions thereto." Held, that subscription rights in additional stock issued by the corporation represented "principal," and not in-

come. *Jewett v. Schmidt*, 92 N. Y. Supp. 737, 738, 45 Misc. Rep. 471.

### PRINCIPAL ADMINISTRATIVE OFFICE

Pen. Code, § 172a, provides that every person who, on or within 1½ miles of a university grounds or campus, on which are located the "principal administrative offices" of any university having an enrollment of more than 1,000 students, more than 500 of whom reside or lodge on such university grounds or campus, sells, gives away, or exposes for sale any vinous or alcoholic liquors is guilty of a misdemeanor. Held, that the words "principal administrative offices" as so used did not mean those offices and those activities through which the university, as an institution, was organized and financed, but were used in the sense of the principal place of business of the university as such. *Ex parte Burke*, 116 Pac. 755, 756, 160 Cal. 300.

### PRINCIPAL BENEFICIARY

Gen. St. 1909, § 9787, requiring certain affirmative proof to establish the validity of a will written or prepared by one occupying a confidential relation to testator, and who is the sole or principal beneficiary in the will, applies solely to a will written or prepared by one in a confidential relation to testator who receives the whole or the most considerable portion of the estate devised, and not to one written by a person who is one of the principal beneficiaries; the word "principal" meaning main, chief, leading, highest in value, character or importance, most considerable or important. *Kelty v. Burgess*, 115 Pac. 583, 584, 84 Kan. 678.

### PRINCIPAL BUILDINGS

Tax Law, § 10, Laws 1896, p. 801, c. 908, provides if land is divided by a line between two tax districts it shall be assessed in the district where the "dwelling house or other principal buildings" are located. Plaintiff owned a 1,335-acre tract of land, 575 acres in the town of H. and the remainder in the town of S., title to the S. land having been acquired by her father from one person, and to the H. land from several different persons. When assessed there were seven dwelling houses on the H. land and five on the S. land. Neither plaintiff nor her father ever resided on the tract. Held, that the fact that plaintiff's son is her principal agent upon the tract did not make the dwelling house in S. occupied by him the dwelling house comprehended by the statute, and that there is a storehouse on the land in S. in which crops from all parts of the tract are stored, and barns and other buildings, did not make them "principal buildings," there being a greater number of buildings in H., and hence the land does not fall within section 10 of the tax law, and each part of the tract should be assessed in

the tax district where it is located. *Chamberlain v. Sherman*, 103 N. Y. Supp. 239, 242, 53 Misc. Rep. 474.

### PRINCIPAL CHALLENGE

At the common law challenges to jurors for affection or partiality were of two kinds: (1) For principal cause; (2) to the favor. A challenge is called "principal," because, if it be founded on truth, it standeth sufficient of itself, without leaving anything to the conscience and discretion of the triors. *Co. Litt. 156b*. Relationship to one of the parties or interest in the subject-matter of the litigation furnish illustrations of grounds for challenges for "principal cause." *People v. Mol*, 100 N. W. 913, 914, 137 Mich. 692, 68 L. R. A. 871, 4 Ann. Cas. 960 (quoting *State v. Sawtelle*, 32 Atl. 831, 66 N. H. 488).

### PRINCIPAL DEPARTMENT

See Head of Principal Department.

The sealer of weights and measures department of a city, charged with the ministerial duty of determining the accuracy of scales and measures, is not a "principal department," within Rev. Laws, c. 19, § 9, exempting from the operation of the civil service law heads of principal departments of a city. *Attorney General v. Andrew*, 91 N. E. 892, 206 Mass. 46.

### PRINCIPAL DOORWAY

Mining Act (Hurd's Rev. St. 1909, c. 93) § 19, cl. "f," requires the keeping of an attendant at all principal doorways through which cars are hauled in a mine, to open and close the doors when cars are passing to and from the workings. Held, that the term "principal doorway" is not limited to ways controlling the main current of air before it is subdivided, but extends to each doorway which is essential to the ventilation of any portion of the face of the coal where the miners are at work, and which is in frequent, regular and habitual use for hauling cars while coal is being mined. *Karkowski v. La Salle County Carbon Coal Co.*, 93 N. E. 780, 782, 248 Ill. 195.

### PRINCIPAL MAKER

As used in a statute providing that whenever the "principal maker" of a note shall die, and the creditor does not within a certain time present the note for allowance, the surety shall be released to the extent that collection might have been made, the term "principal maker" would seem to be the person who would have been the party to the note had there been no sureties or indorsers. In other words, he would be presumed to be the person who received the consideration for making the note, and, where it is made for money loaned, it would ordinarily be the person who borrowed the money. There could not be a parol agreement between various indorsers on a note whereby the first

should be "a principal maker" as to the others, and the second a "principal maker" as to those following, etc., which, by communication to the payee, would require him under the statute to follow the estates of each in the order named in case of death, or lose the debt or release the sureties. *Tinker v. Catlin*, 68 N. E. 773, 780, 205 Ill. 108.

### PRINCIPAL MARKET

In Customs Administrative Act June 10, 1890, c. 407, § 19, the provision that dutiable value shall be the market value "in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported," refers to the "principal market" where imported merchandise is bought and imported to the United States in wholesale quantities, rather than to markets where there may have been limited purchases. *United States v. Haviland & Co.*, 167 Fed. 414, 418.

### PRINCIPAL OFFICE

Principal place of business synonymous, see Principal Place of Business.

Kirby's Dig. § 6067, provides that an action against a corporation created by the laws of the state may be brought in the county in which it is situated or has its "principal office" or place of business, or in which its chief officer resides. Held that, since a corporation may be situated in one county, and have its "principal office" or place of business in another, while its chief officer may reside in a third, an action may be brought against the corporation in either of such counties. *Spratley v. Louisiana & A. Ry. Co.*, 95 S. W. 776, 777, 77 Ark. 412.

Under Rev. St. 1899, § 8092, requiring service of process on town mutual fire insurance companies to be made on some corporate officer at defendant's "principal office," service at defendant's "usual business office" is insufficient. *Lohofener v. Mercantile Town Mut. Ins. Co.*, 118 S. W. 515, 136 Mo. App. 540.

Under Rev. St. 1899, § 8092, providing for service of process on town mutual insurance companies by service on the president, secretary, or other chief officer in charge of the company's "principal" office, a return showing service on the secretary of the company in its "usual" business office and in charge thereof is insufficient to confer jurisdiction because the "usual" business office of the company may be a place other than its "principal" office. *Wicecarver v. Mercantile Town Mut. Ins. Co.*, 117 S. W. 698, 700, 137 Mo. App. 247.

### PRINCIPAL PLACE OF BUSINESS

The "principal place of business" of a corporation, for the purpose of the venue of an action against it, is its residence. *Krogh*

*v. Pacific Gateway & Development Co.*, 104 Pac. 698, 11 Cal. App. 237.

The "principal office or place of business" of a corporation, especially in connection with the taxation of its property at such place, means its domicile, which is the place where its governing power resides and is executed, and, under the Tennessee statutes, where its charter is registered, and not where its ordinary business is conducted. *Southern Express Co. v. Patterson*, 123 S. W. 353, 359, 122 Tenn. 279.

The term "principal office," in a general act, under which a corporation was organized, granted the power to "change the location of its principal office," was intended to include "principal place of business," and hence such a change of the place of business to another city in the state was authorized. *Bernstein v. Kaplan*, 43 South. 581, 582, 150 Ala. 222.

The phrase "principal place of business," as used in Revisal 1905, § 422, providing that the principal place of business of a domestic corporation shall be its residence for purposes of suing and being sued, is synonymous with the words "principal office," as used in Revisal 1905, §§ 1137, 1176, 1179, respectively providing that, in the formation of a corporation, the location of the principal office in the state must be set forth in the certificate of incorporation, that the board of directors may change the principal office, and that the meeting of stockholders shall be at the principal office in the state. *Roberson v. Greenleaf Johnson Lumber Co.*, 68 S. E. 1064, 1065, 153 N. C. 120.

Under Code Civ. Proc. § 101, as amended by Laws 1909, c. 283, providing that the action shall be tried in the judicial subdivision in which defendant resides at the commencement of the action, the venue of an action against a domestic corporation is not any place where it happens to transact business, but in the county of its "principal place of business," the place where its president, secretary, and board of directors meet to transact the governing business of the corporation proper, where its books are kept; that is, where its governing power is exercised and controlled by its board of directors and officers. *Mullen v. Northern Accident Ins. Co.*, 128 N. W. 483, 484, 26 S. D. 402 (citing 6 Words and Phrases, p. 5559).

The "principal place of business" of the city of New York being in New York county, it was not a resident of Kings county, and the county court of Kings county had therefore no jurisdiction of an action against such city. *Maisch v. City of New York*, 86 N. E. 458, 460, 193 N. Y. 460.

A petition in involuntary bankruptcy was filed in the district of Massachusetts against a Maine corporation, which had carried on the mercantile business for which it was incorporated in Boston. About six

months prior to the filing of the petition, it sold the most of its stock in trade and gave up its place of business, and two months later receivers were appointed by a court of Maine, who took charge of and kept its remaining property in Boston. Held, that the corporation was not "doing business" in any proper sense after the appointment of the receivers, and had not had its "principal place of business" in Massachusetts for the greater part of the six months preceding the filing of the petition, within the meaning of Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545, and that the court in that district was without jurisdiction of the proceedings. In determining whether a corporation has had its "principal place of business" in another state, so as to give the court in that district jurisdiction to adjudicate it a bankrupt, it is immaterial whether or not it complied with the laws of that state to entitle it to do business therein as a foreign corporation. *In re Perry Aldrich Co.*, 165 Fed. 249, 251.

Where a corporation operating factories, mills, or mines in various states has a principal office, from which supreme direction and control are exercised over all its business and property, and its selling and collecting are done, where its directors meet, its books of account are kept, and its correspondence conducted, such office is its "principal place of business," within the meaning of Bankr. Act July 1, 1898, c. 541, § 2, cl. 1, 30 Stat. 545, and it is subject to bankruptcy proceedings in that district. *Burdick v. Dillon*, 144 Fed. 737, 738, 75 C. C. A. 608.

A notice of mechanic's lien describing the lienor as the Wright-Easton-Townsend Company, a corporation of the state of New York, with its principal office in the city of New York, at a given street number, was a compliance with Lien Law, Laws 1897, p. 518, c. 418, § 9, subd. 1, requiring the notice to state the business address and principal place of business of a lienor corporation; the terms "principal office" and "principal place of business" being synonymous terms when used in respect to New York corporations, and the assumption being that the principal office of such a corporation is both its "principal place of business" and "business address." *Hurley v. Tucker*, 112 N. Y. S. 980, 985, 128 App. Div. 580.

Where a manufacturing corporation, although maintaining a nominal office in the state in which it is organized, has its manufacturing and an office from which it conducts its business within a district in another state, its "principal place of business" is in the latter district, within Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 545, and it is subject to adjudication as a bankrupt therein, although it has ceased manufacturing and is engaged in liquidating its affairs from such principal office. *Tiffany v. La Plume*

*Condensed Milk Co.*, 141 Fed. 444, 445 (citing *In re Marine Machine & Conveyor Co.*, 1 Am. Bankr. Rep. 421, 91 Fed. 630; *In re Brice*, 2 Am. Bankr. Rep. 197, 93 Fed. 942; *In re Elmira Steel Co.*, 5 Am. Bankr. Rep. 484, 109 Fed. 456; *Dressel v. North State Lumber Co.*, 5 Am. Bankr. Rep. 744, 107 Fed. 255; *In re Mackey*, 6 Am. Bankr. Rep. 577, 110 Fed. 355; *In re Magid-Hope Silk Mfg. Co.*, 6 Am. Bankr. Rep. 610, 110 Fed. 352).

Ky. St. 1903, § 576, requiring each corporation, except those of certain classes, to have its name placed on its "principal" place or places of business, with the word "Incorporated" thereunder, does not apply to a local exchange office of a telephone company at which an assistant manager is kept, where the general business of the company is transacted at offices at other places, to which the local offices report. *Commonwealth v. Cumberland Telephone & Telegraph Co.* (Ky.) 108 S. W. 262, 263.

Under Civ. Code, § 305, authorizing the board of directors of a corporation to exercise corporate powers and control the business and property of the corporation, the board of directors may remove the office of the corporation from one location to another in the same city, notwithstanding section 321a, declaring that the principal place of business of a corporation can be changed only with the consent of the holders of two-thirds of the stock, though the word "office" is deemed equivalent to the words "principal place of business." *Seal of Gold Mining Co. v. Slater*, 120 Pac. 15, 18, 161 Cal. 621.

Under Revisal 1905, § 422, providing that for purposes of suing and being sued the "principal place of business" of a domestic corporation shall be its residence, and section 424, providing that, in the absence of contrary statutes, an action shall be tried in the county where plaintiff or defendant resides at the commencement thereof, an action against a domestic corporation for a personal injury is properly brought in the county of plaintiff's residence, or in the county of the principal place of business of the corporation, at his election. *Rackley v. Rowland Lumber Co.*, 69 S. E. 56, 57, 153 N. C. 171.

## PRINCIPAL PLACE OF RESIDENCE

"Principal place of residence" means place of residence. A person cannot, legally speaking, have two places of residence; and the word "principal" may be properly treated as surplusage, in a petition alleging that the petitioner has his principal place of residence within a certain district. *Ross-Lewin v. Goold*, 71 N. E. 1028, 1029, 211 Ill. 334.

## PRINCIPALLY ENGAGED

Engaged principally in manufacturing, see *Manufacturer*.

Engaged principally in mercantile pursuits, see *Mercantile*.

The words "principally engaged," in a statute exempting from execution certain articles necessary to carry on the occupation in which one is principally engaged, are not to be construed with reference to the productiveness or profit of one kind of business over another, where two or more occupations are followed at the same time, but with reference to the occupation or business on which the party chiefly relies for a livelihood, and that engrosses the most of his time and attention, not for a day, or a week, or month, but through the year. *Smalley v. Masten*, 8 Mich. 529, 530, 77 Am. Dec. 467.

## PRINCIPLE

In patent law, "the 'principle' of a machine is properly defined to be its mode of operation or that peculiar combination of devices which distinguishes it from other machines. A machine is not a principle or an idea." *United States Consol. Seeded Raisin Co. v. Selma Fruit Co.*, 195 Fed. 204, 270, 115 C. C. A. 234.

A "principle," in the abstract, is a fundamental truth, an original cause, a motive; these cannot be patented, as no one can claim in either of them an exclusive right. *Denning Wire & Fence Co. v. American Steel & Wire Co.*, 169 Fed. 793, 796, 95 C. C. A. 259 (quoting and adopting definition in *Le Roy v. Tatnam*, 14 How. [55 U. S.] 156, 14 L. Ed. 367).

## PRINT—PRINTING

See County Printing.

Device, print, or impression, see Device.

### Pictorial illustrations

Pictures printed in successive colors from metal plates from which parts have been cut out so as to leave portions of the print in relief are entitled to copyright as "prints," under the general enumeration of Rev. St. § 4956, and are not within the proviso requiring chromos or lithographs to be printed from "drawings on stone made within the limits of the United States, or from transfers made therefrom," to be entitled to copyright. *Hills & Co. v. Hoover*, 138 Fed. 701.

### As materials

See Materials.

### As publish

"Print" is familiarly used in the sense of publish, and in that sense receives recognition in many, if not all, of the dictionaries." *State ex rel. Cronin v. Cronin*, 106 N. W. 986, 987, 75 Neb. 738 (citing *Nebraska Land, Stock Growing & Inv. Co. v. McKinley-Lanning Loan & Trust Co.*, 72 N. W. 357, 52 Neb. 410; *Ætna Life Ins. Co. v. Wortaszewski*, 88 N. W. 855, 63 Neb. 636).

### Typewriting

Under Gen. St. 1901, § 1076, providing that, if there is no newspaper printed, print-

ed notices must be conspicuously posted, notices printed on a typewriter are sufficient to meet the statutory requirements. *State v. City of Oakland*, 77 Pac. 694, 696, 69 Kan. 784.

### As writing

See Write—Writing.

## PRINTED AND PUBLISHED

Under a statute requiring notice of tax sale to be published once in each week for four successive weeks prior to the sale, where the tax sale in 1903 took place on May 19th, and that in 1904 on May 17th, and the affidavit of publication in each case declared that the notice was "printed and published" in a designated newspaper once in each week for four successive weeks, commencing on April 15th, and terminating on May 6th, it showed a sufficient publication; the term "published" being used in the sense of the physical act of printing the notice in a published newspaper, and not to refer to the term of notice, the office of the word "printed" in that connection being only to emphasize such meaning. *Bauchler v. Hammer*, 123 N. W. 132, 134, 140 Wis. 648.

## PRINTED MATTER

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189, for "printed matter," includes post cards of paper combined with such materials as celluloid, silk, and wood, the latter the components of chief value; one side bearing floral and decorative effects produced by spraying and embossing, and the other being printed with the words "Post Card" in various languages. *United States v. Deutsch*, 178 Fed. 272, 101 C. C. A. 116.

Imported post cards bore on the face words printed in different languages and on the back printed pictorial representations, and were ornamented with feathers; the feathers being the element of chief value. Held, that the printing, and not the feathers, constituted the chief feature of the cards, and that therefore the cards were "printed matter," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189. *A. H. Ringk & Co. v. United States*, 164 Fed. 1021.

So-called lace paper, which is used in decoratively packing confectionery, etc., is not brought within the provision for printed matter in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189, by reason of having names and addresses of merchants printed thereon. Said provision does not cover matter on which the printing is but a subordinate feature. *United States v. Hensel, Bruckmann & Lorbacher*, 152 Fed. 578, 579.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 433, 30 Stat. 151, the term "printed matter" does not include beer mats, consisting of round pieces of wood pulp upon

which have been printed German verses, and the name and advertisement of beer dealers. *Frederick Hollender & Co. v. United States*, 177 Fed. 594, 595.

Paper used for box tops and similar purposes was printed with trade-marks and business names and addresses, and in some instances with floral or other decorative designs. Held, that the authorities would justify its classification as "printed matter," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189. *Hamilton v. United States*, 167 Fed. 796, 798, 93 C. C. A. 186.

The provision for "printed matter" in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189, does not include Japanese napkins made of crinkled paper and ornamented with designs in colors, stenciled, stamped, or printed thereon. *Morimura Bros. v. United States*, 172 Fed. 248.

Post cards, with the inscription "Post card" printed thereon in several languages, are "printed matter," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189, because such printing has a useful and valuable connection with the article itself. *Deutsch v. United States*, 172 Fed. 290, 291.

Paper bags elaborately printed with advertising matter relating to the goods intended to be packed and sold within them are not "printed matter" within the meaning of paragraph 403, Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 189, but are dutiable as manufactures of paper not specially provided for, under paragraph 407 of said act, 30 Stat. 189. *Kraut v. United States*, 134 Fed. 701, 142 Fed. 1037, affirming 130 Fed. 392, 71 C. C. A. 684.

## PRINTER

### Foreman

The foreman of the mechanical department of a newspaper or a typesetter is not a "printer" or "publisher," who is authorized by Mills' Ann. St. § 3884, to make proof of publication of a notice of tax sale; the quoted terms relating to one who has some title or proprietary interest in the plant. *Herr v. Graden*, 127 Pac. 319, 321, 22 Colo. App. 511.

## PRINTING CLOTHS

Where a small calico printer, in embarrassed circumstances, had contracted to work out a debt by printing, under a contract which bound his creditors to furnish him with nothing to enable him to fulfill his contract but the gray cloth to be printed, and the father of the calico printer guaranteed his son's "return and delivery of any and all 'printing cloths' the said creditors may hereafter deliver to him to be printed," under a certain contract identified by date and subject, the

subject of the guaranty was the return and delivery of the gray cloth only; and damages could not be recovered upon the guaranty, because goods returned printed were not printed in a workmanlike manner, and were to be confined, as to goods not returned, to the cost of the gray goods, with interest thereon after a reasonable time for their return printed. *Bailey v. Larchar*, 5 R. I. 530, 535.

## PRINTING PAPER

An imitation parchment paper known as grease-proof paper, which, though it can be printed on, is not suitable for printing purposes, but is used almost altogether as wrapping paper, is not dutiable as "printing paper," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 396, 30 Stat. 187, but as paper not specially provided for, under paragraph 402 (30 Stat. 189). *Germania Importing Co. v. United States*, 142 Fed. 215.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, pars. 396, 401, 30 Stat. 187, 189, handmade printing paper is dutiable as "handmade" rather than as "printing paper," even when suitable for printing. In construing the application of the terms "handmade" and "printing" as applied to paper imports, consideration was given to the evident intent of Congress (1) as revealed in numerous successive tariff acts to reduce the duties on printing paper for the benefit of the ordinary reading public, and (2) by elevating handmade paper into a new class, now that it has become in the art of printing a luxury. *United States v. Davies, Turner & Co.*, 177 Fed. 371, 372, 101 C. C. A. 425.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 396, 30 Stat. 187, the provision for "'printing paper' suitable for books and newspapers" prescribes an exceptionally low duty on such material on account of the educational value of books and newspapers, and only such paper as comes within the true spirit of the law should be assessed thereunder. A thin, flimsy, colored paper, said to be used for "printing circulars and printing of all kinds," but not shown to be used for books or newspapers, is not within the scope of the provision. *Gallenkamp v. Wyman*, 173 Fed. 460, 461.

Handmade printing paper, suitable for books and newspapers, is more specifically provided for under Tariff Act as "printing paper \* \* \* suitable for books and newspapers," than as "handmade \* \* \* paper," under said act. *Miller, Sloane & Wright v. United States*, 128 Fed. 469; *United States v. Miller, Sloan & Wright*, 135 Fed. 349, 68 C. C. A. 131.

## PRINTS

See Lithographic Prints.

## PRIOR

### PRIOR APPROPRIATION

When, from among the most energetic and enterprising classes of the East, that enormous tide of emigration poured into the West, there was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped make, as the settlements increased to such numbers as justified organization, they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of "prior appropriation." This did not mean that the first appropriator could take what he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire West, and became the basis of the laws we have to-day on that subject. *Willey v. Decker*, 78 Pac. 210, 216, 11 Wyo. 496, 100 Am. St. Rep. 939 (quoting and adopting definition in *Drake v. Earhart*, 23 Pac. 541, 2 Idaho, 716).

### PRIOR CLAIMS

In trespass to try title, where it appeared that defendant claimed under a "prior deed" of the land which was the only "prior claim" involved, the "prior claim" was referable to "prior deed," where used in a charge that notice to a subsequent purchaser of a prior deed could have been given by knowledge of facts which would have put an ordinarily prudent man upon inquiry which, if prosecuted with ordinary diligence, would have led to actual notice of the prior deed, or by knowledge of another person of the prior claim if he were found to be the purchaser's agent; the terms as used being practically synonymous. *La Brie v. Cartwright*, 118 S. W. 785, 788, 55 Tex. Civ. App. 144.

### PRIOR DISCOVERY

To constitute a "prior discovery," which will support a location on public grounds as an oil placer claim under the mining laws, the locator must have actually discovered oil within the limits of his claim. Mere surface indications of the existence of oil therein,

however strong, are not sufficient, nor is the existence of oil on adjoining lands. *Bay v. Oklahoma Southern Gas, Oil & Min. Co.*, 78 Pac. 936, 940, 13 Okl. 425; *Whiting v. Straup*, 95 Pac. 849, 854, 17 Wyo. 1, 129 Am. St. Rep. 1093 (quoting *Nevada-Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673).

### PRIOR IN TIME

Under the general rule that, between mere equities, that which is "prior in time" is regarded as the best and takes precedence over any which may be subsequently created, where a testator died, leaving certain debts, and there was a judgment existing against one of his children at the time of testator's death, the equities of testator's creditors and other children were "prior in time" to the equity created in favor of the judgment creditor of the child in question. *Alderson v. Alderson's Guardian*, 87 S. W. 810, 811, 120 Ky. 666.

### PRIOR ORDINANCE

The local improvement act of June 14, 1897, as amended by the act of 1901, provides, in section 58, that no special assessment shall be held void because levied for work already done under a "prior ordinance," if it shall appear that such work was done in good faith, by the contract duly let and executed, pursuant to an ordinance providing that such improvement should be paid for by special assessment or special tax. This provision shall only apply when the prior ordinance shall be held insufficient for the purpose of such assessment, or otherwise defective, so that the collection of the assessment therein provided for becomes impossible. Held, that the "prior ordinance" contemplated by the section may be one passed under the laws existing prior to 1897. *Gorton v. City of Chicago*, 66 N. E. 541, 542, 201 Ill. 534.

### PRIOR PUBLIC USE

"When the subject of invention is a machine, it may be tested and tried in a building, either with or without closed doors. In either case such use is not a public use, within the meaning of the statute, so long as the inventor is engaged in good faith in testing its operation. He may see cause to alter it and improve it, or not. His experiments will reveal the fact whether any, and what, alterations may be necessary. If durability is one of the qualities to be obtained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished, and though, during all that period, he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experimenting; and no one would say that such a use, pursued with a bona fide intent of testing the qualities of the machine, would be a public use, within the meaning of the statute. So long as he did not voluntarily

allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent. It would not be necessary, in such a case, that the machine should be put up and used only in the inventor's own shop or premises. He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment. Still, if used under the surveillance of inventor and for the purpose of enabling him to test the machine, and ascertain whether it will answer the purpose intended, and make such alterations and improvement as experience demonstrates to be necessary, it will still be a mere experimental use, and not a public use, within the meaning of the statute." Where a patent is for a manufactured article itself, designed for general use, a presumption arises that, when the inventor issues such article to the public, he regards it as a finished product, and, in case he does not apply for a patent within two years, abandonment of his purpose to do so may well be assumed; but where the invention is for a machine designed to produce articles, a different rule as to experimental use may well apply, and, although the articles produced may be perfect, the machine may not, and the sale of the product does not necessarily render the use of the machine a "prior public use," where none are sold, and the use is entirely under the observation of the inventor. *Bryce Bros. Co. v. Seneca Glass Co.*, 140 Fed. 161, 171 (quoting and adopting definition in *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000).

#### PRIOR RIGHT

In an action against a street railroad for personal injuries, error in instructing that the street railroad had no prior right to that part of the street occupied by its track, as against pedestrians and vehicles, is not cured by an instruction that it had a superior and preferential right, since there is no distinction between a "prior" right and a "superior" or "preferential" right, and hence the two instructions were clearly inconsistent and left the jury to accept either and disregard the other. *Denver City Tramway Co. v. Gustafson*, 121 Pac. 1015, 1020, 21 Colo. App. 478.

In a clause in a lease giving the lessee, at the expiration of the term, "the prior right to lease the same, said premises, for a further term of five years" at a specified rental, the word "prior" did not qualify the right of renewal, as the lessee's right to renew must necessarily be prior to the right of others. *Butt v. Maier & Zobelein Brewery*, 92 Pac. 652, 653, 6 Cal. App. 581.

#### PRIOR SUIT

In personal actions priority of suit as between a federal and state court is deter-

mined by the time when the parties are served with process, and not by the date of the filing of the two actions. Defendant brought an action in ejectment in a state court against a nonresident receiver to recover a tract of land, and service was made by publication; the date of last publication being September 23d. Prior to the filing of such action, a bill had been filed in the federal court by the receiver and others against defendant to quiet title to the same land in complainants, and personal service was made on defendant September 24th. Two of the complainants in such suit claiming title to the land were not parties to the action in ejectment. Held, that the ejectment action was not a prior suit within the rule that a federal court will ordinarily in its discretion stay proceedings in a suit before it to await the termination of a prior suit in a state court involving the same matters. *Benolist v. Smith*, 191 Fed. 514, 515.

#### PRIOR TO MATURITY

A mortgage securing notes maturing at different times stipulated that, on default in the payment of any one of the notes, the whole indebtedness should be due at the option of the mortgagee. A contemporaneous agreement provided that any one or more partial payments might be made at any time "prior to maturity," and that all payments so made should be indorsed and credit given. Held, that the words, "prior to maturity," meant the time prior to the election of the mortgagee to declare the entire debt due; a mortgage due by election of the mortgagee being as fully matured as one due by the expiration of the extreme limit of time fixed for payment. *Bartlett Estate Co. v. Fairhaven Land Co.*, 94 Pac. 900, 903, 49 Wash. 58, 15 L. R. A. (N. S.) 590, 126 Am. St. Rep. 856.

#### PRIOR TO THE PASSAGE

In an Iowa statute providing that a homestead may be sold on execution for debts contracted "prior to the passage" of the law, the court in *Charless v. Lamberson*, 1 Iowa, 442, 63 Am. Dec. 457, held that the "words 'prior to the passage' we think amount to the same thing as if the Legislature had used the word 'heretofore,' and either must relate to the time of taking effect, and not to the time of passage." *Scales v. Marshall*, 70 S. W. 945, 946, 96 Tex. 140.

The phrase "prior to the passage of this act," in Local Option Law of 1908 (Laws Sp. Sess. 1908, p. 4, c. 2), which contained no emergency clause, and provided in section 9 thereof that 90 days after the holding of an election, resulting in prohibition, liquor licenses should be void, but that no license issued prior to the passage of this act should be terminated by virtue of the act or any vote thereunder, was used in its technical sense as referring to the time of the act going into effect on the distribution of the



session laws to the various counties and the proclamation of the Governor, and a liquor license issued after the enactment of the statute, but before the Governor's proclamation, was not terminated by a local option election resulting in prohibition. *State v. Williams*, 90 N. E. 754, 173 Ind. 414, 140 Am. St. Rep. 261, 21 Ann. Cas. 986.

### PRIORITIES

"Priorities" in bankruptcy are often called preferences. They are given out of the bankrupt's estate after all liens upon the assets and all claims of others in the things which constitute them have been discharged. *Smith v. Mottley*, 150 Fed. 266, 268, 80 C. C. A. 154.

### PRIORITY IN PAYMENT

A lien is a qualified right which, in a given case, may be exercised over the property of another. It attaches to the subjects of property and follows them in their transmission to others. "Priority in payment" is preference in the appropriation of the proceeds of the debtor's property, and if, before it has attached, there is a bona fide transfer of the property, the right will be lost. *Advance Thresher Co. v. Beck*, 128 N. W. 315, 316, 21 N. D. 55, Ann. Cas. 1913B, 517 (quoting and citing *Anderson v. State*, 23 Miss. 459).

### PRISM

#### PRISMATIC GLASS

The Tariff Act, 30 Stat. 158, provision for strips of glass ground or polished to "prismatic form" is not limited to strips so ground that a side in itself forms a prism, but includes also strips that fulfill the functions of a prism, as where there are ground in one side fine parallel longitudinal incisions forming prisms. *United States v. Ashcroft Mfg. Co.*, 172 Fed. 449; *Id.*, 176 Fed. 736, 100 C. C. A. 281.

### PRISON

See State Prison.

The word "prison," used in Ballinger's Ann. Codes & St. § 6959, providing for the commitment of persons who have been acquitted of crime on the ground of insanity, comprehends the penitentiary, any county jail, or any state hospital for insane. *State ex rel. Thompson v. Snell*, 89 Pac. 931, 933, 46 Wash. 327, 9 L. R. A. (N. S.) 1191.

A "prison" is not a place of refuge for a criminal. It is for his punishment, to which he is involuntarily committed, and the same power that commits him can take him from it, when in the interest of justice he should be transferred elsewhere to answer for his misdeeds. *Commonwealth v. Ramunno*, 68 Atl. 184, 186, 219 Pa. 204, 14 L. R. A.

(N. S.) 209, 123 Am. St. Rep. 653, 12 Ann. Cas. 818.

Where a commitment for contempt in supplementary proceedings recited that, on the debtor's failure to comply with the order for the payment of the debt, he was adjudged guilty of contempt and "committed to prison for the term of 14 days," the term "prison" was sufficiently broad to include all institutions for the detention of persons sentenced to imprisonment, so that the commitment was not in excess of the jurisdiction of the police court, as authorizing imprisonment in the house of correction at hard labor, and therefore would not sustain an action for false imprisonment. *Brewer v. Casey*, 82 N. E. 45, 196 Mass. 384.

#### Industrial school

A commitment of a boy to the State Industrial School, in pursuance of Comp. St. 1907, c. 75, § 4840, providing that where a boy under 18 shall be found guilty of any crime, except murder or manslaughter, the court may instead of entering judgment or sentencing the boy to the penitentiary, commit him to the State Industrial School, is not a punishment, nor is the industrial school a prison, so as to require the imposition of a fine rather than the commitment, within the rule that, where one of two or more punishments may be imposed, the court should inflict the one which would be the less severe and result in the least disgrace. *Roberts v. State*, 118 N. W. 574, 576, 82 Neb. 651.

### PRISON BREACH

An escape is where one who is under arrest gains his liberty before he is delivered by due course of law, and where an escape from confinement is effected by the prisoner with force, it is called a "prison breaking," and where it is effected by others with force, it is known as a "rescue." *State v. Sutton*, 84 N. E. 824, 826, 170 Ind. 473.

### PRISONER

As public charge, see Public Charge.

Discharge of prisoner, see Discharge.

The word "prisoner" used in section 2248 et seq., Gen. St. 1906, relating to habeas corpus proceedings, has reference to any person unlawfully restrained of his liberty or unlawfully detained from his proper custody, and includes minors. *Porter v. Porter*, 53 South. 546, 547, 60 Fla. 407, Ann. Cas. 1912C, 867.

Persons committed to the county jail for violations of city ordinances, as well as persons committed for violations of general laws, are "prisoners," within the meaning of the law providing for the board of prisoners by the sheriff at the county's expense. *Burton v. Erie County*, 56 Atl. 40, 41, 206 Pa. 570.

**Juvenile delinquent**

Act March 2, 1905 (Laws 1905, p. 106), providing for the care of delinquent children, is not a criminal statute, but a reformatory one, and a person charged with assisting a juvenile delinquent to escape from custody, under the provisions of the act, is not guilty of a crime, under Rev. Codes, § 6456, providing that every person who willfully assists prisoners to escape is guilty of a felony; the delinquent not being a "prisoner" within the statute. *Ex parte Small*, 116 Pac. 118, 119, 19 Idaho, 1.

**PRISONERS OF WAR**

On the representations of the Secretary of the Interior, the Secretary of War sent troops into the vicinity of an Indian reservation to serve as a repressing influence on the Indians, a group of whom, under a leader, threatened trouble. The officer in command arrested the leader and some of his immediate followers. While the arrest was made, the troops were fired on by other Indians, and the fire was returned. The Indians arrested were, on the recommendation of the Secretary of the Interior, confined for an indefinite period at hard labor, on condition that they could be released whenever it might be deemed wise to do so. Held, that the Indians were not "prisoners of war," and their detention could not be justified on the ground that a state of war existed. *Ex parte Bi-a-Lil-Le*, 100 Pac. 450, 451, 12 Ariz. 150.

**PRIVACY**

See Right of Privacy.

**PRIVATE****PRIVATE ACT**

"Private acts" are those which operate only on particular persons and private concerns, in contradistinction to those which regard the whole community. *State ex rel. Roberts v. Indian Territory Illuminating Oil Co.*, 123 Pac. 166, 167, 32 Okl. 607 (citing 6 Words and Phrases, p. 5567).

A "private bill" applies only to individuals or corporations, and not to municipalities. *Gubner v. McClellan*, 115 N. Y. Supp. 755, 756, 130 App. Div. 716.

In an article in the *Atlantic Monthly* for January, 1906 (volume 97, p. 69), Mr. Samuel P. Orth states that: "A 'public law' is a measure that affects the welfare of the state as a unit; a 'private law' is one that provides an exception to the public rule; the one is an answer to a public need and the other an answer to a private prayer. When it acts upon a public bill, a Legislature legislates; when it acts upon a private bill, it adjudicates. It passes from the function of a lawmaker to that of a judge. It is

transformed from a tribunal of the people into a justice shop for the seeker after special privilege." *Anderson v. Board of Com'rs of Cloud County*, 95 Pac. 583, 586, 77 Kan. 721.

P. L. 1907, p. 114, authorizing the mayors in cities having a population of not less than 100,000 or more than 200,000 inhabitants to appoint boards of public works, is not a private, local, or special law affecting the internal affairs of towns or counties, within the constitutional prohibition. *Wilson v. McKelvey*, 77 Atl. 94, 95, 78 N. J. Law, 621.

Act April 8, 1909 (P. L. 1909, p. 98), creating a board of excise commissioners in cities having a population of not less than 50,000 nor more than 100,000 inhabitants, is not a "private, local or special law" regulating the internal affairs of towns or counties within the constitutional prohibition. *Wilson v. Fromm*, 78 Atl. 193, 80 N. J. Law, 582.

Va. Code 1904, §§ 1759, 1766, denouncing certain acts as misdemeanors affecting the interests of the Virginia Pharmaceutical Association, and undertaking to give to the appointees of such association the exclusive right to be prosecutors of such crimes and the exclusive beneficiary in the penalty to the extent of a half of the fines imposed, apply to the whole state, and make a violation of its provisions by any person a misdemeanor punishable by fine, and are not "special or private laws" within Const. 1902, § 63, cl. 1 (Code 1904, p. ccxxiii), prohibiting the General Assembly from enacting any local, special, or private law for the punishment of crime. *Bertram v. Commonwealth*, 62 S. E. 969, 971, 108 Va. 902.

Where all objects which can constitutionally be included in a class are by legislation recognized by inclusion therein, such legislation will be general in the constitutional sense, and P. L. 1907, p. 365, art. 25, supplementary to the school law creating and providing for the Teachers' Retirement Fund, is not a private, local, or special law, violative of Const. art. 4, § 7, par. 11, prohibiting the passage of such laws in certain cases, because for constitutional reasons it did not compel teachers whose contracts antedated the enactment of the supplement to become members of the fund, but only those whose contracts were made after it became effective. *Allen v. Board of Education of City of Passaic*, 79 Atl. 101, 103, 81 N. J. Law, 135.

The charter of a building and loan association, obtained under the general law, is not a "local" or "private" law, within Code 1906, § 8, providing that private and local laws, not revised and brought into the Code, are not affected by its adoption; and so is not saved from the operation of section 2678, revising the usury law, and doing away with the exception thereof, whereby building and loan associations could receive more than 10

per cent. interest. *Mississippi Building & Loan Ass'n v. McElveen*, 56 South. 187, 189, 100 Miss. 16.

Highway Law (Consol. Laws 1909, c. 25) § 59a, added by Laws 1910, c. 701, providing that awards under any statute for damages to real estate by change of grade of any street, etc., shall bear interest, is a general, and not a local, law, as affecting the sufficiency of the title of the act. *People ex rel. Central Trust Co. of New York v. Prendergast*, 95 N. E. 715, 717, 202 N. Y. 188.

Election Law (Laws 1896, p. 893, c. 909, as amended by Laws 1908, p. 1903, c. 521), relating to cities of a million or more inhabitants, provides that the register shall contain a column for the signature of the elector, or, if unable to write, for entering his identification statement. If the elector cannot write, the inspectors are required to ask him certain questions as to his name, parentage, occupation, etc. Section 3 requires each clerk to keep a pollbook which each elector must sign before he receives a ballot, the signature to be compared with the elector's signature in the inspector's register, or, if the elector cannot read, he must answer the same questions propounded to him when he registered. Held that, being an amendment to the state election law, the fact that it contains provisions applying only to cities of a million or more inhabitants, deemed necessary in the light of local conditions, does not render it a "private or local bill" within the prohibition of Const. art. 3, § 18. *Ahern v. Elder*, 88 N. E. 1059, 1061, 185 N. Y. 493.

Const. § 110, defines a special or "private law" as one which applies to an individual association or corporation. *State ex rel. Attorney General v. Sayre*, 39 South. 240, 142 Ala. 641, 4 Ann. Cas. 656.

#### **Ordinance**

A county ordinance is within Pen. Code, § 963, providing that, in pleading a "private statute," it is sufficient to refer to the statute by its title and the day of its passage, and that the court must thereupon take judicial notice thereof. *Ex parte Childs*, 81 Pac. 667, 1 Cal. App. 39.

#### **PRIVATE ALLEY**

A "private alley" is ordinarily an alley which has not been dedicated to the public use, and to which the general public is denied access, or which is set apart for some particular purpose. A private passage or way is sometimes referred to as a private alley, especially when bordered by trees or otherwise defined or inclosed. Alleys in cities and towns are usually public, and a private alley therein is exceptional. Under Code, § 916, requiring that land platted shall be divided by streets into blocks with alleys, and section 751 authorizing cities to widen, vacate, improve, and repair alleys,

the word "alley," when used by one dealing with lots in platted ground and referring to an alley therein, presumptively means a public alley. *Talbert v. Mason*, 113 N. W. 918, 921, 136 Iowa, 373, 14 L. R. A. (N. S.) 878, 125 Am. St. Rep. 259.

#### **PRIVATE BANK**

A "private bank," carried on by an individual, is not a quasi corporation under the banking law. *In re Purl's Estate*, 125 S. W. 849, 853, 147 Mo. App. 105.

#### **PRIVATE BANKER**

Institution as including, see Institution.

The term "individual banker" has been construed to mean a person who, having complied with the statutory requirements, has received authority from the banking department to engage in the business of banking, subject to its inspection, supervision, and to the burdens imposed, and the term "private bankers" has been construed to mean persons or firms engaged in banking without having any special privileges or authority from the state. The term "individual banker," as used in the statutes of Montana, declaring guilty of a felony every officer or agent of a bank, and every "individual banker," teller, or clerk of an individual banker, who receives deposits, knowing that such bank or association or banker is insolvent, means one other than a private banker, and the statute does not authorize the conviction of a private banker. *Ex parte Wisner*, 92 Pac. 958, 959, 36 Mont. 298.

A corporation authorized to deal in notes, loans, and bonds is not comprehended by the section of the federal bankruptcy act, making "private banks" subject to involuntary bankruptcy proceedings. *Murphy v. Penniman*, 66 Atl. 282, 289, 105 Md. 452, 121 Am. St. Rep. 583.

#### **PRIVATE BILL**

See Private Act.

#### **PRIVATE BOARDING HOUSE**

In *Humburd v. Crawford*, 105 N. W. 330, 128 Iowa, 743, it was held that if one served meals only in pursuance of previous arrangements, and therefore to particular individuals rather than to any who might apply, his place was not an eating house, but a "private boarding house" only, and that the civil rights statute did not apply. *Brown v. J. H. Bell Co.*, 123 N. W. 231, 234, 235, 146 Iowa, 89, 27 L. R. A. (N. S.) 407, Ann. Cas. 1912B, 852.

#### **PRIVATE CAPACITY**

See, also, Public Capacity.

A borough which undertakes to supply water to its inhabitants acts in a "private" and not a public capacity. *Carlisle Gas & Water Co. v. Carlisle Borough*, 67 Atl. 844, 845, 218 Pa. 554 (citing *Jolly v. Borough of*

Monaca, 65 Atl. 809, 216 Pa. 345; Baily v. City of Philadelphia, 39 Atl. 404, 184 Pa. 594, 39 L. R. A. 837, 63 Am. St. Rep. 812).

### PRIVATE CARRIER

A "common carrier" is one who openly professes to carry for hire the goods of all who choose to employ him, and whose duty it is to carry for all who comply with the terms as to freight, etc.; while a "private carrier" is one who, without being engaged in the business generally, undertakes to carry goods for hire in a particular case. The Cape Charles, 198 Fed. 346, 349.

A common carrier may become a "private carrier," when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry. Santa Fé, P. & P. Ry. Co. v. Grant Bros. Const. Co., 108 Pac. 467, 469, 13 Ariz. 186.

A furniture mover is a "private carrier" or bailee for hire, subject only to the duties and responsibilities of such a bailee, unless by agreement he assumes additional ones. Jaminet v. American Storage & Moving Co., 84 S. W. 128, 130, 109 Mo. App. 257.

A "private carrier" is one who does not engage in the business of carrying, or does not hold himself out to carry, certain kinds of property, and therefore, respecting the carriage, enjoys the full freedom of the right of contract, and may stipulate for relief from liability for every kind of accident resulting from negligence or otherwise. Cleveland, C., C. & St. L. R. Co. v. Henry, 83 N. E. 710, 712, 170 Ind. 94.

There are two kinds of carriers, a common carrier and a private carrier; a "private carrier" being one who acts in a particular case for hire or reward. O'Rourke v. Bates, 133 N. Y. Supp. 392, 393, 73 Misc. Rep. 414.

"There are but two carriers known in law, 'private carriers' and common carriers. A private carrier undertakes to deliver particular goods at a particular place. He is not bound in law to undertake such transportation. When opportunity for such employment is presented, he may reject it or avail himself of it as he sees fit. He enters into a contract applicable to and binding him only as to the particular undertaking. He does not hold himself out to the public as a carrier." State ex rel. Winnett v. Union Stock Yards Co., 115 N. W. 627, 630, 81 Neb. 67.

### Lighter

Under the rule of the American courts of admiralty a lighter hired exclusively to convey the goods of one person to a particular place for an agreed compensation is not a "common carrier" with respect to such goods, but a "private carrier," and liable only

as a bailee for hire. The Wildenfels, 161 Fed. 864, 866, 89 C. C. A. 58.

### PRIVATE CLAIM

A claim by a private corporation against a state for excess registration fees, paid for registering automobiles and illegally retained by the state, is a "private claim" within the statute giving the Court of Claims jurisdiction of private claims. Fifth Ave. Coach Co. v. State, 131 N. Y. Supp. 62, 63, 73 Misc. Rep. 498.

### PRIVATE CORPORATION

A "private corporation" is one whose object is to promote private interests. Hart v. Baltimore & O. R. Co., 6 W. Va. 336, 357 (quoting and adopting Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 30).

If the entire interest does not belong to the government, or if the corporation is not created for political or municipal power, it is a "private corporation." St. Louis & S. F. R. Co. v. Traveek, 19 S. W. 370, 371, 84 Tex. 65; Branch Bank of State at Mobile v. Collins, 7 Ala. 95, 101 (citing Aug. & A. Corp. 23; Trustees of University of Alabama v. Winston [Ala.] 5 Stew. & P. 17).

A "private corporation" is one created for advancement of some private end and derives existence from consent of the public and in a measure partakes of a public nature. Rhodes v. Love, 69 S. E. 436, 437, 153 N. C. 468.

A "private corporation" is an association of persons to whom the sovereign has offered a franchise to become an artificial, juridical person, with a name of its own, under which they can act and contract, and sue and be sued. Mackay v. New York, N. H. & H. R. Co., 72 Atl. 583, 586, 82 Conn. 73, 24 L. R. A. (N. S.) 768.

"Private corporations" are those created for the immediate benefit and advantage of the individuals constituting them, and the franchises conferred are to be exercised for their advantage. The corporation stands to them in the relation of trustee, holding the property owned by it, and dividing the profits arising from its management and the employment of its franchisees, for these individuals as cestuis que trust. Trustees of Carriek Academy v. Clark, 80 S. W. 64, 67, 112 Tenn. 483.

"'Private corporations' are those which are created for the immediate benefit and advantage of individuals, and their franchises may be considered as privileges conferred on a number of individuals to be exercised and enjoyed by them in the form of a corporation." Whether these privileges are given to the corporators for their own benefit or for the benefit of other individuals, the corporation must be viewed in relation to the franchisees as a trustee, and each of those who are beneficially interested in them

is a cestui que trust. *Dartmouth College v. Woodward*, 65 N. H. 473, 628.

"'Private corporations' are associations formed by the voluntary agreement of their members, such as banking, railroad, and manufacturing companies, etc., for the preservation and advancement of private interests." A corporation which was created by the Legislature, and which was to consist of certain public officers to be appointed perpetually by public authority and subject to public control by designated public officers to administer a fund which was left in trust to educate poor children, was not a "private corporation" but was a quasi public corporation. *Wambelsie v. Orange Hum. Soc.*, 5 S. E. 25, 27, 84 Va. 446.

A railroad company is a "private corporation," in the purview of Const. § 87, providing that the operation of any general law shall not be suspended by the Legislature for the benefit of any individual or private corporation. *Yazoo & M. V. R. Co. v. Southern Ry. Co.*, 36 South. 74, 76, 83 Miss. 746.

A railroad corporation is a "private corporation" in many respects, though in the strict sense of the ordinary business corporation it is not, since it is charged with duties of a public nature which distinguish it from a purely private corporation, but its foundation is private, and it is organized for gain, and in its strictly private rights is as much beyond legislative control as are the rights of a purely private corporation. *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133, 153.

An educational corporation in which the state has no interest, and over which it exercises no control, and which has simply received from the state comparatively small benefactions, for specific purposes, is a "private corporation." *Medical College of Georgia v. Rushing*, 57 S. E. 1083, 1085, 1 Ga. App. 468.

Const. 1901, § 229, providing that the charter of any corporation shall be subject to amendment or repeal under general laws, which, as shown by the official copy of the Constitution on file in the office of the Secretary of State, is under the subhead "Private Corporations," applies only to private business corporations. *City of Ensley v. Simpson*, 52 South. 61, 65, 166 Ala. 366.

#### PRIVATE CROSSING

As road, see Road.

#### PRIVATE DETECTIVE

A person who agreed to act as private detective to watch the movements of a husband and report to the wife, for which he was promised a certain fee, undertook "to engage in the business of a private detective for hire or reward," within Laws 1898, p. 1120, c. 422, § 1, as amended by Laws 1901, p.

1002, c. 362, requiring private detectives to be licensed, though he was not regularly engaged in the business. *Fox v. Smith*, 108 N. Y. Supp. 181, 182, 123 App. Div. 369.

#### PRIVATE DOMAIN

Unfenced or unoccupied lands belonging to some private person or corporation cannot in any possible construction of the term be called public domain. Such lands are "private domain." An animal might be away from its accustomed range, and still be in a private inclosure, many miles from any public lands. *State v. Cunningham*, 90 Pac. 755, 756, 35 Mont. 547.

#### PRIVATE DUTY

A driver of a city cart, engaged in hauling trash and dirt for the city, is not engaged in a "public or governmental duty," which is a duty given by the state to a city as a part of the state's sovereignty, to be exercised by the city for the benefit of the public living within and without the corporate limits, but is engaged in a "private or corporate duty," and for his negligence the city is liable. *City of Pass Christian v. Fernandez*, 56 South. 329, 100 Miss. 76, 39 L. R. A. (N. S.) 649.

#### PRIVATE DWELLING

As public place, see Public Place.

A restrictive building covenant, stipulating that the buildings erected on the premises shall be first-class "private houses" prohibits the use of a private dwelling on the premises for a private sanitarium; for a "private house" is a "private dwelling" intended for private living, and a private dwelling is a "dwelling house" in which a person or family lives in an individual or private state. *Barnett v. Vaughan Institute*, 119 N. Y. Supp. 45, 46, 134 App. Div. 921.

The distinction between "private dwelling house" or a "private residence" on the one side and a house built or occupied as a residence for two or more families is obvious, and a covenant by a grantee not to use the premises for any other purpose except for a private residence is violated by constructing a dwelling house designed to accommodate two families, and allowing two families to occupy the same. *Koch v. Corrufo*, 75 Atl. 767, 768, 77 N. J. Eq. 172, 140 Am. St. Rep. 552.

#### PRIVATE EASEMENT

A "private easement" implies, as an essential quality thereof, two distinct tenements, namely, the dominant, to which the right belongs, and the servient, on which the obligation rests. *Maryland & P. R. Co. v. Silver*, 73 Atl. 297, 300, 110 Md. 510 (citing *Wolfe v. Frost*, 4 Sandf. Ch. [N. Y.] 89).

#### PRIVATE ENTRY

See At Private Entry.

**PRIVATE ESTATES**

The English translation of Civ. Code La. 1825, art. 450, reading, "Les 'choses' qui sont dans le domaine de chaque individu forment les 'biens' et les richesses particulières," is "private estates and fortunes are those which belong to individuals." *State v. Fontenot*, 36 South. 630, 632, 112 La. 628.

**PRIVATE EXAMINATION**

"Private" and "separate" mean substantially the same thing. Thus a certificate of acknowledgment, stating that a wife, on a "separate" examination, apart from her husband, acknowledged the deed, complies with the law requiring that her acknowledgment shall be on "private examination." *Timber v. Desparois*, 101 N. W. 879, 881, 18 S. D. 587.

**PRIVATE FERRY**

A "private ferry" is for the transportation of one's own property in his own boat. *Parsons v. Hunt* (Tex.) 81 S. W. 120, 122.

**PRIVATE GAIN**

As used in Const. § 170, exempting from taxation property of educational institutions not used or employed for private gain, but the income of which is devoted solely to the cause of education, the words "private gain" have reference only to the gain of the person, corporation, or stockholders owning the property. Hence college property was not rendered liable for taxation, because the trustees leased it to a person who maintained a school therein for a profit, the rentals derived by the trustees being wholly applied to the cause of education. *Commonwealth v. Trustees of Hamilton College*, 101 S. W. 405, 125 Ky. 329.

**PRIVATE HIGHWAY**

"It is true that the term 'private highway' embraces a contradiction which destroys the original significance of the noun if the adjective is recognized." Under Pub. Acts, 1909, No. 283, c. 9, §§ 7-10, authorizing the opening of temporary highways which "shall be private highways," to allow the owners of timber land to remove the timber therefrom, made the so-called temporary highways private roads. *Burdick v. Harbor Springs Lumber Co.*, 133 N. W. 822, 825, 167 Mich. 673.

**PRIVATE HOSPITAL**

A "private hospital" is one founded and maintained by a private person or corporation; the state or municipality having no voice in the management or control of its property or the formation of rules for its government. Such a hospital incorporated and conducted for private gain and for the benefit of the stockholders thereof is liable in damages to its patients for the negligence or misconduct of its employees. *Hogan v. Clarksburg Hospital Co.*, 59 S. E. 943, 944, 63 W. Va. 84.

**PRIVATE HOUSE**

A house in course of construction, but so nearly finished that the owner began moving into it the next day, was a "private house," within the statute making it unlawful for a person to disturb the inhabitants of a private house by the use of loud, vociferous, obscene, vulgar, and indecent language. *Crain v. State*, 111 S. W. 150, 53 Tex. Cr. R. 617.

A restrictive building covenant, stipulating that the buildings erected on the premises shall be first-class "private houses" and shall stand back at least 20 feet from the street line, is not violated by moving a first-class dwelling to the rear of a first-class private house erected in accordance with the covenant, with a space between the two buildings. *Barnett v. Vaughan Institute*, 119 N. Y. Supp. 45, 46, 134 App. Div. 921.

**PRIVATE HOUSEKEEPER**

The proprietor of a private boarding house is a "private housekeeper," irrespective of the number of boarders he may keep. *Huffman v. State*, 92 S. W. 419, 49 Tex. Cr. R. 319 (quoting and adopting definition in *Commonwealth v. Cuncannon* [Pa.] 3 Brewst. 347).

**PRIVATE INSTITUTION**

"Private institutions" are those which are created or established by private individuals for their own private purposes. Public institutions are those which are created and exist by law or public authority. Some public benefits or rights may result from the institutions of private individuals or associations. So also some private or individual rights may arise from public institutions. The only sensible distinction between public and private institutions is to be found in the authority by which, and the purpose for which, they are created and exist." *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133, 153 (quoting and adopting definition in *Toledo Bank v. Bond*, 1 Ohio St. 623, 643).

**PRIVATE INSTRUCTION**

Rules of a stock exchange, by which a broker, who is a member thereof, is prohibited from receiving a certain class of legitimate orders, are in the nature of "private instructions" by him to his general agent for the brokerage business, and cannot be received, as against a client who is ignorant thereof, to limit the agent's authority. *Newman v. Lee*, 84 N. Y. Supp. 106, 107, 87 App. Div. 116.

**PRIVATE LAW**

See Private Act.

**PRIVATE LODGING HOUSE**

"There is a clear distinction between a mere 'private lodging house' and a 'hotel' where no meals are served. Such a 'hotel or inn' is a house, the proprietor of which holds

out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. The keeper of such a house is bound, without making any special contract therefor, to provide all to the limit of his facilities at a reasonable price; but the proprietor of a 'private lodging house' is not bound to receive all who apply, but he has the right to select his guests, contracting specially with each." *Nelson v. Johnson*, 116 N. W. 828, 829, 104 Minn. 440, 17 L. R. A. (N. S.) 1259.

### PRIVATE NUISANCE

A "private nuisance" is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. *Martin v. City of St. Joseph*, 117 S. W. 94, 95, 136 Mo. App. 316; *People v. Transit Development Co.*, 115 N. Y. Supp. 297, 301, 131 App. Div. 174; *Boyd v. Schreiner (Tex.)* 116 S. W. 100, 103; *Lazarus & Cohen v. Parmly*, 113 Ill. App. 624, 626; *Thomason v. Seaboard Air Line R. Co.*, 55 S. E. 198, 200, 142 N. C. 300 (quoting and adopting Blackstone's definition).

Anything is a "private nuisance" done unlawfully or tortiously to the hurt or annoyance of the person, as well as the lands, tenements, and hereditaments of another. *Hogle v. H. H. Franklin Mfg. Co.*, 105 N. Y. Supp. 1094, 1097 (citing 5 Words and Phrases, p. 4855).

Any unwarrantable, unreasonable, or unlawful use by a person of his own property, whereby it works a special injury to another in the use and enjoyment of his property, is a "private nuisance" for which the person injured may sue in his own name. *Gus Blass Dry Goods Co. v. Reinman & Wolfert*, 143 S. W. 1087, 1089, 102 Ark. 287.

"Private nuisances" are ordinarily considered as injuries to property rights by wrongful, unreasonable, and unlawful use of premises, so as to interfere with the enjoyment of another's premises. *McCluskey v. Wile*, 129 N. Y. Supp. 455, 457, 144 App. Div. 470.

"Private nuisances" are injuries that result from the violation of private rights and produce damages to but one or few persons. *Russell v. State*, 69 N. E. 482, 484, 32 Ind. App. 243.

A nuisance rendering the occupancy of dwellings materially uncomfortable is a "private" one as to each occupant, for which each may have an action. *Meek v. De La-tour*, 83 Pac. 300, 301, 2 Cal. App. 261.

An act or use of property to constitute a nuisance must violate some legal right, either public or "private," and must work some material annoyance, inconvenience, or injury, either actual or implied, from the invasion of the right. Thus the operation of

trains over a spur track on lands outside the railroad's right of way is a nuisance if it keeps the adjoining owners in constant dread and makes their homes less valuable and comfortable. *Thomason v. Seaboard Air-Line Ry.*, 55 S. E. 198, 200, 142 N. C. 300.

Where a city sewer contractor, in an unreasonable and oppressive manner, wantonly piled dirt from the sewer excavation in the street and on a vacant lot adjoining plaintiff's property so as to entirely deprive her of ingress and egress, and so as to precipitate surface water in large volumes onto her property and into her cellar, and failed to remove the same with reasonable diligence, such acts constituted a "private nuisance," for which plaintiff was entitled to recover. *Frick v. Kansas City*, 93 S. W. 351, 352, 117 Mo. App. 488.

Where the nuisance, though public, produces a special or particular injury to an individual, he may proceed in a court of equity for an injunction and also for damages. Any establishment, which, from its situation, the inherent qualities of the business, or the manner in which it was conducted, directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a "private nuisance." *Tedescki v. Berger*, 43 South. 960, 961, 150 Ala. 649, 11 L. R. A. (N. S.) 1060 (citing *Woods*, Nuis. [3d Ed.] p. 49, § 29; *Ex parte Birchfield*, 52 Ala. 377; 1 Wood, Nuis. p. 50, § 80; *Givens v. Van Studdiford*, 4 Mo. App. 499, 503, 505; *Id.*, 72 Mo. 129; *Marsan v. French*, 61 Tex. 173, 48 Am. Rep. 272; *Ahern v. Steele*, 22 N. E. 193, 115 N. Y. 203, 5 L. R. A. 449, 450, 12 Am. St. Rep. 778; *Cahn v. State*, 20 South. 380, 110 Ala. 56; 1 High, Inj. [3d Ed.] § 782; 2 Wood, Nuis. [3d Ed.] pp. 1201, 1202, § 819; *Id.* p. 1160, § 792; *Whaley v. Wilson*, 20 South. 922, 112 Ala. 627).

Under a statute providing that "any fence or structure in the nature of a fence unnecessarily exceeding six feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property, shall be termed a 'private nuisance,'" one may erect upon his own land a fence as much higher than six feet as may be necessary to protect himself, his family, and his property from annoyances inflicted or threatened by his neighbor, but, if he build the fence still higher for the malicious purpose of annoying his neighbor, such extra height is unlawful and a "private nuisance." *Healey v. Spaulding*, 71 Atl. 472, 473, 104 Me. 122.

### Public nuisance distinguished

A "private nuisance" is one that affects a single individual, or a determinate number of persons, in the enjoyment of some private right in contradistinction to the public.

Merchants' Mut. Tel. Co. v. Hirschman, 87 N. E. 238, 243, 43 Ind. App. 283.

### PRIVATE PAPERS AND DOCUMENTS

The written prescriptions of practicing physicians on which a licensed druggist has sold liquor, and which he has preserved as required by law, are not his "private papers and documents," within the meaning of the constitutional guaranty against compulsory self-crimination. *State v. Davis*, 69 S. E. 639, 641, 642, 68 W. Va. 142, 32 L. R. A. (N. S.) 501, Ann. Cas. 1912A, 996.

A copy of the grand jury minutes as made by an official stenographer while in the possession of Deputy Attorney General in connection with the discharge by him of his official duties is probably a "private paper," within Penal Code, § 642, as to opening of private papers. *In re Osborne*, 117 N. Y. Supp. 169, 173, 174, 62 Misc. Rep. 575.

### PRIVATE PARTS

The term "private parts" sufficiently describes the female organ of generation and its immediate vicinity, not only for that particular and limited portion anatomically known as the womb, but for the vagina, the urethra, and lips of the womb. Where an indictment for murder, committed while attempting to produce an abortion, charged in some of the counts that the instrument was thrust into the "body and womb," and in other counts into the "private parts and womb," of the deceased, and the proof showed that the instrument was not thrust into the womb, but was thrust into the private parts and bladder, there was not a fatal variance. *Clark v. People*, 79 N. E. 941, 943, 224 Ill. 554 (citing *Baker v. People*, 105 Ill. 452).

### PRIVATE PARTY

A domestic public utility corporation is a "private party" as regards his property rights, and within St. 1898, § 3466, authorizing an action of quo warranto on the complaint of any private party. *State ex rel. Green Bay Gas & Electric Co. v. Minahan Bldg. Co.*, 123 N. W. 258, 260, 141 Wis. 400.

By the use of the words "private parties," in *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424, holding that if the officers of the land department err in the construction of the law applicable to the case, or fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between "private parties" founded upon their decisions, is probably meant such parties as have acquired the legal title and hold by private right. *Jones v. Hoover*, 144 Fed. 217, 220.

### PRIVATE PASSWAY

See, also, Private Way.

A "private passway" is a means of passage for one or more individuals from some

place to some other place. *Seery v. City of Waterbury*, 74 Atl. 908, 909, 82 Conn. 567, 25 L. R. A. (N. S.) 681, 18 Ann. Cas. 73.

### PRIVATE PERSON

A "private person," referred to in Code Cr. Proc. § 395, providing that a confession, whether in the course of judicial proceedings or to a private person, may be proved against him unless made under the influence of fear produced by threats, or on a stipulation by the district attorney that he will not prosecute therefor, etc., means any person not engaged in the conduct of a judicial proceeding including public officers having accused in custody at the time they procured the confession in question. *People v. Rogers*, 85 N. E. 135, 141, 192 N. Y. 331, 15 Ann. Cas. 177.

### PRIVATE PERSON, PARTNERSHIP, OR CORPORATION

Const. art. 15, § 3, providing that certain tidelands shall be withheld from grant or sale to "private persons, partnerships, or corporations," does not prohibit its grant to a municipal corporation, "private" qualifying each of the three words following it; though, when granted to a city, the prohibition protects it from grant or sale by the city to privates, except as it may be properly disposed of in furtherance of the trust on which it is held—that is, to subserve the public uses of navigation and fishery. *Cimpher v. City of Oakland*, 121 Pac. 374, 375, 162 Cal. 87.

### PRIVATE POND

Ponds constructed in streams which are natural spawning grounds for trout and other fishes, and contain at all times trout and food fishes, are not "private ponds," within a statute permitting a person to establish a "private pond" to propagate fish on his own premises, where food fish do not naturally abound. *State v. Dolan*, 81 Pac. 640, 641, 11 Idaho, 256.

### PRIVATE POWERS

See, also, Private Capacity.

#### Of municipality

Municipalities have two classes of powers, the one political, public, in exercise of which they govern their people and act as delegates of the state, the other private, in exercise of which they act for advantage of their inhabitants and themselves. *City of Winona v. Botzet*, 169 Fed. 321, 332, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

### PRIVATE PROPERTY

See Impairing Right to Private Property.

A landowner's right of egress and ingress to and from the street is private property within Const. art. 1, § 16, providing that no "private property" shall be taken or damag-



ed for public use without just compensation. *Lund v. Idaho & W. N. R. R.*, 97 Pac. 665, 666, 50 Wash. 574, 126 Am. St. Rep. 916.

"Private property," forbidden by the Constitution to be taken or damaged for public use without just compensation, is not limited to the tangible subject-matter or corpus of the property, but includes the right of user and enjoyment, and when such rights are destroyed or taken for public use the owner is entitled to compensation. *City of Belleville v. St. Clair County Turnpike Co.*, 84 N. E. 1049, 1051, 234 Ill. 428, 17 L. R. A. (N. S.) 1071.

#### **Animals *feræ naturæ***

Statutes regulating and restricting the capture of creatures *feræ naturæ*, not reduced to actual possession, are not violative of Const. § 17, declaring that "private property" shall not be taken without just compensation. *Ex parte Fritz*, 38 South. 722, 723, 86 Miss. 210, 109 Am. St. Rep. 700.

#### **Building restriction**

A valid building restriction is private property within Const. 1908, art. 13, § 1, which forbids the taking of "private property" for public use without the necessity therefor being first determined, and just compensation therefor being first made or secured in such manner as shall be prescribed by law. *Allen v. City of Detroit*, 133 N. W. 317, 320, 167 Mich. 464, 36 L. R. A. (N. S.) 890.

#### **Easement**

The easement of abutting owners in a public highway is "private property" which cannot be taken for private use, and hence, where abutting owners upon a public highway owned a fee to the center of the street, a manufacturing corporation could not construct a switch through the street to its plant. *George Sweet Mfg. Co. v. Van Der Hoof*, 121 N. Y. S. 842, 844, 137 App. Div. 492.

An owner of property abutting on a public street has a right therein entitling him to have the same continued as a public street for the benefit of his property, and this right constitutes an easement in the bed of the street, which attaches to the abutting property and is "private property," within the meaning of the Constitution, of which the owner cannot be deprived without compensation. *Gillender v. City of New York*, 111 N. Y. Supp. 1051, 1053, 127 App. Div. 612.

The easement of a reclamation district for the construction of a levee is a right of way, within Code Civ. Proc. § 1240, enumerating the "private property" which may be taken under the right of eminent domain, and providing that rights of way shall be deemed private property for the purposes mentioned in section 1238, declaring that the right of eminent domain may be exercised

in behalf of specified public uses, and hence the right of way procured by a reclamation district in the construction of a levee, together with the levee, may be taken by a railroad company under the right of eminent domain for its right of way, provided the right of way will not interfere with the right of way and levee of the district or affect the efficiency of its works. *Reclamation Dist. No. 551 v. Superior Court of Sacramento County*, 90 Pac. 545, 546, 151 Cal. 263.

#### **Municipal property**

The water hydrants and electric light fixtures of the city are "private property" owned by it in its corporate capacity. They have a permanent situs within the drainage district and constitute "property" and "other property liable to assessment" within the meaning of chapter 80, Laws 1909. *State v. Board of Com'rs of Shawnee County*, 110 Pac. 92, 95, 83 Kan. 199.

#### **Public office**

A public office is not "private property." *Mial v. Ellington*, 46 S. E. 961, 971, 134 N. C. 131, 65 L. R. A. 697.

#### **Railroad property**

The right of way of a railroad company is "private property," within a statute providing for the taking of "private property" for public use. *Boca & L. R. Co. v. Sierra Valleys Ry. Co.*, 84 Pac. 298, 304, 2 Cal. App. 546.

"A railroad's right of way is so far 'private property' as to be entitled to that provision of the Constitution which forbids it taking, except under the powers of eminent domain, and upon the payment of compensation." *Western Union Tel. Co. v. Pennsylvania R. Co.*, 25 Sup. Ct. 183, 142, 195 U. S. 540, 49 L. Ed. 312, 1 Ann. Cas. 517.

Code 1904, § 1294d, cl. 37, authorizes one railroad company to connect with another, and provides that the company making the connection must bear all expenses of operating the connection, etc., but does not require compensation to the company with which connection is made for the use of its property. Const. 1902, § 53, prohibits a law whereby private property is taken or damaged for public uses without just compensation. Held, that since a railway right of way is "private property," even to the public, except as to an interest and benefit in its uses, the land of a company with which connection is sought cannot be taken upon which to construct the connecting track for joint use against its consent without compensation; the Code provision being subordinate, and not repugnant, to the constitutional provision. *Louisville & N. R. Co. v. Interstate R. Co.*, 62 S. E. 369, 108 Va. 502.

"A corporation, in the eyes of the law, is a 'private individual,' so far as property rights are concerned." Hence the property

of a railroad cannot be taken for private use. *Mays v. Seaboard Air Line Ry.*, 56 S. E. 80, 34, 75 S. C. 455.

The acquisition of a crossing by one railroad over another contemplates the taking of "private property" for public use, under the power of eminent domain. *Wellsburg & S. L. R. Co. v. Panhandle Traction Co.*, 48 S. E. 746, 748, 56 W. Va. 18.

#### Tide lands

The interest which the grantee or lessee acquires after a grant or lease from the state of lands lying between high and low water mark is "private property" subject to condemnation. *Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co.*, 60 Atl. 44, 45, 72 N. J. Law, 137; *Shamberg v. Same*, 60 Atl. 46, 72 N. J. Law, 140.

#### PRIVATE PURPOSE

Under Port District Act (Laws 1911, c. 92) § 4, authorizing a port district to lease terminal property to be acquired by it for a term not exceeding 30 years, where the purpose of such district in acquiring the property was not primarily to lease it, but rather to establish public wharves, a lease for a limited time, with power reserved to regulate wharfage charges, will not render the transaction one in which property is acquired by a municipality for a "private purpose," nor the giving of money or property, nor the leasing of the credit of the municipality to an individual or corporation, within the prohibition of Const. art. 8, § 7. *Paine v. Port of Seattle*, 127 Pac. 580, 582, 70 Wash. 294.

"The public or private character of a track or way depends upon the right of the public generally to its use, and not upon the extent of the exercise of that right. If such right is confined to a limited number only, it is a private use and a 'private track,' although such persons may use it an equal or unequal number of times each, while, if it is available to all the public who desire to use it for shipping purposes it is a public use, although some one or more of the public may use it more frequently than others." Where a railway switch, though used largely by a miller, is open to all persons for shipping purposes, it is a public and not a "private track." *Wolfard v. Fisher*, 87 Pac. 530, 48 Or. 479, 7 L. R. A. (N. S.) 991 (citing *Phillips v. Watson*, 18 N. W. 659, 63 Iowa, 33; *Bridal Veil Lumbering Co. v. Johnson*, 46 Pac. 790, 30 Or. 210, 34 L. R. A. 368, 60 Am. St. Rep. 818; *Towns v. Klamath County*, 53 Pac. 604, 33 Or. 225; *Elliott, R. R.* [3d Ed.] § 961).

#### PRIVATE RAILROAD TRACK

A "private track" connected with a railroad is one not constructed or used for the purpose of traffic; for example, a spur or other track constructed and used only by a railway company for the purpose of reaching its gravel pit, or its shops, or its roundhouse, or for other similar purposes. The fact that

the appellant acquired its right of way for this track by contract defining its rights, or that the purpose of constructing the track was to afford shipping facilities to a single industry, is not the test whether or not it is a private track. The test is whether its use is a public one. The appellant acquired by the contract the right to construct, maintain, and operate forever the spur track over the designated right of way from its main line of railway to the terminus of the spur, the quarries of the licensor, together with the necessary turnouts, switches, and sidings, with the further right, as against the licensor, to remove them after the spur ceased to be used for the purpose of transporting stone from the quarries, and, if so removed, the land to revert to the licensor. It appears from these provisions that the appellant is not bound in any contingency to remove the spur track, but may operate it forever for railroad purposes, substantially as if it had acquired the right of way by condemnation proceedings. The evidence in this case clearly shows that it has connected this spur track with, and made it a part of, its railway system, and devoted it to the purposes of traffic; to a public use. Such being the case, it is not a private track, and the appellant is subject to the same obligations and public control as to it as to its main line. *State ex rel. Railroad & Warehouse Commission v. Willmar & S. F. R. Co.*, 93 N. W. 112, 114, 88 Minn. 448 (citing and adopting *Chicago, B. & N. R. Co. v. Porter*, 46 N. W. 75, 43 Minn. 527; *Barre R. Co. v. Montpelier & W. R. R. Co.*, 17 Atl. 923, 61 Vt. 1, 4 L. R. A. 785, 15 Am. St. Rep. 877).

#### PRIVATE RESIDENCE

As gambling house, see *Gambling House*.

The distinction between "private dwelling house" or "private residence" on the one side and a house built or occupied as a residence for two or more families is obvious, and a covenant by a grantee not to use the premises for any other purpose except for a private residence is violated by constructing a dwelling house designed to accommodate two families, and allowing two families to occupy the same. *Koch v. Gorruso*, 75 Atl. 767, 768, 77 N. J. Eq. 172, 140 Am. St. Rep. 552.

"A residence may be a 'private residence,' although it be not occupied by a family." *Williams v. State*, 87 S. W. 1156, 1158, 48 Tex. Cr. R. 325.

Though a private residence is commonly resorted to for gaming, it is a "private residence," within Pen. Code 1895, art. 383, providing that no person shall be indicted for playing at a game at a private residence. *Thompson v. State (Tex.)* 96 S. W. 1065; *Marks v. State*, 101 S. W. 806, 51 Tex. Cr. R. 218.

A room back of a shop, in which a bachelor lives alone, is not a "private residence

occupied by a family," within Acts 1901, p. 26, c. 22, arts. 379, 381, punishing gaming at any place other than at such a residence. *Beard v. State*, 101 S. W. 796, 51 Tex. Cr. R. 61.

A one-room house on a bachelor's land occupied solely by him is not within the exception of Acts 1901, p. 26, c. 22, punishing gaming at any place except a "private residence occupied by a family." *Patterson v. State*, 116 S. W. 1151, 1152, 55 Tex. Cr. R. 393.

The place at which defendant, a bachelor and farmer, played cards, a house occupied by him alone, except that a man, who was a stone mason, was stopping with him, was not a "private residence occupied by a family," within the exception to the gaming law (Laws 1907, p. 107, c. 49). *Robbins v. State*, 121 S. W. 504, 505, 57 Tex. Cr. R. 8.

"Private residence," within a statute prohibiting gaming in a place other than a private residence, includes a tent, owned by a saloonkeeper and situated near the saloon, occupied by an employé, who slept there, and occupied by no one else, though the public would go in and out of the tent. *Hooper v. State* (Tex.) 105 S. W. 816.

Under White's Ann. Pen. Code, arts. 839a, 845a, 845b, declaring that the term "private residence" shall be construed to be any building or room occupied and actually used at the time of the offense by any person or persons as a place of residence, it is not necessary that the family be personally present at the very time it is burglarized, in order to constitute the offense of burglary of a private residence. It is sufficient, if it is actually used at the time as a private residence, though at the time it was burglarized the family was temporarily absent. *Handy v. State*, 80 S. W. 526, 46 Tex. Cr. R. 406.

An indictment under Acts 1899, p. 318, c. 178, making it a separate and distinct offense to burglarize a private residence at night, and defining a "private residence" as any building or room occupied and actually used at the time of the offense as a place of residence, must allege that the building or room was occupied and actually used at the time of the offense as a place of residence, and an allegation that the house was a private residence is insufficient. *Jones v. State*, 96 S. W. 44, 45, 50 Tex. Cr. R. 100.

Pen. Code 1895, art. 839, provides that one who with intent to commit a felony breaks and enters a house in the daytime is guilty of burglary. Laws 1899, p. 318, c. 178 (Pen. Code 1895, art. 839a), provides that the offense of burglary of a private residence is constituted by entering a private residence, etc. Article 845b makes burglary of a private residence a distinct offense. One count of an indictment charged that defendant by force, etc., in the daytime, did burglariously and fraudulently break and enter a house

then and there at the time of the commission of the offense occupied by W. as a private residence, etc. Held, that the use of the words "private residence" in that count did not bring the charge within the purview of article 839a. *Martinez v. State*, 103 S. W. 930, 931, 51 Tex. Cr. 584.

Pen. Code 1895, art. 838, provides that the offense of burglary is constituted by entering a house by force, threats, or fraud at night, or, in like manner, by entering a house during the day and remaining concealed therein until night, with intent in either case of committing felony or the crime of theft. Article 839 provides that he is also guilty of burglary who, with intent to commit a felony or theft, enters a house in the daytime. Article 839a (Laws 1899, p. 318, c. 178) provides that the burglary of a private residence is constituted by entering a private residence by force, threats, or fraud at night, or in any manner by entering a private residence at any time either day or night and remaining concealed therein until night with intent in either case of committing a felony or the crime of theft. Article 845a provides the punishment at a term of years not less than five for burglary of a private residence, and article 845b provides that nothing in articles 839a and 845a of the chapter shall be construed to alter or in any manner repeal articles 838 and 839, but shall be construed to make burglary of a private residence at night a separate and distinct offense from burglary as defined in said articles 838 and 839. Article 845c defines a private residence as mentioned in the preceding article to mean any building or room occupied and actually used at the time of the offense by any person or persons as a place of residence. Held, that the burglary of a private residence in the daytime is not within the terms of article 839a, and hence the indictment need not allege that the house was a private residence. *Reyes v. State*, 102 S. W. 421, 422, 51 Tex. Cr. R. 420.

Under Acts 26th Leg. (Laws 1899) p. 318, c. 178; article 839a, Pen. Code 1895, defining "burglary of a private residence"; article 845a, providing punishment therefor different from that provided for "burglary"; article 845c, defining a "private residence" as a building or room actually used at the time of the offense by any person or persons as a place of residence; and article 845b, providing that article 839a should be construed not as repealing articles 838 and 839 relating to ordinary "burglary," but as making "burglary of a private residence" a separate and distinct offense from "burglary"—an indictment in a prosecution for "burglary of a private residence," which charged that the house burglarized was occupied and actually used by a family as a private residence and that the house was occupied and controlled by a named person, was defective in not directly charging that the person named, or his

family, actually occupied and used the house as a private residence. *Lewis v. State*, 114 S. W. 818, 819, 54 Tex. Cr. R. 636.

The house burglarized consisted of a storeroom which was subdivided by a partition, the front room being a restaurant, the middle room being used as a kitchen, and the rear room as a sleeping apartment for the tenant, his wife, and daughter, and the entry was made in the middle room and the articles stolen therefrom. Held, that the only part of the building used as a "private residence" was the sleeping apartment, so that the burglary was not a burglary of a private residence. *Allnis v. State*, 139 S. W. 980, 981, 63 Tex. Cr. R. 272.

An instruction in a prosecution for burglary which defines "private residence" as "a building actually occupied and used as a place of residence" is not erroneous, since placing the word "actually" before the word "occupied," instead of before the word "used," as in the statute, does not give to the words any different meaning. *Dowling v. State*, 140 S. W. 224, 225, 63 Tex. Cr. R. 366.

#### PRIVATE ROAD

As public use, see Public Use (In Eminent Domain).

See, also, Private Way.

There is no such thing, in the state of Kansas, as a "private road," in the sense that the land of one person can be appropriated to the exclusive use and ownership of another. The words "private road," therefore, when used in such sense, is an expression without force or meaning, and the mere fact that the word "private" is used in a petition and other papers, and proceedings relative to the establishment of the road, under Gen. St. 1901, § 6044, as a part of the description thereof, will not affect the validity of a road so established. *Board of Com'rs of Johnson County v. Minnear*, 83 Pac. 828, 829, 72 Kan. 326.

#### Way distinguished

"Private roads" are not to be understood as being synonymous with "ways" at common law, but as indicating a particular class of highways or public ways over which any one may pass without committing trespass. *Hartley v. Vermillion*, 74 Pac. 987, 991, 141 Cal. 339 (citing *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577).

#### PRIVATE SALE

The term "private sale," as used in the statute providing for the sale of pledged property, comprehends something more than a mere taking over of the property by the pledgee at such price as he may elect to consider an offer. It must be a sale conducted in the manner usually and ordinarily followed in relation to private sales of property.

*Lowe v. Ozmun*, 86 Pac. 729, 732, 3 Cal. App. 387.

#### PRIVATE SCHOOL

As school, see School.

Where a parent in good faith employed a competent teacher formerly employed in the public schools to teach his child all the branches taught in the public schools at the regular public school hours, and the child attended the teacher's home regularly every school day, and received instruction equal to that which could have been received at the public schools, it was a compliance with the statute, requiring every parent to send his child to a public, "private," or parochial school, although the teacher did not advertise herself as keeping a private school, and had no regular tuition fixed, nor any school equipments, and made no arrangement to take other pupils. *State v. Peterman*, 70 N. E. 559, 551, 32 Ind. App. 665.

#### College

Rev. Laws, c. 112, § 72, requiring street railroads to transport "pupils of the public schools" at half rates, was amended by St. 1906, p. 653, c. 479, by the insertion of the words "or private" after the word "public." Held, that the word "private," as so used, included only such schools as were ejusdem generis with the public schools previously mentioned, namely, in which instruction was permitted to take the place of the compulsory instruction required in the public schools designated by Rev. Laws, c. 42, §§ 1, 2, and hence did not include education in a private business college. *Commonwealth v. Connecticut Valley St. Ry. Co.*, 82 N. E. 19, 21, 196 Mass. 309.

The college created by Laws 1910, c. 119, creating a state normal college, is neither a "private school" nor a "common school," within Const. 1890, § 90, subd. "p," prohibiting any local law for the management or support of any private or common school. *Turner v. City of Hattiesburg*, 53 South. 681, 683, 98 Miss. 337.

#### PRIVATE SPORTS

"Private sports" are those which are engaged in for the entertainment and pleasure of those who participate, but "public sports" are those which are engaged in for the entertainment and pleasure of the public. *Cheeves v. State*, 114 Pac. 1125, 1126, 5 Okl. Cr. 361.

#### PRIVATE STATUTE

See Private Act.

#### PRIVATE STEALING

To constitute "privately stealing" from the person, the theft must be committed without the knowledge of the person from whom the property is taken, or it must be committed so suddenly as not to allow time

to make resistance before the property is taken. *Bush v. State*, 109 S. W. 184, 186, 53 Tex. Cr. R. 213.

### PRIVATE TRUST

A testamentary gift for masses for the repose of the souls of persons named and of the testator, to be said according to directions as to time and place of persons named, is not a "private trust" within St. 1898, § 2081, defining the purposes for which trusts may be created but is a "public charity." In re *Kavanaugh's Estate*, 128 N. W. 672, 674, 143 Wis. 90, 28 L. R. A. (N. S.) 470.

### PRIVATE USE

The management and use by a city of land along the sides of its streets and through a busy part thereof to promote the interests of merchants or traders who might occupy it, and to furnish better facilities for doing business and making profits, would not be a public, but a "private, use" thereof. A city cannot tax its inhabitants to obtain money to be used in acquiring property to obtain the possible income and profit that might inure to it from the ownership and control thereof. In re *Opinion of Justices*, 91 N. E. 405, 407, 204 Mass. 607, 27 L. R. A. (N. S.) 488.

A taking of land by a corporation empowered to erect and operate plants for furnishing electric light and power and water to individuals and corporations in designated cities which has no franchise to enter the cities, and which is under no contractual obligation to furnish electricity to any person or for any purpose, is a taking for a private use, within Const. art. 1, § 16, declaring that private property shall not be taken for "private use." *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 82 Pac. 150, 153, 154, 39 Wash. 648, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987.

### PRIVATE WAY

Private way of necessity, see *Way of Necessity*.

See, also, *Private Passway*.

"There are different kinds of public ways and different kinds of private ways, but all ways are included in the one or the other general classification, though some may partake of the nature of both, being maintained and operated for private gain and for use by the public." "The common-law writers divided 'private ways' into several classes, according to the purpose or purposes for which the right of way could be used. Thus, Lord Coke, adopting the civil law, divided them into three kinds: A footway, called 'iter'; a footway and horseway, called 'actus'; and a cartway, which embraced the other two, called 'via'; to which was added a driftway—a road over which cattle could be driven. Woolrych also makes these four classes of ways: Footways; footways and horse-

ways; foot, horse, and carriage ways; and driftways. But these old classifications of private ways are not exhaustive of the subject, for as a private way for any particular purpose could always be created by a grant, and in theory always rested upon a grant, it is evident that when one person granted to another a right of way extending from the land of the grantee over the land of the grantor, for the private use of the grantee, in any manner and for any particular purpose, a private way was created." A right of way for a private railroad across the lines of others, for a person or corporation engaged in the business of quarrying granite or other stone, is a private way. *Jones v. Venable*, 47 S. E. 549, 550, 120 Ga. 1, 1 Ann. Cas. 185.

A "private way" is an easement or right over or under another person's estate which belongs to and is for the use of individuals, one or more, as distinct from a way that is used by the public in general. *Rice v. Wade*, 111 S. W. 594, 595, 131 Mo. App. 388.

The phrase "private way," in Comp. Laws 1897, § 6234, par. 5, providing that no railroad shall be constructed on any "public street, lane, alley, highway, or private way" until compensation has been made, is not confined to private roads laid out under the statute, but includes all private ways, and includes a private way created by a conveyance of a designated tract, together with a right of way over a strip adjacent thereto, and a railroad acquiring the strip for a right of way with knowledge of the conveyance cannot construct a track thereon without first making compensation therefor. *Detroit Leather Specialty Co. v. Michigan Cent. R. Co.*, 113 N. W. 14, 15, 149 Mich. 588.

At common law a "private way" is a right of passage over or under another person's ground, which belongs to and is for the use of individuals, one or more, as distinct from a way that is used by the public in general, and such a way is an easement. Such a private way may be acquired by grant, reservation, prescription, or under a statute authorizing its establishment. Under Rev. St. 1901, par. 3956, declaring that all roads located as public highways by the supervisors, or roads in public use which have been recorded as public highways, shall be public highways, and all roads not coming within the foregoing provisions are vacated, and section 3972 authorizing the board of supervisors to lay out public or private roads in the manner therein prescribed, public highways are such only as come within the statutory provisions, and private roads are such as are duly laid out by the public authorities, and roads merely established without authority for the convenience of individuals are neither public nor private roads. *Territory v. Richardson*, 76 Pac. 456, 457, 8 Ariz. 336.

Easements of a "private way" lie in grant and must be created by written grant

or its equivalent, as by express grant, implication, adverse use, etc., and one quality of a private way is that it must have a definite beginning and ending. *Stevens v. Headley*, 62 Atl. 887, 892, 69 N. J. Eq. 533.

The character of a "way," whether it is public or "private," is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who may have occasion to exercise the right is very small. *Railroad Commission of Texas v. St. Louis Southwestern Ry. Co. of Texas*, 80 S. W. 102, 104, 35 Tex. Civ. App. 52 (citing *Phillips v. Watson*, 18 N. W. 659, 63 Iowa, 28).

#### Driveway or crossing

Where a road leads from the public road across a railroad to a house, and is used only by the owner and by the tenant of a neighbor, it is a "private way," and the railroad is not required to keep the crossing over such private way in repair, under Civ. Code 1902, § 2183, providing that a railroad crossing a highway shall protect its rails, so as to procure a safe passage across the road. *Morgan v. Charleston & W. C. Ry. Co.*, 58 S. E. 150, 151, 77 S. C. 437.

#### As highway or street

See Highway; Street.

#### PRIVATE WRONG

"Private wrongs" are infringements of the private or civil rights belonging to individuals, considered as individuals, and are frequently termed "civil injuries." *United States v. Illinois Cent. R. Co.*, 156 Fed. 182, 185 (citing *Huntington v. Attrill*, 13 Sup. Ct. 228, 146 U. S. 668, 36 L. Ed. 1123).

#### PRIVATUM

See Jus Privatum.

#### PRIVIES

See Privy—Privy.

#### PRIVILEGE

See Bill of Privilege; Corporate Powers and Privileges; Exclusive Privilege; Mill Privilege; Privileges and Facilities; Privileges and Immunities; Right, Privilege, or Immunity; Rights or Privileges; Separate Public Emoluments or Privileges; Special Privilege; Temporary Privilege; Terms and Conditions, Rights and Privileges; With the Privilege.

Especial privilege, see Especial.

See, also, Immunity.

The accepted meaning of the term "privilege" is a "peculiar advantage." In re *Hopper*, 132 N. Y. Supp. 730, 734, 73 Misc. Rep. 369. A special enjoyment of a good, or exemption from an evil or burden. *Wisener v.*

*Burrell*, 118 Pac. 999, 1001, 28 Okl. 546, 34 L. R. A. (N. S.) 755, Ann. Cas. 1912D, 856.

A "privilege" is said to be a particular or peculiar benefit enjoyed by a person, company, or class beyond the common advantages of other citizens, an exception or extraordinary exemption, or an immunity held beyond the course of the law. And again it is defined to be an exemption from some burden or attendance, with which certain persons are indulged, from a supposition of the law that their public duties or services, or the offices in which they are engaged, are such as require all their time and care, and that therefore, without this indulgence, those duties could not be performed to that advantage which the public good demands. *State v. Cantwell*, 55 S. E. 820, 823, 142 N. C. 604, 8 L. R. A. (N. S.) 498, 9 Ann. Cas. 141 (dissenting opinion, citing *Black*, Dict. p. 941; *Anderson v. Rountree* [Wis.] 1 Pin. 118).

"A 'privilege,' as defined by the Standard Dictionary, is a peculiar benefit, favor, or advantage, a right \* \* \* not enjoyed by all, \* \* \* a special right or power conferred on or possessed by one or more individuals, in derogation of the general right." *Leatherwood v. Hill*, 89 Pac. 521, 523, 10 Ariz. 243.

Act May 8, 1909 (P. L. 417), requires exits, fire escapes, fire extinguishers, and fire preventives for buildings of a certain character such as theaters, public halls, and other places where persons assemble or the public resort, "other than buildings situated in the cities of the first and second classes." The provisions of the act are enforceable by state officers, no duty to be performed, nor responsibility to be incurred, being imposed upon any city, county, borough, or school district officer, and the fees of any such officer are not regulated thereby, and it has nothing to do with the revenues of counties, cities, or townships. Held, that the act grants no "powers" or "privileges" within Const. art. 3, § 7, providing that no law shall be passed granting powers or privileges in any case, where the granting of such powers or privileges shall have been provided by general law. *A. L. Roumfort Co. v. Delaney*, 79 Atl. 653, 655, 230 Pa. 874.

As between the grantor retaining the bed of a stream and the grantee of the ripa, with restrictions or limitations by contract as to boundaries or other express limitations of the natural riparian rights, the rights conveyed may perhaps be strictly called "easements" or "privileges," and not "riparian rights." *Paterson v. East Jersey Water Co.*, 70 Atl. 472, 480, 74 N. J. Eq. 49.

#### Civil rights

Rev. St. § 5508, which provides that if two or more persons conspire to oppress, threaten, or intimidate "any citizen" in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States, or because of his hav-

ing so exercised the same, they shall be fined, etc., was not intended for the sole protection of the civil rights of citizens of African descent, depending entirely on the federal Constitution and laws passed in accordance therewith, but protected all citizens in the civil rights guaranteed and secured to them by the Constitution and laws of the United States. *Felix v. United States*, 186 Fed. 685, 689, 108 C. C. A. 503.

#### Exemption

Exemption from jury duty is a mere "privilege" or gratuity which may be subsequently revoked. *State v. Cantwell*, 55 S. E. 820, 821, 142 N. C. 604, 8 L. R. A. (N. S.) 498, 9 Ann. Cas. 141.

A contract exemption of a street railway company from paving obligations is not a "privilege" within the meaning of Laws N. Y. 1867, c. 254, as amended by Laws 1879, c. 503, empowering a railway company, being the lessee of the property of another railway company, to acquire the whole of the latter's capital stock, in which case its "estate, property, rights, privileges, and franchises" shall vest in and be held and enjoyed by the purchasing corporation "fully and entirely, and without change or diminution." *Rochester Ry. Co. v. City of Rochester*, 27 Sup. Ct. 469, 472, 205 U. S. 236, 51 L. Ed. 784.

#### Exemption from taxation

The term "privileges," in a prohibition against a statutory grant of especial privileges, does not cover immunity from taxation unless the other provisions of the statute give such meaning to it. *Board of Trustees of Whitman College v. Berryman*, 156 Fed. 112, 121 (citing *Pickard v. East Tennessee, V. & G. R. Co.*, 9 Sup. Ct. 640, 130 U. S. 642, 32 L. Ed. 1051).

While the term "privileges" has been held to include immunity from taxation in cases where other provisions of the statute in question have given such meaning to it, the better opinion seems to be that, unless other provisions remove the doubt of the intention of the Legislature to include the immunity in the term "privileges," it will not be so construed. *Lake Drummond Canal & Water Co. v. Commonwealth*, 49 S. E. 506, 509, 103 Va. 337, 68 L. R. A. 92 (quoting and adopting the definition in *Morgan v. State of Louisiana*, 93 U. S. 217, 23 L. Ed. 860; citing *Humphrey v. Pegues*, 16 Wall. [83 U. S.] 244, 21 L. Ed. 826; *East Tennessee, V. & G. R. Co. v. Hamblen County*, 102 U. S. 273, 26 L. Ed. 152; *Pickard v. East Tennessee, V. & G. R. Co.*, 9 Sup. Ct. 640, 130 U. S. 637, 32 L. Ed. 1051; *Koekuk & W. R. Co. v. Missouri*, 14 Sup. Ct. 592, 152 U. S. 301, 38 L. Ed. 450; *Chesapeake & O. R. Co. v. Miller*, 5 Sup. Ct. 813, 114 U. S. 176, 29 L. Ed. 121; *Norfolk & Western Ry. Co. v. Pendleton*, 15 Sup. Ct. 413, 156 U. S. 667, 39 L. Ed. 574).

#### Franchise

A "privilege," as distinguished from a "power," is a right peculiar to the person or class of persons, on whom it is conferred. As applied to a corporation, it is usually synonymous with "franchise," and means a special right conferred by the state which does not belong to citizens generally of common right and which cannot be enjoyed or exercised without legislative authority. *Northwestern Trust Co. v. Bradbury*, 127 N. W. 386, 388, 112 Minn. 76 (quoting *International Trust Co. v. American Loan & Trust Co.*, 65 N. W. 78, 632, 62 Minn. 501).

A "privilege" within the public utility law, whether a license, permit, or technically a franchise, is the latter in the statutory sense. *Calumet Service Co. v. City of Chilton*, 135 N. W. 131, 137, 148 Wis. 334.

"A franchise to operate a telephone is a 'privilege' to operate a 'public business.'" *Lowther v. Bridgeman*, 50 S. E. 410, 411, 57 W. Va. 306.

#### Inheritance

The inheritance tax law (Kirby's Dig. § 242), as amended by Act May 17, 1907 (Acts 1907, p. 832), provides that all property shall be subject to an inheritance tax at the rate thereafter specified, and further provides that, where property passes to strangers, the rate "on each and every \$100 of the clear market value of all property and at the same rate for any less amount; on all estates of \$10,000 and less, \$3.00; on all estates of over \$10,000, not exceeding \$20,000, \$4.00; on all estates over \$20,000 and not exceeding \$50,000, \$5.00," and provides that an estate not exceeding \$2,000 shall not be subject to taxation. Held, that the statute did not wholly exempt estates of over \$50,000 from taxation, so as to conflict with Const. 1874, art. 16, § 6, forbidding the exemption of property from taxation, except as therein provided, but only the excess over that amount, and being a tax, not on the property, but on the privilege of inheritance, within Const. 1874, art. 16, § 5, authorizing the taxation of hawkers, etc., "and privileges in such manner as may be deemed proper," was not in violation of the requirements of the same section that all property should be taxed according to its value, equally and uniformly, no one kind higher than another, nor of the constitutional declaration (article 2, § 3) of the equality of all persons before the law. *State v. Handlin*, 139 S. W. 1112, 1113, 100 Ark. 175.

#### Lease

Where a lease provided a rental payable monthly for a certain term "with the privilege at the same rate and terms each year thereafter from year to year," such lease did not entitle the lessee to a perpetual right of renewal, but constituted a letting from month to month after the expiration of the term specified. *Tischner v. Rutledge*, 77 Pac. 388, 35 Wash. 285.

A lease of land for oil and gas purposes which, after prescribing the royalty to be paid by the lessee on the oil and gas produced, and the payment of a stated sum per acre annually as advance royalties, provides that the lessee shall exercise diligence in developing the property and shall drill at least one well within 12 months, and that, should he fail to do so, the lease may be declared null and void by the lessor after 10 days' notice, "provided that the lessee shall have the privilege of delaying operations for a period not exceeding five years \* \* \* by paying \* \* \* in addition to the required annual advanced royalty, the sum of one dollar per acre per annum," imposes no obligation upon the lessee to pay for such extension, but merely gives him an option to do so, and his failure to either drill the well or make the payment does not give the lessor a right of action to recover such payment. *United States v. Comet Oil & Gas Co.*, 187 Fed. 674, 684, 685.

#### Preference right of creditor

The word "privilege" in the French statute, relating to the creation of a fund by foreign life insurance companies for the protection of local policy holders, means a preference to holders of insurance obligations over other debts in the distribution of the fund. *Robinson v. Mutual Reserve Life Ins. Co.*, 182 Fed. 850, 853.

Civ. Code, art. 3095, provides that privileged creditors may seize and sell the property on which they have a privilege. Article 3186 defines privilege as a right which the nature of a debt gives to a creditor, and which entitles him to a preference. Act No. 66 of 1874 creates a pledge in favor of merchants and factors on shipments consigned to them, with the right of sale and of appropriation of the proceeds to the amount due them, which shall be superior to all privileges, except those for wages and rents. Held, that a firm of cotton factors, having a lien under Act No. 66 of 1874, are privileged creditors, within article 3095, as to shipments consigned to them, and are not affected by a respite granted to the consignor by a majority of his creditors. *Ott v. His Creditors*, 54 South. 44, 45, 127 La. 827.

#### As property

See Property.

See, also, Privileged Communication.

The privilege against self-incrimination afforded by Const. Amend. 5, is purely personal to the witness, and he cannot claim the privilege of another person or of the corporation of which he is an officer or employé. *McAllister v. Henkel*, 26 Sup. Ct. 385, 201 U. S. 90, 50 L. Ed. 671.

The word "privilege" as applied to the exclusion of testimony of a husband or wife, under Rev. Codes 1905, § 7253, providing that a husband cannot be examined for or against his wife without her consent, nor a wife for

or against her husband without his consent, nor can either, without the consent of the other, be examined as to any communications made by one to the other during the marriage, implies an option or a right of waiver. *Luick v. Arends*, 132 N. W. 353, 362, 21 N. D. 614.

#### PRIVILEGE TAX

A collateral inheritance tax is a "privilege tax," imposed on the right of acquiring property by succession, within Acts 1907, c. 602, § 28, conferring on county courts jurisdiction to try and determine cases involving delinquent privilege taxes. *Knox v. Emerson*, 131 S. W. 972, 973, 123 Tenn. 409.

Ky. St. 1909, §§ 4077, 4082, provide that certain corporations, including gas companies, shall, in addition to other taxes, annually pay a tax on their franchise to the state and a local tax thereon to the county, town, etc., where the franchise is exercised; and each corporation shall report the amount of tangible property in the state, and where situated, and assessed and the fair cash value thereof; and the board of valuation and assessment is required to fix the value of the capital stock of each corporation and from such amount deduct the assessed value of all tangible property assessed in the state; the remainder to be the value of its corporate franchise subject to taxation, etc. By another provision all the property of domestic corporations, including intangible property considered in determining the value of the franchises, shall be subject to taxation unless exempt by the Constitution. Held, that within Const. § 174, requiring the property of corporations and natural persons to be similarly taxed, and allowing such further license, income and franchise taxes as the Legislature may deem proper, the tax on the franchise of a gas company was a "property tax" on the intangible property, and not a "privilege tax" for engaging in a business that natural persons could not, since under section 4082 natural persons engaged in such business are taxed as such corporations are. *Commonwealth ex rel. Auditor's Agent v. Louisville Gas Co.*, 122 S. W. 164, 165, 135 Ky. 324.

#### PRIVILEGED COMMUNICATION

##### Attorney and client

The relation of attorney and client must exist, and the communication must be made to enable the attorney to properly conduct the suit, or to better advise his client, to constitute "privilege." *Moyers v. Fogarty*, 119 N. W. 159, 165, 140 Iowa, 701.

Communications between attorney and client, to be "privileged," must be made during the existence of the actual relation or during interviews and negotiations looking to the establishment of such relationship, and must relate to professional advice. *Lanasa v. State*, 71 Atl. 1058, 1064, 109 Md. 602.



A "privileged communication" between an attorney and his client must relate to some matter as to which the client is seeking advice, or be made in order to put the attorney in possession of information supposed to be necessary to enable him to properly and intelligently serve his client. Where the transaction between the attorney and client is the preparation of a deed or contract in accordance with the directions of the client and no legal advice is asked or required, the reasons or motives moving the client to make the deed or contract, if stated to the attorney, are not privileged. The execution of a will and its contents are within the rule governing privileged communications during the life of a testator, but the rule ceases at his death, and the attorney may then disclose all that affects the execution and tenor of the will except such facts as would tend to invalidate the will. An attorney instructed by a client to draw a will so as to devise the property to a child may testify that the client stated that she was the mother of an illegitimate child not mentioned in the will. *Champion v. McCarthy*, 81 N. E. 808, 811, 228 Ill. 87, 11 L. R. A. (N. S.) 1052, 10 Ann. Cas. 517 (citing *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; *Smith v. Long*, 106 Ill. 485; *Hatton v. Robinson*, 14 Pick. [31 Mass.] 416, 25 Am. Dec. 415; 4 Wig. Ev., § 2314).

Where a testator stated to his attorney during a consultation as to drawing a will that the debt of a certain person, which was released by the will, was secured by a deed of that person's property to the testator, the statement was a "privileged communication," and, in an action, by the one whose debt was released to cancel the deed, the attorney could not testify to such fact, since plaintiff did not claim under the will and could not waive the privilege of the client. *Emerson v. Scott*, 87 S. W. 369, 39 Tex. Civ. App. 65.

That a client gives his attorney notice of his place of residence does not affect the attorney's professional employment, and is not a "privileged communication," within Code Civ. Proc. § 835, which the attorney cannot be compelled to disclose, for the purpose of service of an order on such client. *Richards v. Richards*, 119 N. Y. Supp. 81, 82, 64 Misc. Rep. 285.

The delivery by the widow of a deceased owner of a map of a block platted by the deceased to the attorney for the estate of the deceased was not a "privileged communication" from client to attorney. *Myers v. Kenyon*, 93 Pac. 888, 890, 7 Cal. App. 112.

Where a railroad's general attorney employed local counsel to try a suit, the contents of a letter received by such local counsel from his employer relating to an issue arising at the trial was "privileged." *Missouri, K. & T. Ry. Co. of Texas v. Williams*,

96 S. W. 1087, 1089, 43 Tex. Civ. App. 549 (citing 1 Greenl. Ev. § 237).

A report of the superintendent of defendant's plant, where plaintiff was employed when injured, concerning the accident, sent to defendant's attorneys before any action had been brought or threatened, was not inadmissible as a "privileged communication." *Virginia-Carolina Chemical Co. v. Knight*, 56 S. E. 725, 727, 106 Va. 674.

Communications which pass between one who is merely acting as a conveyancer or friendly advisor and the grantor, or grantee, are not "privileged communications" under a statute which protects communications which pass between attorney and client in the course of professional employment. *Latter v. Haywood*, 85 Pac. 494, 496, 12 Idaho, 78.

#### Husband and wife

A husband's written acknowledgment to his wife that, on the collection of a note payable to himself and received on the sale of their joint property, he would owe her a fixed sum, is not inadmissible as a privileged communication, under the common law or under Code Va. 1904, § 3346a, subsec. 3, since the rule of privilege does not apply to communications between husband and wife respecting a business matter in which he acts as her agent. *Lurty's Curator v. Lurty*, 59 S. E. 405, 407, 107 Va. 466.

#### Minister or priest

Under the express provisions of the statute, in order to make statements to a minister of the gospel inadmissible, they must be made to him in his professional character and in the course of discipline enjoined by the rules of practice of the denomination. Communication, to be "privileged," must be made by the penitent as an enjoined religious discipline and a confession made to a clergyman not in the course of such discipline is not privileged. *State v. Morgan*, 95 S. W. 402, 404, 196 Mo. 177, 7 Ann. Cas. 107 (citing *Whart. Law of Ev. § 597*; *Knight v. Lee*, 80 Ind. 208).

#### Physician and patient

Information obtained by a physician to enable an insurance company to determine whether a person examined is a proper risk is not "privileged" by Code Civ. Proc. § 834. *Lynch v. Germania Life Ins. Co.*, 116 N. Y. S. 998, 999, 132 App. Div. 571.

Where plaintiff's leg was crushed by being run over by a car of one of defendant's railroad trains, which facts were known and not in dispute, a statement made by plaintiff to defendant's physician who came to treat his injury as to the manner in which his foot came to be caught under the wheel was not a privileged communication within Civ. Code Neb. § 333 (Comp. St. Neb. 1901, § 5907), which prohibits a physician from disclosing "any confidential communication properly in-

trusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office," having no relation to the treatment of the injury, and the exclusion of such statement when offered in evidence was error. *Missouri Pac. Ry. Co. v. Castle*, 172 Fed. 841, 845, 97 C. O. A. 124.

The intent in enacting the statute providing that a physician cannot without the consent of his patient be examined in a civil action, as to any information acquired in attending the patient which was necessary to enable him to prescribe for the patient, was not that all information, whether by communication or otherwise, obtained by physicians from their patients, should be privileged, but such information only as may reasonably be necessary to enable the physicians to apply their full professional skill for their patient's benefit, which information is "privileged," although it may be a narrative of the facts leading to an accidental injury. Thus, where one injured in alighting from a street car stated to his physician that he was standing on the lower step, expecting to get off, but the car kept on going, and he got off and was thrown to the ground; that he did not tell the conductor to stop, but thought that he always did stop, and therefore jumped off and fell on his left side and could not get home without assistance, the information was not necessary to enable the physician to treat the injury and was not a "privileged communication." But where physicians also made a physical examination of his person to enable them to treat his injury, the information obtained thereby was a "privileged communication." *Mausen v. Utah L. & Ry. Co.*, 105 Pac. 799, 801, 803, 86 Utah, 528.

#### Witness

Statements by a passenger injured in alighting from a street car, on the day of the injury, to her physician, as to how the injuries occurred, in the presence of her daughter and another, were in the nature of "privileged communications" within a statute declaring that physicians, as to matter communicated to them as such, by patients in the course of their professional business, shall not be competent witnesses, and she was not obliged to testify thereto on cross-examination. And though the persons present were competent to testify to such statements, the physician could not do so without the patient's consent. *Indiana Union Traction Co. v. Thomas*, 88 N. E. 356, 359, 44 Ind. App. 468 (citing *Post v. State ex rel. Hill*, 42 N. E. 1120, 14 Ind. App. 452; *Citizens' St. R. Co. v. Shepard*, 65 N. E. 765, 30 Ind. App. 193; *George v. Hurst*, 68 N. E. 1031, 31 Ind. App. 660; *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Masons' Union Life Ins. Ass'n v. Brockman*, 59 N. E. 401, 26 Ind. App. 182; *Springer v. Byram*, 36 N.

E. 861, 187 Ind. 15, 23 L. R. A. 244, 45 Am. St. Rep. 159).

#### PRIVILEGED COMMUNICATION (As Libel and Slander)

A "privileged communication" is one in which the words are not defamatory. *Cleveland Leader Printing Co. v. Nethersole*, 95 N. E. 735, 739, 84 Ohio St. 118, Ann. Cas. 1912B, 978.

A "privileged communication" is one fairly made by a person in the discharge of some private or public duty, legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. *Ashcroft v. Hammond*, 90 N. E. 1117, 1119, 197 N. Y. 488.

A libelous communication is regarded as "privileged" if made bona fide upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty if made to a person having a corresponding interest or duty, although it contains criminating matter which without this privilege would be slanderous and actionable; and this though the duty be not a legal one but only a moral or social duty of imperfect obligation. *Overton v. White*, 93 S. W. 363, 372, 117 Mo. App. 576 (quoting and adopting definition in *Byam v. Collins*, 19 N. E. 75, 111 N. Y. 143, 2 L. R. A. 129, 7 Am. St. Rep. 726).

To give words a privileged character, they must be spoken in discharge of some public or private duty with that end in view, or in conduct of some matter involving the speaker's own interest and for its protection, and they must be proper in that connection and be uttered in good faith, in the honest belief that they were true. *Burch v. Bernard*, 120 N. W. 33, 34, 107 Minn. 210.

A libelous communication is regarded as privileged, if made bona fide, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contains incriminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation. *Kersting v. White*, 80 S. W. 730, 734, 107 Mo. App. 265 (citing *Byam v. Collins*, 19 N. E. 75, 111 N. Y. 143, 2 L. R. A. 129, 7 Am. St. Rep. 726); *Overton v. White*, 93 S. W. 363, 372, 117 Mo. App. 576 (quoting and adopting definition in *Byam v. Collins*, 19 N. E. 75, 111 N. Y. 143, 2 L. R. A. 129, 7 Am. St. Rep. 726).

In *Hix v. State* (Tex.) 20 S. W. 550, the definition of a "privileged communication" from *Ormsby v. Douglas*, 37 N. Y. 477, is quoted approvingly as follows: "The rule is well settled that a communication which would otherwise be slanderous and actionable is privileged if made in good faith upon

a matter involving an interest or duty of the party making it, though such duty be not strictly legal, but an imperfect obligation to a person having a corresponding interest or duty." *Stayton v. State*, 78 S. W. 1071, 46 Tex. Cr. R. 205, 106 Am. St. Rep. 988.

An alleged libel is a "privileged communication" if made on proper occasion, through proper motives, on reasonable cause, and in the proper manner. The immunity of a privileged communication is an exception to the general rule that nothing short of proof of the truth is a defense to libel. *Mulderig v. Wilkes Barre Times*, 64 Atl. 636, 637, 215 Pa. 470, 114 Am. St. Rep. 967.

In determining whether a communication is privileged, the court must consider the exigencies of the situation of the party making the communication as to whether they warranted the charges made for the protection of the interest such party had under his control, or whether the language, under the circumstances, was warranted or was of such a nature and character as to indicate an abuse of privilege. *Holmes v. Royal Fraternal Union*, 121 S. W. 100, 106, 222 Mo. 556, 26 L. R. A. (N. S.) 1080.

Statements in response to inquiries as to another person, when the inquirer is one naturally interested in such person's welfare, are privileged under Civ. Code 1910, § 4436, par. 2, declaring statements made in the performance of a private duty either legal or moral privileged communications. *Whitley v. Newman*, 70 S. E. 686, 687, 9 Ga. App. 89.

Where one to whom an inquiry is addressed regarding another communicates bona fide without malice to the inquirer facts regarding the one inquired about, the communication is "privileged"; and hence one is justified in giving in good faith his opinion of the integrity and standing of a tradesman in response to an inquiry concerning him. *Melcher v. Beeler*, 110 Pac. 181, 184, 48 Colo. 233, 139 Am. St. Rep. 273.

Where an employer is requested by the father of a discharged employé, who, though of age, is living with her father as a member of his family and under his care and protection, to state the reason why his daughter was discharged, the reply of the employer would be "privileged"; but, if the employer voluntarily states to the father the reason why the discharge was made, the statement would not be "privileged." *Rosenbaum v. Roche*, 101 S. W. 1164, 1165, 46 Tex. Civ. App. 237.

One may publish by speech or writing whatever he honestly believes is essential to the protection of his own rights or those of another, provided the publication be not unnecessarily made to others than to those whom the publisher honestly believes are concerned in the subject-matter of the publication. The statement must be no broader

and the publication no wider than the interest to be subserved demands. Care must be taken not only to keep the statement within proper limits as to its subject-matter, but also that it be not made to those who are wholly without interest in the matter. To make the defense of "privilege" complete in an action of slander or libel, good faith, and interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons must all appear. The absence of any one or more of these constituent elements will, as a general rule, prevent the party from relying on the privilege. When a railway company discharges a conductor, and it comes to its knowledge that there are still in his possession tickets of the company which were delivered to him while in its employment, which he at that time had a right to sell, and which he refuses or fails to surrender, the company has a right, in order to protect its own interest, to take such precautions as are reasonably necessary to prevent the use of the tickets by persons not entitled to use them. *Shetfall v. Central of Georgia Ry. Co.*, 51 S. E. 646, 648, 123 Ga. 589.

#### Classes

See Conditionally Privileged; Qualifiedly Privileged; Qualified Privilege.

Privileged communications fall into two classes, those absolutely privileged, such as the opinions of judges, and others qualifiedly privileged, such as publications made to protect the rights of the one publishing. *Allen v. Earnest (Tex.)* 145 S. W. 1101, 1104.

"Privileged communications" are of four classes, to wit, where the publisher of the slander acted in the bona fide discharge of a public or private, legal or moral, duty, or in the prosecution of his own interests; second, statements by an employer with reference to the character of a servant who has been in his employment; third, words used in the course of a legal or judicial proceeding; and, fourth, publications duly made in the course of parliamentary proceedings. *Williams Printing Co. v. Saunders*, 73 S. E. 472, 476, 113 Va. 156, Ann. Cas. 1913E, 693.

The "privileged communications," recognized in the law of slander and libel as freeing the speaker or writer from liability, are of two classes: The one where the privilege is absolute, and the other where the privilege is conditional. "The characteristic feature of absolute, as distinguished from conditional, privilege, is that in the former the question of malice is not open. All inquiry into good faith is closed." *Wilson v. Sullivan*, 7 S. E. 276, 81 Ga. 243. In every case of conditional privilege, if the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed has a right of action.

Atlanta News Pub. Co. v. Medlock, 51 S. E. 756, 759, 123 Ga. 714, 3 L. R. A. (N. S.) 1139.

The proceedings of legislative bodies, of courts, and of military and naval tribunals are "privileged." In these cases the privilege is said to be absolute. The second class of privileged publications or communications is said to be conditionally privileged from the fact that the privilege depends upon the good faith of the party making the defamatory publication. Cases of conditional or qualified privilege may be divided into three general classes, viz.: (1) Fair reports of the proceedings of courts and legislative bodies; (2) where the defendant, in good faith, in the performance of a duty, makes a communication to another to whom he owes the duty; (3) where one who has an interest in the subject makes a communication relating thereto to another having a corresponding interest. Publication in a newspaper of remarks made, at a meeting of a city council, by the city's representative in the state assembly, purporting to give information as to the conduct of the representative of the city in the state senate with reference to passage of city charter amendments, is not "privileged," though the newspaper be the official paper of the city, the article being a mere voluntary unofficial report, published as a matter of news, especially where the paper circulated outside the city and the senator's district. *Buckstaff v. Hicks*, 68 N. W. 403, 404, 94 Wis. 34, 59 Am. St. Rep. 853.

"Privileged communications" are either absolutely privileged so that no action will lie, though it be averred that the injurious publication was both false and malicious, or are privileged to the extent that the circumstances are held to preclude any presumption of malice, but leaves the party responsible if both falsehood and malice are affirmatively shown. Speaking generally, absolutely privileged communications are confined to legislative proceedings, judicial proceedings in the established courts of justice, acts of state, and acts done in the exercise of military and naval authority. All other privileged communications are only conditionally privileged. Anything that an officer says in a report to his superior in the discharge of his duty is privileged unless plaintiff both avers and proves that the words were used maliciously and without reasonable or probable cause on the part of the officer to believe them true. *Ranson v. West*, 101 S. W. 885, 886, 125 Ky. 457 (quoting *Cooley, Torts* [3d Ed.] 425; *Townsh. Sland. & L.* § 209).

When one undertakes to find a definition of "privilege, or conditional privilege," it is very difficult to find one that is satisfactory. The reconciliation of the two classes of cases—those in which motive is material and those in which motive is not material—is to be sought in an extension of the concept of

privilege, as understood in the law of libel, or in a coherent application of the idea of justification or excuse. The conception of privilege in the law of defamation is that an individual may with immunity commit an act which is a legal wrong, and but for his privilege would afford a good cause of action against him; all that is required, in order to raise the privilege and entitle him to protection, being that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act. *United States v. Smith*, 173 Fed. 227, 228.

#### Inference of malice

A privileged communication is one made under such an occasion as rebuts the inference arising *prima facie* from a statement therein prejudicial to the character of another, and the latter must prove the existence of express malice. *Holmes v. Royal Fraternal Union*, 121 S. W. 100, 106, 222 Mo. 556, 26 L. R. A. (N. S.) 1080.

"The meaning in law of a 'privileged communication' is that it is made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they might judge whether there is any evidence of malice on the face of it. *Konkle v. Haven*, 103 N. W. 850, 852, 140 Mich. 472 (citing *Bacon v. Michigan Cent. R. Co.*, 33 N. W. 181, 66 Mich. 166).

A "privileged communication" means nothing more than that the occasion of making it rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it. Where plaintiff had resigned his position, and his resignation had been accepted, and his employment terminated, several days before the writing of the letter which purported to discharge him, a communication to defendant's agent, reciting that plaintiff had been discharged from his employment for cause, that defendant would not again give him a position under any circumstances, and that he was "a dirty dog and a traitor," known by the writer to be false, and intended to prevent plaintiff's success in his endeavor to go into business for himself, was not privileged. *National Cash Register Co. v. Salling*, 173 Fed. 22, 28, 97 C. C. A. 334 (quoting and adopting definition

in *White v. Nicholls*, 3 How. [44 U. S.] 287, 11 L. Ed. 591).

"A 'privileged communication' is a communication made on such an occasion as rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it." An insurance agent is not such a public character that the plea of privilege is available in an action for libel of him. The defense of privilege is not available to a libel published in a newspaper, where it would not be available were it published otherwise. *Morse v. Times-Republican Printing Co.*, 100 N. W. 867, 872, 124 Iowa, 707.

"The proper meaning of a 'privileged communication' is said to be this: That the occasion on which it was made rebuts the inference arising, prima facie, from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill will, independent of the circumstances in which the communication was made" (quoting and adopting *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360). "A 'privileged communication' is an exception to the rule that every defamatory publication implies malice. A qualified privilege is extended to a communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, either legal, moral, or social, if made to a person having a corresponding interest or duty, and the burden of proving the existence of malice is cast upon the person claiming to have been defamed" (quoting and adopting *Newell, Sland. & L.*). A communication between officers of a corporation on the subject of the conduct of one of its servants is "privileged." *Denver Public Warehouse Co. v. Holloway*, 83 Pac. 131, 133, 34 Colo. 432, 8 L. R. A. (N. S.) 696, 114 Am. St. Rep. 171, 7 Ann. Cas. 840.

Civ. Code, § 47, defines a "privileged communication" as one without malice, to a person interested therein, by one who is also interested; one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive innocent, or who is requested by the person interested to give the information; and section 48 declares that the "malice" so referred to is not inferred from the communication or publication. Held, that "malice" as used in section 47 meant malice in fact, or a libel published with an actual, malicious intent. *Davis v. Hearst*, 116 Pac. 530, 540, 160 Cal. 143.

#### Particular kinds of cases

A newspaper publication, to be "privileged" as a publication of judicial proceedings, must be fair; that is, just, impartial as to the party complaining, and reasonably correct. *Jones v. Pulitzer Co.*, 144 S. W. 441, 445, 240 Mo. 200.

The rule that a fair account of the whole proceedings in a court or before a public magistrate, sitting publicly, is a privileged communication, whether the proceedings are on a trial or on a preliminary and ex parte hearing, implies that there must be a hearing of some kind, and, in order that the ex parte nature of the proceedings may not destroy the privilege, there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action. *Brown v. Globe Printing Co.*, 112 S. W. 462, 482, 213 Mo. 611, 127 Am. St. Rep. 627.

#### Same—Judicial proceedings

Under Civ. Code § 47, providing that a "privileged communication" is one made in any legislative or judicial proceeding, but irrelevant or immaterial matter voluntarily or maliciously published in the course of judicial proceedings is not privileged, a district attorney conducting a criminal case in a justice's court is not "privileged" to charge opposing counsel with perjury or subornation of perjury. *Carpenter v. Ashley*, 83 Pac. 444, 445, 148 Cal. 422, 7 Ann. Cas. 601.

Civ. Code, § 45, defines libel as a false and unprivileged communication exposing a person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned and avoided, or which has a tendency to injure him in his occupation. Section 47 enumerates as a privileged publication one made in any legislative or judicial proceeding, or in any other official proceeding authorized by law. Held that, where minority stockholders in a corporation sued plaintiff as its president for alleged illegal management, an allegation in the complaint that plaintiff was guilty of misappropriation and embezzlement of the corporation's funds was relevant to the inquiry, and was therefore privileged, even if section 47 be construed as only making such allegations in a judicial proceeding privileged as are relevant to the inquiry. *Gosewisch v. Doran*, 119 Pac. 656, 657, 161 Cal. 511, Ann. Cas. 1913D, 442.

#### Same—Public official proceeding

There is no practical difference in the meaning of "public official proceedings" and "proceedings authorized by law" as applied to privileged communications, and an investigation by a Senate committee of charges against one, appointed to office by the President and whose appointment has been sent to the Senate for confirmation, falls within the meaning of the latter term as used in *Wilson's Rev. & Ann. St. 1903*, § 2239. *Tuohy*

v. Halsell, 128 Pac. 126, 127, 35 Okl. 61, 43 L. R. A. (N. S.) 323.

### PRIVILEGED OCCASION

A "privileged occasion" in the law of libel is one on which a privileged person is entitled to do something which no one not within the privilege is entitled to do on that occasion. In the case of absolutely "privileged occasion," the weight of authority seems to hold that it is immaterial whether the person making the libelous statement was actuated by malice or not, though there is a respectable line of authority which holds to the view that proof of express malice in making a libelous statement will render the publisher liable. *Ferdon v. Dickens*, 49 South. 888, 894, 161 Ala. 181.

Occasions when for the public good and in the interests of society one is freed from liability that would otherwise be imposed upon him by reason of the publication of defamatory matter are "privileged occasions." A witness while testifying under oath in a court of justice is not subject to prosecution for slander for any statement that he may make upon the subject under consideration. Whether words otherwise actionable as defamatory are privileged is a question of law for the decision of the court, depending upon the circumstances of their utterance or publication. *Sebree v. Thompson*, 108 S. W. 374, 375, 126 Ky. 223, 11 U. R. A. (N. S.) 723, 15 Ann. Cas. 770.

### PRIVILEGED PUBLICATION

Under section 47, Civ. Code, a "privileged publication" is one made in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive of the communication innocent, or who is requested by the party interested to give the information. Publication of a false criminal charge concerning a candidate for public office by a member of the community is not privileged. *Dauphiny v. Buhne*, 96 Pac. 880, 882, 153 Cal. 757, 126 Am. St. Rep. 136.

St. 1898, § 4256a, providing that the publisher of a newspaper shall not be liable for the publication of a true "report of any judicial, legislative, or other public official proceeding," enacted after a decision of the Supreme Court denying any privilege to reports of city council proceedings, does not change the common law defining the privilege of publications of judicial proceedings, and the publication of a pleading to which no judicial action has been invited is not privileged, though the words "judicial proceedings" may be used to include everything involved in a civil action, including the service and filing of a pleading, since the words are used only in their common-law significance relating to libel. *Ilsley v. Sentinel Co.*, 113 N. W. 425, 426, 133 Wis. 20, 126 Am. St. Rep. 923.

### PRIVILEGES AND FACILITIES

#### Granted by carrier

The furnishing of lumber for bulkheads for a grain car was not the furnishing of "privileges or facilities" within Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3156) as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (U. S. Comp. St. Supp. 1909, p. 1153), requiring the schedules filed by a carrier with the Interstate Commerce Commission to state the privileges and facilities granted or allowed by the carrier, and the fact that a carrier's printed schedule did not show that bulkheads were furnished in grain cars would not prevent a shipper, who furnished material for constructing bulkheads in cars furnished him for shipping grain, in order to make the cars available for use, from recovering the expense of such bulkheads from the carrier; the carrier being under a common-law obligation to pay such expense. *Loomis v. Lehigh Valley R. Co.*, 132 N. Y. Supp. 138, 141, 147 App. Div. 195.

### PRIVILEGES AND IMMUNITIES

See, also Special Privilege; Special Privilege or Immunity.

"The 'privileges and immunities of citizens of the several states' are those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this union, from the time of their becoming free, independent, and sovereign. They may be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." *Browner v. Irvin*, 169 Fed. 964, 967 (quoting and adopting definition in *Corfield v. Coryell*, 4 Wash. C. C. 371, 380, 6 Fed. Cas. 546; quoted in *Slaughter-House Cases*, 16 Wall. [83 U. S.] 36, 21 L. Ed. 394, and in *Hodges v. United States*, 27 Sup. Ct. 6, 203 U. S. 1, 51 L. Ed. 65); *Shaw v. City Council of Marshalltown*, 104 N. W. 1121, 1123, 131 Iowa, 128, 10 L. R. A. (N. S.) 825, 9 Ann. Cas. 1039 (citing and adopting definition in *Corfield v. Coryell*, 4 Wash. C. C. 371, 6 Fed. Cas. 546).

The fourteenth and fifteenth amendments to the federal Constitution operate on state action only, and the privilege and immunity clause applies to privileges and immunities arising out of the nature and essential character of the federal Government, and granted or secured by the Constitution, and the provision is satisfied if all persons similarly situated are treated alike in privileges confer-

red or liabilities imposed; the words "immunity" and "privilege" referring to a right conferred peculiar to some individual or body, or an affirmative act of selection of special subjects of favors not enjoyed by citizens in general under the federal Constitution or laws. *Hammer v. State*, 89 N. E. 850, 851, 173 Ind. 199, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034.

The "privileges and immunities" referred to, in Const. Ind. art. 1, § 23, prohibiting any law granting privileges or immunities to one class of persons which upon the same terms are not open to all citizens, and Const. U. S. Amend. 14, § 1, prohibiting the abridgment of the privileges and immunities of citizens of the United States, are general abstract personal rights, in their nature fundamental and pertain to all citizens in free governments, and which they are entitled to enjoy throughout the several states as well as in the state of residence, such as freedom of travel, pursuit of any lawful vocation or of pleasure, enjoyment of life and liberty, acquisition of property, the right to control it in security and peace, and the right to resort to the courts for its protection without restriction other than those usually affecting all persons. *Strange v. Board of Com'rs of Grant County*, 91 N. E. 242, 173 Ind. 640; *Id.*, 91 N. E. 506.

"Privileges and immunities" of a citizen within the guarantees of Const. U. S. Amend. 14, involve the right not only to be free from physical restraint, but the right to follow any lawful business or avocation in life and to make all proper contracts in furtherance thereof. *Ex parte Hollman*, 60 S. E. 19, 80, 79 S. O. 9, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105.

The due process clause of the fifth amendment of the Constitution applies only to privileges and immunities arising out of the natural character of the national government, or those specifically granted to all citizens and persons by the Constitution of the United States, and those fundamental rights which are inherent to all are privileges and immunities of state citizenship only and not within the protection of the fifth amendment. *Watson v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. 942, 946.

The words "privilege and immunity," as used in the Illinois Constitution, providing that the General Assembly shall not pass any special law granting any special or exclusive privilege, immunity, or franchise whatever, include all the rights which the state government was created to establish and every right which can be conferred or granted by any law of the state, and by that provision of the Constitution a guaranty is given that all valid enactments of the Legislature shall operate uniformly on persons and property, and all citizens are assured the equal protection of the laws of the state. *Jones v. Chicago, R. I. & P. R. Co.*, 83 N.

E. 215, 216, 231 Ill. 802, 121 Am. St. Rep. 813.

#### Action by states

The "privileges and immunities" protected by Const. U. S. Amend. 14, § 1, are only those arising under the federal Constitution, and not under the state Constitution or laws. *People ex rel. Lasher v. City of New York*, 118 N. Y. Supp. 742, 744, 134 App. Div. 75.

The rights, privileges, and immunities which the fourteenth constitutional amendment and Rev. St. § 1979, for its enforcement, were designed to protect, are such as belong to citizens of the United States as such, and not as citizens of a state. Code Civ. Proc. Cal. § 1747, which authorizes proceedings for the appointment of guardians for the persons and estates of minor children having no guardians by will or deed, is a lawful exercise of the state's power; and proceedings based thereon, by which parents are deprived of the custody of their children, do not give them a right of action against the persons instituting the proceedings, under Rev. St. § 1979, for depriving them of rights, privileges, or immunities secured to them by the Constitution or laws of the United States. *Wadleigh v. Newhall*, 136 Fed. 941, 946 (citing *Bradwell v. Illinois*, 16 Wall. [83 U. S.] 130, 138, 139, 21 L. Ed. 442).

#### Business regulations

*Kirby's Dig.* § 6886, which provides that any person, either as owner, manufacturer, or agent, who, without a license, shall travel in any county, and peddle certain specified articles, shall be deemed guilty of a misdemeanor, but that the section shall not apply to any resident merchant in said county, is in conflict with Const. Ark. art. 2, § 18, providing that the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens. *Ex parte Deeds*, 87 S. W. 1030, 1031, 75 Ark. 542.

A city ordinance prohibiting any one from peddling fruits, vegetables, etc., within the fire limits of the city, excepting farmers disposing of produce grown by themselves—there being no element of taxation involved—is a violation of Const. art. 1, § 12, prohibiting any law granting to any citizen or class privileges or immunities which on the same terms shall not equally belong to all. *Ex parte Camp*, 80 Pac. 547, 549, 38 Wash. 393.

#### Exemption from self-incrimination

Exemption from self-incrimination, though secured as against federal action by Const. U. S. Amend. 5, is not one of the fundamental rights of national citizenship, so as to be included among the privileges and immunities of citizens of the United States which the states are forbidden by the fourteenth amendment to abridge. *Twining v. State of New Jersey*, 29 S. Ct. 14, 19, 211 U. S. 78, 53 L. Ed. 97.

### Exemption from taxation

Liquor dealers are not denied the "privileges or immunities of citizens of the United States," under Const. U. S. Amend. 14, because producers or manufacturers of domestic wines are exempted by Rev. Civ. St. Tex. 1895, art. 50601, while such wines are in their hands, from the tax imposed and the bond required by preceding articles regulating the sale of intoxicating liquors. *Cox v. State of Texas*, 26 Sup. Ct. 671, 673, 202 U. S. 446, 50 L. Ed. 1099.

### Fisheries

A statute which provides that the owners of tidelands and riparian owners above tide water on certain rivers shall have the exclusive right of fishing, in so far as it attempts to vest in such owners the exclusive right to fish in navigable waters, is in violation of the Constitution, providing that "no law shall be passed granting to any citizen privileges or immunities which upon the same terms shall not equally belong to all citizens," in that it grants a monopoly in a lawful and uninjurious business which may be conducted as of common right. *Hume v. Rogue River Packing Co.*, 92 Pac. 1065, 1073, 51 Or. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 132.

The right to take fish from the tide waters of a state is a property right and not a mere "privilege" of citizenship, and, since the title to the bed of all tide waters in the state is in the state as trustee for its citizens, the state may impose such conditions on the right to take fish therefrom as it sees fit, notwithstanding the license fee exacted from aliens is higher than that required of its own citizens. *Leong Mow v. Board of Com'rs for Protection of Birds, Game, and Fish*, 185 Fed. 223.

The right to fish in the waters of a state is not a "privilege" to which citizens in the several states are entitled, under Const. U. S. art. 4, § 2, pt. 1, providing that the citizens of each state shall be entitled to all the privileges of the citizens in the several states. *State v. Tower*, 24 Atl. 898, 84 Me. 444.

### Municipal contracts

A municipal ordinance, requiring all contracts for the building of public works involving the use of dressed stone to require the work of dressing stone to be done within the territorial limits of the state, is not violative of Const. U. S. art. 4, § 2, entitling the citizens of each state to all the privileges and immunities of the citizens of the several states. *Allen v. Labsap*, 87 S. W. 926, 928, 188 Mo. 692, 3 Ann. Cas. 306.

### Office

"The 'privileges and immunities' which are protected by the constitutional inhibition concern the personal and private rights of the citizen, such as his right to acquire and

possess property, to pursue ordinary callings, and secure happiness and safety, etc., and do not include within their meaning the right to hold office. The state may decline to confer official power on residents of other states without depriving such nonresidents of any 'privilege' or 'immunity' protected by the Constitution of the general government." *In re Mulford*, 75 N. E. 345, 346, 217 Ill. 242, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986.

The right of a nonresident to be appointed administrator or executor is not a "privilege or immunity," the denial of which is prohibited by the federal Constitution. *In re McWhirter's Estate*, 85 N. E. 918, 920, 235 Ill. 607; *In re Mulford*, 75 N. E. 345, 346, 217 Ill. 242, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986.

Act March 8, 1910, creating a municipal plans commission to be formed from members of various city boards and by appointment by the mayor from eligibles nominated by 14 different associations, clubs, and corporations in the city, all of the members to be citizens of the city, was not in violation of Const. art. 1, § 12, prohibiting the passing of any law granting to any citizen, class of citizens, or corporation, other than municipalities, privileges or immunities which, on the same terms, shall not equally belong to all citizens or corporations, on the theory that the privilege of nomination granted to the organizations mentioned was not granted to the members of other similar organizations; the right to make such nominations not being one of the "privileges or immunities" granted by the Constitution. *Bussell v. Gill*, 108 Pac. 1080, 1083, 58 Wash. 468, 137 Am. St. Rep. 1070.

### Pollution of stream

The alleged right of a riparian proprietor to pollute a stream flowing over his land or along the boundary thereof is not a "privilege" or "immunity" which he enjoys as a citizen of the United States, as distinguished from those of a citizen of the state in which the land and stream are situated. *Commonwealth v. Emmers*, 70 A. 762, 764, 221 Pa. 298.

### Quarantine

Laws Or. 1907, p. 383, c. 223, regulating the importation of sheep from other states, and providing for the treatment and quarantine of sheep affected with scabies, etc., was equally applicable to the citizens of all states, without discrimination, and was therefore not in conflict with Const. art. 4, § 2, guaranteeing to the citizens of each state the "privileges and immunities" of the citizens of the several states. *Adams & Bryson v. Lytle*, 154 Fed. 876, 878 (citing *Reid v. Colorado*, 23 Sup. Ct. 92, 187 U. S. 137, 47 L. Ed. 108).

### Sale of intoxicating liquors

"The privileges and immunities" guaranteed to the citizens by the federal Consti-



tution relate to these rights which may be called fundamental, those which belong of right to all citizens of a free government, and which have, at all times, been enjoyed by the citizens of the several states. The right to sell intoxicating liquors by retail is not a privilege of a citizen of the state or of the United States. *Meehan v. Board of Excise Com'rs of Jersey City*, 64 Atl. 689, 690, 78 N. J. Law, 382.

The right to sell intoxicating liquors is not one of the privileges or immunities attaching to citizenship in the United States. *State v. Durein*, 80 Pac. 987, 988, 70 Kan. 13.

The right to engage in the sale of intoxicating liquors is not one of "privileges" guaranteed to the citizen by the state or federal Constitution. *State v. Baker*, 92 Pac. 1076, 1078, 50 Or. 381, 13 L. R. A. (N. S.) 1040.

An ordinance interdicting the sale of intoxicating liquors in a private room does not, by making an exception in favor of hotels, contravene Const. art. 1, § 21, inhibiting laws granting privileges which on the same terms shall not equally belong to all citizens; this not being applicable to a business which may lawfully be prohibited. *Sandys v. Williams*, 80 Pac. 642, 645, 647, 46 Or. 327.

#### Saloon regulations

A statute making it an offense to permit a female under the age of 21 years to remain in a saloon is not invalid because of the fact that a female attains her majority at the age of 18; the right to enter and remain in a saloon not being one of the equal privileges granted to every citizen. *State v. Baker*, 92 Pac. 1076, 1078, 50 Or. 381, 13 L. R. A. (N. S.) 1040.

#### Sunday laws

The "privileges and immunities" guaranteed to the citizens of the United States by the fourteenth amendment to the federal Constitution are those which arise out of the nature of the general government, its Constitution, or the laws made in pursuance thereof, and these are placed by the Constitution under the protection of Congress; but the privileges and immunities of the citizens of the states, with those exceptions, embrace, generally, those fundamental rights, for the security and establishment of which society is instituted; and they remain under the care of the state governments. The privileges and immunities involved under a statute prohibiting certain trades and amusements on Sunday belong to that class characterized as those of the citizens of the state, and are not referred to by the federal Constitution. They do not arise out of the nature of the general government, its constitution, or laws. *State v. Dolan*, 92 Pac. 995, 998, 13 Idaho, 693, 14 L. R. A. (N. S.) 1259.

### PRIVITY—PRIVY

"Privity" denotes mutual or successive relationship to the same rights of property.

*Withers v. Wabash R. Co.*, 99 S. W. 34, 37, 122 Mo. App. 282 (quoting and adopting definition in *Crispen v. Hannavan*, 50 Mo. 418); *Ottensoser v. Scott*, 37 South. 161, 163, 47 Fla. 276, 66 L. R. A. 346, 110 Am. St. Rep. 187, 4 Ann. Cas. 1076; *Pond v. Pond's Estate*, 65 Atl. 97, 98, 79 Vt. 352, 8 L. R. A. (N. S.) 212 (quoting and adopting 1 Greenl. Ev. § 189); *Womach v. City of St. Joseph*, 100 S. W. 443, 445, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (quoting and adopting definition in *McDonald v. Gregory*, 41 Iowa, 516); *Logan v. Atlanta, etc., R. Co.*, 64 S. E. 515, 516, 82 S. C. 518; *Lamar County v. Talley (Tex.)* 127 S. W. 272, 276.

The several classes of "privities" are as follows: Privities in estate, as donor and donee, lessor and lessee, and joint tenants; privities in blood, as heir and ancestor, and copartners; privities in representation, as executor and testator, administrators and intestate; and privities in law, that is where the law without privity of blood or estate casts the land upon another as by escheat. Other privities are given as privities in tenure between landlord and tenant; privity in contract alone or in the relation between lessor and lessee, or heir and tenant in dower, or by the courtesy by the covenants of the latter after he has assigned his claim to a stranger; privity in estate alone, between the lessee and the grantee of the reversion; and privity in both estate and contract, as between lessor and lessee. *Ottensoser v. Scott*, 37 South. 161, 163, 47 Fla. 276, 66 L. R. A. 346, 110 Am. St. Rep. 187, 4 Ann. Cas. 1076; *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 218, 203 Mass. 159, 40 L. R. A. (N. S.) 314 (citing *Buckingham v. Ludlum*, 37 N. J. Eq. 137, 141; *Douglass v. Howland* [N. Y.] 24 Wend. 35-53); *Womach v. City of St. Joseph*, 100 S. W. 443, 445, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (citing 1 Greenl. Ev. [16th Ed.] § 189).

The term "privity" denotes mutual or successive relationship to the same right of property. An action by a tenant of an abutting owner against an elevated railroad for injuries to easements brought within 20 years after the commencement of the operation of the railroad, does not interrupt the running of limitations against the owner, and he cannot after the expiration of more than 20 years from the commencement of the operation of the railroad maintain an action for injury to easements. *Goldstrom v. Interborough Rapid Transit Co.*, 100 N. Y. Supp. 911, 913, 115 App. Div. 323.

"Privity" expresses a condition where one knows or believes that another contemplates committing an act, and wrongfully conceals such knowledge, or pays no attention to the information, or covertly aids in the work. *Richardson v. Richardson*, 114 N. Y. Supp. 912, 916.

The term "privity," within the rule that color of title must purport to convey title to the claimant thereunder or to those with whom he is in privity, means privity of possession and not privity in blood, for a "privity in blood" is one who derives his title by descent, and applies to a real title which can descend and not to a mere colorable title. *Barrett v. Brewer*, 69 S. E. 614, 616, 153 N. C. 547, 42 L. R. A. (N. S.) 403 (citing 6 Words and Phrases, p. 5608).

"Privity" denotes merely a succession of relationships by deed or other act or by operation of law. Where land held by a widow's husband adversely was awarded, after his death, to the widow as a part of her homestead, and she thereafter continued to occupy the same adversely, her possession was not adverse, but in subordination to the rights of her husband's heirs, and was therefore properly tacked to the possession of her husband in order to complete the period of adverse possession in their favor. *Atwell v. Shook*, 45 S. E. 777, 779, 133 N. C. 387.

Where C., owning a roadbed, leased rolling stock from the A. Co., at a specified mileage rental, the C. Company having control of the trains, operators, etc., while on its tracks and being primarily and solely responsible for the damages to property or injuries to passengers arising from any accidents to the trains while on its line, there was a privity between the two companies in so far as they were liable to a passenger for injuries; the term "privity" being used to denote mutual or successive relationship to the same right of property, or those so connected with the parties in estate as to be identified with them in interest, and consequently affected by them. *Jenkins v. Atlantic Coast Line R. Co.*, 179 Fed. 535, 537 (citing 6 Words and Phrases, pp. 5606-5611).

The knowledge or privity of the managing officer or agent of a corporation is the knowledge or privity of the corporation within the meaning of Rev. St. § 4283, providing for the limitation of liability of shipowners for losses caused without their privity or knowledge. In *re Jeremiah Smith & Sons*, 193 Fed. 395, 397, 113 C. C. A. 391.

"Privies" are "all who have mutual or successive relationship to the same rights; \* \* \* persons whose interest in an estate is derived from the contract or conveyance of others; \* \* \* those who have mutual or successive relationship to the same right of property or subject-matter; those whose relationship to the same right of property is mutual or successive." *Tolliver v. Great Northern Ry. Co.*, 187 Fed. 795, 797, 109 C. C. A. 643 (quoting and adopting definition in 32 Cyc. 388).

"Privies" are those who have mutual or successive relationship to the same right of property or subject-matter, such as personal representatives, heirs, devisees, legatees, as-

signees, voluntary grantees, or judgment creditors or purchasers from them with notice of the fact. *Johnson v. Stebbins-Thompson Realty Co.*, 76 S. W. 1021, 1027, 177 Mo. 581; *Withers v. Wabash R. Co.*, 99 S. W. 34, 37, 122 Mo. App. 282 (quoting and adopting definition in *State ex rel. National Subway Co. v. St. Louis*, 46 S. W. 981, 145 Mo. 551, 42 L. R. A. 115).

Where the claimant of land derived all of his title thereto by descent or purchase from the person to whom the tax deed was originally issued, there was such privity between them that whatever was binding on the latter was binding on the former: the term "privity" denoting mutual or successive relationship to the same rights of property, operating by descent or by voluntary or involuntary transfer, and all privies being bound because they have succeeded to some estate which was bound in the hands of its former owner. *Towle v. Quante*, 92 N. E. 967, 92, 246 Ill. 568 (citing 6 Words and Phrases, p. 5607).

Under Civ. Code Prac. § 734, providing that an appeal shall be granted as a matter of right on the application of either party or his "privity," on filing with the clerk a copy of the judgment, and section 745, declaring that an appeal shall not be granted, except within two years next after the right to appeal first accrued, the attorneys representing the estate of the deceased defeated party may within two years after judgment file a copy of the judgment and take out the appeal, acting for the estate, and thereafter the administrator may revive the appeal in his name as administrator; the word "privity" including those claiming under the party, such as heirs and devisees. *Davis v. Catlettsburg-Kenova-Ceredo Water Co.*, 123 S. W. 335, 336, 136 Ky. 66.

"Privies" are persons who are partakers of or have an interest in any action or thing, or any relation to another. *Roarke v. Roarke*, 75 Atl. 761, 763, 77 N. J. Eq. 181.

Plaintiffs claimed a certain double lot under a will, by which testator devised the lot to their father for life, with remainder to them. Defendant claimed that the will referred only to the north half of the lot, and that she held the south half thereof by virtue of a deed from the testator, left in escrow for her and drawn pursuant to a contract for her benefit, entered into between the testator and the mortgagor of such south half, and under which she was required to make rent payments to the testator during his life. In an action of ejectment brought by the father against defendant, the mortgagor testified for defendant. Thereafter the mortgagor died. The ejectment action was never brought to trial. Held, in an action to recover the property, that the mortgagor's testimony in the action of ejectment was competent, under Code Civ. Proc. § 890, which

permits the evidence given on a former trial by a witness since deceased to be used in an action relating to the same subject-matter between the same parties or their legal representative; the remainderman being a privy of the life tenant. *Shook v. Fox*, 110 N. Y. Supp. 951, 954, 126 App. Div. 565 (citing *Jackson ex dem. Bates v. Lawson*, 15 Johns. [N. Y.] 539, 543).

#### In action or judgment

"Privy" is defined to be a mutual or successive relationship to the same rights of property, and within the rules relating to the conclusiveness of judgments all persons are "privies" to a judgment whose succession to the rights of property thereby adjudicated was derived through or under one or other of the parties to the action, and accrued subsequent to the commencement of that action. *Lamar County v. Talley (Tex.)* 127 S. W. 272, 276 (citing 23 Cyc. p. 1253).

"Privies," in such sense that they are bound by a judgment, are those who acquired interest in the subject-matter after the rendition of the judgment. *Kahn v. Richard L. Walsh Co.*, 129 N. Y. Supp. 137, 139, 72 Misc. Rep. 20.

"The term 'privy' denotes mutual or successive relationship to the same right of property. The ground therefore upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is that, if they are identified with him in interest and whenever this identity is found to exist, all are alike concluded." *Perkins v. Goddin*, 85 S. W. 936, 940, 111 Mo. App. 429.

"To make a man 'privy' to an action he must have acquired an interest in the subject of the action either by inheritance, succession, or purchase from a party subsequently to the action or he must hold property subordinately." *Womach v. City of St. Joseph*, 100 S. W. 443, 445, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (quoting and adopting definition in *Bigelow, Estop.* [5th Ed.] p. 142).

No one is "privy" to a judgment whose succession to the rights of property affected by the judgment occurred previously to the institution of the suit. *Calculagraph Co. v. Automatic Time Stamp Co.*, 154 Fed. 166, 167 (citing *Ingersoll v. Jewett*, 16 Blatchf. 378, 13 Fed. Cas. 45); *Schuler v. Ford*, 80 Pac. 219, 220, 10 Idaho, 739, 109 Am. St. Rep. 233, 3 Ann. Cas. 336 (citing 1 *Freem. Judgm.* [4th Ed.] § 162); *Northwestern State Bank v. Silberman*, 154 Fed. 809, 814, 83 C. C. A. 525 (citing *Freeman, Judgm.* par 162). Thus a party in possession of land under contract to purchase is not in "privy" with the party who contracted to sell, in the sense that he will be bound by the judgment affecting such property, where the action was commenced subsequent to entering into such contract.

*Schuler v. Ford*, 80 Pac. 219, 220, 10 Idaho, 739, 109 Am. St. Rep. 233, 3 Ann. Cas. 336.

Where sellers of a threshing outfit delivered the same to the buyer under a conditional sale, reserving title in the sellers until paid for, the sellers, by delivering possession to the buyers, did not become their privies, so that a judgment against the buyers in a suit by their employes to enforce a thresher's lien for services, given by Civ. Code, § 3061, would not bind the sellers, who were not made parties to the proceedings; a "privy" being defined as one whose succession to the rights of property affected occurred after the institution of the particular suit and from a party thereto or who claims under or in right of parties, as an executor or administrator. *Holt Mfg. Co. v. Collins*, 97 Pac. 516, 519, 154 Cal. 265.

A judgment is conclusive between the parties thereto and their privies in a second action on the same claim or cause of action, as to all questions that were, or might have been, litigated in the first action, and is likewise conclusive in a second action upon a different claim or cause of action, as to every proposition within the issues at first, which was presented for adjudication and decided. In this rule the mere personal effect is confined to the parties, while the term "privy" suggests mutual succession or relation to the same property or property right. *Rowell v. Smith*, 102 N. W. 1, 3, 123 Wis. 510, 3 Ann. Cas. 773.

The term "privy" denotes mutual or successive relationship to the same rights of property, and purchasers of articles made by the defendant in a suit for infringement of a patent after the decree therein are not privies to such decree, nor protected thereby as such. *Hurd v. Seim*, 189 Fed. 591, 600.

The ground of "privy" is property, not personal relation. Absolute identity of interest is essential to "privy." The fact that two parties as litigants in two different suits happened to be interested in proving or disproving the same facts creates no privy between them. In some of the cases, the word is used somewhat inaccurately to denote the relation and the consequences thereof between principal and agent, and unless the sense in which the word is used is kept in mind we are apt to be led into confusion and error. *Logan v. Atlanta & C. A. L. R. Co.*, 64 S. E. 515, 516, 82 S. C. 518 (quoting *Bigelow, Estop.* p. 142; *Freem. Judgm.* § 162; *Smith v. Moore*, 7 S. C. 215, 24 Am. Rep. 479).

Where promoters of a mill company guaranteed to a subscriber that the company to be organized would within a year establish a tiling plant or he could have his money returned, and he refused to pay a balance of the subscription because of the company's failure to establish the plant, and obtained judgment in an action by the com-

pany for the balance, no such "privity" existed between the promoters and the company as would bind them by the judgment against the company. *Broadus v. Russell*, 49 South. 327, 329, 160 Ala. 353 (citing 6 Words and Phrases, p. 5606 et seq.).

A voluntary grantee with knowledge of the facts is a "privity" to a judgment against his grantor, so that he has no right to go back of the judgment and set up defenses to the claim on which it is based. *Johnson v. Stebbins-Thompson Realty Co.*, 76 S. W. 1021, 1027, 177 Mo. 581.

Where a wife brings an action in her own right for personal injuries, there is no privity between her and her husband, and therefore a judgment in such action does not bar an action by him for the loss of society, companionship, and services of his wife. *Wompach v. City of St. Louis*, 100 S. W. 443, 449, 201 Mo. 467, 10 L. R. A. (N. S.) 140.

"Privity" depends upon the relation of the parties to the subject-matter, rather than their activity in a suit relating to it after the event. Participation in the defense because of general or personal interest in the result of the litigation does not make one privy to the judgment. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 217, 218, 203 Mass. 159, 40 L. R. A. (N. S.) 314.

"Privies," within the rule that privies to the record are entitled to a writ of error, means the heirs, executors, administrators, terre-tenants, or those having an interest in remainder or reversion, or one who is made a party by the law, as he who comes in as a vouchee. *Carney v. Superior Court*, 74 Atl. 1018, 1021, 30 R. I. 276.

"Privies," within the rule that a writ of error may not be prosecuted by one not a party or privy to the record, etc., means heirs, executors, administrators, terre-tenants, remaindermen, reversioners, or those made parties by law, and does not comprehend a stockholder of a corporation against which judgment has gone. *White Brass Castings Co. v. Union Metal Mfg. Co.*, 83 N. E. 540, 541, 232 Ill. 165, 122 Am. St. Rep. 63.

"Privity," so far as concerns the effect of a judgment over property rights, does not arise from mere relationship by blood or affinity, nor because two parties may have an interest in the subject-matter of the litigation. The term implies relationship by succession or representation between a party to the first action and a party to the subsequent action in respect to the matter adjudicated in the first action. Thus where, in a proceeding for letters of administration, a party intervened claiming to be the decedent's widow, and this issue was decided adversely to her, the decree was not binding on her son claiming to be a son and heir of the decedent, since there was no "privity"

between him and his mother. *Sorensen v. Sorenson*, 98 N. W. 837, 839, 68 Neb. 483.

The question of who is concluded by a judgment has been obscured by the use of the words "privity" and "privies," which in their precise technical meaning in law are scarcely determinative always of who is and who is not bound by a judgment. Courts have striven sometimes to give effect to the general doctrine that a judgment is only binding between parties and privies by extending the signification of the word "privies" to include relationships not originally embraced in it, whereas the true reason for holding the issue res judicata does not necessarily depend on "privity," but on the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy. *Taylor v. Sartorius*, 108 S. W. 1069, 1094, 130 Mo. App. 23.

#### In blood

"Privies in blood" denotes privity between heir and ancestor. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 218, 203 Mass. 159, 40 L. R. A. (N. S.) 314 (citing *Buckingham v. Ludlum*, 37 N. J. Eq. 137, 141; *Douglass v. Howland* [N. Y.] 24 Wend. 35-53).

The term "privity," within the rule that color of title must purport to convey title to the claimant thereunder or to those with whom he is in privity, means privity of possession and not privity in blood, for a "privity in blood" is one who derives his title by descent, and applies to a real title which can descend and not to a mere colorable title. *Barrett v. Brewer*, 69 S. E. 614, 616, 153 N. C. 547, 42 L. R. A. (N. S.) 403 (citing 6 Words and Phrases, p. 5608).

#### In contract

A contract between two parties based on a valid consideration may be enforced by third parties when entered into for their benefit, though such parties are not named in the contract nor privy to the consideration. It is sufficient to create the necessary privity of contract that the obligee owe to the parties to be benefited some obligation or duty, legal or equitable, which would give them a just claim. *City of St. Louis v. G. H. Wright Contracting Co.*, 101 S. W. 6, 7, 202 Mo. 431.

#### In estate

"The term 'privity' denotes mutual or successive relationship to the same right of property." "A 'privity' in estate is a successor to the same estate, not to a different estate in the same property." Letters written by a husband, prior to his joining with his wife in a deed of trust conveying the wife's real estate, in which he had an inchoate dower right and homestead right, tending to show that he had, as trustee, invested trust funds in the land, were admissible against the grantee; the latter being a "privity" in

estate to the husband. *Lang v. Metzger*, 69 N. E. 483, 498, 206 Ill. 475 (quoting and adopting definitions in 1 Greenl. Ev. § 180; *Pool v. Morris*, 29 Ga. 374, 74 Am. Dec. 68).

"Privies in estate" are donor and donee, lessor and lessee, and joint tenants, but joint tort-feasors are not privies in estate, and one of several joint tort-feasors sued by the person injured cannot plead by way of estoppel a judgment in favor of another joint tort-feasor rendered in an action by the person injured. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 218, 203 Mass. 159, 40 L. R. A. (N. S.) 314.

To constitute privity of estate as applied to the assignee of a lease, the latter must have acquired legal title to the term or have taken possession. In the latter case, such possession constitutes sufficient title to establish the relation of privity of estate, and makes him liable for the rent unless he shows he is a mere undertenant. *Comley v. Ford*, 64 S. E. 447, 448, 65 W. Va. 429.

To constitute one the privy by estate of another, it must appear that he succeeded after the bringing of the action by which he is sought to be concluded to an estate or interest held by the party to the judgment. *Minnesota Debenture Co. v. Johnson*, 102 N. W. 381, 382, 94 Minn. 150, 110 Am. St. Rep. 354.

"A 'privy in estate' is one who derives from another title to property. He comes in by succession to property by contract or law. It is identity of title. The privy in estate takes property under another. To make one person a privy in estate to another; that other must be predecessor in respect to the property in question from whom the privy derives his right or title, a mutual or successive relationship." *Smith v. White*, 60 S. E. 404, 405, 63 W. Va. 472, 14 L. R. A. (N. S.) 530 (citing 6 Words and Phrases, p. 5609).

A "privy in estate," so as to be bound by a judgment affecting realty in an action to which he was not a party, is one whose title is derived from a party bound by the judgment. *Hungate v. Hetzer*, 111 Pac. 183, 184, 83 Kan. 265.

#### Of possession

To show privity of possession so as to avail of the color of title of a prior occupant, the later occupant must enter under the prior one and obtain his possession either by purchase or descent from him. *Barrett v. Brewer*, 69 S. E. 614, 616, 153 N. C. 547, 42 L. R. A. (N. S.) 403 (citing 6 Words and Phrases, p. 5609).

#### Executor or administrator and testator or intestate

The term "privy," as defined by Greenleaf (1 Greenl. Ev. § 189), denotes mutual or successive relationship to the same rights of property. In the classification usually stated is found privies in representation, which include executor and testator, administrator,

and intestate. An administrator or executor takes legal title to the personal property not in his own right, but as trustee for a particular purpose. When an estate consists entirely of personal property, the relation of trustee and cestui que trust exists between the executor and the legatee, and in litigation affecting the amount or value of such an estate the administrator or executor represents the legatee, and the privity between them is complete. The privity between them is the privity of trustee and cestui que trust, which, it is said, was classified in the old books as "privity of person." The real estate, however, descends directly to the heir, and the interest of the administrator is in the nature of a naked conditional power, and the privity between them as to such property is slight or none at all. Where a claimant seeking to establish a claim against a decedent was estopped from asserting her claim as against a third person who had contracted for the estate of the decedent consisting of personalty, the executor of the decedent, being in privity with the third person, was entitled to avail himself of defense of estoppel. *Pond v. Pond's Estate*, 65 Atl. 97, 98, 79 Vt. 352, 8 L. R. A. (N. S.) 212 (citing Rap. & L. Law Dict.).

#### Executors or administrators appointed in different jurisdictions

The term "privy" denotes mutual or successive relationship to the same rights of property. Lord Coke divides privies into three classes: Privies in estate, privies in law, and privies in blood. The only principle upon which the doctrine of estoppel applies to one party because of his privity with another is that the party claiming through another is estopped by that which estopped that other respecting the same subject-matter. Thus, the executors and the administrator with the will annexed are in privity with the testator, and are estopped by judgments and prescriptions that prevail for or against him, because they each derived the property they are respectively administering from him. But there is no privity between Illinois executors and a Kansas administrator, because none of the property which the latter is administering was derived from the former, and none of the property which the former is administering was derived from the latter, so that an estoppel against or in favor of the latter does not relate to the same subject-matter with which the former is dealing, and they are not privies in estate. They received their authority from different sovereignties over different property. They are accountable to different courts which are acting under different laws. The authority of the executors is paramount and that of the administrator is nothing in Illinois. The authority of the administrator is paramount and the executors are without authority in Kansas. Hence they are not "privies" in law. They are certainly not privies in blood,

and the result is that they are not privies at all. *Wilson v. Hartford Fire Ins. Co.*, 164 Fed. 817, 820, 90 C. C. A. 593, 19 L. R. A. (N. S.) 553 (citing *Greenl. Ev.* [16th Ed.] § 189).

The term "privity" denotes mutual succession or relationship to the same rights of property, and administrators of the estate of the same person appointed in different jurisdictions are not privies. *Richards v. Blaisdell*, 106 Pac. 732, 735, 12 Cal. App. 101.

#### Joint tort-feasors

"Privies in representation" are executor and testator, or administrator and intestate, but joint tort-feasors are not privies in representation, and one of several joint tort-feasors sued by the person injured cannot plead by way of estoppel a judgment in favor of another joint tort-feasor rendered in an action by the person injured. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 219, 203 Mass. 159, 40 L. R. A. (N. S.) 314.

A decree of a federal Circuit Court sitting in New York, dismissing a suit in personam brought against one of two joint tort-feasors, is not denied full faith and credit by the refusal of a Massachusetts court to give it effect as a bar to a suit upon the same facts against the other, who was not a resident of New York, and not a party to the first suit, where such refusal was rested upon the ground that, under the general law—whatever might be the rule in New York—the relationship between two joint tort-feasors was not such as to make the one not sued a party by either "privity" or representation, this being a jurisdictional question which the Massachusetts court was at liberty to determine for itself. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 32 Sup. Ct. 641, 643, 225 U. S. 111, 56 L. Ed. 1009, Ann. Cas. 1913E, 875.

#### Tenants in common

"In the law of estoppels, privity signifies merely succession of rights—that is, the devolution in whole or in part of the rights and duties of one person upon another; \* \* \* the derivation of rights by one person from and holding in subordination to those of another, as in the case of a tenant. No one can be bound by or take advantage of the estoppel of another, who does not succeed or hold subordinate to his position." Tenants in common are not in privity to each other, so as to entitle them to take advantage of an estoppel by judgment obtained by one co-tenant, suing alone, to set aside a deed executed by their common ancestor. *Allred v. Smith*, 47 S. E. 597, 599, 135 N. C. 443, 65 L. R. A. 924 (quoting *Bigelow, Estop.* 347; *Black, Judgm.* 549).

## PRIZE

Drawing a prize, see *Drawing*.

"Premiums" and "prizes" are equivalent words within the meaning of the federal stat-

ute forbidding the carriage from one state to another of any paper, etc., purporting to be or to represent a chance in a lottery. *U. S. v. Jefferson*, 134 Fed. 299, 300.

The word "prize" has been defined by Webster as: "That which is obtained against the competition of others; anything carried off as the result or award of a contest; the thing striven for; and hence anything offered to be competed for, or as the inducement to or reward of effort; that which is won in a lottery." One definition given by the *Century Dictionary* is "that which is won in a lottery, or in any similar way." Among the definitions of the word given in the *Standard Dictionary* are "anything to be striven for; also anything offered as an inducement to participate in a scheme of chance." As used in connection with anti-lottery laws, the word "prize" comprehends anything of value gained (or, correspondingly, lost) by the operation of chance, or any inequality in amount or value in a scheme of payment of money or other thing of value as a result of the use of chance. The gain need not be large to constitute a prize. If there are a number of purchasers of tickets, bonds, certificates, or whatever the thing sold may be called, who enter on equal terms, but in payment by the company or manager the scheme includes the making of an inequality in amounts by the employment of chance, so that one gets more than another similarly situated, it is a lottery. The inequality may not be great nor in favor of the person selected by chance. It may be against him. He need not lose all or gain all. Partial gain (or loss in the hope of gain) is sufficient to constitute a prize. A scheme wherein inequality in payment or distribution is to result from chance has been held to be a lottery. But in this case the court held that a scheme of a loan and security company which issued what was called "investment certificates" was not unlawful. *Equitable Loan & Security Co. v. Waring*, 44 S. E. 320, 326, 117 Ga. 599, 62 L. R. A. 93, 97 Am. St. Rep. 177.

#### PRIZE (In Admiralty)

Movables taken from the enemy on land are generally called "booty," and on the high seas "prize." The high seas include coast waters without the boundaries of low-water mark, though within bays or roadsteads; waters on which a court of admiralty has jurisdiction. *United States v. Dewey*, 23 Sup. Ct. 415, 422, 188 U. S. 254, 47 L. Ed. 463 (citing *United States v. Ross*, 27 Fed. Cas. 890, 1 Gall. 624).

## PRIZE LOGS

Under the provisions of section 1504, Rev. Codes, all prize logs must be divided between the owners in proportion to the number of logs owned by each, and "prize logs" are defined to mean such logs as bear no mark or marks and all logs bearing marks not recorded or claimed within one year af-

er any general drive. *Norman v. Rose Lake Lumber Co.*, 128 Pac. 85, 88, 22 Idaho, 711, Ann. Cas. 1913E, 673.

## PRO

### PRO CONFESSO

See Decree Pro Confesso.

### PRO RATA—PRORATE

"Pro rata" means, literally, "according to the rate," or, as ordinarily understood, "in proportion." Where a contract of reinsurance provided that the loss, if any, should be payable "pro rata," at the same time and in the same manner as by said companies, means according to that proportion which the amount of the reinsurance bears to the original insurance; and, where the amount of original insurance is \$10,000 and the reinsurance is \$5,000, the insurer is liable for one-half of the loss, and, where the original insurance is subsequently reduced to \$2,000, the insurer does not thereby become liable for the whole amount of any loss. *Home Ins. Co. v. Continental Ins. Co.*, 73 N. E. 65, 66, 180 N. Y. 389, 105 Am. St. Rep. 772.

### PRO TEMPORE

See Judge Pro Tempore; Officer Pro Tem.

The words "pro tempore" mean for the time being. *Dobbs v. State*, 115 Pac. 370, 372, 5 Okl. Cr. 475.

## PROBABILITY

See Reasonable Probability.

"Probability" is an element which addresses itself to the reason, and is frequently invoked in matters of human conduct and experience for determining the existence or nonexistence of a fact. In civil cases a jury is authorized to determine an issue of fact as its probability or improbability may appear to them from the evidence before them. Hence, any evidence tending to show either of these conditions is relevant to the issue to be determined by them. "If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury." *Moody v. Peirano*, 88 Pac. 380, 383, 4 Cal. App. 411 (quoting *Home Ins. Co. v. Welde*, 11 Wall. [78 U. S.] 438, 20 L. Ed. 197).

"Probability" is defined to be the state of being probable. To say that a state of facts have a probable existence *ex vi termini* implies that there is reason for the belief that they exist. If there is no reason for such belief, there is no probability of their existence. In order to find that there is a probability of the existence of a fact, a reason for believing in the existence of such fact must be entertained. A requested instruction that, if from the evidence there was a "reasonable probability" of defendant's innocence,

then there was a just foundation for a reasonable doubt and would authorize an acquittal, is not erroneous, because of the use of the word "reasonable" as qualifying the word "probability." The employment of the word "reasonable" does not and cannot affect the correctness of the charge. It is but a statement of what would have been implied from the word probability had it been used alone. *Mims v. State*, 37 South. 354, 141 Ala. 93.

A "probability of innocence," is the equivalent of a reasonable doubt, and requires the acquittal of a defendant charged with crime. *Gainey v. State*, 37 South. 355, 141 Ala. 72.

## PROBABLE

The word "probable" is defined as "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely;" and in common acceptance the word implies, when applied to a condition which may be supposed beforehand, that we know facts enough about the condition supposed to make us reasonably confident of it, or, at the least, that the evidence preponderates in its favor. *Gallamore v. City of Olympia*, 75 Pac. 978, 980, 34 Wash. 379 (citing *Webst. Int. Dict.*).

The word "probable" does not mean free from doubt, but carries with it the idea that the contingency is more likely to happen than otherwise. It is said to be synonymous with the word "likely." Webster's definition is: "Having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely." *Willard Oil Co. v. Riley*, 115 Pac. 1103, 1105, 29 Okl. 19.

"Probable" means capable of being proved; having more evidence for than against. Accused's explanation of the possession of stolen property may or may not be reasonable, probable, satisfactory, or true, yet, if in the minds of the jury it creates a reasonable doubt of his guilt, he is entitled to an acquittal, and the burden is thrown on the prosecution to establish the falsity of it beyond a reasonable doubt. *State v. Trosper*, 109 Pac. 858, 859, 41 Mont. 442.

The term "probable" has been defined to mean "having more evidence for than against," supported by evidence which inclines the mind to believe, but leaves some room for doubt. *Ex parte Heacock*, 97 Pac. 77, 8 Cal. App. 420.

In prosecutions for homicide, in charging as to the presumption that persons intend the ordinary results of their acts, the words "necessary," "probable," "usual," and "ordinary" are substantially synonymous. *Beauregard v. State*, 131 N. W. 347, 351, 146 Wis. 280.

### Liable synonymous

See Liable.

**As likely**

The word "probably," as used in an instruction as to future suffering, has the same if not a stronger meaning than the word "likely," and on the authority of *Holden v. Missouri R. Co.*, 84 S. W. 133, 103 Mo. App. 665, it is held that an instruction permitting the jury to allow plaintiff a reasonable compensation for bodily pain and distress of mind which she had suffered or would "probably" in the future suffer, in direct consequence of her injuries, was not fatally erroneous in the use of the word "probably." *Pentoney v. St. Louis Transit Co.*, 84 S. W. 140, 141, 108 Mo. App. 681.

**PROBABLE CAUSE**

See Certificate of Probable Cause; Reasonable or Probable Cause; Want of Probable Cause.

See, also, Proximate Cause.

An affidavit for a warrant of arrest, stating that affiant has "good reason to believe" that an offense has been committed, rather than, as required by the Code, that he has "probable cause for believing," is void. "Good reason to believe" is not the equivalent of "probable cause for believing," as required by the statute. *City of Bessemer v. Eldge*, 50 South. 270, 271, 273, 162 Ala. 201.

An affidavit averring that affiant has probable cause for believing and does believe that a designated offense has been committed, and charging accused with the offense, is defective for failing to affirm probable cause for believing that accused is guilty, as required by the Code. *City of Selma v. Shivers*, 43 South. 565, 566, 150 Ala. 502.

**For appeal**

The phrase, "probable cause for appeal," used in Rev. St. 1887, § 8048, does not mean there is no probable reason to suppose the judgment shall be reversed, but that appellant has assigned grounds on which he expects to rely which are open to doubt or honest difference of opinion. In *re Neil*, 87 Pac. 881, 12 Idaho, 749 (citing *In re Adams*, 22 Pac. 547, 81 Cal. 163; *People v. Valencia*, 45 Cal. 305; *Ex parte Hoge*, 48 Cal. 6).

**For arrest**

The expression "probable cause," as used in the federal Constitution, referring to the issuance of warrants, means that there is a probability that a crime has been committed by the person named in the warrant. *Ex parte Heacock*, 97 Pac. 77, 8 Cal. App. 420.

"Probable cause" for arrest, as a defense to an action for false imprisonment, means a reasonable ground of suspicion, supported by circumstances. *Sanders v. Davis*, 44 South. 979, 983, 153 Ala. 375.

Under Const. U. S. Amend. 4, providing that no warrant shall issue but on probable cause supported by oath or affirmation, a federal court has no jurisdiction to direct the is-

suance of a warrant on an information made on the information and belief of the United States district attorney alone; but it must be supported by proof establishing probable cause, to wit, legal evidence that a crime has been committed and that there is probable cause and belief that the accused is guilty of the commission thereof. Rev. St. § 1022, provides that certain offenses may be prosecuted either by indictment or information filed by the district attorney, and Const. Amend. 4, declares that no warrant shall be issued but on probable cause supported by oath or affirmation. Held, that the constitutional provision does not require that the oaths or affirmations of the supporting witnesses be taken in open court or before the judge issuing the warrant or directing its issuance, but that the information is so supported where it is accompanied by the evidence of witnesses sworn before a United States commissioner on a preliminary examination, properly taken and certified, or when accompanied by the affidavits made on oath of witness sworn before any officer authorized by law to take and subscribe such oaths or affirmations. *United States v. Baumert*, 179 Fed. 735, 738.

**For removal of accused to another district**

"Probable cause" to believe a person has committed a crime is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. "Probable cause" to believe a defendant has committed a crime, such as will warrant his removal to another district to be tried therefor, is not established by evidence which is as consistent with his innocence as with his guilt, although it may afford ground for a suspicion or conjecture that the offense was committed. *United States v. Green*, 136 Fed. 618, 628 (citing *Wheeler v. Nesbitt et al.*, 24 How. [65 U. S.] 544, 16 L. Ed. 765; *Bacon v. Towne*, 4 Cush. [58 Mass.] 217; *Carl v. Ayers*, 53 N. Y. 14; *McGurn v. Brackett*, 33 Me. 331; *Wanser v. Wyckoff*, 9 Hun [N. Y.] 178; *Anderson v. How*, 22 N. E. 696, 116 N. Y. 336; *Lacy v. Mitchell*, 23 Ind. 67; *Hays v. Blizzard*, 30 Ind. 457; *Driggs v. Burton*, 44 Vt. 124; *Mitchell v. Wall*, 111 Mass. 492; *Harpham v. Whitney*, 77 Ill. 32).

**In civil proceedings**

"Probable cause" for the issuance of an attachment is not synonymous either with "just cause" or "legal cause." *Sehon, Blake & Stevenson v. Whitt (Ky.)* 92 S. W. 280, 281.

**In relation to prizes and seizures**

"Differences of opinion existed for a time as to the legal meaning of the term 'probable cause' [for the seizure of goods under the revenue laws], but it is settled that it imports circumstances which warrant suspicion, and



that a doubt respecting the true construction of the law is as reasonable a cause of seizure as a doubt respecting the fact." *Averill v. Smith*, 17 Wall. [84 U. S.] 82, 92, 21 L. Ed. 613.

"Reasonable cause" sufficient to justify seizure under the revenue laws means "probable cause;" it imports a seizure under circumstances which warrant suspicion. *United States v. One Sorrel Horse*, 22 Vt. 655, 657, 27 Fed. Cas. 315, 316.

In order to constitute "probable cause" in case of seizure, it is not necessary that the circumstances should be such as to make a prima facie case for condemnation. The words "probable cause" in all cases of seizure have a fixed and well-known meaning and import a seizure made under circumstances that warrant suspicion, and the same rule applies in cases of prize, and captors are not liable for damages in a case where a vessel captured presents probable cause for the capture, even though she was led into the predicament in which she was found by mistakes of the revenue officers of the captors' own government. *The La Manche*, 3 Spr. 207, 25 Law Rep. 585, 14 Fed. Cas. 965, 968.

"Probable cause" is held to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged." "Probable cause" means less than evidence which would justify condemnation; it imports a seizure made under circumstances which warrant suspicion. In an action against an internal revenue officer for a wrongful seizure of property which has been returned to the claimant intact, proof of probable cause for such seizure is a complete defense, and may be made, although the court, in rendering judgment for the claimant in a proceeding for the forfeiture of the property, failed to make the certificate of probable cause provided for by Rev. St. § 970; and where the proof shows that defendant made the seizure by direction of the Commissioner of Internal Revenue, based upon information received from his special agents which justified a suspicion that the plaintiff was violating the law, the court is warranted in charging the jury as matter of law that there was probable cause. *Agnew v. Haymes*, 141 Fed. 631, 640, 72 C. C. A. 325 (quoting and adopting definition in *Munns v. De Nemours*, 3 Wash. C. C. 87, 17 Fed. Cas. 993).

On judgment for claimant of property seized by officers of the customs service for forfeiture, on the ground that it was fraudulently imported, a certificate of reasonable cause should be entered by the court as provided by Rev. Stat. § 970, although the verdict of the jury was clearly right, under the evidence, where it is affirmatively shown that the officers who instituted the proceedings

acted in good faith and on reasonable ground of suspicion. The term "reasonable cause" does not differ in meaning from the term "probable cause" found in section 909, Rev. Stat. As stated in *Averill v. Smith*, 17 Wall. (84 U. S.) 82, 21 L. Ed. 613: "Proof of 'probable cause,' if shown by the certificate of the District Court which rendered the decree discharging the property, is a good defense to an action of trespass brought by the claimant against the collector who made the executive seizure, provided it appears that judicial proceedings were instituted, and that the charge against the property was prosecuted to a final judicial determination. Where the respondent prevails in such an information, the court, says Mr. Parsons, gives to the prosecuting or seizing officers a certificate of 'probable cause,' if in their judgment he had such cause for the seizure, and that, he says, protects the officer who made the seizure from prosecution for making the same; and he adds that the final decree of the court in a case of forfeiture regularly before the court is conclusive. \* \* \* Probable cause, he says, means less than evidence which would justify a condemnation, and the same author says, if the court before whom the cause is tried shall cause a certificate of entry to be made that there appeared to be a reasonable cause of seizure, the seizing officer shall be protected from all costs, suits, and actions on account of the seizure and prosecution. Differences of opinion existed for a time as to the legal meaning of the term 'probable cause,' but it is settled that it imports circumstances which warrant suspicion, and that a doubt respecting the true construction of the law is as reasonable cause of seizure as a doubt respecting the fact." *United States v. 88 Sacks of Wool and 5,974 Sheepskins*, 147 Fed. 747, 748, 749 (citing *Gelston v. Hoyt*, 3 Wheat. (16 U. S.) 246, 4 L. Ed. 381; *Locke v. U. S.*, 7 Cranch (11 U. S.) 359, 3 L. Ed. 364; *Munns v. De Nemours*, 3 Wash. C. C. 31, 17 Fed. Cas. 993).

#### As proximate cause

See Proximate Cause.

#### Sufficient cause synonymous

Under Pen. Code, § 872, providing that if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe defendant guilty, the magistrate must issue the commitment, evidence that accused on June 18, 1906, stated, in the affidavit to secure registration as a voter, that he was born in England, and on January 31, 1908, stated, in a similar affidavit, that he was born in San Francisco, was sufficient to justify an order of commitment; the term "sufficient cause," as used in the statute, being equivalent to the term "probable cause," as used in the habeas corpus act. Pen. Code, § 1487. *People v. Coombs*, 98 Pac. 686, 687, 9 Cal. App. 262.

**PROBABLE CAUSE (In Malicious Prosecution)**

"Probable cause" for a prosecution is a "reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense." *Shafer v. Loucks* (N. Y.) 58 Barb. 426, 431 (quoting definition in *Foshay v. Ferguson* [N. Y.] 2 Denio, 619); *Cook v. Proskey*, 138 Fed. 273, 276, 70 C. C. A. 563 (quoting and adopting definition in *Sanders v. Palmer*, 55 Fed. 217, 5 C. C. A. 77); *Gates v. Union Sawmill Co.*, 47 South. 761, 762, 122 La. 437 (quoting and adopting definitions in 26 Cyc. p. 24; *Lane v. Pennsylvania R. Co.*, 76 Atl. 1016, 1017, 78 N. J. Law, 672); *Butcher v. Hoffman*, 73 S. W. 266, 268, 99 Mo. App. 239; *Moneyweight Scale Co. v. McCormick*, 72 Atl. 537, 540, 109 Md. 170; *Lasky v. Smith*, 80 Atl. 1010, 1011, 115 Md. 370, Ann. Cas. 1913A, 742; *Carp v. Queen Ins. Co.*, 101 S. W. 78, 97, 203 Mo. 295; *Wilkerson v. McGhee*, 134 S. W. 595, 596, 153 Mo. App. 343; *Price v. Denison*, 103 N. W. 728, 729, 95 Minn. 106; *Stoecker v. Nathanson*, 98 N. W. 1061, 1063, 5 Neb. (Unof.) 435, 70 L. R. A. 667.

"Probable cause," unlike malice, is not determined by the standard of the particular defendant, but of the ordinarily prudent and cautious man, exercising conscience, impartiality, and reason, without prejudice, upon the facts; and an honest belief, unfounded upon reasonable grounds, is not sufficient. *Rawson v. Leggett*, 90 N. Y. Supp. 5, 7, 97 App. Div. 416 (citing *Heyne v. Blair*, 62 N. Y. 19).

"Probable cause" has been variously defined as "reasonable cause, such as would operate on the mind of a discreet man; probable cause, such as would operate on the mind of a reasonable man." There must be such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person is guilty. *McMorris v. Howell*, 85 N. Y. Supp. 1018, 1019, 89 App. Div. 272.

"Probable cause" is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. *Burt v. Smith*, 73 N. E. 495, 496, 181 N. Y. 1, 2 Ann. Cas. 576.

"Probable cause" is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a reasonably prudent man in his belief that the person accused is guilty of the offense with which he is charged. *Deering v. Gebhard*, 108 N. Y. Supp. 715, 716, 57 Misc. Rep. 451.

Knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful ground for a

prosecution, is "probable cause," which will defeat an action for malicious prosecution. *Orefice v. Savarese*, 113 N. Y. Supp. 175, 177, 61 Misc. Rep. 88.

"The question of what constitutes 'probable cause' in instituting a criminal prosecution does not depend upon whether the offense has been committed in fact, nor whether the accused is guilty or innocent, but upon prosecutor's belief based upon reasonable grounds. The prosecutor may act upon appearances, and, if the apparent facts are such that a discreet and prudent person would be led to believe that accused had committed the crime, he would not be liable in a prosecution for malicious prosecution although it may turn out that the accused was innocent." A finding of want of "probable cause" in instituting a prosecution against plaintiff for larceny of money collected by him for defendant's company of B. is not warranted, the facts being that on investigation it was found that plaintiff had received the money of B. and given him a receipt therefor, and examination of the books and inquiry of the company's employes not disclosing that it had been paid over to the company, or showing any trace of it after its receipt by plaintiff, and plaintiff having previously and in like manner misappropriated money belonging to the company. *Banckell v. Weihnacht*, 91 N. Y. Supp. 107, 108, 99 App. Div. 316 (citing *Fagan v. Knox*, 66 N. Y. 525; *Anderson v. Howe*, 22 N. E. 695, 116 N. Y. 336; *Kutner v. Fargo*, 54 N. Y. Supp. 332, 34 App. Div. 317; *Scott v. Dennett Surpassing Coffee Co.*, 64 N. Y. Supp. 1016, 51 App. Div. 321).

"Probable cause" consists of such reasons as are sufficient to create a reasonable belief that a crime has been committed, and that the party charged was connected therewith. It is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person accused is guilty. *Florida East Coast R. Co. v. Groves*, 46 South. 294, 296, 55 Fla. 436 (quoting and adopting definition in *Cockfield v. Braveboy* [S. C.] 2 McMul. 270, 39 Am. Dec. 123; *Bacon v. Towne*, 4 Cush. [58 Mass.] 217; *Faris v. Starke*, 3 B. Mon. [42 Ky.] 4; citing *Cooley, Torts* [3d Ed.] p. 323).

"Probable cause" for a criminal prosecution is in effect the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief. *Runo v. Williams*, 122 Pac. 1082, 1083, 162 Cal. 444.

"Probable cause" for the commencement of a civil action consists in such facts and circumstances as will warrant a cautious, reasonable, and prudent man in the honest belief that his action and means taken in its prosecution are just, legal, and proper. *Ne-*

son v. International Harvester Co. of America, 135 N. W. 808, 810, 117 Minn. 298.

"Probable cause" means a belief by the prosecutor in the guilt of the accused based upon facts and circumstances sufficiently strong in themselves to induce such belief in the mind of a reasonable and cautious man. *Ruth v. St. Louis Transit Co.*, 71 S. W. 1055, 1058, 98 Mo. App. 1.

"Probable cause" for a criminal prosecution is such a state of facts known to the prosecutor, or such information received by him from sources entitled to credit, as would induce a man of ordinary caution and prudence to believe, and does induce the prosecutor to believe, that accused is guilty of the crime charged, and thereby cause the prosecution. A well-founded doubt as to the law may constitute probable cause which will justify a prosecution the same as doubt concerning the facts, if such doubt induces in the mind an honest belief that there are legal grounds for the prosecution. *Whipple v. Gorsuch*, 101 S. W. 735, 737, 82 Ark. 252, 10 L. R. A. (N. S.) 1133, 12 Ann. Cas. 38.

"Probable cause" is any such combination of facts and proofs as may fairly lead the reasonable mind to the belief that, in the absence of hitherto unknown qualifying or rebutting evidence, the prosecution ought to be successful. *Bosch v. Miller*, 118 S. W. 506, 509, 136 Mo. App. 482.

The following instruction was not erroneous for any reason assigned: "'Probable cause' is defined to be the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which she was prosecuted." *Stewart v. Mulligan*, 75 S. E. 991, 992, 11 Ga. App. 660.

"Probable cause" for a prosecution alleged to have been malicious is based on circumstances that would induce action upon the part of an ordinarily prudent person; the test being applied as of the time when the prosecution began. *Equitable Life Assur. Soc. of United States v. Lester (Tex.)* 110 S. W. 499, 501.

"Probable cause," as employed in actions for malicious prosecution, is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. *Hanchey v. Brunson*, 56 South. 971, 972, 175 Ala. 236.

"Probable cause," justifying the institution of a criminal prosecution so as to constitute a defense in an action for malicious prosecution, embodies the element that defendant at the time of instituting the criminal prosecution believed plaintiff guilty. *Fleischhauer v. Fabens*, 96 Pac. 17, 19, 8 Cal. App. 30.

"Probable cause" for a prosecution is a suspicion founded upon circumstances warranting a reasonable man to believe that the charge is true. *Carpenter v. Ashley*, 115 Pac. 268, 269, 15 Cal. App. 461.

"Probable cause" for the institution of a prosecution claimed to have been malicious is the existence of circumstances and facts sufficiently strong to excite in a reasonable mind suspicion that the person charged with having been guilty was guilty. It is a case of apparent guilt as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at that time that it would be sufficient ground to induce a rational and prudent man, having due regard for the rights of others, as well as his own rights, to institute a prosecution. The facts and circumstances should be such as to justify a reasonable belief in the guilt of the person accused. *Moore v. First Nat. Bank of Statesville*, 52 S. E. 944, 947, 140 N. C. 293 (citing *Cabiness v. Martin*, 14 N. C. 454; *Smith v. Deaver*, 49 N. C. 513; *Stacey v. Emery*, 97 U. S. 642, 24 L. Ed. 1035; *Ferguson v. Arnou*, 37 N. E. 626, 142 N. Y. 580; *Spengler v. Davy*, 56 Va. [15 Grat.] 381; *Munns v. Dupont*, 17 Fed. Cas. 993; *Jagg. Torts*, 616).

In an action for malicious prosecution, probable cause is that which leads the average man to believe that the accused, charged with embezzlement, purposely withheld the truth, and which warrants him to believe in the guilt of the accused in the offense charged. *Kirk v. Wiener-Loeb Laundry Co.*, 45 South. 738, 739, 120 La. 820.

It is not essential to probable cause for an arrest that the accuser believe that he has sufficient evidence to procure a conviction. Belief that "probable cause" exists for an arrest is different from belief of guilt, and the former has no materiality in malicious prosecution unless as bearing on the question of malice. *Michael v. Matson*, 105 Pac. 537, 539, 81 Kan. 360.

"Probable cause" is a suspicion founded upon circumstances warranting a reasonable man in the belief that the charge is true; and, in an action for malicious prosecution under Penal Code, § 481, making it a crime to alter a railroad ticket with intent to defraud, evidence that a ticket had been altered, with intent to use it a second time between the same points, that it was purchased from plaintiff, and, on a comparison of plaintiff's handwriting with the writing on the ticket which constituted the claimed alteration, both the railroad employes and a reputable expert, acting in good faith, were convinced that the writing on the ticket was plaintiff's showed probable cause for the prosecution, though plaintiff denied having seen the ticket. A person instituting a prosecution need not investigate the crime itself,

or seek to ascertain whether there are any other facts relating to the offense, or whether the accused had any defense to the charge, or exhaust all sources of information bearing upon the facts which have come to his knowledge, but it is sufficient, to justify him in seeking to have the act punished, if the facts within his knowledge, although not in law constituting a crime, are such as to induce in the mind of a reasonable man the honest belief that a crime has been committed. That, after the taking of evidence upon the preliminary examination of one accused of crime, the magistrate adjudged that he was guilty of the offense, and committed him to answer thereto in the superior court, is *prima facie* evidence of probable cause in an action for malicious prosecution. *Johnson v. Southern Pac. Co.*, 107 Pac. 611, 613, 157 Cal. 333.

Under Civ. Code 1910, §§ 4440, 4452, providing that want of probable cause shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused, it was not accurate to charge, in an action for illegal arrest and malicious prosecution that to constitute probable cause there must be reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant a "cautious" man in the belief that the person arrested is guilty of a crime. *McPherson v. Chandler*, 72 S. E. 948, 949, 137 Ga. 129.

Want of probable cause, the burden of proving which is on plaintiff in an action for malicious prosecution, the determination of any disputed facts as to which is for the jury, and the sufficiency of the facts shown as to which is for the court, and which is absence of a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true, does not exist where a draft given a hotel by a guest is thrown out by the bank on which it is drawn, with the indorsement, "Has no account," and the hotel has him arrested, without further communication with the bank, and without consulting the district attorney; and this, though it knows the guest has correctly given it the name of another hotel to which he has gone, and which is further away from the bank. *Booraem v. Potter Hotel Co.*, 97 Pac. 65, 66, 154 Cal. 99.

#### **Actual guilt or innocence**

Probable cause, in an action for malicious prosecution, does not depend on the actual state of the case in point of fact, for there may be probable cause for commencing a criminal prosecution against a party, although subsequent developments may show his absolute innocence. *Mundal v. Minneapolis & St. L. R. Co.*, 99 N. W. 273, 274, 92 Minn. 28.

"Probable cause" for the institution of a prosecution alleged to have been malicious is not to be confounded with actual guilt. As actual guilt must always be established by proof beyond a reasonable doubt, while "probable cause is only such a state of facts and circumstances as would lead a careful and conscientious man to believe that the plaintiff was guilty." *Martin v. Corscadden*, 86 Pac. 33, 36, 34 Mont. 308 (adopting definition in *Barron v. Mason*, 31 Vt. 189).

#### **Apparent state of facts**

"Probable cause" for the institution of a criminal prosecution, so as to defeat an action for malicious prosecution therefor, exists where the facts found on reasonable inquiry are such as will induce a reasonably intelligent and prudent person to believe that accused had committed the crime charged. *Indianapolis Traction & Terminal Co. v. Henry*, 97 N. E. 313, 317, 178 Ind. 239.

#### **Conjecture or suspicion**

"Probable cause" is a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged, but mere suspicion and belief, though honestly entertained, do not afford a basis for probable cause, but it is essential that the actor knows of facts or circumstances justifying a reasonable and cautious man in believing that accused is guilty. *Gulsby v. Louisville & N. R. Co.*, 52 South. 392, 394, 167 Ala. 122.

#### **Conviction or acquittal**

The existence of want of probable cause is not to be determined by the subsequent acquittal or discharge of accused, but by the existence or nonexistence at the time of reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused was guilty of the offense charged. *Goodman v. Bedras*, 123 N. Y. Supp. 250, 252.

Where a criminal prosecution is commenced on the initiative of a private person and a conviction and judgment is had without collateral fraud, the judgment will stand as probable cause for such prosecution, though it is reversed on appeal for error in the trial, even error in holding that the facts do not constitute guilt of the criminal charge. The fraud that will take a judgment of conviction out of the rule rendering it probable cause is fraud extrinsic, not in respect to matters litigated and passed upon at the trial. *Topolewski v. Plankinton Packing Co.*, 126 N. W. 554, 558, 143 Wis. 52.

Unless shown to have been procured by fraud or undue influence, a judgment of conviction by a court of competent jurisdiction is conclusive evidence of the existence of probable cause, though subsequently reversed

and set aside. The finding of an indictment is *prima facie*, but not conclusive, evidence of probable cause, but an acquittal is not evidence of the want of it. *Casey v. Dorr*, 127 S. W. 708, 709, 94 Ark. 433, 140 Am. St. Rep. 124, 21 Ann. Cas. 1046.

"Probable cause" for instituting criminal proceedings which will protect the person instituting them from liability for malicious prosecution is constituted by such facts and circumstances as when communicated to the generality of men of ordinary and impartial minds are sufficient to raise in them a belief, or real grave suspicion of the guilt of the person, and there was probable cause, where a verdict and judgment of conviction were had in a court of competent jurisdiction, though the party was afterwards acquitted upon an appeal to a superior tribunal. *Griffis v. Sellars*, 19 N. C. 492, 496, 31 Am. Dec. 422.

If the facts reasonably justify defendant in the honest belief that plaintiff had committed an offense, defendant cannot be said to have made complaint without "probable cause," notwithstanding the fact that the papers when drawn did not accurately state the offense. An acquittal does not necessarily show want of "probable cause." *Davis v. McMillan*, 105 N. W. 862, 863, 864, 142 Mich. 391, 3 L. R. A. (N. S.) 928, 113 Am. St. Rep. 585, 7 Ann. Cas. 854.

When a committing magistrate examines a criminal complaint and discharges accused, his action establishes a *prima facie* case of want of probable cause in an action for malicious prosecution, but such is not the effect of a verdict and judgment of acquittal by a court having jurisdiction to try and determine the guilt or innocence of accused, so that, where accused was tried and acquitted by a justice of the peace having final jurisdiction, the justice's docket in an action for malicious prosecution was admissible only to show that the prosecution had terminated, and was not relevant to the question of probable cause. *Downing v. Stone*, 68 S. E. 9, 11, 152 N. C. 525, 136 Am. St. Rep. 841, 21 Ann. Cas. 753.

#### Good faith or malice

Malice distinguished, see *Malice*.

"Probable cause" has reference to the common standard of human judgment and conduct, and malice refers to the mind and judgment of the defendant in the particular act charged as a malicious prosecution. *Griswold v. Griswold*, 77 Pac. 672, 673, 143 Cal. 617.

#### Honest belief

"Probable cause" in an action for malicious prosecution does not depend on the actual state of the case in point of fact, but upon the honesty and reasonable belief of the party commencing the prosecution. The

want of probable cause is essential for every suit for malicious prosecution. *Richardson v. Dybedahl*, 98 N. W. 164, 165, 17 S. D. 629.

"Probable cause" does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution; and, where, defendant knew that his former wife and plaintiff had married in Missouri the next day after such wife's divorce from defendant in Kansas, and knew that by the law of the latter state a divorce did not become effective until six months after its rendition, and that under that law a marriage within six months was bigamy, and also knew that plaintiff, though himself unmarried, was subject to prosecution in this state under Rev. St. 1909, § 4724, for knowingly marrying the wife of another, defendant had probable cause for a prosecution under section 4724. *Smith v. Glynn (Mo.)* 144 S. W. 149, 151.

#### Prosecution to enforce civil liability

Where a creditor brings a criminal prosecution against his debtor for the purpose of collecting the debt, it is *prima facie* evidence of want of probable cause, shifting the burden of showing probable cause and want of malice on defendant. *MacDonald v. Schroeder*, 63 Atl. 1024, 1025, 1026, 214 Pa. 411, 6 L. R. A. (N. S.) 701, 6 Ann. Cas. 506 (citing *Prough v. Entriken*, 11 Pa. 81; *Schofield v. Ferrers*, 47 Pa. 194, 86 Am. Dec. 532; *Schmidt v. Weldman*, 63 Pa. 178. To the same effect is *Appeal of Work*, 59 Pa. 444; *Mayer v. Walter*, 64 Pa. 283; *Fillman v. Ryon*, 32 Atl. 89, 168 Pa. 484).

#### Reliance on information of others

"Probable cause," depending not on the actual state of the case, but on honest and reasonable belief, being necessarily the product, in part, of hearsay declarations, the prosecuting attorney, being called on in an action for malicious prosecution to justify his course, may give the sources of his information, and relate in detail not only the facts of his personal knowledge, but those communicated by others. *Carpenter v. Sibley*, 119 Pac. 391, 396, 15 Cal. App. 589.

"Probable cause" means reasonable grounds for suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that accused is guilty of the offense charged; and, to constitute probable cause, a prosecutor need not necessarily have personal knowledge of the transaction of which he complains, but may act upon information communicated to him in the ordinary routine of business, where he honestly believes such information to be true and the information is of such character, and is communicated in such a manner that, under similar circumstances it would be acted upon by a business man of ordinary prudence. The question of probable cause does not turn upon a

consideration of what were the facts of the case, but upon a consideration of what were the facts as they appeared to or were known by, or were believed to be, by the person making complaint; the controlling fact being not whether there was actual cause for the prosecution, but whether the person instituting it had probable cause for doing so. Thus where a person's goods had been stolen, and two of such person's regularly employed watchmen reported to him that they had seen another steal the goods, and that he admitted to them that he had done so, the owner was warranted in believing that the other man was guilty, and, in the absence of evidence tending to show negligence or bad faith in the employment of the watchman, or that the owner knew or had reason to suspect the information to be false, constituted probable cause for suing out a warrant to search the suspected person's dwelling house. Where the facts are undisputed, and but one inference can be drawn from them, the question of probable cause for suing out a complaint is one of law for the court, and it is error to submit any phase of the question to the jury. *Lane v. Pennsylvania R. Co.*, 76 Atl. 1016, 1017, 78 N. J. Law, 672.

"The finding of an indictment by a grand jury, or the commitment of an examining magistrate, is prima facie evidence of 'probable cause.'" On parity of reason, the filing of an information by a prosecuting attorney on his own information and belief is prima facie evidence of probable cause, but not so when the information is predicated on the affidavit of the complaining witness. *Pinson v. Campbell*, 101 S. W. 621, 624, 124 Mo. App. 260 (citing *Cooley*, Torts [3d Ed.] p. 328; *Sharpe v. Johnston*, 76 Mo. 660).

#### Reasonable cause

In an action for malicious prosecution, the use in the charge of the term "reasonable cause" for "probable cause" was not error, the terms being practically synonymous, though it is better to use the latter term. *McCall v. Alexander*, 65 S. E. 1021, 1022, 84 S. C. 187.

A finding, in an action for malicious prosecution based on defendant procuring the arrest of plaintiff on the ground that there was danger that he would leave the state to avoid examination of proceedings in aid of execution, that defendant had reasonable cause to believe there was danger that plaintiff was about to leave the state to avoid examination, is the same thing as "probable cause" to procure his arrest on that ground. *Bank of Miller v. Richmon*, 94 N. W. 998, 999, 68 Neb. 731.

#### PROBABLE CONSEQUENCE

A "probable consequence" is one that is more likely to follow its supposed cause than it is to fail to follow it. *The Santa Rita*, 173

Fed. 413, 417 (quoting and adopting definition in *Cole v. German Savings & Loan Soc.*, 124 Fed. 115, 59 C. C. A. 595, 63 L. R. A. 416).

#### PROBABLE EXPECTANCY

The right which every man has to earn his living or pursue his trade without interference, or to seek employment without hindrance, has been called a "probable expectancy." *L. D. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3*, 85 N. E. 897, 900, 200 Mass. 110, 23 L. R. A. (N. S.) 1236 (citing and adopting definition in *Jersey City Printing Co. v. Cassidy*, 53 Atl. 230, 63 N. J. Eq. 759).

#### PROBATE

See Matter of Probate.

"Probate" means proof of the will by the proper tribunal. *Decker v. Fahrenholz*, 68 Atl. 1048, 1050, 72 Atl. 339, 107 Md. 515 (quoting and adopting definition in *Warford v. Colvin*, 14 Md. 532).

"Probate of a will" is defined to be: "The proof before an officer authorized by law that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be." In other words, probate is proving the instrument purporting to be a will to have been signed by the testator in the presence of at least two witnesses, who at his request signed the same as witnesses, and that the testator at the time of the execution thereof was of sound mind." *Shevalier v. State*, 123 N. W. 424, 426, 85 Neb. 368, 19 Ann. Cas. 361 (quoting and adopting definition in *Pettit v. Black*, 12 N. W. 841, 844, 13 Neb. 142, 151; citing 2 Bouv. Law Dict. 378); *Walker v. Ehresman*, 113 N. W. 218, 219, 79 Neb. 775 (citing *Pettit v. Black*, 12 N. W. 841, 13 Neb. 151).

The "probate of a will" is the proof before the proper court or officer that the instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be. This includes not only the evidence jurisdictional and otherwise, presented to the court, but also the judicial determination by the court on that evidence that the instrument is what it purports to be. *Tilghman v. France*, 59 Atl. 277, 278, 99 Md. 611.

The word "probate," as used in a statute providing that all original wills together with a probate thereof shall remain in the office of the clerk of the probate court of the proper county, means the legal proof of the due execution and validity of the will. *Schofield v. Thomas*, 83 N. E. 121, 124, 231 Ill. 114.

The probate of the will in the probate court is the "probate of the will," and an appeal by the widow from the decree of pro-

bate court allowing the will, against her objection, is a legal proceeding, wherein the validity of the will is drawn in question, within Pub. St. c. 127, § 18, authorizing the widow, within six months after "probate of the will," to waive provisions therein for her, and claim as in case of intestacy, and providing that when, after probate of the will, legal proceedings are instituted, drawing in question the validity or effect of the will, the probate court may, within the six months, on petition, extend the time for filing the claim and waiver till expiration of six months from termination of such proceedings, so that, not having obtained such permission, she cannot make such filing after the affirmance on appeal, more than six months after the decree of the probate court. *Bunker v. Murray*, 65 N. E. 420, 421, 182 Mass. 335.

"In England the 'probate of wills' of personal estate belongs to the ecclesiastical courts. No probate of a will relating to real estate is there necessary. The real estate, upon the death of the party seised, passes immediately to the devisee under the will, if there be one, or, if there be no will, to the heir at law. The person who thus becomes entitled takes possession. If one person claims to be the owner under a will, and another denies the validity of the will and claims to be the owner as heir at law, an action of ejectment is brought against the party who may be in possession by the adverse claimant; and on the trial of such an action the validity of the will is contested, and evidence may be given by the respective parties as to the capacity of the testator to make a will, or as to any fraud practiced upon him, or as to the actual execution of it, or as to any other circumstance affecting its character as a valid devise of the real estate in dispute. The decision upon the validity of the will in such action becomes *res judicata*, and is binding and conclusive upon the parties to that action and upon any person who may subsequently acquire the title from either of those parties; but the decision has no effect upon other parties and does not settle what may be called the status or character of the will, leaving it subject to be enforced as a valid will, or defeated as invalid, whenever other parties may have a contest depending upon it. A probate of a will of personal property, on the contrary, is a judicial determination of the character of the will itself. It does not necessarily or ordinarily arise from any controversy between adverse claimants, but is necessary in order to authorize a disposition of the personal estate in pursuance of its provisions. In case of any controversy between adverse claimants of the personal estate, the probate is given in evidence, and is binding upon the parties, who are not at liberty to introduce any other evidence as to the validity of the will." *Medill v. Snyder*,

81 Pac. 216, 217, 71 Kan. 590 (quoting *State v. McGlynn*, 20 Cal. 233, 265, 81 Am. Dec. 118).

"The 'probate' of a will merely determines the validity of its execution." Hence a will may not be denied probate because some of its provisions are invalid or contrary to provisions of law. In *re Pforr*, 77 Pac. 825, 826, 144 Cal. 121.

#### Administration and guardianship

The term "probate," when strictly used, relates to proving a will before the officer or tribunal having jurisdiction to determine its validity, but in common usage the word is often used as applying to any of the incidents of administration. *Dibble v. Winter*, 93 N. E. 145, 152, 247 Ill. 243 (citing 6 Words and Phrases, pp. 5627, 5628).

While the word "probate" in a technical sense means the official proof of an instrument offered as a last will and testament, the term "probate matters," as used in Const. art. 6, § 20, providing that probate courts, when established, shall have original jurisdiction of all probate matters, means the settlement of estates, including the granting of letters testamentary or of administration, the collection of assets, allowance of claims, payment of debts, and the sale of real estate, if necessary for that purpose, and the distribution of the property to those entitled thereto by the laws of descent or by the will, but does not include the administration of testamentary trusts. In *re Mortenson's Estate*, 94 N. E. 120, 121, 248 Ill. 520, 21 Ann. Cas. 251. See, also, *Frackelton v. Masters*, 94 N. E. 124, 249 Ill. 30.

The admission of a will to "probate" is in effect, the appointing as executor of the person named therein as such. "The proof of the authority of the executor to act as such is a production of a copy of the will by which he was appointed, certified under the seal of the ordinary. This is usually called the 'probate.'" In *re Miller's Estate*, 65 Atl. 681, 682, 216 Pa. 247 (citing *Bouv. Law Dict.*); *Miller v. Henderson*, 61 Atl. 913, 914, 212 Pa. 263 (citing *Bouv. Law Dict.*).

#### PROBATE COURT

##### See Pertaining to Probate Court.

The "probate court" is a court of superior jurisdiction, and within its jurisdictional limits its judgments import absolute verity, the same as other superior courts. *Collins v. Paepcke-Leicht Lumber Co.*, 84 S. W. 1044, 1046, 74 Ark. 81 (citing *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217; *Currie v. Franklin*, 11 S. W. 477, 51 Ark. 338; *Montgomery v. Johnson*, 31 Ark. 74; *Apel v. Kelsey*, 12 S. W. 703, 52 Ark. 341, 20 Am. St. Rep. 183; *Alexander v. Hardin*, 16 S. W. 264, 54 Ark. 480).

The "probate court" is an administrative rather than a judicial court. It cannot bind

a court of full equity powers by a decision that a given course of conduct is not inequitable and cannot compel the equity court to enforce its decree, however inequitable the conduct of the party obtaining it. *Clark v. Chase*, 64 Atl. 493, 495, 101 Me. 270.

In order to effect the legislative will, the statute authorizing "probate courts" to entertain applications for the purchase of school lands will be held to confer jurisdiction upon the persons who exercise the jurisdiction of the probate courts and not upon the courts themselves as "probate courts." In *re Johnson*, 12 Kan. 102, 105.

**As court of law**

See Court of Law.

**As court of record**

See Court of Record.

**As inferior court**

See Inferior Court.

**PROBATE DUTIES**

See Inheritance Tax.

"Probate duties" are taxes graded in accordance with the valuation of the estate to be probated. *State ex rel. Foot v. Bazille*, 106 N. W. 93, 96, 97 Minn. 11, 6 L. R. A. (N. S.) 732.

**PROBATE HOMESTEAD**

Under Rev. St. 1887, §§ 5440, 5441, a probate homestead is one to be created by probate court out of the real property belonging to the decedent which was subject to a homestead at the time of the death of the decedent, where its value was less than \$5,000, and it was such property as might have been occupied as a home at the time of decedent's death. In *re McVay's Estate*, 93 Pac. 23, 34, 14 Idaho, 56.

**PROBATE JURISDICTION**

See Pertaining to Probate Courts.

**PROBATE MATTERS**

All probate matters, see All.

Control of probate matters, see Control.

**PROBATE PROCEEDING**

See Ordinary Probate Proceedings.

Matters pertaining to probate are called "probate procedure," as distinguished from what is denominated "civil" or "criminal procedure"; but, when the court sitting in a probate procedure discovers in a petition the statement of facts forming the basis of controversies, those issues may be tried in that forum in a proper manner as in the case of any other civil action, and the judgment in a probate case is conclusive on a matter therein involved and considered, in a subsequent action. *Meeker v. Winyer*, 92 Pac. 883, 884, 48 Wash. 27.

**As civil action**

See Civil Action—Case—Suit—Etc.

**As special proceeding**

See Special Proceeding.

**As suit**

See Suit.

**PROCEDENDO**

At common law "procedendo" was a writ by which an appellate court handed back jurisdiction to the trial court. *Donnell v. Wright*, 97 S. W. 923, 931, 199 Mo. 304.

A "procedendo" is a writ from a higher to a lower court, directing that the case be proceeded with. It does not undertake to say what the decision shall be, but merely that there shall be one, and where there is a reversal the case is thereupon taken up in the court below at the point where the erroneous judgment was rendered. *Exchange Mut. Life Ins. Co. v. Warsaw-Wilkinson Co.*, 185 Fed. 487, 488, 107 C. C. A. 587.

**PROCEDURE**

See Court Procedure; Criminal Procedure.

See, also, Practice (In Law).

The term "procedure" is so broad in its signification that it is seldom employed as a term of art; it includes in its meaning whatever is embraced by the three technical terms, "pleading," "evidence," and "practice." *State ex rel. Sims v. Caruthers*, 93 Pac. 474, 479, 1 Okl. Cr. 428 (quoting and adopting the definition of *Bish. Cr. Proc.*): *Kirksville v. Munyon*, 91 S. W. 57, 58, 114 Mo. App. 567 (citing *City of Kansas v. O'Connor*, 36 Mo. App. 594).

Proceedings to secure a change of venue are within the words "commencement, pleading, practice and procedure," in a statute providing that civil actions and proceedings in municipal courts shall be commenced and conducted as prescribed by the statute regulating the commencement, pleading, practice, and procedure in district courts, but more especially are within the words "practice and procedure." *Clark v. Baxter*, 108 N. W. 833, 839, 98 Minn. 256.

Rev. St. 1908, § 3226, provides that every person desiring to change the point of diversion of water from any of the streams of the state shall present a petition to the district court from which the original decree issued, and that the "practice and procedure" on all petitions shall be the same as if the petition were for an original statutory decree, etc. Section 3300 provides for the payment by counties of the costs of reference, in a general adjudication of the priorities of rights to the use of water for irrigation, out of the treasury of the county in which the water district lies. Held, that the terms "practice" and "procedure," as used in section 3226, related to the legal rules directing the manner of bringing parties into court.



and the method of the court after they are brought in, in hearing, dealing with, and disposing of matters in dispute between them, and had no reference to costs, so that such sections did not authorize imposition of costs on a county of proceedings by petitioner to change the point of his diversion, which involved a mere private dispute, in which the county was not interested. *Downs v. Reno* (Colo.) 124 Pac. 582, 583 (citing 6 Words and Phrases, p. 5486).

In an act regulating the ascertainment of compensation for property condemned for public use, providing that the practice prescribed by the act shall supersede existing practice in condemnation cases except in cases of the taking of land for public improvement where a payment of award and damages is authorized to be set off against benefits, the word "practice" was used as synonymous with "procedure," and hence includes the tribunal as well as the conduct of matters before it. *Morris v. City of Newark*, 62 Atl. 1005, 1006, 73 N. J. Law, 268.

## PROCEED

The word "proceed," used by the trial judge in response to objections, may mean go on, stop objecting, or that the objection is frivolous, or that he does not choose to consider it then, if at all. Such rulings, if rulings they be, are vague in legal intentment, and are shorn of all precision. *Morrison v. Turnbaugh*, 91 S. W. 152, 155, 192 Mo. 427.

## PROCEED TO ENFORCE

The words "proceed to enforce," in a statute providing that creditors may proceed to enforce a judgment at any time within 10 years after the entry thereof, mean to take steps to make it effectual by legal process. Issuing execution on a money judgment is such a step. "To proceed to enforce" and "to enforce" are materially different things. *Davidson v. Gaston*, 16 Minn. 230, 240 (Gil. 202, 212).

**Municipalities Lien Law** (P. L. 1892, p. 369), as amended by P. L. 1909, p. 260, provides that when serving notice of lien, claimant shall file with an official of the municipality a bond for payment of interest to the contractor in the event of claimant's failure to proceed according to the statute, and provides that nothing shall affect the validity of claims or liens due under contracts made prior to the act, but that all the proceedings shall be subject to the provisions of the amending statute so far as applicable. No bond was required by the former act. Held, that the phrase "proceedings to enforce" does not include the filing of the claim itself, so that a claim due under a contract made prior to the act must be accompanied by the bond required by the amending act; "proceeding to enforce" referring to such proceed-

ings had after the claim is duly perfected. *Howell Lumber Co. v. New Brunswick* (N. J.) 75 Atl. 750, 751.

## PROCEED TO TRIAL

The phrase "proceed to trial," in Rev. Codes 1899, § 6650, authorizing the postponement of a trial on application for a continuance showing that accused cannot safely "proceed to trial," is not inconsistent with a postponement after a trial has commenced on satisfactory showing of necessity therefor on account of matters arising or coming to the applicant's knowledge since the trial commenced. *Lyman-Elieel Drug Co. v. Cooke*, 94 N. W. 1041, 1043, 12 N. D. 88.

## PROCEEDING

See **Bankruptcy Proceeding**; **Cause of Proceeding**; **Collateral Proceeding**; **Condemnation Proceeding**; **Contempt Proceeding**; **Costs of Proceedings**; **Criminal Proceeding**; **Direct Proceedings**; **Equitable Proceeding**; **Final Proceeding**; **Further Proceeding**; **Judicial Proceeding**; **Legal Proceedings**; **Multiplication of Proceedings**; **Original Special Proceeding**; **Party to Suit or Proceeding**; **Probate Proceeding**; **Special Proceeding**; **Statutory Proceeding**; **Stay of Proceedings**; **Subsequent Proceeding**; **Summary Proceeding**; **Supplementary Proceeding**; **Tax Proceeding**.

All actions or proceedings, see **All**.

All other proceedings, see **All Other**.

Any and all proceedings, see **Any**.

Any criminal proceeding, see **Any**.

Any proceeding, see **Any**.

See, also, **Controversy**; **Suit**.

The word "proceedings," in its general acceptation, means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and of executing judgment. In its more general sense, it means all steps or measures adopted in the prosecution or defense of an action. The word "proceedings," in **Municipalities Lien Law** (P. L. 1892, p. 369), as amended by P. L. 1909, p. 260, providing that, when serving notice of lien, claimant shall file with an official of the municipality a bond conditioned for the payment of interest to the contractor on the event of claimant's failure to proceed according to statute, and providing that nothing in law shall affect the validity of claims or liens under contract made prior to the act, but all proceedings to enforce such lien shall be subject to the provision of the amended statute, does not include the filing of the claim itself, so that a claim due under a contract made prior to the act must be accompanied by the bond required by the amending act, but refers to such proceedings had after the claim is duly perfected. *Howell Lumber Co.*

v. New Brunswick (N. J.) 75 Atl. 750, 751 (quoting and adopting definition in *Erwin v. United States*, 37 Fed. 470, 2 L. R. A. 229; *Morewood v. Hollister*, 6 N. Y. 309).

"'Proceedings,' both in common parlance and in legal acceptance, imply action, procedure, prosecution. \* \* \* If it is a progressive course, it must be advancing; and cannot be satisfied by remaining at rest." *Beers v. Haughton*, 9 Pet. [34 U. S.] 329, 368, 9 L. Ed. 145.

Railroad Law (Laws 1890, c. 565, as amended by Laws 1898, c. 520) § 61, provides that in constructing a street or new portion thereof across a steam surface railroad, notice shall be given by the municipality to the railroad company, and, if the municipality shall determine that such street is necessary, it shall apply to the Board of Railroad Commissioners before any further proceedings are taken to determine whether such street shall pass over or under such railroad, or at grade. Held, that the words "before any further proceedings are taken" mean proceedings to physically make, grade, and open the streets, and not proceedings to acquire title, and therefore, where hearing on due notice was had on the question of necessity, the city could proceed to acquire title to the land required for the street, without first applying to the Railroad Commissioners. In re *West 134th St. in City of New York*, 128 N. Y. S. 589, 593, 143 App. Div. 258.

Under Code 1907, § 3792, authorizing a third person to interpose a claim to the property in detinue, and thereupon the same proceedings must be had as in other trials of the right of property, and section 6039, authorizing a person claiming to own the legal or equitable title to, or a paramount lien on, property levied on under execution or attachment, to contest his right to the property, a landlord, claiming a landlord's lien on crops grown on premises, may not interpose his claim in an action in detinue brought by the holder of the legal title conveyed by the tenant's mortgage on the crops, as the word "proceedings" signifies form, manner, or mode, and tokens a means, an instrument. *Johnson v. New Enterprise Co.*, 50 South. 911, 912, 163 Ala. 463 (quoting 6 Words and Phrases, p. 5632 et seq.).

Under Acts 1901, p. 30, c. 26, § 3, providing that the publication by a newspaper of a fair account of judicial proceedings, unless prohibited by the court, etc., or of any other official proceedings authorized by law in the administration of the law, shall be deemed privileged, and not libelous, unless actual malice is proved, "proceedings" relates to the form and manner of the exercise of the power conferred by law. *A. H. Belo & Co. v. Lacy* (Tex.) 111 S. W. 215, 217.

#### All matters and steps

"Proceedings" is defined to mean all the steps or measures adopted in the prosecution

or defense of an action. *State ex rel. West v. McCafferty*, 105 Pac. 992, 996, 25 Okl. 2. See, also, *State ex rel. Nissler v. Donlan*, 80 Pac. 244, 247, 32 Mont. 256.

In its most comprehensive sense, the term "proceeding" includes every step taken in a civil action except the pleadings. *Loeb v. Loeb*, 103 Pac. 570, 572, 24 Okl. 384 (quoting 6 Words and Phrases, p. 5632).

"The word 'proceeding' applies to any step to be taken in a cause which is authorized by law in order to enforce the rights of the parties or effectuate the proper conduct of it while pending in court." *State ex rel. Bruce v. District Court*, 83 Pac. 641, 642, 33 Mont. 359.

In *Stonesifer v. Kilburn*, 29 Pac. 335, 94 Cal. 42, it said: "The settlement of a bill of exceptions is a 'proceeding' in an action. *Lukes v. Logan*, 4 Pac. 883, 66 Cal. 33; *Irwin v. Bank of Bellefontaine*, 6 Ohio St. 86; *Wilson v. Allen* (N. Y.) 3 How. Prac. 371; *Rich v. Husson* (N. Y.) 1 Duer, 620; *Wilson v. Macklin*, 7 Neb. 52; *Strong v. Hardenburgh* (N. Y.) 25 How. Prac. 438. In *Irwin v. Bank of Bellefontaine*, 6 Ohio St. 86, it is said: 'The word "proceeding" is generally applicable to any step taken by a suitor to obtain the interposition or action of a court.' In *Wilson v. Allen* (N. Y.) 3 How. Prac. 371, the court said: 'The term "proceeding" is generally applicable to any step taken by a party in the progress of a civil action. Anything done from the commencement to the termination is a proceeding.' " *Sherman v. Southern Pac. Co.*, 102 Pac. 257, 258, 31 Nev. 285.

The word "proceedings," in the recital of the case-made that it contains all the proceedings, includes the evidence. *John Deere Plow Co. v. Jones* (Kan.) 75 Pac. 1039, 1040; *Id.*, 76 Pac. 750, 68 Kan. 650.

#### Act of city

In Laws 1903, p. 243, c. 122, § 200, the Legislature used the expression "proceedings of any kind commenced and now pending and not completed on behalf of any city" with reference to the subjects then under consideration, and did not refer to judicial proceedings, but to the organization, powers, and duties of cities of the first class, and particularly of issuing bonds and the erection of public improvements, and it was to protect such proceedings commenced under previously existing law that the saving clause was enacted. *State v. City of Topeka*, 74 Pac. 647, 650, 68 Kan. 177.

#### Act of officer

Proceedings legislative in nature, such as the fixing of passenger rates by the Virginia Corporation Commission, are not "proceedings in a court," within the meaning of Rev. St. § 720, forbidding federal courts from enjoining proceedings in state courts. *Pren-tis v. Atlantic Coast Line Co.*, 29 Sup. Ct. 67, 69, 211 U. S. 210, 53 L. Ed. 150.

A proceeding before the Mississippi Railroad Commission does not become a "proceeding in a state court," within the meaning of Rev. St. § 720, so as to prevent a federal court from enjoining the enforcement of an order of such commission which is claimed to violate the federal Constitution, because the Commission would have to resort to a state court to aid it in the enforcement of its order. *Mississippi Railroad Commission v. Illinois Cent. R. Co.*, 27 Sup. Ct. 90, 93, 203 U. S. 835, 51 L. Ed. 209.

#### Same—Reprieve

A reprieve by the Governor of a state, postponing, until a fixed date, the execution of a death sentence, evidently granted to permit the prisoner to appeal to the Supreme Court of the United States from the order of a district court denying habeas corpus, is not a "proceeding against the prisoner," within the meaning of Rev. St. § 766, 27 Stat. 751, c. 226, nullifying any proceeding against a person in prison or confined or restrained of his liberty, in any state court, or by authority of any state, pending the proceedings or appeal in habeas corpus cases in the federal courts. *Rogers v. Peck*, 26 Sup. Ct. 87, 90, 199 U. S. 425, 50 L. Ed. 256.

#### Action and suit synonymous

A "proceeding" is not an "action" as used in the Code of Civil Procedure, and no such thing as "a proceeding" is known thereto. Hence a demurrer on the ground of another "proceeding" pending between the same parties, for the same cause, raises no question of law. *Queens County Water Co. v. O'Brien*, 115 N. Y. S. 495, 499, 131 App. Div. 91 (quoting and adopting definition in *Webst. Dict.*).

The term "action," as defined by Code Civ. Proc. §§ 3471, 3479, means a proceeding instituted in a court by one or more parties against another or others to enforce or protect a right, to redress or prevent a wrong, or to punish a public offense; and by section 3472 all proceedings to enforce a remedy, not falling technically under the foregoing definition of the term "action," are classed under the head of "special proceedings." The term "proceeding," as ordinarily used, is generic in meaning and broad enough to include all methods of invoking the action of courts, whether controversies properly termed "actions" or "special proceedings," as distinguished from them. But, in view of the distinction made by the Code between actions and special proceedings, the term "proceeding," when used in connection with the phrase "action, motion, or proceeding," must be construed, not in this general generic sense, nor as synonymous with the term "action," but as referring to the other proceedings provided for in the Code, to wit, special proceedings; otherwise the term "action" could not be assigned any meaning, nor could the term "motion," as used in the expression

"action, motion, or proceeding." *State ex rel. Carleton v. District Court of Lewis and Clarke County*, 82 Pac. 789, 790, 33 Mont. 138, 8 Ann. Cas. 752.

#### Appeal

Laws 1909, c. 549, establishing the civil court of Milwaukee county and regulating the procedure therein and appeals therefrom, as amended by Laws 1911, c. 425, provides, by section 14, subd. 1, that all proceedings therein and on appeal therefrom, shall be governed by St. 1898, c. 160, relating to proceedings in courts of justices of the peace; and by subd. 2 that, in actions and proceedings specified in St. 1898, §§ 3572, 3573, in such court and involving over \$200, the practice, trials, judgments, and "proceedings thereafter" shall be governed by the law relating to circuit courts. Section 28, subd. 1, as amended, provides that an appeal may be taken to the circuit court of Milwaukee county from any final judgment of such civil court, or from certain orders; and subdivision 5 provides that proceedings on appeal shall be governed by the provisions relating to appeals from justice's court. Held, that the "proceedings thereafter," under section 14, subd. 2, referred to proceedings for the enforcement of the judgment; but that section 14, subd. 1, referring to proceedings on appeal, adverse to the judgment, left appeals to the circuit court governed by the statutory provisions relating to appeals from justices' courts, and required notice of appeal to be served on the civil judge, and that service on the clerk was not sufficient. *Fred Miller Brewing Co. v. City of Milwaukee*, 136 N. W. 157, 158, 150 Wis. 336.

#### Appropriation of waters

Rev. St. 1908, § 3308, providing for the publication of a copy of the order allowing an appeal from a judgment in a "proceeding" under section 3280, applies, not only to a proceeding to change the point of diversion of water, but also to a proceeding for original adjudication of a water right. *Napier v. Glenwood Light & Water Co.*, 112 Pac. 823, 49 Colo. 208.

#### Assessment proceeding

The several statutory steps required for the improvement of a street by pavement or sewer constitute a "proceeding," within the meaning of Rev. St. § 79, providing that when ever a statute is amended such amendment shall not affect pending proceedings. *City of Toledo v. Marlow*, 28 Ohio Cir. Ct. R. 298, 299.

Lists of real estate returned delinquent by collectors of cities and towns, for nonpayment of municipal taxes, as authorized and provided by section 86 or chapter 47 of the Code of 1899, or a like provision in a charter specially granted to a city or town, must be certified to the clerk of the county court of the county wherein the real estate is, and by that officer recorded, as the lists returned by

the sheriff of the county for nonpayment of state taxes are recorded, and thereby made part of the "proceedings of record" in said office. *Hogan v. Piggett*, 56 S. E. 189, 193, 60 W. Va. 541.

#### Assignment for benefit of creditors

It has been held that the word "proceedings," as used in subdivision "b" of section 70 of National Bankrupt Act of 1898, was not employed with reference to specific litigation or actions in some particular matter pending the insolvency administration, but refers to the commencement of proceedings to establish the fact of insolvency in the state court. The making of an assignment for the benefit of creditors is such a proceeding. *Osborn v. Fender*, 92 N. W. 1114, 1115, 88 Minn. 309.

#### Criminal proceeding

A witness testifying before the grand jury relative to violations of section 145a, Code Supp. 1910, is entitled to the immunity afforded by subsection 9, whether the grand jury's investigation results in an indictment, presentment, or information, or not; such inquiry by the grand jury constituting a "proceeding." *Flanary v. Commonwealth*, 75 S. E. 289, 292, 293, 113 Va. 775.

The words "hearing" and "proceeding," as used in Acts 1897, p. 137, c. 14, § 6, providing that a person offending against sections 1 and 2, which define various offenses which are made felonies by section 7, is a competent witness against another person so offending, and may be compelled to testify upon any trial, hearing, proceeding, or investigation in the same manner as any other person, are terms that pertain to proceedings of a criminal nature and mark different steps in a criminal prosecution. Thus "proceeding" relates to proceedings before a grand jury when the state is proceeding by indictment or presentment; the word "hearing" may relate to the trial of the cause upon final hearing of a preliminary hearing before the committing magistrate; but in all cases the state contemplates the same sort of criminal proceeding against a person offending, and an offender can be compelled to testify only in some criminal trial, hearing, proceeding, or investigation of some offense under sections 1 and 2 of the act, and cannot be compelled to testify or be punished for contempt for failure to testify in a civil proceeding growing out of a fraudulent election. *Lindsay v. Allen*, 82 S. W. 648, 649, 113 Tenn. 517.

#### Default

The taking and entering of a default is a "proceeding taken against" the party in default, within Code Civ. Proc. § 473, authorizing the court to relieve a party from proceedings taken against him on application therefor within a specified time. *Title Ins. & Trust Co. v. King Land & Improvement Co.*, 120 Pac. 1066, 1067, 162 Cal. 44.

#### Equitable action

Actions by grantors of real property, about 5 years after the youngest of them came of age, to have the deed set aside, are not "proceedings to recover real property or the possession thereof," within Code Civ. Proc. § 385, and fall within the 10-year limitation of section 338. *O'Donohue v. Smith*, 109 N. Y. Supp. 929, 930, 57 Misc. Rep. 448.

#### Execution

The statute prohibiting sales in bulk contains a proviso that no proceedings at law or in equity shall be brought against the purchaser to invalidate any such voidable sale after 90 days from the consummation thereof. Held, that a levy on property so wrongfully sold made under an execution within 90 days after the sale constituted a "proceeding" at law to invalidate the sale within such act. *Dickinson v. Harblson*, 72 Atl. 941, 942, 78 N. J. Law, 97.

#### Family allowance

An application for a family allowance for infant beneficiaries of an estate is a "proceeding" and a "case" within Code Civ. Proc. § 372, providing that a guardian ad litem may be appointed in any case where it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant in the action or proceeding. In *re Snowball's Estate*, 104 Pac. 446, 447, 156 Cal. 235.

#### Filing affidavit

The filing of an affidavit is a "proceeding." *Wimberly v. State*, 119 S. W. 668, 670, 90 Ark. 514.

#### Garnishment

While a garnishment is ancillary to the main action, it is a "proceeding" within *Ballinger's Ann. Codes & St.* § 6500, relating to appeals to the Supreme Court. *Tatum v. Geist*, 82 Pac. 902, 40 Wash. 575.

#### Grand jury inquiry

The phrase, "any suit or proceeding," in the federal Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087), in force January 1, 1912, declaring in section 299 that the repeal of laws shall not affect "any suit or proceeding," including those pending on writ of error, appeal, certificate, or writ of certiorari, includes an inquiry pending before a grand jury properly impaneled in the District Court, and an indictment returned by the grand jury after January 1st is valid. The word "proceeding," though frequently used in a restrictive sense, must be understood in its ordinary signification. *United States v. New Departure Mfg. Co.*, 195 Fed. 778, 779.

The word "proceeding" is not a technical one and is aptly used by the courts to designate an inquiry before a grand jury. The examination of witnesses before a grand

jury concerning an alleged violation of the anti-trust act of July 2, 1890 (26 Stat. 209, c. 647), is a "proceeding," within the meaning of the proviso to the act of February 25, 1903 (32 Stat. 854-904, c. 755), that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding," suit, or prosecution under certain named statutes, of which the anti-trust act is one. *Hale v. Henkel*, 26 Sup. Ct. 370, 375, 201 U. S. 43, 50 L. Ed. 652.

An inquisition before a grand jury to determine the existence of supposed violations of the anti-trust act was a "proceeding," within Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 848, providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding," under several statutes mentioned, including such anti-trust act. The word "proceeding" is a broad term, and was apparently intended to include some form of judicial inquiry other than a "suit or prosecution." In one sense it is true a criminal proceeding is not instituted against an accused person until a formal charge is made against him by indictment or information, or a complaint before a magistrate; and proceedings before a grand jury are not, in that sense, a criminal proceeding against an accused. *Post v. United States*, 16 Sup. Ct. 611, 161 U. S. 583, 40 L. Ed. 816. But in another sense any initial step before a judicial tribunal preliminary to the commencement of a civil suit or a criminal prosecution is a proceeding. As used in this statute, inasmuch as testimony given in a suit or prosecution embraces that given, not only at the trial, but upon all occasions incident to the controversy, the term "proceeding," if limited to some step in the progress of a civil suit or a criminal prosecution which has been previously instituted, is mere tautology. A rational construction seems to require it to include any preliminary step which is incident to the institution of a civil suit or a criminal prosecution. In *re Hale*, 139 Fed. 496, 503.

The words "prosecution" or "proceeding," in the connection in which used in Rev. St. 1899, § 2041, making every person who shall deter a witness from giving evidence in a cause guilty of a misdemeanor, provided that if the cause be a "prosecution" or "proceeding" against any one for a felony, the punishment shall be imprisonment in the penitentiary or in the county jail, or by fine, and mean a prosecution by indictment or information or on an affidavit on which accused has been charged before an examining magistrate, and by no fair intendment can either of them be held to mean a mere

inquiry by the grand jury as to the commission of an offense. *State ex rel. Butler v. Foster*, 86 S. W. 245, 251, 187 Mo. 590.

#### Inspection

Pub. St. 1901, c. 148, § 12, provides that all records and papers of a corporation shall be open to inspection of stockholders, and such portions thereof as have any relation to an unpaid demand of a creditor or to the collection of any demand shall be open to the inspection of the creditor and his attorney. Held that, where a creditor of a corporation was entitled, as an absolute right, to an inspection of certain records of the corporation, a proceeding to compel such inspection was a "proceeding at law," and not in the nature of a bill for discovery. *Hub Const. Co. v. New England Breeders' Club*, 67 Atl. 574, 575, 74 N. H. 282.

#### Judgment

In so far as a judgment for plaintiff is defective and fails to finally adjudicate his rights, it is a "proceeding" taken against him, within Code Civ. Proc. § 473, giving the court power to relieve a party from a proceeding taken against him through his mistake, etc., and a plaintiff may invoke the aid of the section as well as a defendant. *Lemon v. Hubbard*, 102 Pac. 554, 556, 10 Cal. App. 471.

#### Ministerial act

The word "proceedings," as used in the rule that the writ of prohibition arrests "proceedings" when they are without or in excess of jurisdiction, cannot reasonably be said to apply or have reference to the doing of a purely ministerial act. *Stein v. Morrison*, 75 Pac. 246, 256, 9 Idaho, 426.

#### Objection

Code Civ. Proc. § 473, provides that the court may relieve a party from a judgment, order, or other proceeding taken against him because of his mistake, surprise, or excusable neglect, where the application for relief is made within a reasonable time, and in no case exceeding six months. Held that, where defendant's bill of exceptions was not served in time through excusable neglect, and the bill came up for settlement within a few days after the expiration of six months from the time defendant should have served her proposed bill, and after six months from the day it was actually served, at which time plaintiffs objected to the settlement of the bill because it had not been served in time, the mere reservation of plaintiffs' objection at the time of service did not constitute "a proceeding," within the statute; and that defendants were entitled to apply for relief at the time the objection based on their default was presented to the court in the proceeding for settlement or within a reasonable time thereafter. *Pollitz v. Wickersham*, 88 Pac. 911, 913, 150 Cal. 238.

### Order

Rev. St. 1895, art. 332, declares that any person interested in the estate of a decedent may have the proceedings of the county court reviewed at any time within two years and not afterwards, provided that persons non compos, etc., shall have two years after the removal of the disability. Held that, where orders of a county judge vesting the entire control of the community property and the right of sale in the surviving husband were invalid, such orders constituted "proceedings of the county court," which the district court was authorized to review by certiorari. *Williams v. Steele*, 108 S. W. 155, 157, 101 Tex. 382.

### Pleadings

A prayer to take a case from the jury which makes no reference to the pleadings presents only the question whether the facts that might properly be found from the evidence constitute a good cause of action, and, if the prayer refers to the "proceedings," it does not by that term include "pleadings," as the "proceedings" consist of successive acts done and steps taken as parts of the suit during its progress, while the "pleadings" consist of statements of the litigants, in legal form, of facts constituting a cause of action and grounds of defense. *Monumental Brewing Co. v. Larrimore*, 72 Atl. 596, 599, 109 Md. 682 (citing 6 Words and Phrases, pp. 5410, 5632, 5633).

### Preliminary examination

A preliminary examination pending in the court of criminal correction is a "proceeding," within the statute providing that such court in proceedings before it, is empowered to establish rules in relation to continuances. *State v. Epstein*, 84 S. W. 1123, 1125, 186 Mo. 144.

The procuring of testimony of one believed by the county attorney to have knowledge of violations of the gambling laws by causing such person to appear before a justice of the peace, under Gen. St. 1909, § 2732, providing that if the county attorney shall be notified by any person or shall have knowledge of any violations of the laws relating to gambling, he shall forthwith inquire into the facts of such violation and be authorized to cause subpoenas to be issued to such persons as he shall have reason to believe have information of such violations, is a "proceeding" within section 2640, making it perjury willfully and corruptly to swear falsely to any material matter to an oath legally administered in any "proceeding before any court, tribunal or public body or officer." *State v. Smith*, 114 Pac. 1074, 1076, 84 Kan. 646.

### Process

The word "process" has a general and a restrictive meaning. In its restrictive sense it applies to judicial writs issued in an action. In its general meaning it is syn-

onymous with "proceeding," and embraces the entire proceedings in an action from beginning to end. The publication of a proclamation calling an election, being a part of a legislative proceeding rather than a judicial proceeding or action, does not constitute "process." *Stearns v. State ex rel. Biggers*, 100 Pac. 909, 914, 23 Okl. 462.

### Scire facias

Rev. St. 1899, § 3748, as amended by Laws 1907, p. 320, provides that any action or proceeding which the plaintiff in a judgment might have thereon may be maintained in the name of an assignee. Held that, though scire facias to revive a judgment is not an "action," it is a "proceeding," and may therefore be maintained in the name of an assignee. *Reyburn v. Handlan*, 147 S. W. 846, 847, 185 Mo. App. 412.

### Settlement of statement or bill of exceptions

The preparation and settlement of a statement or a bill of exceptions is a "proceeding" within Rev. Codes, § 4229, authorizing an amendment of any pleading or proceeding in the furtherance of justice. *Richardson v. Bohnay*, 109 Pac. 727, 729, 18 Idaho, 328.

The judge's certificate to the engrossed bill of exceptions "was an adjudication by the judge that all the matters ordered incorporated in the bill had been set forth therein, and that the bill so certified constituted the bill of exceptions as ordered settled by him." It constituted a "proceeding" taken against appellant, within the meaning of Code Civ. Proc. § 403, allowing amendments to proceedings on the ground of mistake, etc., within six months. *Merced Bank v. Price*, 93 Pac. 866, 867, 152 Cal. 697.

### Taking deposition

As used in Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), providing that an injunction shall not be granted by any federal court to stay "proceedings" in any court of the state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy, the term "proceedings" includes the taking of depositions in an action in the state court, so that a federal court, having obtained no jurisdiction of the action, could not enjoin the taking of such depositions. *American Shipbuilding Co. v. Whitney*, 190 Fed. 109, 110.

### Taxation of costs

Taxation of costs in an action is a "proceeding," within Rev. Codes, § 6589, giving the court authority to allow amendments, and the court must permit an amendment to the original memorandum of costs, and thus supply the necessary facts on which to determine the amount of costs. *Neary v. Northern Pac. Ry. Co.*, 110 Pac. 226, 237, 41 Mont. 480.

The word "proceedings," as used in the bastardy act providing that the trial and "proceedings" of a prosecution both before the justice and in the district court shall in all respects not otherwise provided for be governed by the law regulating civil actions, may be construed as indicating all steps taken in the action, including the taxation of costs, and, although there is no provision in the act authorizing the taxing of costs to the defendant, yet the character of the action is such as to authorize such costs to be taxed under the statute relating to the allowance of costs in actions, civil or criminal. *Poole v. French*, 80 Pac. 997, 998, 71 Kan. 391.

#### Verification of claim

Where the venue of an affidavit of a claim for injuries on a defective sidewalk required by Oswego City Charter (Laws 1895, p. 733, c. 394, § 345), was laid in the city and county of Oswego, but the affidavit was taken before a notary, whose signature and seal stated that he was an official of New York county, and the affidavit was in fact taken in New York county, the court had no authority to permit the venue to be amended; it not being a "proceeding in an action," within Code Civ. Proc. § 723, providing for amendments. *Kleyle v. City of Oswego*, 95 N. Y. Supp. 879, 881, 109 App. Div. 330.

#### PROCEEDING ACCORDING TO LAW

See According to Law.

#### PROCEEDING AUTHORIZED BY LAW

There is no practical difference in the meaning of "public official proceedings" and "proceedings authorized by law" as applied to privileged communications, and an investigation by a Senate committee of charges against one, appointed to office by the President and whose appointment has been sent to the Senate for confirmation, falls within the meaning of the latter term as used in *Wilson's Rev. & Ann. St. 1903*, § 2239. *Tuohy v. Halsell*, 128 Pac. 126, 127, 35 Okl. 61, 43 L. R. A. (N. S.) 323.

#### PROCEEDING FOR SETTLEMENT OF BILL OF EXCEPTIONS

The phrase "when there is a proceeding pending for the settlement of a bill of exceptions," in a court rule, requiring the appellant in a civil action to file, within 40 days after the appeal is perfected, a transcript of the record, provided that, when there is a proceeding pending for the settlement of a bill of exceptions which may be used in support of such appeal, the time for filing and serving the transcript shall not begin to run until the settled bill of exceptions has been filed, includes any proceeding looking to the settlement of a bill of exceptions actually inaugurated and pending undisposed of and not abandoned, regardless

of questions whether the bill can be legally settled. *Dernham v. Bagley*, 90 Pac. 543, 544, 151 Cal. 216.

#### PROCEEDING IN BANKRUPTCY

See Bankruptcy Proceeding.

#### PROCEEDING IN EQUITY

Bill of interpleader as, see Bill of Interpleader.

#### PROCEEDING IN REM

See In Rem.

#### PROCEEDING IN WHICH UNITED STATES IS INTERESTED

See Interest.

#### PROCEEDING OF COUNTY BOARD

##### Canvass

The proceedings of the county board of supervisors in canvassing the votes at general elections, and declaring the names of successful candidates for county offices, as required by Code, §§ 1149-1156, are proceedings of the board as a board of supervisors within section 441, requiring the publication of proceedings of the board of supervisors. *Index Printing Co. v. Board of Sup's of Muscatine County*, 130 N. W. 401, 402, 150 Iowa, 411.

#### PROCEEDINGS ON A JUDGMENT

See Stay Proceedings on a Judgment.

#### PROCEEDS

See Clear Proceeds; Gross Proceeds; Net Proceeds; Receipt of Proceeds.  
Net proceeds as earnings, see Earnings.

The word "proceeds" is defined as "the amount proceeding or accruing from some possession or transaction." It is also defined as "yield, issue, product." *State ex rel. Ledwith v. Brian*, 120 N. W. 916, 917, 84 Neb. 30.

"Proceeds" is synonymous with product, income, yield, receipts, returns, and means all that was received from an execution sale. *Dittemore v. Cable Milling Co.*, 101 Pac. 593, 594, 16 Idaho, 298, 133 Am. St. Rep. 98.

The word "proceeds," as used in an attorney's contract with another employed to solicit retainers by which the attorney contracted to pay the solicitor one-half of the proceeds realized by the attorney on account of the claims prosecuted, meant that the attorney would divide evenly with the solicitor whatever amount he received on account of such claims, whether costs or bonuses or percentages paid by clients on the amounts recovered for them respectively. *In re Clark*, 95 N. Y. Supp. 388, 396, 108 App. Div. 150.

Property received in exchange for property granted for the use of schools, and likewise rents of the property so received, is "proceeds," within Const. 1870, art. 8, § 2,

providing that property granted for school purposes, and the proceeds thereof shall be applied to the object for which such grant was made; and therefore such property and the rents are not subject to taxation. *People ex rel. Hanberg v. City of Chicago*, 75 N. E. 239, 240, 218 Ill. 537.

The word "proceeds" is a word of loose and varying significance, employed with different meanings. Where testator devised certain property to a trustee to maintain and educate his niece and nephew until the latter should attain majority, when the "proceeds" of the property remaining unexpended were to be equally divided between them, they to share equally therein during their natural lives, but that, if either died without issue, the whole net proceeds should be paid to the survivor, and that, if either died with issue, then one-half of the net proceeds should be expended to maintain and educate such issue until both niece and nephew had died, when the proceeds should become the absolute property of the issue then surviving, the court refused to say that it was not the actual intent of the testator that the rents were to be paid over as proceeds, as had been in fact done. *Kidwell v. Ketler*, 79 Pac. 514, 517, 146 Cal. 12.

The word "proceeds," as used in Code Civ. Proc. § 1644, providing that the preference given in section 1643 to a mortgage against a decedent's estate extends only to the "proceeds" of the property mortgaged, and that, if such proceeds are insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate, does not include the rents of the property mortgaged accruing before sale, where the rents, issues, or profits of the property were not included in the mortgage. *In re McDougald's Estate*, 79 Pac. 875, 877, 146 Cal. 196.

Testator gave his residuary estate to trustees to support a son at a cost of not exceeding \$3,000 a year, and to pay a daughter for life \$1,000 annually, and he directed that the income from the remainder should, during the life of a brother, be divided into four parts, one part of which should be paid to the brother for life and the other parts to enumerated beneficiaries, and that at the death of the brother the income given him should be paid to his eldest daughter until the death of the son and daughter of testator, and at the death of the survivor of them the executors should sell all the real estate then unsold and divide the proceeds equally into six parts, to be disposed of in a manner prescribed. Held, that testator did not dispose of the remainder of his estate except the proceeds of real estate unsold at the time of the death of his brother and son and daughter, and the words "proceeds of real estate then unsold" cannot be construed to mean real estate sold by the executors before that time on the theory of equitable conversion, and

hence there was a partial intestacy. *Woodruff v. White*, 79 Atl. 304, 306, 78 N. J. Eq. 410.

#### As gross proceeds

The word "proceeds," in a contract by which defendant in consideration of a sum advanced, agreed to go to the gold diggings of California and give plaintiff one-half of the proceeds of labor there for one year, means the amount, income, or products of the labor, and no deductions are to be made from such proceeds by reason of expenses paid for sickness during the year. *Staples v. Wheeler*, 38 Me. 372, 374.

Where a contract provides that a certain payment is to be made "out of the proceeds" of a certain crop of oats, held, that such payment must be made out of the entire proceeds of the sale, and is not limited to the net proceeds thereof. *Salisbury v. Spofford*, 126 Pac. 400, 401, 22 Idaho, 393.

#### As conveying estate

Where a trust to pay the income of an estate quarterly to testator's widow and daughter was to cease upon the widow's death, whereupon the corpus of the trust estate was to become the property of the daughter, and, if testator's wife died before he did, the entire estate was to go to the daughter, and, in case of her death before testator, testator's wife was to receive the whole income from the trust estate during her life, the trust to cease upon her death and the corpus thereof to become the property of testator's son, and the will provided that the provision for testator's wife, if accepted, should be in lieu of dower, and that, if she should elect to receive dower instead of such provision, the entire net proceeds from the remaining trust estate should be paid to the daughter, and the wife elected to take her dower, the daughter was entitled merely to the proceeds of the trust estate during the life of the wife, as the estate cannot be embraced in the gift of the "proceeds" where the proceeds are derived from the estate. *In re Kings County Trust Co.*, 127 N. Y. Supp. 879, 881, 69 Misc. Rep. 531 (citing 6 Words and Phrases).

#### As money or other thing realized from sale

Where a will creating a testamentary trust provided that, upon the sale by the executors of personal or mixed property, the trust should apply only to the "proceeds," and that the purchasers should not be required to see to the application of the "purchase money," and the next paragraph required the executors to distribute the proceeds at once as soon as any realty was sold by them, a sale by the trustees on credit was unauthorized, in view of the meaning of the term "proceeds," which, when used in connection with a sale, means a sum of money derived from a sale of property. *Wisdom v.*



Wilson (Tex.) 127 S. W. 1128, 1187 (quoting 6 Words and Phrases, p. 5640).

The words "proceeds," as used in Const. art. 8, § 3, relating to the permanent school fund, and declaring that the proceeds of all lands that have been or may hereafter be granted to the state shall be a perpetual fund for common school purposes, implies a sale and conversion of the lands into money; and the statement in the section that the proceeds shall be a perpetual fund places it beyond question that the true meaning of the provision is that such lands might be sold and the proceeds invested. *McMurtry v. Engelhardt*, 98 N. W. 40, 41, 5 Neb. (Unof.) 271.

The term "proceeds," used in Rev. St. 1898, § 1158, exempting the "proceeds" of a sale of a homestead for one year after the receipt thereof, means some tangible thing which is the subject of manual delivery and receipt. *Christensen v. Beebe*, 91 Pac. 129, 131, 32 Utah, 406.

The term "proceeds," used in a contract employing an agent, whose commission is to be based upon the "proceeds" of goods shipped to and sold by him, means amounts realized on the goods. *Poland v. Hollander*, 115 N. Y. Supp. 1042, 1043, 62 Misc. Rep. 523.

A bank check received by a county treasurer and receipted for as money on a sale of county bonds is "proceeds of sale," within the meaning of the act under which the bonds were issued, and therefore within the protection of the official bond of the treasurer. *Montgomery County v. Cochran*, 126 Fed. 456, 458, 459, 82 C. C. A. 70.

Testator devised certain real estate to the support of any child of his daughter's marriage, of which there was none, and, in case such child should not reach majority, gave the real estate or the proceeds derived from the same to his daughter, and provided that, in the event of the sale hereafter had of said premises, on the death of the daughter the proceeds should be paid over to a granddaughter. Testator sold the premises, taking back a mortgage for the price. Held that, as the fee of the property was devised, should testator die possessed, the "proceeds from the premises" meant the proceeds from the sale of the premises, and this whether such sale occurred before or after testator's death. *Hoffman v. Steubing*, 98 N. Y. Supp. 706, 708, 49 Misc. Rep. 157.

#### As net proceeds

The word "proceeds," as used in a contract whereby plaintiff was to receive all the proceeds of logs delivered by one defendant to another, after deducting advances made thereon by the other, means net proceeds after all charges for delivery, including raftage and boomage, have been paid. *Moss Point Lumber Co. v. Thompson*, 35 South. 828, 83 Miss. 490.

The word "proceeds," as used in Rev. Laws, c. 98, § 2, relative to Sabbath breaking, but which permits the giving on Sunday of an entertainment by a religious or charitable society, the "proceeds" of which, if any, are to be devoted exclusively to a charitable or religious purpose, means the net returns after the payment of necessary expenses incidental to the entertainment, taking into account not only that which is received but that which is incidentally and properly paid out. *Commonwealth v. Alexander*, 70 N. E. 1017, 1018, 185 Mass. 551.

The term "proceeds" in an assignment of the proceeds of fruit consigned to a commission merchant includes only the amount remaining after deduction of freight, duties, and other necessary expenses incurred in order to put the goods in condition to be sold. *Coles v. Saitta*, 130 N. Y. Supp. 857, 859, 71 Misc. Rep. 544.

In an action by a parent to recover for the services of his minor child, an instruction that the word "proceeds," as used in the statute, which provides that until majority a child remains under control of the father, who is entitled to his services and the "proceeds" of his labor, means the proceeds of his labor reduced by the necessary expenses of maintenance, was not erroneous. *Culbertson v. Alabama Const. Co.*, 56 S. E. 765, 767, 127 Ga. 599, 9 L. R. A. (N. S.) 411, 9 Ann. Cas. 507.

#### As power to sell

A testamentary gift to persons named of testator's personal and real estate for the use of designated beneficiaries, with the provision that "the proceeds of said property be equally divided after my personal expenses are met," impliedly confers on the persons named the right to sell the real estate to distribute the proceeds; the word "proceeds" justifying the inference that a sale is implied. *Corley v. Bishop*, 58 South. 360, 101 Miss. 490.

#### As profit

See Profit.

#### Of life insurance

A bankrupt carried a policy of life insurance for \$3,000, payable to his executor or administrator, and after his petition in bankruptcy was filed, and after his decease, the proceeds, less a loan thereon, were paid to his administrator, and in a proceeding by his trustee in bankruptcy the trustee was awarded the cash surrender value of the policy. Code 1906, § 2141, provides "that the 'proceeds' of a life insurance policy not exceeding \$3,000, payable to the executor or administrator of the insured, shall inure to the heirs, \* \* \* freed from all liability for the debts of the decedent." Held, that under the statute the whole "proceeds" of the policy, including the cash surrender value, were exempt, and that the administrator was

entitled thereto. *Dreyfus v. Barton*, 54 South. 254, 255, 98 Miss. 758.

Testator by his will bequeathed two policies of insurance, made out in the name of his daughter, "the proceeds from same" to be placed at interest for her use and that of her foster mother, and provided that his administrator should give of the first moneys in his hands \$300 to such mother, all the balance of his estate to go to his wife. Thereafter the estate was substituted as a beneficiary in the policies. Held, that the word "proceeds" merely distinguished between the policies and what would be realized thereon in connection with the matter of investment; and the daughter took an absolute estate in the proceeds, subject to the life interest in the mother. In *re Thompson's Estate*, 82 Atl. 1108, 1109, 234 Pa. 82.

## PROCESS

See In Process of Collection; Secret Process.

It is when the term "process" is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means, not natures, which are not effected by mechanism or mechanical combinations. *Cameron Septic Tank Co. v. Village of Saratoga Springs*, 151 Fed. 242, 261.

"A 'process' is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or not be new or patentable, whilst the process itself may be altogether new and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence." A process patent can only be anticipated by a similar process. *Johnson v. Foos Mfg. Co.*, 141 Fed. 73, 85, 72 C. C. A. 105 (quoting and adopting definition in *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139).

### Apparatus distinguished

"A 'process' and an 'apparatus' by which it is performed are distinct things. They may be found in one patent. They may be the subject of different patents." *San Francisco Cornice Co. v. Beyrle*, 195 Fed. 516, 519, 115 C. C. A. 426 (quoting definition in *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 29 Sup. Ct. 495, 500, 213 U. S. 301, 313, 53 L. Ed. 805).

### Machine or machinery distinguished

A "process," as distinguished from a "machine," which is a thing, is a mode of act-

ing on materials to produce a certain result, so that one may be using the same process as another, though using different machinery in applying it. *Eastern Extracting Co. v. Greater New York Extracting Co.*, 110 N. Y. Supp. 738, 739, 126 App. Div. 928 (quoting *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279).

A "machine" is a thing. A "process" is an act, or a mode of acting. The one is visible to the eye, an object of perpetual observation; the other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result. A "process" is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. A "process" which may be patented is not restricted to those involving mechanical or other similar elemental action, but an invention or discovery of a process or a method involving mechanical operations and producing a new and useful result is within the scope of Rev. St. § 4886, securing protection to the inventor of "any new or useful machine, manufacture, or composition of matter or any new and useful improvement thereof." *Expanded Metal Co. v. Bradford*, 29 Sup. Ct. 652, 657, 214 U. S. 366, 384, 53 L. Ed. 1034 (quoting and adopting definitions in *Curt. Pat.* [4th Ed.] § 14; 1 *Rob. Pat.* § 167; *Walk. Pat.* [4th Ed.] § 3; *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279; *Westinghouse v. Boyden Power-Brake Co.*, 13 Sup. Ct. 707, 170 U. S. 537, 42 L. Ed. 1136. See, also, *San Francisco Cornice Co. v. Beyrle*, 195 Fed. 516, 519, 115 C. C. A. 426.

A "machine" is a thing. A "process" is an act or mode of acting. The one is visible to the eye, an object of perpetual observation; the other is a conception of the mind seen only by its effects when being executed or being performed. Either may be the means of producing useful results. The mixing of certain substances together or the heating of certain substances to a certain temperature is a "process." If the mode of doing it or the apparatus in or by which it may be done is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough in the patent to point out the process to be performed without giving supererogatory directions as to the apparatus or method to be employed. If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient. There is then a description of the process and of one practical mode in which it may be applied. *Kirchberger v. American Acetylene Burner Co.*, 124 Fed. 764, 775.

The term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, of one substance to another, such modes, methods, or operations are called "processes." A new process is usually the result of a discovery; a machine, of invention. But the term "process" is often used in a more vague sense in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it. *Denning Wire & Fence Co. v. American Steel & Wire Co. of New Jersey*, 169 Fed. 795, 796, 95 C. C. A. 259.

#### PROCESS (In Practice)

See Civil Process; Compulsory Process; Judicial Process; Legal Process; Mesne Process; Sale by Adverse Process; Void Process.

Issue of, see Issuance—Issue.

Malicious abuse of, see Malice.

Other process, see Other.

Return of process, see Return.

Served with process, see Served.

Service of process, see Service (In Practice).

Voidable process, see Voidable.

See, also, Personal Service; Summons.

A "process" is an instrument in an epistolary form running in the name of the sovereign of a state and issued out of a court of justice, or by a judge thereof, at the commencement of an action or at any time during its progress or incident thereto, usually under seal of the court, duly attested and directed to some municipal officer or to the party to be bound by it, commanding the commission of some act at or within a specified time, or prohibiting the doing of some act. The cardinal requisites are that the instrument issue from a court of justice, or a judge thereof; that it run in the name of the sovereign of the state; that it be duly attested, but not necessarily by the judge, though usually, but not always, under seal; and that it be directed to some one commanding or prohibiting the commission of an act. *Watson v. Keystone Ironworks Co.*, 74 Pac. 272, 273, 70 Kan. 43.

The word "process," as used in the phrase "due process of law," indicates the method that may be employed to accomplish the purpose of the law, and is the mode by which the purpose of the law may be effected. *Jenkins v. Ballantyne*, 30 Pac. 760, 8 Utah, 245, 16 L. R. A. 689.

"Processes" issue upon pleadings, orders, and judgments, and must be conformable to such pleadings when issued on them. *Farmers' Banking & Loan Co. v. Mauck*, 97 N. W. 835, 836, 70 Neb. 586.

#### As all proceedings

"Process" in its broadest sense comprehends all proceedings to the accomplishment of an end, including judicial proceedings. Frequently its signification is limited to the means of bringing a party into court. In the Constitution process which at the common law would have run in the name of the king is intended. In the Code process issued from a court is meant. *McKenna v. Cooper*, 101 Pac. 662, 663, 79 Kan. 847 (quoting *Hannah v. Russel*, 12 Minn. 80 [Gil. 43]; *Black Com.* 279; *Bouv. Law Dict.*).

Code Civ. Proc. § 3463, defines "process" as a writ issued in the course of judicial proceedings, and "writ" is defined as a written order or precept, issued in the name of the state, of a court or judicial officer. Section 2170 makes any unlawful interference with the process or proceedings of a court a contempt. Sections 840-843, in relation to the recovery of possession of personal property, provides that, when a delivery is claimed, plaintiff must make an affidavit stating certain facts, and that he may, by an indorsement on the affidavit, require the sheriff of the county to take the property from defendant, and the officer is required to serve on the defendant a copy of the affidavit and undertaking. And so where defendant in replevin refused to receive a copy of papers, and threatened the officer with violence if he took possession of the property, and while the officer was absent seeking assistance secreted the property, he was guilty of a contempt, though he had not been served with summons and though the order indorsed by plaintiff on the affidavit was not strictly within the definition of "process" *State ex rel. Bruce v. District Court*, 83 Pac. 641, 642, 33 Mont. 359.

The word "process," in Gen. St. 1901, § 1261, requiring that a foreign corporation doing business in the state file its written consent that actions may be commenced against it by service of process on the Secretary of State, includes writs issued in both civil and criminal actions for bringing parties into court. *State v. International Harvester Co. of America*, 99 Pac. 603, 604, 79 Kan. 371.

Pol. Code, § 4175, declares that "process" includes all writs, summons, and orders of

courts of justice. *Hooper v. McDade*, 82 Pac. 1116, 1118, 1 Cal. App. 733.

#### **Attachment**

An order of attachment is "process," within the meaning of Code 1899, c. 41, §§ 23, 24, against which the right to exempt personal property may be exercised. *Brown v. Beckwith*, 51 S. E. 977-979, 58 W. Va. 140, 1 L. R. A. (N. S.) 778, 112 Am. St. Rep. 965.

#### **As civil action**

See Civil Action—Case—Suit—etc.

#### **Commitment**

An order of commitment for trial issued by a magistrate before whom a person is brought for examination upon a felony charge is not a "process" issued on a final judgment within Wilson's Rev. & Ann. St. § 4867, providing that no court shall inquire into the legality of a process issued on a final judgment of a court of competent jurisdiction, whereby a party is in custody or discharge him when the term of commitment has not expired. *Ex parte Johnson*, 98 Pac. 461, 1 Okl. Cr. 414.

#### **Information, indictment, or motion**

An information is not a "process," within Const. art. 5, § 38, requiring all processes to run in the name of the state of South Dakota. *State v. Carlisle*, 139 N. W. 127, 129, 30 S. D. 475.

An information is not a "writ" or "process." It is an accusation, upon which writs and processes issue. The clause of the Constitution providing that the style of all writs and processes shall be "the state of Oklahoma," does not require an information to begin with these words. It is sufficient if it appears from the record of a case that the prosecution was carried on in the name and by the authority of the state. But, as a matter of good pleading, it is well for indictments and informations to begin with these words. *Caples v. State*, 104 Pac. 493, 494, 497, 3 Okl. Cr. 72, 26 L. R. A. (N. S.) 1033 (citing 8 Words and Phrases, p. 7531).

#### **Notice**

The word "process," as used in Rev. St. § 911, providing that all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof, means an order of the court, although it may be issued by the clerk. The summons in a common-law action is a "process," but the word does not apply to a notice given under Code Va. 1887, § 3211, authorizing a judgment on a contract to be obtained on motion after 15 days' notice to defendant; and under the Conformity Act, Rev. St. § 914, an action may be instituted by such a notice in a federal court in Virginia in accordance with the state practice. *Leas & McVitty v. Merriman*, 132 Fed. 510, 513.

P. L. 1898, p. 648, §§ 9, 10, authorizes the orphans' court to entertain jurisdiction for

partition of lands on "application by petition made by one or more of said coparceners, joint tenants, or tenants in common," and requires the person proposing to apply to the court for partition to give four weeks' notice to all co-tenants of the time when the petition will be presented to the court. Held, that the orphans' court acquires no jurisdiction until the petition for partition is presented; the notice required not being "process," and until the petition is presented there is no pending cause in the orphans' court, which will abate a suit for partition in chancery, filed after such notice is given. *Brown v. Gaskill*, 70 Atl. 665, 74 N. J. Eq. 620.

#### **Notice of appeal**

A notice of appeal is not a writ or summons within Rev. Codes 1905, § 6738, defining "process" as a writ or summons issued in a judicial proceeding, and need not be served in the manner in which "process" is required to be served. *Gooler v. Eldness*, 121 N. W. 83, 85, 18 N. D. 338.

#### **Order of publication**

An order for publication of notice of sale of real estate, being a substituted process for the sale of real estate, is "process and notice" within the meaning of the act changing the time for holding the April term of the probate court, and so the clerk properly changed the return day of an order of publication made before passage of the act so as to conform the same thereto. *Rhodes v. Bell*, 130 S. W. 465, 469, 230 Mo. 133.

#### **As proceeding**

See Proceeding.

#### **Proclamation**

The word "process" has a general and a restrictive meaning. In its restrictive sense it applies to judicial writs issued in an action. In its general meaning it is synonymous with "proceeding," and embraces the entire proceedings in an action from beginning to end. The publication of a proclamation calling an election, being a part of a legislative proceeding rather than a judicial proceeding or action, does not constitute "process." *Stearns v. State ex rel. Biggers*, 100 Pac. 909, 914, 23 Okl. 462.

#### **Subpoena**

A subpoena to testify as a witness is a "process" and when issued out of a court of record, as on the trial of the action, may be issued by the attorney for the party, as provided by Code Civ. Proc. § 24, without application to a court or judge by signing it himself and testing it in the name of a judge of the court and of its clerk. *Lowther v. Lowther*, 100 N. Y. Supp. 965, 966, 115 App. Div. 307.

#### **Summons**

The words "process" and "summons" as used in the common law and in the statute, are often synonymous, and it has been settled

at common law that process and summons were synonymous. Process is the means by which the court compels the appearance of the defendants, and summons is the first process in the institution of an action whereby the defendant is notified to appear and answer. *Ackermann v. Berriman*, 114 N. Y. Supp. 937, 940, 61 Misc. Rep. 165.

## PROCESS OF LAW

See Due Process of Law.

## PROCHEIN AMI

See Next Friend.

Guardian ad litem distinguished, see Guardian Ad Litem.

## PROCLAMATION

As process, see Process.

Legislation specially named in proclamation, see Specially Named Legislation.

A "proclamation" is that which is proclaimed or publicly announced, and, in law, designates notice by an administrative or executive officer, as by the President or Governor, as to some public matter, or the exercise of some administrative or executive power affecting the public at large, as a proclamation of martial law, a Thanksgiving proclamation. *State ex rel. Barrett v. Hitchcock*, 146 S. W. 40, 52, 241 Mo. 483.

Under Acts 1903, p. 70, § 2, providing that "the mayor may by proclamation convene the common council in special session," the manner of calling the special session is left in his discretion, and it is within his discretion to call a special meeting by posting a notice on the city hall door and serving each member of the council with a copy. *Cushing v. Hartwig*, 120 S. W. 109, 110, 138 Mo. App. 114.

## PROCURE

The word "procure" means to acquire for one's self; to cause; and the allegation that plaintiff "procured to be issued" to her a policy of insurance is equivalent to an allegation of delivery to and acceptance of such policy by plaintiff. *Homestead Fire Ins. Co. v. Ison*, 65 S. E. 463, 465, 110 Va. 18; *Cunningham v. Royal Neighbors of America*, 124 N. W. 434, 435, 24 S. D. 489, 140 Am. St. Rep. 793.

The word "procure" is defined as "to bring about by care and pains"; effect; contrive and effect; induce; cause; as, he procured a law to be passed. *United States v. Somers*, 164 Fed. 259, 262 (citing Cent. Dict.).

Where an attorney contracted to "procure" for defendant certain school land, and to receive \$200 for his services, contingent on success, he did not perform his contract by successfully conducting certain litigation against a prior claimant of the land; the land

commissioner having subsequently awarded the land to a third person, on the ground that it was not subject to sale to defendant at the time of his application. *Shaw v. Threadgill*, 115 S. W. 671, 672, 53 Tex. Civ. App. 254.

By the word "procured," as used by the court in *Hoe v. Sanborn*, 21 N. Y. 562, 78 Am. Dec. 163, where the court says: "Where the vendor has manufactured the article with his own hands, the inference of knowledge would plainly in many cases be strong enough to charge him even in an action for fraud; but, if the manufacturing is done by agents, the general principles of law would hold the principal responsible for those whom he employs. Whenever the vendor, therefore, has himself manufactured the article sold, or 'procured' it to be done by others, if honest and fair dealing are ever to be enforced by law, a warranty should be implied"—it is not meant buying in the open market from another manufacturer, but simply means procuring the manufacturing to be done by the vendor's own servants or agents. *Howard Iron Works v. Buffalo Elevating Co.*, 99 N. Y. Supp. 163, 174, 113 App. Div. 562.

### Accessory denoted

Where, on a trial of several persons jointly charged with rape, there was no evidence that any of them was guilty as an accessory before the fact, within St. 1898, § 4614, an instruction that, to hold two or more guilty, the evidence must establish that some one of them performed an act under circumstances constituting rape, and that such others as were held guilty assisted him, by the exercise of force or threats, in committing such particular act, or "procured" him to commit such act, was not erroneous because of the use of the word "procured," for "procure" means to obtain, to bring about, and, as used, the word "procured" was synonymous with "aid" or "abet." *Vogel v. State*, 119 N. W. 190, 197, 138 Wis. 315.

### As cause

One agreeing to give money to others to procure a female to enter the state for immoral purposes, and actively urging, advising, and assisting in having the female brought to his house of ill fame as an inmate, violates the pandering act (Laws 1909, p. 180), punishing any person who shall "procure" a female inmate for a house of ill fame, for the word "procure" means to begin proceedings; to cause a thing to be done. *People v. Van Bever*, 93 N. E. 725, 727, 248 Ill. 136.

## PROCUREMENT

"Procurement" denotes direction, influences, personal exertion, interference, or other action, with knowledge or belief that such action would produce certain results,

which results are produced. *Richardson v. Richardson*, 114 N. Y. Supp. 912, 917.

In determining whether a broker has earned a commission for procuring a purchaser, what amounts to a "procurement" is a question of fact, and it is enough that the efforts of the broker, acting upon the purchaser, are the efficient cause of his offer to purchase, but they need not be the sole cause. *Handley v. Shaffer* (Ala.) 59 South. 286, 291.

"Procurement" is defined to be the act of procuring, obtaining, bringing about, or effecting, etc. And so an averment that the procurement of the miscarriage was not necessary to preserve the life of the woman is equivalent to an averment that the miscarriage was not necessary to preserve her life. *Willey v. State*, 52 Ind. 246, 250, 251 (quoting Webster).

"Fraud in the procurement of the note" means "fraud in its procurement by the holder thereof, and has no reference to fraud in the contract out of which the note arises." *Johnson County Sav. Bank v. Roberts & McClure*, 53 S. E. 808, 125 Ga. 41.

#### PROCURING CAUSE

In order to be entitled to commissions for the sale of real estate, the broker must show that he was the "procuring cause of the sale"; that he was the first to call the buyer's attention to the property; and that it was through his efforts that the sale was made; or, where the purchaser is not introduced by the broker, he must show that it was through his active negotiations that a satisfactory arrangement was finally reached; the active negotiations required being not a single introduction of the parties, but a carrying back and forth of propositions, etc., which result in the sale. *Wood v. Smith*, 127 N. W. 277, 279, 162 Mich. 334. See, also, *Langford v. Issenhuth*, 134 N. W. 889, 893, 28 S. D. 451; *Sallee v. McMurtry*, 88 S. W. 157, 160, 113 Mo. App. 253 (citing *Gelatt v. Ridge*, 23 S. W. 882, 117 Mo. 553, 38 Am. St. Rep. 683; *Timberman v. Craddock*, 70 Mo. 638; *Tyler v. Parr*, 52 Mo. 249; *Bell v. Kaiser*, 50 Mo. 150; *Wright & Orison v. Brown*, 68 Mo. App. 577; *Brennan v. Roach*, 47 Mo. App. 290).

#### PRODUCE

The word "produce" means "to be the cause of." *Elder v. State*, 50 South. 370, 373, 162 Ala. 41 (citing Webster. Int. Dict.).

"Produce" means to bring forward; to lead forth; to offer to view or notice; to exhibit; to show—while "surrender" means to yield to the power of another; to deliver up; to give up; as a principal surrendered by his bail. Under Pen. Code 1895, § 935, providing that bail may surrender their principal in vacation to the sheriff or in open court in discharge of themselves from liability, pro-

ducing or presenting a principal in court is not all that is required to discharge the sureties on a bail bond. In order for a surrender of the principal in open court to be effective, the attention of the court must be called to the presence of the accused principal, and the intention to surrender him must be definitely expressed and understood. *Perkins v. Terrell*, 58 S. E. 133, 135, 1 Ga. App. 250 (quoting Webster. Int. Dict.).

A broker employed to sell land, while "bound to produce a purchaser" is not required to exhibit him in person to the owner, but it is sufficient that the purchaser had authorized the broker to say to the owner that he will take the land. *McCray & Son v. Pfost*, 94 S. W. 998, 999, 118 Mo. App. 672.

Statements compiled by employes of a corporation from its books and records, which were before a grand jury and produced to the grand jury by an officer of the corporation on a subpoena duces tecum, do not constitute testimony given or documentary evidence produced by such officer within the meaning of Act Feb. 25, 1903, c. 755, § 1, 32 Stat. 904, which grants immunity in certain cases to a witness "on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise"; the preparation or production of the statements in such case being the act of the corporation, and not of the witness. *Heike v. United States*, 192 Fed. 83, 88, 112 C. C. A. 615.

#### PRODUCE (Noun)

Under the condition of a bond that a person should enjoy one-fifth part of a farm free of all expenses, the word "produce" included hay, as the word "produce" has the largest signification of any word which could be used in such connection. *Luques v. Thompson*, 26 Me. 514, 517.

#### PRODUCT

See Farm Product; Logs and Other Timber Products.

Petroleum products, see Petroleum.  
Raw products, see Raw.

"The word 'product' imports an article which is made of something, and which, when made, has characteristics which are apparent to the senses." *Elder v. State*, 50 South. 370, 373, 162 Ala. 41 (quoting and adopting the definition in 6 Words and Phrases, p. 5655; Webster. Int. Dict.; Stand. Dict.).

The courts judicially know that cotton is a farm product, included within those "products" mentioned in Pen. Code 1910, § 553, under which payment by means of a worthless check is punishable by law. *Whitaker v. State*, 70 S. E. 990, 991, 9 Ga. App. 213.

## PRODUCTION

A sublessee under an oil lease contracted to sell oil. The contract recited that it was its desire to sell its "production" to the buyer and the desire of the buyer to purchase the "production." The sublessee contracted to sell 300,000 net barrels of oil, to be delivered in installments before a designated date, the contract to terminate when the total net barrels had been delivered. The contract referred to the lease, which gave the lessor the option to take as rent one-sixth of the product, or one-sixth of the proceeds, and gave the lessor the right to purchase all the oil produced at the ruling market price, and made the lease a part thereof. Held, that the word "production" in the contract did not refer merely to the five-sixths part of the production which the seller was authorized to mine and sell, but the seller was required to deliver the quantities called for, though it might require the delivery of the rental in kind, to which the lessor was entitled, unless the lessor should exercise his option to purchase, or give direction as to the disposition to be made of its royalty. *Coalinga Pac. Oil & Gas Co. v. Associated Oil Co.*, 116 Pac. 1107, 1110, 18 Cal. App. 361.

## PRODUCTIVE

See Unproductive.

## PROFANE—PROFANITY

"As a general rule, words are 'profane' or not, according to the sense in which they are used; and it is necessary to show by other words coupled with them the sense in which they are used, to make a valid charge of using profane language." *Roberts v. State*, 47 S. E. 511, 120 Ga. 177.

The word "profane," in an indictment drawn under a statute aimed at the use of vulgar, obscene, or "profane" language, may be merely epithetic of the general nature of the offense, and does not fall within the rule that, where the facts are alleged with needless particularity, the unnecessary allegations cannot be rejected as surplusage. The words, "You woman with the big fat rump," were not profane, and the use of the word "profane" in the indictment could be rejected as pure surplusage. *Holcombe v. State*, 62 S. E. 647, 648, 5 Ga. App. 47 (citing *Bish. New Cr. Proc.* § 480).

Since "profane language" means language irreverent toward God or holy things, proof that defendant called another a liar in a public street did not show disorderly conduct in the public use of profane language. *City of Georgetown v. Scurry*, 73 S. E. 353, 354, 90 S. C. 346.

The words, "Go to hell, you low-down devils," is not a violation of a statute, making it an offense to "profanely swear or curse in any public place in the presence" of others, since the language does not imprecate

divine vengeance nor imply divine condemnation. *Sanford v. State*, 44 South. 801, 91 Miss. 158.

## PREFERENCE

See Autoptic Preference.

## PROFERT

The purpose of making "profert" of a deed, letters testamentary, letters of administration, or other instruments under seal is to enable the opposite party to craveoyer thereof. The purpose of "oyer" is to enable the party craving it to hear the deed, etc., read, so that he may enter it upon the pleading and take advantage of any part thereof not already pleaded by his adversary. Thus a defendant may craveoyer and set out letters of administration if he wish to avail himself of any variance in the statement of them in the declaration. *Sautter v. Metropolitan Life Ins. Co.*, 63 Atl. 994, 995, 73 N. J. Law, 455 (citing 1 Chit. Plead. 431, 432).

## PROFESSION

See Learned Profession; Publicly Profess to be Physician.

As property, see Property.

As trade, see Trade.

The term "profession" signifies an employment requiring a learned education, as those of law and physics, and is applied to a calling which requires learning and special preparation in the acquirement of such knowledge and skill, and, in its broader meaning, is defined to be the occupation, if not mechanical or agricultural, or the like, to which one devotes one's self; the business which one professes to understand and to follow for a subsistence, calling, vocation, employment. *Semple v. Schwartz*, 109 S. W. 633, 636, 130 Mo. App. 65 (citing *Netterville v. Barber*, 52 Miss. 171; *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710).

The word "profession," in its larger meaning, means occupation, if not mechanical or agricultural, or the like, to whatever one devotes one's self; the business which one professes to understand and follow. In a restricted sense it only applies to learned professions. It is also defined as a calling, vocation, known employment. *Gelse v. Pennsylvania Fire Ins. Co.* (Tex.) 107 S. W. 555.

### Express business

Conducting an express agency for the reception and transaction of packages is not a "profession," within the meaning of a statute authorizing municipal corporations to impose a license tax on callings, trades, professions, and occupations. *City of Topeka v. Jones*, 86 Pac. 162, 163, 74 Kan. 164.

### Insurance agent

Code, § 4622, provides that the entries of a person deceased, who was in a position

to know the facts, made at or near the time of the transaction, are presumptive evidence of such facts when made in a professional capacity or in the ordinary course of professional conduct. In an action on a fire insurance policy, the insurer offered in evidence entries in a policy register kept by the agent who had issued the policy showing the number, term, and amount of the policy, the name of the insured, the premium rate and the nature of stock insured, attached clauses and permits, etc., and there was testimony that the entries were in the handwriting of the agent and that any subsequent changes in the policy were entered therein. Held, that "professional" is that which pertains to a profession, and that, to constitute a "profession," something more than a mere employment or vocation is essential, that the employment or vocation must be such as exacts the use or application of special learning or attainments of some kind, and that, while such an agency was an occupation or vocation, the entries were not made in a professional capacity or in the course of professional conduct, and hence were inadmissible. *Cummins v. Pennsylvania Fire Ins. Co.*, 134 N. W. 79, 82, 153 Iowa, 579, 37 L. R. A. (N. S.) 1169, Ann. Cas. 1913E, 235.

#### Ministers of the gospel

Preachers of the gospel are, in a popular, and also in a technical, sense, professional men, just as much as physicians, teachers, and lawyers. A minister of the gospel is therefore following a profession, within the law which makes a person liable, without proof of special damage, for words spoken of another, with reference to his profession, calculated to injure him therein; and it is not necessary that such a minister should, at the time the words are spoken, be receiving compensation for his services. *Flanders v. Daley*, 48 S. E. 327, 120 Ga. 885.

#### Physician

The word "profession" is defined as the occupation, if not agricultural, mechanical, or the like, which one follows, and a physician practicing medicine is engaged in an occupation within the meaning of an ordinance levying a tax on the occupation of physicians. *Village of Dodge v. Guidinger*, 127 N. W. 122, 123, 87 Neb. 349, 138 Am. St. Rep. 494.

#### Undertaker

The business of embalming and undertaking is not a "profession," within a statute exempting professional instruments, etc., from execution. *O'Reilly v. Erlanger*, 95 N. Y. Supp. 760, 761, 108 App. Div. 318.

#### PROFESSIONAL

"The term 'professional' can only relate to some of those occupations universally classed as professions, the general duties and character of which the courts must be expected to understand judicially." *O'Reilly v. Erlanger*, 95 N. Y. Supp. 760, 761, 108 App. Div. 318.

"Professional" is that which pertains to a profession. To constitute a "profession," something more than a mere employment or vocation is essential. The employment or vocation must be such as exacts the use or application of special learning or attainments of some kind, so that, while an insurance agency is an occupation or vocation, the entries in the policy register kept by the agent are not made in a professional capacity or in the course of professional conduct, and hence are inadmissible. *Cummins v. Pennsylvania Fire Ins. Co.*, 134 N. W. 79, 82, 153 Iowa, 579, 37 L. R. A. (N. S.) 1169, Ann. Cas. 1913E, 235.

#### PROFESSIONAL CAPACITY

A physician called to treat a patient against his will acts "in a professional capacity," within Code Civ. Proc. § 834, prohibiting the disclosure by a physician of professional information. *Meyer v. Supreme Lodge K. P.*, 70 N. E. 111, 112, 178 N. Y. 63, 64 L. R. A. 839.

Insanity Law (Consol. Laws 1909, c. 27) § 90, makes it incumbent upon those in charge of state hospitals for the insane to make entries from time to time of the mental state of a patient. Section 93 provides that, upon return of a writ of habeas corpus upon application of an insane person or in his behalf, the medical history of the patient shall be in evidence. Section 45 provides for the care and treatment of indigent patients and the personal examination of their condition in such institutions. Held, that the relation arising by operation of law between a patient committed and the official physician in charge is not a professional relation contemplated by Code Civ. Proc. § 834, and, in an action to annul a marriage for insanity, testimony of a physician of a state insane hospital to which the alleged insane spouse was committed was admissible to prove her insanity. *Liske v. Liske*, 135 N. Y. Supp. 176, 178.

#### PROFESSIONAL DUTIES

See Gross Violation of Professional Duties.

#### PROFESSIONAL EMPLOYMENT

Where an attorney is employed in procuring a loan, but merely as an agent, the communications between him and his principal do not relate to a "professional employment," under Code Civ. Proc. § 835, relating to communications with a client, and the communication is not privileged. *Lifschitz v. O'Brien*, 127 N. Y. Supp. 1091, 1092, 143 App. Div. 180.

#### PROFESSIONAL INSTRUMENT

A desk, safe, and candelabra, belonging to an undertaker and used by him in his business, are not professional instruments, within Code Civ. Proc. § 1391, exempting "professional instruments, furniture, and library" from



execution; such provision not applying to the office furniture and tools of an ordinary business man. *O'Reilly v. Erlanger*, 95 N. Y. Supp. 760, 761, 108 App. Div. 318.

### PROFESSIONAL SERVICES

The services of a member of a law firm rendered in caring for the property and interests of his wife and relatives in probate proceedings are not "professional services," and the earnings therein are not partnership property. *Roth v. Boies*, 115 N. W. 930, 935, 139 Iowa, 253.

*Bankr. Act* July 1, 1898, c. 541, § 64b (3), 30 Stat. 563, which authorizes the allowance of "one reasonable attorney's fee for the professional services actually rendered \* \* \* to the bankrupt in involuntary cases while performing the duties herein prescribed," does not authorize such allowance of fees for all legal work the attorney may do for the bankrupt in the proceeding, but only for that which the referee or the court may consider was required by the provisions of law and the necessities of the proceeding. *In re Payne*, 151 Fed. 1018.

### PROFILE

The term "profile," as used in *Act March 3, 1875*, 18 Stat. 482, c. 152, relating to grants of right of way through public lands and providing for the filing of a "profile" of the road, means a map of alignment. *Oregon Short Line R. Co. v. Stalker*, 94 Pac. 56, 61, 14 Idaho, 362 (citing 32 Land Dec. Dep. Int. 423).

A "profile" within the meaning of *Act March 3, 1875*, c. 152, § 4, 18 Stat. 483, which provides that any railroad company desiring to secure right of way thereunder through public lands shall file with the register of the land office a profile of its road, etc., is the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows. *United States v. Minidoka & S. W. R. Co.*, 190 Fed. 491, 498, 111 C. C. A. 323.

### PROFIT

See *Community of Profits*; *First Net Profits*; *Gross Profits*; *Mesne Profits*; *Net Profits*; *Office of Honor or Profit*; *Pecuniary Profit*; *Remote Profits*; *Rents and Profits*; *Rents, Issues, and Profits*; *Secret Profits*; *Surplus Profits*; *Uncertain Profits*; *Undivided Profits*; *Yearly Profits*.

Sharing profits as constituting partnership, see *Partnership*.

The word "profits" is susceptible of the construction that it includes the difference between the actual cost and the selling prices. *Cooke v. Cain*, 77 Pac. 682, 683, 35 Wash. 353.

The term "profits," allowed to plaintiff in an action of covenant, has reference to the gain which he would have made if he had been permitted to complete his contract. *Gardner v. Deeds & Hirsig*, 92 S. W. 518, 519, 116 Tenn. 128, 4 L. R. A. (N. S.) 740, 7 Ann. Cas. 1172 (adopting definition in *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. [54 U. S.] 307, 14 L. Ed. 157).

That which the directors of the corporation distribute among its stockholders, without intrenchment upon capital, must be comprehended within the term "profits." In an action involving the respective rights of a widow, who was entitled to the income and profits of corporate stock for life, and the remaindermen, on a distribution of the corporation's cash surplus, evidence held to show that the surplus was not based upon the sale of corporate real estate, but upon the excess of revenue remaining after the payment of annual dividends, and belonged to the widow. *Robertson v. De Brulatour*, 80 N. E. 938, 942, 188 N. Y. 301 (quoting and adopting definition in *McLouth v. Hunt*, 48 N. E. 548, 154 N. Y. 179, 39 L. R. A. 230).

The failure of a testator to use the word "profits" in connection with personal estate when he has used the same in connection with real estate does not indicate that he did not mean to include the "profits" of a store business. The words "rents, issues, and profits" are so commonly connected together with reference to the income of real estate that failure to use the word "profits" in connection with personal estate is of little significance. What are called "rents, issues, and profits" in real estate are the same as what are naturally called "interest and income" with reference to personal property. The word "profits" may naturally be used when referring to the proceeds of a mercantile business as a mercantile enterprise as between the executors and the legatee, while the word "income" would be a more natural description of these "profits" after they had reached the executor's hands and as between the executors and the legatees. *Oram v. Peirce*, 67 Atl. 1053, 1056, 73 N. J. Eq. 391.

An association, formed for the purpose of mining and trading in California, stipulated that a statement of its affairs should be made in one year, and that a division of the profits over and above the original capital invested should then be made pro rata to each and every member of the association. The defendant sent out one man holding one share, and took an assignment of the share to himself, and the man sent out agreed to remit to defendant one-half of the profits of such share. The defendant, in consideration of \$300, guaranteed to the plaintiffs one-fourth part of the "profits" of such one share, when the dividend should be made according to the form of the copartnership. On their way out the association dissolved, sold

the company property, and divided the proceeds among the members, according to the shares which each represented, and upon the understanding that each man should go on and mine for him who sent him out, in the same manner and upon the same terms as if the association had not been dissolved. The man sent out by the defendant sent home to him gold dust to the value of \$300. Held, that the word "profits" in the defendant's guaranty did not mean simply returns, but profits in the strict sense of the term exclusive of capital; that, no dividend of profits having been made according to the form of copartnership, the plaintiffs were not entitled to recover under the guaranty. *Fletcher v. Hawkins*, 2 R. I. 330, 335.

A school is not conducted for profit, within Tax Act April 8, 1903 (P. L. p. 395) § 3, pl. 4, so as not to be exempt from taxation, when the charges for tuition and board are not fixed with an intent to yield a profit over and above the actual cost. *Institute of Holy Angels v. Bender*, 74 Atl. 251, 79 N. J. Law, 34.

A corporation formed to promote social recreation issued stock to provide money to furnish rooms and to pay its debts and the debts of a partnership it succeeded. The greater part of its income was derived from monthly dues from its members. It paid its shareholders a dividend equal to legal interest. Held, that the corporation was not organized for "profit," within Pub. St. 1901, c. 150, § 1, making the officers and stockholders of corporations whose object is a dividend of profits individually liable for the debts of the corporation. *Coulombe v. Eastman*, 81 Atl. 704, 705, 76 N. H. 248.

#### **Annuity distinguished**

See Annuity.

#### **Commissions synonymous**

See Commission.

#### **As damage for infringement of patent or copyright**

In patent nomenclature, what the infringer makes is "profits," and what the owner of the patent loses is "damages." *Diamond Stone Sawing Mach. Co. of New York v. Brown*, 166 Fed. 306, 92 C. C. A. 224.

"While in some cases the profits to be accounted for are spoken of as damages, yet in no case that has been presented is it held that damages, as distinct from or additional to profits, can be decreed in equity in a copyright case, as in patent causes. While the word 'damages' is used in decrees, it is used synonymously with 'profits.' Confusion can be avoided by omitting the word 'damages,' since the word 'profits' is more accurate, and sufficient." *Social Register Ass'n v. Murphy*, 129 Fed. 148.

"Damages," under the patent laws, refer to what plaintiff has lost, and "profits" to what the defendant has earned, by the un-

lawful use of the patented invention. A contract between the owners of two patents covering similar inventions, by which joint licenses were to be issued at the request of the second party, who was to recover a share of the license fee for the use of the patent of the first party, and also of the "damages" payable from infringers of such patent, does not entitle him to share in the sum recovered by a suit in equity as "profits" realized by an infringer, where no "damages" were allowed. *Wooster v. Trowbridge*, 115 Fed. 722, 728.

The word "damages," in Rev. St. § 4900, providing that no damages shall be recovered for an infringement of a patent, except on proof that defendant was notified of the infringement and continued after such notice to make, use or vend the article so patented, includes profits, and neither damages nor profits are recoverable, except for infringement after such notice was given. *Lorain Steel Co. v. New York Switch & Crossing Co.*, 153 Fed. 205, 208 (citing *Lowell Mfg. Co. v. Hogg*, 70 Fed. 787).

#### **Dividend distinguished**

The term "profit" has a larger meaning than "dividends," and covers benefits of any kind, excess of value over cost, acquisition beyond expenditure, gain, or advance. *Simcoke v. Sayre*, 126 N. W. 816, 817, 148 Iowa, 132.

"Profits" and "dividends" of a corporation are not necessarily synonymous terms. *Boothe v. Summit Coal Min. Co.*, 104 Pac. 207, 212, 55 Wash. 167, 19 Ann. Cas. 1255 (citing *City of Allegheny v. Pittsburgh, A. & M. Pass. R. Co.*, 36 Atl. 161, 179 Pa. 414).

#### **As earnings or income**

Profits as earnings, see Earnings.

"'Profits' and 'income' are sometimes used as synonymous terms; but, strictly speaking, 'income' means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures, while 'profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into account." In re *Murphy*, 80 N. Y. Supp. 530, 533, 80 App. Div. 238 (quoting and adopting definition in *People v. Sup'rs of Niagara County* [N. Y.] 4 Hill, 20).

As used in a will bequeathing stock of a corporation in trust, the profits to be paid to the beneficiaries, the word "profits" was interchangeable with "income" and referred to the earnings paid over by the officers of the corporation in the form of dividends to the trustees. In re *Stevens*, 95 N. Y. Supp. 297, 305, 46 Misc. Rep. 623.

Under Const. art. 9, § 3, permitting the exemption from taxation of property used exclusively for school purposes, and Revenue Act, § 2, the fact that the rents of property

are devoted to school purposes does not exempt it from taxation, so that the income of a school which may be used for any purpose by it, or is in fact being loaned out on interest, is not exempt; but a fund donated to it, to be held to use the income for endowing free scholarships, is exempt, such income not being a "profit." *Monticello Seminary v. Board of Review of Madison County*, 94 N. E. 938, 249 Ill. 481.

"Earnings expended on a new structure may or may not be 'profits.' Whether they are or not depends on other things to be taken into the account besides the mere fact of such expenditure." *Grant v. Hartford & N. H. R. Co.*, 93 U. S. 225, 228, 23 L. Ed. 878.

"If a railroad company should make a second track when they had but a single track before, this would be a betterment or permanent improvement, and if paid out of the earnings would be fairly characterized 'profits used in construction.'" *City of Erie v. Erie Gas & Mineral Co.*, 97 Pac. 468, 469, 78 Kan. 348 (quoting with approval from *Grant v. Hartford & N. H. R. Co.*, 93 U. S. 225, 23 L. Ed. 878).

#### Increase in value

Where all of the stockholders in a corporation having a capital of \$15,000 agreed that the plant, good will, etc., was worth \$25,000, the increase of \$10,000 could be treated as "profits" in reorganizing the company, and stock to that amount issued to the stockholders in proportion to their holdings in the old corporation. *McGinnis v. O'Connor*, 72 Atl. 614, 615, 111 Md. 695.

#### As net earnings or income

"Profit" implies, without more, the gain resulting from the employment of capital; the excess of receipts over expenditures. *Fechtel v. Palm Bros. & Co.*, 133 Fed. 462, 469, 66 C. C. A. 336 (citing *Black*, Law Dict.).

The word "profits" in a manufacturing or agricultural business means the net earnings or the excess of returns over expenditures, and relates to any excess which remains after deducting from the returns the operating expenses and depreciation in capital, and also, in a proper case, interest on capital employed. *Morrow v. Missouri Pac. R. Co.*, 123 S. W. 1034, 1039, 140 Mo. App. 200.

"The term 'profits,' out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans." *Mobile & O. R. Co. v. State of Tennessee*, 14 Sup. Ct. 968, 971, 153 U. S. 486, 88 L. Ed. 793.

The surplus over and above the capital stock and the debts of a corporation constitute the "profits," which term is synonymous with net earnings. *Mangham v. State*, 75 S. E. 508, 610, 11 Ga. App. 440.

Under Act No. 241 of 1908, § 1, making it unlawful for any corporation to declare

any dividends except from actual profits, or to withdraw or in any manner to pay the stockholders any portion of the company's capital stock, the term "profits" denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans. *Van Vleet v. Evangeline Oil Co.*, 56 South. 848, 129 La. 406.

"Profits" represent the net gain made from an investment or from the prosecution of some business. Webster defines the word as "acquisition beyond expenditure; excess of value received for producing, keeping, or selling over cost; hence pecuniary gain in any transaction or occupation." When the "profits" of a business depend solely on the personal efforts of him who prosecutes it, they form an accurate measure of his earning capacity; but, when capital is also required, this must be taken into account, and his power to earn money may be inferred, though with approximate accuracy only. It has been said that the "profits" derived from capital invested in business cannot be considered as earnings, but in many cases 'profits' derived from the management of a business may properly be considered as measuring earning power. This is especially true where the business is one which requires and receives the personal attention and labor of the owner." *Mitchell v. Chicago, R. I. & P. R. Co.*, 114 N. W. 622, 625, 138 Iowa, 283.

The word "profits," in a lease providing that the lessee should sell everything that was produced on the demised premises and divide the profits with the lessor every month, is what remains of the proceeds of the sales after all expenses incident to running the farm are deducted. *Mead v. Owen*, 67 Atl. 722, 723, 80 Vt. 273, 13 Ann. Cas. 231.

"A 'profit' is the excess of receipts over expenses, and, in winding up a partnership, nothing is properly divisible as a profit which does not answer this description. So that, when it is once shown that profits have been ascertained and divided, it must be inferred that at least all of the ordinary running expenses of the partnership have been paid, and this would include any outlay or advances made by either partner on account of partnership transactions." *Simpson v. Miller*, 94 Pac. 567, 568, 51 Or. 232 (citing 2 *Lindl. Partn.* \*394; 1 *Lindl. Partn.* \*382).

An agreement between two persons for the purchase and sale of real estate and a division of the profits, which binds one of them to furnish the money for the purchase, and which binds the other to furnish his efforts and experience, and which provides that the latter shall receive a third of the profits made in the venture, requires that interest on the money furnished for the purchase of unproductive realty from the respective dates of the purchase must be allowed before profits can be distributed; the

word "profits" being the excessive returns over advancements, and interest on the price of unproductive property being a part of its cost. *Barry v. Bernays*, 141 S. W. 933, 934, 162 Mo. App. 27.

The word "profits," as ordinarily used and understood, must be taken to mean the excess of receipts over expenditure; that is, net earnings from the work in hand. An assignment, by C. and D. to a bank, of "all the profits that may arise out of a certain contract which we now have with the C. Railway Company for certain grading, \* \* \* and we do hereby assign \* \* \* to said bank all claims and demands against said C. Railway Company growing out of said contract over and above the cost and expense of performing and completing the work provided by the terms of said contract," is only of the net earnings from the work. *Price Bros. v. Cushing & O'Keefe*, 110 N. W. 1030, 1031, 135 Iowa, 457 (citing *Hubbard v. Weare*, 44 N. W. 915, 79 Iowa, 678; *Connolly v. Davidson*, 15 Minn. 519 [Gil. 428], 2 Am. Rep. 154).

#### As net profits

Under exceptional circumstances showing an intended distinction there may be a difference in the meaning of the term "net profits" and "profits," but usually they mean the same thing. *Thomas v. Columbia Phonograph Co.*, 129 N. W. 522, 523, 144 Wis. 470.

#### As proceeds of estate

In an item of a will providing that all incomes and profits growing out of testator's real estate, no matter where situated, should be used to pay the several bequests, the words "incomes" and "profits," coupled with directions to rent and sell, clearly included proceeds of sales as well as rents in the meantime, especially in view of the testator's use, in another item, of the word "income," meaning proceeds. In *re Handley's Estate*, 61 Atl. 350, 352, 212 Pa. 11.

### PROFIT À PRENDRE

The term "profit à prendre" is defined to be "a right to take something out of the soil of another, as a right of common, and also some minor rights, as a right to take drifted sand, or a liberty to fish, fowl, hunt, and hawk." *State v. Mallory*, 83 S. W. 955, 958, 73 Ark. 236, 67 L. R. A. 773, 3 Ann. Cas. 852 (citing 1 Crabb, Real Prop. 125; *Phear, Waters*, 57).

The right to fish is in the ancient legal French called a right "profit à prendre"; a right so peculiarly for personal enjoyment that it is incapable of being acquired by the general public, either by custom or dedication. *Albright v. Sussex County Lake & Park Commission*, 57 Atl. 398, 399, 71 N. J. Law, 303, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48.

The interest conveyed by an oil and gas lease is a mere license to explore, an in-

corporeal hereditament, a "profit à prendre." A mechanic's lien will not attach to the interest acquired in lands by the lessee under an ordinary oil or gas lease, notwithstanding oil or gas is discovered. *Phillips v. Springfield Crude Oil Co.*, 92 Pac. 1119, 76 Kan. 783.

#### Easement distinguished

As easement in gross, see *Easement in Gross*.

The term "profit à prendre" is in the nature of an easement, and includes such rights regarding another's land as those of cutting the grass, pasturing cattle, taking coal or mineral from the soil, or taking water that has been artificially accumulated or restrained so as to be a source of power, and of hunting or fishing. *Baker v. Kenney*, 124 N. W. 901, 903, 145 Iowa, 638, 139 Am. St. Rep. 456.

A fishery, so far as it is exercised on another's land, is a "profit à prendre," and cannot therefore be claimed by way of easement. *Hume v. Rogue River Packing Co.*, 92 Pac. 1065, 1068, 51 Or. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732.

"Strictly speaking, a right to cut and take ice is perhaps more in the nature of a 'profit à prendre' than an easement, though it comes within the definition of an easement which was given by Chief Justice Shaw in *Ritger v. Parker*, 62 Mass. (8 Cush.) 145, 54 Am. Dec. 744, and which was quoted with approval by the court in *Owen v. Field*, 162 Mass. 90." A lease, for a round sum, of premises on the shores of a pond, to be used for a dwelling house and other buildings for the ice business, and providing that the lessor leases to the lessee the right to cut and take ice from the pond, and that the lessee, in addition to the rent, shall deliver to the lessor as much ice as shall be required for two families during the lease, annexes the right to take ice to the leased premises as an easement or a "profit à prendre." *Walker Ice Co. v. American Steel & Wire Co.*, 70 N. E. 937, 939, 185 Mass. 463.

"A 'profit à prendre' in the land of the owner, when not granted in favor of some dominant tenement, cannot be said to be an easement but an interest or estate in the land itself" (quoting and adopting definition in *Post v. Pearsall* [N. Y.] 22 Wend. 432). A and B, tenants in common of a tract of land, divided it by a deed from each to the other of his undivided one-half interest in a moiety of the tract. The line which divided the portion afterward held by A. in severalty from the portion held by B. in severalty separated a mill and milldam situated on B.'s portion from a deposit of gravel on the west side of the milldam located on A.'s portion. In the partition deed from A. to B. was this clause: "The privilege and liberty to get gravel from the west side of the milldam to keep the same in repair is also granted in this deed to the possessor of the mill." Held,

that a right of "profit à prendre" in the land of A. was granted by A., which right was appurtenant to the sawmill property of B. Held that, like an easement, the right was attached to and followed the property of B., and the burden of servitude was attached to and followed the property of A. into the hands of their respective heirs or purchasers. *Hopper v. Herring*, 67 Atl. 714, 718, 75 N. J. Law, 212 (citing *Godd. Easem.* p. 7; 14 Cyc. p. 1142, subd. E; 2 Washb. Real Prop. p. 276; *Post v. Pearsall* [N. Y.] 22 Wend. 425; *Ritger v. Parker*, 8 Cush. [62 Mass.] 145, 54 Am. Dec. 744; *Owen v. Field*, 102 Mass. 103; *Huntington v. Asher*, 96 N. Y. 610, 48 Am. Rep. 652; *Goodrich v. Burbank*, 12 Allen [94 Mass.] 459, 90 Am. Dec. 161; *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612; *Grubb v. Gullford* [Pa.] 4 Watts, 223, 28 Am. Dec. 700; *Eckert v. Peters*, 36 Atl. 491, 55 N. J. Eq. 379; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Funk v. Haldeman*, 53 Pa. 229).

### PROFIT SHARING

The charter of an insurance organization provided that the corporation should not engage in any business for gain, but that its purpose should be fraternal and benevolent; that its property should not be "divided among the members, but descend to their successors for fraternal and benevolent purposes." Its constitution declared that the funds of its endowment rank should be used to defray expenses and legitimate death losses. Held, that such association was not a "profit-sharing" institution, within Rev. St. 1899, § 1408, declaring that a fraternal beneficiary association shall be one not conducted for profit, etc., and this though it derived from assessments and interest-bearing securities a fund which sometimes was in excess of the amount required for the payment of accrued benefits. *Tice v. Supreme Lodge Knights of Pythias*, 100 S. W. 519, 527, 123 Mo. App. 85.

### PROFOUND SLUMBER

"Profound slumber" is a physical or other disability to leave the position occupied by the sleeper. *Alabama G. S. R. Co. v. Hamilton*, 33 South. 157, 159, 185 Ala. 343.

### PROGENY

The word "progeny," as used in a will in which testator devises land to his niece to hold for life and to her progeny, if any, was equivalent to "issue," and such niece took a life estate, with remainder in fee to her issue, and testator's intention could not be defeated by construing the word as a word of limitation. *Baxter v. Bickford*, 88 N. E. 7, 8, 201 Mass. 495.

### PROGRESS

#### PROGRESS OF SETTLEMENT

See *During Progress of Settlement*.

### PROGRESSIVE TAX

"If different rates are levied on inheritances or bequests according to the degree of relationship of the heir or successor, the tax is sometimes called a graduated or 'progressive tax.'" *State ex rel. Foot v. Bazille*, 106 N. W. 93, 96, 97 Minn. 11, 6 L. R. A. (N. S.) 732, 7 Ann. Cas. 1056.

### PROGRESSIVELY FED

The term "propelled," in a claim for a patent of an apparatus for reproducing sound, is the equivalent of "progressively fed." *Victor Talking Mach. Co. v. Duplex Phonograph Co.*, 177 Fed. 248, 249, 255.

### PROHIBIT

Prohibited by law or otherwise, see *Otherwise*.

Strictly the word "prohibit" means to forbid or interdict by authority; hinder; debar; prevent. *Timm v. Common Council of Village of Caledonia Station*, 112 N. W. 942, 149 Mich. 323.

Where the term "prohibit" is used, it is in the sense of interdict; that is, to stop altogether. Most, if not all, police regulations do in fact interfere with free exercise of the businesses subjected to them. But this interference alone cannot be made the test of their validity; if they afford reasonable facilities for the conduct of the business, they do not amount to a "prohibition" but to a "regulation" thereof. *City of Butte v. Paltrovich*, 75 Pac. 521, 30 Mont. 18, 104 Am. St. Rep. 698.

The word "prohibit" is an active transitive verb. As defined by the Standard Dictionary, it means to forbid, especially by authority or legal enactment; interdict, as to prohibit liquor selling or a person from selling liquor. The word "prohibit," in its legal sense, implies some enactment forbidding something. Prohibition in the United States specifically means the forbidding by legislative enactment of the manufacture and sale of alcoholic liquor for use as beverage. "Prohibit," as applied to the sale of spirituous liquors, implies some positive act done by authority. The local option law (Pen. Code 1895, § 428), as amended by act of 1897, is by its terms made applicable only in those counties where the sale of intoxicating liquors "is prohibited by law, high license, or otherwise." The sale of liquor is not "prohibited by law, high license, or otherwise" in a county which has not adopted the local option law, although the commissioners have granted no licenses; and therefore an indictment in that county for an alleged violation of said section is invalid. *Rose v. State*, 58 S. E. 20-22, 1 Ga. App. 596.

"The designation of localities where the sale of intoxicating liquor is prohibited is not 'prohibition' but 'regulation' of the sale."

Garonzik v. State, 100 S. W. 374, 375, 50 Tex. Cr. R. 533.

Under Const. art. 7, § 8, giving the circuit courts original jurisdiction of criminal and civil matters in all cases, not hereafter prohibited by law, the general jurisdiction of the circuit courts is "prohibited by law" when jurisdiction has been in terms or by necessary implication conferred upon some other court. Goyke v. State, 117 N. W. 1027, 1029, 136 Wis. 557.

"Prohibition" is not a crusade against the use of medicines, household remedies, culinary and toilet articles, and all "soft drinks." It is a crusade against the multi-form evils of intemperance caused by the use of intoxicating liquors as a beverage, and therefore a crusade against vice and crime greater in extent and enormity than the combined evils of war, pestilence, and famine. The intention of the Legislature in enacting the prohibition statute (Acts 1907, p. 81) was to prevent the evils of intemperance caused by the use of intoxicating liquors as a beverage. The laws should be interpreted so as to accomplish this beneficial purpose. There should be a reasonable construction, equally removed on the one hand from that extreme strictness which would make it unpopular or ridiculous, and difficult of enforcement and, on the other, from that latitude which would render it ineffective. Roberts v. State, 60 S. E. 1082, 1086, 4 Ga. App. 207.

#### As conferring power to punish

The word "prohibit," as used in the title of an act to prohibit the sale of intoxicating liquors, is sufficiently broad to authorize legislation making penal the sale which is prohibited by the act. James v. State, 52 S. E. 295, 124 Ga. 72.

#### As exclude

See Exclude.

#### As regulate

Power to regulate, as conferring power to prohibit, see Regulate; Regulate Commerce.

The word "prohibit," in an act granting a city council authority to regulate or prohibit the use or placing of telegraph, telephone, or light poles in or over the streets, has been construed as simply granting authority to make proper regulations to preserve to the public use of the streets as common highways of travel. City of Wichita v. Old Colony Trust Co., 132 Fed. 641, 646, 66 C. C. A. 19 (citing Michigan Tel. Co. v. City of Benton Harbor, 80 N. W. 388, 121 Mich. 512, 47 L. R. A. 104).

"Prohibition," as applied to the sale of intoxicating liquors, means interdiction of the liberty of making and selling or giving away intoxicating liquors, for other than medicinal, scientific, and religious purposes; the prohibiting by law of the sale of alco-

holic liquors. Thus a prohibitory law, to be classed as such, must in the same instant and in the same way become effective to interdict the sale of liquors throughout all parts of the jurisdiction of the lawmaking power, while "regulation" means to restrict and control the authorized sale of liquors by providing the conditions under which sales may be made. McPherson v. State, 90 N. E. 610, 613, 174 Ind. 60, 31 L. R. A. (N. S.) 188.

"Regulation" and "prohibition" are distinct and incongruous subjects of legislation. The prohibitory act is not unconstitutional on the ground that the exceptions created by the act provide the methods whereby those exceptions may be availed of without violating the major purposes of the act, and contains the subject of regulations, as well as the subject of prohibition of dealings in intoxicants foreshadowed by the title, for while, in a sense, regulation is accomplished by the act it is only a method by which the universal prohibition is bereft of its penalizing qualities by affording exceptions to those who comply with the act. State ex rel. Woodward v. Skeggs, 46 South. 268, 273, 154 Ala. 249 (quoting and adopting definition in Miller v. Jones, 80 Ala. 89).

#### As restrain

See Restrain.

### PROHIBITED MARRIAGE

A marriage which may at once be valid to all intents and purposes, and involves the parties or third persons in penal consequences, is called a "prohibited marriage." Hunt v. Hunt, 100 Pac. 541, 542, 23 Okl. 490, 22 L. R. A. (N. S.) 1202 (quoting Stew. Marriage & Divorce, § 49).

### PROHIBITION (Writ of)

Return to writ, see Return.

"The office of a writ of 'prohibition' is to restrain excess or improper assumption of jurisdiction." Taylor v. Bliss, 57 Atl. 939, 28 R. I. 16.

The writ of "prohibition" is an extraordinary judicial writ, directed to an inferior tribunal to prevent use or usurpation of judicial functions. Norton v. Emery, 81 Atl. 671, 672, 108 Me. 472.

"The writ of 'prohibition' may be invoked to check the use of judicial power when sought to be exerted beyond the lines which the law has marked as the limits of the operation of the power." State ex rel. Pulliam v. Fort, 81 S. W. 476, 478, 107 Mo. App. 328.

"A writ of 'prohibition' may be defined as an extraordinary judicial writ, issuing out of a court of superior jurisdiction, and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested." People ex rel. Metz v. Day-

ton, 105 N. Y. Supp. 809, 812, 120 App. Div. 814 (quoting High, Extr. Leg. Rem. p. 549).

Sand. & H. Dig. § 4892, defines a "writ of prohibition" as one addressed to an inferior court, and such a writ only lies to a court, not to a judge or chancellor at chambers, and not to the court until the jurisdictional question has been raised there and overruled. *Reese v. Steele*, 83 S. W. 335, 336, 73 Ark. 66.

The "writ of prohibition," in the exercise of judicial discretion, may go to confine a court within the limits of its jurisdiction, whether it has no jurisdiction at all, or is exercising powers in excess of its rightful jurisdiction. *State ex rel. Judah v. Fort*, 109 S. W. 737, 210 Mo. 512.

"A 'writ of prohibition' is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising a jurisdiction with which it has not been vested by law. Courts almost universally preserve the original common-law features of the writ of prohibition, and confine its use to the prevention of usurpation or excess of jurisdiction by courts and bodies possessing, for certain purposes and in certain instances, quasi judicial powers. The office of a writ of prohibition is to restrain subordinate courts and inferior tribunals of every kind from exceeding their jurisdiction." *People ex rel. Bender v. Milliken*, 77 N. E. 872, 873, 135 N. Y. 35 (citing and approving *Spell. Extr. Rem. §§ 1716, 1722; Appo v. People*, 20 N. Y. 531).

At common law the "writ of prohibition" was issued on the suggestion that the cause originally, or some collateral matter arising therein, did not belong to the inferior jurisdiction, but the cognizance of some other court. "It was an original remedial writ, provided as a remedy for encroachment of jurisdiction. Its office was to restrain subordinate courts and inferior judicial tribunals from extending their jurisdiction." *Stein v. Morrison*, 75 Pac. 246, 256, 9 Idaho, 426.

As a general rule, "prohibition" will not issue unless it clearly appears that the inferior tribunal or board is about to proceed in some matter over which it possesses no jurisdiction, or that it by some acts or declarations indicates an intention to pursue such a course. Prohibition is a process by which a superior court prevents an inferior court or tribunal from usurping or exercising a jurisdiction with which it has not been invested by law and to arrest it from exercising a want or an excess of a legal jurisdiction, and not to prevent or correct an erroneous exercise of jurisdiction. *Campbell v. Durand* (Utah) 115 Pac. 986, 988.

"The 'writ of prohibition' is an extraordinary remedy, and should be issued only in cases of extreme necessity. Before it should issue, it must appear that the petitioner has applied to the inferior tribunal

for relief. The object of the writ is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such action. It does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal. It is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. Like all other prerogative writs, it is to be used with caution and forbearance for the furtherance of justice, and securing order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable. The writ should not be granted, except in cases of usurpation or abuse of power, and not then, unless the other remedies provided by law are inadequate to afford full relief. If the inferior court has jurisdiction of the subject-matter of the controversy, and only errs in the exercise of its jurisdiction, this will not justify a resort to the extraordinary remedy by prohibition." *Bell v. First Judicial District Court*, 81 Pac. 875, 876, 28 Nev. 280, 1 L. R. A. (N. S.) 843, 113 Am. St. Rep. 854, 6 Ann. Cas. 982 (quoting and adopting *Walcott v. Wells*, 24 Pac. 367, 21 Nev. 51, 9 L. R. A. 59, 37 Am. St. Rep. 478); *Turner v. Langan*, 88 Pac. 1088, 1089, 29 Nev. 281 (quoting and adopting definition in *Walcott v. Wells*, 24 Pac. 368, 21 Nev. 51, 9 L. R. A. 59, 37 Am. St. Rep. 478); *Bell v. First Judicial District Court*, 81 Pac. 875, 28 Nev. 280, 1 L. R. A. [N. S.] 843, 113 Am. St. Rep. 854, 6 Ann. Cas. 982).

"The 'writ of prohibition' is applicable whenever judicial functions are assumed which do not rightfully belong to the person or court assuming to exercise those functions. It is the nature of the act which determines the propriety of the writ." The writ of prohibition runs only to judicial tribunals, and will not issue to prevent the state board of health from revoking a license to practice medicine and surgery. *State ex rel. McAnally v. Goodier*, 93 S. W. 928, 930, 195 Mo. 551.

#### Adequacy of other remedy

The "writ of prohibition" will issue only when the inferior tribunal usurps or exceeds the power conferred on it by law, and when there is no other adequate remedy. *Board of Home Missions of Presbyterian Church of United States v. Maughan*, 101 Pac. 581, 583, 35 Utah, 516, 24 L. R. A. (N. S.) 874.

At common law the writ of "prohibition" prevents excess or usurpation of jurisdiction, and prohibition may not be resorted to when the ordinary remedies by appeal, writ of review, certiorari, or injunction, or other modes of review, are available. *State ex rel. Robinson v. Durand*, 104 Pac. 760, 764, 36 Utah, 93.

"The object and purpose of a 'writ of prohibition' is to prevent a court of peculiar, limited, or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance." The writ is equally appropriate and available to keep such a court within the boundaries of its lawful power in given cases, no less than to prevent its cognizance of causes not consigned to its jurisdiction. Where a court acted within its jurisdiction in granting a change of venue, a "writ of prohibition" will not lie to correct its procedure, however erroneous it may have been; this question being proper for determination on appeal only. *State ex rel. Kochitzky v. Riley*, 101 S. W. 567, 570, 203 Mo. 175, 12 L. R. A. (N. S.) 900 (citing 2 Bailey, Jurisdiction, § 449; *Smith v. Whitney*, 6 Sup. Ct. 570, 116 U. S. 167, 29 L. Ed. 601).

Within a statute giving the superior court authority to issue a "writ of prohibition" to arrest proceedings of a tribunal exercising judicial functions in excess of its jurisdiction, and a section providing that the writ will not issue where there is a plain, speedy, and adequate remedy in the ordinary course of the law, the writ will not issue to stay receivership proceedings to provide security for the payment of temporary alimony, etc., from orders for payment of which the husband has appealed, since the writ of supersedeas offers defendant a speedy and adequate remedy to stay the proceedings. *McAneny v. Superior Court Santa Clara County*, 87 Pac. 1020, 1021, 150 Cal. 6.

The "writ of prohibition," being a prerogative writ to be issued with great caution to secure order and regularity in all tribunals where there is no other regular and ordinary remedy, will not lie to arrest the proceedings in the probate court upon the ground that the testator was not a resident of the district; the issue of residence being open to contest in the probate court and reviewable by appeal. *Whitehead v. Roberts*, 85 Atl. 538, 541, 86 Conn. 351.

A "writ of prohibition" is an extraordinary writ and is proper to be issued only in cases of extreme necessity. It should appear that it is the only adequate remedy of the party making the application therefor. It will not lie in a case which may be redressed in the ordinary course of judicial proceeding, and is not to be made a substitute for any other method of obtaining the relief sought. If a complete remedy lies by appeal, certiorari, mandamus, or in any other manner, this writ should be denied. It is different from an injunction in that the injunction is addressed to the litigating parties, while a writ of prohibition is addressed to the inferior court itself. *Crittenden v. Town of Booneville*, 45 South. 723, 725, 92 Miss. 277, 131 Am. St. Rep. 518 (citing High, Extr. Leg. Rem. §§ 762, 763).

"A 'writ of prohibition' is to prevent the exercise by a tribunal possessing judicial powers of jurisdiction over matters not within its cognizance or exceeding its jurisdiction in matters of which it has cognizance." Where relator was a veteran of the class specified in Laws 1904, p. 1694, c. 697, under the express provisions whereof he had a remedy by certiorari to review proceedings against him in case they resulted in his removal or attempted removal from a position held by him by appointment or employment in the city of New York, he was not entitled to an absolute writ of prohibition. *People ex rel. Crowley v. Butler*, 103 N. Y. Supp. 329, 330, 53 Misc. Rep. 366 (quoting and adopting definition in *Thomson v. Tracy*, 60 N. Y. 31, 37).

#### As discretionary writ

A writ of "prohibition" is not a writ of right, but is a matter of sound judicial discretion in each case, and is available only when the inferior court, body, or tribunal is about to act without jurisdiction or in excess of jurisdiction. Rev. Codes 1905, § 7835, expressly declares that the writ is the counterpart of the writ of mandamus. *Zinn v. District Court for Barnes County*, 114 N. W. 475, 476, 17 N. D. 128.

#### As injunction

While "prohibition" is similar to the remedy by injunction against proceedings at law, the object in each case being restraint of legal proceedings, an "injunction" is directed only to the parties litigant, and prohibition is directed to the court itself, commanding cessation of exercise of jurisdiction to which it has no legal claim. The right to prohibition implies that a wrong is about to be committed, not by the parties litigant, but by the person or court assuming to exercise judicial power, and against whom the writ is asked. *State ex rel. Terminal R. Ass'n of St. Louis v. Tracy*, 140 S. W. 888, 890, 237 Mo. 109, 37 L. R. A. (N. S.) 448.

#### As mandamus

"Mandamus is a legal remedy to compel action in accordance with legal duty, while 'prohibition' is a legal remedy to restrain action in excess of legal authority." *State ex rel. Pelton v. Ross*, 81 Pac. 865, 867, 39 Wash. 399 (quoting and adopting definition in *Dunklin County v. Dunklin County District Court*, 23 Mo. 454).

Code Civ. Proc. § 1102, in defining the writ of "prohibition," provides: "The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." *Beaulieu Vineyard v. Superior Court of Napa County*, 91 Pac. 1015, 1017, 6 Cal. App. 242.



**Past acts**

"Prohibition" is a restraining, not a corrective, remedy. It "issues only to prevent the commission of a future act, and not to undo an act already performed." Prohibition lies "only to prevent the doing of an act, and can never be used as a remedy for acts already done." *Williamson v. Mingo County Court*, 48 S. E. 835, 836, 56 W. Va. 38, 3 Ann. Cas. 355 (quoting *High, Extr. Leg. Rem.* [3d Ed.] § 766; *Haldeman v. Davis*, 28 W. Va. 324, 326).

**As prerogative writ**

The "writ of prohibition" is a prerogative writ issued out of a superior court and directed to a judge of an inferior court, or to a party to a suit in an inferior court, or to any person whom it may concern, commanding that no further proceedings be had in a particular case. The writ is as old as the common law itself. The oldest authentic instance of the grant of such a writ was against the bishop in the third year of the reign of Edward III. 2 Rolle, Abr. 1668, p. 281. Originally in England the writ was most frequently employed against the ecclesiastical courts to restrain them from acting without jurisdiction or in excess of jurisdiction, and, while it never issued for the correction of mere errors or irregularities, it was frequently employed in England, where the inferior court proceeded contrary to the course of the common law, or in violation of the principles of law, and even the inferior courts of law were prohibited when so acting. The remedy by prohibition has been always regarded as preventive rather than corrective. It is the counterpart of mandamus, preventing action while mandamus commands action. It is a common-law writ and operates upon courts or others exercising judicial functions, and it is as to courts what an injunction is to individuals. In later days in England, under the judicature act of 1873, it is not uncommon for the writ of prohibition to be accompanied with a writ of injunction. The general rule, both in England and America, is that a writ of prohibition will not lie where the inferior court has jurisdiction of the class of cases to which the particular case belongs. But this does not exhaust the functions of the writ or define the limitations under which it may be properly invoked. The books are full of cases where the writ has been granted in cases where the inferior court has jurisdiction of the class of cases to which the particular case belongs, but in which the inferior court has acted in excess of its jurisdiction, and cases are likewise not wanting in which the writ has been granted where the inferior court, in exercising its jurisdiction, had proceeded outside the course of the principles of law. Cases also exist where the inferior court has been prohibited from acting in cases which belong to the class of cases over which the inferior court original-

ly had jurisdiction, but where the particular case sought to be prohibited was clearly a sham proceeding, not instituted or prosecuted for public good, but for ulterior and unlawful purposes to hinder or obstruct the proper administration of law. This class of cases constitutes what may be termed exceptions to the general rule. *State ex rel. McNamee v. Stoble*, 92 S. W. 191, 215, 194 Mo. 14 (quoting and adopting definition in *Lloyd, Prohibition*, p. 45).

**Prevention of ministerial acts**

"A 'writ of prohibition' is to prevent the exercise of a tribunal possessing judicial powers, of jurisdiction over matters not within its cognizance or exceeding its jurisdiction in matters of which it has cognizance. It will not lie to restrain a ministerial act." *Kalbfell v. Wood*, 92 S. W. 230, 233, 193 Mo. 675 (quoting and adopting definition in *Thomson v. Tracy*, 60 N. Y. loc. cit. 37).

"Prohibition" is a writ to restrain judicial and not ministerial acts, though performed by judges. Prohibition does not lie to restrain the commissioners' court from proceeding with the construction of a bridge, for the building of which a contract has been let by it; the allowance of a claim therefor being a ministerial act. *Goodwin v. State ex rel. Wakefield*, 40 South. 122, 123, 145 Ala. 536 (citing *In re Pierce*, 8 South. 74, 89 Ala. 177; *Atkins v. Siddons*, 66 Ala. 453).

**Regulation of proceedings of lower court**

The writ of "prohibition" only issues in cases where the inferior court is proceeding or is about to proceed in excess of its jurisdiction, and cannot be used to correct anticipated errors. *Kinard v. Police Court of City of Oakland*, 83 Pac. 175, 2 Cal. App. 179.

"The 'writ of prohibition' is an extraordinary prerogative writ, as old as the common law itself. It lies to prevent the encroachment, excess, or improper assumption of jurisdiction on the part of an inferior court or tribunal. But, where the inferior court has jurisdiction of the person and subject-matter, the writ does not lie to prevent an erroneous decision, or to prevent the enforcement of an erroneous judgment. It does not lie to correct errors. Nor is it allowed even in cases of usurpation or abuse of power, unless existing remedies are inadequate or inapplicable. When the encroachment, excess, or improper assumption of jurisdiction can be corrected by appeal, writ of error, or certiorari, prohibition will not lie." *Holladay v. Hodge*, 65 S. E. 952, 953, 84 S. C. 91.

Under Civ. Code Prac. § 479, defining the "writ of prohibition" as an order to an inferior court to prevent the usurpation of jurisdiction, and Cr. Code Prac. § 25, authorizing the circuit court, by writ of prohibition, to restrain other courts of inferior jurisdiction

from exceeding their criminal jurisdiction, the circuit court may issue the writ of prohibition to prevent one, claiming to be police judge of a district, from executing a judgment of his court for a fine and costs, where the provision creating the police court has been repealed. *Morris v. Randall*, 112 S. W. 856, 858, 129 Ky. 720.

The "writ of prohibition" goes only to restrain the assumed exercise of jurisdiction where none exists, and not to its erroneous or irregular exercise. It is not the office of the writ to usurp the functions of an appeal, and it cannot be assumed that the circuit court will permit an insufficient notice of contest to receive his judicial sanction; but, if he should do so, the remedy of the relator is ample in other directions. *State ex rel. Wells v. Hough*, 91 S. W. 905, 915, 193 Mo. 615 (citing *State ex rel. Brown v. Klein*, 22 S. W. 693, 116 Mo. 259 loc. cit. 263).

The function of a "writ of prohibition" is to arrest proceedings without or in excess of jurisdiction, and not to correct errors. *Hindman v. Great Western Coal Development & Mining Co.*, 89 Pac. 894, 895, 46 Wash. 317.

A "writ of prohibition" lies as well to prevent an excessive or unauthorized application of judicial force as where a court assumes judicial power not granted by law. *State ex rel. Missouri Pac. R. Co. v. Williams*, 120 S. W. 740, 741, 744, 221 Mo. 227.

A "writ of prohibition" must be directed to some judicial officer. Its purpose is to restrain judicial action and not legislative, executive, or administrative action. A few courts hold that administrative boards exercising quasi judicial function may be reached by the writ, but such holdings are confined to two or three states. *State ex rel. McEntee v. Bright*, 123 S. W. 1057, 1060, 224 Mo. 514, 135 Am. St. Rep. 552, 20 Ann. Cas. 955 (citing 32 Cyc. p. 600).

A "writ of prohibition" arrests the proceedings of a court when its proceedings are without or in excess of its jurisdiction. Hence, where an appeal from the probate court to the district court has not been perfected by filing the undertaking required by law, and the district court proceeds to try the case, its action may be arrested by a writ of prohibition. *Gunderson v. District Court, Fourth Judicial Dist.*, 94 Pac. 166, 167, 14 Idaho, 478 (citing *Rev. St.* 1887, § 4994).

Where a court is without jurisdiction, a party is entitled to a "writ of prohibition," which is an order from an appellate court forbidding the court of the first instance to proceed further in the cause on the ground that cognizance of such cause does not belong to such court, or that it is not competent to decide it. *Iberia, St. M. & E. R. Co. v. Morgan's L. & T. R. & S. S. Co.*, 56 South. 417, 129 La. 492.

The writ of "prohibition" is an order of the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction. *Civ. Code Prac.* § 479. If the inferior court has jurisdiction, the circuit court cannot grant a writ of prohibition to prevent the inferior court from deciding the case, although he may be of the opinion that it will decide it improperly. *Hughes v. Holbrook* (Ky.) 108 S. W. 225 (citing *Scott v. Tully*, 49 S. W. 1063, 106 Ky. 69); *Thomas v. Davis* (Ky.) 110 S. W. 408, 409.

The "writ of prohibition" will not issue to arrest the proceedings of an inferior tribunal, unless such proceedings are without or in excess of the jurisdiction of such tribunal, and there is no plain, speedy or adequate remedy in the ordinary course of law. *Johnston v. Superior Court of Sacramento County*, 87 Pac. 211, 212, 4 Cal. App. 90 (citing *Code Civ. Proc.* §§ 1102, 1103; *Works, Courts*, § 81; *Maurer v. Mitchell*, 33 Cal. 292; *White v. Superior Court of City and County of San Francisco*, 42 Pac. 471, 110 Cal. 58).

#### As suit

See Suit.

### PROHIBITION DISTRICT

A "prohibition district," is defined by Local Option Act (Laws 1909, p. 18, § 28) to be any district or territory in which the sale of intoxicating liquors is prohibited by law, and while section 8, forbidding that existing licenses shall be affected by an election in favor of prohibition, may not render the district a prohibition district as to holders of unexpired licenses, yet it will be within the definition of section 28 as one who has no license. *State v. Jordan*, 112 Pac. 1049, 1050, 19 Idaho, 192.

### PROJECT

#### PROJECTION

See Ornamental Projections.

For one, as occasion requires, to obstruct a sidewalk by a skid from his door to a delivery wagon for purposes of moving merchandise between them is not within an ordinance prohibiting one from constructing a "door, porch, window, fence, or other projection which shall project into a street." *Gates & Son Co. v. City of Richmond*, 49 S. E. 965, 103 Va. 702.

### PROJECTOR

Under Const. art. 9, § 8, prohibiting the granting of a license to a foreign corporation to build a railroad within the state, and providing that, where a railroad is partly in the state, the owners or "projectors" thereof must incorporate in the state, the term "projectors" of a railroad not in existence, as distinguished from owners, are those who project, plan, or promote the

prospective railroad or the corporation. 23 St. at Large, p. 1053, providing for the domestication of foreign railroad corporations, is invalid under such constitutional provision. *Carolina, O. & O. Ry. v. McCown*, 66 S. E. 418, 423, 84 S. C. 318.

## PROLAPSUS

In an action for personal injuries, an instruction was not objectionable as calling special attention to "the pulling down sensation, or prolapsus of the womb," because there was no evidence of such sensation. Plaintiff's injury having resulted in prolapsus uteri, it was not necessary to prove the sensation; prolapsus being a pulling down of the womb. *Saeger v. Wabash R. Co.*, 110 S. W. 686, 687, 181 Mo. App. 282.

## PROLONGATION

The word "prolongation," as used in a deed, means a continued or extended line, though consisting of several angles, where such meaning would be consistent with the other words of description, rather than a direct line, which would render the next course in the deed inconsistent with the direction and monument by which it is described. *Chapman v. Hamblet*, 62 Atl. 215, 217, 100 Me. 454.

## PROMISE

See Collateral Promise; Conditional Promise; Implied Promise; New Promise; Original Promise; Special Promise.

A "promise" is a solemn affirmation of intention as a present fact. When a promise is made with no intention of performing it, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense. *Hill v. Gettys*, 47 S. E. 449, 450, 135 N. C. 373 (quoting and adopting definition in 1 Bigelow, Fraud, 484).

One desiring to purchase real estate stated to a real estate broker: "If you get hold of a piece of ground to sell, that is suitable for raising potatoes and onions, and for which I can put in the fair grounds as part pay, 'let me know,' and I will do what is right with you." Held, that the statement did not amount to more than a request to the broker to let the intended purchaser know in case the broker came across a suitable piece of land, and was insufficient to constitute a "promise" to accept land that might be offered by the broker. *Pomeroy v. Wimer*, 78 N. E. 233, 79 N. E. 446, 447, 167 Ind. 440.

The word "promised," standing by itself, without any modifying words, means a distinct, express, unambiguous, and unconditional promise. It means a declaration made

by one person to another, for a good and valuable consideration, by which the promisor binds himself to do or forbear some act, and gives to the promisee a legal right to enforce a fulfillment. To promise is to agree. That, after a discharge in bankruptcy, one "promised" to pay a debt discharged in bankruptcy implied a distinct, express, and unconditional promise. *Stern v. Bradner Smith & Co.*, 80 N. E. 307, 309, 225 Ill. 430, 116 Am. St. Rep. 151 (citing Cent. Dict.).

### Undertaking distinguished

Where, in a suit to enforce a resulting trust, the complaint alleged that the property in controversy was conveyed to defendant on her promise and undertaking to redeliver the deed to plaintiff in the event of his recovery from an illness, etc., that plaintiff delivered the deed to defendant in trust only, defendant promising plaintiff at the time of such delivery, etc., such language did not necessarily mean an oral promise, since the term "promise" may be a contract, a pact, or an agreement, while the word "undertaking" is a stronger term and implies entering into a stipulation. *Dennison v. Barney*, 118 Pac. 519, 521, 49 Colo. 442.

## PROMISE OF MARRIAGE

See Agreement to Marry.

Seduction induced by, see Seduce—Seduction.

## PROMISE OF SALE

See Sale.

## PROMISE OF VALUABLE CONSIDERATION

See Valuable Consideration.

## PROMISE TO ANSWER FOR DEBT, DEFAULT, ETC.

See, also, Promise to Pay Debt of Another.

A promise by the owner of the equity of redemption to pay the mortgage note provided the mortgagee would not foreclose was not within Rev. Laws, c. 74, § 1, cl. 2, as a special "promise to answer for the debt, etc., of another." *Manning v. Anthony*, 94 N. E. 466, 208 Mass. 399, 32 L. R. A. (N. S.) 1179.

A parol statement by one person that he "would remit for cattle" purchased by another person was, in the absence of a showing of partnership or agency, a mere "promise" to answer for the debt of another, and hence within the statute of frauds (Ky. St. § 470, subsec. 4). *Hillert v. Harned*, 135 S. W. 764, 766, 143 Ky. 3.

An agreement to pay an account for another to prevent his prosecution is a promise to answer for the debt, default, or miscarriage of another within Civ. Code, 1895, § 2693, and must be in writing. *Bush v. Roberts*, 62 S. E. 92, 93, 4 Ga. App. 531.

Where a partnership, to enable one of the partners to borrow the money necessary

to commence business, agreed that if the contemplated sureties would sign the note it should become and be a partnership debt, and the sureties signed and the firm obtained the money, its agreement to pay the debt was direct, and not collateral, and not within Rev. St. Colo. 1908, § 2666, requiring every special "promise to answer for the debt of another" to be in writing. *Kelsey v. Munson*, 198 Fed. 841, 842, 117 C. C. A. 483.

Where defendants agreed to pay a mortgage indebtedness on a drug store as a part of the consideration for the purchase of the stock and business, such agreement was an original undertaking, and not a "promise to answer for the debt of another," within the statute of frauds. *Ubert v. Schonger*, 129 N. Y. Supp. 545, 546, 144 App. Div. 696.

A "promise," although in form to pay the debt of another, and although its performance may incidentally have the effect to extinguish the liability, is not within the statute of frauds if the main purpose and object is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party. *Rice v. Hardwick* (N. M.) 124 Pac. 800, 801.

Where the benefit, legal or pecuniary, to the promisor is the inducement for the promise of indemnity, such promise is not within the statute of frauds, as being a special promise to answer for the debt or default of another, but is an original promise binding upon the promisor. *McCormick v. Boylan*, 78 Atl. 335, 336, 83 Conn. 686, Ann. Cas. 1912A, 882.

A parol promise by owner of realty to pay a subcontractor the amount due from the contractor who failed to pay, given in consideration of the subcontractor not filing a lien on the property, is an original promise to answer for one's own debt and not a promise to answer for the debt of another and is not within the statute of frauds. *Wells & Morris v. Brown*, 121 Pac. 828, 67 Wash. 351, Ann. Cas. 1913D, 317.

A promise by officers of a corporation, which had an interest in a certain building to answer for the purchase price of a quantity of lumber sold to the contractor corporation of the construction of the building, was a "promise" to answer for the debt of a third person, required by the statute of frauds to be in writing; and hence such promise, when oral, did not render the officers individually liable thereon. *Roscoe Lumber Co. v. Reynolds*, 108 N. Y. Supp. 1018, 1020, 124 App. Div. 539.

Where the first of two accommodation indorsers of a promissory note having indorsed on the strength of a verbal agreement made by the second indorser, whereby the latter, in consideration that the maker of the note should place in his hands certain valuable personal property to secure

payment of the note by the maker, promised the first indorser to indemnify him against loss thereon, and the maker having furnished the consideration before delivery of the note, and the first indorser having been obliged to pay the note to the holder, it was held, in an action by the first indorser against the second indorser for reimbursement under the agreement of indemnity, that this was not a "promise to answer for the debt, default, or miscarriage of another person," within the statute of frauds. *Wilson v. Hendee*, 66 Atl. 413, 416, 74 N. J. Law, 640.

### PROMISE TO MORTGAGE.

Mortgage distinguished, see Mortgage.

### PROMISE TO PAY

See Unconditional Promise to Pay; Sale. See, also, Promissory Note.

A "promise to pay" is not the equivalent of actual payment, and the entering into an agreement to receive proceeds is not tantamount to the actual receipt thereof. *Christensen v. Beebe*, 91 Pac. 129, 133, 32 Utah, 406.

To be a "promise in writing to pay money," within the 10-year limitation of Rev. St. 1899, § 4272, the writing must contain words either expressing a promise to pay, or from which it may be implied. *Bail v. Peper Cotton Press Co.*, 121 S. W. 793, 802, 141 Mo. App. 26.

"It is a perversion of the word 'promise' to apply it to a declaration made to one who has no interest in or connection with the subject spoken of." An acknowledgment of a mortgage debt to an assessor for the purpose of assessment was not a 'promise to pay,' within the statute of limitations. President and Board of Trustees of California College v. Stephens, 105 Pac. 614, 615, 11 Cal. App. 523 (citing 1 Bouv. Inst. 339).

### PROMISE TO PAY DEBT OF ANOTHER

See, also, Promise to Answer for Debt, Default, etc.

An oral "promise to pay" an existing debt of a third person, founded on a new consideration, is not within the statute of frauds, being an original and not a collateral promise. *Zimmerman v. Holt*, 144 S. W. 222, 223, 102 Ark. 407.

A parol promise of a buyer of mortgaged chattels to pay the mortgage debt, providing that the property shall not be sold without the mortgagee's consent, made in consideration of the mortgagee consenting to the sale, is not a "promise to pay the debt of another." *Gay v. Schaefer*, 100 Pac. 334, 335, 52 Wash. 269.

Where a creditor of a corporation agreed to release it from the whole debt on the payment of a part thereof if its president and a

stockholder would individually assume the remainder, and that was done, the remainder of the debt became the president's obligation and a promise to pay his own debt, and not a "promise to pay the debt of another" within the statute of frauds. *Beall v. Board of Trade of Kansas City*, 148 S. W. 386, 388, 104 Mo. App. 186.

A promise by a stockholder that, if a seller to the corporation will forego his demand for immediate payment for goods delivered, and will continue to sell and deliver goods to the corporation, he will indemnify the seller from any loss on account of the extension of credit is a promise to pay a debt of the corporation, within the statute of frauds and, to be enforceable, it must be in writing. *Goldie-Klenert Distributing Co. v. Bothwell*, 121 Pac. 60, 67 Wash. 264, Ann. Cas. 1913D, 849.

An oral agreement by a partner to pay an order drawn by his copartner in favor of a creditor of the copartner individually, when a firm transaction is settled, unsupported by any consideration, is a "promise to pay the debt of another," within the statute of frauds and is not enforceable. *Hill v. Wright*, 139 S. W. 946, 144 Ky. 806.

Where plaintiff purchased a horse at auction, under a warranty, and returned the same on its proving unsound, an action by him against the auctioneer to recover the money paid as money had and received to plaintiff's use, was not an action on a contract "to pay the debt of another," within the statute of frauds. *McClellan v. Stansberry*, 131 N. W. 15, 16, 151 Iowa, 312, 35 L. R. A. (N. S.) 481.

Where a purchaser of standing timber, who was indebted therefor to the owner, the latter holding a lien on the lumber for the price, transferred his right to cut and remove the lumber to a third person, who orally agreed, in order to obtain a release of the lien, to pay the price, or see that it was paid, and the owner because of the promise released his lien, the promise was not a "promise to pay the debt of another" within the statute of frauds. *Rogers v. Gennett Lumber Co.*, 69 S. E. 788, 789, 154 N. C. 108.

Defendant, an attorney, having procured plaintiff to become surety on an injunction bond, placed in plaintiff's hands \$200 to indemnify him against any possible loss. The injunction having been made perpetual before plaintiff had returned the deposit to defendant's client, plaintiff was summoned as garnishee on the claim that the money so deposited belonged to another. The garnishment was sustained, and defendant, to induce plaintiff not to pay the judgment out of the deposit, and to permit an appeal, promised that he would guarantee plaintiff against any loss above the amount so held. Held, that defendant's promise was an original undertaking, and not a "promise to pay the

debt of another," within the statute of frauds. *Dent v. Arthur*, 137 S. W. 285, 286, 156 Mo. App. 472.

### PROMISE TO SELL

See Sell.

### PROMISSORY NOTE

See, also, Note.

A "promissory note" is a promise to pay. *Beall v. Hudson County Water Co.*, 185 Fed. 179, 181.

A promissory note is a promise in writing to pay a specified sum at a time fixed therein. In *re McGuire & Hanlein*, 132 Fed. 394, 395.

A "promissory note" is defined to be an unconditional promise in writing for the payment of a certain sum of money absolutely. *Bick v. Clark*, 114 S. W. 1144, 134 Mo. App. 544.

A written instrument containing an unequivocal promise to pay a sum certain on a fixed day, and which recites that it was given for value, is a promissory note. *Leczycki v. Kuczynski*, 138 N. Y. Supp. 316, 317.

In order to constitute a "promissory note," the instrument must be for a specified sum or certain sum of money. *Smith v. Myers*, 69 N. E. 858, 860, 207 Ill. 126.

A "promissory note" is a promise in writing to pay to a person therein named a certain sum of money at a specific time. *Digan v. Mandel*, 79 N. E. 899, 902, 167 Ind. 586, 119 Am. St. Rep. 515.

A "promissory note" is a written engagement by one person to pay another absolutely and unconditionally a certain sum of money at a time specified therein. *White v. Harris*, 48 S. E. 41, 43, 69 S. C. 65, 104 Am. St. Rep. 791.

"Promissory notes, among our people, are regarded as securities for money, more or less valuable; indeed, in proportion as the pecuniary ability and credit of the makers of them are more or less reliable." *Wagner v. Scherer*, 85 N. Y. Supp. 894, 895, 89 App. Div. 202 (citing *Jennings v. Davis*, 31 Conn. 134).

An attested note in which the maker for value received unconditionally promises to pay to the payee or order a fixed sum at a fixed date is a "promissory note" within Rev. St. c. 83, § 89, declaring that the six-year limitation does not apply to actions on promissory notes signed in the presence of an attesting witness. *Murray v. Quint*, 66 Atl. 313, 314, 102 Me. 145.

A "promissory note" carries with it a presumption in the hands of the holder that it was made for a valuable consideration regularly indorsed for value before maturity and is truly dated. *Sears v. Daly*, 73 Pac. 5, 7, 43 Or. 346.

"A 'promissory note' is an unconditional promise in writing for the payment of a certain sum of money. It is an essential condition of a promissory note that there be no uncertainty as to the amount it calls for at any particular time. If the promise be to pay a stated sum plus or minus an indefinite amount, it is not a promissory note." An instrument in the general form of a promissory note, whereby the maker promises to pay a definite sum with exchange and collection charges is not a "promissory note." *Smith v. First State Bank of Tyler*, 104 N. W. 369, 95 Minn. 496 (citing *Loring v. Anderson*, 103 N. W. 722, 95 Minn. 101).

The essentials of a "promissory note" are that it be in writing, that it contain an expressed or implied promise to pay a certain sum absolutely and at all events, that the promise be unincumbered with collateral agreements, and that the instrument indicate with certainty the parties to the contract, so that an instrument, as follows, "Good for \$1,000 for ten shares Kinloch Jockey Club stock, surrendered to the undersigned by the owner of said stock, and for which I am liable," is a promissory note, though not a negotiable one. *Kessler v. Claves*, 125 S. W. 799, 801, 147 Mo. App. 88.

A "promissory note" is an "absolute promise in writing, signed, but not sealed, to pay a certain specified sum at a time therein limited, or on demand, or at sight, to a person therein named or designated, or to his order or to the bearer." A writing reading: "Kingston, I. T., July 16th, 1903. On or before Oct. 1, 1904, I, we, or either of us promises to pay to the order of B. \$150 at K., for value received. And in case of legal proceedings on this note, or the same placed in the hands of an attorney for collection, I, we, or either of us agree to pay 10 per cent. additional on the amount"—and signed by two persons, is a note. *Harris v. Pate*, 104 S. W. 812, 813, 7 Ind. T. 493.

An instrument as follows: "May 17, 1865. Deposited with me by David Luther, eight hundred dollars in cash, and three hundred dollars in Yorktown bonds, to be delivered on call. A. Crawford,"—held a promissory note. *Luther v. Crawford*, 116 Ill. App. 351, 352.

#### Negotiable instrument

Negotiable promissory note, see Negotiable Note.

A "promissory note" is something more than a mere general promise; it is a negotiable instrument recognized by the law merchant as property. *Manning v. Berdan*, 132 Fed. 382, 386.

The words "promissory note," in *Wilson's Rev. & Ann. St. 1903*, § 3660, providing that days of grace shall be allowed for the payment of a "promissory note," defined in section 3698 as an instrument negotiable

in form whereby the signer promises to pay a specified sum of money, include a note negotiable in form, notwithstanding the fact that it is rendered nonnegotiable because of subsequent provisions therein. *Sullins v. Farmers' Exchange Bank*, 87 Pac. 857, 858, 17 Okl. 419, 10 L. R. A. (N. S.) 839.

#### Payment of money only

A trade check reading as follows: "We promise to pay bearer one dollar, two years after demand, in merchandise. [Signed] Gulf Lumber Co., by W. H. Vernon," and indorsed by the letters "A. D. M."—is a "promissory note" payable to bearer in merchandise within the statute against forgery of notes, since under Act No. 223, p. 345, of 1908, trade checks redeemable in merchandise are payable on demand in current money. *State v. White*, 52 South. 238, 126 La. 119.

#### Certificate of deposit

A certificate of deposit issued by a bank, certifying that the depositor has on deposit in the bank a stated sum of money, subject to his order, is the equivalent of a "promissory note," payable on demand. *Lamar, Taylor & Riley Drug Co. v. First Nat. Bank of Albany*, 56 S. E. 486, 487, 127 Ga. 448 (citing *Lynch v. Goldsmith*, 64 Ga. 42).

#### As chose in action

See Chose in Action.

#### As property

See Personal Property; Property.

#### As property actually received

See Property Actually Received.

#### As security

See Security.

#### Township warrant

A township warrant is not a "promissory note" in any sense of the word. *Mitchelltree School Tp. of Martin County v. Carnahan*, 84 N. E. 520, 522, 42 Ind. App. 473.

## PROMISSORY REPRESENTATION

"What has been called 'promissory representations' looking to the future as to what the vendee can do with the property, how much he can make on it, and in this case how much he can save by the use of it, are on a par with false affirmations and opinions as to the value of property, and do not generally constitute legal fraud." *Williamson v. Holt*, 61 S. E. 384, 386, 147 N. C. 515, 17 L. R. A. (N. S.) 240 (citing and adopting *Gordon v. Parmelee*, 2 Allen [84 Mass.] 212; *Long v. Woodman*, 58 Me. 52; *Benj. Sales* [7th Ed.] 483 et seq.).

## PROMISSORY WARRANTY

A "promissory warranty" has reference to something to be done or omitted in the future, and does not include that which exists at the time, or relates to the past, and it must

embody an agreement to do or not to do something in the future; hence where no additional insurance was procured after a policy was issued, and the false representation or statement, if any was made, related to conditions existing at the time, it did not constitute a promissory warranty. *Scottish Union & National Ins. Co. v. Wade (Tex.)* 127 S. W. 1186, 1189.

Warranties in insurance law are of two kinds—affirmative and promissory. Affirmative warranties consist of a representation in the policy of a fact. Promissory warranties are those that require that something shall be done or not done after the policy takes effect. *Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co.*, 46 S. E. 1021, 55 W. Va. 238.

What is commonly known as the "iron-safe clause," in a policy of fire insurance, requiring the insured to "keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit," is a promissory warranty. *Aetna Ins. Co. v. Johnson*, 56 S. E. 643, 644, 127 Ga. 491, 9 L. R. A. (N. S.) 667, 9 Ann. Cas. 461 (citing *Southern Fire Ins. Co. v. Knight*, 36 S. E. 821, 111 Ga. 628, 629, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Scottish Union & National Ins. Co. v. Stubbs*, 27 S. E. 180, 98 Ga. 754).

Where a clause in a fire insurance policy provides that the "assured shall keep books of account correctly detailing purchases or sales of stock," and another clause in effect provides that failure to observe such condition shall work a forfeiture of all claims under the policy, such clause requiring the assured to keep books of account is a "promissory warranty" on his part. Where a clause in a policy of fire insurance provides that the insured as often as required shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof, if the original be lost at such reasonable place as may be designated by the insurance company or its representative and shall permit extracts and copies thereof to be made," and another clause in effect provides that no suit or action on the policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with the foregoing requirement, the clause requiring the insured to produce the books is a "promissory warranty" on his part and a condition precedent to his right of recovery on the policy. *Tucker v. Colonial Fire Ins. Co.*, 51 S. E. 86, 90, 58 W. Va. 30.

## PROMOTE

### PROMOTER

#### Corporation

Persons who plan and organize a corporation are "promoters." *Hinkley v. Sac Oil*

& Pipe Line Co., 107 N. W. 629, 631, 182 Iowa, 396, 119 Am. St. Rep. 564.

A "promoter" of a corporation is one who brings about its incorporation and organization, and he is its agent and occupies a fiduciary relation toward it. *Richlands Oil Co. v. Morriss*, 61 S. E. 762, 764, 108 Va. 288.

"Cook on the Law of Stock and Stockholders defines a 'promoter' to be a 'person who brings about the incorporation and organization of a corporation.' He brings together the persons who are interested in the enterprise, aids in procuring subscriptions, generally is the representative of parties who wish to sell property to the corporation or to construct its works." *Hutchinson v. Simpson*, 87 N. Y. Supp. 369, 376, 92 App. Div. 382.

A "promoter" is one who brings together the persons who are to become interested in the enterprise, aids in promoting or procuring the subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself. See *v. Heppenheimer*, 61 Atl. 843, 857, 69 N. J. Eq. 36 (quoting *Cook, Stock & Stockh.*).

A "promoter" is a person who brings about the incorporation and organization of a corporation and who brings together the persons who become interested in the enterprise and who aids in procuring subscriptions and sets in motion the machinery which leads to the formation of the corporation. *Cox v. National Coal & Oil Inv. Co.*, 56 S. E. 494, 500, 61 W. Va. 291.

A "promoter" has been defined to be one who brings about the incorporation and organization of a company; who brings together the persons who become interested in the enterprise; who aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself. It is said to be a business, not a legal, term. A "promoter" is in the situation akin to that of agent or trustee of the company; and his dealings with it must be open and fair. *The Telegraph v. Loetscher*, 101 N. W. 773, 774, 127 Iowa, 383, 4 Ann. Cas. 667 (citing 2 *Cook, Stockh.* § 651).

"The term 'promoter' is a term not of law but of business. A promoter is one who seeks opportunities for making advantageous purchases and profitable investments in industrial or other enterprises, who interests men of means in such a project, when found organizes them in a corporation for the purpose of 'taking over' the project, and attends upon the newly formed company until it is fully launched in business. He may be stockholder, director, officer, or none of these. His services begin before the company is formed, and ordinarily are not concluded until some time after its formation." *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 71 Atl. 153, 171, 172, 74 N. J. Eq. 457.

The rule that a "promoter" of a corporation stands in a fiduciary relation to the cor-

poration, charged with the duty of good faith, as in cases of other trusts, so that he cannot lawfully make a secret profit in a transaction with the corporation, and must account for such profit if made, includes one who undertakes to form a corporation and to procure for it the rights, instrumentalities, and capital by which it is to carry out the purposes of the incorporation, and to establish it as able to do its business, and his work may begin long before the organization of the corporation, and may continue after the incorporation by attracting the investment of capital in its securities. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 203 Mass. 159, 40 L. R. A. (N. S.) 314.

A "promoter" is "a person who takes such preliminary steps in the formation of a corporation as to bring himself into a fiduciary relation thereto, analogous to that of trustee and cestui que trust." A promoter is "a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself." Where there was no evidence that a person helped organize a corporation, there was nothing to show that he was a "promoter." *South Missouri Pine Lumber Co. v. Crommer*, 101 S. W. 22, 26, 202 Mo. 504 (quoting and adopting definition in *Cook, Stock & Stockh* § 631).

A "promoter" is one who brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself. The term involves the idea of exertion for the purpose of getting up and starting a company, and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it. It is a term of business, and not of law, usefully summing up, in a single word, a number of business operations familiar to the commercial world by which the company is brought into existence. The term does not imply that the promoters are brought into the corporation itself, nor have promoters necessarily aught to do with the payment in of the capital or cash of the corporation. *Armstrong v. Sun Printing & Publishing Ass'n*, 122 N. Y. Supp. 531, 533, 137 App. Div. 828.

## PROMOTION

The term "promotion" is defined as an advancement, or the act of exalting in rank or honor (Webst. Dict.); and as advancement to a higher position, grade, class, or rank; preferment in honor or dignity (Standard Dict.). Const. art. 5, § 9, requires promotions in the civil service to be made according to the merits, to be ascertained, as far as practicable, by competitive examina-

tion; and Laws 1899, p. 795, c. 370, passed in pursuance thereof, provides that telegraph operators in the city of New York shall rank as sergeants of police, and that the selection of captains shall be made from the list of sergeants. Held, that the designation of a patrolman as telegraph operator by the chief of police, intended to be permanent, was a promotion, and, being made without an examination, was without effect. *People ex rel. Campbell v. Partridge*, 85 N. Y. Supp. 853, 854, 89 App. Div. 497.

A "promotion" is an advancement to a higher position, an elevation, a preferment. Const. 1894, art. 5, § 9, providing that appointments and promotions in the civil service of the state and the civil divisions thereof shall be made according to merit and fitness, to be ascertained as far as practicable by competitive examinations, contemplates that all appointments and promotions shall be made according to merit and fitness, to be ascertained by competitive examinations, unless it is in good faith found that it is impracticable so to determine the relative merit and fitness of persons for a particular position, and any statute or rule contrary to the provision is void. *Hale v. Worstell*, 77 N. E. 1177-1179, 185 N. Y. 247, 113 Am. St. Rep. 895.

Though not accompanied by any change in character of work, an increase of compensation of a clerk in the bureau of assessments and arrears is a "promotion," within the meaning of the Constitution directing that civil service promotions shall be made according to merit and fitness, to be ascertained by competitive examinations. *In re Dryer*, 102 N. Y. Supp. 922, 923, 52 Misc. Rep. 612.

An increase, from \$2,000 to \$2,400, of the annual salary of an assistant engineer to the board of water supply of New York City, attempted to be made by such board, constituted a "promotion," in violation of Civil Service Law, § 16; it appearing that the board intended a promotion from one grade to another, and did not exercise its power under Laws 1905, c. 724, to fix his compensation. *People ex rel. Holleran v. Creelman*, 132 N. Y. Supp. 176, 177, 148 App. Div. 121.

Const. art. 5, § 9, requires appointments and promotions in the civil service to be made according to merit and fitness to be ascertained as far as practicable by competitive examinations. Civil Service Law, Laws 1899, p. 795, c. 370, § 15, requires vacancies in positions in the competitive classes to be filled as far as practicable by "promotion," and promotions to be based on merit, and defines an increase of salary as a "promotion." New York Charter, § 290 (Laws 1897, p. 99, c. 378), as amended by Laws 1901, p. 122, c. 466, requires the police commissioners to maintain a central office bureau of detectives and to select persons to perform detective duty therefrom from the patrolmen or roundmen, and



provides that the persons so selected shall be known as "detective sergeants" and shall receive the same pay as other sergeants of police. Section 299 of the charter (Laws 1901, p. 125, c. 466) limits the salary of a roundsman to \$1,500 a year and fixes the salary of a detective sergeant at \$2,000. Held, that a roundsman appointed to the central office bureau of detectives is promoted, within the meaning of the constitutional requirement of competitive examinations, and, when appointed after the classification of the position of detective sergeant in the competitive schedule by resolution of the municipal civil service commission, must be appointed pursuant to a civil service examination. *People ex rel. Gilhooly v. McAdoo*, 95 N. Y. Supp. 400, 402, 108 App. Div. 1.

### PROMOTION STOCK

As used in Act March 5, 1909, regulating the issuance by mining corporations of treasury and promotion stock, and requiring the stamping of certificates therefor, the words "treasury stock" mean stock set aside for the actual development of the property, while "promotion stock" is that issued to those who may originally own the mining ground or valuable rights connected therewith in consideration of their deeding the same to the mining company, or such stock as is issued to promoters for incorporating the company. *State ex rel. Moore v. Manhattan Verde Co.*, 109 Pac. 442, 443, 32 Nev. 474.

### PROMPT

By usage of the Boston grain trade, the phrase "to be shipped prompt" means to be shipped within 10 days. *Soper v. Tyler*, 58 Atl. 699, 700, 77 Conn. 104.

A policy of insurance on a canal boat provided that, "in case of any loss or misfortune" to the vessel, "prompt notice of the disaster" should be given to the insurer, and that a failure to give such notice should relieve it from any liability therefor. Held, that notice given nearly a month after the boat sank was not "prompt" within such requirement and avoided the policy; no reason appearing why the owner could not have given such notice at once. *Whalen v. Western Assur. Co. of Toronto*, 185 Fed. 490, 492, 107 C. C. A. 590.

### PROMPTLY

The requirement in a surety bond that notice of default or loss should be given the surety "promptly and immediately" means only that it shall be given within a reasonable time after default. *Bacigalupi v. Phoenix Bldg. & Const. Co.*, 112 Pac. 892, 895, 14 Cal. App. 632.

The words "promptly and without delay," used to define a carrier's duty with reference to the transportation of goods, mean "with reasonable promptness, and without

unreasonable delay." *Burlington v. Adams Exp. Co.*, 171 Fed. 902, 904.

Under a contract to ship "promptly," the word "promptly" means nothing more nor less than reasonable time; the term being a relative one, and its meaning dependent upon the circumstances. *McCleskey & Whitman v. Howell Cotton Co.*, 42 South. 67, 70, 147 Ala. 573.

Where a contract for the sale of land and a prior agreement to refund the monthly installments paid in case the purchaser became dissatisfied at the end of six months were a part of the same transaction, payments made by him within the 60 days allowed by the contract of sale were "promptly" made as required by a condition of the agreement to refund. *Livieratos v. Commonwealth Security Co.*, 106 Pac. 1125, 1126, 57 Wash. 376.

As assignment, dated November 11, 1909, of sufficient money due the assignor to discharge a loan made that day by the assignee to the assignor, if the loan should not be "promptly" repaid, entitled the assignee to the amount assigned, as against the assignor's administratrix, where the debt remained unpaid July 22, 1911. *Just's Adm'x v. Woodman*, 144 S. W. 379, 380, 147 Ky. 493.

Where by plaintiff's contract it was to "promptly" forward information to defendant, its prayer, merely requiring it to be found that its information was "regularly" forwarded, was defective; "regularly" being generally understood as meaning merely in compliance with some prescribed or adopted rule or order, without regard to the idea of absence of unnecessary delay embodied in "promptly." *F. W. Dodge Co. v. H. A. Hughes Co.*, 72 Atl. 1036, 1039, 110 Md. 374.

Act June 7, 1901, § 1 (P. L. 514), relating to street railroads, requires that the consent of the local authorities for the right to occupy the street shall be "promptly" applied for and shall have been obtained within two years from the date of the charter. Held, that the limit of time permissible under the word "promptly" could not be exactly determined. Prima facie any application long enough beforehand to afford opportunity to the municipality to consider and act upon it within two years would comply with the statute. But, on the other hand, the intent of the statute is to hurry the work, "and the courts are at liberty at all times to inquire into the delay for the purpose of ascertaining whether the intention is to make an effort in good faith to get consent, or merely to shut out rival competitors as long as possible." *Nanticoke Suburban St. Ry. Co. v. People's St. R. Co. of Nanticoke & Newport*, 61 Atl. 997, 998, 212 Pa. 395.

The word "promptly," as used in an offer which states that it is subject to "prompt" acceptance by wire, means more expedition than reasonable time. Where defendants

wired plaintiff an offer for a car load of eggs, subject to "prompt" acceptance by wire, plaintiff did not have a "reasonable" time in which to accept, and defendants were not bound by an acceptance wired after 2 o'clock p. m. and received by defendants at 3:30; the defendant's telegram having been delivered at plaintiff's office at 10 o'clock a. m., though he did not receive it until 11:30, and wrote his acceptance about 12 o'clock; the further delay in the transmission of the acceptance being caused by the operator's absence from the office from about 12 o'clock until after 1 o'clock, about which time plaintiff went to dinner, after which he filed the telegram. *Brewer v. Lepman & Heggie*, 106 S. W. 1107, 1108, 127 Mo. App. 693.

### PROMPTNESS

In an action against a carrier for damages arising from delay in the transportation of a shipment, the word "promptness," in an instruction "that it is the duty of a common carrier to exercise ordinary diligence to transport and deliver with promptness goods and freight delivered to it for transportation for hire," required only the exercise of ordinary diligence to transport and deliver the shipment; a degree of care which is proper to require at the hands of the carrier. *Houston & T. O. R. Co. v. Foster* (Tex.) 86 S. W. 44.

### PROMULGATE

In Act Cong. March 3, 1905, c. 1496, § 3, 33 Stat. 1265, requiring the Secretary of Agriculture to "make" and "promulgate" rules governing the inspection, delivery, and shipment of cattle from a quarantined state into any other state, and section 1 requiring publication of notice of quarantine and the giving of notice to the proper officers of carriers doing business in any quarantined state, the words "make" and "promulgate" are not synonymous, and the duty to "make" rules was sufficiently accomplished by writing them and signing them officially, but to "promulgate" them required the giving notice thereof to the officers of carriers, etc., and their publication in the selected newspapers within the affected district. *United States v. Louisville & N. R. Co.*, 165 Fed. 936, 939.

### PROOF

See Additional Proof; Affirmative Proof; Burden of Proof; Conclusive Proof; Failure of Proof; On the Like Proof; Satisfactory Proof; Strict Proof. Indubitable proof, see Indubitable. Other proof, see Other.

What circumstances will amount to "proof" cannot be a matter of general definition; the legal test being the sufficiency of the evidence to satisfy the understanding and conscience of the jury. *Clarke v. Koep-*

*pel*, 104 N. Y. Supp. 65, 67, 119 App. Div. 458 (quoting *Starkie*, Ev. p. 865).

"Proof," when used in a statute, means evidence which is competent under the general rules of evidence, so that under a statute forbidding the issuance of a *capias ad respondendum* in tort actions, unless the proof establishes special cause for holding defendant to bail, hearsay evidence embodied in an affidavit could not be considered. *Huf-ty v. Wilson*, 74 Atl. 137, 138, 78 N. J. Law, 241.

An unverified petition is not proof within Code Civ. Proc. § 2091, providing that a writ of prohibition may be granted "on an affidavit or other written proof, showing a proper case therefor." In *re Fenton*, 109 N. Y. Supp. 321, 322, 58 Misc. Rep. 303.

A petition in an action on a fire policy stipulating that the amount of the loss shall be due 60 days after ascertainment thereof, which alleges that the property was destroyed by fire on April 28th, that on May 20th plaintiff gave defendant notice and proof of the fire and loss and demanded payment, sufficiently shows, after verdict, ascertainment of the loss 60 days before the institution of the suit, which was instituted more than 60 days after May 20th, the word "proof" meaning the degree of evidence which convinces the mind of any truth or fact and produces belief. *Wiccarver v. Mercantile Town Mgt. Ins. Co.*, 117 S. W. 698, 702, 157 Mo. App. 247.

Under a statute providing that wills shall be proved by oaths or affirmations of two or more competent witnesses, no subscribing witnesses were necessary; "proof" of the testator's signature by witnesses acquainted with his handwriting being sufficient. But under a statute providing that no property shall be bequeathed to any person in trust for religious or charitable use except by deed or will attested by two credible witnesses, an attesting witness must be a subscribing witness. In *re Paxon's Estate*, 70 Atl. 280, 282, 221 Pa. 98.

Code Civ. Proc. § 2620, providing that, if all the subscribing witnesses to a written will are dead, the will may be established upon proof of the handwriting of testator and all the subscribing witnesses and also of such other circumstances as would be sufficient to prove the will upon the trial of an action, uses the word "proof" in the ordinary legal meaning, and hence does not require direct evidence as to the fact itself, but allows the establishment of the fact by inference or legal presumptions from other established facts. In *re Abel's Will*, 121 N. Y. Supp. 452, 454, 136 App. Div. 788.

The "proof" of majority, or consent of parents or tutor in case of minority, required by Civ. Code, arts. 97, 98, to be furnished by one demanding permission to marry, does not mean competent and legal evi-

dence or testimony conforming to the fundamental rules of proof, one of which excludes hearsay testimony. It is not the duty of the clerk to administer an oath in every case to parties applying for a license, or require them to produce a written act of consent signed by the parents or tutor. It depends on circumstances, and appearance as to age might justify him in acting thereon. When a clerk of court does not know and has never seen the intended wife, and there is nothing in the particular case calculated to arouse his suspicions as to her being a minor, he is not guilty of negligence and failure of official duty, and liable in damages, for granting a license, relying upon the truthfulness of statements made to him by the intended husband and the friend accompanying him, who signed as surety on the bond, required to be given under article 101, that the parties were of age, and everything was right. *Barnidge v. Kilpatrick*, 35 South. 757, 758, 111 La. 587.

Under Const. § 106, declaring that, with certain exceptions, no special, private, or local law shall be passed unless notice of intention to apply therefor shall have been published, which notice shall state the substance of the proposed law, and that proof by affidavit that notice has been given shall be exhibited to each house of the Legislature, the journals of which must affirmatively show that the bill has passed in accordance with this provision, a mere affidavit of the publisher of a newspaper that a notice containing the substance of a local act was published in his paper, but not setting forth the contents of the notice, stated only a conclusion of the affiant that the notice contained the substance of the proposed law, and was not sufficient proof on that point. The word "proof," when used in a legislative enactment, means competent and legal evidence or testimony that conforms to the rules of evidence, one of which excludes hearsay evidence, however trustworthy the informant, or however implicit may be the deponent's belief in the truth of what he has heard. *State ex rel. Frederick v. Brodie*, 41 South. 180, 181, 148 Ala. 381 (citing *Inglis v. Schreiner*, 32 Atl. 131, 58 N. J. Law, 120).

#### **Evidence distinguished**

"Proof" is the legal effect of evidence. *United States v. Lee Huen*, 118 Fed. 442, 456.

"Proof" is the effect of evidence, rather than the medium by which a fact is established. *Lone Star Brewing Co. v. Wille*, 114 S. W. 186, 192, 52 Tex. Civ. App. 550.

"Technically there is a difference between 'evidence' and 'proof.' Evidence tends to establish or disprove an alleged matter of fact in issue. Proof is an effect of evidence, while evidence is merely the means of making proof. A fact is not proved until it is established." *Oliveros v. State*, 47 S. E. 627, 629, 120 Ga. 237, 1 Ann. Cas. 114.

Rem. & Bal. Code, § 2316, provides that no order of dismissal on the grounds of variance between the information and the proof shall bar another prosecution for the same offense. Held, that while the words "proof" and "evidence" were not synonymous, evidence being the medium through which proof is established and proof the effect of evidence rather than the evidence itself, the word "proof" as used in the statute was loosely used in the sense of evidence; and hence it was not essential to the application of the section that evidence should have been actually introduced at the trial and a variance so established in order that a dismissal because of variance should be relieved of its effect as former jeopardy. *State v. Poole*, 116 Pac. 468, 469, 64 Wash. 47.

#### **As notice**

An insurance policy provided that immediate notice must be given of any accident and injury for which a claim is to be made, with full particulars thereof, and other affirmative proof of death, or loss of limb or of sight, or of duration of disability, must also be furnished within two months from time of death or loss of limb," etc. Held, that a complaint alleging no notice of the accident until immediately after death was sufficient, since it must be conceded that "proof of the death and the causes thereof" include notice of the death and the causes thereof. *Fidelity & Casualty Co. v. Brown*, 69 S. W. 915, 918, 4 Ind. T. 397.

#### **PROOF BEYOND A REASONABLE DOUBT**

See Reasonable Doubt.

#### **PROOF BY A PREPONDERANCE OF EVIDENCE**

See Preponderance.

#### **PROOF OF CLAIM**

A "proof of claim" is defined by the bankruptcy act as "a statement under oath in writing signed by a creditor." It is an affirmative personal paper writing made by the creditor as distinguished from any admission of the bankrupt or secondary evidence from other sources. In *re Strobel*, 163 Fed. 787.

Bankr. Act July 1, 1898, c. 541, § 63, subd. "a" (30 Stat. 562), provides that debts founded on an implied contract may be proved and allowed, and subdivision "b" declares that unliquidated claims may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the bankrupt's estate. Section 57, subd. "a" (30 Stat. 560), declares that proof of claims shall consist of a statement under oath, in writing signed by a creditor setting forth the claim, the consideration, and that the sum is justly owing from the bankrupt to the creditor. Subdivision "c" declares

that claims, after being proved, may, for the purpose of allowance, be filed by the claimants, and subdivision "d" that proved claims shall be allowed on presentations to the court, unless objection is made. Subdivision "f" makes the determination of objections dependent on the convenience of the court and the best interests of the estate and the claimants, and subdivision "n" (30 Stat. 561) declares that claims shall not be proved subsequent to one year after the adjudication, or if they are liquidated by litigation, and the final judgment therein is rendered within 30 days before or after the expiration of such time, then within 60 days after the rendition of such judgment. Held, that the "proof" and the "allowance" of claims are separate and distinct steps, and that where a written statement of claim, duly verified, is filed with the referee within the year, such filing is sufficient to take the claim out of the statutory limitation, and it may be allowed, or liquidated and allowed thereafter. In re J. M. Mertens & Co., 147 Fed. 177, 180, 77 C. C. A. 473.

### PROOF OF LOSS

A clause in an insurance policy requiring insured to make within 60 days after the fire a complete inventory, etc., is commonly called the "proof of loss." *Greenwich Ins. Co. v. State*, 84 S. W. 1025, 1028, 74 Ark. 72.

### PROOF SPIRIT

"Proof spirit," or, as it is commonly called 'hundred-proof' liquor, the United States government's basis for revenue tax, is defined by the Standard Dictionary to be an 'alcoholic liquor that contains half its volume of alcohol.' Very little whisky is hundred proof. Most of it, especially the cheaper grades, runs from seventy, and even lower, to ninety proof; that is to say, contains 35 to 45 per cent. alcohol. Commercial alcohol itself is only 188 proof. Beers and wines usually contain only 4 to 10 per cent. of alcohol." *Mason v. State*, 58 S. E. 139, 140, 1 Ga. App. 534.

### PROPELLED

In a claim for a patent of an apparatus for reproducing sound consisting of a stylus shaped for engagement with a record and free to be vibrated and propelled by said record, the term "propelled" is the equivalent of "progressively fed." *Victor Talking Mach. Co. v. Duplex Phonograph Co.*, 177 Fed. 248, 249, 255.

### PROPENSITY

Vicious propensity, see Vicious.

### PROPER

See As She Thinks Proper; Necessary and Proper; Pay Proper; Right and Proper.

The word "proper" means fit, suitable, and appropriate. *Kirchoff v. Hohnsbehn Creamery Supply Co.*, 123 N. W. 210, 212, 148 Iowa, 508; *Miller v. Cedar Rapids Sash & Door Co.*, 134 N. W. 411, 153 Iowa, 735.

The word "proper" is necessarily a relative term, but may be definite and specific when used in connection with a definite subject-matter. *State v. Louisville & N. R. Co.*, 96 N. E. 340, 343, 177 Ind. 553.

### PROPER ACCOMMODATION

It is the duty of a carrier of passengers to provide fit and suitable accommodations for all the passengers that it receives and attempts to transport, and "proper accommodations" means seats such as are usually provided and in use in a vehicle intended for the transportation of passengers. *Lane v. Choctaw, O. & G. R. Co.*, 91 Pac. 883-886, 19 Okl. 324.

### PROPER ACTION

In Laws 1899, p. 407, c. 245, authorizing the trustees of a county asylum "to commence and prosecute in the name of the county any 'proper action' or actions to collect any claim to the county in connection with the affairs of the asylum," refers to an ordinary action under the Code. *Richardson v. Stuesser*, 103 N. W. 261, 263, 125 Wis. 66, 69 L. R. A. 829, 4 Ann. Cas. 784.

### PROPER AND LAWFUL AUTHORITY

The expression "proper and lawful authority," in a contract provided that a line dividing certain properties should remain stationary until decided by proper and lawful authority, could only refer to a court of law in the absence of any express designation of any other tribunal. *Bishop v. Babcock*, 22 Vt. 295, 299.

### PROPER AND LEGAL EXPENSES

Under a statute (St. 1864, p. 402) providing that the trustees of any corporation formed under the laws of California shall have power to levy and collect, for the purpose of paying the "proper and legal expenses" of such corporation, assessments on the capital stock, etc., it was held that the debts of a corporation incurred in the transaction of its legitimate business are included among its "proper and legal expenses." *Sullivan v. Triunfo Gold & Silver Min. Co.*, 29 Cal. 585, 588.

### PROPER AND NECESSARY

Ky. St. § 567, provides that no corporation shall hold or own real estate not proper and necessary for its legitimate business for more than five years under penalty of escheat. Held that, if a corporation acquires land "proper and necessary" when acquired or at any time within five years after, its future use and availability may be considered in determining whether the quantity acquired and the time of bringing it into actual use

make it proper and necessary for carrying on the legitimate business of the corporation, and it is not necessary to the validity of the holding that the land be immediately "used" by the corporation. *Commonwealth v. Louisville Property Co.*, 132 S. W. 413, 414, 139 Ky. 680.

### PROPER BELT SHIFTER

The term "proper belt shifters," as used in Laws 1903, p. 40, c. 37, § 1, providing that any corporation, operating a factory or mill, shall provide "proper belt shifters," or other mechanical contrivances for throwing on or off belts on pulleys, does not merely mean belt shifters in proper or necessary places, but rather sufficient belt shifters or other mechanical contrivances to effect the throwing on or off of belts on pulleys. There is no classification of pulleys or places as to the matter of necessity or practicability, and it was the manifest theory of the lawmakers that, when belts have been placed upon any pulleys for the purpose of operating machinery, the necessity for removing and replacing them will at some time arise, and that, in order to guard against danger from an attempt to shift them while in operation, some effective contrivance must be maintained for that purpose. *Whelan v. Washington Lumber Co.*, 83 Pac. 98, 99, 41 Wash. 153, 111 Am. St. Rep. 1006.

### PROPER BURIAL

The determination as to how a corpse shall be dressed for burial and the quality of the coffin and the box in which it is to be placed, as well as the depth of the grave, are matters for those who have the burial in charge, so that what is a "decent," "proper," or "respectable" burial will vary with the financial or social standing of the deceased and his relatives, the customs of the community, and the rules of religious, social, and political organizations to which he may have belonged. *Seaton v. Commonwealth*, 149 S. W. 871, 872, 149 Ky. 498, 42 L. R. A. (N. S.) 211.

### PROPER CARE

"Proper care," the failure to exercise which constitutes negligence, is that degree of care which a prudent man should use under like circumstances and charged with like duty. *Ramshotbottom v. Atlantic Coast Line R. Co.*, 50 S. E. 448, 449, 138 N. C. 38.

In a suit for injury to a passenger, a charge to find for defendant if it had exercised "proper care" to keep the appliances in reasonably good repair and condition does not impose too high a degree of care upon defendant. *Missouri, K. & T. R. Co. of Texas v. Flood*, 79 S. W. 1106, 1108, 35 Tex. Civ. App. 197.

In an action against a railroad for injuries to a passenger, where the court had properly defined in its charge the degree of

care required of the railroad as that high degree of care which would be exercised by very cautious, competent, and prudent persons under the circumstances, a subsequent charge to find for defendant if it had exercised "proper care" to keep its appliances in good repair and its servants exercised "proper care" in handling its engine was not prejudicially erroneous to defendant in failing to define what would constitute proper care. *St. Louis Southwestern R. Co. of Texas v. Parks*, 90 S. W. 343, 345, 40 Tex. Civ. App. 480.

### PROPER CASE

In determining that certain rights might be enforced in a "proper" case, the court defined the word "proper" as a case over which the court had jurisdiction. *Larabee v. Dolley*, 175 Fed. 865, 886.

To constitute due "process of law" within the federal Constitution and a "proper case" within Code Civ. Proc. § 854, providing for the issuance of a subpoena duces tecum "in a proper case," it must appear that the books and papers sought for have some materiality or relevancy to the matter under consideration, since no inquisitorial officer should be permitted, of his own volition, and arbitrarily, to compel a person to produce books and papers of a private and confidential character. In *re Foster*, 124 N. Y. Supp. 667, 675, 139 App. Div. 769.

Code Civ. Proc. § 269, providing that the official reporter must, if directed by the court, or requested by either party, within such reasonable time after the trial of a case as the court may designate, transcribe, in longhand or by typewriter, the testimony taken on the trial, or such portions thereof as may be requested, and when directed by the court file the same with the clerk, duly certified, contemplates that in a proper case the trial court, when called upon, will designate the "reasonable time" within which the phonographic reporter shall file the transcription of his notes. A "proper case" is one where it has become the duty of the phonographic reporter to make the transcription and where, for the orderly and expeditious procedure of the case, the court is appealed to to designate the time within which the phonographic reporter shall perform his duty. If the case be one where the shorthand reporter is not called upon to make a transcript, it is not one which calls for a declaration of time upon the part of the court. *Richards v. Superior Court of City and County of San Francisco*, 78 Pac. 244, 145 Cal. 38.

### PROPER CASH ITEM

"Proper cash items" in a cashier's accounts ordinarily include not only money on hand, but everything for which he has paid out the association's cash during a particular

day or business period. *United States v. Young*, 128 Fed. 111, 114.

### PROPER CAUSE

See On Proper Cause Shown.

### PROPER CLERK

The term "proper clerk," as used in Code 1860, c. 121, § 7, providing that where the acknowledgment of the conveyance of a married woman "shall have been delivered to the proper clerk and admitted to record, as to the husband as well as the wife, such writing shall operate to convey from the wife her right of dower," means any clerk who has the right and whose duty it is to record the deed when delivered to him for that purpose. *Tarrant v. Core*, 56 S. E. 228, 230, 106 Va. 161.

### PROPER CONDITION

In a railway servant's action for injuries, wherein the court instructed that if the jury believed that, had the braking apparatus of the car been in proper condition, plaintiff could have set the brake and avoided the injury, and that in permitting such apparatus to become or to remain in the condition in which the jury should find the same to have been, etc., defendant was guilty of negligence, etc., the error, if any, in using the expression "proper condition," thereby leaving the jury to determine what was the proper condition, was cured by a following paragraph of the charge defining "proper condition" as such condition that it was able to perform its ordinary functions of setting the brake when used in the customary manner in which the same is used under similar circumstances, etc. *Missouri, K. & T. R. Co. of Texas v. Neaves (Tex.)* 127 S. W. 1090, 1092.

### PROPER CONSIDERATION

Where an option to purchase realty for \$950 recited a consideration of \$1, that sum, if actually advanced, would be merely nominal, and would not alone constitute the "proper" or "fair" consideration required for such an option. *Rude v. Levy*, 96 Pac. 560, 561, 43 Colo. 482, 24 L. R. A. (N. S.) 91, 127 Am. St. Rep. 123.

### PROPER COUNTY

The words "proper," "properly," and "efficient" are not necessarily relative terms, but may be definite and specific when used in connection with a definite subject-matter, as, for example, the "proper" county, used in connection with other statutes as to the county in which a suit is brought, where a specific statute fixes the proper county. *State v. Louisville & N. R. Co.*, 96 N. E. 340, 343, 177 Ind. 553.

"A proper county," as used in Code Civ. Proc. § 102, and Laws 1905, c. 82, relating to venue and change of venue in civil cases, means the place of trial prescribed by the statute, independent of any question of con-

venience of witnesses, or waiver or consent of parties and the county which, under the statute may lawfully be designated in the complaint when it is filed. *Ivanusch v. Great Northern R. Co.*, 128 N. W. 333, 334, 26 S. D. 158.

Under St. 1909, p. 709, § 27, providing that the Supreme Court or District Courts of Appeal or the superior court of the proper county may entertain a primary election contest, by "proper county" is meant the county in which the election is held. In *re Snyder*, 110 Pac. 820, 158 Cal. 218.

Under a statute providing that any inhabitant of this state, or any husband and wife jointly, may petition the superior court of "their proper county" for leave to adopt a child, the phrase "their proper county" means the county in which petitioners reside, and precludes the idea that a nonresident may petition under the statute. *Knight v. Gallaway*, 85 Pac. 21, 22, 42 Wash. 413.

### PROPER COURT

Under Rev. Codes, § 5468, requiring suit on a claim rejected by an administrator to be brought in the proper court, the court that has jurisdiction under the Constitution and laws to determine a civil suit for recovery of the debt sued on is the "proper court," and, if the amount claimed is within jurisdiction of the justice's or probate court, action may be brought therein; otherwise in the proper district court. *Idaho Trust Co. v. Miller*, 102 Pac. 360, 361, 16 Idaho, 308.

### PROPER DEED

The term "proper deed," in a contract to convey land described and requiring the vendor to execute and deliver a "proper deed," means a deed which will convey a marketable title, which is one that is free from reasonable doubt. Where a contract to convey land described therein as the most southerly 20 acres of a tract described required the vendor to execute and deliver a proper deed, with the usual covenants conveying the property in fee simple free from all incumbrances, except, etc., and it was thereafter agreed that the 20 acres should be surveyed, which was never done, but it was discovered that it carried across a street of which both parties had notice and deprived the vendor's remaining property along such street of frontage thereon, whereupon she tendered a deed in the language of the contract. Such deed required a judicial construction to identify the premises conveyed, and was therefore not a "proper deed," as required by the contract. *Wadick v. Mace*, 103 N. Y. Supp. 889, 893, 118 App. Div. 777.

### PROPER DISTRICT

The term "proper district" for purposes of removal of a case is that within which the defendant is sued in the court of a state, and the "proper district" for original actions is

the "district" of the residence of either the plaintiff or defendant. *Manufacturers' Commercial Co. v. Brown Alaska Co.*, 148 Fed. 308, 312.

Within Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by 25 Stat. 433, giving the United States Circuit Courts original cognizance concurrent with the courts of the several states in all civil suits where the matter in dispute exceeds \$2,000, and section 2, providing that any suit of a civil nature of which the Circuit Courts have original jurisdiction may be removed from the state court into the Circuit Court for the "proper district" by the defendant or defendants therein, being nonresidents of that state, the "proper district" to which a suit may be removed from a state court must be a district where one of the parties resides, and, secondly, that, in view of the fact that the removal can be obtained only by "the defendant or defendants therein, being nonresidents of that state; the 'proper district' is that in which the plaintiff resides." An action pending in a Delaware court of competent jurisdiction, brought by a citizen of Pennsylvania against a citizen and resident of New Jersey to recover a sum in excess of \$2,000, is not removable to the United States Circuit Court for Delaware. *Hill v. Woodland Amusement Co.*, 158 Fed. 530, 533, 534.

#### PROPER GUARD.

An employer who is required by statute to provide a proper guard, and who in good faith endeavors to comply with the statute by providing a guard approved by experienced men, is entitled to interpose the defense of assumption of risk; the mere fact that the guard did not prevent the injury which some other kind of guard would have done not proving that the guard furnished was not a "proper guard." *Johnston v. Northern Lumber Co.*, 84 Pac. 627, 628, 42 Wash. 230.

#### PROPER INDEPENDENT ADVICE

See Independent Advice.

#### PROPER JUDGMENT

A mandate of the Supreme Court, on remanding a case, to "render the proper judgment for the plaintiff," only authorizes the proper judgment on the special verdict in the case; no further trial being contemplated. *Stahl v. Chicago, St. P., M. & O. R. Co.*, 68 N. W. 954, 955, 94 Wis. 315.

#### PROPER OFFICER

The street commissioner, directed by ordinance to make an estimate of the cost of a sidewalk, is a "proper officer," within Rev. St. 1899, § 5985, providing that, before the aldermen shall make a contract for building a sidewalk, an estimate of the cost shall be made by the city engineer or other proper officer. *City of Bevier v. Watson*, 87 S. W. 612, 614, 113 Mo. App. 506.

#### PROPER ORDER

Where, on the death of an executor's surety, an order requiring the executor to file a new bond, and providing that on the filing thereof the old bond should be released and discharged, was made and fully complied with, it was a "proper order" within Code, § 3268, providing that if the clerk, on examining an executor's bond, finds the same insufficient, he shall place the matter on the calendar of the court at the next term for the proper order. *Bankers' Surety Co. v. Wyman*, 120 N. W. 116, 118, 141 Iowa, 574.

Rule 14 of the Circuit Court of Appeals (150 Fed. xxix, 79 C. C. A. xxix), provides that, whenever it shall be necessary or "proper" in the opinion of the presiding judge in any Circuit or District Court that original papers of any kind should be inspected in the court upon writ of error or appeal, the presiding judge may make such rule or order for the safe-keeping and transporting and return of such original papers as to him may seem "proper," etc. Held that the word "proper" is equivalent to the word "useful" or the word "aidful," and the rule fixes the limit within which the presiding judge may act in such matter, and he is not authorized to make an order for incorporating original papers introduced in evidence in the record on appeal, instead of copies, merely for the purpose of saving expense to the parties, not unless in his opinion an inspection of the originals by the appellate court, as distinguished from authenticated copies, is either necessary or would be useful or aidful in the determination of the appeal. *Dowagiac Mfg. Co. v. Brennan & Co.*, 156 Fed. 213, 215.

#### PROPER PARTY

"'Proper parties' are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy and conclude all the persons who have any interest in the subject-matter of the litigation." *Leonard v. Pierce*, 75 N. E. 313, 315, 182 N. Y. 431, 1 L. R. A. (N. S.) 161 (quoting and adopting definition in *Pom. Rem. & Rem. Rights*, § 329).

The meaning of the term "proper party," as used in the phrase "is not a proper or necessary party," is not so clear as the meaning of the term "not a necessary party." The word "or" may be used in two forms. In one it corresponds to "either," and in that sense the term "proper or necessary" would mean either proper or necessary—that is, one or the other. In the other form it means to express the same thing alternatively in different words. In that sense the term "not proper or necessary" would imply that it was not proper—that is, not necessary. *Jones v. Kansas City, Ft. S. & M. R. Co.*, 77 S. W. 890, 893, 178 Mo. 523, 101 Am. St. Rep. 434.

Every party who has any interest in the controversy or subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree which does complete justice between them, is a "proper party." *Rogers v. Penobscot Min. Co.*, 154 Fed. 606, 610, 616, 83 C. C. A. 380 (citing Rev. St. §§ 737, 738; Equity Rule 47; *Chadbourne v. Coe*, 51 Fed. 479-481, 2 C. C. A. 327; *Shields v. Barrow*, 17 How. [58 U. S.] 130, 139, 15 L. Ed. 158; *Ribon v. Chicago, R. I. & P. R. Co.*, 16 Wall. [83 U. S.] 446, 450, 21 L. Ed. 367; *Colron v. Millaudon*, 19 How. [60 U. S.] 113, 15 L. Ed. 575; *Williams v. Bankhead*, 19 Wall. [86 U. S.] 563, 22 L. Ed. 184; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061; *Alexander v. Horner*, 1 Fed. Cas. 868, 1 McCrary, 634; *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, 6 Fed. Cas. 72, 1 Sawy. 685; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124, 128, 27 C. C. A. 73, 75; *Wood v. Dummer*, 30 Fed. Cas. 435, 3 Mason, 308).

**Necessary or indispensable party distinguished**

See Necessary Parties.

**PROPER PERSON**

A carrier, independent of contractual relation, is under a general obligation to receive and carry on its train all proper persons who apply for transportation and offer to pay the regular fare for such service; the term "proper persons" being defined to mean persons whose status or condition apparently entitles them to be carried as passengers. *Bogard's Adm'r v. Illinois Cent. R. Co.*, 139 S. W. 855, 857, 144 Ky. 649, 36 L. R. A. (N. S.) 337.

**PROPER PLEADING**

The words "proper pleadings," in the rule that to render judgment without proper pleadings to support it is error in law apparent on the face of the record which the court should consider without assignment, are so broad that they might include any pleadings that would be open to special exception, because such pleadings would not be entirely proper. The fundamental error in pleadings which will require no objections to render the pleadings reviewable does not embrace any case in which pleadings defectively state a cause of action, but only where the pleadings are so defective as not to state a cause of action. *Rivers v. Campbell*, 111 S. W. 190, 192, 51 Tex. Civ. App. 103.

**PROPER PRECINCT**

"Proper precinct," as used in Rev. St. art. 1589, providing that, if there be no justice of the peace qualified to try the suit in the proper precinct, the suit may be commenced before the nearest justice of the peace of the county who is not disqualified to

try the same, means that precinct in which the suit is required by the general rule to be commenced or may be commenced under some one of the thirteen exceptions of article 1585; and, if none of these exceptions are applicable, then the proper precinct is the one in the county where the defendant or one or more of the defendants resides, not a county in which one of the defendants resides. *Aspermont Drug Co. v. J. W. Crowder Drug Co. (Tex.)* 80 S. W. 258, 259.

**PROPER RULE**

See Proper Order.

**PROPER SAFEGUARD**

Under Laws 1903, p. 40, c. 37, requiring the operators of factories, etc., where machinery is used, to provide "proper safeguards," the operator of a laundry is not deprived of the defense of assumption of risk in an action by an employe for failure to have furnished a proper guard on the ground that the guard provided did not prevent the injury while another kind of guard would have done so, where it was not shown that any particular kind of guard was recognized or accepted generally as being essential to meet the requirements of the statute, and it was shown that there were several different kinds of guards in use; no particular kind of guard being required by the statute or any recognized custom or authority. An employer is only required to provide guards sufficient to protect against such dangers as reasonably intelligent and experienced employers would anticipate. *Daffron v. Majestic Laundry Co.*, 82 Pac. 1089, 1090, 41 Wash. 65.

**PROPER TIME**

The use of the words "proper time," in an instruction in an action against a carrier for unreasonable delay in the delivery of a shipment of cattle, was not erroneous, if, when read in connection with the paragraph in which they were used, it could only be understood to mean a reasonable time. *Missouri, K. & T. R. Co. of Texas v. Stanfield Bros.*, 90 S. W. 517, 518, 40 Tex. Civ. App. 385.

The term "proper time," as used in the rule of law that, if a contract is voidable at the option of a party, such party should exercise that option at the proper time, can mean no greater period than a reasonable time after those, in whom the power of avoidance or repudiation is lodged, acquired a knowledge of the existence and terms of the contract, or should, in the ordinary course of business, have, acquired such knowledge. *City Nat. Bank of Texarkana v. Merchants' & Planters' Nat. Bank (Tex.)* 105 S. W. 838, 841.

**PROPER WARNING**

A charge permitting plaintiff to recover for injuries inflicted by a street car, if de-



tendant's agents operating the car failed to use due care in giving "proper" warning of the approach of the car, was not erroneous because of the use of the word "proper"; it being without meaning in that connection, since "warning," as understood, could only mean notice of approaching danger, and, if warning was given, it was sufficient. *Engelman v. Metropolitan St. R. Co.*, 113 S. W. 700, 701, 703, 133 Mo. App. 514.

### PROPER WRIT

Rev. St. c. 83, § 94, provides that when a writ falls of sufficient service, etc., or is abated, or the action is otherwise defeated for any matter of form, the plaintiff may commence a new action within six months after the abatement or determination of the original suit. As originally enacted as section 11, c. 62, Laws 1821, it provided that any action which should be actually declared on, and in which the writ purchased therefor should fail of a sufficient service, etc., or when such writ should be abated, or the action avoided by demurrer or otherwise, for informality of proceedings, the plaintiff might commence another action upon the same demand and thereby save the limitation thereof. Section 8 of that chapter provided that any action of the case or debt, etc., which should be actually declared upon in a proper writ, returnable according to law within six years after the cause accrued, should be deemed and taken to be duly commenced within the meaning of that act. Held, that chapter 83, § 94, does not apply to a case where an action was dismissed because the writ was made returnable at a term other than the first term after its issuance, contrary to law, since the word "action," as used in section 11, had the same meaning as in section 8, where it was defined as one declared upon in a proper writ returnable according to law, which meaning has not been changed by any subsequent provision; and while the words "proper writ" did not mean one that could not be abated or defeated for any matter of form, but merely meant one adapted to the cause of action, the words "returnable according to law" were definite and explicit and not subject to judicial construction, and hence the word "writ," as used in section 94, means a writ returnable according to law. *Densmore v. Hall*, 84 Atl. 983, 985, 109 Me. 438.

### PROPERLY

The word "properly" is not necessarily a relative term, but may be definite and specific when used in connection with a definite subject-matter. *State v. Louisville & N. R. Co.*, 96 N. E. 340, 343, 177 Ind. 553.

In *Liquor Tax Law* (Consol. Laws 1909, c. 34) § 13, the word "properly" means in a proper manner; that is, in the manner prescribed by law. In *re Norton*, 184 N. Y. S. 1080, 1082, 75 Misc. Rep. 180.

### PROPERLY CONSTRUCTED

In an action for injuries from fire, an instruction to find for defendant if the engine was properly constructed, in good repair, and properly handled, is erroneous, as ignoring the duty to equip a locomotive with a suitable spark arrester, as the expression "properly constructed" cannot be held of necessity to include suitable appliances for arresting sparks. *Horton v. Louisville & N. R. Co.*, 49 South. 423, 426, 161 Ala. 107.

### PROPERLY COVERED

A planer, the shaft of which turned 3,500 revolutions a minute, protected only by a guard extending over to about the center of the knives, so that the feeder of the machine could not see them, was not "properly covered" as required by Code Supp. 1907, § 4909—a2; the words "properly covered" as so used meaning that the machinery should be protected by such device, made of such material and construction, as would shield those operating the machine or moving near it from contact therewith when in motion, when practicable, without unreasonably interfering with the efficiency of the machine; the word "proper" meaning "fit, suitable, and appropriate," and the word "cover" to "over-spread the surface to shelter, protect, lay, or set over." *Kirchoff v. Hohnsbehn Creamery Supply Co.*, 123 N. W. 210-212, 148 Iowa, 608.

### PROPERLY DOCKETED

Under a statute providing that in taking an appeal the appellant must file his transcript in the Supreme Court and have the same properly docketed, the words "properly docketed" did not relate to nice distinctions in making the entries upon the record in correct form, but rather to the duty of doing what was necessary to have the case placed upon the docket of the court, so that it would be before the court in its proper order, and that the adverse parties might raise such questions thereon as they saw fit. If the question presented was of such a nature that it might be determined either upon appeal or error proceedings, a change of election as to the manner of presenting it would be immaterial. The appellant was not required to compel the clerk to make the entries in proper form. *Jones v. Danforth*, 98 N. W. 668, 670, 71 Neb. 130.

### PROPERLY FILED

The word "properly," as used in Code Civ. Proc. § 1739, requiring a certificate of the clerk attached to the transcript that the undertaking on appeal has been properly filed, has reference to the time of the filing of the undertaking; and if it appears by fair intendment from the wording of the certificate, or by a comparison of the date of its filing with that of the filing of the notice of appeal, that the undertaking has been filed in

time, this is sufficient. *Davidson v. Wampler*, 74 Pac 82, 83, 29 Mont. 61.

### PROPERLY GUARD

"Proper" means "fit, suitable, appropriate"; and to guard machinery properly is to cover it, so as to reasonably accomplish the design of guarding. *Miller v. Cedar Rapids Sash & Door Co.*, 134 N. W. 411, 415, 153 Iowa, 735.

Code Supp. 1907, § 4999—a2, requiring the owner of any establishment where machinery is used to have it "properly guarded," contemplates such a guard as will reasonably accomplish the purpose of the statute. *Stephenson v. Sheffield Brick & Tile Co.*, 130 N. W. 586, 588, 151 Iowa, 371.

Where defendant's jointer was as well protected as all similar machines generally are, defendant was not negligent in failing to screen the machine. *Brown v. J. A. Adams & Sons Co.*, 44 South. 1005, 1006, 120 La. 119.

The words "properly guarded," as used in a statute requiring that, all vats, pans, saws, etc., be "properly guarded," mean guarded against accidents which may reasonably be apprehended or are liable to occur. *Ostermann v. Ware*, 119 N. Y. Supp. 981, 983, 185 App. Div. 119.

"Properly guarded," within Act May 2, 1905 (P. L. 352), providing that shafting and set screws shall be properly guarded, is a term which depends on the facts of the particular case; and the shaft may be so located as to an employé in such proximity to the place where he works that to protect him against danger an artificial guard is necessary. *McCoy v. Wolf Co.*, 84 Atl. 581, 582, 235 Pa. 571.

The phrase "properly guarded" in the statute, providing that enumerated machinery, including saws, shall be properly guarded, is a relative term, and involves the extent of guarding and the question of the efficiency of the machinery for the purpose used, and an allegation in an indictment for violation of the provision that a swinging cut saw was not properly guarded is merely a conclusion, and there must be an allegation that it is practicable to guard the saw so as not to render it inefficient for the use intended. *State v. Rodgers*, 93 N. E. 223, 224, 175 Ind. 25.

Where, in an action for injuries to an employé coming in contact with knives in a planer, the complaint and answers to interrogatories showed that the knives were inclosed in a boot, except where they extended above the planer plate, as was necessary, and a small aperture in the side of the boot which was guarded by a projection of the plate, and that workmen operating the machinery had no duties to perform requiring them to come in close proximity to the knives, a general verdict for the employé,

based on the negligence of the employer in failing to properly guard the knives, could not be sustained, for the construction and manner of using the planer needed no other guards than those maintained. *Vigo Cooperage Co. v. Kennedy*, 85 N. E. 986, 989, 42 Ind. App. 433.

A revolving shaft hung 4 inches under a table 10 or 12 inches back of the front edge, the table having a 4-inch board along its upper front edge, and another board at the bottom coming up from the floor a sufficient distance to leave an opening between the boards of 10½ to 16 inches, is "properly guarded," within Labor Law (Laws 1897, p. 480, c. 415) § 81, as amended, so as to relieve the master from liability for injuries to an employé who was injured by crawling under the table through the opening in front to gather up some accidentally scattered work, though the employé was not warned of the danger of coming in contact with the shaft. *Kirwan v. American Lithographic Co.*, 108 N. Y. Supp. 805, 806, 124 App. Div. 180.

### PROPERLY HEAT

Under a contract by which plaintiff agreed to put in defendant's house a steam-heating apparatus which should "properly heat" it, where defendant's architect directed that certain parts of the apparatus, such as the boiler, should be of a certain size and kind, plaintiff was entitled to recover if the apparatus would heat the house as well as could be done with a boiler of the kind chosen by defendant's architect. *Pitt v. Downing*, 52 N. Y. Super. Ct. 508, 510.

### PROPERLY OPERATED

An interrogatory as to whether defendant's locomotive was operated "properly," the complaint alleging that it was carelessly operated, is improper as calling for a conclusion; the word "properly" as used being the antonym of "negligently." *Southern R. Co. v. De Pauw (Ind.)* 90 N. E. 27-29.

### PROPERLY REPAIR

An instruction requiring the city to "properly repair" its sidewalks meant, not that the city should repair them so as to make them absolutely safe, but reasonably safe for the use of the traveling public. *City of Mattoon v. Faller*, 75 N. E. 387, 390, 217 Ill. 278.

### PROPERLY SECURE

As used in Rev. St. 1899, § 8822, requiring the owner of a mine to keep a sufficient supply of timber when required to be used as props so that the workmen may at all times be able to properly secure the workings from caving in, the phrase "properly secure" does not mean reasonably safe or absolutely safe, but such security as a reasonable person would afford, commensurate with the impending or threatening danger. *Mc*

Daniels v. Royle Min. Co., 85 S. W. 679, 681, 110 Mo. App. 708.

# PROPERLY SUBMITTED

Under Liquor Law 1896 (Laws 1896, p. 57, c. 112) § 16, providing that four local option questions shall be "properly submitted" at a town meeting, there has been no proper submission unless the votes have been properly canvassed. In re Burrell, 100 N. Y. Supp. 470, 471, 50 Misc. Rep. 261.

## PROPERTY

See Base Property; Bulk of My Property; Captured Property; Church Property; City Property; Commercial Property; Community Property; Controversy Concerning Property; County Property; Distributable Property; Dotal Property; Enemy's Property; Entire Mining Property; Estate and Property; Impairing Right to Private Property; Injured in Property; Injury to Person and Property; Injury to Property; Insured Property; Intangible Property; Issues (of Property); Landed Property; Life, Liberty, and Property; Literary Property; Localized Property; Local Property; Located Property; Lost Property; Municipal Property; No Property; Paraphernal Property; Partnership Property; Perishable Property; Personal Property; Private Property; Public Property; Railroad Property; Real Property; Right of Property; Rule of Property; School Property; Separate Property; Village Property.

All my property, see All.

All other property, see All Other.

All property, see All.

Any property, see Any.

Deprivation of property, see Property.

Immovable property, see Immovable.

My property, see My.

Other property, see Other.

Other tangible property, see Other.

Passing property by will or law, see Pass.

Similar property, see Similar.

"Property" is nomen generalissimum, and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other corporeal hereditaments. Equitable Fire & Marine Ins. Co. v. St. Louis & S. F. R. Co., 114 S. W. 546, 548, 184 Mo. App. 48.

The term "property" includes everything of value, tangible or intangible, capable of being the subject of individual right or ownership. First Nat. Bank of Estherville v. City Council of Estherville, 112 N. W. 829, 832, 136 Iowa, 203.

The term "taxes on property," as used in the Organic Law, means taxes on things tangible or intangible, as distinguished from taxation on the right to use or transfer

things, or on the proceeds of business in which the use of things is essential, and that is because such meaning is the common, ordinary meaning and so the one which, nothing appearing to the contrary, it must be presumed was intended in framing the constitutional provision. Chicago & N. W. R. Co. v. State, 108 N. W. 557, 563, 128 Wis. 553.

"Property" means everything of exchangeable value, and includes money, chattels, things in action, and evidence of debt. Fishburn v. Londershausen, 92 Pac. 1060, 1062, 50 Or. 363, 14 L. R. A. (N. S.) 1234, 15 Ann. Cas. 975 (citing 6 Words and Phrases, p. 5694).

"Property," within the tax laws, includes every species of valuable right and interest. Watson v. City of Boston, 95 N. E. 302, 304, 209 Mass. 18.

The word "property," as used in fire policy providing that it shall become void if the property therein described shall be shut down or become inoperative, vacant, unoccupied, etc., refers to the entire plant, and not to any specific building. Central Montana Mines Co. v. Fireman's Fund Ins. Co., 100 N. W. 3, 92 Minn. 223.

"Property" is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common in every man." Munden v. Harris, 134 S. W. 1076, 1078, 153 Mo. App. 652.

Const. 1879, art. 13, § 1, providing that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, and defining the word "property" to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership, requires the taxing of everything capable of private ownership, and deprives the Legislature of power to exempt from taxation any such property not exempted by the constitution itself. Crocker v. Scott, 87 Pac. 102, 105, 149 Cal. 575 (citing Mackay v. City and County of San Francisco, 45 Pac. 696, 113 Cal. 392, 397; Bank of California v. San Francisco, 75 Pac. 832, 142 Cal. 276, 285, 64 L. R. A. 918, 100 Am. St. Rep. 130).

The term "property," as used in Const. 1906, art. 3, § 17, providing that an individual's property shall not be taken or damaged for public use, except on due compensation first made, includes every species of value, right, or interest. The term "value," as applied to property, is the price deemed or accepted as equivalent to the utility of anything—compensation regarded as an equivalent. The law infers value from the term "property," and, if none is shown, the inference will be that the value is nominal. Illinois Cent. R. Co. v. State ex rel. District Attorney, 48 South. 561, 563, 94 Miss. 759.

The word "property," as well as "owner," may be used to convey a meaning sometimes broad and sometimes quite restricted. In its general and commonly accepted sense, ownership and property would necessarily imply the power of sale. They are frequently used in a more restricted sense, and as used in *Laws 1903*, p. 200, providing that the probate court shall not have jurisdiction to inquire into the insanity of any person who is the "owner" of no "property," the property which the person thought to be insane must own is property which he has been managing and controlling, or which he may manage and control in his direction of his affairs. The statute contemplates that, if he be found of unsound mind, a guardian of his person and his property be appointed who shall take upon himself the management and control of such property. Where testator provides for the setting aside of property sufficient to produce a certain income to be paid to one as trustee for another, an incompetent, who shall pay the same out for the benefit of the incompetent, the incompetent owns no "property" within the meaning of the act. *Carter v. Bolster*, 98 S. W. 105, 106, 122 Mo. App. 135.

The terms "life, liberty, and property" are representative terms, and intended to cover every right to which a member of the body politic is entitled under the law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away, except by due process of law. *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 76 Pac. 848, 850, 69 Kan. 297, 66 L. R. A. 185, 1 Ann. Cas. 936 (citing *Gillespie v. People*, 58 N. E. 1007, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176).

A policy covering certain mining property, consisting of a quartzmill, hoist building, bunkhouse, assay office, and other buildings constituting a part of the entire system, contained the warranty that the assured should at all times, when the property therein described should be idle or inoperative, keep a constant day and night watchman on duty, provided that, if such property should be idle or shut down for more than 30 days at any one time, notice should be given to the company, and permission to remain idle should be indorsed on the policy. The property described in the policy referred to and included the entire system, and not any particular property specified as the mill, which was not shut down and idle, and hence the policy was valid. *Central Montana Mines Co. v. Fireman's Fund Ins. Co.*, 99 N. W. 1120, 1123, 92 Minn. 223.

The word "property," as used in Gen. St. 1902, §§ 2367-2377, imposing a succession tax on any property within the jurisdiction of the state which shall pass by will or inheritance, is used to indicate the whole or proportional shares of estates as made subject to the tax; and, as thus used, property in such estates is within the jurisdiction of the state for the purpose of regulating its descent and distribution, is within the jurisdiction of the court of probate whose administrator holds it for distribution. Hence the statute imposes a tax on the personal property of a decedent administered in Connecticut though the property is situated in other states. *Appeal of Gallup*, 57 Atl. 699, 702, 76 Conn. 617.

Under a will giving all testatrix's property to her sister for and during her natural life, with the power of disposing of any or all the real estate, if she deemed it expedient, with a provision that at the sister's death the property be divided among certain other relatives, the word "property" in the second sentence should be construed as including whatever might remain at the death of the tenant for life. Under this construction the limitation over is not repugnant, but consistent with the object of the testatrix, which evidently was to provide for the comfortable support of her sister, even if the whole of the property might be exhausted, but if a residue remained it was to go to her other relatives in the proportions named. *Reed v. Reed* 80 N. E. 219, 194 Mass. 216.

A "water right" is the legal right to the use of any unappropriated water of any natural stream, water course, or source of supply, and exists only in contemplation of law, and is for purposes of taxation "personal property," within Const. art. 12, § 17, and Pol. Code 1895, § 16, 3680, defining "property" as including money, franchises, and other things capable of private ownership, and defining "real estate" as including the possession or ownership of land, mines, minerals, and quarries, and "improvements" as including all buildings, structures, etc., and "personal property" as including everything which is the subject of ownership, not included within real estate or improvements, so that under section 3716, providing that the personal property and franchises of water companies must be assessed in the district where the principal works are located, a water company owning a water right without the limits of a school district and conveying water by pipe lines into the district, where it is distributed to the inhabitants thereof, is properly assessed in the district; that being the place of business and principal works of the company. *Helena Waterworks Co. v. Settles*, 95 Pac. 838, 37 Mont. 237.

Testator bequeathed to his two daughters each two-ninths of the residue of his estate, and to his widow the remaining five-ninths,

with power, in addition, to dispose of three-fifths thereof in value, at her election, the remaining two-fifths after such disposition, if made, or whether made or not, at her death to be divided equally between the two daughters, if living, and, if not, an equal half to the children of each, if they left children surviving them. If either of the daughters should die without issue, the property devised to her should be equally divided between her surviving sister and the widow, with power to the widow to dispose of her portion unconditionally, and, if both daughters died before the mother without issue, the property to pass to them should go to the widow, to be disposed of at her election. He then devised to his son, who was then in the Southern Army, in case he survived the War, his dying blessing, and commended him to the tender regard of his mother. Held, that the word "property," as used in the last two clauses of the will, applied to the two-fifths given to his widow for life as well as to the property given to the daughters conditionally, and that the son took no property under the will; it being discretionary with the widow to convey three-fifths of five-ninths to him in case he survived, at her election. *Talbott v. Rogers*, 139 S. W. 858, 859, 144 Ky. 678.

#### As all property

Const. art. 12, § 17, reads: "The word 'property,' as used in this article, is hereby declared to include money, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed." This latter section, in its definition of that which may be made subject to taxation, is sufficiently comprehensive to include all matters and things, visible and invisible, tangible and intangible, corporeal and incorporeal, capable of private ownership. *Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County*, 72 Pac. 982, 983, 28 Mont. 484, 98 Am. St. Rep. 572.

A statute exempting from taxation, and from sale under execution, lands and "property" of a cemetery association, exempts from taxation and sale under execution only the land actually brought into use for cemetery purposes. *Spear v. Locust Wood Cemetery Co.*, 66 Atl. 1068, 1070, 72 N. J. Eq. 821.

"Under Pub. Acts 1899, No. 188, imposing a tax on the transfer of property by will or by the intestate law, section 21 of which provides that the word 'property' shall include all property or interest therein, whether situated within or without this state, over which this state has any jurisdiction for the purposes of taxation, the inheritance tax to be imposed is measured by the property which it is within the power of the state to

tax, and not by the 'property' which state policy has selected for purposes of general taxation." *In re Stanton's Estate*, 105 N. W. 1122, 1123, 142 Mich. 491.

A city charter provided that applications for street improvements should be made to the commissioner of public works, and signed by the property owners, and that the city council by a two-thirds vote might without petition order an improvement. On the passage of a resolution by the council for an improvement, surveys, diagrams, and estimates should be filed, and notice given by publication. Property owners were given opportunity to remonstrate. If the council ordered the work done, the expense should be charged to the property described in the notice, "provided that no improvements shall be made when the estimated cost thereof shall exceed 50 per cent. of the assessed value of the property to be assessed." No provision was made for an appraisal of the property. Held, that the word "property" in the quoted clause referred to all the property in the assessment district, and that clause did not preclude the making of an improvement because certain lots in such district were charged with more than 50 per cent. of their valuation. *Ferry v. City of Tacoma*, 76 Pac. 277, 278, 279, 34 Wash. 652.

Under Pol. Code, § 3897, providing that, when the state shall become the owner of property sold for taxes, in reselling it, the tax collector shall sell the "property" to the "highest bidder" for cash, the word "property" means all of the land, and the term "highest bidder" means the one who will make the highest cash bid for all the property, and not the person who will pay all the taxes for the least amount of the land. *Fox v. Wright*, 91 Pac. 1005, 1006, 152 Cal. 59.

#### As both real and personal property

The word "property," within Rev. St. 1890, § 7979, declaring that no insurance company shall take a risk on any property in this state greater than three-fourths of the value of the property insured, and, when taken, its value shall not be questioned in any proceeding, embraces both real and personal property. *Howerton v. Iowa State Ins. Co.*, 80 S. W. 27, 29, 105 Mo. App. 575.

Some of the older cases are to the effect that this word "property" both in public statutes and transactions and business affairs inter parties applies only to tangible property, and would not include choses in action, or an interest or investment unless such significance was clearly required by the context or by the facts and circumstances of the special case. Since these decisions and probably in consequence of them this restricted significance of the word "property" in statutes or the rule of interpretation has been altered by express enactment and Rev. Code, c. 108, § 2, subsec. 6 (Revisal 1905, § 2831, subsec. 6) provides that the word "property" shall in-

clude all property both real and personal. *Worth v. Knickerbocker Trust Co.*, 65 S. E. 918, 920, 151 N. C. 191.

#### Enjoyment, use, and disposition

The word "property" implies the exclusive right of possessing, enjoying and disposing of a thing; and, when used subjectively, it means that with respect to which this right exists, or that which is one's own. *Vann v. Edwards*, 47 S. E. 784, 787, 135 N. C. 661, 67 L. R. A. 461.

According to the approved definitions, "property" includes the power of disposition and sale, as well as the right of private use and enjoyment. *Beals v. State*, 121 N. W. 347, 350, 139 Wis. 544 (citing 1 Bl. Comm. 138; 2 Kent, Comm. pp. 320, 326; Bouv. Law Dict. tit. Property; *Wynehamer v. People*, 13 N. Y. 378, 396. Dissenting opinion by Timlin, J.).

The right of dominion and power of disposition over a tract of land, constituting "property," includes the right of an owner to subdivide it in such a way as he sees fit, or to leave it unsubdivided. *City of Chicago v. Wells*, 86 N. E. 197, 199, 236 Ill. 129, 23 L. R. A. (N. S.) 406, 127 Am. St. Rep. 282.

"Property in land" is the right of user, disposition, and dominion over it to the exclusion of all others. The term "property," as used in the constitutional provision requiring compensation for a taking thereof, means the right to use, dispose of, and have dominion over, property to the exclusion of all others. *Drainage Com'rs of Dist. No. 8 in Town of Oakwood v. Knox*, 86 N. E. 636, 637, 237 Ill. 148.

Since "property" implies dominion, right of user, or of disposition, the services and advice of an attorney are not property within the provisions of the bankrupt law making it a ground to refuse the discharge of a claim that it is one for obtaining property under false pretenses or false representations. *In re Thaw*, 180 Fed. 419, 420.

The owners of lots abutting or adjacent to a public street of a city, even if not owners of a fee therein, have the right of access and the "right of quiet enjoyment," and such rights are property which may be protected by injunction when invaded without legal authority; that is, they have an interest in the street not common to all the people of the state, but personal and peculiar to themselves. Their property is affected in its commercial value and in the possibilities and advantages of its use by the character of the streets upon which it abuts. Even partially sentimental objections, such as the noise of electric cars, or the unsightliness of elevated structures, largely make up the actual elements of market value. Such an abutting property owner having this peculiar and personal interest may protect it in his own right in a court of equity against the intrusion of a usurper who comes on the street without

color of law. *Holst v. Savannah Electric Co.*, 131 Fed. 931, 943 (quoting and adopting *Hart v. Buckner*, 54 Fed. 925, 5 C. C. A. 1; *Beeson v. City of Chicago*, 75 Fed. 880).

Under the word "property," as used in Bankr. Act July 1, 1898, c. 541, § 70, subd. 5, 30 Stat. 566, vesting in the trustee the title of the bankrupt to all property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied on and sold under judicial process against him, the intent was to vest the trustee with all rights and claims having a pecuniary value, and which could be transferred by the party or parties entitled. *In re Burnstine*, 131 Fed. 828, 831.

The word "property," as used in Const. art. 1, § 17, providing that no person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made, is held to incorporate not only the thing owned, but also every right which accompanies ownership and its incident. A property owner is entitled to recover from a railroad which constructs its yards so near plaintiff's residence as that the noise, smoke, cinders, and gas from the operation by defendant of its locomotives thereon injuriously affects plaintiff's property. *Missouri, K. & T. R. Co. of Texas v. Calkins (Tex.)* 79 S. W. 852, 853.

While the term "property" in its appropriate sense means that dominion or definite right of user and disposition which one may legally exercise over particular things or subjects, the words "abutting property," as used in statutes relating to assessments for public improvements, contemplate the res or subject of property between which and the street there is no intervening land. *Kneeb v. Sioux City (Iowa)* 137 N. W. 944, 945.

#### As interest or right

"Property" is the right to or interest in a thing. *Commonwealth, by McElroy, v. Walsh's Trustee*, 117 S. W. 398, 399, 133 Ky. 108.

#### As the thing owned

"Property" is a generic term, which, under Civ. Code, § 654, includes anything which may be the subject of ownership. *Los Angeles Pac. Co. v. Hubbard*, 121 Pac. 306, 308, 17 Cal. App. 646.

"Property," as defined by *Seas. Laws* 1903, c. 78, an act to provide a system of public revenue, includes every kind of property tangible or intangible subject to ownership. *State ex rel. Breckenridge v. Fleming*, 97 N. W. 1063, 1066, 70 Neb. 523, 533.

Under *Laws* 1907, c. 408, § 1 (Gen. St. 1901, § 7502), defining "property," as used therein respecting taxation, to mean and include every kind of property subject to ownership, the finished product of a manufacturer as to which there is no question of

ownership is taxable. *State v. Holcomb*, 106 Pac. 1030, 1033, 81 Kan. 879.

"Property" is something to which the owner can have title. Title may be evidenced by an appropriate instrument. No instrument for the conveyance of things which are not property is known to the law, and none can be contrived. *Holcombe v. Trenton White City Co.*, 82 Atl. 618, 633, 80 N. J. Eq. 122.

"Property," in the strict legal sense, is an aggregate of rights which are guaranteed and protected by the government, and, in the ordinary sense, indicates the thing itself, rather than the rights attached to it. *Fulton Light, Heat & Power Co. v. State*, 121 N. Y. Supp. 536, 553, 65 Misc. Rep. 263.

Under Civ. Code, §§ 654, 655, 663, declaring that anything of which there may be ownership is "property" under the Code, that there may be ownership of all inanimate things which are capable of appropriation or of manual delivery, and that every kind of property that is not real is personal, a plaintiff was entitled to recover for breach of a contract for the delivery of electricity under a complaint charging a breach of a contract to sell and deliver "personal property." *Terrace Water Co. v. San Antonio Light & Power Co.*, 82 Pac. 562, 563, 1 Cal. App. 511.

#### **Bonds in general**

Bonds are "property" within Act 29th Leg. providing for the taxing of property owned in the state. *Hall v. Miller*, 115 S. W. 1168, 1171, 102 Tex. 289.

Bonds are "property" within the statute providing that to actions brought to recover money or property deposited with any bank no limitation begins to run until after demand. *Bates v. Capital State Bank*, 110 Pac. 277, 280, 18 Idaho, 429.

The obtaining of a surety or indemnity bond by a bankrupt by means of a materially false statement was not the obtaining of "property" on credit within the meaning of Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550, as amended by 32 Stat. 797, which bars his right to a discharge. *In re Tanner*, 192 Fed. 572, 574.

#### **Business, occupation, or profession**

A person's business is "property." *People v. McFarlin*, 89 N. Y. Supp. 527, 528, 43 Misc. Rep. 591.

A calling, business, or profession chosen and followed is "property." *State v. Chapman*, 55 Atl. 94, 95, 69 N. J. Law, 464.

While the right to labor or to practice a profession may be considered a property right for the purpose of protection, services already rendered by one person for another are not "property," for the purpose of enlarging or changing the ordinary remedies by which the indebtedness therefor may be re-

covered. *Gleason v. Thaw*, 185 Fed. 345, 347, 107 C. C. A. 463, 34 L. R. A. (N. S.) 894.

A corporation upon complying with the regulations of a statute as to the formation of a corporation has the right to do business; in other words, the "right to be," to "exist." But this right to be or to exist is not an element of property that can be taxed. A corporation might exist for any number of years, but, if it never acquired any property or engaged in any business, its "right to be" would have no taxable value, it would have no cash value or no assessment value, a corporation so formed would likewise have a right to transact business, but until it acquired property or actually transacted some business it would have absolutely no value, and hence would not be a subject for taxation. *Commonwealth v. Ledman*, 106 S. W. 247, 251, 127 Ky. 603.

A license tax on the privilege or right to carry on a particular trade within a city is not a tax on "property" as defined by Const. art. 13, § 1, declaring that all property should be taxed in proportion to its value, and that the word "property" includes "moneys, credits, bonds, stock, dues, franchises and all other matters and things real, personal and mixed, capable of private ownership." *City of Los Angeles v. Los Angeles Independent Gas Co.*, 98 Pac. 1006, 152 Cal. 765.

A person's business is property entitled, under the Constitution, to protection from unlawful interference. Every person has a right, as between his fellow citizens and himself, to carry on his business within legal limits, according to his own discretion and choice with any means which are safe and healthful, and to employ therein such persons as he may select, and with such absolute right third persons may not interfere with intent to injure if their demands are not complied with. *Purvis v. Local No. 500, United Brotherhood of Carpenters and Joiners*, 63 Atl. 585, 588, 214 Pa. 348, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275 (citing *Barr v. Essex Trades Council*, 30 Atl. 881, 53 N. J. Eq. 101).

The right to operate vessels and to conduct business is as much "property" as are the vessels themselves. All the rights which are incident to the use, enjoyment, and disposition of tangible things are property. "Property" is everything that has an exchangeable value." An owner of a vessel has a property right not only in the vessel itself, but in its use and the business in which it is employed, which may be protected by injunction restraining unlawful interference with employes engaged in operating the vessel and conducting such business. *Sailors' Union of the Pacific v. Hammond Lumber Co.*, 156 Fed. 450, 454, 85 C. C. A. 16 (quoting and adopting definition in *Slaughterhouse Cases*, 16 Wall. [83 U. S.] 127, 21 L. Ed. 894).

**Check**

An undelivered check is subject to larceny as "property" under Pen. Code 1895, art. 868, providing that "property" as used in relation to the crime of theft includes any writing containing evidence of existing debt, contract, liability, promise, or ownership of real or personal property and any writing, provided it possesses ascertainable value. *Worsham v. State*, 120 S. W. 439, 441, 56 Tex. Cr. R. 253, 18 Ann. Cas. 134.

A "check" is a bill of exchange, sometimes defined as an inland bill of exchange, and is "property"; it being capable of beneficial ownership. *State v. Fraley*, 76 S. E. 134, 135, 71 W. Va. 100, 42 L. R. A. (N. S.) 498 (citing 2 Words and Phrases, p. 1109).

**Conduits in streets for carrying wires**

Conduits laid in city streets by a telephone and telegraph company for the purpose of carrying its wires are "property" within Rev. St. c. 8, § 41, providing that the excise tax imposed on telephone and telegraph companies shall be in lieu of all taxes on its shares of capital stock and its property used in the conduct of its business, including the poles, wires, insulators, etc., and are not excluded by the express mention of such other items of exempted property in that section. *City of Portland v. New England Telephone & Telegraph Co.*, 68 Atl. 1040, 1044, 103 Me. 240.

**Contingent remainder**

Under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565, providing that all property that a bankrupt could by any means have transferred passes to the assignee, a contingent remainder in land is subject to sale by the trustee. While a contingent remainder is not technically an estate, but a mere possibility of an estate in the future, it is "property" within Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565; that term as used therein being of the broadest possible signification, embracing everything that has exchangeable value, or goes to make up a man's wealth, and every interest or estate which the law regards of sufficient value for judicial recognition. *Martin & Earle v. Maxwell*, 67 S. E. 962, 964, 86 S. C. 1, 138 Am. St. Rep. 1012.

**Credits**

The word "property," as used in Const. art. 8, § 1, declaring that taxes shall be levied on such property as the Legislature shall prescribe, includes credits, and hence Rev. St. 1898, § 1036, declaring that personal property, for purposes of taxation, shall be construed to include all debts due from solvent debtors, is valid. *Kingsley v. City of Merrill*, 99 N. W. 1044, 1045, 122 Wis. 185, 67 L. R. A. 200, 2 Ann. Cas. 748.

The word "property," defined in *Cobbey's Ann. St.* 1903, § 10402, relating to assessment for taxation, as every kind of property, tangible or intangible, subject to ownership, in-

cludes credits. *Lancaster County v. McDonald*, 103 N. W. 78, 79, 73 Neb. 453.

Outstanding uncollected accounts are generally recognized in law and in practice as "property," and, that being the case, are subject to taxation. *Standard Marine Ins. Co., Limited, of Liverpool, England, v. Board of Assessors*, 49 South. 483, 484, 123 La. 717, 29 L. R. A. (N. S.) 59.

Const. § 172, requires all property not exempted to be assessed for taxation at the price it would bring at a fair and voluntary sale. Ky. St. § 4020, requires all real and personal estates to be assessed for taxation, and section 4022 provides that for taxation purposes real estate shall include all lands, and personal estate shall include every other kind of property, tangible as well as intangible. Held, that the word "property" embraced everything of value owned, or which could be sold at any price, and included an enforceable demand against a person or property, and that the "storage account" created by the deposit by distillers of whisky in bonded warehouses was property assessable for taxation; any contingency that the whisky might not bring enough to pay storage or might be destroyed, etc., not depriving it of its character of property. *Commonwealth v. Kentucky Distilleries & Warehouse Co.*, 136 S. W. 1032, 1136, 143 Ky. 314.

**Dead body**

While a dead human body is not property in the usual meaning of the term, it is a sort of quasi property, to which certain persons may have rights, as they have duties to perform toward it, and the right to dispose of a corpse by decent sepulture includes the right to the possession of the body in the condition in which death leaves it. *Gray v. State*, 114 S. W. 635, 641, 55 Tex. Cr. R. 90, 22 L. R. A. (N. S.) 513.

In the sense in which "property" is ordinarily used, one whose duty it becomes to bury a deceased person has no rights of ownership over the corpse; but, in the broader meaning of the term, he has a quasi property right therein, which entitles him to possession and control of the body for the single purpose of decent burial. *Litteral v. Litteral*, 111 S. W. 872, 874, 131 Mo. App. 306.

**Debts**

A debt is "property" within Laws 1896, p. 868, c. 908, § 220, imposing a tax on the transfer of any property, real or personal. In view of the definition of property contained in section 242, moneys due a nonresident, who was, because of his illness, unable to transact business, was given to his secretary, and by him deposited in a bank as a special account in the creditor's name, where it remained until after the creditor's death was subject to the transfer tax, since the money was subject to the creditor's order at the time of his death, and money deposited with a broker by a nonresident to margin-



stock transactions, which could be withdrawn at any time, is, when withdrawn after the death of the depositor, subject to the transfer tax. In re Daly's Estate, 91 N. Y. Supp. 558, 362, 100 App. Div. 373.

#### Deposits

Under B. & C. Comp. § 800, providing that all "property" of defendant not exempt from execution shall be liable to attachment, the balance a firm has to its credit in a bank is liable to seizure under an attachment in an action against the firm, the word "property" including money and credits. Caldwell Banking & Trust Co. v. Porter, 95 P. 1, 2, 52 Or. 318.

The word "property," in Pub. St. 1901, c. 64, § 1, providing that every railroad corporation shall pay to the state an annual tax on the value of its property at a rate as nearly equal as may be to the average rate of taxation on other property throughout the state, when considered in connection with the history of the legislation on the subject of railroad taxation, together with the decisions of the Supreme Court on the subject, and when considered in connection with similar language used in the statutes governing taxation of telegraph and telephone companies, and of sleeping, dining, and parlor cars, includes savings bank deposits taxable by chapter 65, § 5, Pub. St. 1901, and, in determining the average rate of taxation on the property in the state, savings bank deposits must be considered. Wyatt v. State Board of Equalization, 70 Atl. 387, 388, 390, 74 N. H. 552.

The words "estate" and "property," as used in the Transfer Tax Law, Laws 1896, p. 869, c. 908, are defined by section 242 to mean the property or interest therein of the testator, intestate, grantor, bargainer, or vendor passing or transferred. A husband and wife deposited moneys with two trust companies, either of them, or the survivor, having power to draw such deposits. In the earlier account the husband's name came first, and in the later one the wife's name came first. The moneys deposited in both accounts previously belonged to the wife, and the checks drawn on the early account were generally signed by the husband to pay household expenses, and the later account was drawn upon by checks signed by the husband with the names of both parties to pay for traveling expenses, and often checks were drawn on the later account and deposited in the first account and disbursed for family expenses. The husband contributed his whole salary to the household expenses. On the death of the wife, the balances in the joint accounts were not subject to the transfer tax. In re Stebbins' Estate, 103 N. Y. Supp. 503, 505, 52 Misc. Rep. 438.

#### Dogs

A dog is "property." Rowan v. Sussdorff, 132 N. Y. Supp. 550, 552, 147 App. Div. 673.

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A dog is such "property" as to be subject to levy and sale for the debts of his owner. Vaughn v. Nelson, 62 S. E. 708, 5 Ga. App. 105.

Code 1907, § 5476, provides that, when any stock is killed or injured or other property damaged by any railroad, the burden of showing absence of negligence shall be on the railroad company. Held, that the term "stock" does not include a dog, but that it is included in the word "property," and, the statute being sufficiently broad to include a street railroad, the burden of proof, in an action against a street railroad company for killing plaintiff's dog, was on defendant to show absence of negligence. Selma Street & Suburban Ry. Co. v. Martin, 56 South. 601, 602, 2 Ala. App. 537.

An ordinance of a city imposing a tax on dogs, enacted under Cities and Villages Act, art. 5, § 1, cl. 80, empowering cities to regulate and prohibit the running at large of dogs and to impose a tax on dogs is within the police power, as imposing a tax for regulation, and not for revenue, so that it is not governed by Const. art. 9, §§ 1, 9, 10, providing that taxes levied by valuation shall be uniform as to persons and property though a dog is "property," and though the ordinance makes no disposition of the taxes when collected. City of Paxton v. Fitzsimmons, 97 N. E. 675, 253 Ill. 355, 39 L. R. A. (N. S.) 155.

#### Draft

A draft is "property" within the garnishment statute. Washington Brick, Lime & Mfg. Co. v. Traders' Nat. Bank, 89 Pac. 157, 158, 46 Wash. 23, 123 Am. St. Rep. 912.

#### Earning capacity

Alimony can be allowed to the wife after she obtains a divorce under Civ. Code, art. 160, only from the property and not in excess of one-third of the income of the husband, and the word "property" does not mean earning capacity. Jackson v. Burns, 41 South. 40, 41, 116 La. 695.

#### Easements

An easement is "property." Stein v. Chesapeake & O. R. Co., 116 S. W. 733, 737, 132 Ky. 322.

The term "property" is capable of including easements. McEwan v. Pennsylvania, N. J. & N. Y. R. Co., 60 Atl. 1130, 1131, 72 N. J. Law, 419.

Street easements are "property" within the protection of the state and federal Constitutions. Minzesheimer v. Prendergast, 129 N. Y. Supp. 779, 781, 144 App. Div. 576.

An easement created by deed is a valuable property right, and cannot be extinguished without compensation merely because of an unauthorized or excessive use. McCullough v. Broad Exch. Co., 92 N. Y. Supp. 533, 534, 101 App. Div. 566.

Right to possession of land under an easement is "property" within the law of eminent domain. *Lancaster v. Augusta Water Dist.*, 79 Atl. 463, 465, 108 Me. 137, Ann. Cas. 1913A, 1252.

An easement appurtenant to real estate is "property" within the Constitution, and, where the same is appropriated by one having no right to acquire property under the right of eminent domain, the owner of the easement is entitled to appeal to equity to enjoin the appropriation. *Batchelor v. Hinkle*, 125 N. Y. Supp. 929, 930, 140 App. Div. 621.

A street railway company exercising the right obtained from a city to construct tracks in the streets and operate cars thereon, by actually constructing the tracks and operating cars, obtains an easement, which is property subject to taxation. *United Rys. & Electric Co. of Baltimore v. City of Baltimore*, 73 Atl. 633, 634, 111 Md. 264.

#### Equitable, legal, or other title

An equity in incumbered real estate is "property" within Const. art. 2, § 30, providing that no person shall be deprived of property without due process of law. *State ex rel. Deems v. Holtcamp*, 151 S. W. 153, 157, 245 Mo. 655.

"The words 'property of the bankrupt' mean only the property to which the bankrupt is beneficially entitled, and do not include property to which he has only a bare legal title." *First Nat. Bank v. Staake*, 26 Sup. Ct. 580, 584, 202 U. S. 141, 50 L. Ed. 967 (citing *Hewitt v. Berlin Mach. Works*, 24 Sup. Ct. 695, 194 U. S. 296, 48 L. Ed. 986).

"In the construction of those provisions of a treaty that provide for the protection of 'property' of owners within the ceded territory, it has been uniformly held that the term 'property' embraces all rights whether legal, equitable or imperfect." *State v. Russell*, 85 S. W. 288, 291, 38 Tex. Civ. App. 13; *Haynes v. State (Tex.)* 85 S. W. 1029, 1039 (citing *Strother v. Lucas*, 12 Pet. [37 U. S.] 435, 9 L. Ed. 1137; *Hornsby v. United States*, 10 Wall. [77 U. S.] 224; 19 L. Ed. 900).

#### Estate

The words "property" and "estate" are often used synonymously, and are so used in a statute imposing an inheritance tax, at a specified rate, on every \$100 of the market value of the "property" received by each person. *People v. Koenig*, 85 Pac. 1129-1131, 37 Colo. 283, 11 Ann. Cas. 140.

The word "estate," used in its primary sense in a will, without anything in the context to limit it, is nearly synonymous with the word "property," where that word is not qualified by the addition of the word "personal," and under the word "estate," in its primary sense, real property will ordinarily pass; the presumption being that the testator

used the word in its inclusive signification, unless the context restricts its meaning to some particular species of property. *Powell v. Woodcock*, 62 S. E. 1071, 1072, 149 N. C. 235 (citing 1 Underhill, Wills, § 295; *Foll v. Newsome*, 50 S. E. 597, 138 N. C. 115, 3 Ann. Cas. 417).

In Civ. Code, § 485, making railroads responsible for injury they may occasion to domestic animals on a line which passes through or along the property of the owner of the animals, "property" is interchangeable with "estate." That a tenant has a property in land may not be doubted. *Walther v. Sierra R. Co.*, 74 Pac. 840, 841, 141 Cal. 288.

"The word 'estate,' taken in its primary sense, as used in a will, without anything in the context to limit it, is a word of very extensive meaning. It is nearly synonymous with the word 'property,' when that word is not qualified by the word 'personal.' Under the word 'estate,' used in its primary sense, real property of every description will ordinarily pass; and the presumption is that the testator, in using the word, uses it in its broad and inclusive signification, unless the context restricts its meaning to some particular species of property." *Foll v. Newsome*, 50 S. E. 597, 598, 138 N. C. 115, 3 Ann. Cas. 417 (quoting and adopting definition in 1 Underhill, Wills, § 295).

#### Exemption under statute of limitations

The bar of the statute of limitations as a defense to an obligation is not "property"; and hence the removal of the bar by statute is not a taking of property without due process of law, within the constitutional inhibition. *People ex rel. Eckerson v. Board of Education, etc., of School Dist. No. 1 of Haverstraw*, 110 N. Y. Supp. 769, 774, 128 App. Div. 414.

#### Fee

The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or mere right of possession. *Harvey Coal & Coke Co. v. Dillon*, 53 S. E. 928, 933, 59 W. Va. 606, 6 L. R. A. (N. S.) 628.

In the constitutional provision as to compensation for property taken for public use, the term "property" includes the fee-simple title to the thing owned, whether it be burdened with an easement or not; and the term "taken" includes the appropriation of that thing or of some interest or estate in it, by actual, physical possession, such as expropriation when a railroad is constructed and operated on it. *McCammon & Lang Lumber Co. v. Trinity & B. V. R. Co.*, 133 S. W. 247, 249, 104 Tex. 8, 36 L. R. A. (N. S.) 662, Ann. Cas. 1913E, 870.

**Expectancy**

A mere expectancy or possibility, as that of an heir at law, or heir in tail while the ancestor is still living, or that of husband or wife, as to curtesy or dower before the death of the other spouse, or that of a joint tenant during the life of the other joint tenant, is not "property" within Const. art. 1, § 10, and the fourteenth amendment to the federal Constitution, providing that no one shall be deprived of property without due process of law. Public Laws 1906, c. 1346, re-enacted in Gen. Laws 1909, c. 252, § 16, authorizing the barring of equitable estates tail and remainders and reversions expectant thereon, violates Const. art. 1, § 10, and the fourteenth amendment to the federal Constitution, prohibiting the deprivation of property without due process of law, so far as it relates to estates in existence prior to its passage, and the rights of grandchildren and heirs at law of testator, existing prior to the act under the will creating equitable estates tail in testator's children with contingent cross-remainders to the survivors or their descendants, and providing that on the death of the children without issue the property shall go to his heirs at law, may not be barred as authorized by the act. *Green v. Edwards*, 77 Atl. 188, 196, 31 R. I. 1, Ann. Cas. 1912B, 41.

**Financial standing or credit**

A man's financial standing or credit may not be "property" within the technical meaning of that term, but it is something often more valuable; and, if it be wrongfully injured or destroyed by another, he may recover whatever pecuniary damages he can prove, by competent testimony under proper pleadings, he has sustained thereby. *Tootle v. Kent*, 78 Pac. 310, 314, 12 Okl. 674 (quoting and adopting definition in *Kyd v. Cook*, 76 N. W. 524, 56 Neb. 71, 71 Am. St. Rep. 661).

"Property," as used in connection with fraud and defamation, as well as in malicious prosecution, may include good will and credit. *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 117 N. W. 928, 927, 105 Minn. 491, 21 L. R. A. (N. S.) 727.

**Fishery**

The right of fishery is "property." *Hume v. Rogue River Packing Co.*, 92 Pac. 1065, 1068, 51 Or. 237, 31 L. R. A. (N. S.) 396, 31 Am. St. Rep. 732.

The right to take fish from the tide waters of a state is a "property right" and not a mere privilege of citizenship, and, since the title to the bed of all tide waters in the state is in the state as trustee for its citizens, the state may impose such conditions on the right to take fish therefrom as it sees fit, notwithstanding the license fee exacted from aliens is higher than that required of own citizens. *Leong Mow v. Board of*

Com'rs for Protection of Birds, Game and Fish, 185 Fed. 223.

**Franchise**

See, also, **Special Franchise**.

A franchise is "property," and, like other property, may be taken for public use. *State v. Suffield & Thompsonville Bridge Co.*, 70 Atl. 55, 57, 81 Conn. 56 (citing *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716).

A franchise to construct waterworks in a city and use the streets for that purpose is "property." *Adams v. Samuel R. Bullock & Co.*, 47 South. 527, 530, 94 Miss. 27, 19 Ann. Cas. 165.

An ad valorem tax laid on franchises of public service corporations is a property tax; their franchises being deemed "property." *Board of Councilmen of City of Frankfort v. Capital Gas & Electric Light Co. (Ky.)* 96 S. W. 870, 872.

The franchise of a water company to collect rates for water is property, and its value, as well as whatever value attaches to its business as a going concern, is to be considered in determining the value of its property for rate-fixing purposes, but the burden of proving such values rests upon the company. *Spring Valley Water Co. v. City and County of San Francisco*, 165 Fed. 667, 693.

The corporate franchise, the right to be a corporation, created by the laws of the state, and to conduct its corporate business in the state whatever value might attach to such right and its exercise, are "property" of the corporation frequently possessing great value. *Marion Nat. Bank of Lebanon v. Burton (Ky.)* 90 S. W. 944, 947, 10 L. R. A. (N. S.) 947.

A gas franchise is "property," a vested right protected by the Constitution, while a "license" is a mere personal privilege, and revocable, except in rare instances and under peculiar conditions. *Elizabeth City v. Banks*, 64 S. E. 189, 192, 150 N. C. 407, 22 L. R. A. (N. S.) 925.

A franchise to one and to such persons as he might associate with him to construct and maintain a turnpike road and to collect tolls thereon, subject to supervision by county officers granting a right of way, and fixing a time for the completion of the road, is "property" within Civ. Code, § 1044, providing that "property of any kind may be transferred except as otherwise provided by this article," and as such is transferable by assignment or in any other authorized mode of transferring real property. *People ex rel. Spiers v. Lawley*, 119 Pac. 1089, 1692, 17 Cal. App. 331.

The tax law (Laws 1881, c. 296), defining the terms, "land," "real estate," and "real property" as including "all surface, underground or elevated railroads," and the

value of all franchises to construct or operate railroads, in, under, above or through streets, is not limited to street surface railroads only, but includes long distance surface steam railroads, and hence a franchise granted by the state to a steam surface railroad for its road in, under, above, or through streets is property, and a special franchise, and taxable. *People ex rel. New York Cent. & H. R. R. Co. v. Woodbury*, 133 N. Y. Supp. 135, 139, 74 Misc. Rep. 130, 145.

A corporate franchise, the right to be and exist as a corporation, may constitute a valuable property of the corporation within the meaning of the term "property" as used in Const. art. 13, § 1, requiring all property to be taxed in proportion to its value, but the tax imposed on corporations by Act March 20, 1905, as amended, imposing a license tax on all domestic corporations with certain exceptions, and all foreign corporations doing business in the state, forfeiting the charter or right to do business in the state on failure to pay, is not a tax upon "property," within that section, being a license fee for the privilege of existing as a corporation in case of domestic corporations, and for the privilege of doing business within the state in case of a foreign corporation. *Kaiser Land & Fruit Co. v. Curry*, 103 Pac. 341, 346, 155 Cal. 688.

Laws 1907, p. 128, c. 107, imposing on each domestic and foreign corporation a progressive annual license tax based on its authorized capital, imposes a license tax on the privilege of existing as a corporation, and does not impose a license tax on the franchise to carry on a particular business, and is not in conflict with Const. art. 13, §§ 2, 3, providing that all property, including franchises, shall be taxed in proportion to value, etc., since corporate franchises may be property, or may not be deemed as property; the intention of the statute being that it should not be treated as property in such case. *Blackrock Copper Min. & Mill. Co. v. Tingey*, 98 Pac. 180, 182, 34 Utah, 369, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850.

A street railway company exercising the right obtained from a city to construct its tracks in the streets thereof, and operate cars thereon, by actually constructing and maintaining its tracks and operating cars thereon, obtains thereby an easement, which is property subject to taxation, while the unexercised right is a franchise, which, separately considered, is not "property" in the sense that it is substantial value for direct taxation. *United Rys. & Electric Co. of Baltimore v. City of Baltimore*, 73 Atl. 633, 634, 111 Md. 264.

#### Good will

"Good will" is not "property," within the meaning of the tax law, and a transfer of good will is not subject to the transfer tax.

In *re Dun's Estate*, 80 N. Y. Supp. 657, 658, 39 Misc. Rep. 616.

The good will of preparations used in treating the hair and system of treatment is a species of "property." *Pope-Turnbo v. Bedford*, 127 S. W. 426, 428, 147 Mo. App. 692.

The good will of a business is the favor won from the public and the probability that old customers will continue their patronage. It is an advantage and benefit that is acquired by business establishments beyond the value of the money or property invested therein, and is "property" in the legal sense of the term, and subject to sale and transfer in conjunction with a sale of the business, precisely as other personality. *Haugen v. Sundseth*, 118 N. W. 666, 667, 106 Minn. 129, 16 Ann. Cas. 259.

"Property," as used in connection with fraud and defamation, as well as in malicious prosecution, may include good will and credit. *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 117 N. W. 926, 927, 105 Minn. 491, 21 L. R. A. (N. S.) 727.

Where promoters of a consolidated corporation secured options on various plants to be consolidated, which options included a transfer of the latter's good will, the owners agreeing not to again enter into the same business for a series of years, neither the good will of the promoters, if any existed with reference to such plants transferred to the consolidated corporation, nor that transferred as a part of the plants consolidated, constituted "property" for which stock of a consolidated corporation could properly be issued, within Gen. St. pp. 917, 952, §§ 54, 213, declaring that nothing but money, or property of the value thereof, shall be considered as payment of any part of the capital stock of any company organized under the act. See *v. Heppenheimer*, 61 Atl. 843, 847, 69 N. J. Eq. 36.

#### Ground of some kind

The word "property," as used in a contract to build a frame building "on the property belonging to said S. situated on Park Place near City Park avenue, formerly Metairie Road" was insufficient to convey notice to third persons of the particular piece of ground in contemplation of the parties. The word "property" is a very vague term and is used in the contract to indicate ground of some kind belonging to the person erecting the building. *Segari v. Mazzel*, 41 South. 245, 246, 116 La. 1026.

#### Ice

Ice on a floatable stream, formed over land belonging to a riparian owner, is "property," within section 21 of the Declaration of Rights, which provides that private property shall not be taken for public use without just compensation, etc.; and hence *Priv. Sp. Laws 1911, c. 92*, which attempts to authorize the city of Lewiston to enter upon an ice

field in the Androscoggin river to cut ice for the benefit of the city, is unconstitutional for failing to provide for compensation to the owner. *Lake Auburn Crystal Ice Co. v. City of Lewiston*, 84 Atl. 1004, 1005, 109 Me. 489.

#### **Inchoate land title**

An inchoate title to lands is "property." *Crochet v. McCamant*, 40 South. 474, 477, 116 La. 1, 114 Am. St. Rep. 538.

A suit to foreclose a land contract is a "suit concerning property" within Comp. Laws, § 435, providing that circuit courts in chancery shall dismiss suits concerning property where the matter in dispute shall not exceed \$100, etc., and where there remains less than \$100 unpaid the suit must be dismissed. *Sands & Maxwell Lumber Co. v. Gay*, 101 N. W. 53, 138 Mich. 82.

The term "property," as used in the Louisiana Purchase Treaty, "comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie in contract, executory as well as executed; and no principle is better settled than that inchoate titles to land are property." *Corkran Oil & Development Co. v. Arnaudet*, 35 South. 747, 753, 111 La. 563 (citing *Bryan v. Kennett*, 5 Sup. Ct. 407, 113 U. S. 179, 28 L. Ed. 908; *Delassus v. United States*, 9 Pet. [34 U. S.] 117, 9 L. Ed. 71; *Smith v. United States*, 10 Pet. [35 U. S.] 326, 9 L. Ed. 442; *Shidell v. Grandjean*, 4 Sup. Ct. 475, 111 U. S. 412, 28 L. Ed. 321; *Williams v. Close*, 12 La. Ann. 873; *Sacket v. Hooper*, 3 La. 107).

#### **Income**

Const. art. 8, § 1, provided that the rule of taxation shall be uniform, and taxes may be levied on such property as the Legislature may prescribe. This was amended in 1908 by adding a provision that taxes may also be imposed on incomes, privileges, and occupations, which taxes may be graduated and progressive. Held, that such amendment expressly authorized income taxation of a progressive character, in addition to taxation of property, and that taxation of income derived from property was not the same as taxation of the property itself, and hence Laws 1911, c. 658, was not unconstitutional in taxing real property and also the rents derived therefrom as imposing double taxation. *State ex rel. Bolens v. Frear*, 134 N. W. 673, 689, 148 Wis. 456, Ann. Cas. 1913A, 1147.

#### **Insurance policy or certificate**

A certificate of insurance in a fraternal order is not "property" in the sense that a change in the beneficiary by the husband from the wife to some one else will of itself constitute a fraud on her marital rights. *Hahn v. Supreme Lodge of the Pathfinder*, 125 S. W. 259, 261, 136 Ky. 823.

Bankruptcy Act July 1, 1898, c. 541, § 70a, 30 Stat. 565, provides that, when a bank-

rupt shall have an insurance policy which has a cash surrender value, he may, within 30 days after such value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his property under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets. Held, that policies having a cash surrender value were governed by such provision, but that policies having no cash surrender value were not "property" within the section, and hence where a bankrupt committed suicide after the filing of an involuntary petition, but before the adjudication, leaving insurance policies, some of which had a small cash surrender value and others none, the bankrupt's executor was entitled to the proceeds of the policies from the trustee on paying to him the cash surrender value of the policies having such a value at the date of the filing of the petition. In re *Judson*, 192 Fed. 834, 836, 113 C. C. A. 158.

#### **Interest of abutting owner in street or highway**

The rights and easements, which an abutting owner has in the street on which his property abuts, constitutes "property," within the rule that a man cannot be deprived of his property without just compensation. *People ex rel. Winthrop v. Delany*, 105 N. Y. Supp. 746, 749, 120 App. Div. 801.

An ordinance vacating a part of a street without providing a means for the ascertainment of damages to property abutting on the street is void as taking property without compensation, in violation of Const. art. 1, § 16, as the interest an abutting property holder has in the maintenance of a street is property. *Smith v. City of Centrailla*, 104 Pac. 797, 799, 55 Wash. 573.

Where the fee in a highway is in the public, an abutting owner has the right to a way for ingress and egress and to light and air, and these are appurtenances and constitute "property" which belong to the owner, and he cannot be deprived of them for public use and other uses without adequate compensation. *Blackwell, E. & S. W. R. Co. v. Gist*, 90 Pac. 889, 891, 18 Okl. 516.

The plat of School Section addition to the town of Chicago, recorded between 1833 and 1836, did not comply with the law of 1833 (Rev. Laws 1833, p. 599), providing for the recording of plats in force at the time, so that it amounted merely to a common-law dedication; the abutting lot owners taking the fee to the center of the streets marked thereon. The curative act of 1843 (Laws 1842-43, p. 65) directed the recorder to certify upon the maps or plat of such school district recorded in his office that the same was the plat of such addition, and to make

such other certificates thereon as the common council might direct to remedy any omission in the plat or map, and that, when so certified, the plat or map should be valid for all purposes, any omission or defect to the contrary notwithstanding. Held, that in view of the fact that the title of the abutting owners to the center of the street, where the city does not own the fee, is not a contingent interest or a mere expectancy, but a present subsisting ownership of the fee, subject to the public easement, which the owners may subject to any private use in connection with their premises consistent with the dominant rights of the public in the easement, so that the rights of the abutting owners became vested, the curative act could not divest them of such rights, since it would be a deprivation of property without due process of law. *Sears v. City of Chicago*, 98 N. E. 158, 162, 247 Ill. 204, 139 Am. St. Rep. 319, 20 Ann. Cas. 539.

#### Interest in pending action

Where statutes make a distinction between a plaintiff's interest in a pending action and his cause of action before suit brought, making the one assignable in cases where the other is not, the interest of a bankrupt in a pending action, which he might sell and assign, and of which his creditors might obtain the benefit on administration of his estate, is to be held "property," within the purview of subdivision 5, § 70, of the national bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 566), rather than a "right of action," under subdivision 6. *Cleland v. Anderson*, 98 N. W. 212, 213, 66 Neb. 252, 5 L. R. A. (N. S.) 136.

#### Interest in stock pool

The interest of a bankrupt in a stock pool to advance the market in a certain stock and then sell to the public constituted "property," within the meaning of the bankruptcy act. *In re Lathrop, Haskins & Co.*, 184 Fed. 534, 535.

#### Interest under will

The interest of one under a will, being a vested interest in a contingent right, is "property," the value of which "can be ascertained by sale, appraisal, or by other means within the ordinary procedure of the court," and so is subject to be reached by creditors' bill, under Rev. Laws c. 159, § 3, cl. 7. *Clarke v. Fay*, 91 N. E. 328, 331, 205 Mass. 228, 27 L. R. A. (N. S.) 454.

The interest which one has under a will, his right to receive property thereunder being contingent only on his surviving his father, though the amount may be increased by others dying without issue before his father, and though his share may be increased or diminished by brothers or sisters dying or being born before death of his father, is more than a mere possibility, and is a vested interest in a contingent right, which is

"property." *Clarke v. Fay*, 91 N. E. 328, 331, 205 Mass. 228, 27 L. R. A. (N. S.) 454.

#### Intoxicating liquor

Intoxicating liquors, being recognized as "property" in Missouri, are insurable. *Kellogg v. German-American Ins. Co.*, 113 S. W. 663, 665, 133 Mo. App. 391.

Intoxicating liquors, whether exposed for sale unlawfully or not, are "property," in the District of Columbia, and cannot lawfully be taken or destroyed save by due process of law. *Nation v. District of Columbia*, 34 App. D. C. 453, 455.

Whisky contained in government warehouses before payment of taxes thereon due to the United States is "property" subject to taxation in common with other property in the state. *Thompson v. Commonwealth*, 94 S. W. 654, 655, 123 Ky. 302, 124 Am. St. Rep. 362.

The law treats whisky as "property," and, because it is property, protects it the same as it protects milk, for instance, and a trade-mark under which whisky bottled by the manufacturer is sold is entitled to protection. *People v. Luhrs*, 89 N. E. 171, 174, 195 N. Y. 377, 25 L. R. A. (N. S.) 473.

"Intoxicating liquors" constitute "property," within the meaning of the laws of this state, even though kept within territory wherein their sale has been prohibited under the local option statutes. Intoxicating liquors may be owned and kept in such territory for a number of perfectly legitimate uses, which readily suggest themselves to any one. This being true, it follows that, before the owner of such property can be deprived of its possession, it must be by some method constituting due course of the law of the land. *Beavers v. Goodwin (Tex.)* 90 S. W. 930, 931.

#### Invention and patent right

A mere idea, unprotected by contract or statute, is not "property." *Haskins v. Ryan*, 64 Atl. 436, 438, 71 N. J. Eq. 575.

Within the meaning of the rule that that which one has been employed and paid to accomplish becomes, when accomplished, the property of his employer, the "property" of the employer is his right to use the invention of his employé. *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 412, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172.

The incorporeal interest of an inventor in an article conceived prior to the allowance of a patent cannot be treated as "property," within Bankr. Act July 1, 1898, c. 541, § 70a, cl. 5, 30 Stat. 566, providing for the surrender of all property which prior to the filing of the petition the bankrupt could by any means have transferred. *In re Dann*, 129 Fed. 495, 497.

The owner of a secret process, not patented, has no exclusive right to make, use,

and vend the article to which it relates, but he has the right to keep his own knowledge to himself, and to protection of the same, as a "property" right against one who, in violation of a contract or through a breach of trust, or confidence, undertakes to apply the secret to his own use or to impart it to others. *Hartman v. John D. Park & Sons Co.*, 145 Fed. 353, 361.

An unpatented formula is not "property," within Const. art. 12, § 6, providing that no corporation shall issue stock except for money paid, labor done, or property actually received. The terms in which this section of the Constitution is expressed indicates the purpose that the assets of the corporation should be something substantial and of such a character that they could be subjected to the payment of claims against the corporation as well as to secure the shareholders in their rights in the capital stock. *O'Bear-Nester Glass Co. v. Antiexplo Co.*, 108 S. W. 967, 968, 101 Tex. 431, 16 L. R. A. (N. S.) 520, 130 Am. St. Rep. 865.

Where the president and manager of a corporation had completed certain inventions with the corporation's funds while acting as the corporation's agent and employé, and thereafter obtained credit thereon, pending applications for patents constituted "property" which passed to the corporation's trustee in bankruptcy under Bankruptcy Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565, providing that a bankrupt's trustee shall be vested by operation of law with the title of the bankrupt to all property which, prior to the filing of the petition, the bankrupt by any means could have transferred or which could have been levied on or sold under judicial process against him; the word "property," as used in such section, being intended to include anything which was a proper subject of a legal transfer. *In re Cantelo Mfg. Co.*, 185 Fed. 276, 280.

#### Labor

Labor or the right to labor is as much "property" as land or money. *Jones v. Leslie*, 112 Pac. 81, 82, 61 Wash. 107, Ann. Cas. 1912B, 1158.

"Labor is 'property,' and as such merits protection. The right to make it available is next in importance to the rights of life and liberty." *Slaughter-House Cases*, 16 Wall. (83 U. S.) 36, 127, 21 L. Ed. 394 (Swayne, J., dissenting).

Labor is "property," within the meaning of the constitutional prohibition against depriving any person of life, liberty, or property without due process of law. *Mathews v. People*, 67 N. E. 28, 32, 202 Ill. 389, 63 L. R. A. 73, 95 Am. St. Rep. 241.

"To say that 'time is money' is a metaphor. It expresses merely the fact that time is of value, and that the use of a man's muscle, or his skill, or of his mentality will

usually procure money in exchange. But time is not money, nor is labor 'property,' in any other sense than that it is usually of some value, and its proceeds belong to the individual or to the parent or guardian if he is a minor, or to the state if he is a convict. But it is not property in the sense that it can be liable to a property tax." *State v. Wheeler*, 53 S. E. 358, 359, 141 N. C. 773, 5 L. R. A. (N. S.) 1139, 115 Am. St. Rep. 700.

Labor is "property." The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner. The right of property involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts. *Coffeyville Vitriified Brick & Tile Co. v. Perry*, 76 Pac. 848, 850, 69 Kan. 297, 66 L. R. A. 185, 1 Ann. Cas. 936.

Labor is "property," within the meaning of the constitutional provision that no person shall be deprived of life, liberty, or "property" without due process of law. *O'Brien v. People ex rel. Kellogg Switchboard & Supply Co.*, 75 N. E. 108, 116, 216 Ill. 354, 108 Am. St. Rep. 219, 3 Ann. Cas. 966.

While the right to labor or to practice a profession may be considered a property right for the purpose of protection, services already rendered by one person for another are not "property," for the purpose of enlarging or changing the ordinary remedies by which the indebtedness therefor may be recovered. *Gleason v. Thaw*, 185 Fed. 345, 347, 107 C. C. A. 463, 34 L. R. A. (N. S.) 894.

"'Property,' in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it; and the right of property preserved by the Constitution is the right, not only to possess and enjoy it, but to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage; and, as an incident to the right of acquiring property, the liberty to enter into contracts by which labor may be employed in such way as to the laborer may seem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty." Acts 29th Leg. p. 372, c. 152, § 1, making it unlawful for any person, firm, association of persons, corporation, or agent of either, to issue any ticket, check, or writing obligatory to any servant or employé for labor performed, redeemable or payable in goods or merchandise, and section 2 providing the punishment for violation of the act, interferes with the right of contract, and contravenes Const. art. 1, § 19, providing that no citizen shall be deprived of life, liberty,

property, privileges, or immunities, etc., except by due course of law, and also the federal Constitution. *Jordan v. State*, 103 S. W. 633, 636, 51 Tex. Cr. R. 531, 11 L. R. A. (N. S.) 603, 14 Ann. Cas. 616 (quoting and adopting definition in *Low v. Rees Printing Co.*, 59 N. W. 362, 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670).

#### Land

The phrase "property sold," in the statutory definition of a redemptioner as being one holding a lien by judgment or mortgage on the property sold, applies to "land," as that word is commonly used. *North Dakota Horse & Cattle Co. v. Serumgard*, 117 N. W. 453, 454, 463, 17 N. D. 466, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717.

"The word 'property,' \* \* \* in statutes giving persons, claiming an interest in condemned property, compensation, etc.," should be held to include every valuable right and interest which a person can have in or appurtenant to land. *Brigham City v. Chase*, 85 Pac. 436, 439, 30 Utah, 410.

Under Const. art. 3, § 43, making a wife's "property" exempt from sale for her husband's debts, land owned by them as tenants by the entirety is "property." *Jordan v. Reynolds*, 66 Atl. 37, 39, 105 Md. 288, 9 L. R. A. (N. S.) 1026, 121 Am. St. Rep. 578, 12 Ann. Cas. 51.

The term "property" embraces land as well as personal effects. Indeed, there is no term of similar signification having a meaning so comprehensive. Civ. Code 1902, §§ 269, 270, provide that all persons listing property for taxation shall be personally responsible therefor, and that, in case of estates administered, the property shall be listed as the property of decedent, and that all property of decedents shall be returned for taxation at the residence of the executor or administrator, if in the county, but, if he resides out of the county, at the county seat of such county. Held, to refer to the assessment of lands, as well as personal property, and it is the duty of the administrator to list the lands of his decedent as the land of "the estate of" the deceased and pay the taxes levied. *Pollitzer v. Beinkempen*, 57 S. E. 475, 477, 76 S. C. 517.

*Burns' Ann. St.* 1908, § 2990, provides that the real and personal property of any person dying intestate shall descend to his or her children in equal proportions. Section 1356 declares that the phrase "real property" shall include lands, tenements, and hereditaments. Held, that the word "property," as used in section 2990, as applicable to lands, includes every species of title inchoate or complete, and embraces the rights which lie in contract, whether executory or executed. *Adams v. Merrill*, 85 N. E. 114, 118, 45 Ind. App. 815.

Laws 1908, p. 876, relating to street openings, requires by section 15 that each

lot, piece, or parcel of land be designated upon a diagram as a basis for assessments. Section 17 requires the amount of assessment to be set opposite each lot, piece, or parcel of land which under section 20 is made a lien upon the property assessed. These sections and sections 23 and 26, use the terms "property," "lands," and "each lot, piece or parcel of land," interchangeably. Held that, in requiring the superintendent of streets to assess the benefits from street improvements on the property of any street railroad within the assessment district, the word "property" was used in a limited sense and as referring to that species of property designated as "land," which as defined by Civ. Code, § 659, is "the solid material of the earth," and hence there was no authority for an assessment against the "ties, tracks, poles, rails and switches" as such or apart from the franchise. *Los Angeles Pac. Co. v. Hubbard*, 121 Pac. 306, 308, 17 Cal. App. 646.

As used in Const. art. 13, § 4, providing that a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and the value of such security shall be taxed to the owner thereof, where the property affected thereby is situated, the term "property" applies to land and estates therein, and does not apply to assessment and taxation of personal property. *Bank of Woodland v. Pierce*, 77 Pac. 1012, 1014, 144 Cal. 434.

Under Act of July 1, 1902, c. 1369, §§ 5, 12, 32 Stat. 691, providing that all the property rights acquired in the Philippine Islands by the United States are to be administered for the inhabitants thereof, and that no law shall deprive any person of life, liberty, or property without due process of law, the term "property" includes land held by the natives under tribal custom, even though it had never been patented to them by the crown of Spain. *Carino v. Insular Government of Philippine Islands*, 29 Sup. Ct. 334, 336, 212 U. S. 449, 53 L. Ed. 594.

#### Leasehold

The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or mere right of possession. *Harvey Coal & Coke Co. v. Dillon*, 53 S. E. 923, 933, 59 W. Va. 605, 6 L. R. A. (N. S.) 628.

Where tenants are in possession of certain real estate under a lease for years, the estate of the tenants is "property," within Code Civ. Proc. § 3358, relating to condemnation proceedings, and defining real property as any right, interest, or easement therein. *Baker v. State*, 118 N. Y. Supp. 618, 620, 63 Misc. Rep. 549.



Within the meaning of a statute relating to the abolition of grade railroad crossings, authorizing the filing of a petition and the making of compensation to all parties sustaining damage, and providing that all parties interested as lessees or otherwise shall be named in the petition, which shall ask for a jury to ascertain the compensation to the persons interested in the abutting "property," a tenant's term was "property," and the tenant was entitled to compensation for injuries to its leasehold. *City of Detroit v. C. H. Little Co.*, 104 N. W. 1108, 1111, 141 Mich. 637.

#### License

A license is in no sense "property." It is a mere temporary permit to do what otherwise would be illegal, issued in the exercise of the police power. *State v. Seebold*, 91 S. W. 491, 492, 192 Mo. 720 (quoting *Voight v. Board of Excise Com'rs of City of Newark*, 36 Atl. 686, 59 N. J. Law, 358, 37 L. R. A. 292); *People ex rel. Lodes v. Department of Health of City of New York*, 103 N. Y. Supp. 275, 288, 117 App. Div. 856 (quoting 6 Words and Phrases, p. 5716).

A license is only a permit to do a particular thing, and it is not "property" in any legal sense. It is a mere privilege granted by a municipal officer empowered to issue it, and is always revocable. The revocation is an administrative act, and may be affected without notice or an opportunity to be heard. *McKenzie v. McClellan*, 116 N. Y. Supp. 645, 646, 62 Misc. Rep. 342.

A license to sell intoxicants is not "property" within the constitutional prohibition against deprivation of property without due process. *Hernandez v. State (Tex.)* 135 S. W. 170, 171.

Though a liquor "license" is technically not "property," in the sense that it can be taken away by the state without compensation, yet, under the statute, it is a valuable right and possesses all other characteristics of property. *State v. Corron*, 62 Atl. 1044, 1053, 73 N. H. 434, 6 Ann. Cas. 486.

A license to sell liquors is not "property" in the ordinary sense of the word, but a mere permission, and the license is but the evidence that the permission has been given by the proper authorities. *People v. Schmitz*, 94 Pac. 407, 418, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717.

A pilot's license, duly granted under the pilotage act, is "property" which cannot be forfeited except by direct legislative authority, and therefore the board of pilot commissioners has no power to revoke, annul, forfeit, or suspend such license as a penalty for the breach of its rules. *Virden v. Board of Pilot Com'rs*, 67 Atl. 975, 980, 8 Del. Ch. 1 (citing *State ex rel. Heise v. Town Council of Columbia [S. C.]* 6 Rich. 404; *Dill. Mun. Corp. § 346*; *Morris v. Board of Pilot Com'rs*, 30 Atl. 687, 7 Del. Ch. 136).

A permit granted by the board of health of New York City to relator to sell milk is not "property" of which, under the Constitution, he cannot be deprived without due process of law, but a mere license revocable by the board without notice or hearing, though, authorized by the permit, he has established a business of selling milk which has become "property," within the meaning of the Constitution. *People ex rel. Lodes v. Department of Health of City of New York*, 82 N. E. 187, 188, 189 N. Y. 187, 13 L. R. A. (N. S.) 894.

#### Liquor tax certificates

"It is true that, under the statute at present regulating traffic in liquors, tax certificates have been held to have characteristics and value which did not attach to excise licenses under former laws, but, when they are referred to as 'property,' it is manifest that the term is applied in a qualified and restricted sense." *People ex rel. Laughran v. Flynn*, 96 N. Y. Supp. 653, 654, 48 Misc. Rep. 159.

#### Mining claim or location

Mining claims on public lands are "property" in the fullest sense of the word, and may be bought, sold, transferred, mortgaged, and inherited. *Elliott v. Elliott*, 3 Alaska, 352, 360.

Mining claims are "property," in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined Code or Codes of Law, and are recognized by the states and federal government. The possessory right of a locator of a mining claim, who has not applied for a patent nor done anything to obtain title other than to do the required assessment work, is "property," and upon his death passes to his heirs by descent, and not directly as the designated donees or beneficiaries of the United States under the mining laws; and hence such rights may be administered upon and sold as other property by his executor or administrator. *O'Connell v. Pinnacle Gold Mines Co.*, 181 Fed. 106, 109; 140 Fed. 854, 855, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919.

Mining claims and locations are "property," being the subject of bargain and sale, and constituting a large portion of the wealth of the Pacific coast states, and, though unpatented, are subject to the lien of a judgment against the claimant. The title of a locator of a mining claim is not only "property," within *Laws Ariz.* 1891, No. 50, § 4, providing for the lien of certain judgments upon real property, but it is "property" which, in addition to being sold, transferred, and mortgaged, is also capable of being inherited without in any manner infringing the title of the United States. *Bradford v. Morrison*, 29 Sup. Ct. 349-351, 212 U. S. 389, 53 L. Ed. 564 (citing *Forbes v. Gracey*, 94 U. S. 762, 767,

24 L. Ed. 313, 314; *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735).

A mining claim perfected under the law is "property," in the highest sense of that term. Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. *Nash v. McNamara*, 93 Pac. 405, 408, 30 Neb. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694 (quoting and adopting definition in *Belk v. Meagher*, 104 U. S. 279, 283, 26 L. Ed. 735; *St. Louis Min. & Mill. Co. v. Montana Min. Co.*, 19 Sup. Ct. 63, 171 U. S. 650, 655, 43 L. Ed. 320).

Independent mining claims on the public domain constitute "property" in the fullest sense of the word, so that a valid location of mineral lands, made and kept up in accordance with Act Cong. July 26, 1866, c. 262, 14 Stat. 251, providing for the location of such claims, is in effect a grant by the United States of the right of present and exclusive possession of the land located. *Van Ness v. Rooney*, 116 Pac. 392, 394, 160 Cal. 131.

Under Const. art. 12, §§ 1-3, 17, requiring a uniform rate of taxation of property not exempt, enumerating what property shall be exempt, declaring that all mining claims after purchase from the United States shall be taxed at a specified valuation, unless the surface ground is used for other than mining purposes and has a separate value for such other purpose, in which case the surface ground so used shall be taxed at its value for such other purpose, and defining "property" as including moneys, credits, bonds, stocks, franchises, and all other matters and things capable of private ownership, and under Rev. Codes, §§ 2498-2500, providing that all property is subject to taxation, except that specially exempted, the surface ground of an unpatented mining claim when used for other than mining purposes and when it has a separate value for such other purposes is subject to taxation. *Cobban v. Meagher*, 113 Pac. 290, 292, 42 Mont. 399.

#### Mining right

A mining right to drill for oil and gas in certain described premises in consideration of a fixed royalty, etc., is "property," and should be taxed. *People ex rel. Carrell v. Bell*, 86 N. E. 593, 594, 237 Ill. 332, 19 L. R. A. (N. S.) 746, 15 Ann. Cas. 511.

"Anything capable of beneficial ownership is 'property.' The sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the rights of any other, is property. So also is the right to possess, use, enjoy, and dispose of a thing property, which in itself is valuable. Man's rights in respect to things constitutes property. For example, a valuable right arising by contract to take coal from a body of land, using the land for that purpose and to convert it into salable coal,

is property." *Harvey Coal & Coke Co. v. Dillon*, 53 S. E. 923, 930, 59 W. Va. 605, 6 L. R. A. (N. S.) 628.

#### Marital companionship

A wife's marital companionship is purely personal to the husband and possesses none of the attributes of "property." *Billingsly v. St. Louis, I. M. & S. R. Co.*, 107 S. W. 173, 174, 84 Ark. 617, 120 Am. St. Rep. 95.

#### Money

Property as money, see Money.

The word "property" embraces money. *Fullerton v. Young*, 94 N. Y. Supp. 511, 512. 46 Misc. Rep. 292 (citing Laws 1892, p. 1496, c. 677, §§ 2-4).

Money is "property" subject to levy by execution. *Exchange Nat. Bank of Montgomery v. Stewart*, 48 South. 487, 489, 158 Ala. 218.

"Money is certainly 'property,' whether we regard any of its forms or any of its theories. It may be composed of a precious metal, and hence valuable of itself, gaining little or no addition of value from the attributes which give it its ready exchangeability and currency. And its other forms are immediately convertible into the same precious metal, and even without such conversion have, at times, even greater commercial efficacy than it." *Pirie v. Chicago Title & Trust Co.*, 21 Sup. Ct. 906, 908, 182 U. S. 438, 45 L. Ed. 1171.

A borrowing of money does not constitute the "obtaining of property on credit" within the meaning of Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550, as amended February 5, 1903 (32 Stat. 797, c. 487), and the obtaining by a bankrupt of a loan from a bank by means of a materially false statement in writing made for the purpose is not ground for denying him a discharge. The word "property" is nomen generalissimum and of wide signification, and in its broadest sense would, of course, include money as well as everything else which can be the subject of ownership. In *re Pfaffinger*, 154 Fed. 528, 530 (citing *United States v. Isham*, 17 Wall. [84 U. S.] 504, 21 L. Ed. 728).

The word "property," in Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562, providing that a person shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property, etc., includes money. *West v. Bank of LaHoma*, 85 Pac. 469, 470, 16 Okl. 328.

One borrowing money obtains "property" on credit, within Bankr. Act July 1, 1898, c. 541, § 14, cl. b. (3), 30 Stat. 550, as amended (32 Stat. 797), forbidding the discharge of a bankrupt who has obtained property on credit upon a materially false statement in writing, etc. In *re Gilpin*, 160 Fed. 171, 172.

An instruction, in a prosecution for forgery, that "the instrument must be such, if true, as would have created, increased, diminished, discharged, or defeated any pecuniary obligation, or that would have transferred or affected any property or any money whatever," is not erroneous because of the use of the word "money," though the statute uses only the word "property," as "property" includes "money." *Williams v. State*, 124 S. W. 954, 955, 58 Tex. Cr. R. 82.

"Property," in its ordinary and common meaning, "is 'anything of value,' 'anything that may be owned or possessed,' 'anything which has debt paying or debt securing power.' \* \* \* Money is property in its most available and efficient form." The word "property," as used in Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550, as amended (32 Stat. 797), providing that the courts shall discharge the applicant unless he has obtained property on credit from another person on a materially false statement made in writing to such person for the purpose of obtaining such property on credit, means anything of value, anything that might be owned or possessed, anything having a debt paying or a debt securing power, including money, so that an objection that the bankrupt obtained a loan of money by making a materially false statement in writing constituted a valid objection to his discharge. In *re Louisville Nat. Banking Co.*, 158 Fed. 403-405, 85 C. C. A. 513 (citing and adopting *United States v. Isham*, 17 Wall. [84 U. S.] 496, 21 L. Ed. 728; *Pirie v. Chicago Title & Trust Co.*, 21 Sup. Ct. 906, 182 U. S. 438, 45 L. Ed. 1171).

#### Mortgage lien

A mortgage is "property," within Code Pub. Gen. Laws 1904, art. 93, § 282, prohibiting an executor from selling any "property" of his decedent without first obtaining an order of the court, since the laws recognize the right of property in mortgages and regulate the acquisition and transfer of the same, and since article 66, § 21, provides that on the death of a mortgagee his interest in the mortgaged lands and his right to the mortgage debt shall devolve on his executor; the word "property" ordinarily embracing every species of valuable right and interest including real and personal property, easements, franchises, and hereditaments. *Alexander v. Fidelity & Deposit Co.*, 70 Atl. 209, 211, 108 Md. 541.

#### Natural gas

The Century Dictionary defines the word "property" as follows: The right to the use or enjoyment or the beneficial right of disposal of anything that can be the subject of ownership; ownership; estate; especially, ownership of tangible things. The word "property," as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which

lie in contract, those which are executory, as well as those which are executed. Natural gas found within the territorial limits of a state is not a product which the state may conserve and preserve by law as a thing in which the people of the state have a common interest, as flowing streams, wild animals, etc.; but one who by lawful right reduces it to possession has the absolute right of property therein, with the right to transport and sell and deliver the same as other personal property, of which right he cannot be deprived by the state without just compensation, without violation of the fourteenth amendment to the federal Constitution, and also article 2, § 24, of the state Constitution of Oklahoma. *Kansas Natural Gas Co. v. Haskell*, 172 Fed. 545, 565 (quoting and adopting definition in *Soulard v. United States*, 4 Pet. [29 U. S.] 511, 7 L. Ed. 938).

#### Option for purchase of land

An option for the purchase of manufacturing plants is "property." *Haskins v. Ryan*, 78 Atl. 566, 75 N. J. Eq. 330.

#### Ore and mineral

Ores and minerals in place are "property," which by a proper conveyance may be severed from the land by the owner thereof, and when so severed they become subject to taxation separate and apart from the land itself. *State v. Downman (Tex.)* 134 S. W. 787, 788.

#### Paper currency

Pen. Code 1895, art. 866, provides that the term "property," in relation to theft, includes every article commonly known and called personal property. Held that, since paper currency of the United States was "property" within such definition, an indictment, charging theft of \$50 in paper currency of the value of \$50, was not fatally defective for failure to allege that such currency was money, or, if not money, for failure to describe it more specifically. *Diaz v. State*, 137 S. W. 377, 62 Tex. Cr. R. 317.

#### Passenger ticket

Railroad tickets, issued by a railroad company, and authorizing the owner to be transferred between certain points on the railroad, are "property," and may be the subject of larceny. *Patrick v. State*, 98 S. W. 840, 841, 50 Tex. Cr. R. 496, 123 Am. St. Rep. 861, 14 Ann. Cas. 177.

A suit by a carrier to enjoin ticket scalpers from dealing in nontransferable passenger tickets is a suit in personam to protect by injunction the property right of the carrier to do a lawful business in a particular way, and the venue is not controlled by Mills' Ann. Code, § 25a, requiring the venue of actions affecting property to be in the county where the property is situated. A passenger ticket is mere evidence of a contract, and is not "property," within Mills' Ann. Code, § 25a, requiring the venue of actions affecting

property to be in the county where the property is situated. *Kirby v. Union Pac. R. Co.*, 119 Pac. 1042, 1052, 1053, 51 Colo. 509, Ann. Cas. 1913B, 461.

A nontransferable passenger ticket issued under contract at a reduced rate, being a mere token of the purchaser's right to be transported according to its terms, and not "property" in its general sense, Acts 1905, p. 873, c. 410, prohibiting the purchase and sale of such tickets by any person, other than the authorized agent of the common carrier, issuing the same, is not unconstitutional as depriving the purchaser of his property without due process of law. *Samuelson v. State*, 96 S. W. 1012, 1017, 116 Tenn. 470, 115 Am. St. Rep. 805 (citing *People ex rel. Tyroler v. Warden of City Prison*, 51 N. E. 1006, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763; *O'Rourke v. Street Ry. Co.*, 52 S. W. 872, 103 Tenn. 124, 46 L. R. A. 614, 76 Am. St. Rep. 639).

#### Personal property

The word "property," in a statute exempting from taxation "cemetery lands and property" of cemetery associations, does not include personal property. *State ex rel. Mount Mora Cemetery Ass'n v. Casey*, 109 S. W. 1, 5, 210 Mo. 235 (citing *Rosedale Cemetery Ass'n v. Linden Tp.*, 63 Atl. 904, 73 N. J. Law, 421).

"Property," in the hands or possession of a garnishee, to be subject to process must be personal property in his possession capable of being seized and sold under execution. *Keyes v. Milwaukee & St. P. Ry. Co.*, 25 Wis. 691, 693.

"Property" for taxation purposes includes all personal property, all rights, credits, bonds, securities, promissory notes, open accounts, and other obligations, all cash, all money loaned at interest, all movable and immovable, corporeal and incorporeal, articles and things of value owned and held, and controlled within the state by any person in any capacity whatsoever. *State Board of Assessors of Parish of Orleans v. Comptoir National D'Escompte*, 24 Sup. Ct. 109, 111, 191 U. S. 388, 48 L. Ed. 232.

#### Possession

The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or mere right of possession. *Harvey Coal & Coke Co. v. Dillon*, 53 S. E. 928, 933, 59 W. Va. 605, 6 L. R. A. (N. S.) 628.

#### Possible future interest

Under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565, providing that all property which a bankrupt could by any means have transferred passes to the assignee, where a bankrupt could transfer a possible future interest in personal property before his bankruptcy, it passes to the assignee in

bankruptcy. *Martin & Earle v. Maxwell*, 67 S. E. 962, 964, 86 S. C. 1, 138 Am. St. Rep. 1012.

#### Power

A power is not "property" but a mere authority. *Melton v. Camp*, 49 S. E. 690, 121 Ga. 693.

#### Premises

The phrase "property sold," in the statutory definition of a redemptioner as being one holding a lien by judgment or mortgage on the property sold, applies to "premises," as that word is commonly used. *North Dakota Horse & Cattle Co. v. Serungard*, 117 N. W. 453, 454, 463, 17 N. D. 466, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717.

#### Privileges of members of fraternal order

The moral, intellectual, and social privileges of which members of a subordinate lodge of a fraternal order, consisting of a supreme lodge and of subordinate lodges, have been deprived by the suspension of the subordinate lodge, and deprivation thereby of the right to participate in the control of the incorporated Supreme Lodge, are merely incidents to membership, and do not constitute "property," within Bill of Rights. *Lone Star Lodge No. 1,935, Knights and Ladies of Honor, v. Cole* (Tex.) 131 S. W. 1180, 1185.

#### Promissory note

A promissory note is something more than a mere written promise. It is a negotiable instrument. It is recognized by the law merchant as "property." *Manning v. Berdan*, 132 Fed. 382, 386.

Notes are "property," within Act 29th Leg., providing for the taxing of property owned in the state. *Hall v. Miller*, 115 S. W. 1168, 1171, 102 Tex. 289.

The word "property," in many cases, is construed to include things in action and evidences of debt; thus Rev. St. 1898, § 4423, punishing one obtaining by false pretenses any money, goods, wares, or merchandise or other property, makes it a criminal offense to obtain by false pretenses a promissory note, notwithstanding the rule *noscitur a sociis*. *Clawson v. State*, 109 N. W. 578, 579, 129 Wis. 650, 116 Am. St. Rep. 972, 9 Ann. Cas. 966.

#### Public office

Under the term "property" is included the right to hold public office. *State ex rel. Guion v. Miles*, 109 S. W. 595, 610, 210 Mo. 127.

The right of an incumbent to his office is not a right of "property" within Const. art. 1, § 9, against depriving a person of property without due process of law. *State v. Henderson*, 124 N. W. 767, 770, 145 Iowa, 651, Ann. Cas. 1912A, 1286.

The office of school commissioner is not "property" in the sense that removal there-

from without a hearing is a taking of property without due process of law. *People ex rel. Woodward v. Draper*, 124 N. Y. Supp. 758, 761, 67 Misc. Rep. 460.

A public office does not come within the meaning of the word "property," within Const. art. 2, § 21, providing that no person shall be deprived of life, liberty, or property except by the law of the land, and Kirby's Dig. § 7992, providing that a county officer indicted for malfeasance or nonfeasance shall be suspended till tried, does not conflict with the constitutional provision. *Sumpter v. State*, 98 S. W. 719, 720, 81 Ark. 60.

To what extent the word "property" applies to an office, its duties, its emoluments, and when and how an office may be abolished or the office retained and its duties either transferred to another or distributed among other governmental agencies, it has been necessary to make many delicate distinctions. An officer appointed for a definite time to a public office has not a vested property interest therein, or contract right thereto, of which the Legislature cannot deprive him. *Mial v. Ellington*, 46 S. E. 961, 969, 134 N. C. 131, 65 L. R. A. 697.

The office of member of the board of education of a city is "property" only in the sense that the incumbent is entitled to the emoluments of the office so long as he holds it lawfully; but the office is not property within the state and federal Constitutions, providing that no person shall be deprived of property without due process of law, and a recall provision in the charter of a city is not invalid as depriving an officer of property without due process of law. *Bonner v. Belsterling* (Tex.) 137 S. W. 1154, 1157.

A public office is a public trust or agency, and not the property of the incumbent, and when he is removed therefrom he is not deprived of any property, and hence Act Oct. 14, 1879, providing that a railroad commissioner may be removed by a majority vote of each house of the General Assembly after suspension by the Governor, is not violative of the United States Constitution, amend. art. 14, § 1, prohibiting the taking of property without due process of law, nor of Const. art. 1, § 1, par. 3, to the same effect, because it makes no provision for notice to the commissioner nor for a hearing or trial on charges regularly preferred against him as a condition precedent to his removal. *Gray v. McLendon*, 67 S. E. 859, 869, 134 Ga. 224.

"An 'office' is as much a species of 'property' as anything which is capable of being held or owned, and to deprive one of it, or unjustly withhold it, is an injury which the law can redress in a manner as ample as it can any other wrong. \* \* \* The right to exercise a public office is a species of property, equally with any other thing capable of possession, and the law affords adequate redress when the enjoyment of it is

wrongfully prevented. 3 Kent, Comm. 454; *Wammack v. Holloway*, 2 Ala. 31. The same doctrine is recognized in *Dodd v. Weaver*, 2 Sneed [34 Tenn.] 670. But the right to the office does not entitle the officer to the compensation as under a contract. He takes it subject to the authority of the creating power to modify the compensation or to discontinue the office. *Haynes v. State*, 3 Humph. [22 Tenn.] 480, 39 Am. Dec. 189; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677. With this qualification the officer is entitled to the office, and to its emoluments, and to redress interference with his rights." *Malone v. Williams*, 103 S. W. 798, 818, 118 Tenn. 390, 121 Am. St. Rep. 1002 (quoting and adopting definition in Mayor, etc., of City of Memphis v. Woodward, 12 Helsk. [59 Tenn.] 499, 27 Am. Rep. 750).

The state may decline to confer official power on residents of other states without depriving such nonresidents of "liberty" or "property," within the meaning of those words as used in the Constitution. A nonresident can have no property right in the fees provided by law to be paid as compensation for the performance of the duties of an office created by or existing in virtue of the statutes of this state. No nonresident has any right of liberty or "property" in the fees or emoluments of the office of executor or administrator. *In re Mulford*, 75 N. E. 345, 346, 217 Ill. 242, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986.

#### Public property

The word "property," as used in the Constitution (Civ. Code, § 5883), providing that taxation shall be uniform on all property subject to be taxed within the limits of the authority levying the tax, does not require the taxing of public property or any of the lawful instrumentalities of government. *Penick v. Foster*, 58 S. E. 773, 776, 129 Ga. 217, 12 L. R. A. (N. S.) 1159, 12 Ann. Cas. 346.

#### Public records

Where a city treasurer prepared a card index system referring to assessments for public improvements at his own expense, such indexes not being required by law, an injunction against the removal of the indexes at the expiration of his term is not a "taking" of services or "property" without just compensation, and does not violate Const. art. 1, § 21, prohibiting such taking without just compensation. *Robison v. Fishback*, 93 N. E. 666, 669, 175 Ind. 132, Ann. Cas. 1913B, 1271.

#### Railroad bonds

Railroad mortgage bonds, constituting the absolute property of a debtor, but registered in the names of his infant children and deposited with a third person, were attached by creditors. The court had jurisdiction over the debtor and his infant children, and could at any time acquire jurisdiction over

the third person. The bonds were payable outside the state by foreign corporations. Held, that the bonds were "property," within Code Pub. Gen. Laws 1904, art. 9, § 10, declaring that any kind of property belonging to defendant may be attached. *De Bearn v. De Galard De Brassac De Bearn*, 81 Atl. 223, 226, 115 Md. 688, 36 L. R. A. (N. S.) 421.

#### **Railroad cars loaded with freight**

The railroad law providing that a railroad company has power to take and to convey persons and property on its railroad and receive compensation therefor, when it speaks of a railroad carrying "property," uses the word "property" in its broadest sense, and seems to embrace everything which a railroad may carry, except persons. Under this word "property" it transfers, for hire or otherwise, the cars of other railroads, either with or without freight, and may take a new and empty car from the factory upon its road and deliver it to the road for which it is intended; and its right to receive pay arises from the fact that it is carrying "property." Section 12 of the railroad law required that railroads which are intersected by another railroad "shall receive from each other, and forward to their destination, goods, merchandise, and 'other property' intended for points on their respective roads." "Other property," as used in this connection, properly means any property which, from its nature and the condition in which it is, is reasonably capable of being transported over the road. Railroad Law, § 12 (Laws 1890, p. 1087, c. 565), requiring intersecting railroads to receive from each other and forward merchandise and "other property," and section 35 (page 1094) requiring such lines to afford each other equal terms for accommodation in the transportation of cars, passengers, baggage, and freight, required such roads to interchange cars loaded with freight. *Hudson Valley R. Co. v. Boston & M. R. Co.*, 92 N. Y. Supp. 928, 932, 45 Misc. Rep. 520.

#### **Railroad ticket**

A suit by a carrier to enjoin ticket scalpers from dealing in nontransferable passenger tickets is a suit in personam to protect by injunction the property right of the carrier to do a lawful business in a particular way, and the venue is not controlled by Mills' Ann. Code, § 25a, requiring the venue of actions affecting property to be in the county where the property is situated. A passenger ticket is mere evidence of a contract, and is not "property" within Mills' Ann. Code, § 25a, requiring the venue of actions affecting property to be in the county where the property is situated. *Kirby v. Union Pac. R. Co.*, 119 Pac. 1042, 1052, 1053, 51 Colo. 509, Ann. Cas. 1913B, 461.

#### **Real property**

The word "property," in a will where there is no indication of its use in a restrict-

ed sense, includes "real property." *Young v. Norris Peters Co.*, 27 App. D. C. 140, 147.

Under Code, § 785, requiring a city changing an established grade of a street to the injury of abutting property to pay the damages to the owner, and section 48 (8, 10), defining "real property" as including land, tenements, hereditaments, and all rights thereto and interest therein, and the word "property" as including real property, a tenant for life or for years of a city lot is an "owner" to the extent of his interest, and may sue the city for injuries sustained by a change in the established grade of the street in front of the property. *Chiesa & Co. v. City of Des Moines (Iowa)* 138 N. W. 922, 924.

The word "property," as used in Code Civ. Proc. §§ 2432, 2435, 2436, 2458, providing that, to maintain supplementary proceedings, execution must have been issued against property, means real as well as personal property. *Mede v. Meyer*, 105 N. Y. Supp. 957, 959, 55 Misc. Rep. 621.

#### **Right of action**

A cause of action is "property," which can only be taken from an individual or a town by due process of law. *Town of Walton v. Adair*, 89 N. Y. Supp. 230, 234, 96 App. Div. 75.

"Property," in one sense, may mean a chose in action. A "chose in action" in one sense may be any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract. *Womach v. City of St. Joseph*, 100 S. W. 443, 446, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (citing Black, Law Dict.).

The word "property," in Const. art. 7, § 9, relating to taxation, includes money, credits, investments, and other choses in action. *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 36 South. 91, 97, 111 La. 982.

A right of action is "property," within Gen. St. 1902, § 237, providing that, when a person having property shall be found incapable of managing his affairs, the court shall appoint a conservator for him. *Appeal of Wentz*, 56 Atl. 625, 627, 76 Conn. 405.

In some senses of the word, a claim in an action of tort for personal injuries is not "property." It is not assignable, and it cannot be appropriated by creditors in proceedings in bankruptcy or insolvency. *Mulvey v. City of Boston*, 83 N. E. 402, 404, 197 Mass. 178, 14 Ann. Cas. 349.

Under Civ. Code, § 953, providing that a "thing in action" is a right to recover money or other personal property by a judicial proceeding, the right to recover damages from a common carrier for breach of a contract is "property." *Justis v. Atchison, T. & S. F. R. Co.*, 108 Pac. 328, 329, 12 Cal. App. 639.

The right given by Rev. St. §§ 6184, 6185, to prosecute an action for damages for wrongfully causing the death of another, is not such species of "property" as will pass to the heirs or next of kin of those to whom the right is given. *Doyle v. Baltimore & O. R. Co.*, 90 N. E. 165, 166, 81 Ohio St. 184, 185 Am. St. Rep. 775.

Under a statute providing that, when the guardian and ward are both nonresidents, the ward's property may be removed on application by the guardian to the judge of the superior court, who shall grant leave to remove the property, which order shall be authority to the guardian to sue for and receive it in his own name, the word "property" is used in its comprehensive sense and includes choses in action as well as tangible property. *In re Crosby*, 85 Pac. 1, 2, 42 Wash. 366.

A vested cause of action for damages is "property" which cannot be taken or destroyed without due process of law, being a chose in action. *Williams v. Atlantic Coast Line R. Co.*, 69 S. E. 402, 406, 153 N. C. 360.

A vested right of action is "property" in the same sense that tangible things are property. While, in ordinary transactions, the term "property" is not supposed to include a right of action, yet in constitutions and public statutes, where the words permit, and the spirit and intent of the law require, a vested right of action, is frequently considered and treated as property. The right of action conferred by Revisal 1905, § 59, making those causing negligent deaths liable to decedent's personal representatives, and providing that the recovery shall not be applied to the payment of debts or legacies, but that it shall be distributed as intestate property, is property as a part of intestate's estate, and, for the purpose of devolution and transfers, the rights of the claimants are to be determined as of the time when intestate died, and hence under section 4, providing that, when a married woman dies intestate, the surviving husband may administer upon her personality and hold the same subject to the claims of her creditors and others having rightful demands against her, to his own use, etc., and providing that if the husband dies after his wife, but before administering, his personal representative or assignee shall receive the personality of the wife as a part of the husband's estate, subject as aforesaid, where intestate's daughter died after his negligent death and before recovery therefor, and her husband became insane after becoming administrator, her administrator de bonis non is entitled to her share of the recovery for the husband's benefit, subject to the claims of her creditors and others having rightful demands against her estate. *Neill v. Wilson*, 59 S. E. 674, 675, 146 N. C. 242 (quoting and adopting definition in *Cooley*, Const. Lim. [7th Ed.] p. 577;

*Duckworth v. Mull*, 55 S. E. 852, 145 N. C. 466).

The word "property," within the meaning of the rule authorizing the grant of ancillary administration when necessary in respect to any unadministered property that may be found in the state, means either specific property found or a right of action for debt or unliquidated damages to which the estate may be entitled. A claim for damages for the death of a decedent under a statute authorizing such recovery for the exclusive benefit of the widow and next of kin does not constitute assets of the estate so as to justify the appointment of an ancillary administrator in another state. *Cooper v. Gulf, C. & S. F. R. Co.*, 98 S. W. 201, 205, 41 Tex. Civ. App. 596.

Plaintiff's intestate, while a laborer in O. county, was injured, and died intestate in the state of Ohio where he resided, and an administrator was appointed in the county of O., who sued his employer in such county. At the time of his death intestate had no residence nor any property in West Virginia, except the claim for damages against his employer. Held, that such claim was property, authorizing the county court of O. to appoint the sheriff administrator of his estate. *Richards v. Riverside Iron Works*, 49 S. E. 437, 438, 56 W. Va. 510 (citing *Marvin v. Maysville St. Railroad & Transfer Co.*, 49 Fed. 438; *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 215; 2 *Woerner*, Adm'n, § 306; *Perry v. St. Joseph & W. R. Co.*, 29 Kan. 420; *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477, 484; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177; 1 *Woerner*, Adm'n, § 205; *Hutchins v. St. Paul, M. & M. Ry. Co.*, 46 N. W. 79, 44 Minn. 5; *Brown's Adm'r v. Louisville & N. R. Co.*, 30 S. W. 639, 97 Ky. 228, 232; *Findlay v. Chicago & G. T. Ry. Co.*, 64 N. W. 732, 106 Mich. 700; *Morris v. Chicago, R. I. & P. Ry. Co.*, 23 N. W. 143, 65 Iowa, 727, 728, 54 Am. Rep. 39; *Sargent v. Sargent*, 47 N. E. 121, 168 Mass. 420).

Code 1907, § 3765, provides that the surviving husband of a woman who dies intestate shall be entitled absolutely to half the personality of her separate estate. Section 4486 provides that all property of a wife, held by her previous to her marriage, is her separate property. Section 2486, giving to the administrator a right of action for negligence causing death, provides that the damages recovered shall not be liable for the debts of the deceased, and shall be distributed according to the statute of distributions. Held, the right of action being expressly vested in the administrator alone, so as not to be assignable, which right is inseparable from the idea of property, and the action by the administrator being more as an agent to effect the legislative policy to prevent homicide, and as trustee of any recovery, than as the representative of deceased in reducing property of the estate to possession, that,

where a widow remarried and died pending a suit by the administrator of the first husband to recover for his death, the surviving second husband was not entitled to share in the subsequent recovery, the wife having had no "property" right in the cause of action, within the meaning of the statutes of distribution, her interest being merely personal, especially in view of Code 1907, § 2, defining "personal property" as money, goods, chattels, things in action, and evidences of debt; the use of the phrase "things in action," in connection only with assignable property, indicating the legislative intent that it shall have a similar meaning. *Holt v. Stollenwerck*, 56 South. 912, 913, 174 Ala. 213.

Under Const. art. 4, § 27, giving justices of the peace jurisdiction of actions on contract, wherein the sum demanded does not exceed \$200, and "jurisdiction of other civil actions wherein the value of the property in controversy does not exceed \$50," and under Revisal 1905, § 1420, enacted in pursuance of the Constitution, a justice of the peace has jurisdiction of all actions *ex delicto* in which the damages demanded do not exceed \$50, and not merely cases of tort involving property to the value of such sum. The words "When the property in controversy does not exceed \$50" mean the value of the injury involved in the litigation. In the business affairs and transactions of individuals and the construction of instruments which concern the devolution and transfer of property between them, this term "property" has usually received a more restricted construction. It has been so in the decisions of our own court; but in constitutions and in public statutes, where the words permit, and the spirit and intent of the law require, the word "property" has frequently and more usually been accorded a broader significance which we have given it. In the sections of our Constitution protecting life and property, the term is held to include vested rights of action. A vested right of action is "property" in the same sense in which tangible things are property, and is equally protected from arbitrary interference. A cause of action accruing at common law, or by contract, which is fixed and settled in a particular person and continues in force, is a vested right, within the protection of the Constitution. It is property, and it cannot lawfully be divested by legislative interference or by taking away the legal means of making it effective, or by so hampering it with conditions or restrictions as to render it practically worthless. *Duckworth v. Mull*, 55 S. E. 850, 852, 143 N. C. 461 (citing *Cooley*, Const. Lim. [7th Ed.] p. 577; *Black*, Const. Law, p. 432; *Angle v. Chicago*, St. P., M. & O. R. Co., 14 Sup. Ct. 240, 151 U. S. 1, 19, 38 L. Ed. 55; *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606).

#### Right of way

A right of way is "property," and, though the enjoyment of it may be subjected to rea-

sonable regulations for the protection of the public health, the easement cannot be arbitrarily restricted and destroyed without compensation, as provided by Const. pt. 1, art. 10. *Durgin v. Minot*, 89 N. E. 144, 145, 203 Mass. 26, 24 L. R. A. (N. S.) 241, 133 Am. St. Rep. 276.

#### Right to earn wages and dispose thereof

A bankrupt's right to earn wages in the future and dispose of the fruits of his labor is not "property," as that term is used in Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565, vesting all the bankrupt's property not exempt in his trustee, etc.; and hence the bankrupt's discharge operated to avoid an assignment of future wages given to secure a provable debt earned after the filing of his petition. *In re Home Discount Co.*, 147 Fed. 538, 548.

#### Right to employment

Penal Law, § 850, defines "extortion" as the obtaining of property from another with his consent, induced by a wrongful use of force or fear, etc., and section 851 provides that threats to do an unlawful injury to person or property may constitute extortion. Held, that one who procured for another, without consideration, a position as a painter, and afterward threatened to have him discharged unless he was paid a certain sum each week out of the painter's wages, was guilty of extortion; the word "property" in the statute including every species of valuable right, including the right to employment. *People ex rel. Short v. Warden of City Prison*, 130 N. Y. Supp. 698, 700, 145 App. Div. 861.

#### Right to hunt

The law recognizes as "property" and entitled to protection an exclusive right to hunt on game preserves, and that the destruction or impairment of such privilege by the driving away of the birds and deterring their return constitutes an injury which cannot be estimated in money damages, and on account of which an injunction will lie. *Guaranty Realty Co. v. Recreation Gun Club*, 107 Pac. 625, 627, 12 Cal. App. 383.

#### Riparian right

A riparian's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a "property" right, and entitled to protection as such, the same as private property rights generally. *Crawford Co. v. Hathaway*, 93 N. W. 781, 786, 67 Neb. 325, 60 L. R. A. 889, 108 Am. St. Rep. 647.

The riparian rights of an owner of land bordering on a river of access to the river and to the use of the water thereof for domestic or farm purposes is "property." *Waterford Electric Light, Heat & Power Co. v. Reed*, 94 N. Y. Supp. 551, 552, 47 Misc. Rep. 406.



Running water in natural streams is not "property," and never was, and a riparian owner has no right to interfere with the rights of other riparian owners by a dam, so as to discontinue the flow of water, without the consent of the lower riparian owners. In re Board of Water Supply of City of New York, 109 N. Y. Supp. 1036, 1047, 58 Misc. Rep. 581.

Under Civ. Code, § 14, providing that "property" includes property real and personal, and section 654, that anything of which there may be ownership is "property," water, and the right to its use as riparian to land, is "property," within Code Civ. Proc. § 1240, enumerating the classes of property which may be condemned, and section 1241 providing that before property can be taken, it must appear that the use is one authorized by law, etc. Code Civ. Proc. § 1238 prescribes the public uses in behalf of which the right of eminent domain may be exercised, and subdivision 12 authorizes the condemnation of property for canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes, and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery to generate and transmit electricity to supply mines, quarries, railroads, tramways, mills, and factories with electric power, and to apply electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns, and to furnish electricity for lighting, heating, or power purposes to individuals or corporations, together with lands, buildings, and all improvements in or upon which to erect, install, place, use or operate machinery to generate and transmit electricity for any of the uses set forth. Subdivision 13 authorizes condemnation for electric light, heat, and power lines. Held, that such subdivisions authorize a corporation organized to furnish electric light, heat, and power to condemn the water in a stream, and the riparian rights of landowners, for its necessary requirements, and that such company is not limited to the acquisition of water by appropriation. Northern Light & Power Co. v. Stacher, 109 Pac. 896, 900, 903, 13 Cal. App. 404.

#### Services of attorney

Inducing the rendition of legal services by false representations is not the obtaining of "property" by false representations, within the meaning of Bankr. Act July 1898, c. 541, § 17a (2) 30 Stat. 550, as amended (32 Stat. 798), excepting liabilities for property so obtained from the provable debts dischargeable in bankruptcy. Gleason v. Thaw, 185 Fed. 345, 347, 107 C. C. A. 463, 34 L. R. A. (N. S.) 894; Gleason v. Thaw, 196 Fed. 359, 361, 116 C. C. A. 179.

#### Services of wife

The domestic services of the wife are purely personal to the husband and possess none of the attributes of "property." Bil-

lingsly v. St. Louis, I. M. & S. R. Co., 107 S. W. 173, 174, 84 Ark. 617, 120 Am. St. Rep. 95.

#### Shares of stock

Neither bank stock owned by a bankrupt's wife, acquired by her before marriage, nor any share in the bank's accumulated, but undivided, profits are "property," within the bankruptcy statute, vesting in the trustee the title to property which, prior to the filing of his petition, the bankrupt might by any means have transferred, or which might have been levied on under judicial process against him, and the trustee could not recover dividends declared on the stock after the bankrupt's discharge. Bryan v. Sturgis Nat. Bank, 90 S. W. 704, 705, 40 Tex. Civ. App. 307.

Corporate stock is "property," within the meaning of the taxing laws. State ex rel. Weller v. Hinkel, 116 N. W. 639, 136 Wis. 66.

The capital stock of a corporation is "property," within Const. art. 9, § 1, providing for the taxation of property in proportion to value. Consolidated Coal Co. of St. Louis v. Miller, 86 N. E. 205, 206, 236 Ill. 149.

Stock held by a resident in a foreign corporation whose property is all outside the state is not such "property" or "personal property" as is taxable under Rev. St. 1909, §§ 11,348, 11,415, 11,519; the last section defining property to include every tangible or intangible thing being the subject of ownership, whether animate or inanimate, real or personal. State ex rel. Koeln v. Lesser, 141 S. W. 888, 889, 237 Mo. 310.

Stock of a railroad company, incorporated, doing business, and owning property, not only in Massachusetts, but in neighboring states, but having only a single issue of stock, is "property," within the jurisdiction of the commonwealth, under Rev. Laws, c. 15, § 1, St. 1905, p. 481, c. 470, and St. 1906, p. 453, c. 436, authorizing taxation of collateral inheritance, so as to enable the state to subject it to taxation as against a nonresident owner. Kingsbury v. Chapin, 82 N. E. 700, 701, 196 Mass. 533, 13 Ann. Cas. 738.

Corporate stock held by a corporation is not "property" due the stockholder, so that, in proceedings to attach stock, the corporation is not summoned, and does not answer, as garnishee. Fowler v. Dickson (Del.) 74 Atl. 601, 606, 1 Boyce, 113.

Though the constitutional provisions that all property not exempt shall be taxed in proportion to its value to be ascertained as provided by law, and defining "property" as including corporate stock, are not self-executing, any deficiency was supplied by Pol. Code, § 3627, requiring property to be assessed at its full cash value, and section 3617 defining that cash value to be the amount at which the property would be tak-

en in payment of a just debt from a solvent debtor. *Cheeseborough v. City and County of San Francisco*, 96 Pac. 288, 289, 153 Cal. 559.

Const. art. 12, § 1, requires the Legislature to prescribe such regulations as shall secure a just taxation for all property except that particularly exempted. Section 7 provides that every corporation shall be subject to taxation on real and personal property owned and used by it, and not exempt. Section 2 prescribes exemptions from taxation. Section 17 provides that the word "property" includes moneys, credits, etc., but shall not be construed so as to authorize the taxation of the stock of a corporation when the property of such corporation represented by such stock is within the state, and has been taxed. Pol. Code, § 3670, provides that all property is subject to taxation except as provided in section 3671, which contains the exemptions mentioned in the Constitution. Section 3680 repeats the provisions of Const. art. 12, § 17. Section 3690 requires taxable property to be assessed at its full cash value. Held, that stock of a state bank or trust company is to be assessed to the owner at its full cash value except to the extent that that value is represented in property which is assessed to the bank or trust company. *Daly Bank & Trust Co. of Butte v. Board of Com'rs of Silver Bow County*, 81 Pac. 950, 952, 33 Mont. 101.

Const. 1879, art. 13, § 1, required taxation of all nonexempt property in proportion to value and defined "property" to include moneys, credits, bonds, stocks, dues, franchises, and all other matters or things, capable of private ownership. Pol. Code, § 3607, provided that all property not exempt must be taxed, except that nothing therein contained should be construed to authorize double taxation, and section 3608 declared that shares of stock in corporations possessed no intrinsic value over the actual value of the property of the corporation, and that all such property should be assessed and taxed, but that no assessment should be made of shares of stock, nor should any holder thereof be taxed thereon. The section was subsequently amended to exclude national bank shares. Held, that since, under such provisions, all the elements of value contained in corporate stock were subject to taxation to the corporation, Pol. Code, §§ 3609, 3610, providing for the taxation of stock in national banks, did not constitute a discrimination against the latter, prohibited by Rev. St. U. S. § 5219. *Crocker v. Scott*, 87 Pac. 102, 105, 149 Cal. 575 (citing *Mackay v. City and County of San Francisco*, 45 Pac. 696, 113 Cal. 392, 397; *Bank of California v. San Francisco*, 75 Pac. 832, 142 Cal. 276, 285, 64 L. R. A. 918, 100 Am. St. Rep. 130).

#### Slot machine

A slot machine incapable of use for any purpose except in violation of penal provi-

sions of the anti-gambling law (*Laws 1899, c. 890, § 4*) is not "property" within the protection of Const. art. 1, § 13, providing that no person shall be deprived of his property without due process of law. *J. B. Mullen & Co. v. Mosley*, 90 Pac. 986, 988, 13 Idaho, 457.

#### Stock transfer stamps

Tax Law, § 271a, as added by Laws 1911, c. 12, which provides that no person other than a corporation organized under the Banking Law of the state (Consol. Laws 1909, c. 2) or under the National Bank Act (Act June 3, 1864, c. 106, 18 Stat. 99), or a duly authorized agent of the Comptroller, shall sell any stamp issued pursuant to the article without first obtaining the Comptroller's written consent, and which makes a violation thereof a misdemeanor, does not deprive one who had a large quantity of stamps on hand at the time of the amendment of any "property" within the meaning of the constitutional provision prohibiting the deprivation of property without due process of law. *People ex rel. Isaacs v. Moran*, 184 N. Y. Supp. 931, 932, 150 App. Div. 226.

#### Street railroad's right to street together with ties, rails, etc.

A street railroad's right to occupy a public street, together with its ties, rails, rolling stock, is "property" within Const. art. 4, § 31, providing that the General Assembly may pass laws permitting the owners of land to construct drains by special assessments on the property benefited thereby. *Spring Creek Drainage Dist. v. Elgin, J. & E. R. Co.*, 94 N. E. 529, 539, 249 Ill. 260.

#### Testator's property

Under the Transfer Tax Law, § 242, defining the word "property," that term means the property or interest of a testator passing or transferred to the successor thereof, when not exempted. In *re Hellman's Estate*, 79 N. Y. Supp. 201, 204, 77 App. Div. 855.

Laws 1896, p. 881, c. 908, defines "property" as meaning the interest therein of a testator passing or transferred to those not exempted. Hence, where a testator devised to his uncle a life interest in his farm, only the present value of the life interest is "property," within the purview of the Transfer Tax Law. In *re Garland's Estate*, 82 N. Y. Supp. 989, 40 Misc. Rep. 579.

#### Trade-name

A man's name is his own "property," as he has the same right to its use and enjoyment as he has to that of any other species of property. A manufacturer using his own name as a trade-name is not required to so use his name as to inform the public that his goods are not the goods of a prior manufacturer using the same name, for the prior manufacturer must know that he has no exclusive right in the name as against others

of the same name. *International Silver Co. v. Rogers*, 63 Atl. 977, 980, 71 N. J. Eq. 560.

#### Trade secret

Equity recognizes a trade secret as "property," and will protect the same by injunction as against those who seek to disclose or use it by a violation of confidential relations or contract stipulations, express or implied. *Elaterite Paint & Mfg. Co. v. S. E. Frost Co.*, 117 N. W. 388, 389, 105 Minn. 239.

#### Trading stamp

A trading stamp is not ordinarily "property." *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 Fed. 833, 834.

#### Trust certificates

"Trust certificates," issued by a railroad company to the stockholders of another railroad company in payment for their stock under an agreement to pay semiannual dividends thereon, and a specified sum at a designated future date for each share, were "property," and could be bought and sold. *Kissel v. Chicago & E. I. R. Co.*, 111 N. Y. Supp. 937, 955, 126 App. Div. 852.

#### Trust property

A trust fund provided to secure the support of a woman and her family is "property," in the true sense of the term, though it be in such form that the beneficiary cannot assign or convey or devise it or use it in any manner otherwise than that specified in the terms of the trust. *Meyer v. Meyer*, 102 N. W. 52, 55, 123 Wis. 538.

The term "property" suggests some unrestricted or exclusive right to that which has been created or acquired. It is an inherent right to the dominion over and the beneficial enjoyment of some valuable right or interest, which cannot be predicated of the estate of a trustee. *Metcalf v. Union Trust Co. of New York*, 73 N. E. 498, 500, 181 N. Y. 39.

#### Water mains, hydrants, and electric light fixtures of municipality

The water mains, hydrants, and electric light fixtures of a city are "private property" owned by it in its corporate capacity. They have a permanent situs, within a drainage district, and constitute "property" and "other property liable to assessment," within the meaning of Laws 1909, c. 80. *State v. Board of Com'rs of Shawnee County*, 110 Pac. 92, 93, 95, 83 Kan. 199.

#### Wild animals

A landlord has no right to distrain for rent, where he has let land with the agreement that muskrats, which the tenant may take upon the property, are to be divided; for these animals are not "property," within the meaning of the law, out of which rent arises. *McLain v. Willey* (Del.) 78 Atl. 493, 494, 2 Boyce, 186.

An inhabitant of the state has no such "property" in wild deer on his land that he

may kill dogs attacking them in the close season, since wild game belongs to the people of the state in their collective and sovereign capacity, and not in their individual and private capacity, except so far as private ownership may be acquired therein under the Constitution, authorizing inhabitants, in seasonable time, to hunt on their lands and other lands not inclosed, under proper regulations by the Legislature, and, as an inhabitant may not hunt deer on his land in the close season, he has no "property" in them then. *Zanetta v. Bolles*, 67 Atl. 818, 80 Vt. 345 (citing *Payne v. Sheets*, 55 Atl. 656, 75 Vt. 385).

#### PROPERTY ACTUALLY RECEIVED

See Actually Receive.

#### PROPERTY ALLEGED TO BELONG TO ESTATE

The expression "property alleged to belong to the estate," found in Code Civ. Proc. § 2731, providing that where a contest arises between the accounting parties and any of the other parties respecting property alleged to belong to the estate, but to which the accounting party lays claim, either individually or as a representative of the estate, the contest mentioned, except where the claim is made in a representative capacity, may be tried and determined in the same manner as any other issue arising in the Surrogate's Court, means property which is deemed assets, as defined in section 2712, and which may be inventoried under section 2714. In *re Thompson*, 76 N. E. 870, 872, 184 N. Y. 36.

#### PROPERTY BELONGING TO ESTATE IN BANKRUPTCY

If a bankrupt has parted with all dominion over property, if the title is gone out of him and is beyond recall, it is not his property, and therefore is not "property belonging to his estate in bankruptcy," and hence cannot be concealed. In *re Hammerstein*, 189 Fed. 37, 39, 110 C. C. A. 472.

#### PROPERTY BENEFITED

Rem. & Bal. Code, § 7785, provides that when an ordinance under which a municipal improvement is ordered shall not provide that such improvements shall be made wholly by special assessment, upon the property benefited, the whole amount of such damage and costs, or such part thereof as shall not be assessed on property benefited thereby, shall be paid from the general fund of the city or town. Held, that the term "wholly by special assessment on property benefited" refers to private property, as distinguished from property of the city. *City of Spokane v. Curtiss*, 120 Pac. 70, 72, 66 Wash. 555.

#### PROPERTY CONSUMED IN ITS USE

See Consumable Articles.

#### PROPERTY CROSSING

The term "property crossings," in a municipal ordinance, providing for the construc-

tion of sidewalks with necessary crossings for the use of property owners, means that part in the line of the sidewalk over which the owner will travel with vehicles in going from the street on his property or leaving the same, and the ordinance is not void for failure to designate the location, number, or method of construction of such crossings. *People ex rel. Rice v. Burke*, 69 N. E. 45, 46, 206 Ill. 358.

#### PROPERTY GROWING OUT OF MARRIAGE RELATION

The expression "property growing out of marriage relation," which a court in a divorce proceeding is authorized to distribute, has reference only to that class of property, the interest in which of either husband or wife attaches by operation of law, as dower, curtesy, tenancy by the entirety, or, in case of divorce, provision for division of which is made in B. & C. Comp. § 511, and does not apply to property belonging to the wife. *Taylor v. Taylor*, 103 Pac. 524, 529, 54 Or. 560.

#### PROPERTY HOLDER

Code Supp. 1907, § 622, declares that, when the inhabitants of any part of a city desire to have such part severed therefrom, a majority of the resident "property holders" of that part of the territory may petition in writing to the district court, describing the territory proposed to be severed, etc., but where the property has not been subdivided, and there are no owners residing on any portion of the same, the petition may be signed and the proceedings maintained by a majority of the owners of the property sought to be severed. Held, that the term "property holders," as used in such section, contemplated resident landowners of the territory sought to be severed, and did not require that the petition be signed by holders of both real and personal property within the territory. *Stason v. City of Albia*, 129 N. W. 809, 810, 150 Iowa, 207.

Under Const. art. 19, § 27, providing that the General Assembly shall not be prohibited from authorizing assessments for local improvements, on the consent of a majority in value of the "property holders owning property" adjoining the locality to be affected, the Legislature may amend Kirby's Dig. § 5665, requiring a city to make a street improvement when any 10 "resident" owners of real property petition therefor, by striking out the quoted word "resident." *Boles v. Kelley*, 117 S. W. 1073, 1074, 90 Ark. 29.

#### PROPERTY IMMOVABLE BY DESTINATION

See Immovable by Destination.

#### PROPERTY IN CONTROVERSY

The words "property in controversy," within the Constitution providing that the Legislature may give to justices of the peace jurisdiction of civil actions wherein the value

of the property in controversy does not exceed \$50, and the statute giving jurisdiction to justices in like terms, mean, when applied to an action in tort, the value of the injury complained of and involved in the litigation, and a justice of the peace has jurisdiction of an action for personal injuries negligently inflicted, where the amount demanded is \$50 or less. *Houser v. W. R. Bonsal & Co.*, 62 S. E. 776, 777, 149 N. C. 51.

As used in Revisal 1905, § 1420, providing that justices of the peace shall have concurrent jurisdiction of a civil action, not founded on contract, wherein the value of the property in controversy does not exceed \$50, the term "property in controversy" means the value of the injury complained of and involved in the litigation. *Duckworth v. Mull*, 55 S. E. 850, 851, 143 N. C. 461.

#### PROPERTY IN POSSESSION

A remainder interest is not "property in possession," within the meaning of the term as used in a statute authorizing the sale of a vested estate for division, if the estate be in possession, etc. *Berry v. Lewis*, 82 S. W. 252, 253, 118 Ky. 652.

#### PROPERTY LINE

The term "lot line" or "property line" has a well-known and understood meaning. The fee to the streets and the sidewalks is in the city. The "property line" or "lot line" extends only to the inner edge of the sidewalk. If the walks were to be constructed one foot from the "lot line" or "property line," that description definitely defines the location. *Gage v. City of Chicago*, 79 N. E. 294, 295, 223 Ill. 602.

#### PROPERTY NOT WITHIN THE STATE

See, also, Property Within the State.

The expression "property not within the state" includes not only property not in fact within the state, but also property not within the state in contemplation of law. *Bates' Ann. St. Ohio*, § 2781, which provides for the listing for taxation by the county auditor for previous years of property which was omitted in such years, and the collection of taxes thereon by the treasurer, was intended to apply only to property which was properly taxable in such years, but which was not returned or properly returned for taxation. All property within the state and not exempt by law is taxed by section 2731, and it was not the purpose of section 2781 to tax exempted property or property not within the state. Section 2781a is therefore constitutional. *Western Assur. Co. of Toronto v. Halliday*, 127 Fed. 830, 838.

#### PROPERTY OF THE COMMONWEALTH

The words "the property of the commonwealth," as used in Rev. Laws, c. 12, § 5, subd. 2, providing that "the property of the commonwealth, except real estate of which

the commonwealth is in possession under a mortgage for condition broken," shall be exempt from taxation, "mean the same as 'all the property of the commonwealth'; and the fact that only one exception is made shows that no other exception could have been intended." Land held under a bond for a deed from the commonwealth, on which a private individual has erected buildings and engaged in manufacturing business thereon, is exempt. *Corcoran v. City of Boston*, 70 N. E. 197, 185 Mass. 325.

### PROPERTY OF THE COUNTY

Lands acquired by a park commission established under "An act to establish public parks in certain counties in this state and to regulate the same" (P. L. 1895, p. 169; Gen. St. p. 2618, § 48) are the "property of the county" in which the park is situate. *Essex County Park Commission v. Town of West Orange*, 67 Atl. 1065, 1066, 75 N. J. Law, 376 (citing *Freeholders of Essex County v. Essex County Park Commission*, 41 Atl. 957, 62 N. J. Law, 376; *Ross v. Board of Chosen Freeholders of Essex County*, 55 Atl. 310, 69 N. J. Law, 291; *State v. Crowley*, 39 N. J. Law, 284, 270; *Herman & Grace v. Board of Chosen Freeholders of Essex County*, 64 Atl. 742, 744, 71 N. J. Eq. 541).

### PROPERTY OF THE STATE

A mortgage held by the Regents of the University of California is "property belonging to the state" within Const. art. 13, § 1, which exempts state property from taxation, and hence where land is mortgaged to the Regents and the mortgagor's interest is sold to the state at a tax sale, and a resale and deed is made by the state to an individual under Pol. Code, § 3897, the deed to such purchaser remains subject to such mortgage, though Const. art. 13, § 4, makes both the interests of mortgagors and mortgagees subject to a tax levy upon either interest; that provision not applying to public property. *Webster v. Board of Regents of University of California*, 126 Pac. 974, 975, 163 Cal. 705.

The indictments against a person are "records or documents filed in a public office under authority of law." Code Cr. Proc. § 272; Code Civ. Proc. § 866. They are the "property of the state," and a willful and unlawful removal of them constitutes a crime, under Pen. Code, § 94. *People v. Mills*, 70 N. E. 786, 789, 178 N. Y. 274, 67 L. R. A. 131.

### PROPERTY OF THE UNITED STATES

The phrase "money or property of the United States," in the federal statutes, relating to embezzlement, does not include fees and emoluments received by the clerk of a federal district court, and the duty of a clerk of a federal district court to pay over to the United States the surplus fees and emoluments of his office, which is half-yearly returned, or the audit thereof shown to exist over and above the compensation and allow-

ances authorized by law to be retained by him, is not governed by the statutes relating to the embezzlement of money or property of the United States. *United States v. Mason*, 31 Sup. Ct. 28, 34, 218 U. S. 517, 54 L. Ed. 1133.

Six blank checks, with stubs attached, each of the value of one cent, the personal property of the United States, constituted "property," the subject of larceny, under Rev. St. § 5456, making it a felony to steal any kind or description of property belonging to the United States. *Keller v. United States*, 168 Fed. 697, 94 C. C. A. 368.

### PROPERTY ON OR NEAR PREMISES

The term "property on or near said premises," in a lease by a railway of part of its right of way to a compress company, stipulating that the compress company assumed all the risks of loss to any building, improvements, or property of any kind that might be on or near the premises occasioned by fire communicated from locomotives, was doubtless used so as to exempt the railway company from liability by reason of fire as to the property of the compress company adjacent to the right of way and likely to be involved in the same fire. *W. A. Morgan & Bros. v. Missouri, K. & T. R. Co. of Texas*, 110 S. W. 978, 985, 50 Tex. Civ. App. 420.

### PROPERTY OWNED

St. 1898, §§ 1890 to 2001—20, provide for the incorporation of religious societies, and sections 1771—1791m provide for the formation of corporations for benevolent, charitable, or medical institutions, and for schools, hospitals, asylums, or other like institutions. The charter of the city of Superior (Laws 1891, c. 124, § 244) provides that no land benefited shall be exempt from assessment for sewers, "excepting only \* \* \* property owned by some religious society" or corporation and not used for pecuniary profit. Held, that a corporation, incorporated under chapter 86, to maintain parochial schools, hospitals, and to help the poor, and not organized for profit, though authorized to acquire and hold property, its principal place of business being its hospital, in which religious services were conducted as a part of its administrative work was not exempt from sewer assessments, the term "religious corporation," in the charter, meaning the same as in chapter 91, and the words "property owned," as used in the charter, referring to a use in connection with religious purposes, and that defendant could not incorporate as a religious corporation, because it had no membership maintaining regular religious worship as a church society, a "religious society" being a body of persons organized to maintain religious worship only, who usually meet in some stated place for worship of God and religious instruction. *United States Nat. Bank v. Poor Hand Maids of Jesus Christ*, 135 N. W. 121, 122, 148 Wis. 613.

**PROPERTY RATIONE SOLI**

"Property ratione soli" is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and, as soon as this right is exercised, the animals so killed or caught become the absolute property of the owner of the soil." *State v. Mallory*, 83 S. W. 955, 958, 73 Ark. 236, 67 L. R. A. 773, 3 Ann. Cas. 852.

**PROPERTY RIGHTS**

See, also, Right of Property.

Immunity from taxation is a "property right." *People ex rel. Interborough Rapid Transit Co. v. Williams*, 123 N. Y. Supp. 137, 141, 188 App. Div. 612.

The right to contract is a right of "property" of which the legislative authority could not deprive the individual. *Glover v. People ex rel. Raymond*, 66 N. E. 820, 821, 201 Ill. 545.

A liquor tax certificate, if not "property" in the strict sense in which that word is used, constitutes a "property right." In re *Cullinan*, 88 N. Y. Supp. 164, 166, 94 App. Div. 445 (citing *Niles v. Mathusa*, 47 N. Y. Supp. 38, 20 App. Div. 483; In re *Lyman*, 65 N. Y. Supp. 673, 53 App. Div. 330; *Id.*, 69 N. Y. Supp. 309, 59 App. Div. 217).

Where the right to transfer a liquor license is recognized by statute, such license or right to transact the liquor business becomes a valuable "property right," subject to barter and sale. *Deggender v. Seattle Brewing & Malting Co.*, 83 Pac. 893, 899, 41 Wash. 386, 4 L. R. A. (N. S.) 626.

The right to teach white and negro children in a private school at the same time and place is not a "property right." *Berea College v. Commonwealth*, 94 S. W. 623, 629, 123 Ky. 209, 124 Am. St. Rep. 344, 13 Ann. Cas. 337.

The right which a person has to pursue a lawful occupation or calling is a "property right." A prosecution for violating Greater N. Y. Charter (Laws 1901, p. 137, c. 466) § 317, denouncing the refusal of a bond broker to exhibit to a police officer certain property bonds, does not involve such a "property right." *People v. Rosenberg*, 112 N. Y. Supp. 316, 319, 59 Misc. Rep. 342 (citing *Slaughter House Cases*, 16 Wall. [83 U. S.] 116, 122, 21 L. Ed. 394).

"The right to practice medicine is, like the right to practice any other profession, a valuable 'property right,' in which, under the Constitution and laws of the state, one is entitled to be protected and secured." *Hewitt v. State Board of Medical Examiners*, 84 Pac. 39-41, 148 Cal. 590, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750.

The office of attorney at law is not a "property right," but an extraordinary privilege, conferred on one in possession of cer-

tain moral and educational qualifications, and after admission he stands as an officer of the court, of which office he may not be deprived, except in the exercise of a sound judicial discretion and on proof of professional unfitness. In re *Thatcher*, 190 Fed. 969, 974.

While the right to labor or to practice a profession may be considered a "property right" for the purpose of protection, services already fendered by one person for another are not "property" for the purpose of enlarging or changing the ordinary remedies by which the indebtedness therefor may be recovered. *Gleason v. Thaw*, 185 Fed. 345, 347, 107 C. C. A. 463, 34 L. R. A. (N. S.) 894.

The membership in the New York Stock Exchange is personal to the member, but the inchoate right of sale, if it may be so termed, and the right to the proceeds of the sale, if the Stock Exchange authorities shall permit that to be done, is a "property right" and a valuable one, and hence the right is one which, subject to the rules of the exchange board, passes to a receiver or trustee in bankruptcy during the member's lifetime, though the membership is personal to the member. *Wrede v. Clark*, 117 N. Y. Supp. 5, 7, 132 App. Div. 293.

Equity has no jurisdiction of a suit to enjoin others from making out affidavits against a merchant and arresting and fining him for alleged disturbance of the peace in using a megaphone to call attention to a clearance sale; there being no "property rights" involved in any proper sense of the word "property," and his rights being determinable by the law courts. *Pleasants v. Smith*, 43 South. 475, 476, 90 Miss. 440, 9 L. R. A. (N. S.) 773, 122 Am. St. Rep. 317.

A landowner's right to take fish and game on his own land, which inheres in him by reason of his ownership in the soil, is a "property right" subject to the state's ownership and title held to preserve and regulate for the public use. *State v. Mallory*, 83 S. W. 955, 959, 73 Ark. 236, 67 L. R. A. 773, 3 Ann. Cas. 852.

A priority to the use of water is a "property right," which is the subject of purchase and sale, and in its character and method of use may be changed, provided such change does not injuriously affect the rights of others. *Seven Lakes Reservoir Co. v. New Loveland & Greeley Irrigation & Land Co.*, 93 Pac. 485, 486, 40 Colo. 382, 17 L. R. A. (N. S.) 329.

A riparian owner's shore rights and rights to access to and from his land and to navigation of the part of the river adjoining his land are "property rights," and subject as such to condemnation for public use, without appropriation of the land itself. *State ex rel. Burrows v. Superior Court for Chellis County*, 93 Pac. 423, 425, 48 Wash.

277, 17 L. R. A. (N. S.) 1006, 125 Am. St. Rep. 927.

A charter authorizing a corporation to organize subordinate councils of a beneficial association to raise funds for relief of members and their families and to defray funeral expenses and other cases of distress gives rise to possible rights of the "property" which are within the protection of a court of equity. *National Council, Junior Order United American Mechanics, v. State Council, Junior Order United American Mechanics*, 51 S. E. 166, 170, 104 Va. 197.

A false certificate of the birth of a child to one holding a life estate, with remainder to his issue, and, in the event of failure of issue, to complainant, was liable to affect the interest to be acquired by the complainant in the future by its use as evidence in some suit or proceeding by the infant, and therefore a "property right" to be acquired in the future was threatened, for which injunctive relief might be granted. *Vanderbilt v. Mitchell*, 67 Atl. 103, 72 N. J. Eq. 927.

Since a married woman's right to the affections of her husband is a "property right," and the loss thereof constitutes an injury to the consortium, a married woman, though living with her husband, may, without joining her husband, sue another married woman for alienating the affections of plaintiff's husband, under 14 Del. Laws, c. 550, providing that any married woman may prosecute and defend suits at law for the preservation and protection of her property as if unmarried. *Ellason v. Draper* (Del.) 77 Atl. 572, 576, 2 Boyce, 1.

An injunction will lie to restrain the unauthorized use of one's name by another as a part of its corporate title, or, in connection with its business or advertisements, his picture and his pretended certificate that a medicinal preparation, which such other is engaged in manufacturing, is compounded according to the formula devised by him, though he is not a business competitor. The basis for an injunction in such case is always injury to property or to "property rights." It may at times have been a matter of doubt whether what was called "property" was really such, and whether the injury thereto, actual or apprehended, forming the basis for injunctive relief, was not so shadowy as to be incapable of judicial cognizance. The insignificance of the right from a pecuniary standpoint does not always bar relief, and the term "property right" is not to be taken in any narrow sense, and the tendency of equity in cases of this character should be to extend rather than to restrict the jurisdiction. *Edison v. Edison Polyform & Mfg. Co.*, 67 Atl. 392, 394, 395, 78 N. J. Eq. 136 (citing *New Jersey State Dental Soc. v. Dentacura Co.*, 41 Atl. 672, 57 N. J. Eq. 594; *Folsom v. Marsh*, 9 Fed. Cas. 342; 2 Story, 100; *Vanderbilt v. Mitchell*, 67 Atl. 103, 72 N. J. Eq. 927).

Act Nov. 29, 1788, enabled owners of meadows already banked in to maintain such banks in repair at the expense of the owners to be apportioned among them. Held, that the act, being a proper exercise of legislative power, and the proceedings thereunder being completed and present owners having acquired their holdings with knowledge thereof, established such rights in such owners in the lands of each of the other owners as amounted to property, and Act March 1, 1904, amending the original act by providing that any owner after 10 years desirous of being relieved from the effect of proceedings under the original act might apply to the commissioners appointed, who should make a new order relieving applicant's meadow from further obligations under the original act, was violative of Const. U. S. Amend. 14, as divesting the other owners of property rights without compensation, and without due process of law. *Cox v. American Dredging Co.*, 77 Atl. 1025, 1026, 80 N. J. Law, 645.

Const. art. 15, § 3, provides that the right to divert and appropriate unappropriated waters of any natural stream for beneficial uses, shall never be denied, that priority of appropriation shall give the better right as between those using water, but that when the waters of such a stream are not sufficient for the service of all those desiring to use them, those taking the water for domestic purposes shall, subject to limitations prescribed by law, have preference over those claiming for any other purpose but that the usage by such subsequent appropriators shall be subject to article 1, § 14, providing that private property may be taken for public and certain private uses but not until a just compensation shall be paid therefor. Held that, under the section, the appropriation of water to a beneficial use is a constitutional right that the first in time is the first in right, without reference to the particular use, and that an appropriation for domestic use is superior to appropriations for other uses when the waters of any natural stream are not sufficient for all those desiring it, and that the right to use for beneficial purposes is a "property right," subject to article 1, § 14. *Montpelier Milling Co. v. City of Montpelier*, 113 Pac. 741, 743, 19 Idaho, 212.

Where the benefit certificates of members of a fraternal insurance order, consisting of a supreme lodge and of subordinate lodges, were contracts between the Supreme Lodge and the individual members, and the subordinate lodges merely served as agencies through which members remitted their assessments, the suspension of a subordinate lodge did not affect property rights of members, who could continue their certificates by payment of assessments directly to the treasurer of the Supreme Lodge, and the suspension made without notice was not a violation of the Bill of Rights, declaring that no citizen shall be deprived of property except by

due course of law. A fraternal insurance order, consisting of a supreme lodge and of subordinate lodges, had no capital stock and did not accumulate any funds beyond the amount required to discharge the benefits promised in its certificates. It had a relief fund charged with the payment of benefit certificates. The right to receive sick benefits was contingent on provision being made therefor by the subordinate lodge under its by-laws. A subordinate lodge was suspended without notice. There was nothing to show that it had provided for sick benefits. Held, that the suspension did not affect rights of property within the Bill of Rights, in the absence of any showing of any misappropriation of the relief fund, or in the absence of any loss of sick benefits, especially since the right to such benefits was merely an incident to membership. *Lone Star Lodge No. 1,935, Knights and Ladies of Honor, v. Cole (Tex.)* 131 S. W. 1180, 1185.

**Political right distinguished**  
See Political Right.

#### PROPERTY RIGHT TO BE OWNED IN THE FUTURE

The accrued interest of an heir, though undivided, is not a "property right to be owned in the future," within the provisions of Porto Rico Mortgage Law, art. 108, defining things not mortgageable, as the property right in things which, although they will be owned in the future, are not yet recorded in the name of the person who will have a right to own them. *Cabrera v. American Colonial Bank*, 29 Sup. Ct. 623, 628, 214 U. S. 224, 53 L. Ed. 974.

#### PROPERTY TAKEN

The courts generally give to the words "property taken," in the Constitution, referring to eminent domain, a construction to include permanent damages to property. *Ingram v. Maine Water Co.*, 57 Atl. 893, 894, 98 Me. 566.

#### PROPERTY TAX

The tax imposed by the transfer tax law is not a "property tax" (that is, one imposed by reason of the ownership of property), but is in the nature of an excise tax, to wit, on the transfer of property. In *re Keeney's Estate*, 87 N. E. 428, 429, 194 N. Y. 281 (citing *In re Vanderbilt*, 64 N. E. 782, 784, 172 N. Y. 69, 74).

The tax on bank stock provided by Rem. & Bal. Code, § 9134, is a "property tax," and not an "excise tax," its primary purpose being to raise revenue; and hence is subject to Const. art. 7, § 2, relative to uniformity in taxation on property. *Spokane & Eastern Trust Co. v. Spokane County*, 126 Pac. 54, 55, 70 Wash. 48.

A tax levy on property passing by will, by virtue of the act of 1894 (P. L. 1894, p. 318), is not a "property tax" within Const.

art. 4, § 7, par. 12, providing that property shall be assessed under general laws and by their uniform rules. *Eastwood v. Russell*, 81 Atl. 108, 109, 81 N. J. Law, 672.

The inheritance tax imposed by Laws 1901, p. 61, c. 62, § 1, is not a "property tax," but a tax imposed on the right of devolution and succession. *Dixon v. Ricketts*, 72 Pac. 947, 948, 26 Utah, 215 (citing and adopting *In re Swift's Estate*, 32 N. E. 1096, 137 N. Y. 77, 18 L. R. A. 709; *Knowlton v. Moore*, 20 Sup. Ct. 747, 178 U. S. 41-56, 44 L. Ed. 989; *Strode v. Commonwealth*, 52 Pa. 181).

A tax on the franchise of public service companies is a "property tax." *Honolulu Rapid Transit & Land Co. v. Wilder*, 29 Sup. Ct. 44, 45, 211 U. S. 137, 53 L. Ed. 121.

An ordinance requiring barber shops to pay a license of a certain sum on each chair, where more than two chairs are used, is not a "property tax," but an occupation tax. *City of Louisville v. Schnell*, 114 S. W. 742, 743, 131 Ky. 104, 40 L. R. A. (N. S.) 637.

An ad valorem tax laid on franchises of public service corporations is a "property tax"; their franchise being deemed "property." *Board of Councilmen of City of Frankfort v. Capital Gas & Electric Light Co. (Ky.)* 96 S. W. 870, 872.

A tax on the gross receipts of a street railroad company imposed as a condition to the exercise of the special privileges granted it is not a "property tax" but is a license fee. *North Jersey St. R. Co. v. Jersey City*, 67 Atl. 33, 34, 74 N. J. Law, 761.

Ky. St. 1909, §§ 4077, 4082, provide that certain corporations, including gas companies, shall, in addition to other taxes, annually pay a tax on their franchise to the state and a local tax thereon to the county, town, etc., where the franchise is exercised; and each corporation shall report the amount of tangible property in the state, and where situated, and assessed and the fair cash value thereof; and the board of valuation and assessment is required to fix the value of the capital stock of each corporation and from such amount deduct the assessed value of all tangible property assessed in the state; the remainder to be the value of its corporate franchise subject to taxation, etc. By another provision all the property of domestic corporations, including intangible property considered in determining the value of the franchises, shall be subject to taxation unless exempt by the Constitution. Held, that within Const. § 174, requiring the property of corporations and natural persons to be similarly taxed, and allowing such further license, income and franchise taxes as the Legislature may deem proper, the tax on the franchise of a gas company was a "property tax" on the intangible property, and not a "privilege tax" for engaging in a business that natural persons could not, since under section 4082 natural persons engaged



in such business are taxed as such corporations are. *Commonwealth ex rel. Auditor's Agent v. Louisville Gas Co.*, 122 S. W. 164, 166, 135 Ky. 324.

Acts 1906, p. 549, entitled "An act relating to revenue and taxation providing for license taxes on compounded, rectified, adulterated or blended distilled spirits, known and designated as single stamp spirits, and providing penalties for violations of its provisions," and imposing a license tax on every wine gallon of compounded, rectified, blended, or adulterated spirits, etc., does not levy a "property tax," within Const. § 171, requiring taxes to be uniform on all property subject to taxation, but imposes a license tax, the amount of which is determined by the amount of spirits produced; the tax being on the business and not on the spirits. *Brown-Foreman Co. v. Commonwealth*, 101 S. W. 321, 323, 125 Ky. 402.

"Occupation taxes" are not "property taxes," and therefore are not subject to the restrictions imposed upon property taxation by statutes and Constitutions. A monthly license tax of \$100 levied by a city on gas companies, regardless of the business done and the earnings, does not infringe Const. art. 18, § 1, requiring all property to be taxed in proportion to its value, to be ascertained as provided by law, and defining property as including franchises, etc.; occupation taxes not falling within the constitutional provision. *City of Los Angeles v. Los Angeles Independent Gas Co.*, 93 Pac. 1006, 1007, 152 Cal. 765 (citing and adopting *People ex rel. Attorney General v. Naglee*, 1 Cal. 252, 52 Am. Dec. 312).

#### PROPERTY TAXPAYER

"Property taxpayers," entitled to vote at a special municipal election, means the owners of property assessed, and a joint owner of realty is a "property taxpayer" to the extent of his interest. *Endom v. City of Monroe*, 86 South. 681, 683, 112 La. 779.

#### PROPERTY TO BE ADMINISTERED

See To Be Administered.

#### PROPERTY WITHIN CITY

The tax on personal securities as "money at interest" provided by the act of 1879 (P. L. 130) and its supplementary acts, making such property taxable, annually, for state purposes at the rate of four mills on each dollar of the value thereof, is a state tax, though a large part thereof is, under the statute, returned to the counties, and the personal securities upon which such tax is levied cannot be included in the assessed value of the "property therein," within Const. art. 9, § 8, limiting the borrowing power of a city to 2 per cent. upon the assessed value of the taxable property therein. *Elliot v. City of Philadelphia*, 78 Atl. 107, 110, 229 Pa. 215.

#### PROPERTY WITHIN THE STATE

See Property Not Within the State.

For the purpose of the collateral inheritance tax, shares of stock in a corporation organized under the laws of the state are "property within the state," without regard to the place of residence of the stockholder, or the place of deposit of the certificates of stock, or the location of the property owned by the corporation, or the place where its business is carried on. *Nelson v. Russell*, 69 Atl. 476, 478, 76 N. J. Law, 27.

Where a domestic corporation issued a "policy of life insurance" to a resident of another state, in which state the corporation had designated a person on whom process might be served, and the policy was never in this state, its proceeds, paid to a foreign executor of the insured, are not "property within the state," subject to a transfer tax. *In re Gordon's Estate*, 99 N. Y. Supp. 630, 631, 114 App. Div. 202.

Const. art. 8, § 1, requiring all property in the state owned by natural persons or corporations other than municipal to be taxed, etc., embraces every kind of "property within the state" over which the state has jurisdiction, whether owned by citizens or non-residents. *Hall v. Miller*, 115 S. W. 1168, 1170, 102 Tex. 280.

Deposits in foreign savings banks made by a resident of the state are "property within the state" within Laws 1905, p. 432, c. 40, imposing a collateral inheritance tax on all "property within the jurisdiction of the state," since the right created by the deposits is property constructively within the state, and passing under the will of the resident by force of the statute of wills, and the deposits are subject to the tax imposed, though they may be subject to a similar tax in a foreign state. *Mann v. State Treasurer*, 68 Atl. 130, 131, 74 N. H. 345, 15 L. R. A. (N. S.) 150.

A vessel engaged in commerce on the high seas was "property in the state," within the meaning of Const. art. 13, § 1, relating to revenue and taxation, and was taxable in the city and county of San Francisco, where the managing owner of the vessel resided, although the vessel had been temporarily registered in Washington, and had received no permanent registration at San Francisco, and had never been in the waters of California, although some of her owners resided without the state. *Olson v. City and County of San Francisco*, 82 Pac. 850, 852, 148 Cal. 80, 2 L. R. A. (N. S.) 197, 113 Am. St. Rep. 191, 7 Ann. Cas. 443.

Transfer Tax Law (Laws 1892, c. 399) § 1, provides that a tax shall be imposed on the transfer by will, or intestate law, of property within the state, where the decedent was a nonresident at the time of his death. Held, that bonds passing under the will of a non-resident pursuant to a power of appointment

were not "property within the state" within such act, and subject to taxation because the bonds were secured by mortgages on lands located in New York. In *re Fearing's Will*, 93 N. E. 956, 958, 200 N. Y. 340.

Under the statute which provides for an inheritance tax upon all "property within the jurisdiction of this state," or any interest therein, which shall pass by will, descent, etc., whether belonging to an inhabitant or not, and whether tangible or intangible, a nonresident owner of shares of stock in a domestic corporation has an interest in "property within the jurisdiction of this state," which is subject to the tax. In *re Culver's Estate*, 123 N. W. 743, 745, 145 Iowa, 1, 25 L. R. A. (N. S.) 384.

A deposit in a bank, subject to withdrawal by check or surrender of the bank book, owned by a nonresident of the state at the time of his death, constitutes "property within the state," within Rev. Laws 1905, § 3627, authorizing administration of the estate of a nonresident leaving property in the state. In *re Lansing's Estate*, 131 N. W. 1010, 1011, 115 Minn. 73.

## PROPIEDAD

The word "propiedad," used in the Spanish text of article 8 of the treaty of peace with Spain of Dec. 10, 1898, declaring that the cession of sovereignty "cannot in any respect impair the property or rights which, by law, belong to the peaceful possession of property of all kinds," etc., is defined by Escriche as the right to enjoy and dispose freely of one's things in so far as the laws do not prohibit it. 4 Escriche, 736. The same word appears in article 9, providing that Spanish subjects may retain, whether they remain or remove from the territory, "all their rights of property, including the right to sell or dispose of such property or of its proceeds." So it is inferred that the right to practice law was not embraced in the provision of article 8. *Bosque v. United States*, 28 Sup. Ct. 501, 504, 209 U. S. 91, 52 L. Ed. 698.

## PROPONENT

"Generally speaking, a 'proponent' is one who propounds a will for probate." Any person interested may propound a will for probate. In *re Jones' Estate*, 106 N. W. 610, 612, 130 Iowa, 177.

## PROPORTION

Const. c. 1, art. 9, providing that every member of society is bound to contribute "his proportion" toward the expense of the protection which the state affords him, is not contravened by Acts 1896, No. 46, taxing collateral inheritances; and this though estates not exceeding \$2,000 are exempted. In *re Hickok's Estate*, 62 Atl. 724, 725, 78 Vt. 259.

## PROPORTIONAL

"The word 'proportional,' in a provision for an assessment, means proportional to the special benefits received." *Cheney v. Beverly*, 74 N. E. 306, 308, 188 Mass. 81 (quoting and adopting definition in *Hall v. Street Commissioners of Boston*, 59 N. E. 68, 177 Mass. 434).

## PROPORTIONAL SYSTEM

By "proportional system," as applied to taxation, is meant a tax at a fixed and uniform rate in proportion to the amount of taxable property based upon a cash valuation. *State ex rel. Foot v. Bazille*, 106 N. W. 93, 96, 97 Minn. 11, 6 L. R. A. (N. S.) 732, 7 Ann. Cas. 1056.

## PROPORTIONAL TARIFF

"Proportional tariffs" are a collection of freight rates which apply upon interstate shipments from certain points to certain other points, when the commodities shipped originate beyond the place of shipment or their ultimate destination is beyond the point to which the proportional rates apply. *J. Rosenbaum Grain Co. v. Chicago, R. I. & T. R. Co.*, 130 Fed. 46, 47.

## PROPORTIONATE MEASUREMENT

"Proportionate measurement" is defined as a "measurement having the same ratio to that recorded in the original field notes as the length of the chain used in the new measurement has to the length of the chain used in the original survey, assuming that the original measurement was correctly made." By actual measurement a county surveyor found that the south line of a section was longer than that returned by the governmental survey. He properly distributed the excess proportionately, for he could not conclude that the error arose in a part of the line, but was bound to conclude that it arose in and affected the whole line. *Christ v. Fent*, 84 Pac. 1074, 1076, 16 Okl. 376.

## PROPOSAL

Offer of reward as proposal, see *Reward*. See, also, *Offer*.

An order given to a traveling salesman for goods is a mere "proposal" to buy, subject to withdrawal at any time before acceptance. *Merchants' Exch. Co. v. Sanders*, 84 S. W. 786, 787, 74 Ark. 16, 4 Ann. Cas. 955 (citing 1 *Mechem, Sales*, § 252).

A life insurance company furnished its agents a printed blank for use by applicants for insurance, which first had blanks, under the caption "Proposal for Insurance," to be filled and signed by applicants, next had a "memorandum for the solicitor to sign," followed by two questions as to amount of insurance now in force in the company and amount now applied for, and then, under the caption "Application for Insurance," ques-

tions as to health and other matters affecting the risk, to be answered over the signature of applicant, together with a declaration and warranty as to the representations and answers. Held, that neither the proposal for insurance nor the memorandum for the solicitor to fill was a part of the "application," within Rev. Laws, c. 118, § 78, requiring, as a condition to the insurer introducing the application in evidence, that a correct copy of it shall have been annexed to the policy. *Bonville v. John Hancock Mut. Life Ins. Co.*, 85 N. E. 1057, 200 Mass. 197.

## PROPOSE

### PROPOSED ORDINANCE

Any proposed ordinance, see Any.

### PROPOSITION

An assignment that the court erred in instructing to return a verdict for defendant, in receiving a verdict for defendant, and in entering judgment thereon that plaintiff pay the costs, did not constitute a "proposition" within the rules governing appeals. *Olivarri v. Western Union Telegraph Co. (Tex.)* 116 S. W. 392.

## PROPRIETARY

The word "disturb," according to Webster, means "to interrupt a settled state of," and "proprietary" means "belonging or pertaining to a proprietor, considered as property owned," and the words "the property shall not be disturbed or the proprietary rights of the owner divested" seem to mean that possession thereof shall not be taken, nor his property taken, nor shall the title thereof be divested, until compensation therefor has been first paid to the owner or into court for the owner. *Edwards v. Thrash*, 109 Pac. 832, 837, 26 Okl. 472, 138 Am. St. Rep. 975.

"Proprietary medicines," within a statute, making it an offense to practice medicine without having secured a certificate from the state board of medical examiners, but providing that it shall not prevent the advertising and sale of patent and proprietary medicine, means medicines which some person or company, other than a person indicted for prescribing certain medicines without a license, manufactured, advertised, and sold. *State v. Kendig*, 110 N. W. 463, 465, 133 Iowa, 164.

## PROPRIETOR

See Riparian Proprietor.

The word "proprietor" signifies one who has the legal right or exclusive title in anything, whether in possession or not; an owner; the proprietor of a farm or mill. *Eldridge v. Finnegan*, 105 Pac. 334, 335, 25 Okl. 28, 28 L. R. A. (N. S.) 227.

## PROPRIETOR OF DRUG STORE

An information charging that accused was a druggist and the "proprietor of a drug store" and a pharmacist, and that he sold intoxicating liquors without a prescription, charges a violation of Rev. St. 1899, § 3047, making it an offense for a druggist, proprietor of a drug store, or pharmacist to sell intoxicating liquors except on a written prescription, and providing that any druggist who shall violate the act shall be punished as prescribed, and it is not duplicitous or multifarious, since the terms "druggist," "proprietor of a drug store," and "pharmacist" are synonymous, for the business of pharmacist or apothecary, or druggist, is one. *State v. Clinkenbeard*, 125 S. W. 827, 829, 142 Mo. App. 146.

## PROPRIETOR OF RAILROAD

Rev. St. 1895, art. 3017, provides that an action for death may be brought where it is caused by the negligence of the "proprietor or owner of any railroad," or by the unfitness or negligence of his servants. Subdivision 2 provides for a recovery when the death is caused by the wrongful act, negligence, or default of another. A railroad maintained a hospital for the care of employes, and a surgeon employed by the road hired an incompetent nurse to care for a servant afflicted with smallpox, and the nurse went on the public streets without disinfecting himself, and communicated the disease to plaintiff's intestate, from which he died. Held, that the railroad company was not liable for the death, as the negligence of the surgeon could not be regarded as the negligence of the road itself, under subdivision 2 of the statute, and the first subdivision was not applicable, since the maintenance of the hospital was not peculiar to the carrier's business, but merely collateral thereto. When death is caused by the negligence of the "proprietor, or owner, of any railroad," the conveyance of goods or passengers limits liability to deaths caused in a business that is peculiar to the owner of a railroad. *Missouri, K. & T. Ry. Co. of Texas v. Freeman*, 79 S. W. 9, 15, 97 Tex. 394, 1 Ann. Cas. 481.

## PROPRIETOR OF RESTAURANT

As person, see Person.

## PROPRIETOR OF THEATER

"The 'proprietor of a theater' is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit every one who may apply and be willing to pay for a ticket, for the theater proprietor has acquired no peculiar rights and privileges from the state, and is therefore under no implied obligation to serve the public. When he sells a ticket, he creates

contractual relations with the holder of it, and, whatever duties on his part grow out of these relations, he is bound to perform, or respond in damages for the breach of his contract, if it is of that only that complaint can be made." *Buenzie v. Newport Amusement Ass'n*, 68 Atl. 721, 723, 29 R. I. 23, 14 L. R. A. (N. S.) 1242 (quoting and adopting definition in *Horney v. Nixon*, 61 Atl. 1088, 213 Pa. 20, 1 L. R. A. [N. S.] 1184, 110 Am. St. Rep. 520, 5 Ann. Cas. 349).

## PROPRIETY

The term "propriety" of the amount of damages, within Ballinger's Ann. Codes & St. § 5645, providing that an appeal in condemnation proceedings shall bring before the Supreme Court the propriety and justness of the amount of damages, means the proper amount of the damages. *State ex rel. McCormick v. Superior Court for Walla Walla County*, 86 Pac. 205, 207, 43 Wash. 91.

## PRORATING

"Prorating" means according to the measure which fixes proportions. It has no meaning unless referable to some rule or standard. *State v. Boston & P. Exp. Co.*, 61 Atl. 697, 699, 100 Me. 278 (quoting *Brombacher v. Berking*, 39 Atl. 135, 56 N. J. Eq. 253).

## PROSECUTE

See *Duly Prosecuted*; *To Be Prosecuted*.

To "prosecute" an action includes the bringing, as well as the carrying on, of the action. *Inhabitants of Great Barrington v. Gibbons*, 85 N. E. 737, 199 Mass. 527.

The word "prosecute," within Gen. St. 1909, § 8906, providing that the Attorney General shall appear for the state in certain cases, implies the commencement, as well as the continuance, of a proceeding; and the term is so used in common speech, as well as in legal parlance. *State ex rel. Stubbs v. Dawson*, 119 Pac. 360, 364, 86 Kan. 180, 39 L. R. A. (N. S.) 993.

Ordinarily an attorney's contract to "prosecute" an action includes the commencement thereof, and is not confined to the pursuit of the remedy thereafter. *Cheshire v. Des Moines City R. Co.*, 133 N. W. 324, 325, 153 Iowa, 88.

One who aids, abets, or procures the burning of a building may be charged in the indictment and tried as a principal offender, the word "prosecuted" in Rev. St. § 6804, being broad enough to cover all the proceedings. *Hutchinson v. State*, 28 Ohio Cir. Ct. R. 595, 599.

To "prosecute" is to proceed against judicially, and a "prosecution" is the act of conducting or waging a proceeding in court; the means adopted to bring a supposed of-

fender to justice and punishment by due process of law. It is also defined as the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information. *State v. Bowles*, 79 Pac. 723, 728, 70 Kan. 821, 69 L. R. A. 176.

The word "prosecuted," as used in Pub. Acts 1905, No. 89, includes the institution of a suit, and is not confined to the mere pursuit of a remedy after proceedings have been instituted. It provides that in all actions for negligent injury to persons hereafter prosecuted by the executor or administrator of the injured person, under the statute declaring that such action shall survive, the measure of damages shall be fair and just compensation for the pecuniary injury, etc. It does no violence to the language used in the act to construe the word "prosecuted" as meaning the complete prosecution, including the institution of the suit. *Davis v. Michigan Cent. R. Co.*, 111 N. W. 76, 77, 147 Mich. 479.

Rev. St. 1908, § 904, provides that no foreign corporation may do any business or prosecute or defend in any suit in this state until the fee prescribed has been paid to the Secretary of State, and section 910 provides that no foreign corporation shall do any business or prosecute or defend in any suit in this state until it receives from the Secretary of State a certificate that full payment of fees required has been made by it. Held, that an attempted suit by a foreign corporation doing business within the state without having paid the fee required would not suspend the running of limitations, since a corporation not complying with the statutes cannot institute suit in this state; the word "prosecute," as used, meaning to bring suit against in a court for redress of wrong, to carry on a judicial proceeding against, or to seek to enforce a claim or right by legal process. *Western Electrical Co. v. Pickett*, 118 Pac. 988, 990, 51 Colo. 415, 38 L. R. A. (N. S.) 702, Ann. Cas. 1913A, 1322.

## PROSECUTE TO OR WITH EFFECT

Where the defendant, in a suit to foreclose a contract for the purchase of real estate by an appeal, secured a modification of the decree below, allowing him a substantial extension of time within which to make the deferred payments and protect his rights under the contract, his appeal was "prosecuted to effect," within the meaning of the condition of his supersedeas bond. *Crane v. Buckley*, 138 Fed. 22, 70 C. O. A. 452 (citing *Buckley v. Crane*, 123 Fed. 29, 33, 59 C. C. A. 109).

Under Gen. St. 1902, § 1004, providing that no temporary injunction shall issue until the applicant therefor shall give bond to

answer all damages in case the plaintiff shall fail to "prosecute the action to effect," etc., the quoted words mean that plaintiff must obtain a final decision that he is entitled to the injunction, or some equivalent order, and hence prosecution to a judgment afterwards vacated is not a prosecution to effect under the statute, since when a judgment is set aside it is entirely destroyed, and the rights of the parties as to the issues tried are left as if no such judgment had ever been entered. *Lawlor v. Merritt*, 72 Atl. 143, 144, 81 Conn. 715.

#### As with success

A stipulation in a bail bond on appeal to "prosecute with effect" means to prosecute with success, and, when the bond contains distinct and independent conditions, the breach of any one condition works a forfeiture. *Commonwealth v. Lenhart*, 82 Atl. 777, 778, 283 Pa. 526.

### PROSECUTING ATTORNEY

As public officer, see Officer.

Under the laws of Kansas, the "prosecuting attorney" is always the county attorney (Gen. St. pp. 283, 284, §§ 135-137); that is, every criminal action prosecuted in the name of the state must be prosecuted by the county attorney, who is the public prosecutor. For the purpose of prosecuting criminal actions, the prosecuting attorney and the county attorney is one and the same person. As used in the new Code, the words "prosecuting attorney" were designed to embrace both the district attorney, who would have authority to prosecute until the next general election, and the county attorney would then be the local attorney. *State v. Bowles*, 79 Pac. 726, 727, 70 Kan. 821, 69 L. R. A. 176.

The "prosecuting or state's attorney," as he is designated in this state, is an expansion of the old English office of Attorney General. He conducts suits on behalf of the central government. The colonies each had an Attorney General, and Connecticut in the early part of the eighteenth century established local assistants to the Attorney General, and from this beginning the present system of public prosecuting officers has been established. Their most important duties are connected with criminal prosecutions, which are brought in the name of the state, and the prosecuting attorney in such cases is acting as the agent of the state, and not as a local officer. *Ex parte Corliss*, 114 N. W. 962, 962, 16 N. D. 470 (citing *Fairlie*, Local Government, p. 104).

### PROSECUTION

See Criminal Prosecution; Public Prosecution.

Any and every kind, see Any.

Expenses of prosecutions, see Expenses.

A bond given by a contractor with the United States for the construction of a rip-

rap breakwater, and conditioned as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278, for the payment by the contractor of persons "supplying him with labor or materials in the prosecution of the work," covers the claims of laborers employed by him in quarrying the stone used and in transporting it to the breakwater, regardless of whether the work was done near by or at a distance. *United States Fidelity & Guaranty Co. v. United States ex rel. Bartlett*, 189 Fed. 339, 342, 111 C. C. A. 71.

Where a policy provided for indemnity in case insured by reason of injury should be immediately and wholly disabled and prevented from prosecuting any and every kind of business for a period of not less than a week, the word "prosecution" indicated that the parties intended that the insured, in order to recover benefits, should be wholly disabled from doing that business which he had the ability to prosecute, and hence the term "disabled from prosecuting any and every kind of business" did not mean that insured who was a day laborer and able to do only manual work, could not recover because he was not so disabled as to be prevented from performing mental activities if he had the requisite education, and he was therefore wholly disabled within the policy when he was incapacitated from performing manual labor. *Industrial Mut. Indemnity Co. v. Hawkins*, 127 S. W. 457, 459, 94 Ark. 417, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029.

"Prosecution of business" means a continuance of business. Insurance Law (Laws 1892, p. 1958, c. 690), § 56, providing that no judgment for an accounting or decree or order restraining or enjoining the prosecution of an insurance company's business or interfering therewith shall be made, does not prevent the bringing by a stockholder and policy holder in an insurance company of an action to compel the directors thereof to repay to the company funds wasted by them. No direct interference or stoppage of business can result from an interlocutory decree for an accounting. While it might become necessary as a consequence of the decree to have reference to the society's books and papers in order to determine the sums of money which some of the directors have unlawfully received and are owing, that would involve a mere incidental inconvenience which might occur whenever the society itself sought to collect a debt. *Young v. Equitable Life Assur. Soc. of United States*, 99 N. Y. Supp. 446, 453, 49 Misc. Rep. 347 (citing *Uhlman v. New York Life Ins. Co.*, 17 N. E. 363, 109 N. Y. 421, 4 Am. St. Rep. 482).

To "prosecute" is to proceed against judicially. A "prosecution" is the act of conducting or waging a proceeding in court; the means adopted to bring a supposed offender to justice and punishment by due course of law. It is also defined as the institution or

commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information. *State v. District Court of Burleigh County*, 124 N. W. 417, 420, 19 N. D. 819, Ann. Cas. 1912D, 935.

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Rev. St. U. S. § 190, providing that it shall not be lawful for any officer, clerk, or employé in any of the departments to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of the departments while he was such officer, clerk, or employé, nor to aid in the prosecution of any such claim within two years next after he shall have ceased to be such officer, clerk, or employé, prohibits not merely the prosecution of claims by lawsuit, but the collection of such claims in any manner. *Van Metre v. Nunn*, 133 N. W. 1012, 1014, 116 Minn. 444.

#### Appeal

See Due Prosecution of Appeal.

#### Civil action

Prosecution for violation of ordinance as civil suit, see Civil Action—Case—Suit—etc.

"The condition in plaintiff's undertaking on commencing an action in claim and delivery for the 'prosecution of the action,' etc., as prescribed by section 5334, Rev. Codes 1899, is broken if plaintiff fails to prosecute the action to a final termination on the merits, whether his failure to do so is due to his own fault or to the fault of the justice of the peace, before whom the action is pending, in entering up a void judgment." *Siebolt v. Konatz Saddlery Co.*, 106 N. W. 564, 565, 15 N. D. 87.

#### Criminal proceeding

A "prosecution for contempt" of court is a criminal proceeding, so that defendant is entitled to the benefit of any reasonable doubt as to his guilt. *Connell v. State*, 114 N. W. 294, 299, 80 Neb. 296.

Proceedings for the seizure and condemnation of liquors alleged to be unlawfully kept for sale are not "prosecutions for criminal offenses" within the constitutional provision giving a right to trial by jury in such prosecutions, but are civil proceedings in rem

to fix the status of the property. *State v. Intoxicating Liquor*, 78 Atl. 586, 587, 82 Vt. 287.

"Prosecution," as used in Pen. Code, § 285, making the subsequent intermarriage of the parties a bar to a "prosecution" for seduction, "includes every step taken in a criminal action from and including the indictment to and including the final judgment, and a bar to a prosecution is the destruction forever of the right to take any of those steps after the bar became effective. *People ex rel. Scharff v. Frost*, 91 N. E. 376, 378, 198 N. Y. 110, 139 Am. St. Rep. 801 (dissenting opinion of Judge Vann).

As used in an act relating to the taking of testimony of witnesses in criminal cases, which provides that the testimony of witnesses taken in writing shall be sworn to and signed by the witness and attested by the officer taking the same, and returned by such officer without delay into court, together with the notice of the taking of the testimony, with such officer's return of service annexed and attached thereto in which the prosecution is pending, etc., the term "prosecution pending" means accusation or charge pending. *State v. Jackson*, 35 South. 593, 598, 111 La. 843.

Revisal 1905, § 2768, allows the solicitor, for "every conviction on an indictment which he shall prosecute for a capital crime," \$20 to be taxed against defendant, but where he is insolvent the solicitor's fee shall be one-half to be paid by the county, "except that for convictions in capital felonies," forgery, perjury and conspiracy, he shall receive full fees. On trial of an indictment for murder in the first degree the solicitor stated that he would only ask for a conviction of murder in the second degree, which was not a capital crime, and the conviction was for that degree. Held, that the prosecution was for a capital crime, "prosecution being the whole or any part of the procedure which the law provides for bringing offenders to justice," but as there was no conviction of a capital crime the solicitor's fee could be only \$10. *State v. Mayhew*, 71 S. E. 447, 448, 155 N. C. 477 (quoting 6 Words and Phrases, p. 5787).

#### Same—Complaint or indictment

The words "prosecution" or "proceeding," in the connection in which used in Rev. St. 1899, § 2041, making every person, who shall deter a witness from giving evidence in a cause, guilty of a misdemeanor, provided that, if the cause be a "prosecution" or "proceeding" against any one for a felony, the punishment shall be imprisonment in the penitentiary or in the county jail, or by fine, mean a prosecution by indictment or information or on an affidavit on which accused has been charged before an examining magistrate, and by no fair intendment can either of them be held to mean a mere in-

quiry by the grand jury as to the commission of an offense. *State ex rel. Butler v. Foster*, 86 S. W. 245, 251, 187 Mo. 590.

#### Proceedings for penalties

A penal action, or action to recover a penalty, is not, in the language of a constitutional provision, a "prosecution by indictment or information," so as to entitle the party to a jury trial in the first instance. *Reagh v. Spann* (Ala.) 3 Stew. 100, 107.

The word "prosecutions," in Const. art. 5, § 31, providing that all writs and processes shall run and all prosecutions shall be conducted in the name of the state, applies to indictments for crime, and does not affect suits under penal statutes, which may be brought in the name of any person in the manner provided by the statute creating the same. *Johnson v. Seaboard Air Line Ry.*, 52 S. E. 644, 646, 73 S. C. 36 (citing *Ward v. Tyler* [S. C.] 1 Nott & McC. 22).

Criminal contempt being classified by statute as a misdemeanor, and the punishment therefor regulated by statute, a prosecution therefor is a "prosecution to recover a penalty," within the one-year statute of limitations. *Gordon v. Commonwealth*, 183 S. W. 206, 208, 141 Ky. 461.

#### Prosecutions under municipal ordinances

Under Const. 1901, § 170, providing that all prosecutions shall be carried on in the name of the state, the provision in section 96 of Acts 1911, p. 288, regulating the sale of liquor, that nothing in the act shall affect any "prosecution" pending before the courts of the state, does not apply to quasi criminal cases for the violation of municipal ordinances. *City of Birmingham v. Baranco*, 58 South. 944, 945, 4 Ala. App. 279.

Laws 1899, p. 273, § 9, provides that one practicing medicine without a license shall forfeit to the state, for the use of the State Board of Health, \$100 for the first offense to be recovered in an action of debt. Const. art. 6, § 33, requires all prosecutions to conclude "against the peace and dignity" of the state. Held, that an action of debt for the penalty for practicing medicine without a license was not a "prosecution" within the constitutional requirement, so that it need not conclude against the peace and dignity of the state; a "prosecution" being the institution and continuance of a criminal proceeding, as by indictment and information, in which sense the word is used in the Constitution. *People v. Gartenstein*, 94 N. E. 128, 129, 248 Ill. 546.

#### PROSECUTOR

A "prosecutor" is one who instigates a prosecution, by making an affidavit charging a named person with the commission of a penal offense, on which a warrant is issued or an indictment or accusation is based.

*Eady v. State*, 74 S. E. 303, 10 Ga. App. 818 (citing 6 Words and Phrases, p. 5739).

### PROSPECT

#### PROSPECTIVE ADVANTAGE

By the words "prospective advantage," as used in Rev. St. 1898, § 4475, in relation to bribery, and making it an offense to receive any pecuniary or other personal advantage, either present or prospective, is intended a promise of future delivery of some of the specified articles of value. *Schutz v. State*, 104 N. W. 90, 92, 125 Wis. 452.

#### PROSPECTIVE RIGHT

A "prospective right" is not yet a right. It is only an expectation having a certain intensity of reasonableness. When the Texas Pacific Railroad filed its map of general route, and the Secretary of the Interior withdrew the odd sections along its route from sale or settlement in accordance with an act of Congress granting such sections to the railroad, the road had a "prospective right" to the land. *Southern Pac. R. Co. v. United States*, 23 Sup. Ct. 567, 568, 189 U. S. 447, 450, 47 L. Ed. 896.

#### PROSPECTIVE VALUE

The "prospective value" of mining property is the value with reference to which the capitalization of a corporation organized to develop such property is fixed, is the value which in the judgment of the parties the property actually has, but which development is necessary to disclose. *Speer v. Bordeleau*, 79 Pac. 332, 334, 20 Colo. App. 413 (quoting *Buck v. Jones*, 70 Pac. 951, 18 Colo. App. 250).

### PROSTITUTE

See Common Prostitute.

Evidence that a woman was living with a man without being married to him did not show that the woman was a "prostitute" as commonly understood. *Van Dalsen v. Commonwealth* (Ky.) 89 S. W. 255, 256.

#### PROSTITUTION

See House of Common Prostitution; Leading Life of Prostitution and Lewdness.

Operating house of prostitution, see Operate.

"Prostitution" is the common lewdness of a woman for gain, or the offering of her person to indiscriminate intercourse with man, while lewdness is unlawful indulgence of the animal desire. *State v. Porter*, 107 N. W. 923, 924, 180 Iowa, 690.

#### Concubinage distinguished

See Concubinage.

### PROTECT—PROTECTION

"Protect" is defined as follows: "To guard; shield; preserve." *Webst. Int. Dict.*

"To cover or shield from danger, harm, damage, trespass, exposure, insult, temptation, or the like; defend; guard; preserve in safety. Synonyms: Defend; shield; screen; secure." Cent. Dict. "To cover, shield, or defend from injury, harm, or danger of any kind." Enc. Dict. An instruction that a servant could presume that the master would use ordinary care to "protect" the servant placed too great a burden upon the master, since he is only bound to use reasonable care to provide a reasonably safe place of work, reasonably safe appliances, and to use reasonable care in selecting fellow servants. *Reino v. Montana Mineral Land Development Co.*, 99 Pac. 853, 855, 38 Mont. 291.

The word "protect," as used in a bond accompanying a deed, wherein the obligor covenanted to "protect" the lands conveyed from levy and sale under a certain judgment, is equivalent to, or at least includes, "defend against attack," which is one meaning of "protect." The contract was not that the lands should not be sold under judgment but that the vendor would "protect" them against sale. This required him to defend in suit, to enforce the judgment by sale of the lands, unless he can make it appear that such defense was not reasonably necessary for the protection of the lands. *Mettlar v. Conover* (N. J.) 65 Atl. 464, 465.

Under the constitution of a brotherhood of painters, providing that the initiation fee paid by an applicant for membership must accompany the application and be returned in case the applicant is rejected, with a proviso that, if the fee is paid in installments while the applicant is working at his trade and receiving the protection of the brotherhood, such payments shall be forfeited to the brotherhood if the applicant has made any false statements or is unable to qualify as a member, the fact that the brotherhood, having no right to interfere, does not interfere with employment by an applicant at his trade pending his application does not constitute "protection" extended by the brotherhood to him, and was not in a legal sense a benefit to him. *Levin v. Cosgrove*, 67 Atl. 1070, 1071, 75 N. J. Law, 344.

An information charging a city marshal with willful and malicious misconduct in office, in that he gave aid, comfort, protection, and assistance to keepers of bawdyhouses, must by the protection referred to be construed to mean protection against an effort of the public officers to enforce the law against them, and it is not necessary to the sufficiency of the information that such conduct be expressly characterized as either willful or malicious. *State v. Dixon*, 103 Pac. 130, 131, 80 Kan. 650.

Act No. 83 of 1908, as amended by Act No. 48 of 1910, § 3, created the juvenile court, and provided that it should have jurisdiction of the trial of all children under 17 charged

as neglected or delinquent children, except for capital crimes, and of all persons charged with contributing to the neglect or delinquency of children under 17, or with a violation of any law then in existence or thereunder enacted for the protection of the physical, moral, or mental well-being of children, not punishable by death or hard labor, together with all cases of desertion or non-support of children by their parents. Held, that such courts had no jurisdiction to try accused for an assault committed on a delinquent minor child; the expression "law enacted for the protection of children" being limited to those laws relating to their physical, moral, and mental well-being, not including general laws prohibiting assault and battery, affecting both adults and children. *State v. Jacobs*, 57 South. 905, 130 La. 245.

### PROTECTION OF LAW

See Equal Protection of Law.

## PROTEST

Importers so changed the form of invoicing as to increase the amount of duty payable, this being done to comply with a rule which had been established by the Board of General Appraisers, but which the courts subsequently held illegal. Held, that as the action of the importers had been without protest and the customs officers had not raised or changed the invoices, nor directed or requested that to be done, there had been no legal compulsion or duress. With no protest other than an oral complaint, importers acquiesced in customs ruling that involved an increase in the duties on their goods. Held, that there had not been such a "protest" as is contemplated by Act June 22, 1874, c. 391, § 21, 18 Stat. 190, making the settlement of duties final "in the absence of protest." *Gulbenkian v. United States*, 175 Fed. 860, 865.

### PROTEST (In Commercial Law)

See Duly Protested.

The term "protest" includes in a popular sense all the steps necessary to fix the liability of a drawer or indorser on the dishonor of commercial paper, and to which he is a party, or, accurately speaking, it is the solemn declaration on the part of the holder against any loss to be sustained by him by reason of the nonacceptance or even nonpayment, as the case may be, of the bill in question. *Sherman v. Ecker*, 109 N. Y. Supp. 678, 679, 58 Misc. Rep. 456.

A complaint in an action on a note, which states that the note was duly presented for payment at the time and place designated thereon and payment thereof demanded and refused, that said note was duly protested, and that due notice of the protest of said note was duly given to the defendants and each of them, is sufficient as against a demurrer by an indorser on the ground that



it did not show the giving of notice of presentment, demand, nonpayment, and protest, notwithstanding Neg. Inst. Law, Laws 1897, p. 739, c. 612, § 160, providing that an indorser to whom no notice of dishonor has been given is discharged; for pleadings must be liberally construed, and the term "protest" includes in a popular sense all the steps taken to fix the liability of an indorser upon the dishonor of a commercial paper to which he is a party, and "duly" in legal parlance means according to law, and does not relate to form only, but includes both form and substance. *Sherman v. Ecker*, 110 N. Y. Supp. 265, 266, 59 Misc. Rep. 216.

#### Presentment and refusal

A "protest" is a formal statement in writing that the described instrument was on a certain day presented for payment or acceptance, and that such payment or acceptance was refused. It is a formal declaration executed by a notary, which in its popular sense means all the steps and acts accompanying the dishonor of a bill or note necessary to charge an indorser. *Peabody v. Citizens' State Bank of St. Charles*, 108 N. W. 272, 275, 98 Minn. 302 (citing 7 Cyc. p. 1051).

#### PROTEST, PAYMENT UNDER

A mere declaration by one at the time he pays money that the payment is made "under protest" does not show that the payment is not voluntary. *Town of Phœbus v. Manhattan Social Club*, 52 S. E. 839, 840, 105 Va. 144.

Where a liquor license fee was not imposed without authority or contrary to law, a payment of the fee under protest was not within Comp. Laws 1907, § 2684, authorizing the recovery of licenses unlawfully imposed. *Williams v. Summit County (Utah)* 123 Pac. 938, 940.

### PROTESTANT

#### PROTESTANT EPISCOPAL JURISDICTION

The phrase "Protestant Episcopal jurisdiction," in a will whereby testator made a bequest in trust to T., missionary bishop of Idaho and Utah, his successors, in fee, to erect therewith a church at such place within his Episcopal jurisdiction as he or his successors should elect, with a further sum bequeathed to build a rectory for the rector of such church, to be the property of the aforesaid "Protestant Episcopal jurisdiction," does not refer to a natural or artificial person, entitled to, or taking title to, property. *Mount v. Tuttle*, 91 N. Y. Supp. 195, 198, 99 App. Div. 433.

### PROVABLE

The term "provable," in Bankr. Act July 1, 1898, c. 541, § 68b, 30 Stat. 565, providing that a set-off or counterclaim shall not be

allowed in favor of any debtor of the bankrupt which is not provable against the estate, means "provable" in its nature at the time when the set-off is claimed, not provable in the pending bankruptcy proceedings. The provision of Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561, limiting the time for proving claims to one year, has reference to the bankruptcy proceedings alone, and, if the claim of a creditor, who is also a debtor, of the estate is one provable in its nature, the fact that he has not proved it within the year does not affect his right to plead it as a set-off or counterclaim, in an action by the trustee to recover his indebtedness to the estate as a claim "provable against the estate," within the meaning of section 68b. *Norfolk & W. Ry. Co. v. Graham*, 145 Fed. 809, 813, 76 C. C. A. 385 (citing *Morgan v. Wordell*, 59 N. E. 1037, 178 Mass. 350, 55 L. R. A. 33).

#### PROVABLE CLAIM

A debt barred by limitations is not a "provable claim" within the bankruptcy act. *In re Putman*, 193 Fed. 464, 467.

A money decree for alimony, rendered in a proceeding for divorce and alimony, is not a "provable claim," under the bankruptcy statute of the United States of July 1, 1898 (30 Stat. 544, c. 541). Hence a discharge in bankruptcy does not work a satisfaction of such decree. *Lemert v. Lemert*, 74 N. E. 194, 195, 72 Ohio St. 364, 106 Am. St. Rep. 621, 2 Ann. Cas. 914.

Where a buyer's bankruptcy resulted in its breach of an express written contract for the sale of burners, the seller's damages were unliquidated and constituted a "provable claim" against the bankrupt's estate, under Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562, providing that debts of the bankrupt may be proved and allowed against his estate which are founded on a contract, express or implied. *In re Duquesne Incandescent Light Co.*, 176 Fed. 785, 791.

An involuntary petition in bankruptcy may be based upon a claim for unliquidated damages arising out of a breach of warranty on the sale of personalty, though, by the provision of Bankr. Act July 1, 1898, § 59b, such petitions may be filed only by creditors who have "provable claims," since, if the claim is of a kind that can be proved in bankruptcy, this provision is satisfied; and the claim in question is provable under section 63a of that act, as founded upon a contract, even if, in case of fraud, there may be an independent claim purely in tort. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 29 Sup. Ct. 332, 333, 212 U. S. 445, 53 L. Ed. 591.

Under the statute relating to provable claims against a decedent's estate, a claim to be provable, must have been a good cause of action against decedent in his lifetime. A decedent in his lifetime employed an agent to negotiate the purchase of mining property of a corporation, and, before the agent had

completed the purchase, the agency was terminated. Before its termination, the agent had, pursuant to the agreement, bought a great number of shares of the corporate stock which caused him financial loss. Held, that the agent had a "provable claim" for the loss sustained though the agency was terminated. *Briggs v. Chamberlain*, 107 Pac. 1082, 1086, 47 Colo. 382, 135 Am. St. Rep. 223.

### PROVABLE DEBT

Debt as including, see Debt.

The expression "provable debts," as used in Gen. Laws, c. 274, § 50, includes all claims against the insolvent which may be proved under the insolvency act; the word "debts" being used in its generic and not in its strict legal sense. *Hebert v. Handy*, 72 Atl. 1102, 1103, 29 R. I. 543 (quoting and adopting definition in *Re Brouillard*, 40 Atl. 762, 20 R. I. 617).

"Provable debts," as used in Gen. Laws, c. 274, § 50, providing that a discharge in insolvency shall release an insolvent from all his provable debts, should be construed to include all claims against an insolvent which may be proved under section 28, providing that claims "growing out of trover, replevin, or any tort" may be proved against an insolvent. In *re Brouillard*, 40 Atl. 762, 20 R. I. 617.

Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562, defines the debts of the bankrupt which may be proved against his estate to consist of a fixed liability, evidenced by a judgment or an instrument in writing absolutely owing at the time the petition was filed, whether then payable or not, claims founded on an open account or on a contract, express or implied, and declares that unliquidated claims against the bankrupt may be liquidated pursuant to an application to the court in such manner as it shall direct, and may thereafter be proved against the estate. Held, that where claimant was an employé of the bankrupt under contract which had many months to run at the time of the filing of an involuntary bankruptcy petition, and he was paid his salary up to the time the petition was filed, the subsequent breach of the contract having been the result of the operation of the bankruptcy act, though the causes permitting the intervention were chargeable to the bankrupt, the claim was not allowable. In *re American Vacuum Cleaner Co.*, 192 Fed. 939, 940.

"Provable debts," as defined by Bankr. Act 1898, § 63, includes debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. A claim arising out of the conversion by stockbrokers of shares, purchased and held by them on a customer's account, charging him with commission and interest, and crediting him with amounts received as margins, is a "provable debt," under Bankr. Act 1898,

§ 63a, as a debt "founded upon an open account or upon a contract, express or implied." *Crawford v. Burke*, 25 Sup. Ct. 9, 10, 195 U. S. 176, 49 L. Ed. 147.

The words "provable debts," as used in section 17 of the Bankruptcy Act of 1898, providing that a discharge in bankruptcy shall release a bankrupt from all of his "provable debts," except such as are enumerated therein, are used in a sense broad enough to include, in the case of taxes, demands against a bankrupt, which, although not strictly or technically "provable," are nevertheless allowable out of his estate. In *re United Button Co.*, 140 Fed. 495, 501.

A "provable debt" is a sum of money absolutely owing at the commencement of the proceedings in bankruptcy, certainly, and in all events payable without regard to the fact whether then due, past due, or to become due; that is, it must be, at the date of the bankruptcy, a fixed liability. This does not have reference to unliquidated demands and claims of creditors holding securities. Where the landlord of a bankrupt has a lien on the leased premises for rent due and to become due for the current contract year, the lien is enforceable against the trustee in bankruptcy for rent to become due during the remainder of the contract year in which the bankruptcy occurs, and which has become due prior to the adjudication of the claim. *Martin v. Orgain*, 174 Fed. 772, 778, 98 C. C. A. 246 (quoting and adopting definition from *In re Smith*, 146 Fed. 923).

A judgment for negligent death is a debt "provable" in bankruptcy under Bankruptcy Act July 1, 1898, c. 541, § 63a(1), 30 Stat. 562, as a fixed liability evidenced by judgment. In *re Putman*, 193 Fed. 464, 468.

A stockholder's liability for an unpaid stock subscription is a "debt provable" in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 63a(4), 30 Stat. 563, as a debt founded on contract. In *re Putman*, 193 Fed. 464, 468.

Under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545, giving courts of bankruptcy jurisdiction at law and in equity, equitable claims are provable if within the purview of the general rules of equity, even though they have no status at law. In *re Putman*, 193 Fed. 464, 472.

The probability that one who has retained title to a horse, which has been sold by the buyer to a third person under a warranty of title, will retake the horse, and that thereby a breach of the warranty will result, is not a "provable debt" within the bankruptcy act, to which a discharge in bankruptcy is a good defense. *Baker v. Hooks*, 64 S. E. 573, 6 Ga. App. 121.

The contingent liability of an accommodation indorser on a note falling due after a petition in bankruptcy, but before time for

filing proof of claims, is a provable "debt on a contract express or implied," under Bankr. Act July 1, 1898, c. 541, § 63a4, 30 Stat. 563; and hence, though not proved, is discharged by the discharge of the indorser in the bankruptcy proceedings, under section 17. *Cohen v. Pecharsky*, 121 N. Y. Supp. 602, 603, 67 Misc. Rep. 72.

A debt created by a loan to the bankrupt by a creditor after adjudication in bankruptcy to be used in complying with the terms of a composition, the bankrupt agreeing to pay to such creditor when the composition was confirmed the balance of such loan after deducting therefrom the creditor's share of the consideration of the confirmation, was not a "provable debt" in the bankruptcy proceedings within Bankr. Act July 1, 1898, c. 541, 30 Stat. 550, § 17a. *Zavelo v. J. S. Reeves & Co.*, 54 South. 654, 656, 171 Ala. 401.

Where claimant procured a divorce and a decree for alimony in South Dakota, and subsequently sued thereon in New York and obtained judgment for alimony due, after which the debtor scheduled the New York judgment as an indebtedness in bankruptcy proceedings, such judgment was a "provable debt," under Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562, 563, defining claims dischargeable to include a fixed liability evidenced by a judgment absolutely owing at time of filing the petition. In *re Williams' Estate*, 118 N. Y. Supp. 562, 566.

A debt is not allowable in bankruptcy, unless it is provable; but it may be provable, without being allowable. Allowability implies, not only provability, but also validity; and if for any reason the claim is improper, or if there is a good defense to it, it is not allowable, though it may be provable, as a debt. *R. P. Williams & Co. v. United States Fidelity & Guaranty Co.*, 75 S. E. 1067, 1070, 11 Ga. App. 635.

## PROVE

See Clearly Proven.

Otherwise proved, see Otherwise.

Under a charge to the grand jury that, if what was alleged in certain affidavits shall be proven before your body, then it will be the duty of the grand jury to find a bill of indictment for the misdemeanor against the parties guilty thereof, it is fair to presume that the grand jury understood the phrase "proven before your body" to mean proven by legal evidence, and by the amount or weight of evidence that would support an indictment in any case. *People v. Glen*, 66 N. E. 112, 115, 173 N. Y. 395.

The words "to have the will proved," in Code Civ. Proc. § 1299, authorizing enumerated persons to petition the court having jurisdiction "to have the will proved," mean no more than that the court shall hear all evi-

dence offered in proof or disproof of the will, and, if on any material matter there is a failure to offer evidence, the production of it shall be had at the instance of the court itself, in order to satisfy the court, under section 1317, of the testamentary capacity of testator and the lack of duress or undue influence. In *re Edwards' Estate*, 97 Pac. 23, 24, 154 Cal. 91.

The word "proven," in a stipulation by the city attorney, on the hearing of an application for an order confirming a reassessment, that the allegations of relator's answer to the effect that the improvement was of no benefit to their property were "proven," is not equivalent to an admission that the improvement was in fact no benefit, and is construed as a concession that evidence to that effect had been introduced for the consideration of the court, thus making it, in connection with the determination of the board of public works that the improvement was a benefit, a question of fact for the court. *State ex rel. Lownsberry v. District Court of Blue Earth County*, 113 N. W. 697, 701, 102 Minn. 482.

Appear as synonymous

See Appear.

## PROVE ACCORDING TO LAW

See According to Law.

## PROVE SATISFACTORY

In an action for the price of machinery, which, by the terms of sale, is to "prove satisfactory" to the purchaser, it is not enough to show that he ought to be satisfied, or that others are satisfied with it. The contract requires satisfaction on his part. On the other hand, the operation of the machinery to the satisfaction of the purchaser must be understood as meaning a satisfactory result in the production of a marketable commodity, when it is properly operated; and this implies an adequate test, made in good faith, under suitable conditions, by a competent operator, to determine whether such a result will be obtained. *Delahunty Dyeing Mach. Co. v. Pennsylvania Knitting Mills*, 27 Pa. Super. Ct. 433, 434.

## PROVED CLAIM

A claim against a bankrupt is "proved" and entitled to allowance only when it is properly verified and gives "the consideration" therefor and contains the other statements required by Bankr. Act July 1, 1898, c. 541, § 57a, 30 Stat. 560. In *re Coventry Evans Furniture Co.*, 166 Fed. 516, 523.

Bankr. Act July 1, 1898, c. 541, § 55e, 30 Stat. 560, provides for the calling of meetings of creditors whenever one-fourth or more in number who have "proven" their claims shall file a written request therefor. Held that, though the term "proven" does not necessarily mean allowance, a claim cannot be regarded as "proven," within such section, until the written proof required by section 57a (80

Stat. 560) shall have been filed or lodged with the court or some officer thereof. In re Back Bay Automobile Co., 158 Fed. 679, 686.

### PROVED ORDER

In an action under a contract to pay \$4, an order for subscriptions obtained by plaintiff to defendant's serials, in which defendant claimed that plaintiff was to receive \$4 for every good or "proved order," which meant a subscription upon which at least ten numbers of the serial subscribed for should be delivered and accepted, evidence was inadmissible to show that in the trade the words "\$4 an order" meant "\$4 for a 'proved order.'" *Newhall v. Appleton*, 6 N. E. 120, 102 N. Y. 133.

### PROVENDER

As provisions, see Provisions.

### PROVIDE—PROVIDE FOR

"To provide" signifies to make ready for future use, to supply, and "additional" means "added; supplemental; coming by way of addition." *Collier v. Smaltz*, 128 N. W. 396, 399, 149 Iowa, 230, Ann. Cas. 1912C, 1007.

"The primary meaning of the word 'provide' is 'to look out for in advance; to procure beforehand; to get, collect or make ready for future use; to prepare.'" (*Webster's Dict.*) Under Act December 17, 1896 (Acts 1896, p. 50; *Van Epp's Code Supp.* § 6219), providing that when it shall be impracticable to hold any session of any superior court at the courthouse it may be held at such place as the proper authorities of the county may provide, the county authorities might have procured and furnished a hall for a temporary courthouse and let it be known that they had 'provided' it as the place for holding this term of the superior court of the county without constituting and designating it as such by order or resolution duly passed and placed upon the minutes of their court; and, if they did so, such term of such court could have been lawfully held there. They could provide a place for the court to be held without constituting or designating it as such by advertisement or in any other public and informal manner. *Cook v. State*, 46 S. E. 64, 65, 119 Ga. 108.

Const. art. 4, § 20, provides that every act shall embrace but one subject and matters properly connected therewith, which subjects shall be expressed in the title, and the act approved October 24, 1874, entitled "An act to provide for the construction of the Willamette Valley & Coast Railroad," granted to that railroad all the tide and marsh lands situated in the county of Benton, and the right to take from lands adjacent to its line material for the construction of the road, and that upon the filing of its acceptance

thereof within 30 days the company should become invested with absolute title thereto, to be thereafter set apart. Held, that the word "provide" means to obtain or make ready supplies or means for future use, to take measures in view of an expected or possible need, and that within the meaning of that term the grant of land was germane to the title of the act. *Corvallis & E. R. Co. v. Benson*, 121 Pac. 418, 421, 61 Or. 359.

The title of the parole law of 1890, which is entitled "An act to revise the law in relation to sentence and the commitment of persons convicted of crime, and providing for a system of parole, and to provide compensation for the officers of said system of parole," does not contain two subjects by providing for the appropriation or supplying of compensation for the officers named in sections 9 and 11; the word "provide" as used in the title meaning to "fix" or "establish as a previous condition," to "grant or stipulate as a condition or provision," and not to appropriate money for such compensation, and hence does not contravene Const. art. 4, § 16, prohibiting the General Assembly from appropriating money out of the treasury in any private law, and prohibiting appropriation bills to pay the salaries of officers of the government from containing any provision on any other subject. *People v. Joyce*, 92 N. E. 607, 610, 246 Ill. 124, 20 Ann. Cas. 472.

#### Select distinguished

Act March 15, 1906, p. 432, c. 248 (Code 1904, § 1433), defining the powers and duties of the state board of education, was amended so as to declare that such board should "select" text-books, school furniture, and educational appliances for the public schools of the state, etc. Two days after, at the same session, Code 1904, § 1458, was amended by Acts 1906, pp. 513, 515, c. 293, and re-enacted, subsection 10 of which declared that the school board of a city should have power, and that it should be its duty, to "provide" schoolhouses with proper furniture and appliances, and to care for and manage and control the school property of the city. Held, that such acts were in pari materia, and should be construed together, and that under them a city school board had only power to provide such school furniture for the public schools of the city as had been selected by the state board of education; the words "select" and "provide" in such provisions not being synonymous, "provide" being used in the sense of "to furnish or supply," while "select" means "chosen" or "picked out." *Commonwealth v. School Board of City of Norfolk*, 63 S. E. 1081, 1082, 109 Va. 346.

### PROVIDE A HOME OR RESIDENCE

Where a testator, by his will, gives personal and real estate in trust to "provide a home or residence" for his daughters, the

survivor or survivors of them as long as they remain single and unmarried, the trustee is bound to provide one home or residence for all of the daughters, and not a home or residence for each one separately. *Oliver v. Oliver*, 3 N. J. Eq. 368, 370.

# PROVIDED

'See As Now Provided.

Otherwise provided, see Otherwise.

See, also, Proviso.

The word "provided," though sometimes used in statutes to except the clause covered by it from the general provisions of the statute, is nevertheless often used as a conjunction to an independent paragraph. *Carter, Webster & Co. v. United States*, 143 Fed. 256, 259, 74 C. C. A. 394.

The word "provided," in an ordinance declaring that none but official ballots provided in accordance with the ordinance shall be counted, means furnished, and the thing to be furnished is the official ballot printed at the direction of the city authorities in the prescribed form, and the mark of an election officer as required by the ordinance is not a part of the prescribed form, but is for identification of the ballot, and, though no ballot without such indorsement is allowed to be deposited in the ballot box, yet, where it is deposited, there is no prohibition against counting it. *King v. State ex rel. Herbert*, 70 S. W. 1019, 1021, 30 Tex. Civ. App. 320.

It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. *St. Mass.* 1887, c. 214, § 73, relating to the payment of premiums on life policies in fraud of creditors was amended by *St.* 1892, c. 372, by adding that any claim arising under a policy issued without previous medical examination or without the knowledge of the insured, or, if insured be a minor, without the consent of his parent or guardian, the statements made in the application shall be binding on the company, provided that it should not be barred from proving that such statements were false. Held, that the word "provided" in *St.* 1893, c. 434, § 1, amending such section by adding after the word "misleading," "and provided further that every policy which contains a reference to the application of the insured, \* \* \* must have attached thereto a correct copy of the application" to be admissible in evidence, made the amendment of 1893 applicable to all life insurance policies, and not simply to the kinds specified in the

amendment of 1892. *Considine v. Metropolitan Life Ins. Co.*, 43 N. E. 201, 202, 165 Mass. 462 (quoting and adopting definition in *Georgia Railroad & Banking Co. v. Smith*, 9 Sup. Ct. 47, 128 U. S. 174, 32 L. Ed. 377; citing and adopting *United States v. Babbitt*, 1 Black [66 U. S.] 55, 17 L. Ed. 94; Appeal of *Mechanics' & Farmers' Bank*, 31 Conn. 63; Mayor, etc., of *City of Cumberland v. Magruder*, 34 Md. 381; *Traders' Nat. Bank v. Lawrence Mfg. Co.*, 3 S. E. 363, 96 N. C. 298; *Wartensleben v. Haithcock*, 1 South. 38, 80 Ala. 565; *Friedman v. Sullivan*, 2 S. W. 785, 48 Ark. 213).

Act March 3, 1885, c. 319, 23 Stat. 340, relating to the Umatilla Indian reservation in Oregon, after providing for setting apart lands for allotments to the Indians, required the remainder of the lands to be surveyed, appraised, and sold at public auction, and "provided" that each purchaser should be entitled to purchase at such sale "160 acres of untimbered lands and an additional tract of 40 acres of timbered lands and no more," and that before patent issued for the untimbered lands he should be required to make proof that he had resided on the land purchased at least one year and had reduced at least 25 acres to cultivation. A portion of the lands not having been sold at the public sale, Act July 1, 1902, c. 1380, 32 Stat. 730, was passed authorizing their sale at private sale "in conformity with the provisions of" the prior act, "provided" that any bona fide settler on any of said lands should have the preference right to buy the same for 90 days. Held, that the latter act was supplementary to the first, and both must be construed together as a single act, and a purchaser of 160 acres of untimbered land under the first was disqualified by the limitation therein from buying under the second, although he was a settler on the tract he sought to buy; the clause following the word "provided" in said act not being a technical "proviso," nor intended to except settlers from any of the limitations imposed on all purchasers. *Jones v. Hoover*, 144 Fed. 217, 228 (citing *Minis v. United States*, 15 Pet. [40 U. S.] 423, 445, 10 L. Ed. 791).

## As on condition

The word "provided" in its ordinary use signifies a condition. *Shipley v. Jacob Tome Institute*, 58 Atl. 200, 203, 99 Md. 520.

"Provided" means upon condition, or with the understanding. *Nusly v. Curtis*, 85 Pac. 846, 848, 36 Colo. 464, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134.

The word "provided" means on condition, and is appropriate for creating a condition precedent. *Brewer v. Rust*, 95 Pac. 233, 235, 20 Okl. 776 (citing *De Vitt v. Kaufman Co.*, 66 S. W. 224, 27 Tex. Civ. App. 332; *Robertson v. Caw* [N. Y.] 3 Barb. 410).

The word "provided," as used in a statute, may mean "upon condition." *Evans v.*

Piedmont Nat. Bldg. & Loan Ass'n, 44 S. E. 2, 5, 117 Ga. 940 (citing Piedmont Nat. Bldg. & Loan Ass'n v. Bryan, 41 S. E. 661, 115 Ga. 417).

The word "provided" is used in our legislation for many other purposes beside expressing a condition. *United States v. Atlantic Coast Line R. Co.*, 153 Fed. 918, 920 (citing *Schlemmer v. Buffalo R. & P. R. Co.*, 27 Sup. Ct. 407, 205 U. S. 1, 51 L. Ed. 681).

Laws 1901, p. 961, c. 354, repealing the liability of directors for corporate debts because of a failure to file an annual report, but saving the right of a creditor against a director, providing an action be commenced within six months after the taking effect of the act, is not a statute of limitations, but rather declares a condition precedent to the right to bring an action, which may be waived, and this though the word "provided" is used. *Watertown Nat. Bank of Watertown v. Bagley*, 116 N. Y. Supp. 772, 775, 62 Misc. Rep. 380.

Where a devise is of all the rest, residue, and remainder of testatrix's property to a certain person and his heirs forever, provided he should take care of the testatrix and look after her while she lived, the word "provided" imports a conditional rather than an absolute estate, and the nature of the devise and the circumstances under which it was made manifest an intention on the part of the testatrix to make a conditional rather than an absolute gift; her object being to make provision for her own care and comfort during the remainder of her life. *Brennan v. Brennan*, 71 N. E. 80, 81, 185 Mass. 560, 102 Am. St. Rep. 363.

The word "provided" is used in legislation for many other purposes beside that of expressing a condition. As used in the proviso in the act relating to automatic couplers, Act March 2, 1893 (27 Stat. 531) § 6, that nothing in it shall apply to trains composed of four-wheeled cars, the only condition expressed in the clause is that four-wheeled cars shall be excepted from the requirements of the act. In substance it merely creates an exception, and the burden of proof is upon a carrier to bring itself within the exception. *Schlemmer v. Buffalo, R. & P. R. Co.*, 27 Sup. Ct. 407, 408, 205 U. S. 1, 51 L. Ed. 681.

A testator left to three persons named "the sum of \$2,000 each, in cash or good security, to be paid at such time as does not inconvenience the business I have left nor my estate to pay the same. 'Provided' these three named parties, as above, shall continue to manage and have charge of the business I am now engaged in. They to decide whether it is best to continue said business, and if not so continued, how to close it out or sell it to the best advantage of my estate." The term "provided" is usually adopted to characterize a condition, but not necessarily, and "we are of the opinion that the express-

ed wishes of the testator show an intent to give the sum of \$2,000 each to his trusted employes" without the contingency that the business was to be managed by the persons named. *In re Davis' Estate*, 104 N. W. 299, 300, 95 Minn. 340.

A testator in 1888 devised all his real property to his wife for life with remainder over to his two sons, each charged with the annual payment to a daughter, after the death of the wife, of interest on \$1,000 during her natural life, and upon the daughter's death to pay the interest to a grandson until he reached the age of 24 and upon his arriving at the age of 24, "provided" he arrived at that age after the death of the daughter, or if the grandson was 24 years of age at the death of the daughter, then each of the sons should pay the sum of \$1,000 to him or for his benefit. The daughter died in March, 1891, the grandson in June, 1891, at the age of 21 years, and the life tenant in 1892. Held that the word "provided" is a conditional term, and that the language used by testator disclosed his intention to make the vesting of the grandson's interest contingent upon his reaching the age of 24 years, and that as he died before reaching that age, the interest never vested in him. *High v. Pollock*, 80 Atl. 43, 45, 114 Md. 580.

Rev. St. 1874, c. 30, § 13, makes every estate in land devised a fee simple, though other words heretofore necessary to pass such estate be not added, if a less estate be not expressly limited, or do not appear to have been devised by operation of law. The will devised and bequeathed to testator's wife all the realty and personalty that he might die seised of, "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive," except a life estate in one-third of the land. Held, that the widow took a conditional or base fee, subject to be terminated by her subsequent marriage, so that her grantee took such fee subject to divestiture by her marriage, and a child of testator had only an expectancy in the land until the happening of such event; the word "provided," as used in the will, not meaning the same as "while," which is merely an adverb expressing duration, but being an apt word to express a conditional estate, unless a different intention appears from the whole instrument. *Cummings v. Lohr*, 92 N. E. 970, 972, 246 Ill. 577.

#### As covenant or limitation

"Provided always" are typical words of condition, which may, either alone or with other words, be used to introduce reciprocal covenants in agreements. *MacKenzie v. Trustees of Presbytery of Jersey City*, 61 Atl. 1027, 1030, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227 (quoting 2 Bl. Comm. \*229).

"The word 'provided,' as used in statutes generally though not always, implies a lim-

itation or restriction on what has preceded in the context. Provisos and exceptions are similar, intended to restrain the enacting clause, to except something which would otherwise be in it, or in some manner to modify it." But this is not always necessarily so. The word may, if such be the sense gathered from the whole act or instrument, simply explain what had previously been stated in general terms or direct the manner of doing what was allowed by the context to be done generally. *Terrell v. City of Paducah*, 92 S. W. 310, 312, 122 Ky. 331, 5 L. R. A. (N. S.) 289 (quoting and adopting definition in *Suth. St. Const.* § 222).

### PROVIDED BY LAW

The words "provided by law," in Pub. Acts 1903, No. 136, providing that the term of imprisonment of any person convicted and sentenced shall not exceed the maximum term provided by law for the crime for which the person was convicted and sentenced, mean provided by statute law and do not mean the term fixed in the sentence. In *re Campbell*, 101 N. W. 826-828, 138 Mich. 597.

The fees of the attorney of record for the Eastern Cherokees were "provided for by law," within the meaning of a contract between him and his associate counsel, by which he was to pay his associates a specified sum for their services out of his stipulated fees, upon collection thereof, provided that, "in the contingency of the fees not being provided for by legislation \* \* \* but upon proof of services," each party should look out for himself, where his fees were allowed in full by the court of claims, under the authority of the subsequent act (Act March 3, 1903, c. 994, 32 Stat. 996), since such statute, though not directly fixing the fees, dispensed with the necessity of making proof, under Rev. St. U. S. §§ 2103, 2106, before the Commissioner of Indian Affairs and the Secretary of the Interior, which must have been the "proof of services" contemplated by the parties. *Owen v. Dudley*, 30 Sup. Ct. 602, 603, 217 U. S. 488, 54 L. Ed. 851.

### PROVIDED WELLS ARE COMPLETED DURING SAID TERM

A lease of land was for the term of three years and as much longer as oil and gas were found on the land, provided wells were completed during the term of the lease, which also stipulated that, if gas was found in sufficient quantities to market the same, the consideration should be \$100 a year for each well as long as gas from such well was marketed, and that the lessee should sink a test well on the land within one year. Held, that the expression "provided wells are completed during said term" meant that other wells were to be completed during the term beside the test well, and that the mere sinking of a test well during the term, without marketing the gas found in it, did not entitle the

lessee to an extension of the term beyond the three years, and an agreement by the lessee to furnish the lessor with gas from the test well in consideration of a release from the payment of any royalty while he was using the gas did not excuse it from its obligation to put down other wells. *Hazel Green Oil & Gas Co. v. Collier*, 110 S. W. 343, 344, 130 Ky. 132.

### PROVISION

See Present Provision.

Other provisions, see Other.

#### Terms, conditions, or stipulations

The word "provision," as used in a policy insuring one subject to the "provisions, conditions, definitions and limits herein," indicates nothing technical, but is a general term which may include either a promise or undertaking of some kind or a condition. *Blackman v. United States Casualty Co.*, 103 S. W. 784, 786, 117 Tenn. 578.

### PROVISIONAL REMEDY

A "provisional remedy" is a collateral proceeding permitted only in connection with a regular action and as one of its incidents. Where plaintiff applied for an inspection of books and papers alleged to be necessary to enable him to frame a complaint, as authorized by Rev. St. 1898, § 4183, such proceeding was a provisional remedy, so that an order staying the proceedings on defendant's application to examine plaintiff as an adverse witness in defense thereof, as authorized by section 4096, was appealable under section 3069, authorizing an appeal from an order refusing a provisional remedy. *Ellinger v. Equitable Life Assur. Soc. of the United States*, 104 N. W. 811, 813, 125 Wis. 643 (quoting 6 Words and Phrases, p. 5752).

Respondent having moved to dismiss the appeal for failure to file the transcript in time, appellants suggested a diminution of the record, and obtained an order requiring the clerk of the circuit court to certify up a nunc pro tunc order extending the time for filing. Respondent then applied, under L. O. L. § 832, to have the persons, on whose affidavits the order on the circuit clerk was obtained, appear before the clerk of the Supreme Court for examination, in aid of an application to vacate the extension of time. Held, that such order on the circuit court clerk was not a "provisional remedy," within L. O. L. § 832, to which cases the proceeding expressly is limited. *Grover v. Hawthorne Estate*, 114 Pac. 472, 62 Or. 77.

### PROVISIONALLY EXECUTED

The words "provisionally executed," as employed in Code Prac. art. 580, to the effect that some judgments are "executed provisionally," although an appeal has been taken from the same within the delay prescribed, are to be taken as meaning that the judg-

ments should be executed temporarily, previously to, and notwithstanding an appeal. *State ex rel. Gelpi v. King*, 37 South. 871, 873, 113 Ga. 905.

## PROVISIONS

### Corn, oats, and bran

The word "provisions," in Gen. St. 1901, § 5864, requiring a railroad contractor to give bond to pay all laborers, mechanics, and materialmen, and persons who supply such contractor with provisions or goods of any kind, includes corn, oats, and bran. *Kansas City, Ft. S. & M. R. Co. v. Graham*, 74 Pac. 232, 233, 67 Kan. 791.

### Eggs

Act May 4, 1889 (P. L. 87), entitled "An act relating to sale of provisions by description," is not defective in title, because the title does not specify the several articles of merchandise commonly understood as being comprehended within the term "provisions," to which the act relates. The act applies to a sale of eggs, inasmuch as eggs are "provisions" as that term is commonly understood when spoken of as the subject of sale. *Weiss v. Swift & Co.*, 36 Pa. Super. Ct. 376, 381.

### Food, fare, or provender

The word "provisions" in a will directing that testator's homestead, "with its appurtenances and furniture and necessary provisions, be held for the use of my wife and other members of my family" so long as they shall be living, is not used in the meaning of an act of providing, but in its plain meaning of food, fare, or provender. *Searle v. Fieles*, 83 N. E. 991, 992, 197 Mass. 343.

### Tea and coffee

The term "provisions," as used in Rev. Laws, c. 65, § 15, permitting the sale of provisions without a license, does not include tea and coffee. The term has been held to mean food, victuals, fare, and provender, but tea and coffee are not used as food in the form in which they are sold by shopkeepers, but are used to make decoctions to be taken as a beverage for their agreeable taste or stimulating effect, and in this respect they are not very different from wine and beer as they are used in countries at meals. *Commonwealth v. Caldwell*, 76 N. E. 955, 190 Mass. 355, 112 Am. St. Rep. 334, 5 Ann. Cas. 879.

Where a clause of will provided that a certain sum should be paid to a legatee on his majority and in the meantime should be subject to the "provisions hereinafter contained," the clause necessarily meant all the provisions of the will capable of affecting the gift. *Eckert v. Pennsylvania Trust Co.*, 61 Atl. 935, 936, 212 Pa. 372 (citing *Bakes v. Reese*, 24 Atl. 634, 150 Pa. 44, 45).

## PROVISIONS OF LAW

The object of Laws 1907, c. 429, creating a Public Service Commission to regulate and control railroads as to the adequacy, security, and accommodation afforded by their service, and as to their compliance with all provisions of law, orders of the commission, and charter requirements, etc., is to regulate the management and the operations of carriers in the interest of the public, and for the persons using the facilities for the transportation of themselves or of their property, and to regulate carriers in their construction, equipment, terminal facilities, and operations, and the power of the commission should not be extended by implication beyond what may be necessary, and the commission should not reach out for dominion over matters not clearly within the statute; the words "provisions of law," referring only to the provisions of the act. *People ex rel. New York, N. H. & H. R. Co. v. Willcox*, 94 N. E. 212, 214, 200 N. Y. 423.

## PROVISO

See, also, *Provided*.

"The general purpose of a 'proviso' is to except the clause covered by it from provisions of the statute, or to qualify a portion of the statute. But it is often used as a conjunction to an independent paragraph." *State v. Harden*, 58 S. E. 715-725, 62 W. Va. 313 (quoting and adopting *Chesapeake & O. R. Co. v. Pack*, 6 W. Va. 397, 403).

The province of a "proviso" is to restrain the enacting clause of a statute, and to except something which would otherwise have been within it, or to modify the enacting clause. *Mackmull v. Brandlein*, 137 N. Y. Supp. 607, 611, 152 App. Div. 733.

"Provisos" and "exception" in statutes are similar, being intended to restrain the enacting clause to except something which would otherwise be within it, something ingrafted upon a preceding enactment, intended to take special cases out of a general class, and the general intent and purpose of an enacting clause will be controlled by the particular intent subsequently expressed. *State v. Barrett*, 87 N. E. 7, 9, 172 Ind. 169.

In the construction of statutes, a "proviso" often constitutes an exception to the enacting words of the section. Provisos and exceptions are similar and are intended to restrain the enacting clause, to except something which would otherwise be within it or in some manner modified. "The office of a proviso is not to enlarge or extend the act of the section of which it is a part, but rather to put a limitation and a restraint upon the language which the lawmaker has employed." *Laidlaw v. Portland V. & Y. R. Co.*, 84 Pac. 855, 857, 42 Wash. 292 (quoting *In re Webb* [N. Y.] 24 How. Prac. 247).



"Provisos" and "exceptions" are similar, being intended to restrain the enacting clause, to except something which would otherwise be in it, or in some manner to modify it; but this is not always necessarily so. The words may, if such be the sense gathered from the act or instrument, simply explain what had previously been stated in general terms, or direct the manner of doing what was allowed by the context to be done generally. Under Ky. St. 1903, § 3457, authorizing a common council of third class cities to cause streets to be graded, paved, etc., and providing for the payment of the cost out of the city treasury, providing the ordinances and contracts for such work shall specify how the work shall be paid for, the proviso or exception is directory and not mandatory, and hence it is not necessary, to render the city liable, that the ordinances shall specify how payment shall be made. *Terrell v. City of Paducah*, 92 S. W. 310, 312, 122 Ky. 331, 5 L. R. A. (N. S.) 289 (quoting *Suth. St. Const.* § 222).

"Matter set off from the parts of a section (of a statute) by the term 'provided' does not always constitute what in legal phraseology is termed and understood as a 'proviso.' This is well illustrated in *Georgia Railroad & Banking Co. v. Smith*, 128 U. S., where at page 181, 9 Sup. Ct. 49, 32 L. Ed. 377, Mr. Justice Field in referring to the term 'provided' says that it may have no greater significance than may be attached to the conjunction 'but' or 'and' and may serve only to 'support or distinguish the different paragraphs or sentences.' In the case of *Wartensleben v. Haithcock*, 1 South. 38, 40, 80 Ala. 568, Mr. Justice Clopton, speaking for the court, uses the following language: 'Generally the appropriate office of a proviso is to restrain or modify the enacting clause, or preceding matter, and should be confined to what precedes unless the intention that it shall apply to some other matter is apparent. When from the context, and a comparison of all the provisions relating to the same subject-matter, it is manifest that the object and intent were to give the proviso a scope extending beyond the section, and effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject-matter of the proviso, or as tantamount to an enactment in a separate section, without regard to its position and connection.' For rules of construction of provisos, see 6 Words and Phrases, p. 5755 et seq., under the title "Proviso." *Marionaux v. Cutler*, 91 Pac. 355, 356, 32 Utah, 475.

Act March 3, 1885, c. 319, 23 Stat. 340, relating to the Umatilla Indian reservation in Oregon, after providing for setting apart lands for allotments to the Indians, required the remainder of the lands to be surveyed, appraised, and sold at public auction, and "provided" that each purchaser should be en-

titled to purchase at such sale "160 acres of untimbered lands and an additional tract of 40 acres of timbered lands and no more," and that before patent issued for the untimbered lands he should be required to make proof that he had resided on the land purchased at least one year and had reduced at least 25 acres to cultivation. A portion of the lands not having been sold at the public sale, Act July 1, 1902, c. 1380, 32 Stat. 730, was passed authorizing their sale at private sale "in conformity with the provisions of" the prior act, "provided" that any bona fide settler on any of said lands should have the preference right to buy the same for 90 days. Held, that the latter act was supplementary to the first, and both must be construed together as a single act, and a purchaser of 160 acres of untimbered land under the first was disqualified by the limitation therein from buying under the second, although he was a settler on the tract he sought to buy; the clause following the word "provided" in said act not being a technical "proviso," nor intended to except settlers from any of the limitations imposed on all purchasers. *Jones v. Hoover*, 144 Fed. 217, 228 (citing *Minis v. United States*, 15 Pet. [40 U. S.] 423, 445, 10 L. Ed. 791).

#### As applying to body of enactment

It is the office of a "proviso" to limit and restrain the preceding enactment, and it cannot be held to enlarge the scope of the preceding enactment. *Stiers v. Mandy* (Ind.) 89 N. E. 959, 960.

The office of a "proviso" is to restrict or explain the general terms of the act of which it forms a part, and not to add to the body of the substantive law nor to take anything therefrom. *Brown v. Patterson*, 124 S. W. 1, 6, 224 Mo. 639 (quoting 6 Words and Phrases, p. 5755).

A "proviso" is something ingrafted upon a preceding enactment, and is legitimately used to take special cases out of the general enactments, and is generally intended to restrain the enacting clause and except something which would otherwise have been within it. *Lichtensteiger v. State*, 131 N. W. 623, 624, 89 Neb. 356.

"A 'proviso' in a grant or enactment is something taken back from the power just declared. The grant or enactment is to read, not as if the larger power was ever given, but as if no more was ever given than is contained within the terms or bonds of the proviso." *Regan v. Iron County Court*, 125 S. W. 1140, 1142, 226 Mo. 79 (citing *Brown v. Patterson*, 124 S. W. 1, 224 Mo. 639).

The word "proviso" attached to a statute is not a part of, but a restraint upon, an exception to, or a modification of some word or phrase of an act. In other words, a "proviso" to a general statute involving no uncertainty and doubt cannot be held, nor can words be

selected therefrom in the body of the act. *Tsutakawa v. Kumamoto*, 101 Pac. 869-871, 53 Wash. 231 (citing *Suth. St. Const.* 222; *Black, Interp Laws*, 270; *In re Webb* [N. Y.] 24 How. Prac. 247).

**Exception distinguished**

An "exception" exempts something absolutely from the operation of a statute by express words in the enacting clause, while a "proviso" defeats its operation conditionally. *Pabst Brewing Co. v. City of Milwaukee*, 133 N. W. 1112, 1114, 148 Wis. 582.

"'Exception' is defined in *Anderson's Dict.* as 'something withheld, not granted or parted with, the exclusion of the thing, or the thing or matter itself as excluded.' By the *Century Dictionary* as 'the act of excepting or leaving out of account; exclusion of the act or excluding from number designated or from a statement or description.' An exception is a proviso that excludes something from a statement or description." *Cassidy v. Royal Exch. Assur. of London*, 59 Atl. 549, 551, 99 Me. 399.

There is some distinction between a "proviso" and an "exception." A "proviso" is properly the statement of something extrinsic of the subject-matter of the covenant, which shall go in discharge of that covenant by way of defeasance; an "exception" is the taking out of a covenant some part of the subject-matter of it. A clause in a lease to furnish a lessee a certain water power, subject to the interruptions provided for in a certain lease by the Milwaukee & Rock River Canal Company to J. T. Perkins, but which were not set forth in the lease or in the declaration, was a "proviso," so that it was not necessary for the lessor to set out either the clause or the lease to which it referred. *La Point v. Cady* (Wis.) 2 Chand. 202, 210 (quoting and adopting 1 *Saund. Pl. & Ev.* 393, and cases in the Supreme Court).

**As a limitation**

The office of a "proviso" is not to enlarge or extend the act or section of the Constitution of which it is a part, but is a limitation on the language employed, and is to be construed strictly and limited to objects fairly within its terms. *State v. Bryan*, 39 South. 929, 957, 50 Fla. 293 (citing *State ex rel. McQuaid v. Commissioners of Duval County*, 3 South. 193, 23 Fla. 483, 486; *Southern Bell Telephone & Telegraph Co. v. D'Alemberte*, 21 South. 570, 39 Fla. 25; *Futch v. Adams Bros.*, 36 South. 575, 47 Fla. 257; *County Commissioners of Lake County v. State*, 4 South. 795, 24 Fla. 263).

**PROVOCATION**

See Adequate Provocation; Reasonable Provocation; Sudden Provocation.

The "provocation," in order to be sufficient in law in cases of homicide, must be such as naturally or incidentally to produce

in the minds of persons ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror. *Johnson v. State*, 108 N. W. 55, 60, 129 Wis. 146, 5 L. R. A. (N. S.) 809, 9 Ann. Cas. 923.

No looks or gestures, however insulting, no words, however offensive or opprobrious, can amount to a "provocation" sufficient to excuse or justify even a slight assault. *State v. Powell* (Del.) 61 Atl. 966, 972, 5 Pennewill, 24; *State v. Brown* (Del.) 61 Atl. 1077, 1079, 5 Pennewill, 339; *Ex parte Bollin*, 109 Pac. 288, 289, 3 Okl. Cr. 725.

"Provocation," in order to mitigate a homicide, must be such as naturally and instantly to produce in the minds of persons ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection, and thus negating the inference of malice. The test of adequacy of the provocation "is not merely whether ungovernable passion was in fact aroused by the provocation, but also whether the provocation was sufficient so to affect ordinary and reasonable men, or men of fair average mind and disposition, that they would be liable to act with violence endangering life." *Ryan v. State*, 92 N. W. 271, 275, 115 Wis. 488.

It is not true that any indignity which tends to throw an average man into sudden heat and passion is "sufficient legal provocation" for a homicide. *State v. Gilliam*, 45 S. E. 6, 66 S. C. 419.

"At common law words of reproach, how grievous soever, were not 'provocation' sufficient to free the party killing from the guilt of murder, nor were contemptuous or insulting actions or gestures without an assault upon the person, nor was any trespassing against lands or goods, to have the effect to reduce the guilt of killing to a grade of manslaughter. The provocation must consist of a personal violence." 1 *East*, P. C. 233; 4 *Bl. Comm.* 201. Threats by decedent made a week or 10 days before the homicide were insufficient to form a basis for excitement and passion reducing the offense from murder to manslaughter. *State v. Edwards*, 102 S. W. 520, 525, 203 Mo. 528.

An instruction that the jury should determine the adequacy of the provocation, instead of the adequacy of the cause of accused's passion, claimed to reduce a homicide to manslaughter, was not error; "provocation" meaning the cause of resentment or the act of provoking or causing anger, and the provocation for the passion being necessarily its cause. *Williams v. State* (Tex.) 148 S. W. 763, 770.

In a prosecution for homicide, an instruction defining "provocation" as any such provocation by improper conduct of deceased toward defendant as to cause defendant to be so far under the dominion of sudden passion in consequence thereof as to be unable

to judge rightly as to the nature and quality and consequence of his acts, or to materially impede or interfere with such judgment, and take away deliberation and prevent a cool state of the blood, was a sufficient definition of such term. *State v. Barrington*, 95 S. W. 235, 260, 198 Mo. 23.

## PROVOKE

### PROVOKING A DIFFICULTY

Commencing a difficulty is not "provoking a difficulty," within the statute relating to provoking difficulty. *Reese v. State*, 91 S. W. 583, 584, 49 Tex. Cr. R. 242.

Where it is said that before a homicide can be treated as justifiable it must appear that the slayer did not "provoke the difficulty," this must be understood as meaning, not that he must not have done anything which might in the ordinary sense of the word be regarded as provocation, but that the provocation must not have been such as would in law be sufficient to justify the attack against which he was defending himself when the homicide was committed. *Smarrs v. State*, 61 S. E. 914, 917, 131 Ga. 21 (quoting *Butler v. State*, 19 S. E. 51, 92 Ga. 601, 606; citing *Boatwright v. State*, 15 S. E. 21, 89 Ga. 140; *Fussell v. State*, 19 S. E. 891, 94 Ga. 78).

### PROVOKING A FIGHT

"Beginning a fight is not 'provoking a fight' within the contemplation of the law," and to abridge an accused's right of self-defense because of provoking the difficulty he must do some overt act or make some statement indicating a purpose to arouse anger and provoke resentment on the part of the injured party, which act or conduct did provoke it, and it is error to instruct that if accused committed the assault as a means of defense, believing that he was in danger of losing his life or of serious bodily injury, then accused should be acquitted, unless he sought decedent for the purpose of provoking a difficulty with the intent to take life or do serious bodily injury, where there was no evidence that accused actually did provoke the difficulty other than that he began the fight. *Smith v. State*, 87 S. W. 151, 48 Tex. Cr. R. 203.

## PROXIMATE

See, also, Approximate—Approximately;  
Remote—Remoteness.

"Proximate" is defined as lying or being in immediate relation with something else, and as synonymous with direct or immediate. *Texas & P. R. Co. v. Coutourie*, 135 Fed. 465, 473, 68 C. C. A. 177 (citing *And. Law Dict.* 155).

In an action for wrongful death, the court's use of the words "immediate and proximate cause" in an instruction submit-

ting plaintiff's theory of the case was not objectionable, since the words "immediate and proximate" were synonyms and the antonym of "remote"; the word "proximate," when connected with the word "immediate," being readily understood by the jury. *Herke v. St. Louis & S. F. R. Co.* 125 S. W. 822, 823, 141 Mo. App. 613.

In instructions as to the causal connection between defendant's negligence and plaintiff's injury, the use of the word "direct," instead of the word "proximate," is not error; the word "proximate" being synonymous with "direct" and "immediate." *Sivertson v. City of Moorhead*, 138 N. W. 674, 675, 119 Minn. 467.

A requested charge in an action for injury to a passenger respecting the "proximate or principal cause" was bad for using the word "principal," which is not a synonym of "proximate." *Woolsey v. Brooklyn Heights R. Co.*, 108 N. Y. Supp. 16, 18, 123 App. Div. 631.

Damages recoverable from a wrongdoer must be the natural and proximate effects of its delinquency; the term "natural" importing such as might reasonably have been foreseen, and "proximate" indicating that there must be no other culpable and efficient agency intervening between the wrongdoer's acts and the loss. *Smith v. Public Service Corporation of New Jersey*, 75 Atl. 937, 938, 78 N. J. Law, 478, 20 Ann. Cas. 151.

"For the purpose of civil liability, those consequences, and those only, are deemed 'immediate,' 'proximate,' or 'natural and probable,' which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct." "This principle is commonly expressed in the maxim that 'a man is presumed to intend the natural consequences of his acts,' or, in the terms of a judicial statement, 'a party must be considered, in point of law, to intend that which is the necessary and natural consequences of that which he does.'" *Rodgers v. Missouri Pac. R. Co.*, 88 Pac. 885, 75 Kan. 222, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441 (quoting with approval from *Pol. Torts*).

In many opinions, the term "proximate" is used in the sense of an originating cause, from which the injurious effect is logically traced through an intervening series of acts or events. This rule is, of course, properly applicable where the right of recovery is based upon the second clause of the civil damage statute, which makes the liquor dealer liable for injury sustained "in consequence" of the intoxication of any person. But where recovery is sought under the first clause for injury done "by an intoxicated person," the adjudicated cases are practical-

ly unanimous that when plaintiff has proved the unlawful sale to a person on whom she is dependent for support, and the intoxication of such person thereby produced an injury done by him while in that condition to her means of support, she has made the case for which the statute provides. *Bistline v. Ney Bros.*, 111 N. W. 422, 426, 134 Iowa, 172, 13 L. R. A. (N. S.) 1158, 13 Ann. Cas. 196.

### PROXIMATE CAUSE

See As the Direct and Proximate Cause. See, also, Intervening Cause; Originating Cause; Remote Cause.

In law "proximate cause" refers to the person producing it, as against "proximate cause" in logic, which refers to the moving influence itself. *Merrill v. Los Angeles Gas & Electric Co.*, 111 Pac. 534, 536, 158 Cal. 499, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

"Proximate cause" must be the responsible, active, operative, and continuing cause as well as the probable and natural source of the injury. *Pittsburgh, C., C. & St. L. R. Co. v. Cozatt*, 79 N. E. 534, 538, 39 Ind. App. 682 (citing *Lake Erie & W. R. Co. v. Charman*, 67 N. E. 923, 161 Ind. 95-103).

The proximate relation of cause and effect, establishing legal responsibility, implies that the result produced had its inception in some responsible agency. *Cary v. Preferred Accident Ins. Co. of New York*, 106 N. W. 1055, 1056, 127 Wis. 67, 5 L. R. A. (N. S.) 926, 115 Am. St. Rep. 997, 7 Ann. Cas. 484.

The term "proximate cause" excludes the idea of legal liability based on merely speculative suggestions as to what might have happened had some circumstance remotely connected with the events leading up to the injury have been otherwise than it was in fact. *Anderson v. Wapello Coal Co.*, 131 N. W. 684, 151 Iowa, 479.

"Proximate cause" is legally a part of the cause, one without which there might have been no injury. Where, in spite of plaintiff's negligence in selecting an incompetent driver, defendant street car company by the exercise of care could have prevented injury to plaintiff in the position he occupied in the care of such driver, defendant's failure to do so constituted the sole cause of the injury, for which plaintiff was entitled to recover, notwithstanding his prior negligence in selecting such driver or the driver's negligence at the time of the accident. *Hanson v. Manchester St. Ry.*, 62 Atl. 595, 597, 73 N. H. 395.

The phrase "proximate cause" is one of a large and learned terminology, and it involves a refinement in mental processes and reasoning not the essence of a good instruction, provided the element of causal connection between the negligence and the injury is presented to the jury in another way and within easy comprehension. An instruction

that if defendant's motorman saw, or by keeping a vigilant watch would have seen, the decedent crossing the street, and in a position of danger, and by stopping the car within the shortest time and space practicable, etc., with the means and appliances at hand, by the exercise of ordinary care consistent with the safety of the car and persons thereon, could have avoided running over and killing decedent, and neglected to do so, plaintiffs are entitled to recover, etc., in the absence of contributory negligence, is sufficient to submit to the jury the question of causal connection between the negligence of defendant and the death of the child, though it did not use the expression "proximate cause." *Cornovski v. St. Louis Transit Co.*, 106 S. W. 51, 55, 207 Mo. 263.

The definition of "proximate cause" as given in *Webst. Dict.*: "A cause which immediately precedes and causes the effect, as distinguished from the remote, mediate, or predisposing cause"—is perhaps too general for legal application. The term as applied to a personal injury for which recovery is sought is defined in *Bouvier's Law Dictionary* as: "The cause nearest in causation, without any efficient concurring cause to produce the result, may be considered the direct cause." The term is often defined as "that which stands next in causal relation." As stated in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, "the primary cause may be the 'proximate cause' of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end; that force being the 'proximate cause' of the movement." Or as stated in *Morrisette v. Canadian Pac. R. Co.*, 52 Atl. 520, 522, 74 Vt. 232, 242, 243, in discussing "proximate cause": "Its proximity has no necessary connection with continuity of space nor nearness of time, but only with that of which the result is the natural and probable consequence, in the sense that a prudent man ought to have foreseen it. Hence, in this class of cases, the defendant's negligence is the proximate cause of the natural and probable consequences of it, and whether the result complained of in the concrete case is the natural and probable consequence of it is a question for the jury, unless it is plain enough to be ruled as matter of law." Or as stated in *Corbin v. Grand Trunk R. Co.*, 63 Atl. 138, 139, 78 Vt. 458, 461, 462: "The test of actionable negligence is whether the injury which followed the act or omission in question was a natural and probable consequence in the sense that a prudent man ought to have foreseen it." *Place v. Grand Trunk R. Co.*, 67 Atl. 545, 548, 549, 80 Vt. 196.

And. *Law Dict.* defines "proximate cause" as "the nearest, the immediate, the direct cause; the efficient cause; the cause that sets another or other causes in operation." A more comprehensive definition is

given in *East Tennessee, V. & G. Ry. Co. v. Kelly*, 20 S. W. 312, 91 Tenn. loc. cit. 704, 17 L. R. A. 691, 30 Am. St. Rep. 902, where, quoting from *Deming & Co. v. Merchants' Cotton-Press & Storage Co.*, 17 S. W. 89, 90 Tenn. 353, 13 L. R. A. 518, it is said: "The 'proximate cause' of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury, an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter." In *Dickson v. Omaha & St. L. R. Co.*, 27 S. W. 476, 124 Mo. loc. cit. 149, 25 L. R. A. 320, 46 Am. St. Rep. 429; *Hudson v. Wabash Western Ry. Co.*, 14 S. W. 15, 101 Mo. 13; *Glick v. Kansas City, Ft. S. & M. R. Co.*, 57 Mo. App. 97; *Saxton v. Missouri Pac. R. Co.*, 72 S. W. 717, 98 Mo. App. 494; *Ohl v. Bethlehem Township*, 49 Atl. 288, 199 Pa. 588; *Ætna Ins. Co. v. Boon*, 95 U. S. loc. cit. 130, 24 L. Ed. 395; *Denver & R. G. R. Co. v. Sipes*, 55 Pac. 1093, 26 Colo. 17; *Lim-ling v. Illinois Cent. R. Co.*, 81 Iowa, 246, 47 N. W. 66; *Butcher v. West Virginia & P. R. Co.*, 16 S. E. 457, 37 W. Va. 180, 18 L. R. A. 519; and *Western Railway of Alabama v. Mutch*, 11 South. 894, 97 Ala. 194, 21 L. R. A. 316, 38 Am. St. Rep. 179—it was ruled: "The 'proximate cause' of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." In other cases "proximate cause" has been defined to be "that cause which immediately precedes and directly produces an effect as distinguished from a remote or predisposing cause," as in *Troy v. Cape Fear & Y. V. R. Co.*, 6 S. E. 77, 99 N. C. loc. cit. 306, 6 Am. St. Rep. 521; *Isbell v. New York & N. H. R. Co.*, 27 Conn. loc. cit. 406, 71 Am. Dec. 78. In *Lindvall v. Woods*, 44 Fed. loc. cit. 857, it is said: "The 'proximate cause' of an injury is that cause which immediately precedes and directly produces the injury, without which the injury would not have occurred." In *Yoders v. Amwell Tp.*, 33 Atl. 1017, 172 Pa. loc. cit. 454, 51 Am. St. Rep. 750, quoting from *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653, it is said: "The injury must be of the natural and probable consequences of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer." In *Banks v. Wabash Western Ry. Co.*, 40 Mo. App. 458, in determining what is the "proximate cause" of an injury, the true rule is declared to be as follows: "The injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." This case is approvingly cited in *Bradford*

*v. Missouri, K. & T. Ry. Co.*, 64 Mo. App. 475. In *Rigby v. Hewitt*, 5 Exch. 243, it is said: "Every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct." In *Graney v. St. Louis, I. M. & S. Ry. Co.*, 57 S. W. 276, 157 Mo. loc. cit. 683, 50 L. R. A. 153, Judge Sherwood said: "No man is required to anticipate an accident that has never occurred before, or held negligent if he fails to do so." See, also, *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Illinois Cent. R. Co. v. Woolley*, 28 South. 26, 77 Miss. 927; *Hansen v. St. Paul Gaslight Co.*, 84 N. W. 727, 82 Minn. 84; *American Exp. Co. v. Risley*, 53 N. E. 558, 179 Ill. 295; *Williams v. Southern Pac. R. Co. (Cal.)* 9 Pac. loc. cit. 155. In *Shear. & R. Neg. (4th Ed.)* § 26, "the 'proximate cause' of an event," it is said, "must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." *Whart. Neg.* § 97, says: "The injury must proceed in ordinary natural sequence from the neglect." *Foley v. McMahon*, 90 S. W. 113, 114, 114 Mo. App. 442.

The "proximate cause" of an event juridically considered may be abstractly defined as that which in a natural sequence, unbroken by a new and intervening cause, produces that event and without which that event could not have occurred. It must be an efficient act of causation, separated from its effect by no other act of causation. *Nehring v. Connecticut Co.*, 84 Atl. 301, 305, 86 Conn. 109, 45 L. R. A. (N. S.) 896, 902.

The law is well settled that an act or omission in order to constitute negligence for which an action will lie must directly, as its natural consequence, produce injury to another. *Cooley*, in his work on Torts (2d Ed., pp. 73-76), says: "It is not only requisite that damage actual or inferential should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded, and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, but not the remote, cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last 'proximate cause,' and refuse to trace it to that which was more remote." "The 'proximate cause' is the efficient

cause, the one that necessarily sets the other causes in operation." The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones. *Edgar v. Rio Grande Western Ry. Co.*, 90 Pac. 745, 748, 32 Utah, 330, 11 L. R. A. (N. S.) 738, 125 Am. St. Rep. 867 (citing *Ætna Ins. Co. v. Boon*, 95 U. S. 130, 24 L. Ed. 395).

The "proximate cause" of an event has been defined as that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which it could not have occurred. The phrase is the name of a legal doctrine used to fix liability for damages and in meaning is akin to, if not identical with, what is called in logic the "efficient cause." As used in judicial decisions, the term signifies a breach of duty owed to a person, followed by injury to him, either as the direct result of the dereliction or through its consecutive consequences, and subject to the condition that there must have been such a probability of the breach proving detrimental, instead of innocent, that, in reason, blame for the injury may fairly be imputed to the wrongdoer. Where an employer furnished a servant a machine known to be unsafe by reason of a loose bar, and when the defect hindered the operation of the machine the servant was injured in an attempt to continue the work, the defect was the "proximate cause" of the injury. *Lawrence v. Heildreder Ice Co.*, 93 S. W. 897, 899, 119 Mo. App. 316.

The term "proximate cause" "signifies a breach of duty owed to a person, followed by injury to him, either as the direct result of the dereliction or through its consecutive consequences, and subject to the condition that there must have been sufficient probability of the breach proving detrimental instead of innocent, that, in reason, blame for the injury may fairly be imputed to the wrongdoer." *Lyman v. Dale*, 136 S. W. 760, 761, 156 Mo. App. 427 (quoting and approving definition in *Lawrence v. Heildreder Ice Co.*, 93 S. W. 897, 899, 119 Mo. App. 316, 328; *Hodges v. St. Louis & S. F. R. Co.*, 135 Mo. App. 683, loc. cit. 691, 692, 116 S. W. 1131; *Bokamp v. Chicago & A. R. Co.*, 100 S. W. 689, 123 Mo. App. 270; *Haley v. St. Louis Translt Co.*, 77 S. W. 731, 179 Mo. 30, 64 L. R. A. 295; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256).

A "proximate cause," in the law of negligence, is such a cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred; it is the cause which sets in motion a train of events which, in their natural sequence, ought and might be expected to produce an injury if undisturbed by any independent or intervening cause. *Glenn v. Metropolitan St. R. Co.*, 150 S. W. 1092, 1095, 167 Mo. App. 109.

As used in judicial decisions, the term "proximate cause" signifies a breach of duty owed to a person, followed by injury to him, either as a direct result of the dereliction or through its consecutive consequences, and subject to the condition that there must have been sufficient probability of the breach proving detrimental, instead of innocent, that, in reason, blame for the injury may fairly be imputed to the wrongdoer. Evidence was held insufficient to show that defendant's failure to furnish oil for plaintiff's torch was the "proximate cause" of his injury while putting coal into a locomotive by stepping on a piece of coal, which caused him to fall. *Hodges v. St. Louis & S. F. R. Co.*, 116 S. W. 1131, 1134, 135 Mo. App. 683 (quoting and adopting definition in *Lawrence v. Heildreder Ice Co.*, 93 S. W. 899, 119 Mo. App. loc. cit. 328).

To hold a railroad company liable for injuries to a person struck by a train, the evidence must show that the company's negligence was the "proximate cause" of the injury, and, to constitute proximate cause, there must be causal connection between the injury and the negligence. *Billingsly v. Illinois Cent. R. Co.*, 56 South. 790, 791, 100 Miss. 612.

In an action for injuries to a servant, an instruction that "proximate" cause meant the immediate, direct, actual, natural, efficient, and real cause was no ground for reversal of a judgment in favor of plaintiff, as it placed a heavier burden on him than the correct rule. *Odegard v. North Wisconsin Lumber Co.*, 110 N. W. 809, 818, 130 Wis. 659.

The court charged, in an action for personal injuries, that the "proximate cause" of an injury was a cause without which it would not have happened, and which, in a natural and continuous sequence, produces an injury; and, in order to find that negligence is the proximate cause of an injury, it must appear that it was the natural and probable consequence of the negligence, and should have been foreseen as a result likely to occur in the light of the attending circumstances. Held, that the charge sufficiently defined proximate cause. *Freeman v. Swan* (Tex.) 143 S. W. 724, 730.

Where, in an action for injuries to an employe, the court defined "proximate cause" and used in its instructions the word "proximate" several times, the use of the word "approximately" for "proximately" in a charge relating to proximate cause was not erroneous. *Choctaw, O. & T. R. Co. v. McLaughlin*, 96 S. W. 1091, 1093, 43 Tex. Civ. App. 523.

Delay of a carrier in transporting goods, whereby they come in the path of a flood and are destroyed by the act of God, is not a "proximate cause" of their injury. When an extraordinary natural disturbance gives

warning of the time and path of its approach and of its general magnitude and power, common carriers whose business places them in charge of the safety of persons and property are charged with the duty of exercising care commensurate with the exigencies of the situation. A breach of such duty is negligence, and, if injury results, must be regarded as a proximate and not a remote cause of the injury. *Elam v. St. Louis & S. F. R. Co.*, 93 S. W. 851, 852, 117 Mo. App. 453.

#### Concurring or contributing cause

By "proximate cause" is not meant the last cause, nor the sole cause, of an injury, but the proximate cause may be any act that aided in producing the result. *San Antonio & A. P. R. Co. v. Trigo*, 108 S. W. 1193, 1194, 49 Tex. Civ. App. 523.

The "proximate cause" of an injury is not always the last act of cause or the nearest act to the injury, but it may be such a negligent act as actively aids in producing the injury as a direct and existing concurrent cause, and such as might reasonably be expected to result in the injury. *Texas & N. O. R. Co. v. Bellar*, 112 S. W. 323, 326, 51 Tex. Civ. App. 154.

Two agencies, acting independently of each other, may jointly and concurrently be the "proximate cause" of an injury when it would not have happened except for a concurrence at approximately the same time and place of the two negligent acts. *City of Louisville v. Hart's Adm'r*, 136 S. W. 212, 215, 143 Ky. 171, 35 L. R. A. (N. S.) 207 (citing *Shear. & R. Neg.* § 26).

To constitute a negligent act the "proximate cause" of an injury, it is not necessary that it be the sole cause, but it is sufficient if it is a concurring cause from which the result might reasonably have been contemplated as involving the result which actually happened under the circumstances, it not being necessary that the injury in the precise form in which it in fact resulted should have been foreseen; it being sufficient that it appears after the accident to have been a natural and probable consequence. *Gulf, C. & S. F. R. Co. v. Green (Tex.)* 141 S. W. 341, 346 (quoting 6 Words and Phrases, p. 5760).

By "proximate cause" is meant such an act wanting in ordinary care as actively aided in producing the injury as a direct and existing cause, and it need not necessarily be the last or sole cause, but it must be a concurring cause, such as might have been contemplated as involving the result under the attending circumstances. *Houston & T. C. R. Co. v. Oram (Tex.)* 92 S. W. 1029, 1031.

Where an injury results from the negligence of defendant and some other contributing cause, but not an independent efficient cause, and the injury could not have

occurred in the absence of either cause, defendant's negligence is a proximate cause of the injury, if, under the circumstances of defendant's negligence the injury was a probable, natural, and usual result of the two contributing causes. *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 46 South. 732, 737, 55 Fla. 514, 20 L. R. A. (N. S.) 92.

"Where the concurrent cause is the independent wrongful act of a responsible person, such act arrests action, being regarded as the 'proximate cause' of the injury; the original negligence being considered as its remote cause. As in the law it is the proximate and not the remote cause which is regarded, he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury." The negligence of a carrier, consisting of its failure to call a station, to stop a reasonable length of time to permit passengers to disembark and embark, in failing to light its platform, in permitting a dangerous obstruction to remain on the platform at a point where passengers ought to have been able to embark and disembark with reasonable safety, was the "proximate cause" of injury to a passenger while disembarking. *Atchison, T. & S. F. Ry. Co. v. Calhoun*, 89 Pac. 207, 210, 18 Okl. 75, 11 Ann. Cas. 681.

It is not essential that a cause should act alone in order to constitute it the "proximate cause"; but if it concurs with another cause in producing the result it will be a proximate cause, and one or both of the instruments setting the cause in motion will be liable for the damages arising therefrom. Where an accident occurred from two causes, both due to negligence of different defendants, but together an efficient cause, such concurring cause was a proximate cause, and the negligence of one furnished no excuse for the negligence of the other. *Galveston, H. & S. A. R. Co. v. Vollrath*, 89 S. W. 279, 281, 40 Tex. Civ. App. 46 (citing *Galveston, H. & S. A. Ry. Co. v. Croskell*, 25 S. W. 486, 6 Tex. Civ. App. 160; *Gulf, C. & S. F. Ry. Co. v. McWhirter*, 14 S. W. 26, 77 Tex. 356, 19 Am. St. Rep. 755).

The juridical or "proximate cause" of an injury is not necessarily the sole cause. The fact that the conduct of the person injured or of a third person concurred with the negligence of defendant does not necessarily render the injury a remote consequence of such conduct. Although an intervening act of plaintiff himself has concurred in producing the damages for which a recovery is sought, defendant is not thereby excused if the injury is the natural result of, or was naturally and reasonably induced by, the antecedent act of defendant. The rule is the same where, though plaintiff's act may not in strictness have been caused or induced by the defendant's act or omission, yet the latter caused or created a negligent and dangerous

condition upon which the plaintiff's act, harmless and innocent in itself, and of a nature which might have been anticipated, operated to produce the injuries received. *Rollestone v. T. Cassirer & Co.*, 59 S. E. 442, 447, 3 Ga. App. 161.

An injury suffered by the negligent act of another is the "proximate cause" of the effect produced, though the person injured may have been suffering at the time from disease which aggravated the consequences of such injury. *City of Roswell v. Davenport*, 89 Pac. 256, 257, 14 N. M. 91 (citing *Crane Elevator Co. v. Lippert*, 63 Fed. 942, 11 C. C. A. 521; *Delaplain v. Kansas City*, 109 Mo. App. 107, 83 S. W. 71; *Owens v. Kansas City, St. J. & C. B. R. Co.*, 8 S. W. 350, 650, 95 Mo. 182, 6 Am. St. Rep. 39; *Allison v. Chicago & N. W. R. Co.*, 42 Iowa, 274; *Sawyer v. Dulany*, 30 Tex. 479; *Brown v. Chicago, M. & St. P. Ry. Co.*, 11 N. W. 356, 911, 54 Wis. 342, 41 Am. Rep. 41; *Chicago City R. Co. v. Saxby*, 72 N. E. 755, 213 Ill. 274, 68 L. R. A. 164, 104 Am. St. Rep. 218; *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 74; *Suth. Dam.* (3d Ed.) § 36; 13 Cyc. p. 31).

The use of the phrase "proximately contributed to" in lieu of that of "proximately caused" is not erroneous, in an action against a company operating a mine to recover for the death of a miner, when used in reference to the effect of defendant's failure to comply with a statute, for the protection of miners, where, if death was caused as contended, defendant's failure to comply with the statute "proximately contributed to" the accident. *Athens Min. Co. v. Carnduff*, 123 Ill. App. 178.

In an action for death under an accident policy wherein the court charged generally that plaintiff must show that death resulted from the accident alone, and also charged that the burden was on defendant to show the specific cause of death to have been other than the accident, it was held that the use of the word "proximate" cause of death in the sense of "sole" cause, when taken in connection with other qualifying and restrictive words in the same connection, did not render the instruction confusing or erroneous to an extent requiring a reversal of the judgment. *Travelers' Ins. Co. v. Leibus*, 28 Ohio Cir. Ct. R. 700, 707.

#### Continuous, natural sequence

"Proximate cause" is that cause which in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred. *Town of Lyons v. Watt*, 95 Pac. 949, 950, 43 Colo. 238; *Snyder v. Colorado Springs & C. D. R. Co.*, 85 Pac. 686, 36 Colo. 288, 8 L. R. A. (N. S.) 781, 118 Am. St. Rep. 110 (quoting and adopting definition in *Denver & R. G. Ry. Co. v. Sipes*, 65 Pac. 1093, 26 Colo.

17); *Evansville & I. R. Co. v. Allen*, 73 N. E. 630, 631, 84 Ind. App. 636.

The "proximate cause" of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred. *Alice, Wade City & C. C. Telephone Co. v. Billingsley*, 77 S. W. 255, 257, 33 Tex. Civ. App. 452 (quoting *Shear. & R. Neg.* § 26); *Williams v. San Francisco & N. W. Ry. Co.*, 93 Pac. 122, 126, 6 Cal. App. 715 (quoting and adopting definition of 1 *Shear. & R. Neg.* [5th Ed.] p. 27); *Pilmer v. Boise Traction Co.*, 94 Pac. 432, 436, 14 Idaho, 327, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161; *El Paso & S. W. R. Co. v. Smith*, 108 S. W. 988, 992, 50 Tex. Civ. App. 10; *Gulf, C. & S. F. R. Co. v. Blake*, 95 S. W. 593, 43 Tex. Civ. App. 180; *Jansen v. Southern Pac. Co.*, 89 Pac. 616, 617, 5 Cal. App. 12 (quoting *Shear. & R. Neg.* § 26); *Washington Mills v. Cox*, 157 Fed. 634, 639, 85 C. C. A. 154 (quoting and adopting definition in *Moore, Carriers*, c. 12, § 2, p. 377); *McVay v. Brooklyn, Q. C. & S. R. Co.*, 99 N. Y. Supp. 266, 267, 113 App. Div. 724.

The "proximate cause" of an injury is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred. *Therriault v. England*, 116 Pac. 581, 582, 43 Mont. 376; *Strojny v. Griffin Wheel Co.*, 116 Ill. App. 550, 552.

The "proximate cause" of an injury is the natural and continuing sequence unbroken by an intervening cause producing the injury, and without which it would not have happened. *St. Louis & S. F. R. Co. v. Justice*, 101 Pac. 469, 473, 80 Kan. 10; *Hull v. Thomson Transfer Co.*, 115 S. W. 1054, 1055, 135 Mo. App. 119; *Mize v. Rocky Mountain Bell Telephone Co.*, 100 Pac. 971, 973, 35 Mont. 521, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189.

The "proximate cause" of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have accrued. *Kremer v. New York Edison Co.*, 92 N. Y. Supp. 883, 888, 102 App. Div. 433; *St. Louis & S. F. R. Co. v. Justice*, 101 Pac. 469, 473, 80 Kan. 10 (quoting *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583).

"Proximate cause" of an injury is the natural and continuing sequence, unbroken by any intervening cause, preceding the injury, and without which it could not have happened. *Joslin v. Linder*, 128 N. W. 500, 502, 26 S. D. 420.

The "proximate cause" of the event must be shown to be that which in natural, continuous sequence, unbroken by any new acts



produces the event, without which that event would not have occurred. *Ship v. Fridenberg*, 117 N. Y. Supp. 599, 601, 132 App. Div. 782 (quoting and adopting definition in *Laidlaw v. Sage*, 52 N. E. 679, 158 N. Y. 73, 44 L. R. A. 216).

It is sufficient to make a negligent act the "proximate cause" of an injury that the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause. *Illinois Cent. R. Co. v. Slier*, 82 N. E. 362, 364, 229 Ill. 390, 15 L. R. A. (N. S.) 819, 11 Ann. Cas. 368.

By "proximate cause" is meant a cause which naturally, by continuous sequence, unbroken by a new cause, produces a result; it need not necessarily be the nearest or immediate cause which may be merely an instrument of the dominant or efficient cause. *Richmond Coal Co. v. Commercial Union Assur. Co., Limited*, of London, England, 159 Fed. 985, 987.

The legal doctrine of "proximate cause" is based on the principle that consequences which follow from an original wrong in unbroken sequence, without an intervening sufficient independent cause, are natural and proximate, and for these the original wrongdoer is responsible. *Merrill v. Los Angeles Gas & Electric Co.*, 111 Pac. 534, 536, 158 Cal. 499, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

Negligence is a "proximate cause" of an injury or loss when, in ordinary, natural sequence, it causes or contributes to causing the injury or loss, without an intervening independent efficient cause. *Woodbury v. Tampa Waterworks Co.*, 49 South. 556, 559, 57 Fla. 243, 249, 21 L. R. A. (N. S.) 1034.

By "proximate cause" is meant a cause which, operating in natural and ordinary sequence, unbroken by any new cause, produces the event, and without which such event would not have happened. *St. Louis Southwestern R. Co. of Texas v. Haney (Tex.)* 94 S. W. 386, 388.

"The 'proximate cause' of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event and without which that event would not have happened. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation." *Boyce v. Chicago & A. R. Co.*, 96 S. W. 670, 671, 120 Mo. App. 168 (quoting and adopting definition in *Dickson v. Omaha & St. L. R. Co.*, 27 S. W. 476, 124 Mo. 140, 25 L. R. A. 320, 46 Am. St. Rep. 429).

The "proximate cause" is the one that acts first, whether immediate to the injury, or such injury be reached by setting other causes in motion each in order being started naturally by the one that precedes it, and al-

together constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result. *Cary v. Preferred Accident Ins. Co. of New York*, 106 N. W. 1055, 1056, 127 Wis. 67, 5 L. R. A. (N. S.) 926, 115 Am. St. Rep. 997, 7 Ann. Cas. 484 (quoting and adopting definition in *Delsenrieter v. Kraus-Merkel Malting Co.*, 72 N. W. 735, 97 Wis. 288).

The "proximate cause" of an event is that which in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which it would not have occurred, and the last conscious agent in producing an injury is the one liable for it, and the law does not search for more remote agencies. *Miner, Read & Garrette v. McNamara*, 72 Atl. 138, 140, 81 Conn. 690, 21 L. R. A. (N. S.) 477.

That cause is "proximate" without which the accident would not have happened, but which, in the probable sequence of events, and without the interposition of a new and efficient cause wholly sufficient in itself, produces the wrong complained of. *Shugart v. Atlanta, K. & N. Ry.*, 133 Fed. 505, 510, 66 C. C. A. 379 (citing *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 479, 24 L. Ed. 256; *Union Pac. Ry. Co. v. Callaghan*, 56 Fed. 988, 6 C. C. A. 205; *Chicago G. W. R. Co. v. Price*, 97 Fed. 424, 38 C. C. A. 239).

"Proximate cause" is well defined as that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred. In *Baltimore & O. R. Co. v. State, to Use of Trainor*, 33 Md. 543, the Supreme Court, in defining "proximate cause," said: "By proximate cause is intended an act which directly produced, or concurred directly in producing, the injury." *Claypool v. Wigmore*, 71 N. E. 509, 510, 34 Ind. App. 35.

The "proximate cause" of an injury is one which produces the result in continuous sequence, and without which it would not occur, and one from which any man of ordinary prudence could foresee that such result was probable under all the facts as they existed. *Ramsbottom v. Atlantic Coast Line R. Co.*, 50 S. E. 448, 449, 138 N. C. 38.

Negligence to furnish the foundation of an action for damages must be the proximate cause of the injury complained of; proximate cause being that which in a natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which it would not have occurred. *City of Indianapolis v. Slider*, 95 N. E. 334, 335, 48 Ind. App. 38.

Under the rule of "proximate cause," the damages must be proximate to the wrong-

ful act; that is, they must follow the negligent act in unbroken sequence, without any intervening independent cause to break the continuity. *Crouse v. Chicago & N. W. Ry. Co.*, 80 N. W. 752, 755, 104 Wis. 473 (citing *Mueller v. Milwaukee St. Ry. Co.*, 56 N. W. 914, 86 Wis. 340, 21 L. R. A. 721).

When the act and the injury are not known by common experience to be naturally and usually in sequence, and the injury does not, according to the ordinary course of events, follow from the act, then the act and the injury are not sufficiently connected to make the act the "proximate cause" of the injury. *Kansas City Southern R. Co. v. Prunty*, 133 Fed. 13, 20, 66 C. C. A. 163 (citing *Cooley, Torts* [2d Ed.] 73; *Beach, Contrib. Neg.* 32).

The "proximate cause" of an injury is that act which directly produced, or concurred directly in producing, the injury in a natural and continuous sequence unbroken by any new cause. *Chesapeake & O. R. Co. v. Wills*, 68 S. E. 395, 397, 111 Va. 32, 32 L. R. A. (N. S.) 280.

The "proximate cause" of an injury is the primary moving cause without which it would not have been inflicted, and which in the natural sequence of events, without the intervention of any independent cause, causes the injury. *City of Winona v. Botzet*, 169 Fed. 321, 328, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

"Proximate cause" means closeness or nearness in point of causal relation. In general terms, it may be said to be the rule of the cases that the *causa proxima* is sufficiently established if the facts are so far connected in orderly sequence as that it can be fairly said that, in the absence of the cause alleged, the injury and damage complained of would not have occurred. *Watters v. City of Waterloo*, 101 N. W. 871, 873, 126 Iowa, 199.

The "proximate cause" of an injury is a cause which in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred, and, to warrant a finding that negligence is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, and ought to have been foreseen as likely to occur by a person of ordinary prudence. *International & G. N. R. Co. v. Schubert* (Tex.) 130 S. W. 708, 709.

"Proximate cause" means such cause as, acting in a natural and ordinary sequence unbroken by any new cause, produces the result. In an action for personal injuries where there was evidence tending to show that plaintiff was previously suffering from Bright's disease, an instruction that if before or since the injury the plaintiff was afflicted with Bright's disease, or is now suffering therefrom, he is not entitled to recover for the pain or disability so caused, was im-

properly refused. *St. Louis Southwestern R. Co. of Texas v. Hall* (Tex.) 92 S. W. 1079, 1080.

The "proximate cause" of an event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event and without which such event would not have occurred. Proximity in point of time or space, however, is not part of the definition. The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original or primary negligence, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected. *Harton v. Forest City Telephone Co.*, 54 S. E. 299, 301, 302, 141 N. C. 455.

"The term 'proximate cause,' in the sense in which it is ordinarily used, means the efficient cause which in a natural and continuous sequence, unbroken by any new and independent cause, produced that event, and without which that event would not have occurred." Where the negligence of a master contributes with the negligence of a servant to cause injury to another servant, such concurrent negligence on the part of the master and of the servant is the "proximate cause" of the injury, and the master is liable therefor; but, where the negligence of the servant is such as to have caused the injury even had the master not been negligent, then the servant's negligence is the sole cause of the injury, and the master is not liable. *Gila Valley, G. & N. Ry. Co. v. Lyon*, 80 Pac. 337, 340, 9 Ariz. 218.

"Proximate cause" is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of, and without which that result would not have occurred. By "proximate cause" is intended an act which directly produced or concurred directly to produce the injury, and a hole in the street pavement between the street car tracks, into which plaintiff's bicycle ran by which he was thrown in front of a street car and run over, was the proximate cause of his injury, though the management of the car may also have been negligent. *Indianapolis Traction & Terminal Co. v. Springer*, 93 N. E. 707, 709, 47 Ind. App. 35.

The "proximate cause" of injury is that which in a natural and continuous sequence, unbroken by independent causes, produces the injury, and without which it would not have occurred; proximity as to time or space being unimportant except as showing proximity of causation. Two agencies, acting independently of each other, may jointly and concurrently be the proximate cause of an

injury when it would not have happened except for a concurrence at approximately the same time and place of the two negligent acts. Where decedent, through defects in a street rendering it unsafe for travel, was thrown from his wagon upon a street car track immediately in front of a car running at a dangerous and negligent rate of speed, and was thereby killed, the negligence of both the city and the street railway company could be deemed the proximate cause of the death. *City of Louisville v. Hart's Adm'r*, 136 S. W. 212, 215, 143 Ky. 171, 35 L. R. A. (N. S.) 207 (citing *Shear. & R. Neg.* § 26).

The "proximate cause" of death is that cause which in natural and continuous sequence, unbroken by any new cause, produced death, and without which cause that death would not have occurred. Intestate sustained a dislocated shoulder by a fall on defendant's steamship due to defendant's alleged negligence, after which he went to a hospital, where he was given chloroform unnecessarily prior to the reduction of the dislocation. During this operation, intestate died from paralysis of the heart solely due to the chloroform; the injury not being such of itself, independent of the chloroform, as would have caused death. Held, that the unnecessary giving of the chloroform, for which defendant was not responsible, and not the injury, was the proximate cause of intestate's death, precluding recovery for death under Code Civ. Proc. N. Y. § 1902, authorizing a recovery of damages for a wrongful act, neglect, or default by which decedent's death was caused. *Mella v. Northern S. S. Co.*, 162 Fed. 499, 502.

"The 'proximate cause' of an event must be understood to be that which, in a natural and continual sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation; that is, the proximate cause which is nearest in the order of responsible causation." Defendant telephone company rented two rooms in a building, one of which was used as an exchange, and the back room for storing materials. The owners of the building employed a carpenter to put up a partition next to the storeroom, in order to accomplish which it was necessary to remove the materials stored therein, and in doing so the carpenter ordered his assistant to remove a box of dynamite from the shelves. Such assistant carried the box into the common hallway, and placed it in a corner near the doorway of defendant's operating room, where, from some unknown cause, it was exploded, injuring plaintiff's decedent, who was at the time in defendant's operating room in the performance of her duties as one of defendant's operators. Held, that the proximate

cause of such injury was the negligence of the carpenter's assistant in placing the box where he did, and not the negligence of the company in storing the dynamite in its storeroom. *Georgetown Telephone Co. v. McCullough's Adm'r*, 80 S. W. 782, 783, 118 Ky. 182, 111 Am. St. Rep. 294 (quoting and adopting definition in *Shear. & R. Neg.* (5th Ed.) § 26).

That only is a "proximate cause" of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation separated from its effect by no other act of causation. If, after an act of omission constituting negligence on the part of one injured at a railroad crossing, the railroad car or cars might have been so controlled, by the exercise of reasonable care and prudence on the part of those in charge of them, as to avoid the injury, then a failure to exercise such care and prudence would be an intervening cause, and the plaintiff's negligence no longer a proximate cause, and therefore not a bar to his recovery. *Smith v. Connecticut Ry. & Lighting Co.*, 67 Atl. 888, 889, 80 Conn. 268, 17 L. R. A. (N. S.) 707 (citing *Grand Trunk R. Co. v. Ives*, 12 Sup. Ct. 679, 144 U. S. 408, 429, 36 L. Ed. 485; *Parkinson v. Concord St. Ry.*, 51 Atl. 268, 71 N. H. 28; *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393, 404-413, 71 Am. Dec. 78).

The "proximate cause" of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which the event would not have occurred. Under *Sayles' Ann. Civ. St.* 1897, art. 4560f, providing that "every corporation shall be liable for all damages sustained by any servant or employé thereof engaged in the work of operating the cars, locomotives, or trains of such corporation, by reason of the negligence of any other servant of such corporation, and the fact that such servants or employés were fellow servants with each other, shall not impair or destroy such liability," the negligence of a railroad foreman in requiring the employés under him to run a hand car on the time of a passenger train over the same track, and in close proximity to such train, is negligence of the company which a jury were warranted in finding was the proximate cause of injury to one of such employés, incurred in assisting to remove the hand car from the track on the approach of the train. *San Antonio & A. P. R. Co. v. Stevens*, 83 S. W. 235, 237, 37 Tex. Civ. App. 80.

The "proximate cause" is the one which in the natural and continuous sequence, unbroken by an intervening cause, produces the injury, and without which the result would not have happened. And it is not enough that the injury is the natural consequence of the negligence; it must be also the probable

consequence which might have been foreseen by a man of ordinary prudence. So that where defendant railroad company negligently permitted cattle infected with Texas fever to escape from its right of way to the adjoining highways, one of which led to a pasture from which plaintiff derived profits which were thereafter lost when the state veterinarian placed the highways under quarantine without lawful authority, and from the fact that the diseased cattle had been thereon, plaintiff's patrons would not permit their animals to be driven to the pasture, there being no way by which it could be reached, except over the highway, the injury was not a natural and probable consequence of the negligent acts which might have been foreseen by a man of ordinary prudence, and plaintiff could not recover. *Wilson v. Missouri, K. & T. R. Co.*, 108 S. W. 590, 592, 129 Mo. App. 658 (quoting and adopting definition in *Saxon v. Missouri Pac. R. Co.*, 72 S. W. 717, 98 Mo. App. 494).

"Proximate cause" is defined to be "that which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." But the sequence is not broken by reason of contributory or concurring causes. Thus there was liability, where plaintiff, as was his custom, started to cross a bridge from the north in the company of and riding behind another wheelman. They were moving along the easterly edge of the bridge, and, when nearly opposite the point from which a rail had disappeared, overtook three pedestrians traveling in the same direction, gave them warning of the approach, and two of the three persons walking stepped to the right and one to the left. The leading wheelman passed, when one of the two, who had stepped to the right, returned to the center of the path, not appreciating that another wheel was coming. A collision occurred. The plaintiff was thrown from his wheel over the side of the wall at the place where there was no proper guard or railing on the bridge. *Schell v. Town of German Flatts*, 104 N. Y. Supp. 116, 118, 120, 54 Misc. Rep. 445 (quoting and adopting definition in *Shear. & R. Neg.* § 26).

"Proximate cause" is "that which in a natural and continual sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred; and the act of one person cannot be said to be the proximate cause of an injury when the act of another person has intervened and directly inflicted it." Where defendant telephone company maintained a wire for over two years across a public street from an old brick chimney on a low building to another building at a considerable elevation, 200 feet away, and during the construction of a building the wire was struck by the boom of a derrick, operated by workmen engaged on the building, causing the chimney to be pulled over into the street, a

part of which struck plaintiff, causing the injuries complained of, though the telephone company was negligent in maintaining its wire on the chimney, which inspection would have shown to have become unsound, its failure to inspect was not the proximate cause of the fall of the chimney, but it was the intervention of the derrick boom carelessly allowed to swing out into the street which caused the accident to occur, and plaintiff injured by the fall of the chimney cannot maintain an action therefor against the telephone company. *Leeds v. New York Tel. Co.*, 70 N. E. 219, 220, 178 N. Y. 118 (quoting and adopting definition in *Laidlaw v. Sage*, 52 N. E. 679, 158 N. Y. 73, 44 L. R. A. 216).

The "proximate cause" of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new, independent cause, produced the event, and without which the event would not have occurred. Where several acts are charged as negligence, and it is apparent that one of them disconnected from the others could not in and of itself have been the direct or "proximate cause," its submission by the court in its charge as a ground for recovery is unauthorized. A passenger on finding that the ticket agent was not in his office, boarded a train without a ticket. An employé in charge of the train requested him to alight and procure a ticket. The agent on being asked for one directed him to board the train, which was then in motion. The absence of the agent from his office was not the "proximate cause" of an injury sustained by the passenger while attempting to board the moving train, nor was the passenger's act in leaving the train the "proximate cause" of the injury. *San Antonio & A. P. R. Co. v. Trigo* (Tex.) 101 S. W. 254, 256.

The "proximate cause" may be the primary cause so linked and bound to the events succeeding that together they create one continuous whole, one event so operating on the other as to tie the result to the primary cause; but, to justify a finding that such act is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the act, and that it ought to have been foreseen in the light of attending circumstances. *Texas & N. O. R. Co. v. Murray* (Tex.) 132 S. W. 496, 497.

Where a person's injuries were received from a fire negligently set by a railway company, the chain of causation between its negligence and the injuries was not broken by the person's removal from the building set on fire just prior to her return to the building, after which the injuries were received. *Birmingham R., Light & Power Co. v. Hinton*, 40 South. 988, 989, 146 Ala. 273.

An operator of a machine in attempting to suddenly stop it by drawing his foot from the treadle in the usual way, slipped and was injured because his foot, instead of reaching

the floor struck against the pulley of another machine placed too near him. He had complained to the foreman of the proximity of the latter machine and had been urged to continue work, with the assurance that it was not dangerous and that the machine would be moved the following day. Held, that the proximate cause of the accident was the proximity of the machine, authorizing a recovery, the "proximate cause" of an injury being that cause which in natural and continuous sequence, unbroken by an intervening cause, produces the injury, the efficient cause or the one that necessarily sets other causes in operation. *Holman v. E. E. Souther Iron Co.*, 133 S. W. 379, 382, 152 Mo. App. 672.

The "proximate cause" of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. A complaint, alleging that defendant railroad violated an ordinance prohibiting a railroad from blocking any public street for more than five minutes at a time, whereby plaintiff's team, when near the crossing, became frightened and ran away, injuring plaintiff, was demurrable, as not showing any causal connection between the violation of the ordinance and the injuries. *Wilson v. Louisville & N. R. Co.*, 40 South. 941, 942, 146 Ala. 285, 8 L. R. A. (N. S.) 987 (quoting and adopting definition in *Shear. & R. Neg.*; citing *Western Ry. of Alabama v. Mutch*, 11 South. 894, 97 Ala. 194, 21 L. R. A. 316, 38 Am. St. Rep. 179, and other cases).

#### Direct or immediate cause

"Proximate cause" of an injury is the immediate cause. *Joslin v. Linder*, 128 N. W. 500, 502, 26 S. D. 420.

Defining proximate cause as the "direct" cause is error, as it may be the indirect cause. *Wheeler v. Milner*, 118 N. W. 187, 188, 137 Wis. 26.

"Proximate cause" is the direct cause, without which injuries would not have occurred. *International & G. N. R. Co. v. Trump*, 94 S. W. 903, 906, 42 Tex. Civ. App. 536 (citing *Texas & N. O. R. Co. v. Black* [Tex.] 44 S. W. 678); *Galveston, H. & S. A. R. Co. v. Averill* (Tex.) 136 S. W. 98, 100; *Houston & T. C. R. Co. v. Beard*, 93 S. W. 532, 533, 42 Tex. Civ. App. 427.

The "proximate cause" of an injury is that act or omission which immediately causes and without which the injury would not have happened, notwithstanding other conditions or omissions concurred therewith. *Miller v. Kelly Coal Co.*, 145 Ill. App. 452.

A "proximate cause" is one that leads to or produces or directly contributes to produce the result or loss. *Western Union Tel. Co. v. Milton*, 43 South. 495, 500, 53 Fla. 484, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077.

By "proximate cause" is intended an act which directly produced or concurred in directly producing the injury. *Claypool v. Wigmore*, 71 N. E. 509, 510, 34 Ind. App. 35 (citing *Baltimore & O. R. Co. v. State, to Use of Trainor*, 33 Md. 543).

A "proximate cause" is one that directly causes or contributes directly to cause the result, without any independent efficient cause intervening between the cause and the resulting injury. *Florida East Coast Ry. Co. v. Wade*, 43 South. 775, 776, 53 Fla. 620.

The "proximate cause" of an injury is that act or omission which immediately causes the injury, and it is enough if it is the efficient cause that necessarily sets the other causes in operation. *Pierson v. Northern Pac. R. Co.*, 100 Pac. 999, 1001, 52 Wash. 595.

"Proximate cause" means a cause that immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause. *Boyce v. Chicago & A. R. Co.*, 96 S. W. 670, 671, 120 Mo. App. 168 (quoting and adopting definition in *Webst. Int. Dict.*).

"Proximate cause" is defined to be "that cause which immediately precedes and directly produces an effect as distinguished from a remote, mediate, or predisposing cause." "Immediate; nearest; next in order." The maxim of the law is, "Causa proxima, non remota, spectatur." It is said and well settled that a party is not responsible "in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." An act is the proximate cause of an event when in the natural order of things, and under the particular circumstances surrounding it, such an act would necessarily produce that event. In negligence all courts, both in England and America, construe "proximate cause" as a cause from which a man of ordinary experience and capacity could see that the results might probably ensue. *Burlington & M. R. R. Co. v. Budin*, 40 Pac. 503, 504, 6 Colo. App. 275 (citing *Broom, Leg. Max.* 386; *Shear. & R. Neg.* 11; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175; *Bennett v. Lockwood* [N. Y.] 20 Wend. 223, 32 Am. Dec. 532; *McGrew v. Stone*, 53 Pa. 436).

"A 'proximate cause' is one from which the injury follows as a direct and immediate consequence. It is the dominant cause—the one that necessarily sets the other causes in motion." The failure of the court to specifically define in its instructions the distinction between proximate and remote causes is not reversible error, where the jury are told that to authorize a recovery the defendant must not only have been negligent, but the negligence must have been the "direct cause" of the injury complained of. *Texas & P. R. Co. v. Coutourie*, 135 Fed. 465, 473, 68 C. C. A. 177.

"Proximate cause" need not necessarily be the immediate cause, which may be merely an instrument of the dominant or efficient cause. *Richmond Coal Co. v. Commercial Union Assur. Co., Limited*, of London, England, 159 Fed. 985, 987.

"The 'proximate cause' is not necessarily the immediate, near, or nearest cause, but the one that acts first, whether immediate to the injury, or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result." *Cary v. Preferred Accident Ins. Co. of New York*, 106 N. W. 1055, 1056, 127 Wis. 67, 5 L. R. A. (N. S.) 926, 115 Am. St. Rep. 997, 7 Ann. Cas. 484 (quoting and adopting definition in *Delsenrieter v. Kraus-Merkel Malting Co.*, 72 N. W. 735, 97 Wis. 288).

When an injury can be traced directly to a tortious act, and but for this tortious act it could not reasonably be supposed that the injury would have resulted, this essentially antecedent act may be said to be the "proximate cause" of the injury. *Southern Ry. Co. v. Daughdrill*, 75 S. E. 925, 928, 11 Ga. App. 603.

An instruction that "proximate cause is the immediate, as contradistinguished from an intermediate, cause," is not subject to the objection that it does not clearly and fully express the law relating to proximate cause. *Snipes v. Atlantic Coast Line R. Co.*, 56 S. E. 959, 960, 76 S. C. 207 (citing *State v. Adams*, 47 S. E. 676, 68 S. C. 421).

"Whatever combination of causes may be charged as having resulted in an injury, the author of one of them can only be held liable when his act or negligence was the 'proximate cause,' for, if it was remote and did not directly contribute to the injury, no liability attaches. It is the proximate and not the remote that the law recognizes." *Edd v. Union Pac. Coal Co.*, 71 Pac. 215, 216, 25 Utah, 293.

To constitute contributory negligence a "proximate cause," it must in the nature of things have some direct and material relation to the injury. *Indianapolis & M. Rapid Transit Co. v. Edwards*, 74 N. E. 533, 534, 36 Ind. App. 202; (citing *Beach, Contrib. Neg.* p. 7; *Toledo & W. Ry. Co. v. Goddard*, 25 Ind. 185; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185).

In order for contributory negligence to have been the "proximate cause" of an accident, it must have been simultaneous in its operation with that of the defendant, of the same kind, immediately growing out of the same transaction, and not something distinct and independent of a prior date. *Vizacchero*

*v. Rhode Island Co.*, 59 Atl. 105, 107, 26 R. I. 392, 69 L. R. A. 188 (quoting *Isbell v. New York & N. H. R. Co.*, 27 Conn. 293, 71 Am. Dec. 78).

What constitutes "proximate cause" has been so often fully explained that it must be assumed that it is understood by the bench and bar. It is just as erroneous to say that the proximate cause is the direct cause when used in connection with the question of plaintiff's contributory negligence, as when used in connection with defendant's negligence. *Mauch v. City of Hartford*, 87 N. W. 816, 823, 112 Wis. 40.

"Proximate cause" is any act or omission that immediately produces or fails to prevent the injury, or that which directly puts into operation another agency or force, or interposes an obstacle whereby injury is inflicted that would not have happened except for the negligent act or omission. *Wells v. Great Northern R. Co.*, 114 Pac. 92, 95, 59 Or. 165, 34 L. R. A. (N. S.) 818, 825 (citing 32 Cyc. p. 745; *Hartvig v. N. P. Lumber Co.*, 25 Pac. 358, 19 Or. 522; *Ahern v. Oregon Telephone & Telegraph Co.*, 33 Pac. 403, 35 Pac. 549, 24 Or. 276, 22 L. R. A. 635; *Robinson v. Taku Fishing Co.*, 71 Pac. 790, 42 Or. 537).

"Proximate cause" is that act which immediately causes or fails to prevent an injury that might reasonably have been anticipated as a result of the negligent act or omission charged, and without which such injury would not have occurred, the test being found in the probable injurious consequences which were to be anticipated, and not in the number of subsequent events or agencies which might arise to bring such consequences about. *Balzer v. Warring*, 95 N. E. 257, 260, 176 Ind. 585.

The "proximate cause" of an accident is the immediate cause, or that without which it would not have happened. It is not the remote cause or the occasion of the accident, and, where the original wrong only becomes injurious because of the intervention of some distinct wrongful act of another, the injury is imputed to the last wrong as the proximate cause. *Louisville & N. R. Co. v. Keiffer*, 113 S. W. 433, 435, 132 Ky. 419.

"Proximate cause" means a direct and moving cause; that is, one without which the things complained of would not have occurred. Defendant's requested instruction, in an action against a railroad for injuries, that if the jury believed that plaintiff's decedent died from heart failure, or did not believe from a preponderance of evidence that he died from a stroke of apoplexy proximately caused by defendant's negligence, they should find for defendant, was properly refused, where the main charge required the jury to find affirmatively that decedent's death was proximately caused by injuries received by him as complained of. *St. Louis*

*Southwestern R. Co. v. Burke*, 81 S. W. 774, 775, 36 Tex. Civ. App. 222.

#### Dominant cause

The "proximate cause" is the dominant cause, the one which necessarily sets the other causes in motion. *Texas & P. R. Co. v. Coutourie*, 135 Fed. 465, 473, 68 C. C. A. 177.

"The 'proximate cause' is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time to the injury." *Bell v. Rocheford*, 113 N. W. 157, 158, 78 Neb. 310.

"'Proximate cause' means the dominant efficient cause without which the injury would not have occurred." *Bryan v. Hilton Lumber Co.*, 70 S. E. 936, 938, 154 N. C. 485 (quoting and adopting definition in *Harvell v. Weldon Lumber Co.*, 70 S. E. 391, 154 N. C. 254).

"Proximate cause" means the dominant, efficient cause; a cause without which the injury would not have occurred, and if the negligence of defendant continues until the time of the injury and the injury would not have occurred but for such negligence, it is not made remote because some act not within the control of defendant and not amounting to contributory negligence on the part of the plaintiff concurs in causing the injury. *Harvell v. Weldon Lumber Co.*, 70 S. E. 389, 391, 154 N. C. 254.

A request to charge that the term "proximate cause" meant the first or efficient cause, and if the jury found that there were several causes contributing to decedent's death, then the proximate cause was the cause coming first which set in motion the other causes producing the accident, was properly refused as susceptible of an interpretation that, if decedent was negligent in crossing defendant's tracks in front of an approaching train, his act was necessarily the proximate cause of the accident, and as overlooking the rule that the proximate cause is the dominant cause from which the injury follows as a direct and immediate consequence; that an act prior in time is not necessarily the proximate cause of an injury, unless the injury is the natural and probable consequence of such act, to be reasonably anticipated therefrom, or if the injury could not have happened but for the intervention of a sufficient and independent cause operating between the first negligent act and the injury. *Toledo, St. L. & W. R. Co. v. Kountz*, 168 Fed. 832, 837, 94 C. C. A. 244.

#### Efficient cause

The "proximate cause" of an injury is the efficient cause, the one that necessarily sets the other causes in operation. *Comer v. Meyer*, 74 Atl. 497, 499, 78 N. J. Law, 464, 29 L. R. A. (N. S.) 597; *Batton v. Public Service Corp. of New Jersey*, 69 Atl. 164, 165, 75 N. J. Law, 857, 18 L. R. A. (N. S.) 640, 127 Am. St. Rep. 855; *Holman v. E. E.*

*Souther Iron Co.*, 133 S. W. 379, 382, 152 Mo. App. 672; *Cleveland, C., C. & St. L. Ry. Co. v. Powers*, 88 N. E. 1073, 1077, 173 Ind. 105 (citing 6 Words and Phrases, pp. 5758, 5759); *Cincinnati, H. & D. R. Co. v. Acree*, 82 N. E. 1009, 1011, 42 Ind. App. 127.

The "proximate cause" is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the "proximate causes" and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. *San Francisco & P. S. S. Co. v. Carlson*, 161 Fed. 851, 853, 89 C. C. A. 45 (citing and adopting *Ætna Ins. Co. v. Boon*, 95 U. S. 130, 24 L. Ed. 395); *Demolli v. United States*, 144 Fed. 363, 366, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424, 7 Ann. Cas. 121 (quoting and adopting definition in *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395); *Frisbie v. Fidelity & Casualty Co.*, 112 S. W. 1024, 1025, 133 Mo. App. 30.

The "proximate cause" of an injury is such cause as operates to produce particular consequences without the intervention of any independent or unforeseen cause without which the injury could not have occurred. *Strobeck v. Bren*, 101 N. W. 795, 796, 93 Minn. 428; *Hendrix v. Cooleemee Cotton Mills*, 50 S. E. 561, 562, 138 N. C. 169; *Pendroy v. Great Northern R. Co.*, 117 N. W. 531-536, 17 N. D. 433.

It is a requisite of "proximate cause" of an injury that it did produce it. *Hayes v. Southern R. Co.*, 53 S. E. 847, 848, 141 N. C. 195.

The "proximate cause" of an injury is the cause which sets in motion the things causing the injury. *Indiana Union Traction Co. v. Keiter*, 92 N. E. 982, 985, 175 Ind. 268.

The "proximate cause" of a fire is the efficient cause which puts the other causes into motion. *Hocking v. British America Assur. Co. of Toronto, Canada*, 113 Pac. 259, 260, 62 Wash. 73, 36 L. R. A. (N. S.) 1155, Ann. Cas. 1912C, 965.

"Proximate cause," in a legal sense, is the efficient cause, or that cause which starts the train of circumstances leading to the injury complained of, and, in legal contemplation, that may be a cause of a particular occurrence, which fails to prevent it, as well as those acts which actively work to produce it. *Republic Iron & Steel Co. v. Lulu (Ind.)* 92 N. E. 993, 995.

"Proximate cause" is the efficient cause, or that which originates and sets in motion the dominating agency that necessarily proceeds through other causes as mere instruments or vehicles in the natural lines of causation to the result in controversy. *Chicago,*

& E. R. Co. v. Dinius, 84 N. E. 9, 12, 170 Ind. 222.

An efficient and adequate cause of an injury may be deemed the real or proximate cause thereof, unless another cause, not incidental to such cause, but independent of it, has intervened, and caused the injury in question. *Davis v. Mercer Lumber Co.*, 73 N. E. 899, 903, 164 Ind. 413.

In actions for injuries to employes, the "proximate cause" of the injury is not necessarily the immediate cause, but it must be the "efficient cause," which is that cause that sets in motion the general circumstances leading up to the injury. *Columbia Creosoting Co. v. Beard (Ind.)* 99 N. E. 823, 825.

Contributory negligence is the "proximate cause" of an injury, if the injury would not have occurred had the negligent act not been committed. *Atoka Coal & Mining Co. v. Miller*, 104 S. W. 555, 561, 7 Ind. T. 104.

Where the accident complained of would have occurred, though there had not been any negligence of a person, his negligence is not the "proximate cause" of the accident. *O'Connell v. Missouri Pac. R. Co.*, 131 S. W. 117, 149 Mo. App. 501.

There may be more than one "proximate cause" of an accident, if each was an efficient one, without which the injury resulting would not have occurred. *Sweet v. Perkins*, 90 N. E. 50, 51, 196 N. Y. 482.

A definition of "proximate cause" as the efficient cause from which the injury follows, in unbroken sequence without any intervening cause to break the continuity, is incorrect. *Eichmann v. Buchheit*, 107 N. W. 325, 326, 128 Wis. 385, 8 Ann. Cas. 435 (citing *Deisenrieter v. Kraus-Merkel Malting Co.*, 72 N. W. 735, 97 Wis. 279, 286; *Feldschneider v. Chicago, M. & St. P. R. Co.*, 99 N. W. 1034, 122 Wis. 423).

It is erroneous to define "proximate," in charging as to the proximate cause of the injury, as meaning efficient or material. *Boyce v. Wilbur Lumber Co.*, 97 N. W. 563, 566, 119 Wis. 642.

An instruction, that "by the term 'proximate cause' \* \* \* is meant the efficient cause which produces the injury as a natural and probable result," is not objectionable in failing to use the words "that which acts first," after the words "efficient cause." *Roedler v. Chicago, M. & St. P. Ry. Co.*, 109 N. W. 88, 91, 129 Wis. 270.

In an action for negligence causing death, an instruction, relating to the cause of death, that by "proximate cause" as used in the charge is meant a cause without which the thing complained of would not have occurred, while not strictly accurate in that it was not sufficiently comprehensive, yet it presented the test of "proximate cause" in

its application to the case. *Galveston, H. & S. A. R. Co. v. Heard (Tex.)* 91 S. W. 371, 374.

The "proximate cause" is ascertained by determining the responsible cause, without regard to its time or place, in the succession of events resulting in an injury, and it is not material whether such cause is the first or last in the succession of events, provided it is the responsible cause; and where an original wrongful act supplies the condition by which a subsequent act is rendered injurious the one committing the wrongful act is responsible. *Peru Heating Co. v. Lenhart*, 95 N. E. 680, 684, 48 Ind. App. 319.

"Proximate cause," so far as applicable to personal injury cases, is defined as "the efficient cause; that which acts first and produces the injury as a natural and probable result, under such circumstances that he who is responsible for such cause as a person of ordinary intelligence and prudence ought reasonably to foresee that personal injury to another may probably follow from such person's conduct." *Feldschneider v. Chicago, M. & St. P. R. Co.*, 99 N. W. 1034, 1037, 122 Wis. 423 (quoting *Deisenrieter v. Kraus-Merkel Malting Co.*, 72 N. W. 735, 97 Wis. 279).

Where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the accident would not have resulted in the injury excepting for the negligent act, the negligence is the "proximate cause" of the injury, for which damages may be recovered. *Birsch v. Citizens' Electric Co.*, 93 Pac. 940, 943, 36 Mont. 574 (quoting and adopting definition in *Goe v. Northern Pac. R. Co.*, 71 Pac. 182, 30 Wash. 654).

In an action for damages on account of negligence, the "proximate cause" is the real or efficient cause unless another not incidental to it, but independent thereof, appears to have intervened and caused the accident. "Proximate cause" is an essential element of recovery in such an action; the rule being that what is the proximate cause of the injury is not a question of science or legal knowledge, but is to be determined ordinarily as a question of fact by the jury. *Davis v. Mercer Lumber Co.*, 73 N. E. 899, 900, 903, 164 Ind. 413.

In determining what kind of cause is to be deemed "proximate," within the meaning of an insurance policy, the law will not go farther back in the line of causation than to find the active, efficient, procuring cause of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause of causes, beyond seeking the efficient predominant cause, which, following it no farther than these consequences that might have been an-



anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes. *Continental Casualty Co. v. Lloyd*, 73 N. E. 824, 828, 165 Ind. 52.

An instruction that "proximate cause" meant the efficient or inducing cause, the cause acting directly and producing injury or which set in motion other causes producing such injury, there being an intimate and close causal relation between the first cause and the final result, that in either case such producing cause was held to reach to the injury and be, in a legal sense, proximate to it, was erroneous, since it authorized the jury to find that defendant's negligence was the "proximate cause" of plaintiff's injury if the relation between them was casual, whereas the relation must be that of cause and effect in natural sequence of events, and not mere coincidence of time and place, which relation is properly described as "causal" and not as "casual." *Dehsoy v. Milwaukee Electric Railway & Light Co.*, 85 N. W. 973, 974, 110 Wis. 412.

The "proximate cause" is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. The "proximate cause" of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. The negligence of a servant does not excuse the master from liability to a coservant for an injury which would not have happened had the master performed his duty. *Kremer v. New York Edison Co.*, 92 N. Y. Supp. 883, 888, 102 App. Div. 483 (quoting and adopting definitions in *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583, 586; citing *The G. R. Booth*, 19 Sup. Ct. 9, 171 U. S. 450, 458, 43 L. Ed. 234; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256).

"Where a negligent act or omission sets in operation a train of occurrences resulting naturally in the injury complained of, such negligent act or omission is deemed to have been the proximate cause or to have

contributed thereto." Where defendant threw dynamite caps upon vacant ground, where, as defendant knew, children picked them up, and exploded them by throwing them against rocks, etc., and a boy who had found a battery back of an automobile garage exploded a cap taken by him by means of the battery, whereby he was injured, defendant was liable, as its negligence was the "proximate cause." *Akin v. Bradley Engineering & Machinery Co.*, 92 Pac. 908, 904, 48 Wash. 97, 14 L. R. A. (N. S.) 586.

The negligence in starting up a street car while one was boarding it, throwing him onto the ground, where he was run over by a truck, is a "proximate cause" of the injury, making the street railway company liable, notwithstanding the concurrent negligence of the driver of the truck; the negligence of the employees of the company being an efficient cause of the injury. *Fine v. Interurban St. R. Co.*, 91 N. Y. Supp. 43, 45, 45 Misc. Rep. 587.

A telephone company negligently permitted its wires to remain suspended near a trolley wire carrying a powerful current of electricity. During a storm the telephone wire became detached from a tree, and came in contact with the trolley wire becoming heavily charged. A driver, exercising proper care, drove his horses against the telephone wire, and they were killed by electricity. Held, that the negligence of the telephone company was the proximate cause of the death of the horses; the "proximate cause" of an injury being the responsible cause, the cause which is the active, operative, continuing, and natural source of the injury, or that which is the moving cause and without which the injury would not have occurred, though subsequent events aided in bringing about the result. *Cumberland Telephone & Telegraph Co. v. Kranz*, 95 N. E. 371, 373, 48 Ind. App. 67.

Where the court in a negligence case charged that the proximate cause was not necessarily the cause closest in point of time to the injury complained of, but was the cause which set in motion the things causing the injury, the refusal to charge that proximate cause was the inducing cause, or the act which set in motion the chain of circumstances operating in a continuous and uninterrupted sequence which produced the injury, was not erroneous. *Indiana Union Traction Co. v. Kelter*, 92 N. E. 982, 985, 175 Ind. 268.

"First cause," "initial cause," "efficient cause," and "proximate cause" all mean the same thing in the law of negligence. They mean the cause acting first and immediately producing the injury, or setting other causes in motion, all constituting a natural and continuous chain of events each having a close causal connection with its immediate predecessor; the final event in the chain im-

mediately effecting the injury as a natural and probable result of the cause which first acted, and the person responsible for the first event having reasonable ground to expect at the moment of his act or default that a personal injury to some person might probably result therefrom. There may be pre-existing conditions or events without which the final injury could not have happened, such as the momentary shying of a horse on a defective highway, the inadvertent and nonnegligent misstep of a traveler into a dangerous excavation close to the sidewalk, or the nonnegligent misstep or slip upon the floor or passage; but none of these is to be deemed a cause of the final injury any more than the mere presence of the injured person on the scene of the accident. They are not links, either initial or otherwise, in the legal chain of responsible causation, and should not be referred to as such, even though in ordinary nonlegal parlance they might broadly be termed causes. They are mere circumstances or conditions either existing, or to be expected in the natural order of things to occur at any time; and they do not enter into the chain of responsible causation. *Winchel v. Goodyear*, 105 N. W. 824, 827, 126 Wis. 271.

"Proximate cause" is the efficient cause—the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones. An act, to constitute the proximate cause of an injury, must have been so connected with the injury that injury would naturally and probably result therefrom, and the result must have been so apparent at the time that it could reasonably be foreseen. It must be established that there was a causal connection between the act and injury, and that the causal connection had not been broken by the interposition of an independent force that took advantage of the situation to accomplish something not the probable or natural effect of the situation as it existed. The act of an employé, charged with the duty of operating engines, in leaving an engine unguarded, is not the proximate cause of an injury resulting from a third person causing the engine to move, unless it could be said that the injury could have been reasonably anticipated or foreseen. *Atchison, T. & S. F. R. Co. v. Dickens*, 103 S. W. 750, 755, 7 Ind. T. 18.

"Proximate cause" is such as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred, and the act complained of must be such as a reasonably prudent person would have foreseen as likely to result in injury to another." Where, in an action for injuries to a passenger while alighting

from a train, the court correctly defined proximate cause, and charged that unless defendant was negligent as charged, and plaintiff's fall was proximately caused by the negligence of defendant's employes, plaintiff could not recover, and that plaintiff's injuries must have been the direct and proximate result of defendant's failure to stop the train a reasonably sufficient length of time, defendant was not prejudiced by the refusal to charge that if plaintiff while alighting was interfered with by a passenger boarding the train, and that such interference was the cause of plaintiff's fall, he could not recover. *St. Louis Southwestern R. Co. of Texas v. Bryant*, 103 S. W. 237, 238, 46 Tex. Civ. App. 601.

#### Foreseen or expected result

"Proximate cause" is defined generally as the cause which leads to or may naturally be expected to produce the result. *Palmer v. Portland Ry., Light & Power Co.*, 108 Pac. 211, 213, 56 Or. 262; *Doyle v. Southern Pac. Co.*, 108 Pac. 201, 208, 56 Or. 495; *Elliff v. Oregon R. & Nav. Co.*, 99 Pac. 76, 79, 53 Or. 66.

The requisites of "proximate cause" are the doing or omitting an act which a person of ordinary prudence could foresee might naturally or probably produce the injury, and that such act or omission did produce it. *Virginia Iron, Coal & Coke Co. v. Kiser*, 54 S. E. 889, 892, 105 Va. 695; *Wilson v. Southern R. Co.*, 62 S. E. 972, 973, 108 Va. 822.

The "proximate cause" of an injury is one which any man of ordinary prudence could foresee that such result was probable under all the facts as they existed. *Ramsbottom v. Atlantic Coast Line R. Co.*, 50 S. E. 448, 449, 138 N. C. 38.

The "proximate cause" of an injury may be such a negligent act as actively aids in producing the injury as a direct and existing concurrent cause, and such as might reasonably be expected to result therein. *Texas & N. O. R. Co. v. Bellar*, 112 S. W. 323, 326, 51 Tex. Civ. App. 154.

"In determining the cause of liability in negligence cases, 'proximate cause' is construed as a cause from which a man with ordinary experience could foresee that the result might ensue." *Haskell & Barker Car Co. v. Prezedziankowski*, 83 N. E. 626, 631, 170 Ind. 1, 14 L. R. A. (N. S.) 972, 127 Am. St. Rep. 352.

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be foreseen. *Atchison, T. & S. F. R. Co. v. Dickens*, 103 S. W. 750, 755, 7 Ind. T. 16.

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"Proximate cause" of a negligent injury is a want of ordinary care which actively aids in directly producing the injury which might reasonably have been contemplated under the attending circumstances. *A. Cohen & Co. v. Rittmann (Tex.)* 139 S. W. 59, 61.

"Proximate cause" is that which naturally leads to or contributes directly to produce a result which might be expected by any reasonable man as likely to directly follow the performance or nonperformance of any act. *Moore v. Lanier*, 42 South. 462, 465, 52 Fla. 353.

"Proximate cause" is that which naturally leads to or produces or contributes directly to produce a result such as might be expected by any reasonable and prudent man is likely to directly and naturally follow or flow out of the performance or nonperformance of any act. *Williams v. Atlantic Coast Line R. Co.*, 48 South. 209, 211, 56 Fla. 735, 24 L. R. A. (N. S.) 134, 131 Am. St. Rep. 169.

To warrant a finding that negligence is the "proximate cause" of an injury, it must appear that the injury ought to have been foreseen as likely to occur by a person of ordinary prudence. *International & G. N. R. Co. v. Schubert (Tex.)* 130 S. W. 708, 709.

"Proximate cause" is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury complained of and such act or omission actually causes the injury. It is the last negligent act without which the injury would not have resulted. *Brewster v. Elizabeth City*, 49 S. E. 885, 886, 137 N. C. 392 (citing *Coley v. City of Statesville*, 28 S. E. 482, 121 N. C. 301; *Schwartz v. Shull*, 31 S. E. 914, 45 W. Va. 405).

It is not necessary that the "proximate" result be one which could be anticipated in detail. *Cavanaugh v. Centerville Block Coal Co.*, 109 N. W. 303, 306, 131 Iowa, 700, 7 L. R. A. (N. S.) 907.

It is not necessary that the particular injury resulting from a negligent act be foreseen to make the negligence the "proximate cause" of the injury. *Cincinnati, H. & D. R. Co. v. Acrea*, 82 N. E. 1009, 1012, 42 Ind. App. 127.

To constitute "proximate cause," it is not necessary that the precise injury should have been foreseen or apprehended as certain to occur. But it is sufficient if an ordinarily careful person ought, under the circumstances, to have foreseen that injury might

probably result. *Coolidge v. Hallauer*, 105 N. W. 568, 578, 126 Wis. 244 (citing *Meyer v. Milwaukee Electric R. & Light Co.*, 93 N. W. 6, 116 Wis. 336).

Where negligence is admitted or otherwise proved, and the injuries are immediate and flow directly from the negligent act, the guilty person will not be excused because the particular circumstances are unusual and could not ordinarily have been foreseen. *Fusselman v. Wabash R. Co.*, 122 S. W. 1137, 1139, 139 Mo. App. 198.

It is said and well settled that a party is not responsible "in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." In negligence, all courts, both in England and America, construe "proximate cause" as a cause from which a man of ordinary experience and capacity could see that the result might probably ensue. *Burlington & M. R. Co. v. Budin*, 40 Pac. 503, 504, 6 Colo. App. 275.

It is not necessary, to make one liable for negligent injuries, that he should have anticipated the particular accident if he negligently permitted conditions to exist or continue from which it might reasonably have been anticipated that some injury to another would result, and the resulting injury is the natural and reasonable consequence of the negligence. *Beaning v. South Bend Electric Co.*, 90 N. E. 786, 792, 45 Ind. App. 261.

The liability of a person charged with negligence does not depend on whether, with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained of; he being liable for anything which, after the injury is complete, appears to have been a natural or probable consequence of his act or omission. *Woodson v. Metropolitan St. R. Co.*, 123 S. W. 820, 827, 224 Mo. 685, 30 L. R. A. (N. S.) 931, 20 Ann. Cas. 1039.

While consequential damages which may be recovered for violation of a statutory duty are such as might reasonably be anticipated by the perpetrator, and must be the natural effect thereof, it is not essential that the wrongdoer may have foreseen the identical injury to the particular person; it being sufficient that the act has a tendency to injure some one, and finally does so, in which case the wrongful act is a "proximate cause." *Cleveland, C. & St. L. R. Co. v. Tauer*, 96 N. E. 758, 760, 176 Ind. 621, 39 L. R. A. (N. S.) 20.

It is not essential to make a negligent act the proximate cause of an injury that the particular injurious consequences and the precise manner of their infliction could reasonably have been foreseen by the wrongdoer; but, where the consequences follow in unbroken sequence from the wrong to the injury without any intervening efficient cause,

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While consequential damages which may be recovered for violation of a statutory duty are such as might reasonably be anticipated by the perpetrator, and must be the natural effect thereof, it is not essential that the wrongdoer may have foreseen the identical injury to the particular person; it being sufficient that the act has a tendency to injure some one, and finally does so, in which case the wrongful act is a "proximate cause." *Cleveland, C. & St. L. R. Co. v. Tauer*, 96 N. E. 758, 760, 176 Ind. 621, 39 L. R. A. (N. S.) 20.

It is not essential to make a negligent act the proximate cause of an injury that the particular injurious consequences and the precise manner of their infliction could reasonably have been foreseen by the wrongdoer; but, where the consequences follow in unbroken sequence from the wrong to the injury without any intervening efficient cause,

it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. *Heiting v. Chicago, R. I. & P. R. Co.*, 96 N. E. 842, 845, 252 Ill. 466, Ann. Cas. 1912D, 451.

There is an apparent conflict in the judicial definitions of "probable cause." What they mean, we think, is about this: If the injury, whatever it may be, directly and naturally flows from the negligence complained of, the defendant is liable, though the particular injury would not ordinarily be expected to result from such negligence. On the other hand, if the injury is extraordinary and exceptional, such as no man could foresee or provide against, the defendant will not be liable, though the injury would not have happened but for his negligence. If this is a correct interpretation of the language of the cases defining probable cause, then they are harmonious and are useful as guides in applying the doctrine to the facts in every case. *Foley v. McMahon*, 90 S. W. 113, 114, 114 Mo. App. 442.

Negligence, to be the "proximate cause" of an injury, must be such that a person of ordinary caution and prudence would have foreseen that an injury would likely result therefrom; not that the specific injury would result, but an injury of some character. "It is not necessary that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. In other words, it is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequence of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault." *Atchison, T. & S. F. Ry. Co. v. Parry*, 73 Pac. 105, 107, 67 Kan. 515 (quoting and adopting definition in *Thomp. Neg.* § 59).

"Proximate cause" of an injury must produce it under such circumstances that he who is responsible for such cause as a person of ordinary intelligence and prudence ought reasonably to foresee that personal injury to another may probably follow from such person's conduct. *Feldschneider v. Chicago, M. & St. P. R. Co.*, 99 N. W. 1034, 1037, 122 Wis. 423.

In an action by a passenger for injuries, an instruction defining the term "proximate cause" as that which naturally and probably caused the injury, that is, the cause which leads up to or might naturally be expected to produce the result, was too restricted, for whether it might naturally be expected to produce the result or not, if it was the cause which did produce it, it was the proximate cause. *Cleveland & S. W. Traction Co. v. Ward*, 27 Ohio Cir. Ct. R. 761, 767.

"Negligence is the 'proximate cause' of an injury only when such injury is the natural and probable result of it, and, in the light of attending circumstances, ought to have been foreseen by a person of ordinary intelligence and prudence." *Banderob v. Wisconsin Cent. R. Co.*, 113 N. W. 738, 743, 133 Wis. 249; *Lemke v. Milwaukee Electric Ry. & Light Co.*, 136 N. W. 286, 288, 149 Wis. 535.

The injury must have been the natural and probable consequence of the negligent act which an ordinarily prudent person ought reasonably to have foreseen might have occurred as a result of the negligence, and without which the injury would not have occurred, in order to make such act the "proximate cause" of the injury, and if a cause is remote and only furnished the condition or occasion of the injury, it is not the proximate cause thereof. *Logan v. Cincinnati, N. O. & T. P. R. Co.*, 129 S. W. 575, 577, 139 Ky. 202.

In order to recover damages for an injury because of negligence, the burden is on plaintiff, not only to show negligence, but to prove that such negligence was the "proximate cause" of the injury; that is, the negligent act must have been the natural and probable cause of the injury, which ought to have been foreseen in the light of the attending circumstances. *Southern Kansas R. Co. of Texas v. Emmett (Tex.)* 139 S. W. 44, 47.

Negligence, to be the "proximate cause" of an injury, must be the natural and probable consequence of the negligent or wrongful act, which ought to have been foreseen by a reasonably prudent man in the light of the attending circumstances. *Butler v. Gulf Pipe Line Co. (Tex.)* 144 S. W. 340, 342.

A "proximate cause" is one that directly causes, or contributes directly to cause, the result, without any independent, efficient cause intervening between the cause and the resulting injury. The particular injuries sustained need not have been in fact contemplated, but the injuries sustained must be such as should have been contemplated as a natural and probable proximate result of the negligence. *Florida East Coast R. Co. v. Wade*, 43 South. 775-777, 53 Fla. 620 (citing *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.*, 9 South. 661, 27 Fla. 1, 157, 17 L. R. A. 33, 65; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Moore v. Lanier*, 42 South. 462, 52 Fla. 353; *Western Union Tel. Co. v. Milton*, 43 South. 495, 53 Fla. 484, 11 R. A. [N. S.] 560, 125 Am. St. Rep. 1077; 6 Current Law, 757; *Florida Cent. & P. R. Co. v. Williams*, 20 South. 558, 37 Fla. 406; *Savannah, F. & W. R. Co. v. Cosens*, 35 South. 398, 46 Fla. 237; *Seaboard Air Line R. Co. v. Barwick*, 41 South. 70, 51 Fla. 304; *Moore, Carriers*, p. 377, § 2).

Negligence is the "proximate cause" of an injury when it appears that the "injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. *Schwarzschild & Sulzberger Co. v. Weeks*, 83 Pac. 406, 408, 72 Kan. 190, 4 L. R. A. (N. S.) 515 (quoting and adopting *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256).

To warrant a finding that negligence is the proximate cause of an injury, it must generally appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances. *Ultima Thule, A. & M. R. Co. v. Benton*, 110 S. W. 1037, 1088, 86 Ark. 289; *McGill v. Michigan S. S. Co.*, 144 Fed. 788, 792, 75 C. C. A. 518.

An instruction, in an action for a servant's injury, that negligence is the "proximate cause" of an injury only when the injury is the natural and probable result of it, and when in the light of attending circumstances it ought to have been foreseen by a person of ordinary care, was proper. *Monaghan v. Northwestern Fuel Co.*, 122 N. W. 1066, 1068, 140 Wis. 457.

In determining what is "proximate cause" the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the circumstances of the case, might or ought to have been foreseen by the wrongdoer as likely to flow from his act. *Russell v. Westmoreland County*, 26 Pa. Super. Ct. 425, 429.

"In determining what is 'proximate cause,' the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his acts." *Waters-Pierce Oil Co. v. Knisel*, 96 S. W. 342, 345, 79 Ark. 608 (quoting and adopting definition in *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653).

"The 'proximate' legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, as a natural and probable result of the cause which first acted, under such circumstances as the person responsible for the first event should as an ordinarily prudent and intelligent person have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result therefrom." *Stefanowski v. Chain Belt Co.*, 109 N. W. 532, 533, 129 Wis. 484, 7 L. R. A. (N. S.) 955.

"A 'proximate cause' is one that leads to or produces, or directly contributes to pro-

ducing, the result or loss. If the loss is not such as would likely or probably result from the negligence of defendant, he is not liable, since he can ordinarily be held responsible only for the probable results of his negligence, which he should have foreseen." *Western Union Tel. Co. v. Milton*, 43 South. 495, 500, 53 Fla. 484, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077 (citing *Moore v. Lanier*, 42 South. 462, 52 Fla. 353; *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Mfg. Co.*, 9 South. 861, 27 Fla. 1, 157, 17 L. R. A. 33, 65; *Janes v. City of Tampa*, 42 South. 729, 52 Fla. 292, 120 Am. St. Rep. 203, 11 Ann. Cas. 510).

To constitute "proximate cause," the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as the result, though it is not necessary that the negligent person might have foreseen the precise form of the injury. *Seith v. Commonwealth Electric Co.*, 89 N. E. 425, 427, 241 Ill. 252, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204.

If, from the time a negligent act of the defendant occurs, the ensuing consequences flow from and become attributable to his conduct as the cause which controlled and led to the final event, his negligence thus becomes the efficient cause and is proximate in its character, if he ought reasonably to have foreseen that a personal injury might result therefrom. "It is not required that the 'specific' injury or 'such' an injury as is complained of was or ought to have been specifically anticipated as the natural and probable consequences of the wrongful act. It is sufficient if the facts and circumstances are such that the consequences attributable to the wrongful conduct charged are within the field of reasonable anticipation." *Winchel v. Goodyear*, 105 N. W. 824, 826, 126 Wis. 271 (citing *Morey v. Lake Superior Terminal & Transfer Ry. Co.*, 103 N. W. 271, 125 Wis. 148, 12 L. R. A. [N. S.] 221).

If one desires to save an objection to an instruction that proximate cause is that which naturally produces the event, and without which the event could not have happened, because it omits the condition that the result must be such as a person of ordinary prudence should have foreseen, he must request a special charge upon the matter. *Thompson & Ford Lumber Co. v. Thomas (Tex.)* 147 S. W. 296, 303 (citing 6 Words and Phrases, p. 5760).

An instruction defining proximate cause as that which in a natural and continuous sequence, unbroken by any new independent cause, produces the event, and without which the event would not have occurred, was not objectionable for failure to require that defendant must have reasonably anticipated injury as the result of the acts for which it

was sought to be held liable. *Missouri, K. & T. R. Co. of Texas v. Turner* (Tex.) 138 S. W. 1126, 1127.

An instruction, defining "proximate cause" as "such a cause in the absence of which injury would not have happened," was erroneous as ignoring the distinction between proximate and remote cause, and leaving out the essential element that the result must be such as a person of ordinary prudence should have foreseen as likely to occur, as a probable consequence in the light of all the attending circumstances. *Gulf Cooperage Co. v. Abernathy*, 116 S. W. 869, 871, 54 Tex. Civ. App. 137.

In an action by a servant for personal injuries, a definition of "proximate cause" as a cause without which the injury would not have occurred, while erroneous because failing to state that such a cause must be one from which it could have been reasonably anticipated that the injury would result as a natural and probable consequence, was cured by other instructions stating that the jury could not find for plaintiff unless the negligent failure of defendants to inform plaintiff that the dangers incident to his occupation evidenced a want of care on defendants' part and that defendants should have reasonably anticipated injury to plaintiff as the probable result of such want of care. *Rice v. Dewberry* (Tex.) 93 S. W. 715, 719.

To render a master liable for an injury there must be a direct causal connection between his misconduct and the injury, and the latter must be the direct result of some negligent act of the master. But he is chargeable with the natural and probable consequences of his own act and the causal connection will be sufficient if, according to the usual experience of mankind, the result ought to have been foreseen and provided against by him. The intervening act of a third person or other agency contributing to, and bringing about, a condition necessary to produce the injurious effect of the original negligence, will not excuse the first wrongdoer, if the intervening cause and its probable consequence be such as should have been anticipated by the latter. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise. *Trickey v. Clark*, 93 Pac. 457, 460, 50 Or. 516 (citing *Ahern v. Oregon Telephone & Telegraph Co.*, 33 Pac. 403, 35 Pac. 549, 24 Or. 276, 22 L. R. A. 635; *Stone v. Boston & A. R. Co.*, 51 N. E. 1, 171 Mass. 536, 41 L. R. A. 794).

A wrongful act is not the "proximate cause" of an injury which is not the ordinary and natural consequence of such act unless the person doing the act knows, or has reasonable means of knowing, that consequences not usually resulting from the act are by reason of some existing cause likely to inter-

vene so as to cause the damage. *Stewart v. City of Ripon*, 38 Wis. 584, 590.

There are two essential elements in the doctrine of "proximate cause": (1) It must appear that the injury was the natural or probable consequence of the negligent or wrongful act; (2) that it ought to have been foreseen in the light of attending circumstances. A fire started in a building some distance from plaintiff's hotel, for which defendant railroad company was not responsible. The fire burned several buildings and spread to and burned certain piles of lumber on and along defendant's right of way, from which piles it spread to plaintiff's hotel and destroyed it. Held, that defendant's negligence, if any, in permitting such lumber to be piled on its right of way adjacent to plaintiff's hotel, was not the "proximate cause" of the burning of the hotel. *Bowers v. East Tennessee & W. N. C. R. Co.*, 57 S. E. 453, 454, 144 N. C. 684, 12 L. R. A. (N. S.) 446.

The first requisite of "proximate cause" is the doing or omitting to do an act which a person of ordinary prudence would foresee might naturally or probably produce the injury, and the second requisite is that it did produce it, and where a trespasser on defendant's train was forcibly ejected therefrom by defendant's brakeman, while the train was moving rapidly, and in falling struck a clearance post by the side of the track, and was thereby thrown under the car wheels and injured, the wrongful act of the brakeman was the "proximate cause" of the injury. *Hayes v. Southern Ry. Co.*, 53 S. E. 847, 848, 141 N. C. 195.

To warrant a finding that negligence, or an act not amounting to wanton wrong, is the "proximate cause" of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Where it is alleged that deceased died from a shot fired by third persons while deceased was in the custody of officers of the law under arrest, and that his death was caused by the negligence of such officers in failing to protect deceased, the "proximate cause" of his death was the shot, and not the negligence of the officers in failing to protect him. *Jarnagin v. Travelers' Protective Ass'n of America*, 133 Fed. 892, 894, 66 C. C. A. 622, 68 L. R. A. 499 (quoting from *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256).

The rule in determining what is "proximate cause" is that the injury must be the natural and probable consequence of the negligence charged, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act. Wires of a telephone company and of an electric light company were strung on the



same poles. The telephone wires maintained below the electric light wires became broken. The electric light wires also became broken, and both wires emitted sparks, and one was injured by coming in contact with the electrically charged telephone wires. The telephone wires became charged by coming in contact with the electric light wires. The proximate cause of the injury was the defective condition of the electric light wires. *Oklahoma Gas. & Electric Co. v. Lukert*, 84 Pac. 1076, 1081, 16 Okl. 397.

Negligence, to be the "proximate cause" of an injury, must be such that a person of ordinary caution and prudence would have foreseen that an injury would likely result therefrom; not that the specific injury would result, but an injury of some character. In an action against the owners of an oil well to recover damages for the loss of tools, etc., by fire resulting from an explosion, on the ground of negligence in causing the well to be shot with nitroglycerine late in the evening instead of waiting until the following day, and in failing to leave a suitable person in charge during the night, where the evidence showed that an explosion occurred about 9 o'clock in the nighttime when no one was present, that there was no fire about the premises, and there was no evidence showing how the escaping oil came in contact with the fire or what the immediate or direct cause of the explosion was, the alleged acts of negligence were the remote and not the "proximate cause" of the injury, and the proximate cause was, necessarily, some independent agency. The acts of the owner only furnished the condition by which the injury was made possible. *Comes v. Dabney*, 102 Pac. 488, 490, 79 Kan. 820 (citing and adopting *Atchison, T. & S. F. R. Co. v. Parry*, 73 Pac. 106, 67 Kan. 515, *Missouri Pac. Ry. Co. v. Columbia*, 69 Pac. 338, 65 Kan. 390, 58 L. R. A. 399).

In order to make a negligent act the "proximate cause" of an injury, it is not necessary that the particular injury and particular manner of its occurrence could reasonably have been foreseen; but if the consequences follow in unbroken sequence from the wrong to the injury, without an intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from his negligence. Where a railway company allowed combustible material to accumulate upon its right of way next to intestate's premises, it was bound to anticipate that, if a fire started therein and endangered her property, she would try to put it out; and where a fire started from a spark from defendant's locomotive and spread to intestate's premises, and she, in attempting to extinguish it and while exercising due care, was burned to death, defendant's negligence was the "proximate cause" of the injury, since it should

have anticipated such a result as probable. *Illinois Cent. R. Co. v. Siler*, 82 N. E. 362, 364, 229 Ill. 390, 15 L. R. A. (N. S.) 819, 11 Ann. Cas. 368.

A carrier is not liable for a loss of property in shipment through an act of God, which could not reasonably have been foreseen, although, but for its previous negligence, by which the shipment was delayed, the property would have escaped the danger and the loss would not have occurred. In such case the negligence is not the "proximate cause" of the injury. *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.*, 135 Fed. 135, 141.

Negligence of a person cannot be the "proximate cause" of a harm to another following it unless under all the attending circumstances ordinary prudence would have admonished the person sought to be charged with the negligence that his act or omission would probably result in injury to some one. The general test as to whether negligence is the "proximate cause" of an accident is therefore said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby. "Proximate cause" is the probable cause. A farmer who had driven a team of 11 year old horses 17 miles hitched one of them, as he had been frequently in the habit of doing, to a hitching rail in front of a store, and was engaged in unloading his wagon, going back and forth for this purpose but a short distance. The halter was apparently in good condition, and no defect therein was shown. While the team was standing quietly, a boy, in turning over the hitching rail near the head of the team, struck the nose of the one hitched with his foot, which frightened the team and caused them to break loose, by breaking the halter, and run away, causing damage. Held, that the striking of the horse by the boy was the "proximate cause" of the accident. *Stephenson v. Corder*, 80 Pac. 938, 939, 71 Kan. 475, 69 L. R. A. 246, 114 Am. St. Rep. 500 (quoting 1 *Thomp. Neg.* § 50).

Where negligence in setting out a fire is established, changes in the direction and force of the wind carrying the result of the negligence further than it would otherwise have gone does not affect the liability for the injuries, though entirely unforeseen. *E. T. & H. K. Ide v. Boston & M. R. R.*, 74 Atl. 401, 406, 83 Vt. 66.

#### Inevitable or necessary result

The "proximate cause" of an injury is the one that necessarily sets the other causes in operation. *Zellers v. Delaney*, 78 A. 212.

A "proximate cause" is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible; it is one which can be used as a term by which a proposition can be

demonstrated; that is, one which can be reasoned from conclusively. The "proximate cause" being given, the effect must follow, and it is this idea of necessity—the necessary connection between the cause and the effect—that is the prime distinction between a proximate and a remote cause. *McGovern v. Degnon-McLean Contracting Co.*, 105 N. Y. Supp. 408, 410, 120 App. Div. 524 (citing 4 Am. Law Rev. 201, 203; *Laidlaw v. Sage*, 52 N. E. 679, 158 N. Y. 73, 99, 44 L. R. A. 216).

A "proximate cause" is one which is involved in the idea of necessity. A city is not liable for injury to a horse slipping upon asphalt pavement and getting its foot wedged in a sewer culvert opening in the face of the sidewalk curb, 3 feet 8 inches long and 8 inches high above the street level; it not appearing similar accidents had ever occurred or that the city had notice of the likelihood of such an accident. *Vaccarini v. City of New York*, 104 N. Y. Supp. 928, 931, 54 Misc. Rep. 600.

#### Intervening agency

An alleged act of negligence, which would not have produced the injury but for the interposition of an independent cause which could not have been reasonably anticipated, but which turned aside the natural sequence of events and produced the result, is not the "proximate cause" of the injury and is not actionable. The intervening cause is the only "proximate cause." *American Bridge Co. v. Seeds*, 144 Fed. 605, 610, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041.

An act of negligence is not the "proximate cause" of an injury, in a legal sense, where there was an independent intervening cause, unless the injury was not only the natural, but the probable, result of such negligence, and the intervening cause should reasonably have been foreseen. *The Santa Rita*, 173 Fed. 413, 417.

The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events, put in motion by the original or primary negligence, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected. *Harton v. Forest City Telephone Co.*, 54 S. E. 299, 302, 141 N. C. 455.

"In speaking of an adequate and independent intervening cause, as cutting off the connecting and negligent and a subsequent injury, it is not proper to require that the intervening cause to be searched for be one involving negligence or wrong." *Cavanaugh v. Centerville Block Coal Co.*, 109 N. W. 303, 306, 181 Iowa, 700, 7 L. R. A. (N. S.) 907.

"In determining the proximate cause we must look to the direct and efficient cause—that is, the thing amiss—and determine whether the injury resulted therefrom. An intervening human agency may break the connection between the negligent act and the subsequent injury, but that agency must act either independently of the preceding negligence, or the intervening action must have been negligent, so as to constitute an independent proximate cause, in order to break the connection between the wrong complained of and the injury." *Phinney v. Illinois Cent. R. Co.*, 98 N. W. 358, 361, 122 Iowa, 488.

The direct or "proximate" consequences of a wrongful act are those which occur without any intervening independent cause; and the fact that the injuries chiefly complained of were caused immediately by the act of plaintiffs in walking from the place where they left the cars to the next station will not relieve defendant from liability therefor, where it appears that the plaintiffs' act in so walking was rendered apparently necessary by defendant's wrongful act, and was not negligent. *Brown v. Chicago, M. & St. P. Ry. Co.*, 11 N. W. 356, 363, 54 Wis. 342, 41 Am. Rep. 41.

Where, in the sequence of events between an original default and a final injury, an entirely independent and unrelated cause intervenes which is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the "proximate cause" and the other as the "remote cause." *Atchison, T. & S. F. R. Co. v. Calhoun*, 29 Sup. Ct. 321, 323, 213 U. S. 1, 53 L. Ed. 671 (citing *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. [74 U. S.] 44, 52, 19 L. Ed. 65, 67).

A negligent act may be the "proximate cause" of an injury, though not the sole cause, where the intervening act is set in motion or induced by the negligent act, and the consequence is one that should have been foreseen. *Dannenhower v. Western Union Tel. Co.*, 67 Atl. 207, 218 Pa. 216 (citing *Marsh v. Giles*, 60 Atl. 315, 211 Pa. 17).

It is a principle of law, applicable to the doctrine of "proximate cause," that if the original act was wrongful, and would naturally in the course of events prove injurious to some person and does actually result in injury through the intervention of other causes not wrongful, the injury is referable to the wrongful cause. But if the original wrong becomes injurious only in consequence of the intervention of some distinct wrongful act by another, the injury is imputed to the last wrong as a proximate cause. *Currier v. McKee*, 59 Atl. 442, 443, 99 Me. 364, 3 Ann. Cas. 57 (citing *Cooley*, Torts, p. 76).

"The breach of duty upon which an action is brought must be, not only the cause, but the 'proximate cause,' of the damage to the plaintiff. \* \* \* The 'proximate cause'

of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. If, after the cause in question has been in operation, some independent force comes in and produces an injury not its natural or probable effect, the author of the cause is not responsible. Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person moving independently comes in and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured." *McVay v. Brooklyn, Q. C. & S. R. Co.*, 99 N. Y. Supp. 266-268, 113 App. Div. 724 (quoting and adopting definition in *Laidlaw v. Sage*, 52 N. E. 679, 153 N. Y. 73, 99, 44 L. R. A. 216; distinguishing *Sheridan v. Brooklyn City & N. R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490).

When two or more causes culminate in an event, one may be nearer and more immediately connected with the result than the others. It is only when something occurs, subsequent to the defendant's act, which makes it result in what would not otherwise have happened, that the latter or intervening cause is said to be the efficient one, and for the result of which the original actor is not responsible in law. Where a motorman in charge of a train of cars on an electric railroad in a mine was injured in a collision with a car negligently left on the track by the preceding train, and the track was not sufficiently lighted to enable the motorman to see plainly obstructions so left, the "proximate cause" of the injury was the negligence of the mineowner in failing to provide proper lights, and not the negligence of the motorman's fellow servant in charge of the first train in permitting one of their cars to obstruct the tracks, or the failure to provide suitable lights on the motor car, etc. *Central Coal & Iron Co. v. Pearce* (Ky.) 80 S. W. 449, 450.

When one has violated a duty imposed upon him by the common law, he should be held liable to every person injured thereby whose injury is the natural and probable consequence of his misconduct, and this liability extends to such injuries as might reasonably have been anticipated under ordi-

nary circumstances as the natural and probable result of the wrongful act. If, subsequently to the original wrongful or negligent act, a new cause has intervened of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote. The original wrongful or negligent act will not be regarded as the "proximate cause" where any new agency, not within the reasonable contemplation of the original wrongdoer, has intervened to bring about the injury. Where, however, the intervening cause and its probable or reasonable consequences are such as could reasonably have anticipated by the original wrongdoer, the casual connection between the original wrongful act and the subsequent injury is not broken, and an action may lie therefor. The act of a railway ticket agent infected with smallpox in exposing himself to plaintiff, who purchased tickets from him, was the "proximate cause" of plaintiff's wife contracting the disease, where plaintiff contracted it and communicated it to her. *Missouri, K. & T. R. Co. of Texas v. Raney*, 99 S. W. 589, 44 Tex. Civ. App. 517.

The question of "proximate cause" always is: "Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the fact constitute a continuous succession of events, so linked together as to make a natural whole? Or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances." In the case at bar the injury resulting to defendant's colt in trying to get over a barbed wire fence to where plaintiff's colts were could not have been anticipated by plaintiff in permitting his colts to remain in the highway adjoining defendant's land. It is true the remote cause of the injury was the fact that plaintiff's colts were on defendant's land or at large. The "proximate" cause seems to have been the efforts of defendant's colt to get over the fence, thereby becoming entangled in the barbed wire resulting in its injury. The proximate cause of the injury therefore was the act of defendant's colt. *Louiseau v. Arp*, 114 N. W. 701, 703, 21 S. D. 566, 14 L. R. A. (N. S.) 855, 130 Am. St. Rep. 741.

"What in law is a 'proximate cause' is well expressed in the definition found in the case of *Milwaukee & St. P. R. Co. v. Kellogg*. 94 U. S. 469, 474, 24 L. Ed. 256. The primary cause may be the 'proximate cause' of a disaster, though it operates through successive instruments, as an article at the end of

a chain may be moved by force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd*, 2 W. Bl. 892. The question always is: Was there any unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a succession of events so linked together as to make a natural whole? Or was there some new and independent cause intervening between the wrong and the injury? This definition is quoted with approval in *Mack v. South Bound R. Co.*, 29 S. E. 905, 52 S. C. 324, 40 L. R. A. 679, 68 Am. St. Rep. 913. This court then says: There may be a succession of intermediate causes, each produced by the one preceding and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring the injurious results. Whether the natural connection of events was maintained or was broken by such new, independent cause is generally a question for the jury. The rule is thus stated in *Harrison v. Berkley* (S. C.) 1 Strob. 525, 549, 47 Am. Dec. 578. It is therefore required that the consequences to be answered for should be natural as well as proximate. 7 Bing. 211; 5 Barn. & Adol. 645. By this I understand, not that they should be such as upon a calculation of chances would be likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from. In requiring concurring consequences that they should be proximate and natural to constitute legal damage, it seems that, in proportion as one quality is strong, may the other be dispensed with; that which is immediate cannot be considered unnatural; that which is reasonably to be expected will be regarded, although it may be considerably removed. *Bennett v. Lockwood* (N. Y.) 20 Wend. 223, 32 Am. Dec. 532." *Cooper v. Richland County*, 56 S. E. 958, 959, 76 S. C. 202, 10 L. R. A. (N. S.) 799, 121 Am. St. Rep. 946.

The question of "proximate cause" "is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of the disaster, though it may operate through successive instruments, as an article at the end of a chain may move by a force applied to the other end, that force being the proximate cause, or as in the oft-cited case of the squib thrown in the market place. The question always is: Was there an unbroken connection between the wrongful act and the

injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of attending circumstances." *McKibbin v. F. E. Bax & Co.*, 113 N. W. 158, 159, 79 Neb. 577, 13 L. R. A. (N. S.) 646, 126 Am. St. Rep. 677 (quoting and adopting definition in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469-474, 24 L. Ed. 256); *Sipes v. Puget Sound Electric Ry.*, 102 Pac. 1057, 1059, 54 Wash. 47 (quoting and adopting definition in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256).

Where an injury attributed to a particular cause occurs through or by means of some intervening cause from which the injury follows as a direct and immediate consequence, the law will refer the damage to the last proximate cause and refuse to attribute it to that cause which was more remote. The reason for this rule is found in the impossibility of tracing consequences through successive steps to the remote cause and the necessity of pausing in the investigation in the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries safely. As stated by Addison: "If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not according to the ordinary course of events follow from the wrong, then the wrong and damage are not sufficiently conjoined and concatenated as cause and effect to support an action." Therefore, where an operating cause is intercepted by an independent force and by that force the injury is produced not in its natural or probable effect, the author of the original operating cause is not responsible. The producing cause of an injury must be one which would naturally bring about the injurious result, and the result must have actually occurred, and therefore, if a party be guilty of an act of negligence which would naturally produce an injury to another, but before the injury actually results a third person does some act which is the immediate cause of the injury, such third person is alone responsible, and the original party is not responsible, though the injury would not have occurred but for his negligence. The logical rule in this connection is that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the cir-

cumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow if they had occurred to his mind. *Mobile & O. R. Co. v. Christian Moerlein Brewing Co.*, 41 South. 17, 18, 146 Ala. 404 (citing *Cooley*, Torts, p. 73, § 69; *Bish*, Noncont. Law, §§ 41, 42; *Whart. Neg.* § 75; *Shear. & R. Neg.* § 26; *Lewis v. Flint & P. M. Ry. Co.*, 19 N. W. 744, 54 Mich. 55, 52 Am. Rep. 780; *Western Ry. of Alabama v. Mutch*, 11 South. 894, 97 Ala. 194, 21 L. R. A. 316, 38 Am. St. Rep. 179; *Armstrong v. Montgomery St. Ry. Co.*, 26 South. 349; 123 Ala. 233; *Alabama G. S. R. Co. v. Arnold*, 2 South. 337, 80 Ala. 600; *Louisville & N. R. Co. v. Quick*, 28 South. 14, 125 Ala. 553).

"When a plaintiff, through the negligence of defendant, is placed in a situation where he must adopt a perilous alternative, or where, in the terror of an emergency for which he is not responsible and for which defendant is responsible, he acts wildly or negligently and suffers in consequence, such negligent conduct under these circumstances is not 'contributory negligence' for the reason that persons in great peril are not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. In such case the negligence of the defendant is the 'proximate cause' of the injury, and plaintiff may have his action \* \* \* even though the injury would not have happened if the acts had not been done." *Texas Midland R. Co. v. Byrd*, 90 S. W. 185, 187, 41 Tex. Civ. App. 164 (quoting and adopting definition in *Beach*, Contrib. Neg. § 14; *International & G. N. Ry. Co. v. Neff*, 28 S. W. 283, 87 Tex. 303).

Where the setting of a fire by and from a locomotive of the defendant was the "proximate cause" of the injury to plaintiff's trees, it was none the less so by reason of a change in the direction of the wind which was blowing at the time the fire was set, and which continued to blow without any extraordinary increase in its velocity, until the flames were carried to the trees of plaintiff injuring and destroying them. A simple change in the direction of the wind is not an intervening cause that will prevent recovery. *Florida East Coast R. Co. v. Welch*, 44 South. 250, 256, 53 Fla. 145, 12 Ann. Cas. 210.

Where a bridge tender was primarily negligent in failing to open the bridge in time and there was no contributory negligence of those in charge of a vessel approaching the bridge, the operation by which the master undertook to stop the boat and the striking of a pier were not such intervening causes as prevented the bridge tender's original negligence for constituting the "proximate cause" of the injury. *Southern R. Co.*

*v. Reeder*, 44 South. 699, 701, 152 Ala. 227, 126 Am. St. Rep. 23.

Where one drove negligently at a rapid rate along a public alley and ran upon a guy wire negligently anchored by a telephone company in the alley, overturning the vehicle, and causing personal injuries to plaintiff, the fact that the negligence of the driver intervened between that of the telephone company and the injury to plaintiff does not prevent the company from being liable therefor. *Louisville Home Telephone Co. v. Gasper*, 93 S. W. 1057, 1058, 123 Ky. 128, 9 L. R. A. (N. S.) 548.

#### Natural and probable result

The "proximate cause" is that which produces the injury as a natural and probable result. *Roedler v. Chicago, M. & St. P. Ry. Co.*, 109 N. W. 88, 91, 129 Wis. 270; *Feldschneider v. Chicago, M. & St. P. R. Co.*, 99 N. W. 1034, 1037, 122 Wis. 423.

For negligence to be the "proximate cause" of an injury, the injury must be the natural and probable result thereof. *Banderob v. Wisconsin Cent. R. Co.*, 113 N. W. 738, 743, 133 Wis. 249; *Lemke v. Milwaukee Electric Ry. & Light Co.*, 136 N. W. 286, 288, 149 Wis. 535; *Monaghan v. Northwestern Fuel Co.*, 122 N. W. 1066, 1068, 140 Wis. 457; *Russell v. Westmoreland County*, 26 Pa. Sup. Ct. 425, 429; *Waters-Pierce Oil Co. v. Knisel*, 96 S. W. 342, 345, 79 Ark. 608; *Seith v. Commonwealth Electric Co.*, 89 N. E. 425, 427, 241 Ill. 252, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204.

For a negligent or wrongful act to be the "proximate cause" of an injury, the injury must be the natural and probable consequence thereof. *Bowers v. East Tennessee & W. N. C. R. Co.*, 57 S. E. 453, 454, 144 N. C. 684, 12 L. R. A. (N. S.) 446; *International & G. N. R. Co. v. Schubert (Tex.)* 130 S. W. 708, 709; *Ultima Thule, A. & M. R. Co. v. Benton*, 110 S. W. 1037, 1038, 86 Ark. 289; *McGill v. Michigan S. S. Co.*, 144 Fed. 788, 792, 75 O. C. A. 518; *Schwarzchild & Sulzberger Co. v. Weeks*, 83 Pac. 406, 408, 72 Kan. 190, 4 L. R. A. (N. S.) 515; *Oklahoma Gas & Electric Co. v. Lukert*, 84 Pac. 1076, 1081, 18 Okl. 397; *Marsh v. Great Northern Paper Co.*, 64 Atl. 844, 850, 101 Me. 489; *Logan v. Cincinnati, N. O. & T. P. R. Co.*, 129 S. W. 575, 577, 139 Ky. 202; *Butler v. Gulf Pipe Line Co. (Tex.)* 144 S. W. 340, 342.

The "proximate cause" of an injury is an act of negligence which produces it, as its natural and probable consequence. *Brubaker v. Kansas City Electric Light Co.*, 110 S. W. 12, 14, 130 Mo. App. 439 (quoting and adopting definition in *Cole v. German Savings & Loan Soc.*, 124 Fed. 114, 59 C. C. A. 595, 63 L. R. A. 416).

An act to constitute "probable cause" of an injury must have been so connected with the injury that the injury would naturally

and probably result therefrom. *Atchison, T. & S. F. R. Co. v. Dickens*, 103 S. W. 750, 755, 7 Ind. T. 16.

To warrant a finding that negligence or an act not amounting to wanton wrong is the "proximate" cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act. *Jarnagin v. Travelers' Protective Ass'n of America*, 133 Fed. 892, 894, 66 C. C. A. 622, 68 L. R. A. 499.

An instruction on "proximate cause," requiring the injury to have been reasonably foreseen or expected as the natural result of the act or omission complained of, in substance required that the injury should be the natural and probable result of such act or omission, and was therefore unobjectionable. *Olwell v. Skobis*, 105 N. W. 777-783, 126 Wis. 308.

Where it is said that the injury must be the "natural and probable consequence of the act of negligence," it means, tracing the effect to the cause, was it probable and natural? *Boyce v. Chicago & A. R. Co.*, 98 S. W. 670, 672, 120 Mo. App. 168.

The natural and probable consequences of a wrongful act or omission means any consequence, immediate or removed, that is directly traceable by natural laws of causation to the wrongful act as the major force. What are regarded as natural and probable consequences are sometimes defined to be such results and effects as according to the usual experience of mankind ought to have been apprehended. The question is never whether the result is possible but was it probable; that is, would it appear probable according to common experience and observation? *P. H. & F. M. Roots Co. v. Meeker*, 73 N. E. 253, 254, 165 Ind. 132.

Where, in an action by a passenger for injuries received by waiting at an unheated depot, plaintiff claimed that consumption resulted from exposure to the cold, a charge defining "proximate cause" as the efficient cause, without which the injury would not have occurred, was insufficient for failing to contain the element as to whether the negligent omission complained of was the natural and probable cause of the injury. *Gulf, C. & S. F. R. Co. v. Turner (Tex.)* 93 S. W. 195, 198.

"It is sufficient to say that, when an act of negligence has been committed, or a wrongful act done, resulting in injury or damage, the party committing it will be responsible for all the consequences that naturally and reasonably flow from the negligent or wrongful act, although the result may not be immediately connected with the cause. It is a familiar rule that there can be no recovery for the negligent acts of another unless they were the 'proximate cause' of the injury complained of." *Louisville & N. R. Co. v. Daugherty (Ky.)* 108 S. W. 336,

338 (citing and adopting *Setter's Adm'r v. City of Maysville*, 69 S. W. 1074, 114 Ky. 60; *Louisville Home Telephone Co. v. Gasper*, 93 S. W. 1057, 123 Ky. 128, 9 L. R. A. [N. S.] 548; *Snydor v. Arnold*, 92 S. W. 289, 122 Ky. 557).

"Proximate cause" is not only that cause without which the accident would not have happened, but must also be a cause resulting from the negligent act or omission from which the injury would naturally and probably result. *Galveston, H. & S. A. R. Co. v. Paschall*, 92 S. W. 446, 448, 41 Tex. Civ. App. 357.

"The 'proximate cause' is to be defined generally as the cause which led to or might naturally be expected to produce the result. Whether plaintiff who was struck by a street car was the proximate cause of the collision, depends upon whether she used due diligence in watching the approaching car before attempting to cross the track, or looked in sufficient time to come within the usual prudential requirements." *Palmer v. Portland Ry., Light & Power Co.*, 108 Pac. 211-213, 56 Or. 262.

To constitute "proximate cause" creating liability for negligence, the injury must have been the natural and probable consequences of the negligent act. It is the cause, which naturally produces a given result. The negligence must be such that by the usual course of events would result in an injury unless independent moral agencies intervene in the particular injury. But where an event is followed in natural sequence by a result it is adapted to produce or aid in producing, the result is the consequence of the event. It is not necessary, however, that the injury should be the usual, necessary, or inevitable result of the negligence. In addition to the requirement that the result should be the natural and probable consequence of the negligence, it is commonly stated that the consequence should be one which, in the light of attending circumstances, an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence. If the injury could not have been reasonably anticipated as the probable result of an act of negligence, such act is either remote cause or no cause. A prior cause and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition, or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, efficient cause of the injury. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. Defendant railroad companies placed a car on the switch of a manufacturing company, the brakes of which were known to be bad by their employes, who chocked it on a grade to prevent it from moving, and thereafter em-

ployees of the manufacturing company with knowledge that the brake would not hold attempted to let it down for unloading by controlling it by means of chocks, but the chocks failed to hold, and it ran into other cars on the switch, which were knocked against plaintiff, who was engaged in picking up coal in the manufacturing company's employment. Held, in an action against the railroad companies for resulting injuries, that the employees of the manufacturing company were negligent in attempting to move the car, and the negligence of the manufacturing company's employees in attempting to move the car was the proximate cause of plaintiff's injuries, and not the defective brake. *Logan v. Cincinnati, N. O. & T. P. R. Co.*, 129 S. W. 575, 577, 139 Ky. 202 (quoting and adopting definition in 29 Cyc. pp. 492, 493; *Thomp. Neg. § 2*).

**Nearest or next cause**

It is only when the causes are independent of each other that the nearest is to be charged with the disaster. *Kremer v. New York Edison Co.*, 92 N. Y. Supp. 883, 888, 102 App. Div. 433.

In determining the "proximate cause" of an injury, it is not material whether it is first or last in the succession of events resulting therein, provided it is the responsible cause. *Peru Heating Co. v. Lenhart*, 95 N. E. 680, 684, 48 Ind. App. 319.

By "proximate cause" is not meant the last cause of an injury, but it may be any act which aided in producing the result. *San Antonio & A. P. R. Co. v. Trigo*, 106 S. W. 1193, 1194, 49 Tex. Civ. App. 523.

"Proximate cause" need not necessarily be the nearest cause, which may be merely an instrument of the dominant or efficient cause. *Richmond Coal Co. v. Commercial Union Assur. Co., Limited*, of London, England, 159 Fed. 985, 987.

Neither proximity in point of time nor space is an appropriate part of the definition of "proximate cause" in a personal injury case. *Ward v. North Carolina R. Co.*, 76 S. E. 717, 719, 161 N. C. 179.

"Proximate cause" does not mean the last cause or the act nearest to the injury, but such acts wanting in ordinary care as actually aided in producing the injury as a direct and existing cause, such as might reasonably have been contemplated as probable under the existing circumstances; nor is it necessary that the particular event which occurred should have been contemplated, but it is enough that the probable happening of some accident of the kind involving damage to the property of others should have been contemplated and guarded against. *St. Louis, B. & M. Ry. Co. v. Maddox (Tex.)* 152 S. W. 225, 227.

"Proximate cause" is probable cause. It does not mean the last act of cause or act

nearest to the injury, but such act wanting in ordinary care as actually aided in producing the injury as a direct and existing cause. It need not be the sole cause, but must be a concurring cause, such as might reasonably have been contemplated as involving a result under the attending circumstances. It is such cause as would probably lead to injury, and which actually has led to it. It need not appear that the injuries complained of resulted instantly and immediately from the act, since the law regards one act as the proximate cause of another without regard to the lapse of time where no other cause intervenes between such act and the injuries, but there must be nothing to break the causal connection between the act and the injuries. *Brown v. Oregon-Washington R. & Nav. Co.*, 128 Pac. 38, 40, 63 Or. 396.

It is not necessarily the last link in the chain of events which constitutes "proximate cause," but that which is the procuring, efficient, and predominant cause; that from which the effect might be expected to follow, without the concurrence of any unforeseen circumstances. *Russell v. German Fire Ins. Co. of City of Pittsburgh, Pa.*, 111 N. W. 400, 403, 100 Minn. 528, 10 L. R. A. (N. S.) 326 (citing *Ransier v. Minneapolis & St. L. Ry. Co.*, 20 N. W. 332, 32 Minn. 331; *Christianson v. Chicago, St. P., M. & O. Ry. Co.*, 69 N. W. 640, 67 Minn. 94; *Strobeck v. Bren*, 101 N. W. 795, 93 Minn. 428; *Phil. Ins.*, §§ 1132, 1134).

The "proximate cause" of an injury is not always the last act of cause or the nearest act to the injury, but it may be such a negligent act as actively aids in producing the injury as a direct and existing concurrent cause, and such as might reasonably be expected to result in the injury. *Texas & N. O. R. Co. v. Bellar*, 112 S. W. 323, 326, 51 Tex. Civ. App. 154.

"The 'proximate cause' is not necessarily the immediate, near, or nearest cause, but the one that acts first, whether immediate to the injury, or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result." *Cary v. Preferred Accident Ins. Co. of New York*, 106 N. W. 1055, 1056, 127 Wis. 67, 5 L. R. A. (N. S.) 926, 115 Am. St. Rep. 997, 7 Ann. Cas. 484 (quoting and adopting definition in *Delsenreiter v. Kraus-Merkel Malting Co.*, 72 N. W. 735, 97 Wis. 288).

The "proximate cause" is not necessarily the fact immediately preceding the result complained of, but there may be a line of facts forming a series, the first of the series being the proximate cause. *Mayrant v. City*

of Columbia, 57 S. E. 857, 858, 77 S. C. 281, 10 L. R. A. (N. S.) 1094.

In ordinary language, the proximate cause is the nearest cause, but in a legal sense an act of negligence may be deemed the proximate cause of the injury, though it may not be the last cause in a connected series of events which have led to the injury. *Chicago, R. I. & G. R. Co. v. Coffee* (Tex.) 126 S. W. 638, 640.

The nearest independent cause which is adequate to, and does, produce the result, is the proximate cause of the accident, and supersedes all remote causes. *Yeates v. Illinois Cent. R. Co.*, 89 N. E. 338, 341, 241 Ill. 205.

"In discussing legal causation, the phrase 'proximate cause' does not necessarily mean that which is nearest, but refers rather to the efficient cause, and in this sense is sometimes referred to as the immediate and direct cause, as opposed to remote; and the words 'proximate,' 'immediate,' and 'direct' are frequently used as synonymous." *Godwin v. Atlantic Coast Line R. Co.*, 48 S. E. 139, 141, 120 Ga. 747.

The expression "proximate cause" frequently signifies, not that act in a chain of causation nearest to the injury complained of, but the culpable act nearest to the injury. The movement of the elevator upward, as distinguished from negligence of the elevator operator in moving the elevator when he knew or should have known that a passenger's dress was caught in the door, was not the "proximate cause" of the accident, as a matter of law. *Hensler v. Stix*, 88 S. W. 108, 113, 118 Mo. App. 162.

An instruction that the "proximate cause" of anything means the nearest cause; the immediate cause; that cause in which there is nothing intervening between it and the effect or injury complained of—and that the negligence of defendant would not give plaintiff the right to recover unless it was the proximate cause of the injury, and that contributory negligence, unless the proximate cause of the injury, would be no defense, was proper. *Anderson v. Southern Ry.*, 50 S. E. 202, 70 S. C. 490.

In determining "proximate cause," the injury is directed to the responsible cause, without reference to whether it is the first or last in the succession of events that resulted in the injury, and it has further been defined to be the efficient cause that necessarily sets the other cause in operation. *Cincinnati, H. & D. R. Co. v. Acrea*, 82 N. E. 1009, 1011, 42 Ind. App. 127 (citing *Lake Erie & W. R. Co. v. Charman*, 67 N. E. 923, 161 Ind. 95; *Pennsylvania Co. v. Congdon*, 33 N. E. 705, 134 Ind. 226, 39 Am. St. Rep. 251).

The "proximate cause" is not necessarily the one nearest to the event, but the primary cause may be the one proximately responsible for the result, although it may operate

through one or more successive instruments. If the primary cause was so linked and bound to the events succeeding it that all together they create and become one continuous whole—the one event so operating upon the other as to tie the result to the primary cause—the latter will be the proximate cause of the injury. If there is some new and independent cause, disconnected from the first or original cause, operating in itself, which intervenes to produce the result, the chain of sequence will be broken, and the primary fault cannot be held to be the direct and proximate cause of the injury. *Shippers' Compress & Warehouse Co. v. Davidson*, 80 S. W. 1032, 1033, 35 Tex. Civ. App. 558.

The negligent act or omission, in order to be the "proximate cause" of an injury, must be the cause which produces the injury, but need not be the sole cause, or the last or nearest cause, it being sufficient if it concurs with some other cause, acting at the same time, which in combination with it causes the injury, or, if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by a new or independent cause; the question being determined, not by the existence or nonexistence of intervening events, but by their character and the natural connection between the original act or omission and the injurious consequences. *Seith v. Commonwealth Electric Co.*, 89 N. E. 425, 427, 241 Ill. 252, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204.

"The 'proximate cause' of an injury is not necessarily the last cause or the one nearest the injury, but such act, wanting in ordinary care, as actively aided or concurred in producing the result. An act may be a proximate cause without being the sole cause; the only requirement being that it is a concurring cause such as aided in producing the injuries." Hence, where it requires the agency of the fellow servants of the injured employé and the employer to produce the result, or where both contribute to the result as concurrent forces, the presence or assistance of the act of fellow servants will not exculpate the other agency. *Ray v. Pecos & N. T. R. Co.*, 88 S. W. 466, 468, 469, 40 Tex. Civ. App. 99 (citing *Shippers' Compress & Warehouse Co. v. Davidson*, 80 S. W. 1032, 35 Tex. Civ. App. 558).

"The 'proximate cause' of an accident or injury is sometimes described as the immediate cause, the nearest cause, the actual or direct cause, or the efficient cause." It was said by Mr. Justice Strong in *Atma Ins. Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 385, that: "The 'proximate cause' is the efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not proximate cause, and the responsible one, though they may be nearer in time to the result. It is only when the causes are independent



of each other that the nearest is, of course, to be charged with disaster. A careful consideration of the authorities will vindicate this rule. Mr. Phillips, in his work on Insurance (section 1097), in speaking of a *casus prius* case of a vessel burned by the master and crew to prevent its falling into the hands of the enemy (Gordon v. Rimmington, 1 Camp. 123), says: "The *maxim causa proxima* spectatur afford no help in these cases, but is, in fact, fallacious; for, if two causes conspire, and one must be chosen, the more scientific inquiry seems to be whether one is not the efficient cause, and the other merely instrumental or merely incidental, and not which is nearer in place or time to the consummation of the catastrophe." Hence complaint in a personal injury action against a street railway, alleging that it negligently ran its car into a switch off the track and against a pole, throwing the plaintiff to the floor and injuring him, sufficiently alleged that defendant's negligence was the "proximate cause" of the injury. *Indianapolis St. Ry. Co. v. Schmidt*, 71 N. E. 201, 202, 163 Ind. 360 (citing *Louisville, N. A. & C. R. Co. v. Lucas*, 21 N. E. 968, 119 Ind. 583, 6 L. R. A. 193; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Chicago, St. L. & P. R. Co. v. Williams*, 30 N. E. 690, 131 Ind. 30; *Indianapolis Union Ry. Co. v. Houllihan*, 60 N. E. 943, 157 Ind. 494, 503, 54 L. R. A. 787).

#### Nearest in time or place

Proximity in point of time or space is no part of the definition. *Boyce v. Chicago & A. R. Co.*, 96 S. W. 670, 671, 120 Mo. App. 168; *Georgetown Telephone Co. v. McCullough's Adm'r*, 80 S. W. 782, 783, 118 Ky. 182, 111 Am. St. Rep. 294; *Harton v. Forest City Telephone Co.*, 54 S. E. 299, 301, 141 N. C. 455.

Proximity as to time or place is not important except as showing proximity of causation. *City of Louisville v. Hart's Adm'r*, 136 S. W. 212, 215, 143 Ky. 171, 35 L. R. A. (N. S.) 207.

"Proximate cause" does not always mean the cause nearest in point of time. It means "closeness of causal relation, not nearness in time or distance." *Fishburn v. Burlington & N. W. R. Co.*, 103 N. W. 481, 487, 127 Iowa, 483.

The "proximate cause" of an injury is ascertained by determining the responsible cause without regard to its time or place in the succession of events resulting therein. *Peru Heating Co. v. Lenhart*, 95 N. E. 680, 684, 48 Ind. App. 319.

To be the "proximate cause," it is not necessary that the negligence be immediate in time, and so, where plaintiff, an employé of defendant, was injured by a log falling from a flat car which was improperly loaded, the negligence in loading is the proximate cause of the injury, though the accident did

not occur until after the car was moved. *Freeman v. Dells Paper & Pulp Co.*, 135 N. W. 540, 543, 150 Wis. 93.

"In law proximate and remote causes and effects do not have reference to time, nor distance, nor merely a succession of events. A wrongdoer is not merely responsible for the first result of his wrongful act, but he is also responsible for every succeeding injurious result which could have been foreseen by the exercise of reasonable diligence as the reasonable, natural, and probable consequence of his wrongful act." The law does not consider the causes of causes and their impulsions, but contents itself with the immediate cause. *Chicago, R. I. & P. R. Co. v. Miles*, 124 S. W. 1043, 92 Ark. 573 (dissenting opinion; quoting and adopting definition in *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 377, 15 Am. Rep. 362; citing *Whart. Neg.* [2d Ed.] § 73).

"Proximate cause" in the law of negligence is not the cause nearest in point of time or in sequence of events. There may be, and frequently is, an intervening agency, a something which it is only reasonable to expect would or might happen; and in such case the remoter cause in point of time or in sequence of events is said to be the proximate cause, for the reason that the final result was made possible by the first negligent act or omission. *Atchison, T. & S. F. R. Co. v. Wilkie*, 90 Pac. 775, 776, 77 Kan. 791, 11 L. R. A. (N. S.) 963, 127 Am. St. Rep. 464, 15 Ann. Cas. 731 (citing *Atchison T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Chicago, R. I. & P. Ry. Co. v. McBride*, 37 Pac. 978, 54 Kan. 172).

In determining "proximate cause," no arbitrary limits can be fixed as to nearness in point of time or as to distance. Much more important are closeness of causal connection, the natural sequence of the original wrongful act, and whether the resulting loss was one which might reasonably have been anticipated to constitute a locomotive the proximate cause of a fire loss. It is not necessary that the loss should have been the inevitable result of the setting of a fire by the locomotive; but if it is the natural consequence, one likely to result from starting the fire, then it should have been anticipated by the railroad company and is the proximate result of any negligence on its part. A fire negligently started in the nighttime by a railroad company extended to plaintiff's premises, and he and others fought and partially subdued, but did not extinguish, it. After watching the fire for some time, and taking certain precautions to prevent its further spread, plaintiff, believing the danger was past, retired, after which the fire broke out anew and destroyed considerable property. Held, that it cannot be said as a matter of law that the original negligence in starting the fire was not the proximate cause of the final burning and loss. *St.*

*Louis & S. F. R. Co. v. League*, 80 Pac. 46, 47, 71 Kan. 79.

Negligence is the "proximate cause" of an injury if it appears that but for such negligence the injury would not have happened, even though not the nearest cause in the order of time. *Yeates v. Illinois Cent. R. Co.*, 145 Ill. App. 11, 22.

#### Primary cause

"The primary cause may be the 'proximate cause' of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place." *Missouri, K. & T. Ry. Co. of Texas v. Raney* (Tex. Civ. App.) 99 S. W. 589, 590 (quoting and adopting definition in *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256).

"The primary cause is the 'proximate cause,' though it may act through successive instruments." *Fishburn v. Burlington & N. W. R. Co.*, 103 N. W. 481, 487, 127 Iowa, 483.

The doctrine of "proximate cause" can have no application where there was no negligence of the defendant to predicate the right of action on. "Primary" cause and "proximate" cause are not synonymous. The proximate cause of injury to an employé caused by a revolving fly wheel belt, against which he was thrown by slipping while attempting to lift a barrel, was the unguarded condition of the belt, and not his slipping or the fall of the barrel. *Hartman v. Bertin & Jones Envelope Co.*, 127 N. Y. Supp. 187, 189, 71 Misc. Rep. 30.

#### Probable cause

"Proximate cause" means probable cause. *Joslin v. Linder*, 128 N. W. 500, 502, 26 S. D. 420.

"The general test as to whether negligence is the 'proximate cause' of an accident is therefore said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby. 'Proximate cause' is therefore probable cause, and remote cause is improbable cause." In an action by a servant for personal injuries, it appeared that the injuries were caused by the fall of iron from a truck on which it was loaded, and that the accident occurred immediately after one of the wheels of the truck had dropped into a hole in the floor, which existed through the negligence of the master. The person in charge of the men with whom plaintiff was working directed them to stop the truck and pull it backwards to get the wheel out of the hole, and the accident occurred as they were doing so. As the dropping of the wheel into the hole and the direction of the foreman to pull the truck backwards were practically

identical in point of time, and one the necessary result of the other, the existence of the defect in the floor was the "proximate cause" of the injuries. *Missouri Malleable Iron Co. v. Dillon*, 69 N. E. 12, 13, 17, 206 Ill. 145 (quoting and adopting definition in 1 *Thomp. Neg.* § 50; *Armour v. Golkowska*, 66 N. E. 1037, 202 Ill. 144).

#### True, probable, and natural cause

Negligence to be the "proximate cause" of an injury must have been the natural and probable cause thereof. *Southern Kansas R. Co. of Texas v. Emmett* (Tex.) 139 S. W. 44, 47.

"Proximate cause" is such a cause as operates to produce particular consequences without the interference of any independent, unforeseen cause, without which the injury would not have occurred; or, in other words "proximate cause" is the true, probable, and natural cause. *Pendroy v. Great Northern R. Co.*, 117 N. W. 531, 536, 17 N. D. 433.

#### PROXIMATE CONTRIBUTORY NEGLIGENCE

In order to be "proximate contributory negligence," there must be that negligence which "in a natural and continuous sequence, unbroken by any new independent cause," contributes to the injuries and without which they would not have occurred. *Jansen v. Southern Pac. Co.*, 89 Pac. 616, 617, 5 Cal. App. 12.

"The rule at common law and in this state still is that any contribution to an injury which directly produced it would bar the action in any case where statutory provisions to the contrary do not apply." Proximate contributory negligence is further explained in the following language: "If the injury was caused by the plaintiff's conduct, or was the immediate result of the plaintiff's conduct, to which the wrong of the defendant did or did not contribute as an immediate cause, the plaintiff cannot recover, but must bear the result of his own negligence or conduct." Contributory negligence is, when it proximately contributes to the infliction of the injury, a bar to an action, because a person cannot be permitted to rush upon an apparent danger, and then, because an injury ensues, saddle the other party with the pecuniary consequences of an injury which his own want of care brought upon him. *Nashville R. Co. v. Norman*, 67 S. W. 479, 482, 108 Tenn. 324 (citing *Southern R. Co. v. Pugh*, 37 S. W. 555, 97 Tenn. 627; *East Tennessee, V. & G. Ry. Co. v. Hull*, 12 S. W. 419, 38 Tenn. 35).

#### PROXIMATE DAMAGE

See, also, Remote Damages.

The damages are said to be "proximate" when they are the direct, immediate, ordinary, usual, and natural result of the negligence, and therefore might have been rea-

sonably expected. The damages must follow the negligence as the efficient cause, in unbroken sequence, without any intervening independent causes to break the continuity. *Mueller v. Milwaukee, St. P. Ry. Co.*, 56 N. W. 914, 86 Wis. 340, 21 L. R. A. 721.

"Proximate damages" as a result of an unlawful act are those which are the natural and not "remote" consequence of such act. If, on the contrary, the damages complained of would not naturally and usually flow from the negligent act, but were brought about by some unforeseen casualty, they are "remote." *Louiseau v. Arp*, 114 N. W. 701, 703, 21 S. D. 566, 14 L. R. A. (N. S.) 855, 130 Am. St. Rep. 741 (quoting and adopting definition in 13 Cyc. p. 25).

"Proximate damages" are such as are ordinary and natural results of the negligence charged, and those that are usual, and therefore to be expected. Damages cannot be recovered against a railroad company for fright which results in nervous prostration and physical disability, where the fright is caused by the running of the railroad company's cars off the end of a switch and out into the street within 15 feet of the yard of the person frightened. *Morse v. Chesapeake & O. Ry. Co.*, 77 S. W. 361, 362, 117 Ky. 11.

Under Civ. Code, §§ 3300, 3301, providing that for breach of an obligation arising from contract the measure of damages is the amount which will compensate the party aggrieved for all detriment "proximately caused thereby," and that no damages can be recovered which are not clearly ascertainable in both their nature and origin, a singer discharged from her employment without notice, in violation of her contract, could not recover damages to her health, nor for injury to her feelings or reputation, by reason of such discharge. "Injury to the plaintiff's health, feelings, or reputation would not be proximately caused by her wrongful discharge, nor would it be likely to result in the ordinary course of things." "Proximately caused thereby"—that is, such damages as must immediately follow and are produced by the act complained of—are the kind of damages for which the statute provides this measure, or such damages as in the ordinary course of things would be likely to result from the act. *Westwater v. Rector, etc., of Grace Church*, 73 Pac. 1055, 1056, 140 Cal. 339 (citing *Friend & Terry Lumber Co. v. Miller*, 8 Pac. 42, 67 Cal. 467).

### PROXIMATE RESULT

The court, in an action for injuries to a servant, in response to a suggestion charged: "I did not tell you, if there was negligence on the part of the plaintiff, it had to be the 'proximate result' of the injuries to bar his recovery. The same rule applies to both sides. If one side was guilty of negligence, it must proximately result in injury, or he

would not be entitled to recover. I mean, if plaintiff was guilty of negligence, to bar recovery, it must be the proximate result of his injury." Held that the use of the word "result," instead of "cause," did not render the instruction erroneous, since, if the injury must be the proximate result of the negligence, then the negligence must have proximately caused the injury. *Gloss-Sheffield Steel & Iron Co. v. Stewart*, 55 South. 785, 788, 172 Ala. 516.

### PROXIMATELY

An instruction on contributory negligence, in an action for death at an interurban railway crossing, was not defective in the use of the word "approximately," instead of "proximately"; the two words being so closely allied in meaning that the use of the former, in a clause requiring such negligence to have "approximately" contributed to the injury, could not have misled the jury. *Brooks v. Muncie & P. Traction Co.*, 95 N. E. 1006, 1008, 176 Ind. 298.

Where, in an action for injuries to an employé, the court defined "proximate cause" and used in its instructions the word "proximate" several times, the use of the word "approximately" for "proximately" in a charge relating to proximate cause was not erroneous. *Choctaw, O. & T. R. Co. v. McLaughlin*, 96 S. W. 1091, 1093, 43 Tex. Civ. App. 523.

### PROXIMITY

See Dangerous Proximity.

"While 'proximity' or 'nearness' to an object is somewhat uncertain as a measure of distance, yet the use of such words as a definition, brings to the mind the idea that lands which are in fact far off, or distant, are not adjacent." *United States v. St. Anthony R. Co.*, 24 Sup. Ct. 333, 337, 192 U. S. 524, 537, 48 L. Ed. 548.

### PROXY

As creditor, see Creditor.

"The ordinary proxy, being intended to be for an election merely, does not enable the proxy to vote to dissolve the corporation, or to sell the entire corporate business and property, or to vote upon other important business, unless such proxy itself in general or special terms gives the proxy the power to vote on such questions." A proxy given by a member of a savings company, appointing one to vote in the member's place in all matters coming before any meeting of the stockholders, contemplates action of the stockholders only with reference to matters which could be submitted to them under such articles and by-laws as existed at that time, and confers no authority on the person holding the proxies to vote on the question of going into voluntary liquidation. *McKee v. Home Savings & Trust Co.*,

98 N. W. 609, 611, 122 Iowa, 731 (quoting 2 Cook, Corp. [4th Ed.] § 610).

A "proxy" is defined by Webster to be "the agency for another who acts through the agent; authority to act for another, especially to vote in a legislative or corporate capacity;" and this is the only proper use of the word "proxy." It is an agency, and where the proxy is duly constituted, and there is no limitation upon its power, a vote by such proxy binds the owner of the stock or other matter acted upon to the same extent as if cast by the latter personally. In *re Daniel*, 134 N. Y. Supp. 254, 257, 149 App. Div. 777 (concurring opinion).

A "proxy" is one permitted to vote in the place of a stockholder of a corporation, and is presumably voicing the judgment and the will of his principal. *Warren v. Pim*, 59 Atl. 773, 783, 66 N. J. Eq. 353.

## PRUDENCE

See Ordinary Prudence; Reasonable Prudence.

The Standard Dictionary gives, as one of the meanings of the word "prudence," good judgment and foresight in practical affairs; economy; discretion; sagacity. *Houston & T. C. R. Co. v. Everett* (Tex.) 86 S. W. 17, 18.

An instruction "that the term 'negligence' means the want of that care and prudence which a man of ordinary 'intelligence' would exercise under all the circumstances of the situation" is erroneous, where the case is bottomed on negligence and defended on the ground of contributory negligence, since it does not correctly define the term. "Intelligence" is not a synonym for either "caution," "prudence," or "care." *Van Cleve v. St. Louis, M. & S. E. R. Co.*, 101 S. W. 632, 634, 124 Mo. App. 224.

## PRUDENT

See Reasonably Prudent.

"Prudent" means sagacious in adapting means to ends; circumspect in action, or in determining any line of conduct; practically wise; judicious; careful; discreet; circumspect; sensible; opposed to rash—as a prudent man; and so a reasonably prudent man means a reasonably careful one. *Kinsel v. North Butte Mining Co.*, 120 Pac. 797, 805, 44 Mont. 445.

## PRUDENT PERSON

See Highly Prudent Person; Ordinarily Prudent Man; Reasonably Prudent.

"A 'prudent person' means the average prudent person or the ordinarily prudent person." *International & G. N. R. Co. v. Trump*, 94 S. W. 903, 908, 42 Tex. Civ. App. 536 (quoting and adopting definition in *Texas & N. O. R. Co. v. Black* [Tex.] 44 S. W. 673).

A charge in trespass for cutting timber that if defendant cut the timber intention-

ally and willfully, and did not exercise the care a "prudent person" would have exercised, he was liable, was sufficient as against the objection that the phrase "a prudent person" in the instruction should have been qualified by the word "ordinarily," in the absence of a request for a more specific charge; for the phrase "a prudent person" in the charge meant an ordinarily prudent person. *Clevenger v. Blount* (Tex.) 122 S. W. 529, 530.

An instruction that if the jury believed that the floods which overflowed plaintiff's land were unprecedented, and such as could not have been reasonably anticipated, by a prudent man skilled in construction of railroad trestles across such streams as the one in question, alleged to have caused the damage, defendant would not be liable, was not erroneous in that the words "prudent man" were not synonymous with "a person of ordinary prudence," and therefore required a higher degree of care than was required by law. *San Antonio & A. P. R. Co. v. Klersey* (Tex.) 81 S. W. 1045, 1046.

## PRUDENTIAL AFFAIRS

The phrase "prudential affairs," in Pub. St. 1901, c. 43, § 5, directing that the selectmen shall manage the "prudential affairs" of the town, means the transacting of business on behalf of the town, requiring the exercise of prudence and discretion. All matters and things necessary to be done in order to carry into effect the lawful powers of towns seem to be embraced in the phrase, and the selectmen may present a petition for the consent of the court to the discontinuance of a highway. *Town of New London v. Davis*, 59 Atl. 369, 373, 73 N. H. 72 (citing *Sumner v. Town of Dalton*, 58 N. H. 295, 297, and *Pike v. Middleton*, 12 N. H. 278, 282).

Rev. Laws, c. 25, § 23, authorizing towns to make by-laws for the direction and management of their "prudential affairs," does not authorize a town to adopt a by-law requiring the assessors thereof to keep a record of abatements of taxes, and annually to make a report of the valuation of the property of the town and the rate of taxation, etc., since the assessors are public officers, whose duties are defined by chapter 12, which does not require the performance of duties sought to be imposed by the by-law, and since the term "prudential affairs" embraces subjects affecting the accommodation and convenience of the inhabitants placed under the jurisdiction of towns by statute and usage. *Cox v. Segee*, 92 N. E. 620, 621, 206 Mass. 380.

## PRURIENCY

"'Pruriency' is an elastic term. Matter and conduct which some good people deem prurient other good people deem chaste. There is no fixed standard of 'pruriency.'"

It is largely a matter of education and taste. And the same is true in respect of 'scandal' and 'shamelessness';" hence where a critic published of a book and its author that they were a "scandal" and "shameless," and that the author was "prurient," under circumstances that would not justify the charges beyond question, it was for the jury to say whether the inferences drawn by the critic from the facts were reasonably possible, and therefore permissible. *MacDonald v. Sun Printing & Publishing Ass'n*, 92 N. Y. Supp. 37, 40, 45 Misc. Rep. 441.

## PSEUDO

In determining whether or not it was libelous to designate one as a "pseudo" scientist, the court said: "'Pseudo' is derived

from the Greek 'pseudein,' to cheat, to deceive, and is defined as a quasi prefix in compounds of Greek origin, meaning 'false'; 'counterfeit'; 'spurious'; 'sham.' It is freely used as an English prefix with the words of any origin." Cent. Dict. Stormonth, a most accurate lexicographer, derives it from the Greek "pseudes," lying, false, and defines it as "a word frequently prefixed to another, and meaning 'false,' 'spurious.'" *MacDonald v. Sun Printing & Publishing Ass'n*, 98 N. Y. Supp. 116, 117, 111 App. Div. 465.

## PTOSIS ABDOMINALIS

"Ptosis abdominalis" is a general letting down of the contents of the abdominal cavity. *Krisinger v. City of Creston*, 119 N. W. 526, 528, 141 Iowa, 154.











